IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2002-404-1729

	BETWEEN	BRANDON POU AND KASEY POU Plaintiffs
	AND	BRITISH AMERICAN TOBACCO (NEW ZEALAND) LIMITED AND W D & H O WILLS (NEW ZEALAND) LIMITED Defendants

Hearing: 7-10, 13-17, 20-24, 27 & 28 February 2006, 8-10 and 13 March 2006

Appearances: Mr D B Collins QC, Mr B Corkill, Mr J French and Ms J Herschell for plaintiffs
Mr M R Camp QC, Mr M R Bos, Mrs V Lobao and Mr S O'Sullivan for defendants

Judgment: 3 May 2006 at 2 pm

JUDGMENT OF LANG J

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Introduction

[1] Janice Pou died on 24 September 2002 at the age of 52 years. She had been a heavy smoker since the age of 17.

[2] In 1968 Mrs Pou began smoking Capstan cigarettes, manufactured and supplied by W D & H O Wills (NZ) Limited ("Wills"). About a year later she switched to Pall Mall, a brand manufactured by Rothmans, now British American Tobacco (NZ) Limited ("BAT"). Later she smoked Winfield cigarettes, also a Rothmans product.

[3] Mrs Pou discovered that she had lung cancer in June 2001. She took the view that her illness had been caused by the defendants in this proceeding, Wills and BAT. She therefore issued this proceeding in June 2002, alleging that each had breached duties of care owing to her in relation to the sale and distribution of their cigarettes. She contends that these breaches caused her to take up smoking and that she contracted lung cancer as a result. She therefore claims that she is entitled to substantial damages against them.

[4] Mrs Pou was survived by her adult children, Brandon and Casey. They are the executors of her estate. They have continued this proceeding in order to honour their mother's wish that it be seen through to a conclusion.

The claim

[5] The statement of claim in its original form contained two separate claims. The first was a claim brought by the plaintiffs on behalf of their mother's estate under s 3 of the Law Reform Act 1936. The plaintiffs also sought damages in their own right under s 6 of the Deaths by Accidents Compensation Act 1952. Their ability to bring the second claim was challenged in a strike-out application that was upheld by Harrison J. The Court of Appeal reversed that decision, but the plaintiffs subsequently elected not to pursue their cause of action under the 1952 Act. The only matter now to be determined is the claim by the estate.

[6] The allegations contained in the current version of the statement of claim can be summarised as follows:

a) Mrs Pou was diagnosed with metastatic small cell cancer of the left lung (lung cancer) in June 2001. The lung cancer caused her death in September 2002.

b) At the time of her death Mrs Pou was aged 52 years and was living on an Invalid's Benefit.

c) Mrs Pou commenced smoking in 1968 when she was 17 years of age. When she began smoking she smoked "Capstan Navy Cut Medium Corked Tip", "Pall Mall's King Size" and "Pall Mall Filter Tipped" cigarettes. Capstan cigarettes were manufactured by Wills whilst Pall Mall cigarettes were manufactured by BAT. She subsequently smoked Winfield, also a brand manufactured by BAT.

d) Mrs Pou commenced smoking cigarettes because she "read, saw and believed" advertisements that glamorised cigarettes. These included advertisements that she saw in the print media circulating in the Southland area, in movie theatres in Invercargill and in shops and billboards in and around Invercargill. In addition, Mrs Pou was impressed by the manner in which Wills and BAT promoted their products through the sponsorship of sporting figures such as Peter Snell and Don Clarke.

e) The advertisements that Mrs Pou saw were promoted by the defendants (and other manufacturers and distributors of cigarettes) to persuade young people to commence smoking cigarettes by representing that smoking was "glamorous, socially acceptable, associated with success, sophisticated and sexy".

Similarly, the promotion of cigarette smoking through the use of leading sports figures was designed to persuade persons in the

position of Mrs Pou that smoking was linked with success and was not harmful.

f) Within approximately 12 months of commencing smoking Mrs Pou became addicted to cigarettes. Her addiction was established and measured against several well-known diagnostic procedures.

g) As a consequence of her addiction Mrs Pou smoked approximately 30 cigarettes per day until the date of her death, notwithstanding the fact that she was diagnosed with lung cancer caused by smoking.

h) Both Wills and BAT manufactured and supplied tobacco products with the intention that the public would purchase and smoke them. In doing so they knew, or ought reasonably to have known, prior to 1968 that the cigarettes that they manufactured and distributed contained substances which:

i) Caused some consumers of cigarettes to become addicted to smoking cigarettes, or

ii) Made it extremely difficult for some consumers of cigarettes to stop smoking, and/or

iii) Caused, or were likely to cause, serious illness to those who smoked cigarettes, and in particular lung cancer.

i) Notwithstanding their knowledge about the nature of the cigarettes that they manufactured and distributed, and the risks that those cigarettes posed for the health of those who smoked them, BAT and Wills:

i) Promoted the smoking of cigarettes through advertisements designed to persuade children and young persons to commence smoking cigarettes.

ii) Failed to cease manufacturing or distributing cigarettes of which they knew or ought reasonably to have known the dangers to the health of consumers including Mrs Pou.

iii) Failed until 1974 to place notices on packets of cigarettes warning about the potential risks to health from smoking cigarettes.

iv) Advertised and marketed their cigarettes in a way that negated the value of any warnings placed on cigarette packets from 1974 onwards.

v) Publicly made disparaging remarks about research and comments from various sources, including the medical

community, that warned of the risks of smoking cigarettes.

vi) By their advertisements reinforced to Mrs Pou that smoking was a glamorous and pleasurable activity.

j) In those circumstances BAT and Wills owed Mrs Pou a duty of care to warn her, prior to the date upon which she became addicted to smoking cigarettes, of the possibility that she might become addicted to smoking cigarettes and/or that she might find it extremely difficult or impossible to stop smoking and/or that she might suffer injury to her health if she continued to smoke cigarettes.

k) Alternatively, BAT and Wills owed Mrs Pou a duty to stop manufacturing and distributing cigarettes when they knew, or ought reasonably to have known, that cigarettes were dangerous to the health of consumers such as Mrs Pou.

l) The defendants breached both duties of care by failing to warn Mrs Pou of the likely consequences of smoking cigarettes and by failing to stop manufacturing and distributing cigarettes.

m) As a result of those breaches Mrs Pou took up smoking and became addicted to smoking cigarettes within about twelve months. By virtue of her addiction Mrs Pou continued to smoke the defendants' products, and as a consequence she developed lung cancer which caused her death. The lung cancer developed as a direct result of the fact that she smoked the defendants' cigarettes.

n) As a result of developing lung cancer Mrs Pou suffered financial losses in the form of medical and treatment expenses ($1,211.85), funeral expenses ($5,579.99) and loss of earnings ($4,174.33).

o) In addition, Mrs Pou endured pain and suffering for which the plaintiffs seek damages in the sum of $200,000. She also suffered a loss of amenity in the form of a loss of enjoyment of life and a loss of the ability to enjoy walking in the company of friends. The plaintiffs seek damages in the sum of $50,000 under this head.

p) The plaintiffs also seek damages in the sum of $50,000 for loss of expectation of life.

Issues

[7] As refined by counsel during their closing addresses, the proceeding gives rise to the following principal issues:

A. Duty of care

1. Did the defendants know, or ought they reasonably have known, by 1968 that smoking cigarettes:

    a) was a major cause of lung cancer; and

    b) could be addictive, or hard to give up.

2. If they did, was there any duty on them to cease producing cigarettes and to withdraw them from sale?

3. If there was not, was any duty to warn of those risks negated by the fact that:

    a) the dangers of smoking cigarettes were obvious; or

    b) the dangers of smoking cigarettes were common knowledge in 1968.

B. Breach of Duty

1. The defendants accept that, if they had a duty in 1968 to provide warnings regarding the risk posed by smoking cigarettes, they breached that duty. They also accept that, if at any time there was a duty to cease manufacturing cigarettes, they breached that duty because they have continued to manufacture cigarettes.

C. Causation

1. Have the plaintiffs established that, if the defendants had provided the appropriate warnings in 1968, Mrs Pou would not have commenced smoking?

2. If they have not, should the Court nevertheless apply the principles referred to by the House of Lords in *Chester v Afshar* [2005] 1 AC 134?

3. If Mrs Pou did not become aware of the dangers of smoking until after 1968, was she able to stop smoking in sufficient time to prevent her lung cancer from developing?

4. Can Wills be held to have contributed materially to Mrs Pou's death given that she only smoked Wills' cigarettes in the early 1970s?

D. Limitation Act 1950

Is any part of the proceeding barred by s 4(7) of the Limitation Act 1950?

E. Volenti non fit injuria

Did Mrs Pou accept the risks inherent in smoking cigarettes and waive her legal rights arising from any resultant harm?

F. Contributory negligence

To what extent, if at all, was Mrs Pou negligent herself in continuing to smoke cigarettes after warnings first appeared on cigarette packets in 1974?

Summary of Findings

[8] My findings, expressed in my own order rather than the order set out above, are as follows:

1. The plaintiffs' claim against the defendants is not statute barred by virtue of the provisions of the Limitation Act 1950.

2. There has never been a duty on a manufacturer of cigarettes to cease the manufacture and distribution of cigarettes and to withdraw its products from sale on the basis that they are dangerous, nor is there any basis for such duty in the present case.

3. Even assuming that a duty to warn existed, liability would have been negated in the present case by the fact that the dangers inherent in smoking cigarettes were a matter of common knowledge when Mrs Pou began smoking in 1968.

4. On the balance of probabilities Mrs Pou herself would also have known of those dangers at the time that she took up smoking.

5. In deciding the scope of a duty to take reasonable care in a novel situation the Court is entitled to take into account policy factors. These would necessarily relate to the circumstances that existed in 1968. Although the legislative and executive branches of government were fully aware of the dangers of smoking in 1968, they elected to address those issues in a manner that did not involve the imposition of a duty to warn until 1974. This approach must have involved the balancing of policy factors that had particular relevance at the time, and those branches of Government were in a much better position to carry out that exercise in the 1960s than the Court is today. The Court would therefore be reluctant to substitute its own view by holding retrospectively that manufacturers of cigarettes had a common law duty to warn consumers in 1968.

6. The claim against Wills fails on the basis that the plaintiffs have not established on the balance of probabilities that the smoking of cigarettes produced by Wills caused Mrs Pou's lung cancer.

7. Mrs Pou's claim against BAT also fails on the ground of causation. This is because, even assuming that manufacturers of cigarettes had a duty in 1968 to warn consumers of the dangers of cigarette smoking,

the plaintiffs have failed to establish on the balance of probabilities that Mrs Pou would not have begun or continued smoking if such warnings had been given.

8. The principles enunciated by the House of Lords in the recent case of *Chester v Afshar* should not be applied in deciding the issue of causation in the present case.

9. The claim against BAT would also have failed because, even if Mrs Pou was not aware of the dangers of smoking in 1968, she must have been aware of those risks by 1974 at the latest. Thereafter she elected to keep smoking and did not take reasonable steps to quit despite having the ability to do so. Any causative effect stemming from an initial breach of duty would at that point be supplanted by the causative impact of her free and informed autonomous conduct.

10. Given the finding that negligence has not been established, it is not necessary to consider the defences of *volenti non fit injuria* and contributory negligence.

[9] I propose to consider these issues, which coincide largely with those posed by counsel in closing, in the order in which they are listed above.

1. Is the plaintiffs' claim barred by virtue of section 4(7) of the Limitation Act 1950?

[10] The defendants contend that the plaintiffs' claim is barred, to the extent that it alleges a breach of a duty to warn of addiction, by s 4(7) of the Limitation Act 1950, which requires any action in respect of a bodily injury to be brought within two years from the date on which the cause of action accrued. It provides as follows:

> (7) An action in respect of the bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:

> Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law other than the provisions of this subsection or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.

[11] This submission proceeds on the basis that the plaintiffs have alleged that the harm, or injury, that Mrs Pou suffered was her addiction to cigarettes. The defendants point out that, on Mrs Pou's own evidence, she was addicted to smoking cigarettes by 1969 and she was aware of her addiction between 1975 and 1980. As a result, they say that the plaintiffs' claim has been brought out of time.

[12] The leading New Zealand authority in relation to the issue of limitation in respect of claims arising out of personal injury is that of the Court of Appeal in *G D Searle & Co v Gunn* [1996] 2 NZLR 129. In that case the Court of Appeal considered earlier authorities and said at 133:

> The law in that regard is now settled. The corresponding problem of what may be described as latent injury or latent disease in actions for bodily injury has only comparatively recently been called into question in this Court, and was referred to but left open in an asbestos-related cancer case, *McKenzie v Attorney-General* [1992] 2 NZLR 14. It should now be resolved in a similar way. To hold that a plaintiff who has not discovered that a bodily injury is attributable to the wrongful action of another, and who could not reasonably have discovered that fact, is barred from suit if the injury in fact occurred outside the statutory period is effectively to deny a person the right of action. We do not see that consequence as being required by the legislation. We would therefore hold that for the purposes of s 4(7) of the Limitation Act 1950, a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant.

[13] A similar approach was taken by Venning J in *Marshall v British American Tobacco* HC AK CIV-2003-404-454 30 October 2003. The plaintiff in that case was a long-term smoker and had been forced to have heart bypass surgery as a result of being diagnosed with severe coronary heart disease. He took the view that his heart disease was caused by smoking cigarettes manufactured by the defendant. He therefore sought leave under the Act to commence proceedings against the defendant. In considering the application of the reasonable discoverability test in

this context, Venning J held (at [12]) that the cause of the action arose at the latest on the date at which the plaintiff was unequivocally and clearly told of the connection between his smoking and his illness.

[14] The plaintiffs aver that the defendants owed Mrs Pou a duty to warn her of three separately pleaded matters. These include the possibility that Mrs Pou might become addicted to smoking cigarettes, and that she might be unable to give them up or that she might find it very difficult to do so. Although the statement of claim does not contain a pleading to the effect that Mrs Pou suffered an injury in the form of addiction, that is the only damage that Mrs Pou could realistically suffer as a result of any breach of those alleged duties. The allegations do not depend in any way upon the fact that Mrs Pou later succumbed to lung cancer. An alleged failure to warn of the risks of injury to her health is the subject of a separate pleading.

[15] To the extent that they are pleaded as claims in their own right, I consider that these particular causes of action accrued when Mrs Pou became aware that she was addicted and that she could not give up, or found it very hard to give up, smoking cigarettes. Mrs Pou told Associate Professor Sellman that she became aware that she was addicted to smoking cigarettes when she was in her mid to late 20's. This gives a date range of between 1975 and 1980. The causes of action must therefore have accrued at that time. Given that Mrs Pou did not commence this proceeding until 2002, these particular claims would be statute barred by the provisions of s 4(7) of the Act.

[16] The plaintiffs have not, however, framed and developed their case on the basis that the failure to warn of addiction gave rise to damage in the form of addiction. The addiction is not pleaded as the harm or injury in respect of which damages are sought. Rather, the plaintiffs refer in the statement of claim to Mrs Pou's addiction being part of an unbroken chain of events connecting the alleged breaches of duty with the subsequent diagnosis that Mrs Pou was suffering from lung cancer. The harm, or injury, that is pleaded is the lung cancer and not the addiction. They say that the failure to warn led to Mrs Pou becoming addicted to smoking cigarettes and that this inevitably led to the injury that she suffered, namely the development of lung cancer.

[17] In some cases it might be possible to suggest that an addiction has created an effect that could properly be categorised as a form of harm or injury. I consider, however, that it would be contrary both to common-sense and to the manner in which the plaintiffs have formulated and developed their claim in this case to suggest that Mrs Pou's addiction was the injury flowing from the alleged breaches of duty by the defendants. Mrs Pou's lung cancer is the harm upon which the plaintiffs rely. Their pleadings are formulated on that basis and they have run their case accordingly. For this reason I consider that the plaintiffs ought to be able to rely on the harm referred to in the pleadings, namely Mrs Pou's lung cancer and not her addiction.

[18] Mrs Pou's evidence is to the effect that, other than suffering a minor cough from time to time, she enjoyed good health throughout her life. She first became aware that something might be amiss when she suffered severe chest pain in May 2001. The fact that she was suffering from lung cancer was discovered shortly thereafter. In those circumstances I consider that Mrs Pou's lung cancer was reasonably discoverable in May 2001. Given that the proceedings were issued in June 2002, no limitation issues arise.

Duty of Care

[19] Counsel agreed that in certain circumstances a manufacturer may owe a duty of care to potential consumers of its products. The existence of the duty flows from the landmark decision of the House of Lords, and particularly the speech of Lord Atkin, in *Donoghue v Stevenson* [1932] AC 562. The debate in this case has not challenged the general principle that a manufacturer of products may owe a duty to potential consumers to take reasonable care. Instead, it has focussed upon whether the defendants owed any such duty in the circumstances of the present case.

2. Could any duty of care owed by a manufacturer of cigarettes in 1968 include a duty to completely cease the manufacture and distribution of its products?

[20] The plaintiffs' primary claim is that the defendants breached a duty to warn Mrs Pou of the dangers of smoking cigarettes. In the alternative, however, they

contend that the defendants were under a duty "to stop manufacturing and distributing cigarettes which they knew or ought reasonably to have known were dangerous to the health of consumers such as Mrs Pou".

[21] In fairness to the plaintiffs, they did not place great emphasis on this particular ground in either their opening or closing submissions. Nevertheless, it remains part of their case and must be determined. I consider, however, that it can be disposed of in relatively short order.

[22] As Mr Camp stressed in his submissions for the defendants, the imposition of this particular duty could be viewed as being draconian, because it would effectively amount to a judicial prohibition of a product that, to this day, has always been sold legally.

[23] I accept that, in theory at least, a manufacturer might be found to have created a product that is so dangerous to consumers or users that the only means of ensuring their safety is to require the manufacturer to stop making and distributing it. Dicta to that effect can be found in *Wright v Dunlop Rubber Co ltd* [1972] 13 KIR 255 (CA) at 272 and in *Thompson v Johnson & Johnson* [1991] 2 VR 449 (Supreme Court of Victoria) at 491.

[24] Counsel were not, however, able to refer me to any case in England, Australia or Canada in which a court has upheld a claim based on an alleged duty to cease to manufacture a product that was being lawfully manufactured and distributed.

[25] Such a claim was made, but rejected, in *McTear v Imperial Tobacco Ltd* [2005] CSOH 69, a recent decision of the Scottish Court of Session. In that case Lord Nimmo Smith dismissed a claim for damages brought by the widow of a cigarette smoker against a cigarette manufacturer. The case raised some issues that are also present in this case, and for that reason I refer to some of the conclusions reached by Lord Nimmo Smith on several occasions in this judgment. The circumstances and issues raised in *McTear* also differ, however, from those in this case in several important respects. In particular, one of the issues that Lord Nimmo

Smith was required to decide was whether the plaintiff had established that Mr McTear's lung cancer had been caused by smoking cigarettes manufactured by the defendant. Apart from the claim brought against Wills, that is not an issue I am required to consider in the present case.

[26] In dealing with the plaintiffs' claim that the defendant had an obligation to cease manufacturing its cigarettes, Lord Nimmo Smith noted at [7.171] that although *Donoghue v Stevenson* was of fundamental importance in establishing that a duty of care may be owed by a manufacturer to a consumer, it did not establish the content of the duty beyond stating that it is to take reasonable care. As a result, the content of any duty that might be owed needed to be considered. On this point he said at [7.172]:

> Assuming for present purposes that cigarette smoking can cause lung cancer, and that tobacco can therefore be described as a dangerous product, I can find no support in the authorities for the proposition that as soon as they became aware of this ITL [the manufacturer] had a duty effectively to cease manufacture. They could only have had such a duty if the law held that a manufacturer must ensure the safety of the consumer. The cases do not support this approach. In *Holmes v Ashford*…the Court of Appeal went no further than to hold that every person who put on the market a dangerous article must take all reasonable steps in all the circumstances.

[27] The difficulty with this aspect of the plaintiffs' claim is that, if it is upheld, it would amount to an order prohibiting the manufacture of cigarettes on a retrospective basis. The plaintiffs would have the Court make that order despite the fact that even now, and notwithstanding all that is known about the dangers of smoking, the manufacture and distribution of cigarettes remain perfectly legal. The sale and use of cigarettes is also legal, so long as the consumer is aged at least 18 years.

[28] The feasibility and practicality of making such an order was not explored at all during the evidence or in closing submissions. The order could not bind other manufacturers, but a total prohibition on manufacture and distribution would be the only way in which consumers of cigarettes could be prevented from gaining access to them. And, as Lord Nimmo Smith asked in *McTear* at [7.183], what would have prevented tobacco from being brought into the country? That would require effective Government action and, as experience has shown, "attempts at prohibition

of substances which people enjoy using and strongly desire to use are notoriously ineffective."

[29] To date there has never been any suggestion in New Zealand that tobacco or cigarettes ought to be completely banned or prohibited. The ramifications would undoubtedly be very significant given the fact that, even now, many people still smoke and, presumably, enjoy doing so. It would be foolhardy for this Court to even contemplate taking such a step unless the probable consequences of the suggested order had been properly explored. Those consequences would need to be considered by a body that had the ability to weigh all the competing considerations. In my view the only body competent to undertake such a complex and, in all probability, controversial task – and be accountable for the consequences – is Parliament. Even now, I consider that such a far-reaching step could only properly be undertaken by way of legislation, and not by order of the Court in a case such as this. I certainly do not accept that in 1968 any duty of care that might have been owed by a manufacturer of cigarettes included a duty to completely cease the manufacture and distribution of that product.

3. ***Was there a prima facie duty to warn consumers of the potential hazards of cigarette smoking when Mrs Pou began smoking in 1968? If so, is the existence of the duty otherwise negated by virtue of the fact that the dangers of smoking were common knowledge at that time?***

[30] As foreshadowed, the plaintiffs' primary contention is that the defendants owed a duty of care to warn consumers of the dangers inherent in their products.

The duty of a manufacturer to take reasonable care

[31] I have already referred to the fact that the development of the duty of care owed by a manufacturer to the consumer of its products can be traced back to the decision of the House of Lords in *Donoghue v Stevenson*. The crux of that decision is captured in the following passage from the speech of Lord Atkin at 599:

> My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots

> and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

[32] The scope of the duty, namely what amounts to reasonable care in any given case, will depend on the circumstances of each case. As the Supreme Court of Victoria noted in *Thompson v Johnson & Johnson Pty Limited* at 490, "the almost infinite variety of circumstances forbid any categorical exegesis of the manner of performance of the relevant duty of reasonable care".

The duty to warn

[33] In the realm of product liability the principles set out in *Donoghue v Stevenson* have been applied and developed over subsequent decades. It is now widely accepted that, in certain circumstances, the duty to take reasonable care may include a duty to warn potential consumers or users about the product's potentially harmful qualities or dangerous propensities.

[34] While a duty to warn has been held to exist in numerous different situations, the underlying rationale that can be extracted from the authorities is clear. A duty to warn assumes a degree of imbalance between the information, and hence knowledge, held by the manufacturer on the one hand and the consumer on the other, regarding risks or dangers that may be inherent in using the product. More than mere imbalance is required, because the manufacturer will almost always possess greater knowledge about the product than the consumer. For this reason the duty to warn has traditionally been held to arise in circumstances where the manufacturer has knowledge about the danger that the consumer could not reasonably be expected to possess. The purpose of the duty to warn is to address, or ameliorate, this imbalance.

[35] Counsel cited numerous cases as authority for this proposition. In *Lambert v Lastoplex Chemicals Co* [1972] SCR 569, for example, the Supreme Court of Canada held a manufacturer of a fast drying lacquer sealant liable for damage arising from a fire set off by a pilot light in a piece of machinery whilst a floor nearby was being lacquered. Although the product did contain warnings, these were held to be insufficient to discharge the defendant's duty to users given the inherently dangerous nature of the product. The court in *Lambert* thus recognised that the scope of any duty to warn must be proportionate to the potential probability and extent of harm.

[36] Similarly, in *Vacwell v B.D.H* [1971] 1 Q.B. 88 a manufacturer of chemicals was held liable for failing to warn of the hazard of the risk of serious explosion if the chemicals came into contact with water. Liability was also found to exist in *Hobbs (Farms) Ltd v Baxenden Chemicals Ltd* [1992] 1 Lloyd's Rep. 54, where damage by fire was caused in circumstances where a wall-coating product contained no warning or indication of its combustibility.

[37] A duty to warn has been recognised in numerous other cases, including *Watson v Buckley* [1940] 1 All ER 174 (risk of serious reaction from using hair dye); *Carroll v Fearon & Others* [1998] P.I.Q.R 146 (likelihood of tyres exploding); *Bow Valley Husky v St John Shipbuilding Bo* [1997] SCR 1210 (flammability of pipe cladding sold for use on oil-rigs); and *Hollis v Dow Corning* (1995) 129 DLR (4^{th}) 609 (breast implants likely to rupture after installation).

[38] The danger posed by the smoking of tobacco does not arise as the result of any defect in the cigarette or tobacco itself. Rather, it flows from the addictive nature of the nicotine that is a constituent of tobacco, coupled with the inherently dangerous nature of tobacco smoke that is inhaled into the lungs. The danger arises from the risk, which even now can only be expressed in statistical terms, that a person who smokes tobacco is much more likely to develop lung cancer or heart disease than a non-smoker.

[39] I accept, however, that that risk is sufficient to give rise to the prima facie conclusion that there is (and always has been) a significant element of danger involved in smoking tobacco. The risk may or may not become reality, because not

all smokers will develop lung cancer, or indeed any other ailment, as a result of smoking cigarettes. Nevertheless, the risk is there.

[40] I also proceed on the basis that it is probable that the defendants, in common with other major manufacturers of tobacco products, kept abreast of the growing concern during the 1960s that there was likely to be a link between smoking tobacco and the incidence of lung cancer. Those developments are considered in greater detail later in this judgment. In particular, I have no doubt that they were aware of the principal conclusions reached in 1962 by the Royal College of Physicians in the United Kingdom and in 1964 by the advisory committee to the United States Surgeon General. Those conclusions were expressed in clear and unmistakable terms, and were also the subject of significant comment in the media when the reports were released. The reports, and the publicity that followed, would have been of obvious and immediate relevance to all the major players in the tobacco industry throughout the world at that time. They of all people would have appreciated the potential ramifications of these matters both from their own perspective and that of the industry as a whole.

[41] In the present case the plaintiffs contend that the knowledge held by the tobacco manufacturers was such that they owed a duty to warn consumers of the dangers inherent in smoking cigarettes. They say that the scope of that duty was "to fully and fairly warn Mrs Pou" of the possibility that she might become addicted to smoking cigarettes, that she would not be able to stop smoking or that she would find it extremely difficult to stop smoking and that she would suffer injury to her health if she smoked cigarettes.

[42] Given the level of knowledge that the tobacco manufacturers, including the defendants, must have had in 1968, I am satisfied that a prima facie duty to warn is likely to have existed at common law by that time. The duty to warn would include a requirement to warn consumers that smoking cigarettes may be very hard to give up and that it could be injurious to health. I stop short of saying that the duty extended to a requirement that consumers be warned that smoking cigarettes created a risk that they would develop specific ailments, although I accept that the reports and subsequent publicity focussed primarily on the risk that smokers might develop

lung cancer. Smokers were, however, also at risk of developing other diseases, including heart disease. I consider that warnings would have been sufficient if they drew the attention of consumers to the possibility that the smoking of cigarettes could endanger or damage their health. As it happens, this was the nature of the first warnings that appeared on cigarette packets between 1974 and 1987.

[43] It is probable, however, that there was no duty in 1968 to warn that smoking cigarettes was addictive. This is because the report issued in 1964 by the advisory committee to the United States Surgeon General did not classify dependence on tobacco as an addiction. Rather, the report classified it as an habituation. It did say, however, that this classification did not mean that smoking tobacco was not difficult to give up. Subsequently, in or about 1988, dependence on tobacco was re-classified by the US Surgeon General as an addiction.

The impact of obvious danger or common knowledge of the danger

[44] The possibility that a duty may be negated where the risks are patent or observable is implicit in the judgment in *Donoghue v Stevenson* itself, where the requirement of a hidden danger, unlikely to be discovered by intermediate inspection, was emphasised by Lords Atkin, Thankerton and Macmillan at 599, 602-3 and 622 respectively.

[45] Once equipped with knowledge of the danger, however, the consumer may elect to use the product nonetheless. Therefore, in assessing the existence or scope of a duty to warn, it is necessary to consider the extent to which, if at all, the danger is either obvious or known to the reasonable user. If the consumer already possesses knowledge or awareness of those risks, any need to warn is logically rendered otiose.

[46] Where a prima facie duty to warn exists, liability may therefore not arise in two situations. The first is where the risk or danger is obvious on its face; the second is where the risk is known to consumers generally.

[47] In New Zealand, the Court of Appeal in *Fraser v Jenkins* [1968] NZLR 816 determined that a bailor was not liable for failing to warn a bailee that he might cut his fingers if he put them near a circular saw, given the obviousness of that risk. In *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 the House of Lords similarly held a Council not to be liable for injuries resulting from the plaintiff diving into a shallow area of a lake, given that the dangers of doing so were perfectly obvious.

[48] The principle that a duty to warn does not exist where the risk is obvious or known has been applied in the realm of product liability. For example, in *Bogle v McDonald's Restaurants Ltd* [2002] EWHC 490 (QB) the Court held that no duty existed to warn consumers of the risk of scalding from hot drinks, given that those who buy such drinks would be well aware that they sometimes get spilled, and when they do it can result in scalding. In *Raines v Colt Industries* 757 F. Supp. 819 (E.D. Mich. 1991) the District Court of Michigan held that a manufacturer was not under a duty to warn of the dangers presented by a loaded gun, given that the risks were well known and obvious to a reasonable user.

[49] In the context of tobacco liability claims any risks arising from the smoking of cigarettes cannot be said to be "obvious" in a superficial sense. The defendants contend, however, that any duty in the present case is negated by the fact that by 1968 the dangers inherent in smoking tobacco were matters of common knowledge. The issue of common knowledge has been central to tobacco liability claims in several jurisdictions.

[50] Although there is now a reasonably large body of American authority regarding the liability of tobacco manufacturers, the decisions are limited in value by the fact that the crucial issue of liability is decided by juries, who are not obliged to give reasons for their decisions. There are, however, several American decisions confirming that liability will not arise in circumstances where knowledge that cigarette smoking is harmful to health can be considered part of the common knowledge of the community: see eg *Roysden v R J Reynolds Tobacco Company* 849 F.2d 230 (6th Cir. 1988) and *Paugh v R J Reynolds Tobacco Company* 834 F. Supp.228 (N.D. 1993).

[51] A Commonwealth case that provides some assistance is that of the Civil Court of Quebec in *Létourneau v Imperial Tobacco Ltd* (1998) 162 DLR (4th) 734. In that case the plaintiff had begun smoking in 1964, and had attempted unsuccessfully to give up in 1973 and 1980. On her third attempt, in 1996, she succeeded with the aid of nicotine patches. She then sued two tobacco companies for the cost of the patches. The evidence showed that in 1964 smoking was considered to be a habit rather than an addiction. The claim was dismissed on the basis that the tobacco companies were not obliged in 1964 to warn either of the danger of addiction or of the fact that smoking was habit forming, since this was well known at the time. The plaintiff's loss had not in any event been caused by the failure to warn, because she continued to smoke with knowledge of the risks.

[52] The Court considered the rationale of the duty to warn at 744-5:

> This duty to warn and provide information aims to compensate for the consumer's lack of knowledge with respect to the true nature of products, how to use them, or certain consequences arising out of use which the manufacturer is presumed to know.
>
> The objective is to place the customer in the position of the normally prudent, knowledgeable and well-informed person. If the substance or object is universally recognised as being dangerous or the user is aware of the dangerous nature of a product or has used it for a sufficiently long period that any additional information would be superfluous, the failure to warn or inform will not be a deemed fault of the manufacturer.
>
> In other words, manufacturers are under no obligation to warn end users of their products with respect to facts which are generally known, that is so well known in the community that they are more or less beyond dispute.

[53] Similar outcomes have occurred in other European jurisdictions: See eg *Heine v Reemtsma Cigarettenfabriken* GmbH 2 O 294 / 02 (Higher Regional Court of Hamm, 3rd Civil Court of Appeal) and *Lund v J.L. Tiedemanns Tobaksfabrik A.S.*, HR-2002-00753a, 31 October 2003 (Supreme Court of Norway).

[54] In *McTear*, after canvassing the information relating to the risks of smoking reported in governmental statements, articles from within the medical profession, and the media publications Lord Nimmo Smith determined at [9.4]:

> I am satisfied that at all material times, and in particular by 1964, the general public in the United Kingdom, including smokers and potential smokers,

> were well aware of the health risks associated with smoking, and in particular of the view that smoking could cause lung cancer.

[55] This was one of the bases upon which he found that the tobacco manufacturer was not liable in respect of Mr McTear's decision to begin smoking.

[56] As the above case law demonstrates, the principle that "common knowledge" will operate to negate a duty to warn has been applied in the context of several claims against tobacco companies in other jurisdictions. I see nothing controversial about applying the same principle to the present case. Informed consumers are entitled to exercise an autonomous right to purchase and consume products that are lawfully sold, notwithstanding the fact that such products may be harmful to their health. The purpose of a duty to warn is not to prevent or preclude consumers from purchasing or using products that carry the risk of danger. Rather, it is to place them in an informed position so that they can exercise their right to purchase products of their choice with knowledge of those risks.

[57] As I have already indicated, the duty to warn is based on the premise that the manufacturer may possess information regarding the dangers inherent in using its products that the consumer cannot reasonably be expected to possess. If potential consumers of the product can reasonably be expected to already possess that information, the rationale underlying the need for any warning necessarily disappears. In my view, and as a matter of common sense, a duty to warn of specific risks should not be held to exist in circumstances where those risks are already well known, or are common knowledge, to potential consumers.

[58] Any assessment of whether the risks or dangers inherent in a product are within the "common knowledge" of potential consumers must necessarily, in my view, be undertaken on an objective basis. This point was helpfully enunciated by the Ontario Court of Appeal in *Deshane v Deere & Co* (1993) 106 DLR (4th) 385 at 394 - 395, where the duty to warn was considered in relation to the concept of "obvious danger":

> It is often said that there is no duty to warn of obvious dangers. It is clear that there should be no liability for failing to warn someone of a risk or hazard which he appreciated to the same extent as a warning would have

> provided. This could easily be explained on the ground that the failure was not a cause of any harm to the plaintiff or on the ground that there was no breach of duty to the claimant under the circumstances. But courts have usually meant by "obvious danger" a condition that would ordinarily be seen and the danger of which would ordinarily be appreciated by those who would be expected to use the product. This objective approach to the issue of warning about obvious dangers may be regarded as reasonable, if the court is willing to find obvious dangers defective when there is a feasible way to make the design safer. The practical difficulties of litigating about whether an obvious danger was actually appreciated by a particular claimant justifies either an objective test of an obvious danger (thereby ruling out failure to warn as a basis for recovery) or simply regarding the obvious nature of a danger as a factor that is relevant on the issue of negligence.

[59] Mr Camp also referred to another formulation of the rule in *Eimers v Honda Motor Company Ltd* 785 F.Supp 1204 (W.D. Pa 1992) where the District Court of Pennsylvania stated at [19]:

> If a danger is obvious, there is no duty to warn against it… This inquiry into the obviousness of the danger depends not on actual knowledge of the user, but upon whether the danger was sufficiently obvious that it would be unreasonable to impose a duty to warn on the manufacturer… Thus, the focus of the 'obviousness' inquiry is upon the objective reasonableness of the supplier's judgment about whether users will perceive danger.

[60] In my view similar reasoning should be applied in determining how the factual question of common knowledge should be ascertained. Just as the "obviousness" of a risk must objectively be assessed from the perspective of the reasonable consumer, so must the existence of "common knowledge" of that risk.

[61] This conclusion flows from the fact that cigarette manufacturers have always distributed their products to a mass market. They do not deal with individual customers. It would therefore be both unreasonable and unrealistic for any duty to warn to require cigarette manufacturers to ensure that each and every individual consumer was aware of the risks inherent in smoking cigarettes. In such circumstances the duty should be no more than to warn of those risks in a manner that could be expected to come to the attention of the reasonable consumer. It follows from this that the issue of common knowledge must fall to be assessed against the level of knowledge likely to be held by reasonable persons who were potential consumers of cigarettes.

[62] I therefore proceed on the basis that the defendants would not have been under a duty to warn of the risks inherent in smoking cigarettes if the existence of those risks was common knowledge in 1968 to reasonable persons who were potential consumers of cigarettes. Whether or not that was the case is the issue that I now need to consider.

Consideration of common knowledge of risks

[63] It is not possible to view the state of the community's knowledge in 1968 in a vacuum. That knowledge will have been shaped and developed by the events that occurred before then. For that reason it is necessary to consider events that occurred well before 1968.

[64] I propose to approach this undertaking in two parts. First, I will briefly traverse the history and development of smoking in New Zealand. Given the manner in which events in this country have always been affected by events overseas, it is also necessary to refer briefly to salient events that occurred outside New Zealand during the years leading up to 1968. Secondly, I will consider the information that was in the public arena in New Zealand during the 1960s. I do so because I take the view that events that occurred during the period from 1960 to 1968 are likely to provide the best indication regarding the level of knowledge that was in the public domain as at 1968.

(i) History and development of smoking in New Zealand

[65] During the trial there was substantial evidence relating to the introduction and history of tobacco smoking in New Zealand. That evidence was contained primarily in a very lengthy and comprehensive report produced by Dr Jennifer Carlyon, an Auckland historian with impressive qualifications and experience. Dr Carlyon was asked by the defendants' solicitors to conduct historical research "into the New Zealand public's knowledge of the health hazards of cigarette smoking and the difficulties of quitting in the period 1900 to 2000". She was also asked to research knowledge of those issues in Southland in order to determine whether knowledge in that region differed from that in the rest of New Zealand.

[66] I consider that Dr Carlyon's evidence provides a useful historical and social context for Mrs Pou's claim. It demonstrates that tobacco use, and the public perception of tobacco smoking, has had a long and chequered history in this country. Long before New Zealand was settled, however, smoking was widespread in England and Europe, and the habit had provoked debate there at an early stage.

[67] As early as the 17th century, the smoking of tobacco gave rise to comment in prominent quarters. In 1604, for instance, King James I issued his well known "Counterblaste to Tobacco", in which he deprecated the then widespread use of tobacco. He described the habit of smoking as being "loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black, stinking fume thereof nearest resembling the horrible Stygian smoke of the pit that is bottomless." However, despite such public denouncements, the report produced by Dr Carlyon noted that tobacco consumption was widespread in the 17th century and lauded in some quarters for its medicinal benefits.

[68] Whilst debate regarding the evils of tobacco waned in the eighteenth century, the nineteenth century again saw a rise in opposition to tobacco use. The renewed debate rose as the result of an increased understanding of the pharmacological basis for the effects of tobacco. Towards the end of the 19th century, anti-tobacco societies grew in Britain, France, the United States and in some European countries. Temperance movements and religious groups publicly condemned tobacco smoking for its perceived medical and "moral" effects, and they campaigned for restrictions on its use.

[69] Tobacco arrived in New Zealand with the first settlers. Thereafter, the public use and perception of tobacco largely mirrored developments in Britain, the United States and Australia. Although the evidence does not suggest that any specialist anti-smoking unions were established in New Zealand at this early stage, organisations such as the Salvation Army, the Seventh Day Adventists and the Women's Christian Temperance Union (WCTU) publicly criticised tobacco consumption. The WCTU in particular made anti-smoking pronouncements in its own magazine throughout the last decade of the nineteenth century. In 1898 it

presented a petition to Parliament seeking prohibition of cigarette sales to people under 16 years of age.

[70] The official gazette of the Salvation Army propounded a similar anti-smoking message, and in 1910 the Salvation Army formed the Anti-Gambling and Smoking League. It urged young people to join up, and to sign a covenant stating that they would not smoke or gamble and that they would dissuade other people from doing so. Young people were also targeted through groups such as Boy Scouts, which advised its members not to smoke for health reasons.

[71] The issue of juvenile smoking was debated in England from the middle of the nineteenth century, and in 1908 the first legislative steps were taken there to prohibit the sale of tobacco to young persons. In Australia, Tasmania had passed a similar law in 1900 and other states followed suit over the next decade. In New Zealand, the first attempt to legislate against juvenile smoking was made by Mr H Chamberlain, MP for Auckland, who petitioned for legislation to combat the physical harm and moral corruption caused by juvenile tobacco use. However, his motion failed to gain sufficient support.

[72] Further bills were introduced in 1901, 1902 and 1903, drawing upon both the perceived social ills of smoking, as well as contemporary medical opinion attesting to the harm caused by smoking. Finally, in 1903, an "Act to Prohibit the Sale or Supply of Cigarettes, Cigars, or Tobacco to, and the Smoking of Cigarette, Cigars, or Tobacco by, Persons under Fifteen Years of Age" – the Juvenile Smoking Suppression Act – was passed.

[73] At this time the overall focus remained on the risks of smoking so far as young people were concerned. Parliamentary Debates of the age suggest that most people did not consider tobacco smoking to pose any significant harm to adults. The view expressed by the Prime Minister, the Right Hon. Richard Seddon, illustrates what was perhaps a common perspective at that time: "As far as smoking is concerned…I think that smokers live just as long as anybody else, and I do not think that in moderation it will do any harm at all."

[74] The Juvenile Smoking Suppression Act 1903 represented a response to escalating rates of tobacco smoking at the turn of the century. During the 1800s, advances in cigarette production technology had led to an extensive rise in the consumption of "ready-made" cigarettes. Articles in the *New Zealand Herald* from that time made reference to the pernicious effects of cigarette smoking on young boys, and suggested that the large-scale production of carbon dioxide produced by smoking would lead to "mental degeneration and dilation of the heart". In 1903 an article in that newspaper noted that "[t]he victim, moreover, almost inevitably develops a peculiar kind of asthma, and becomes very susceptible to lung trouble of all sorts."

[75] In the 1920s medical experts warned of the dangers of smoking, although the basis for these proclamations were variable. They ranged from the irritation that smoking caused to the eyes and skin, to suggestions that women smokers began to suffer from "smoker's heart". At this time growing numbers of women commenced cigarette smoking, and the smoking of cigarettes by females become socially acceptable during the First World War. As women left the household and joined the workforce in greater numbers, smoking in public became increasingly common, and accepted, amongst New Zealand women. During this period any debate tended to focus upon the peculiar risks that smoking posed to women, given their "delicate" constitutions.

[76] The role and effect of nicotine in tobacco cigarettes was also the subject of consideration amongst the medical profession at the turn of the century, and it was regarded in some quarters as a "poison" by the end of the nineteenth century. In 1899 the *New Zealand Herald* published an article entitled "The Use and Abuse of Tobacco", in which reference was made to nicotine poisoning.

[77] The risk of cancer caused by the smoking of tobacco was also discussed within the medical profession in the early 1900s. However, this related largely to the smoking of pipes, and the possibility that it might cause cancer of the lip, mouth and tongue. The link between pipe smoking and such cancers was canvassed in the *Christchurch Press* in the period from 1923 to 1925. However, in 1929 the Grand Council of the British Empire Cancer Campaign issued a report stating that after

several experiments it had been found "impossible to prove that tobacco smoking has any effect as a cancer-producing agent, either on the tongue, from pipe-smoking, or on the lungs, from cigarette smoking." The British Ministry of Health expressed similar sentiments in 1930.

[78] Throughout this period, tobacco smoking was also linked to other injurious effects on health, such as deteriorating eyesight. In 1890 the New Zealand Medical Journal published an article on "tobacco amblyopia" – a loss of eyesight attributed to the effects of nicotine. Suggestions of a link between tobacco smoking and degenerating eyesight persisted into the early 1920s. Comments made in the public arena also touched upon the addictive or habit-forming nature of nicotine.

[79] Despite the emergence of various objections to tobacco smoking, cigarettes were regularly sent to New Zealanders during the First World War in order to soothe soldiers' nerves. Contemporaneously, however, articles published in the *Christchurch Press* indicated a concern by some that this was causing harm among the soldiers, especially those suffering from tuberculosis and chest complaints. Cigarettes were again sent to troops during the Second World War, although the evidence provided by Dr Carlyon indicates an absence of objections based upon health concerns at that stage. During that period articles about cigarette smoking tended to focus upon the difficulties in supplying troops abroad given the shortage of tobacco in New Zealand and increasing tobacco prices.

[80] The Second World War was clearly an important period so far as the development of smoking patterns in New Zealand is concerned. A large number of personnel in the various services smoked, and smoking was also the norm within the civilian population. As a result, by the end of the war in 1945 a very significant proportion of the New Zealand population, both male and female, smoked cigarettes.

[81] The period after 1945 saw a further significant increase in tobacco smoking. By the 1950s, smoking patterns in New Zealand had begun to change. Men and women were now smoking both regularly and in public, as opposed to in particular settings and on special occasions. Although no official figures were kept at that time, it seems likely that by the end of the 1950s approximately 50 per cent of men and 35

per cent of women in New Zealand smoked. Tobacco imports into the country increased, while the local tobacco industry also expanded.

[82] Women's smoking habits during the period from 1920 to 1960 were influenced by the fact that increasing numbers of women entered the workforce during the inter-war period, and this led to an increase in both independence and disposable income. During the 1920s and 1930s British and American tobacco companies had begun to specifically target women in cigarette advertisements. With the onset of the Second World War, women played an important role in both the armed services and in the civilian workforce. As a result, the tone of tobacco advertisements changed from depicting attractive, fashionable women, to portraying the "emancipated female patriot."

[83] In the 1950s, advertisements in New Zealand women's magazines depicted female movie stars, politicians and members of the royal family smoking cigarettes. By the mid 1960s the rate of smoking amongst women had climbed to 45% in Britain, and it was widely accepted that New Zealand smoking patterns generally mirrored those in other western countries.

[84] Throughout the 1950s, the prevalence of smoking amongst males also continued to climb. Soldiers during both World Wars had been provided with cheap tobacco, and Government agencies such as the National Patriotic Fund Board facilitated shipments of millions of cigarettes to troops abroad. After the war, Returned Servicemen's clubs were allowed extra rations of cigarettes. When the so-called 'black budget' in 1958 doubled import duties on tobacco, alcohol and cars in an effort to restore economic equilibrium, the public outcry resonated loudly.

[85] The evidence suggests that the 1950s also saw a further resurgence of medical concern relating to the negative health effects of smoking. In 1950 Doctors Ernst Wynder and Evarts Graham published results in the United States indicating that out of 605 men with lung cancer, over 96% had smoked at least half a packet of cigarettes per day over the past twenty years. In Britain, also in 1950, Dr Richard Doll and Professor A. Bradford Hill published preliminary findings in the British Medical Journal under the title "Smoking and Carcinoma of the Lung". This was

probably the first significant work in the post-war period to postulate the likelihood of a link between smoking and lung cancer. By the end of the 1950s, seven further medical studies carried out in Europe and the United States suggested that there were increased levels of lung cancer amongst tobacco smokers.

[86] The results of such studies were widely published, although at that stage the existence of any direct causal connection between tobacco and lung cancer was not a matter of widespread acceptance. However, following the publication of a further report by Doll and Hill in 1956, the British Medical Research Council (BMRC) issued a special report in 1957 on the link between smoking and lung cancer. The report accepted that the link was one of "direct cause and effect". In the United States, American Cancer Society researchers Doctors E Cutler Hammond and Daniel Horn published a report in 1957 suggesting that cigarette smokers had significantly increased mortality rates. This report was widely published in periodicals such as *Time* and *Newsweek*. In 1960, the World Health Organisation issued an international press release stating that "cigarette smoking is a major cause of lung cancer". In the early 1960s, the debate finally prompted central government in both Britain and the United States to undertake public health initiatives.

[87] In New Zealand, daily newspapers covered the debate that followed major events such as the Doll & Hill study, the BMRC report and the American Cancer Society report in the 1950s. At the same time, members of the New Zealand medical profession also expressed their views regarding the link between smoking and cancer, several of which were also published in the major daily newspapers.

[88] The discussion continued through the 1950s but, whilst a growing number of medical reports suggested a connection between smoking and lung cancer, alternative arguments were also widely presented by tobacco manufacturers. In particular, the lack of any conclusive evidence to establish a causal link between smoking and lung cancer was stressed, as well as the alternative possibilities of atmospheric pollution and other confounding variables.

[89] The 1950s saw the first public health initiatives taken by the Government in New Zealand in relation to smoking. Ministerial communications from the early

1950s suggest a very cautious approach towards taking any anti-smoking measures. However, by the mid 1950s, public statements by the Minister of Health and the Deputy Director-General of Health indicate that the Department of Health (DOH) accepted the existence of a clear statistical link between smoking and lung cancer. Statements by the Department from the late 1950s indicate that by that stage causality - the existence of a direct link between smoking and lung cancer - was accepted by it.

[90] Given the virtual impossibility of persuading the general population to immediately cease smoking, the DOH adopted a preventive focus, concentrating primarily on the education of young persons. The evidence indicates that for some time during the 1950s DOH anti-smoking initiatives took place on an ad hoc basis. It initially involved messages published in the Departmental Magazine, *Health*, and also via radio messages, advertisements and posters. The first co-ordinated anti-smoking campaign by the DOH did not eventuate until 1958, when it began to make preparations for a campaign aimed primarily at school children. This campaign officially commenced in the early 1960s.

[91] The 1960s were marked by two significant international developments. In March 1962 the Royal College of Physicians released its report "Smoking and Health", which represented the culmination of three years' evaluation of existing medical data. The report concluded that "cigarette smoking is a cause of lung cancer" and that "heavy smokers were thirty times more likely to contract lung cancer than non-smokers".

[92] Following instructions given in 1962 to undertake a comprehensive review of all data on smoking and health, an expert advisory committee to the US Surgeon General released its landmark report on the health effects of tobacco smoking in 1964. The report concluded that "cigarette smoking is causally related to lung cancer" and that it "far outweighs all other factors". The report also recognised that tobacco use could lead to habituation and dependence, and it recommended "immediate appropriate remedial action."

[93] During this period and in response to these two watershed events, both the British and American governments took steps towards instigating nation-wide, comprehensive anti-smoking campaigns. The first restrictions on cigarette advertising appeared in Britain during the 1960s and in both countries warnings began to appear on cigarette packets. In 1967 the First World Conference on Smoking and Health was held in New York to address appropriate governmental action to combat smoking, and in 1968 the World Health Organisation issued its special report "Smoking and the Heart".

[94] In this country, cigarette advertising was banned on TV and radio before 7.30pm from October 1962 and from April 1963 the New Zealand Broadcasting Corporation stated that it would not broadcast any cigarette advertising that encouraged young people to smoke. In response, the New Zealand tobacco industry unilaterally withdrew all forms of radio and television advertising. A voluntary agreement in 1973 subsequently reaffirmed this decision. However, tobacco sponsorship of prominent sporting events, and media coverage of those events, continued and in fact escalated during the 1960s and 1970s. Rates of spending by tobacco companies on advertisements in the print media also climbed during this period.

[95] 1970 saw the World Health Organisation adopt its first anti-smoking resolution, stating that cigarette smoking was the largest single avoidable cause of death in several industrialised countries. The following year, the Second World Conference on Smoking and Health was held in London, reinforcing the comments made in the first conference in 1967.

[96] In 1971 a second report was published by the Royal College of Physicians, calling for stronger anti-smoking measures and concluding that there was "no doubt that smoking caused lung cancer, chronic bronchitis, emphysema, coronary heart disease and coronary thrombosis." A voluntary agreement was reached in the same year between the government and the tobacco industry in Britain. The tobacco companies agreed to place governmental health warnings on cigarette packets, whilst a legislative ban was placed on cigarette advertising on radio and television. Also in the same year, the US Surgeon General issued a review of the entire field of research

into smoking, included in which were observations about the effects of smoking during pregnancy, such as effects on foetal growth.

[97] Thereafter, the Surgeon General continued to issue smoking related reports on a biennial basis. The World Health Organisation also continued to urge governments to take stronger anti-smoking measures throughout the 1970s. By the 1980s, World Conferences on Smoking were also held biennially.

[98] In 1972 the DOH engaged in an ongoing dialogue with the tobacco industry in order to reach agreement on the issue of health warnings on cigarette packets. A voluntary agreement was signed in March 1973. This agreement, set to last for three years, confirmed the existing ban on radio and television advertising and stated that in six months all cigarette adverting would be banned in cinemas, billboards and posters that were not at the point of sale. Advertisements in the print media were also to be limited in size.

[99] The agreement also required the words "Government warning: Smoking may damage your health" to be displayed on all cigarette packets after January 1974. The agreement was renewed in 1976 for a further two years. In 1979 a further agreement was signed, extending the warning-label requirements, and requiring tar ratings to appear on all press and media advertisements. A fourth agreement was signed in 1981 after difficult negotiations, changing the wording on the label from "smoking can endanger your health" to "smoking may endanger your health."

[100] The 1970s and 1980s were marked by the rise of more prominent anti-smoking campaigns. By the late 1970s, individual companies and retailers also undertook anti-smoking measures on a voluntary and ad hoc basis. For instance, Woolworths supermarkets requested in 1977 that their customers refrain from smoking whilst in the store. Foodtown supermarkets followed suit in the early 1980s. In 1971 the DOH adopted an internal policy that departmental staff should not smoke during meetings, or when in public representing a government department.

[101] Following the Third World Conference on Smoking and Health in 1975, the DOH, in conjunction with the Cancer Society and the National Heart Foundation, formed a governmental steering committee to consider the WHO Expert Committee Report on Smoking and how it could be applied to public health in New Zealand. Based on the recommendations by the steering committee, the Government formed the Advisory Committee on Smoking and Health (ACSH) in November 1976.

[102] In 1977 ACSH indicated an intention to "do away with the association of cigarettes with sport". This resulted in immediate objection from both sporting bodies and tobacco companies. The strength of the opposition forced ACSH to shift its focus from stopping sponsorship entirely to limiting the visible advertising associated with such sponsorship. Attempts to reach a voluntary agreement regarding the sponsorship of sport by tobacco companies were unsuccessful.

[103] In 1979 the Toxic Substances Act listed tobacco as a toxic substance, thereby making provision for regulations governing advertising and marketing. However, the government did not consider it necessary to promulgate further legislation so long as the voluntary agreements remained in place.

[104] Throughout this period, non-governmental agencies such as the Cancer Society and the National Heart Foundation continued to run concerted anti-smoking campaigns. Concurrently, while sponsorship of sporting events continued to increase in response to the bans in respect of television and radio advertising, spokespeople from the tobacco industry also issued their own information and reports. By way of example, in 1979 the tobacco industry released a booklet entitled "The Smoking Question". This continued to highlight the lack of a proven causal connection between smoking and lung cancer. In May that year, the DOH produced a point-by-point refutation of the points made in the booklet. In that same month, the Tobacco Manufacturers Association invited Dr Carl Seltzer of Harvard University to tour New Zealand stating his belief that "cigarette smoking was not one of the principal contributors to coronary heart disease." Again, the DOH and various heart specialists issued immediate responses.

[105] Pressure on the Government mounted during the 1980s, in line with a worldwide trend. In 1986 a further US Surgeon General's report was issued, this time focussing upon the effects of passive smoking. Another report by the Surgeon General in 1988 concluded that cigarettes and other forms of tobacco were addictive. The report isolated nicotine as the drug that caused the addiction, likening the pharmacological processes involved to those that occur in addiction to drugs such as heroin and cocaine. The report noted that the earlier 1964 report had relied upon a semantic distinction between habituation and addiction, a distinction that was no longer valid.

[106] In 1986, after the Thirty-Ninth World Health Assembly, the WHO launched an international public health campaign against tobacco use, encouraging countries to aim for smoke-free societies by the year 2000. In 1987, the date of 31 May was designated as the annual World No-Smoking Day.

[107] International trends in the 1980s were echoed in New Zealand. In 1984, Dr Murray Laugesen, a principal medical officer at the DOH was appointed to the Health Promotions Unit. His role was to focus solely on tobacco monitoring and control. In conjunction with the Toxic Substances Board (TSB) and the Action on Smoking and Health group (ASH), Dr Laugesen worked towards replacing the voluntary agreements with legislative controls.

[108] Throughout the late 1980s, successive Ministers of Health also continued to work towards such legislation. Numerous publications were issued by governmental agencies such as the DOH and other groups such as the TSB and ASH. In 1986, taxation on tobacco was increased by 55 per cent.

[109] In 1989 the Minister of Health, the Hon Helen Clark, launched the publication "Health or Tobacco: An End to Tobacco Advertising and Promotion" authored by Dr Laugeson and produced with the support of the TSB. The report presented comparative statistics relating to tobacco advertising and sponsorship across 33 countries and canvassed evidence regarding the impact of advertising bans. The report recommended that tobacco advertising and sponsorship in all their forms be totally eliminated in New Zealand. In response to this paper, the Tobacco

Institute of New Zealand filed a 216-page report. Thereafter the government proceeded with a Bill to restrict tobacco advertising and sponsorship.

[110] The Bill became the Smoke-Free Environments Act, which was passed in 1990. The Act had three primary purposes. First, it aimed to prevent the detrimental effects of smoking on the health of people in workplaces, or in certain public enclosed areas. The Act prohibited smoking in passenger aircraft and passenger service vehicles, and required all employers to have a written policy on smoking. Employers were also required to provide smoke-free areas. Secondly, the Act controlled the marketing and distribution of tobacco products. Its passage resulted in an effective ban on most advertising and sponsorship by tobacco manufacturers, and required health warnings and constituent labelling to be displayed on cigarette packets. Thirdly, the Act established the Health Sponsorship Council to fund organisations that had previously received and been reliant on tobacco sponsorship.

[111] Throughout the 1990s, anti-smoking measures increased worldwide. As a result, international air carriers began to ban smoking on all flights. Reports from this period indicate that issues of key concern in New Zealand were the rates of smoking amongst adolescents, smoking rates amongst Maori and the health risks of passive smoking and smoking during pregnancy. During this period groups such as the Cancer Society, the National Heart Foundation and ASH continued to run concerted public education campaigns. High profile anti-smoking campaigns were widespread. The Health Sponsorship Council created sponsorship brands such as "Smokefree" and "Lifespan" to sponsor sporting and artistic events whilst promoting healthy lifestyles.

[112] The period from the 1990s through to the present day saw the consolidation of a shift in public attitudes against cigarette smoking. An editorial in the *New Zealand Herald* newspaper in 1993 summarised this in the following terms: "the most surprising thing about it all is the complete turn-around in public attitude. What was right is now wrong. What was cool is now gross. What was acceptable is now not… It all shows how completely public opinion can change direction, and with what effect."

[113] The widespread extent of public awareness of the risks of smoking in the contemporary period was also reflected in an editorial in the *Dominion* in 1997: "The admission by United States tobacco company Ligger that cigarettes are addictive and cause cancer should stun no one with its content. In 1997 only the most woefully ignorant or the most wilfully blind could believe cigarettes are anything else."

(ii) Information as to public awareness of the risks of smoking during the 1960s

[114] Many of the matters to which I have just referred are also relevant to the next matter that I consider, namely the level of information that was available to the community at large in the 1960s regarding the dangers of smoking.

[115] In considering this issue I base my findings on the numerous journal articles, reports and media publications submitted in evidence during this proceeding. I have also been greatly assisted by the information provided in Dr Carlyon's report.

[116] By the beginning of the 1960s, there was already growing awareness in medical circles regarding the health risks of cigarette smoking. Key developments in the 1950s, including the Doll & Hill study, the BMRC report and the American Cancer Society report provided a platform for both further research and public debate.

[117] As mentioned previously, the two landmark events during the 1960s were the report of the Royal College of Physicians (RCPR) in 1962 and report of the advisory committee to the US Surgeon General (USSGR) in 1964. The results of the RCPR were published in 1962 in international periodicals such as *Time*, *Newsweek* and *Reader's Digest*, all of which were reasonably widely read in New Zealand at that time.

[118] By this stage the New Zealand DOH was taking further steps towards warning the public of the potential dangers of smoking. A departmental press release from June 1960 stated "it is the duty of the Department of Health to warn all cigarette smokers that there is now conclusive evidence that they are taking an unnecessary risk… we must accept smoking as a dangerous pastime." The approach

taken by the DOH focussed primarily upon preventing young people from starting smoking, whilst at the same time encouraging adults to at least consider moderation.

[119] A departmental report from 1960 stated: "Adults will be encouraged to stop or, at least, reduce cigarette smoking, but they will particularly be asked to assist in discouraging youngsters from developing the smoking habit." The DOH recognised the element of individual choice in smoking, and therefore focussed upon the issue of informed choice.

[120] In 1962 the Director of the Division of Health Education stated: "It is not my intention to tell you not to smoke – that is something that you must decide for yourselves – but you will find it easier to make the decision if you know some of the facts about smoking." The evidence indicates that at that stage the likelihood of immediate legislative moves curbing the availability of tobacco cigarettes, or banning cigarette advertising, seemed remote. The focus of the DOH, as evidenced by a Cabinet memorandum from 1962, was therefore to "make available to the public, and particularly to minors, evidence on the connection between smoking and lung cancer."

[121] Communications from the DOH Division of Health Education indicate that the Department was also aware of the difficulties that smokers had with quitting – another recognised justification for focussing upon youth education.

[122] Before the Department of Health instigated any concerted anti-smoking campaign aimed at the nation's youth, it conducted a pilot survey in order to gauge the attitudes of school aged children towards smoking. The pilot survey was undertaken at Onslow College in April 1960. A follow-up study surveying the smoking habits of over 4000 male and female secondary school children across nine schools was conducted in August the same year. The results of the survey, which were published in a Department Special Report series in May 1961 and also issued via press release, found that many children had tried smoking at a very young age. For this reason, the DOH decided to pitch its campaign at primary school children.

[123] In July 1961 the first steps were taken towards compiling a booklet entitled "Notes for Teachers on Cigarette Smoking". This was to be sent to every school, accompanied by a copy of the Special Report. An article was also published in the *Education Gazette* of December 1961 warning teachers of the risks of smoking and encouraging them to dissuade students from starting to smoke. Simultaneously, the Auckland Division of the British Empire Cancer Campaign Society BECCS (a precursor to the NZ Cancer Society) was organising a campaign for secondary schools, including tape recordings and films, brochures for teachers and pamphlets for students. Such packs were distributed in the Auckland area starting in 1961, and in 1962 the Wellington Division of BECCS also began distribution.

[124] Aside from co-ordinated school campaigns, the DOH also took several ad hoc measures to publicise the risks of smoking. For instance, anti-smoking advertisements and articles were published in the *New Zealand Herald* and the *Junior Red Cross Magazine* in 1962, as well as in the Department of Health's own publication, *Health*. In 1962 the children's magazine *Junior Digest* ran a poster competition where entrants designed posters emphasising the dangers of smoking. The DOH agreed to judge the competition and display the winning posters nationally. A similar anti-smoking poster campaign was organised in 1963 by the Auckland Division of BECCS.

[125] By the end of 1962 the DOH campaign included materials that were sent to schools, including an animated anti-smoking film entitled "Space Flight" and posters that were to be displayed in prominent locations. More than 7000 copies of "Notes for Teachers on Cigarette Smoking" were also sent to schools, accompanied by a directive from the Minister of Education calling for a positive effort to discourage smoking amongst children. The Department of Education also incorporated anti-smoking messages into the health education syllabus taught by both primary and secondary teachers. In 1965 the syllabus was re-worked and a new handbook, "Healthy Living", was constructed as a guide for teachers to utilise in their own courses. The New Zealand Broadcasting Corporation also created various broadcasts to schools, including on the topic of health and hygiene. This broadcast warned against the dangers of smoking.

[126] The DOH campaign provoked reaction from the New Zealand tobacco industry. For instance, in 1962 the *Nelson Daily Mail* published an article reporting that the Tobacco Growers Federation in Motueka had complained to the Minister of Industries and Commerce criticising the anti-smoking campaigns run by the DOH.

[127] During the 1960s the DOH campaign featured advertisements in newspapers and magazines such as the *New Zealand Herald* and the *Listener,* as well as more specialist journals such as the *Boys Brigade News*, the *Public Service Journal*, the *New Zealand Catering Journal*, the *Labour and Employment Gazette*, and regional publications such as the *Hokitika Guardian*, the *Wanganui Chronicle* and the *Otago Daily Times*. District Nurses were also sent to give regular education talks in schools. Public addresses, radio announcements, exhibitions at A&P days, posters and directives to teachers all stressed the dangers of cigarette smoking. Initiatives such as the Cancer Education Week in May 1964 displayed anti-smoking messages in prominent public places and workplaces nationwide.

[128] Regional Health Districts also ran anti-smoking messages as part of summer health programmes. For example, in the summer of 1963/64 the Southland and Otago Health districts ran a campaign throughout holiday camps, which included anti-smoking posters and pamphlets. The film "Space Flight", as well as another film highlighting the dangers of smoking, "Time Pulls the Trigger", were screened in the evenings.

[129] A review of the districts in June 1966 undertaken by the Director of Health Education indicated a considerable degree of variation in the extent and effectiveness of campaigns between the regions. Strong anti-smoking campaigns had been run in the Wellington and Hutt districts, and also in Wanganui, Hamilton and Southland. Other regions, such as New Plymouth and Palmerston North, reported that they had not run concerted District Health campaigns because of the perceived effectiveness of the measures already undertaken by the Cancer Society. Other regions such as Timaru, Napier and Rotorua reported little in the way of systematic anti-smoking measures, although Public Health Nurses and Education Officers continued to provide information on an ad hoc basis. The reason for this ambivalence may have been captured by the Medical Officer in Timaru, who reported that "the general

public appear to be aware of the danger but the attitude is 'Oh well, you've got to die of something.'"

[130] The report of the Royal College of Physicians in 1962 had noted that the smoking habits of male doctors contrasted markedly to those of other men. Stemming from this finding, the DOH conducted a similar survey of the smoking habits of 2623 New Zealand doctors in 1963. The results, published in 1964, indicated that 60.7% of doctors did not smoke and that 36.9% had given up within the last 10 years. This indicates that approximately 76.2% of New Zealand doctors smoked in 1953. Comparable population statistics are not available in relation to other New Zealand males, but data on smoking rates in the United Kingdom in 1963 suggests that smoking rates amongst New Zealand doctors at that time were markedly below those in the general population in the United Kingdom.

[131] The results of this survey were covered in the news media. In July 1964 the *Christchurch Press* reported that "the object of the survey…was to inform the public on what their doctors were doing about cigarette smoking in view of what the report describes as the "major lung cancer epidemic"… If then, New Zealand doctors are rejecting cigarettes it is important for the public, their patients, to know why."

[132] Throughout the 1960s the magazine *Health*, which was free to all subscribers and by 1965 had a circulation of 70,000, continued to disseminate the anti-smoking message. For example, in 1960 *Health* published statistics relating to the increasing incidence of lung cancer and unequivocally linked this to tobacco smoking. The article stated in bold text "the dangers of heavy smoking are very real and health workers in New Zealand would be failing in their duty were they not to present the facts as they are known." Similar feature articles on smoking appeared in 1962, 1963 and 1964. Aside from these feature articles *Health* also published numerous articles on how to quit smoking, together with cartoons, anti-smoking advertisements and reminders about the negative health effects of smoking. Communications from the DOH indicate that *Health* was also used as an educative tool in schools. By the end of the 1960s its total readership was estimated at half a million.

[133] The DOH also continued its policy of educational radio talks throughout the 1960s, propounding the dangers of smoking in regular feature reports.

[134] Apart from the initiatives undertaken by the DOH, independent non-governmental groups also promoted the anti-smoking message throughout the 1960s. Groups such as the Salvation Army, Women's Temperance and the National Association of Smoking and Health continued to work both at a regional level and by lobbying national government.

[135] The Seventh Day Adventists published anti-smoking messages in their magazine *Alert*, and also created a film entitled "One in 20,000". This was shown at schools in several districts and also to the public in cinemas during 1962. From 1964 the Seventh Day Adventists also circulated a five-day stop smoking plan throughout New Zealand and ran regular quit-smoking seminars and support groups.

[136] The most active independent body throughout this period was the British Empire Cancer Campaign Society (BECCS), which became the Cancer Society in 1964. BECCS launched its first school-based anti-smoking programme in 1961, and collaborated with the DOH in further efforts over the following years. BECCS produced pamphlets, films and posters to accompany talks given in schools by Public Health Nurses and Health Education Officers.

[137] Regional data for the mid-1960s suggests that BECCS and the Cancer Society played a reasonably significant role. For example, in 1966 the Otago and Southland division of the Society reported that it had visited 31 schools, given 58 lectures and had reached an estimated 10,000 children. The visits often included media presentations such as the films "To smoke or not to smoke" and "Tobacco and the Human Body." During this period the Cancer Society also visited prominent public events such as the 1966 Easter Show in Auckland. In 1967 anti-smoking advertisements were placed on billboards in branches of the Bank of New Zealand and in the same year the Society organised a mobile cancer display unit to tour the country, part of which focused on the link between smoking and lung cancer.

[138] The medical profession also played a role in promoting public debate and education regarding the risks of tobacco smoking. In the 1950s references had begun to appear in the New Zealand Medical Journal regarding the link between cigarette smoking and rising incidents of lung cancer. In 1962 the New Zealand Medical Association endorsed the Royal College of Physician's report and wrote to the New Zealand Broadcasting Corporation suggesting that limits should be placed upon cigarette advertising. From the 1960s onwards, Dr David Hay, the head of the cardiac unit at Princess Margaret Hospital, played a prominent role as an anti-smoking spokesperson for the medical profession. He took an active role in communicating with both the media and the public on the risks of smoking. In 1967 his medical observations on the incidence of lung cancer were published in a *New Zealand Medical Journal* (NZMJ) article entitled "An appraisal of the relation of smoking to health".

[139] The *NZMJ* published eight significant articles linking smoking to ill health during the 1960s. These included articles on the risks of smoking during pregnancy and the prevalence of smoking amongst adolescents. Articles of a similar nature were also published in the *New Zealand Nursing Journal (Kai Tiaki)*, the *Nursing Gazette*, *New Zealand Family Doctor* and *New Ethicals*, a magazine emerging in 1964 that was distributed to all registered doctors and sixth-year medical students.

[140] The risks associated with cigarette smoking also received significant coverage in the news media throughout the 1960s.

[141] The Royal College of Physician's report in 1962 attracted widespread press coverage. Immediately following the release of the report daily papers published articles with headlines such as "Medical Findings on Smoking and Cancer" (*Dominion*) and "It's Cigarette Users who get Lung Cancer" (*Taranaki Herald*). There was regular discussion of the report in the print media over the following weeks. According to Dr Carlyon, when the British Tobacco Manufacturers responded to the report claiming that the evidence was still equivocal, their response was not widely reported in New Zealand.

[142] In March 1962 the press also reported comments made during public talks by a visiting lung specialist from Edinburgh, Professor John Crofton. His subsequent statement urging New Zealand health authorities to take urgent steps to combat lung cancer was also reported in the *Christchurch Press*, the *Otago Daily Times*, the *Dominion*, the *Southland Times* and the *New Zealand Herald*. His comment on 9 April 1962, to the effect that lung cancer rates would climb steeply in New Zealand unless something drastic was done, was covered in major newspapers under headlines such as "Smoking a Factor in Death Rate" (the *Dominion*).

[143] During 1962 and 1963, the debate continued in the media. In 1962 newspapers such as the *Otago Daily Times* and the *Southland Times* reported assertions by British American Tobacco that no causal connection could be established between smoking and lung cancer. The *Southland Times* also reported the immediate response to this assertion made by doctors and the DOH. Towards the end of 1962, more specialised information about the risks of smoking featured in the media. For example, the *Southland Times*, the *Otago Daily Times* and the *Dominion* all ran articles concerning the risks of smoking during pregnancy.

[144] In 1964 the release of the report by the advisory committee to the US Surgeon General sparked further media interest in the smoking debate. The report itself appeared on the main news page of several papers, in some cases occupying a full page. The articles contained prominent headlines, including "Smoking Causes Lung Cancer US Scientists Say" (*Southland Times*), "Report Cites Cigarettes As Lung Cancer Cause" (*Christchurch Press*) and "Cigarette Smokers Running Tenfold Risk" (*New Zealand Herald*).

[145] On a national level, these articles were followed by numerous editorials, letters and further reports. For example, in the latter half of January 1964, the *Christchurch Press* alone published 23 articles and 14 letters discussing varying aspects of the smoking debate. The *New Zealand Herald* published 16 articles on the topic throughout January 1964. Some newspapers also covered assertions by the tobacco industry to the effect that the report did not contain any findings of causality, as well as the DOH's response reiterating its support of the Surgeon General's findings.

[146] Over the following months, topics related to smoking remained prominent in the media, with a shift in focus from the conclusions in the Surgeon General's report to possible methods of dealing with the problem. Articles in major newspapers included "Anti Smoking Clinic for City" (*Otago Daily Times*) and "Regular Clinics to Combat Smoking" (the *Christchurch Press*).

[147] In 1964 a prominent article in the British Medical Journal, which stated "Cigarettes now kill thousands of men and women every year", was reported in New Zealand daily newspapers. A television documentary entitled "Spotlight on Smoking" was played in January 1964, and a radio programme on cancer was aired in May the same year. The results of the DOH survey of doctors were also reported, with the *New Zealand Herald* reporting "60% of Doctors in N.Z. Do Not Smoke". In the same year the *New Zealand Herald*, the *Dominion*, the *Christchurch Press*, the *Daily Telegraph*, the *Nelson Daily Mail*, and the *Taranaki Herald* all reported that the US government had imposed a requirement that warnings be placed on cigarette packets stating "cigarette smoking is dangerous and may cause death from cancer."

[148] Likewise, the move by the British Government in 1965 to ban cigarette advertising on television, in conjunction with continuing comment regarding the US Surgeon General's report, was covered in newspapers such as the *Southland Times*, the *New Zealand Herald*, the *Southland Daily News*, the *Christchurch Press*, the *Dominion*, the *Daily Telegraph* and the *Taranaki Daily Times*. During the same year a comment made by Mr J A Baird, a thoracic surgeon at Wellington Hospital, regarding smoking rates amongst lung cancer patients, sparked headlines such as "Lung Cancer Victims All Smokers" (*Southland Times*).

[149] Media coverage in 1966 featured not only the link between smoking and cancer, but also possible links with other diseases. In February 1966, the *Christchurch Press* ran an article entitled "Cancer Death Rate Higher for Smokers". This reported that women smokers had not only a higher risk of cancer and coronary heart disease, but also higher rates of death from emphysema, cirrhosis of the liver and cancers of the mouth, pharynx, oesophagus and pancreas.

[150] Dr Hay's comments in 1967 to the effect that a large number of New Zealanders would die of smoking-related diseases was cited in newspapers including the *Southland Times* and the *New Zealand Herald*. In 1968, articles appeared in the major daily newspapers nation-wide on smoking-related issues. These included the move to ban cigarette advertising in the United States, the prevalence of smoking amongst young people, the link between smoking and lung cancer, heart disease and emphysema, and the introduction of a bill into Parliament providing for possible restrictions on tobacco advertising. To a lesser extent, some of the major dailies also reported the statements issued by sectors of the tobacco industry at the time and other contradictory accounts. For instance, the *Christchurch Press* and the *New Zealand Herald* covered the statements made by Dr Carl Seltzer during his visit to New Zealand in 1968, when he disputed the existence of any established link between smoking and heart disease.

[151] By the end of 1969, the *New Zealand Herald* had published an average of one article per month on the topic of cigarette smoking. In that same period the *Waikato Times* and *Southland Times* had also published just over one such article per month.

[152] Developments in the smoking debate were also reported in weekly and monthly magazines. The 1962 Royal College of Physician's report was covered in a feature article in the *Listener* entitled "The Trouble With Smoking." In 1964 a *Listener* editorial entitled "Lost in the Big Smoke" discussed the US Surgeon General's report and the competing interests of individual liberty. The *Listener* again revisited the issue in 1967 in one of a series of articles on health issues.

[153] The *New Zealand Women's Weekly* featured an article in February 1964 entitled "How to Avoid Heart Attacks", which propounded the benefits of reducing or quitting smoking. In the following month the magazine featured a comment on responses to the US Surgeon General's report, and in April 1964 a full page article sponsored by the Seventh Day Adventists discussed the "Five Day Plan" to stop smoking. In 1965 and 1968 the magazine published views expressed by readers concerning the health risks of smoking and the difficulties caused by craving for tobacco.

[154] By way of contrast, the *Truth* newspaper, a prominent weekly publication in New Zealand, featured little in the way of detailed reports on the smoking issue. However, in 1962 and 1963 *Truth* published letters on the issue as well as information in the health column on how to stop smoking. In 1967 it noted that smoking had not been proved as a cause of heart attacks, although it recognised the Surgeon General's comments that it was "prudent to assume a causative link."

[155] During this time, the *Reader's Digest* featured anti-smoking articles or referred to the risks of smoking regularly. Between May 1967 and the end of 1969, eight articles in that publication emphasised the ill effects of smoking.

[156] Aside from the health risks associated with smoking, throughout the 1960s newspapers and magazines also published articles, letters and editorials acknowledging the difficulties associated with smoking cessation. The *Christchurch Press*, the *Listener*, the *Southland Times*, the *Dominion* and the *Woman's Day* featured phrases such as "nicotine addict", "compulsive need to smoke", "a habit so tyrannical" and "tobacco slaves". The daily newspapers and magazines featured articles on topics such as the best means to quit smoking, smoking clinics and the difficulties in trying to quit. Advertisements regularly appeared for quit-smoking aids and courses, whilst letters from members of the public attested to the difficulties of cessation.

[157] Beyond the print media, radio and television broadcasts also covered the issue of smoking. From May to July 1962 a radio show entitled "The Smoking Habit" was aired on various stations nationally. The National Programme featured a question and answer panel on cancer in 1964, and in 1967 it featured a BBC documentary on smoking and cancer. On television, the BBC documentary "The Smoking Habit" was aired on various channels in 1962. "Spotlight on Smoking" was broadcast in 1964, whilst current affairs programmes considered topical issues such as the banning of smoking on public transport.

[158] In her report, Dr Carlyon pays particular attention to the information available in the Southland region during this period. I have already referred to some

of the information that was available in that region regarding smoking-related issues, but it is appropriate at this juncture to consider this issue in a little further detail.

[159] The anti-smoking campaign conducted by the Department of Health operated in Southland as it did in the rest of the country. As a result, the Invercargill District Health Office participated in nationally co-ordinated anti-smoking campaigns. Public Health Nurses spoke to students and parents, and assisted by providing advice at stop-smoking and antenatal clinics. The Cancer Society was also active in the Southland region, organising regular educational talks and distributing posters, pamphlets and stickers. It also sponsored an independent campaigner to tour Invercargill secondary schools. Anti-smoking films were shown at holiday programmes, and displays were set up at the regional A&P show.

[160] In 1964, in response to the findings in the United States and the United Kingdom concerning the harmful effects of tobacco, the Invercargill City Council determined that it would no longer allow smoking advertisements to be placed on council property, including buses. In announcing this decision the Council said that it could not "allow what has been revealed as a national health hazard to be promoted on council property."

[161] The two major regional daily papers in Southland in the 1960s were the *Southland Times* and the *Southland Daily News*. The latter became the *Southland News* in 1967, before being taken over by the *Southland Times* in 1968 and becoming the *Southland Times (Afternoon Edition*). The evidence suggests that between these two papers, there were at least three to four articles on average every month throughout the 1960s on smoking-related topics. There was a significant increase in the number of such articles following the release of the Royal College of Physician's report in 1962 and the US Surgeon General's report in 1964. The latter report was covered in a *Southland Times* article entitled "Smoking Causes Lung Cancer U.S. Scientists Say." The Surgeon General's report was also the catalyst for several articles discussing how a smoker could break the cigarette habit. Advertisements for smoking-cessation pills also appeared on numerous occasions in the *Southland Daily News* throughout 1964.

[162] In 1965 the *Southland Daily News* published an average of 4.3 articles per month on smoking-related issues. These included the advertising bans imposed in Great Britain and the warning requirements in the US, tips for quitting smoking, the association between heart attacks and smoking, educational efforts being undertaken internationally and the Seventh Day Adventist Stop-Smoking Clinics. The frequency of articles waned slightly after 1966. However, for the rest of the decade articles were still published regularly regarding different aspects of the smoking issue. During the 1960s the *Southland Times* published a total of 199 items, including articles, letters and editorials relating to smoking and health.

Conclusions relating to public awareness of the risks of smoking during the late 1960s

[163] I naturally approach this aspect of my judgment with a degree of caution. The task of reaching a factual conclusion regarding the state of knowledge held by the community as a whole on any particular issue is one that is fraught with difficulty, and in some respects amounts to an artificial and unreal exercise. That difficulty becomes very much more pronounced when the exercise relates to knowledge held by the community some 38 years ago.

[164] As I stressed during the trial, I prefer to reach my own conclusions regarding this particular issue, and do not rely on those expressed by Dr Carlyon in her report or her evidence. In doing so I readily accept that Dr Carlyon undoubtedly has a familiarity with the base factual material that I could never hope to gain during my relatively fleeting association with it. Over the last two years she has spent more than 2000 hours researching and writing her report. This would have given her ample opportunity to reflect upon the material that she and her assistants had gathered, and her formal qualifications and experience would generally have been sufficient to enable her to pass expert comment on it.

[165] In the end, however, I do not consider that the evidence regarding this issue is of such a nature or complexity (or even specialty) that it is beyond the ability of the Court to assess. What the Court is being asked to do is determine, having regard to all of the material before it, the extent to which a relevant section of the New

Zealand community knew of the dangers of smoking in 1968. Whilst the ultimate decision might have its difficulties, the evidence upon which it must be based is relatively straightforward. I therefore consider that it is not beyond the ability of the Court to reach its own conclusions regarding the ultimate issue without the assistance of the opinions offered by Dr Carlyon.

[166] For these reasons I therefore proceed on the basis that, whilst Dr Carlyon has produced an extremely useful catalogue of base historical material, the interpretation of that material should be left to the Court. It is therefore necessary for me to explain how I propose to determine whether a matter can be said to have been a matter of common knowledge for present purposes.

[167] The starting point is the composition of the pool of persons who fall within the group that must have the knowledge in question. Common sense dictates that the pool will not comprise every single person in New Zealand in 1968. That would amount to a requirement that there be universal knowledge. Rather, the pool must be relevant to the exercise being undertaken. For the reasons that I have already indicated (at [61]), I consider that the pool would comprise those persons who were likely to purchase cigarettes for their own consumption in 1968. Given the widespread nature of cigarette smoking at that time, the pool would obviously also be wide. It would comprise adolescents and adults from both sexes, all races, all socio-economic groups and all parts of New Zealand.

[168] For present purposes, and for reasons that I have already given, those in the pool would need to have known in 1968 that persons who smoked cigarettes might be unable, or could find it very difficult, to stop. In addition, they would need to know that smoking cigarettes could be injurious to their health.

[169] The exercise necessarily assumes that those in the pool are reasonable persons. No allowance can be made for the deliberately obtuse or obstinate, or for those whose approach to life falls for whatever reason outside the range of reasonable behaviour. In deciding whether those in the pool had the required knowledge, the Court is therefore entitled to assume that they would have a level of interest in, and comprehension of, current issues of general importance within the

community as would have been considered reasonable at the time. For that reason members of the pool could be expected to have regard to such sources of information as might have been available at the relevant time and to which they might reasonably be expected to have resort. In the present context this would exclude from the pool those at extreme ends of the scale, such as the nine year old who purloins a cigarette from an unattended handbag, or the hermit who has chosen to forsake civilisation by retreating to a hut in the backblocks.

[170] The next step is to determine the sources of information that were in fact available to the community in 1968. I consider that Dr Carlyon's report provides an extremely useful starting point in any consideration of this issue.

[171] In 1968 television was still very much in its infancy, and I put it to one side for present purposes. It did not have the ability that it now has to impart knowledge instantly to virtually the whole of the community. Radio was very much more established in 1968, and it is likely to have been a major source of information for the general population at that time. It is difficult, however, to gauge the extent to which it may have imparted information relating to smoking and the potential health risks that it entailed. The number of actual radio programmes dealing with issues relating to smoking appears to have been relatively small, and it is possible that these had only a minor impact. News items regarding significant events such as the landmark reports released in 1962 and 1964 are much more likely to have been reported to the nation at large, but there is no way now of knowing just what was broadcast or to whom. For that reason, whilst I accept that radio is likely to have played a part in disseminating smoking-related information, it is difficult to say just how much impact it had.

[172] Similarly, the cinema was clearly still an important source of information in 1968, but the only evidence before me regarding its role as a purveyor of relevant information is in relation to the cigarette advertisements that were screened in cinemas during the 1960s. These would have done nothing to alert the public to the risks associated with smoking.

[173] I also have some difficulty with any suggestion that displays or stands of pamphlets at chemist shops or in doctors' waiting rooms are likely to have played a major role, or indeed any role, in disseminating such information. There is no evidence to indicate that these are likely to have had any effect at all.

[174] It is also difficult to assess the overall impact of the initiatives undertaken by the District Offices of the Health Department. These obviously varied greatly from region to region, and, I suspect, the variation is likely to have extended not only to the intensity of the programmes offered but also to their quality. Much probably depended upon the energy and commitment of the personnel involved in each region.

[175] I accept, however, that the programmes undertaken in schools during the 1960s are likely to have had some effect. Although Mrs Pou and her sister do not specifically recall receiving any information about the dangers of smoking whilst they were at school, this does not mean that they did not receive it. Common sense also suggests that, to some extent at least, messages that are received by children at school are likely to have some effect. The fact that Mrs Pou's own children responded immediately to information that they were given at school (see [295]) suggests that children do take on board messages that they perceive to be of relevance to their own situation. I consider that it is likely that all children in New Zealand schools during the 1960s received information in some form or another regarding the risks associated with smoking. I reach that conclusion primarily on the basis of the extent to which schools were provided with materials and assistance during this period from many quarters including the DOH, the Cancer Society (formerly BECCS), the Broadcasting Corporation, the Seventh Day Adventists and *Health* magazine. The extent to which it made an impact on them may well have depended upon the extent to which they perceived it to be relevant to their own circumstances.

[176] Similarly, although it is difficult to assess the overall effect of advertising campaigns and displays at regional shows, I accept that it is likely that at the very least they reinforced messages that New Zealanders were receiving from other quarters.

[177] These sources of information are, in my view, secondary to the most important means by which information is likely to have been imparted to the general public in 1968. I have no doubt that then, as now, news of current events served to inform and educate New Zealanders about the issues that faced their community. If anything, the impact of the mainstream news media was probably greater in 1968 than it is now. News media organisations must now compete with numerous alternative means by which the community may gain access to information and entertainment. In particular, the dawn of the electronic age has provided young people with virtually unlimited access to a wide variety of entertainment and information. It has also probably served to lessen the interest of many young people in the traditional forms of information media.

[178] In 1968, however, the position was completely different. People learned about news and current events almost exclusively from the radio, television, cinema and print media. They were not distracted by the other factors that exist today. And the impression I gain from the evidence is that in 1968, perhaps even more so than now, people were genuinely interested in the events around them, both in New Zealand and overseas.

[179] Mrs Pou herself provides a good example of this. She grew up and lived in a mid-sized provincial town rather than a large city. In 1968 she was probably on the cusp of adolescence and adulthood. Although she was only 17 years of age, she had finished school and started working two years earlier. She is probably therefore representative to some extent of both young people and adults of the period. There is nothing to suggest that she came from a particularly affluent background; if anything, the evidence suggests the opposite.

[180] For entertainment she went to the cinema, where she remembers seeing advertisements for cigarettes. Importantly, however, she confirmed that her family subscribed to the local daily newspaper, the *Southland Times*, and that she read that newspaper regularly. She also read the *Truth* newspaper, which was published weekly.

[181] These facts indicate to me that, if there is such a thing as an ordinary New Zealander in 1968, Mrs Pou was close to it. The fact that she made a habit of reading daily and weekly newspapers is of some significance. Daily newspapers had large circulations at that time, not only in the major cities but also in the provinces. Other than radio, there can be no real doubt that they are likely to have been the most influential and effective means of imparting news and information during the 1960s. I am therefore satisfied that, like Mrs Pou, most New Zealanders gained their knowledge of those matters during this period from their daily newspaper.

[182] I am also of the view that any reasonable person who read the daily newspapers during the 1960s must, from at least 1962 onwards, have been aware that a link was being suggested between smoking and lung cancer. After the release of the report of the Royal College of Physicians in 1962 there was extensive media coverage of smoking-related issues. It is quite possible, in fact, that the debate regarding the dangers of smoking was reasonably well known well before 1962 to those who followed current events.

[183] The editorial in the *Christchurch Press* on 15 March 1962 provides a useful snapshot of the state of public knowledge at that time. It said:

> "The Report of the Royal College does not add to the public knowledge of the dangers of smoking cigarettes though it usefully brings together the mass of information obtained from 23 studies in nine countries. The man in the street already knows quite well that smoking cigarettes greatly increases the chances of death from lung cancer..."

[184] The regularity with which articles appeared in the major daily newspapers from this time on is such that even the casual reader of newspapers could not, in my view, help but notice the articles and news items about the dangers of smoking. In reaching this conclusion I take into account the fact that items about smoking may not have been of interest to everyone, and that it is not possible to accurately gauge the extent to which they were assimilated by those who read them. I am also mindful of the fact that most newspapers were formatted in a very different manner in the 1960s. In those days the front page was often filled with classified advertisements, and major news stories were tucked away on inside pages. Even taking these matters into account, however, I am left with the firm impression that

the debate about the dangers of smoking played a reasonably prominent role in the print media between 1962 and 1968.

[185] Although the major daily newspapers were undoubtedly the major source of information during this period, they were ably supported by other sections of the print media. These included magazines such as the *Listener*, *Newsweek*, *Time*, *Reader's Digest*, *New Zealand Women's Weekly* and *Women's Day*, all of which were widely read and contained articles about the dangers of smoking during this period.

[186] The community has also always had a further and very important source of information, namely the spoken word. Human beings do not soak up information like sponges and keep it to themselves. Matters of current interest are invariably discussed with others. In this way information that one person may have obtained through one medium will be transmitted to others, albeit often with embellishment or inaccuracy.

[187] Information may also be imparted in a formal, or professional, setting. In the present case there is evidence to suggest that doctors may have played an important role in emphasising the emerging dangers of smoking to their patients during the 1960s. Although many doctors probably still smoked in 1968, the survey conducted by the DOH in 1963 found that 36.9 per cent of doctors had given up smoking within the previous 10 years. This suggests that the medical profession had taken early heed of the suggestions that smoking was dangerous to health. In those circumstances I also accept that it is highly likely that many doctors took every opportunity to pass the message on to their patients.

[188] That this is likely to have been the case is demonstrated by Mrs Pou's own experience. The evidence shows that on seven occasions when she visited a doctor between 1975 and 1995 the doctor raised the issue of smoking with her. I consider that many New Zealanders are likely to have had that topic raised by their doctors during routine check-ups or when they sought advice from their doctors regarding other matters.

[189] Of even more importance, however, is the extent to which people are likely to have discussed the dangers of smoking in general conversation, particularly when that topic was in the news. The dangers of smoking are also likely to have directly affected a significant number of people at that time, because of the rising incidence of lung cancer. Many people were likely to have contact with the phenomenon through the illness of a close relative or friend. At the very least, many people are likely to have known or heard of others who had developed lung cancer and who had been smokers.

[190] This was also an issue that had the potential to directly affect a great many people in the future. In the late 1960s many New Zealanders were heavy smokers who had been smoking for a long time. Suggestions from reputable bodies that there was a strong link between smoking and lung cancer would not have been a matter of mere passing interest. It must have engaged the attention of a great many people. If they were smokers, or were related to persons who smoked, it would have been natural for them to wonder how it might affect them in the future. The importance of the issue was such that I have no doubt that they would also have talked about it with friends and relatives.

[191] Finally, the behaviour of smokers during the early part of the 1960s suggests that they, too, were conscious of the potential effect of smoking on their health. In 1959 filter tip cigarettes accounted for just 25 per cent of Rothmans' total sales. By 1966 that figure had climbed to 70 per cent. The move to filter tips can be tracked on the sales figures that were produced in evidence. There is no independent means of verifying the reason for the switch to filter tipped cigarettes, but one very likely explanation is that smokers perceived them to be safer than cigarettes without filters. That in turn may be linked to an acceptance by smokers that smoking raised issues for their health.

[192] Two of the plaintiffs' witnesses, Ms Dunford and Dr Scragg, rejected the suggestion that there was common knowledge regarding the dangers of smoking in the 1960s. Ms Dunford's evidence was called principally to point out perceived shortcomings in the methodology adopted by Dr Carlyon. Her evidence was also to the effect, however, that if there had been knowledge about the dangers of smoking

in the 1960s one would also expect to see corrective action being taken by smokers. Dr Scragg, who gave evidence principally about adolescent behaviour, supported Ms Dunsford on this point.

[193] To the best of my recollection, however, there was no evidence to support the proposition that knowledge of a danger in this type of area is likely to translate into immediate action. People are understandably likely to take heed of a sign warning them of the existence of immediate physical danger. I doubt, however, that the same can necessarily be said for warnings that people should give up what they see to be a pleasurable activity because of possible risks to their health in the future. Moreover, as Mrs Pou's own experience demonstrates, it is likely that a range of factors will influence a decision to take up smoking. Knowledge will be but one of those issues. As Dr Scragg accepted, knowledge alone is unlikely to be a sufficient deterrent so far as adolescents are concerned.

[194] I consider the views expressed by Ms Dunsford and Dr Scragg on this point to be at odds with human nature, which will often eschew the wholesome for the pleasurable. They are also at odds with Dr Scragg's own survey (see [310]) relating to the uptake in smoking by year 10 students between 1992 and 1996. That survey revealed that there was a significant increase in smoking by year 10 students over the five-year period of the study notwithstanding a high level of knowledge about the dangers of smoking. That increase also occurred notwithstanding the absence of sponsorship and advertising even at the point of sale.

[195] I do not consider that it would be safe to equate knowledge with action in this particular context. To be fair to Dr Scragg, he accepted during cross-examination that this was the case.

Conclusion regarding the issue of common knowledge

(a) Addiction / Difficulty in giving up smoking

[196] The fact that a smoker can become dependent upon (or even addicted to) smoking cigarettes must, in my view, have been a matter that was well within the

knowledge of the community well before 1968. The same can be said for the fact that people may not be able to give up smoking cigarettes and that it can be extremely difficult to give up smoking. By 1968 many people had been smoking for a very long time, and the difficulties associated with nicotine dependence had been well documented. Given the number of people smoking at that time, it is reasonable to assume that virtually everyone in New Zealand had either experienced, or knew someone who had experienced, such difficulties.

[197] This fact was acknowledged by Dr Sellman, the plaintiffs' expert on addiction. He confirmed that it had been well known that it was difficult to give up smoking cigarettes since at least the first half of the twentieth century.

[198] I consider that this aspect of the defence is established beyond any doubt.

(b) Potential injury to health

[199] It will probably already be obvious from what I have said that I have also concluded that, by 1968, those who had even a passing interest in current affairs would undoubtedly have been aware that there was a strong link between smoking and lung cancer. As such, they must have known that smoking brought with it the danger of injury to health. My conclusion is primarily based on the extent to which this issue was the subject of articles and reports in the print media, coupled with supporting information disseminated by the DOH and other organisations. Finally, it must also have been disseminated further by word of mouth.

[200] In reaching this conclusion I reject the plaintiffs' submission that tobacco advertising and statements from the tobacco industry (including the defendants) resulted in mixed messages being received by the community regarding the dangers of smoking cigarettes.

[201] A similar submission was made to Lord Nimmo Smith in the *McTear* case. He dealt with it in this way at [7.176]:

> While it could hardly be disputed, and indeed was accepted by Professor Hastings, that the general public would be aware, because of all the publicity referred to in Part III, of the association between cigarette smoking and lung

> cancer, or at least of the serious risks to health attributed to smoking, I understood Mr McEachran to submit that the impact of this publicity was lessened by the continued appearance of advertisements for cigarettes and by statements made by the tobacco industry that it had not been proved that the association amounted to a causal connection between cigarette smoking and lunch cancer. As has been seen, the issue was by no means as open-and-shut as Sir Richard Doll, for example, believed it to be. If Sir Ronald Fisher and other critics seriously disagreed with him, this would quite properly be taken into account by [the cigarette manufacturer], and it would be part of the normal process of press coverage that opposing views be reported. I have no reason to think that the general public in the United Kingdom were not well aware that both sides of an argument might appear in the media – indeed they might well expect this to happen – or were unable to weigh up the competing arguments and decide what to make of them. Although, at para. [5.337], Professor Hastings spoke of the difficulty of making such decisions, he also accepted that readers of newspapers might be expected to have a certain degree of sophistication. What is important is that the general public, and each individual could decide what to make of it and how, if at all, to act upon it.

[202] I consider that members of the general public in New Zealand should also be credited with having the ability to weigh up competing arguments and messages and to make up their own minds on an issue such as this. Debate about controversial issues through the news media was established long before 1968. The public would have been well used to making decisions based on competing and sometimes contradictory information. Members of the public would therefore not have been surprised to hear the statements made by the tobacco industry in the 1960s. Even in 1968, advertising was already an established phenomenon that must have been well understood. There was nothing to prevent individual members of the public from making up their own minds regarding the dangers of smoking in the same way that they were asked to decide other important matters in their daily lives.

[203] For these reasons I have concluded that the risk that smoking could be injurious to health was a matter of common knowledge to those who were likely to purchase cigarettes in 1968. I therefore consider that any duty to warn consumers of that risk was negated by that fact.

[204] Given that the test is objective, it is not necessary for me to determine whether Mrs Pou herself was aware of the risks of smoking in 1968. Out of an abundance of caution, however, I propose to briefly consider that issue.

4. Did Mrs Pou know of the risks when she began smoking in 1968?

[205] The only direct evidence on this point comes from Mrs Pou herself. Although she read the *Southland Times* and *Truth* newspaper reasonably regularly, she says that she had not noticed any of the articles or information about the dangers of smoking before she began smoking in 1968. Thereafter, she says that the effect of any information that she received regarding the dangers of smoking was negated by the advertisements for cigarettes and the statements made by the tobacco industry. Where there was a conflict between health warnings and statements made by the tobacco industry, she accepted the statements made by the latter.

[206] It is not surprising that Mrs Pou does not remember individual newspaper articles that were published nearly forty years ago. It is hardly likely that anyone would do so, regardless of the topic in question. She did, however, remember an advertisement for Capstan cigarettes that depicted two identical twins ("the Capstan twins") lying on a beach. The surprising feature about this aspect of her evidence is that the advertisement in question was only ever published once, and that was in the *Truth* newspaper on 9 January 1962. At that stage Mrs Pou would have been less than 12 years of age. It seems somewhat remarkable that she can recall an advertisement that appeared when she was eleven years of age, and yet she can not remember anything at all about the numerous articles that appeared later regarding the dangers of smoking. It may be explained by the evidence that people have the ability to recall "one off" events notwithstanding the fact that such events may have occurred a long time ago.

[207] Mrs Pou confirmed in cross-examination that she went through the newspaper looking for articles of interest to read. It was in the course of doing this that she noticed the advertisements for cigarettes. Although she did not recall any of the articles from between 1962 and 1968 that were put to her by Mr Camp, she accepted that some of those articles about the dangers of smoking were likely to have caught her eye. This was because she would have been worried about her mother, who was a smoker. She also accepted that she would have understood the articles and the headlines that she was shown by Mr Camp, even though she would only have been aged between 11 and 18 years at the time. Mrs Pou confirmed also that

she had known at an early stage about the damage caused by drunken drivers, probably because of articles on that subject in the newspapers over the years.

[208] During cross-examination Mrs Pou accepted that, like most people, she would have discussed events of interest at school with her friends and classmates. She did not, however, believe that it was likely that she would have discussed current events with members of her family.

[209] In considering the issue of Mrs Pou's knowledge in 1968, I bear in mind the principle that the standard of proof that I must apply is that of the balance of probabilities. Applying that standard, I conclude that it is more likely than not that Mrs Pou was aware as at 1968 of the dangers of smoking, including the fact that it was addictive and that it could be injurious to health. I also consider that it is more likely than not that she was actually aware that there was a risk that smoking could cause lung cancer. I reach these conclusions for two reasons. First, many of the matters that were relevant in deciding the issue of common knowledge are equally relevant when considering Mrs Pou's actual knowledge. In saying that, I accept immediately that it is only possible to take into account the pool of information that is likely to have been available to Mrs Pou, and not that which was available to the New Zealand public as a whole.

[210] Secondly, a considerable amount of information about these issues was in fact available to Mrs Pou. She was an intelligent person who read newspapers regularly from an early age. This suggests that she was interested in current events. She obviously read newspapers from at least 1962, because she can recall the advertisement featuring "the Capstan twins" that was published in January that year. During the period from 1962 to 1968 the *Southland Times* published more than 120 articles or features about smoking, many of which were about the dangers of smoking. Some of these were in the *Women's Pages* section, a part of the newspaper that Mrs Pou accepted was likely to have attracted her interest at that time.

[211] Although the dangers of smoking may not have been directly relevant to Mrs Pou's own situation at that time, it is likely nevertheless to have been a matter of at least some interest because of the fact that her mother was a smoker. As she herself

accepted, if she saw the articles they may well have attracted her attention because of her worry about her mother. She would naturally be concerned at the prospect that her mother might develop lung cancer. In my view it is highly likely that Mrs Pou did see and read newspaper articles about the dangers of smoking prior to 1968, even if she could not remember them in 2002.

[212] Although Mrs Pou cannot specifically recall the dangers of smoking being the subject of instruction at school, I have no doubt either that at some stage during her school career she would have been confronted with material regarding that issue. It is also likely to have been the topic of discussion with her friends at some stage, particularly after she left school and began working. At that stage she was surrounded by people who smoked.

[213] Had it been necessary to do so, I would therefore have found that it was more likely than not that Mrs Pou did know about the dangers of smoking at the time that she took it up in 1968.

5. What impact, if any, should policy issues have in determining the scope of the duty to take reasonable care?

[214] The factual findings that I have made mean that no liability can attach to the defendants in this case. As a result, it is not strictly necessary for me to discuss whether, as a matter of policy, it would be reasonable for a duty to warn to have been imposed on cigarette manufacturers in 1968.

[215] In case my earlier conclusions were wrong, however, I will address this issue briefly. I record that it was the subject of very little discussion during argument.

[216] It has long been accepted that the Court must take into account issues of policy when considering whether or not to extend a duty of care in a novel situation. In earlier cases such as *Anns v Merton London Borough Council* [1978] AC 728, the

courts held that that exercise involved a two stage inquiry. The issue of proximity (or foreseeability) was to be determined first. If that issue was answered in favour of the existence of a duty, the court would proceed to consider policy factors relevant to the imposition of the proposed duty. More recently, however, the distinction between the two step process has become less well defined.

[217] In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 the Court of Appeal applied the proximity and policy considerations enunciated in *Anns*. It said at 294, however, that the ultimate question was whether in the light of all the circumstances of the case it was just and reasonable that a duty of care of broad scope was incumbent on the defendant. That exercise was described as being a matter of "judicial judgment".

[218] The Court of Appeal recently applied the principles referred to in the *South Pacific* case in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324. Delivering the judgment of the court in that case, Glazebrook J noted that while proximity and policy were still guiding considerations, they only provided a framework. No presumptions, rebuttable or otherwise, arose at any stage of the inquiry. Glazebrook J noted that the boundary between proximity and policy can merge, and emphasised that the important object is that all relevant factors are properly weighed, not the stage of the inquiry at which they are taken into account.

[219] In the present case the Court is not required to determine whether a duty of care arises. The principle that a manufacturer owes a duty to consumers to take reasonable care is now beyond dispute. The Court is, however, required to determine the scope of that duty in a clearly novel situation. Although counsel for the plaintiffs submitted that this is not a test case, I do not share his optimism. A finding that cigarette manufacturers had a duty to warn consumers of the dangers of smoking cigarettes in 1968 could have major ramifications. In particular, it could give rise to numerous claims in the future by persons who might believe that they have a more convincing factual basis for their claims than the plaintiffs have been able to establish in the present case.

[220] In those circumstances I consider that the Court would have been entitled in the present case to have regard to policy factors in deciding the scope of any duty to warn that might have existed in 1968. The problem, however, is that very little evidence relevant to this particular issue has been adduced. Such as there is, however, suggests that there may be significant policy reasons militating against the imposition of the duty for which the plaintiffs contend.

[221] The principal factor favouring the existence of such a duty is, of course, the desirability that consumers be placed in a position where they are able to make an informed choice. A requirement to warn will obviously assist in achieving that objective. Any breach of the duty also provides a possible avenue of redress for those who have suffered injury as a result of not receiving the appropriate warning. The plaintiffs contend that these considerations should prevail in the present case. As against these factors, however, several other matters would need to be weighed in the balance.

[222] First, the context in which the proposed duty is said to have arisen needs to be taken into account. In most cases this will not be a problem, because the claim will be based on events that have occurred comparatively recently. The Court will therefore be able to base its conclusions on contemporary knowledge, standards and practices. It will also be able to judge with a degree of certainty the likely effect that the proposed duty will have.

[223] That does not necessarily hold true, however, when the Court is being asked to determine the scope of a duty of care as it applied to events that occurred a very long time ago. When that duty is to be applied in respect of events that occurred more than three decades ago, there is inevitably a degree of danger involved in the undertaking. In particular, there is a danger that the standards and expectations of a later era will be applied to the events under consideration. If this occurs, the ultimate conclusion will be based upon a flawed premise. This is because some factors that were vitally important and self-evident thirty years ago may not present as being of significance at a later date. Others, however, may assume an importance at a later date that they simply did not have at the relevant time.

[224] For these reasons I consider that the Court is required to adopt a very cautious approach in deciding the scope of the duty.

[225] This approach is particularly relevant in the present context, because the Court is being asked to hold that cigarette manufacturers owed a duty to warn consumers of the risks of smoking in 1968. It is being asked to take that step notwithstanding the fact that this issue was very much within the purview of both the executive and legislative arms of the government during the 1960s, and the government was not prepared to respond at that time by imposing a similar duty. In a sense, the Court is being asked to re-examine that decision and to substitute its own view for that of the other two branches of government.

[226] I accept without reservation that in many situations the fact that other branches of government may have chosen to adopt a particular approach to an issue will not influence, or even be relevant to, the outcome of litigation between private parties. It seems to me, however, that a more cautious approach is required when important issues of public policy are concerned and where the outcome of a proceeding is likely to have significance well beyond the immediate dispute between the parties.

[227] Lord Nimmo Smith considered the manner in which the Government in the United Kingdom dealt with the emerging link between lung cancer and smoking in *McTear*. He noted at [7.175] that the defendant had become "aware in the same way that the general public did, from published reports, of the association between cigarette smoking and lung cancer from 1950 onwards". He then said:

> The Government have from the outset relied on the provision to the public of information and education about the risks to health, in particular lung cancer, associated with cigarette smoking. Apart from the imposition of restrictions designed to prevent the sale of cigarettes to persons other than adults and the use of fiscal measures designed, in part, to act as a deterrent to purchase, the Government have left it to individuals to decide whether or not to smoke cigarettes. It is not irrelevant that by section 10(7)(f) of the Consumer Protection Act 1987 tobacco is excluded from the expression "consumer goods" and thus from the general safety requirement under the Act.

[228] He made these remarks in response to submissions by counsel (summarised at [7.136]) to the effect that the views of the Government were a factor of some

weight in determining the question of whether or not a manufacturer of cigarettes might be in breach of a duty of care by continuing to sell its product once the dangers of smoking became known.

[229] In New Zealand, there is no doubt that during the 1950s and 1960s the DOH kept itself fully informed regarding the developing body of knowledge in relation to the link between smoking and lung cancer. The fact that the DOH followed these developments closely is no surprise. Other than the tobacco manufacturers, it perhaps had the greatest incentive to ensure that it kept abreast of developments on this front. It was, after all, charged with looking after the health of the nation's citizens. It could not properly discharge that function unless it kept up to date with developments that were likely to be relevant to that issue.

[230] This was not a matter of trifling significance. During the 1950s and 1960s the increasing incidence of lung cancer had become an observed phenomenon. That fact must have caused the Department to be especially vigilant to the likely cause of the problem. The suggestion of a link between smoking and lung cancer would therefore have been of obvious interest to the Department, especially given the fact that such a high proportion of New Zealanders were regular smokers at that time.

[231] As I have already indicated, the government took the first public health initiatives in relation to smoking in the mid to late 1950s. That occurred after the DOH accepted the existence of a causative link between smoking and cancer. At that time the DOH elected to take a preventive focus, concentrating primarily on the education of young persons. This led in the early 1960s to the first co-ordinated anti-smoking campaign aimed primarily at school children.

[232] In the early 1960s the government, through the New Zealand Broadcasting Corporation, operated all radio and television broadcasting facilities in New Zealand. It therefore had the ability, without the need to resort to legislation, to prohibit or impose severe restrictions on advertising for cigarettes. It did not, however, take early steps to do so. Instead, it took measures that were consistent only with a policy of endeavouring to influence the behaviour of young persons.

[233] In October 1962 cigarette advertising was banned from radio and television advertising before 7.30pm, a move that was no doubt designed to ensure that young persons did not see or hear such advertisements. Then, in April 1963, the Corporation agreed not to broadcast advertising that might encourage young people to smoke. This led to the unilateral decision by the tobacco industry, not prompted by the government, that it would not advertise on radio and television at all.

[234] Health warnings first appeared on cigarette packets in the United Kingdom and the United States in the mid-1960s, but no steps were taken by the government of New Zealand to impose similar requirements here. Instead, the DOH continued with its policy of attempting to dissuade young people from taking up smoking.

[235] The possibility that warnings might be placed on cigarette packets in this country does not seem to have been seriously considered by the government until the early 1970s, several years after they had been introduced elsewhere. Even then the issue only arose in the context of the negotiations that commenced between the government and the tobacco industry in or about 1972. During these negotiations the government was obviously in a powerful position because, as the tobacco industry recognised, the government had the ability to introduce legislation if negotiations failed to produce an acceptable outcome.

[236] The negotiations led to the agreement that was reached in March 1973. This confirmed and extended restrictions on tobacco advertising, and provided for warnings to be placed on cigarette packets from January 1974. The terms of the agreement were obviously sufficient for the government's purposes at that time, because it was content to allow the situation to be governed by the terms of the agreement and it did not seek to consolidate its position by passing legislation. Legislation governing and extending the issues covered by the agreement was not in fact passed until 1990.

[237] The net result, therefore, is that the government chose not to place pressure upon cigarette manufacturers to place warnings on cigarette packets until 1972. It took that stance notwithstanding the fact that its executive branch was in possession

of all the material facts regarding the dangers of cigarette smoking, and it must also be taken to have been aware that warnings were required in other parts of the world.

[238] The government's approach to this issue was, however, undoubtedly dictated by the balancing of competing policy factors. The evidence before me did not traverse these in any great detail, for the simple reason that they are largely irrelevant to the primary issues that need to be determined in this proceeding. Nevertheless, it is not difficult to articulate some of the matters that are likely to have been of relevance to the government in deciding how best to approach the issue during the 1960s and early 1970s.

[239] As I have already said, the obvious factor supporting a requirement that warnings be given is the need to ensure that potential consumers of cigarettes are advised of the dangers of smoking. However, although the government was aware that other countries had imposed a requirement that warnings be placed on cigarette packets, documents produced in this proceeding demonstrate that the government in this country was reluctant to intervene with legislative control in this area.

[240] On 25 August 1964 the then Minister of Health (Mr McKay) answered questions in the house about this topic as follows:

> The tobacco industry has withdrawn entirely from the fields of radio and television advertising, and voluntarily restricted forms of advertising directed at young people. Because of this responsible attitude, and in view of the continuing health programmes by the New Zealand Cancer Society and the Department of Health, it has been decided that it would be preferable not to resort to legislative control.

[241] Ambivalence regarding the effectiveness of placing warnings on cigarette packets appears to have been felt by both the main political parties. In responding to a suggestion that such warnings should be introduced, the Labour Party, which was then in opposition, stated:

> The proposal of printing a warning on the packets stressing the detrimental effect to health has not been fully accepted in most countries as the most effective way to give adequate warning….
>
> It would seem that one of the most effective steps would be a positive and extensive publicity campaign by Health and Education Authorities stressing through schools the health hazard of smoking.

[242] The government was content to monitor events overseas in order to ascertain the value that such warnings might have, although in July 1966 the Minister of Health, Mr McKay, told the House that the DOH was considering the introduction of warnings on cigarette packets. Then, on 10 August 1966, the Minister responded to a similar question in the House by saying:

> As you probably know, the Department of Health has been carrying out an intensive and sustained campaign of education and persuasion to discourage young people from smoking and to some extent it has been able to win a measure of co-operation from the tobacco companies who have agreed to refrain from advertising in a manner calculated to attract the interest of the young.
>
> This attitude of co-operation could be destroyed if we resorted to statutory requirements to include warning notices on cigarette and tobacco packets, and the results of such legislation may not necessarily be effective. It is too early to determine whether the measure has been successful in the USA….. These campaigns [by the Health Department] do extend into the schools, and the young people in New Zealand are fairly well informed on the subject of the dangers to health from smoking.
>
> ….. this kind of enquiry is becoming more frequent indicating I believe a growing awareness at all levels of the dangers inherent in cigarette smoking. This in turn shows that the Health Department's anti-smoking campaigns are effective and while this situation continues there seems to be little need for compulsory warning notices of the types suggested to be shown on cigarette and tobacco packets.

[243] The issue does not appear to have been advanced greatly over the next five years. In answering a question in the House on 11 November 1971 the Minister said that the matter of printing a warning on cigarette packets was at present "under consideration." He also said that the Director-General of Health:

> …was awaiting the official evaluations of the effectiveness of the labelling requirements in the United States and United Kingdom, and when the reports are received this matter will be given further consideration.

[244] In November 1971, the government received a report containing 19 recommendations designed to promote cessation of smoking by the New Zealand public. This followed the second World Conference on Smoking that had been held two months earlier. On 1 December 1971 the Minister of Health told the House:

> …The effectiveness of warnings on cigarette packets in the United States and Britain has been the subject of careful study, but it has been considered more important to educate the community on the dangers of smoking so that the practice is not commenced rather than warn smokers after they have

> purchased a packet of cigarettes. However, Dr D.R. Hay, who recently attended the second world conference on smoking, has made a number of recommendations in the field which are being considered.

[245] It is against that background that the government proceeded to enter into negotiations with the tobacco industry, and eventually entered into the first formal but voluntary agreement with the industry in March 1973. There are also several other matters that are likely to have been relevant to the government at this time.

[246] First, it would obviously have been aware that smoking was both widespread and socially acceptable. Smoking was viewed by many as a pleasurable activity. It is therefore not surprising that the government took the view that, at least so far as adults were concerned, the ability to smoke was a matter of choice. For that reason it may understandably have been reluctant to take any step that might be viewed by the public as trying to pass judgment on an activity that up until then had universally been viewed as a matter of individual choice.

[247] Secondly, the government had regulated and supported the tobacco industry for some considerable time, and it continued to do so until the late 1980s. The government had actively assisted the development of the tobacco growing and manufacturing industry during both wars to enable New Zealand troops to be supplied with tobacco on the battlefields of Europe and the Pacific. This support continued after the end of the Second World War.

[248] The Tobacco Board was established under the Tobacco Growing Industry Act 1935, and was required "to endeavour to promote the sale or disposal in New Zealand and elsewhere of any raw tobacco grown or to be grown in New Zealand." The Tobacco Growing Industry Regulations 1945 permitted the Tobacco Board to apply money "in the making of grants (by loan or otherwise) to growers, packers and manufacturers of tobacco and to any person or association of persons, to encourage, foster and develop the growing preparation, manufacture and marketing of tobacco." The Tobacco Growing Industry Act 1974 reconstituted the Tobacco Board and provided that its function was "to promote and organise the development of the tobacco industry in New Zealand" and to encourage "the use and manufacture of

New Zealand tobacco." Regulations were promulgated in 1976 that contained similar provisions to those contained in the 1974 regulations.

[249] Up until 1976, the government both supported and controlled the tobacco industry. Moreover, by the 1960s many New Zealanders would have been employed in the production of tobacco and tobacco products. By that stage the industry had been subject to governmental control and support for at least three decades. The government may naturally have been hesitant to unilaterally impose measures that had the potential to threaten the livelihood of those who depended on the industry for their gainful employment. It may have considered that it was preferable to advance the issue with the industry through the medium of structured negotiations rather than by forcing legislation on it.

[250] In addition, the government had always derived very significant financial benefits from the sale of tobacco and tobacco products. These came from the taxes, tariffs and duties that have been imposed on the sale of cigarettes and tobacco since 1858. The government may also have been reluctant to take any step that could potentially threaten the income that it received from this source.

[251] These are just a few of the matters that may have influenced the government in its decision not to require the manufacturers of cigarettes to place warnings on cigarette packets before 1974. There are, no doubt, many more. All of them are, however, matters of policy that the government was uniquely able to balance before reaching a conclusion. They also highlight the difficulty inherent in the suggestion that the Court should now hold that in 1968 cigarette manufacturers were under a common law duty to warn consumers of the dangers of smoking. To do so would be to place an obligation on cigarette manufacturers that the government of the day was not prepared to impose.

[252] In those circumstances I would in any event have been reluctant to hold that manufacturers of cigarettes were under a duty in 1968 to warn consumers about the dangers of smoking.

Causation

[253] Although my earlier factual findings mean that it is not strictly necessary for me to do so, I propose to address the issue of causation in any event. I do so because I am satisfied that, even if the defendants were under a duty to warn consumers of the dangers of smoking in 1968, the determinative issue in the present case is that of causation.

6. Can Wills be liable given that Mrs Pou has not smoked cigarettes produced by it since approximately 1969?

[254] When Mrs Pou began smoking in 1968, she smoked Capstan cigarettes. These were produced by Wills. There is no dispute, however, that she stopped smoking cigarettes produced by Wills approximately a year later. Whilst BAT accepts that Mrs Pou's lung cancer was caused by the cigarettes manufactured by it, Wills does not. Wills contends that the plaintiffs have not established that cigarettes produced by it contributed materially to the development of Mrs Pou's lung cancer.

[255] There is no evidence at all regarding the manner in which Mrs Pou's lung cancer developed. As I have already indicated, her own evidence is to the effect that she had no inkling that she had lung cancer until she suffered severe chest pain in May 2001. By that stage the cancer was obviously well developed, because it was incurable. The treatment that she received following her diagnosis was designed to extend her life rather than to eradicate the cancer.

[256] I accept that, where lung cancer develops as a result of the sufferer smoking cigarettes, the disease takes time to fully develop. It may in fact develop over a number of years. The difficulty that arises in relation to the claim against Wills, however, is that, by the time that the symptoms of lung cancer appeared, more than thirty years had elapsed since Mrs Pou had last smoked cigarettes produced by Wills.

[257] This means that Mrs Pou smoked, in very rough terms, approximately 350,000 cigarettes manufactured by persons other than Wills, and she did so over a very long period of time. There is no evidence to suggest that cigarettes smoked by Mrs Pou in 1968 and 1969 would have had a lasting physiological effect on her, let alone that they could have contributed to the development of her lung cancer.

[258] The onus of establishing the elements of the claim is on the plaintiffs. They must prove that it is more likely than not that cigarettes manufactured by Wills contributed materially to the development of the lung cancer that is at the heart of their claim.

[259] For the reasons that I have given I do not accept, on the balance of probabilities, that Mrs Pou's lung cancer was caused by cigarettes that were manufactured by Wills. I consider that it is far more likely that her lung cancer was caused, as BAT accepts, by the cigarettes that Mrs Pou smoked from 1969 onwards. The harm or injury that Mrs Pou suffered was therefore not caused by the fact that she took up smoking Wills' cigarettes. The plaintiffs' claim against Wills must necessarily fail for this reason.

[260] I also accept Mr Camp's submission that Wills' conduct after 1969, when Mrs Pou stopped smoking Capstan cigarettes, cannot be of any relevance. Thereafter nothing that Wills did could have had any influence on Mrs Pou. She had stopped smoking Wills' cigarettes and she never took them up again. The fact that Wills continued to advertise its products (as it was legally entitled to do at that stage) has no bearing on any of the issues that the Court is required to determine.

[261] This conclusion logically leads to a potential problem so far as the plaintiffs' claim against BAT is concerned. Like the claim against Wills, the claim against BAT is also advanced on the basis that BAT had a duty to warn Mrs Pou of the dangers of smoking. Included in these are the risk that she might be unable to stop smoking or that she might find it extremely difficult to stop smoking. As the defendants point out, if Mrs Pou was already addicted to cigarettes when she began smoking cigarettes produced by BAT, there could be no utility in any duty to warn being imposed on it. Similarly, the plaintiffs could not establish causation, because Mrs Pou would have become addicted at a time before she began smoking cigarettes produced by BAT.

[262] I consider that these problems are answered in two ways. First, the evidence is somewhat equivocal regarding both the precise point at which Mrs Pou is said to have become addicted to smoking and the point at which she took up smoking

cigarettes produced by BAT. She says that both events occurred "about a year" after she began smoking in 1968. There is sufficient ambiguity in the evidence to suggest that Mrs Pou may not have been fully dependent upon cigarettes at the time that she began smoking cigarettes produced by BAT.

[263] Secondly, the alleged duties are wider than the duty to warn of the difficulties of cessation. They include a duty to warn Mrs Pou of the risk of injury to her health if she smoked cigarettes. The fact that a person might already have taken up smoking seems to me to be irrelevant to the existence of that particular duty. A consumer may, for instance, have taken up smoking in circumstances where he or she could not reasonably have been expected to be aware of the potential dangers in doing so. Moreover, the risks to health remain as real for the experienced smoker as the novice. I therefore consider that the duty, if it existed, would have been owed to all potential consumers notwithstanding the fact that it could reasonably be expected that many of them may already have taken up smoking.

7. Have the plaintiffs established that the defendants' failure to provide the appropriate warnings in 1968 and 1969 can be causally linked to Mrs Pou's decision to commence smoking and to continue smoking thereafter?

The direct evidence

[264] The plaintiffs rely primarily on the evidence of Mrs Pou to establish that her injury, in the form of her lung cancer, was caused by the defendants breaching the duties that they owed her. Counsel for Mrs Pou submitted that her evidence:

> … establishes that, had she been properly and fairly warned by the defendants of the health risks associated with smoking, she would not have started smoking in 1968. Janice Pou's own evidence satisfies the traditional "but for" test of causation. But for the defendants' failure to warn, Janice Pou would not have taken up smoking and consequently she would not have suffered from its devastating effects.

[265] Mrs Pou's evidence is to be found in the affidavit that she filed in support of her claim. In that affidavit she said at [97]:

> Had I known in 1967 that smoking cigarettes was going to be so addictive and would cause me lung cancer and drastically shorten my life, I simply would not have started smoking.

[266] I consider that this evidence is somewhat different to the submission that, had Mrs Pou been "fairly warned" of the health risks associated with smoking, she would not have it taken up. In her evidence Mrs Pou is talking about what she would have done if she had "known" what was going to happen rather than what she would have done if she had been "fairly warned" about something. Having knowledge that something will actually happen is completely different to receiving a warning that it might occur.

[267] Even assuming, however, that Mrs Pou's evidence was to the effect asserted by her counsel, it is necessary to consider whether that evidence should be accepted at face value.

[268] I consider that I am entitled to regard Mrs Pou's assertion with a considerable degree of caution. In this regard Mr Camp referred me to the recent decision of the High Court of Australia in *Commissioner of Main Roads v Jones* (2005) 215 ALR 418, in which (at [83]) Callinan J referred to an earlier case in which he had "counselled against too ready an acceptance" of a plaintiff's evidence, given after the event, that if she had been informed of a risk, she would not have elected to take it.

[269] In a case such as the present the need for such caution is obvious. First, Mrs Pou was being asked to say what she may or may not have done more than thirty years ago. That would be an extremely difficult task in any circumstances. More importantly, however, I consider that it would have been difficult, if not impossible, for Mrs Pou to prevent her circumstances in 2002 from influencing her evidence.

[270] By the time Mrs Pou swore her affidavit in July 2002 she knew that she did not have long to live. It is clear from her affidavit, and the tenor of her evidence when cross-examined in August 2002, that she fully appreciated and was devastated by the prospect of her imminent demise. She laid the blame for her predicament firmly at the door of the tobacco companies in New Zealand, whose conduct she obviously regarded as being reprehensible in the extreme. I consider that Mrs Pou's

situation at the time at which she gave her evidence was such that it must have influenced, even if subconsciously, her evidence and her recollection of past events.

[271] For these reasons I consider that Mrs Pou's direct evidence regarding this particular issue can only be given limited weight. An objective examination of the circumstances that existed when Mrs Pou began smoking in 1968 is likely to produce an answer that is far more reliable. I am also entitled to take into account the evidence about Mrs Pou's personality, the manner in which Mrs Pou subsequently responded to such warnings as were given, and other objective factors relevant to the issue.

Mrs Pou's circumstances in 1968

[272] In 1968 Mrs Pou was 17 years of age. Although she accepts that she may have tried a cigarette on a couple of occasions prior to 1968, she is adamant that she did not smoke on a regular basis until then.

[273] The evidence discloses that nearly all smokers begin smoking before the age of 25 years. Children and adolescents are particularly vulnerable between the age of 10 and 15 years. If they begin smoking then, they are likely to continue smoking as adults. Mrs Pou may therefore be seen as an exception to the general rule. She had resisted smoking during her early teens, and only began smoking two years after she had left school and at a time when she commenced employment at a delicatessen.

[274] Many smokers drift into the habit of smoking. Mrs Pou did not. Perhaps unusually, she made a conscious decision to take up smoking. The reasons that Mrs Pou gave for deciding to do so are instructive. She said (at para 19 of her affidavit):

> I took up smoking because I wanted to look and feel "cool" and glamorous. At 17 I was very shy and introverted. I had a poor self image, possibly because I was the youngest of a large family. I wore glasses and thought I was on the "chubby" side. I desperately wanted to be beautiful and mature.

[275] Mrs Pou was interviewed by Associate Professor Sellman, a consultant psychiatrist engaged by the plaintiffs, and he reports that she gave the following background to her decision to begin smoking:

> 29 By way of background, Janice Pou outlined that she was the youngest of eight children in a "poorish family" and grew up thinking of herself as "the little fat kid with glasses". When her parents separated at age 10, Janice and her next eldest sister went with her mother to live with her stepfather to be. She continued through her pre and early adolescence believing herself to be "a fat girl trying to grow up" in a family that struggled financially. She left school at the age of 15 because she wanted to get a job and get money. She tried to be outgoing and to change her physical appearance by dieting, colouring her hair etc but continued to feel that something was missing.
>
> 30 Janice reported trying her first cigarette at age 17 thinking that this might make her sophisticated and beautiful (as in advertising material she had seen). She remembered standing in front of a mirror practising holding a cigarette and wondering if she "looked right".

[276] Mrs Pou was also interviewed by Dr Goodwin, a psychiatrist engaged by the defendants. He, too, asked Mrs Pou about her motivation for starting smoking. She told Dr Goodwin:

> I wanted to be gorgeous. I wanted to look trendy… I was the youngest of 8 children and I was …a fatty and wore glasses. I was the geek. And then when I started working gradually I had new clothing as I could afford it to become this new Janice. And still at the finish of it all, after a couple of years of working … I still felt something missing. And then cigarettes came to mind. And this is where I do remember posing. I didn't need a cigarette. I don't remember anything going on that I thought I needed one. It was an accessory. Posing in front of the mirror to get the look.
>
> Did you have a boyfriend at the time?
>
> No.
>
> No?
>
> No. I was, that was my whole thing it was, to become this beautiful person. I thought it would make me …
>
> Were your friends taking up smoking as well?
>
> No, I think they were already smokers. I couldn't be sure but I know later when I think about it we were all smoking together. It was never discussed or anything like that, you know.

[277] In my view these passages provide a significant degree of insight into the reasons why Mrs Pou began smoking. She clearly had problems with self-esteem, and saw smoking as one means of resolving those issues. She deliberately took up smoking because she believed that it could help to transform her into "a new Janice".

[278] Mrs Pou's decision to take up smoking must also be viewed in its context. As the passage from the interview with Dr Goodwin demonstrates, when Mrs Pou began smoking her friends were already smokers. In addition, her parents both smoked, as did several of her brothers and sisters. In 1968 it is also likely that approximately 60 per cent of all New Zealanders smoked. The fact that many people around her were smoking is in my view likely to have reinforced Mrs Pou's view that it was the right thing to do in the circumstances.

[279] Powerful personal factors therefore motivated Mrs Pou to begin smoking. The fact that many of those around her were already smokers is likely to have encouraged her. At the very least, it may have meant that there was little in the way of discouragement from her immediate family and peer group. Her assertion in 2002 that she would have been dissuaded from taking up smoking if she had been fairly warned about the dangers of smoking needs to be considered in the light of these factors.

Mrs Pou's personality

[280] The impression I gain from all of the evidence is that Mrs Pou was an intelligent person. That much can be gleaned from her own evidence, as well as that given by her sister Helen Toomata and her friend Mrs McCorkindale. The evidence regarding her interviews by the psychiatrists called by both sides also confirms this.

[281] There is no doubt that Mrs Pou was sufficiently intelligent to have been able to appreciate the meaning of warnings had they been given in 1968. She certainly noticed and understood warnings after they were first placed on cigarette packets in 1974. Although her evidence is to the effect that she regarded the initial warnings as "airey fairey" and "not particularly serious", nevertheless I consider that she understood what the warnings meant, even though she did not give them much weight.

[282] Intelligence, of course, is not an indicator of whether or not a person will take up smoking despite explicit warnings about the dangers of doing so. Even now,

many intelligent people take up smoking notwithstanding the fact that the dangers of smoking have been known for many years.

[283] The next characteristic I ascribe to Mrs Pou is that of determination. That quality is perhaps best demonstrated by the fact that, at a time when she was terminally ill, Mrs Pou commenced the present proceeding. She did so because she was appalled at what she saw as a failure by the tobacco industry to accept responsibility for its own actions. It is also shown in other ways, not the least of which is the manner in which Mrs Pou has brought up her children in an exemplary fashion in quite difficult circumstances. I consider that when she took up smoking in 1968 Mrs Pou was determined to improve her lot, and that this factor would have significantly limited the extent to which she would have heeded any warnings that might have been given at that time.

[284] This characteristic was obviously noticed by her neighbour of 11 years, Mrs McCorkindale. She lived next door to Mrs Pou in Invercargill between 1986 and 1997, and they regularly spent time together having a cup of coffee and a cigarette. In cross-examination the following exchange occurred:

> Q. But she [Mrs Pou] made it quite clear to you she would have liked to have been able to stop if she could, didn't she?
>
> A. I honestly – if she did, I don't recall it, but if she did – I think, if Janice had wanted to, she possibly could have. In my opinion that's the kind of person she was.

[285] This passage suggests to me that Mrs McCorkindale also considered Mrs Pou to be a strong-willed person.

[286] Other factors also suggest that, like many people, Mrs Pou was a person who was prepared from time to time to place her own pleasure before lifestyle choices that might objectively be viewed as being in her own best interests. Examples include the fact that she began drinking alcohol when she was 15 years of age. For a two-year period following her separation, when she was aged about 30, she would drink three to four jugs of beer each Friday and Saturday night. These caused her to experience "bad hangovers" from time to time and every two or three months she

had a memory blackout. Although her drinking subsequently moderated, in the years leading up to 2002 she still consumed three to four jugs of beer once a week.

[287] Mrs Pou also enjoyed gambling, particularly Housie and horse racing. She first became involved in gambling during her mid to late 20s, and was most heavily involved between the ages of 26 and 30 years. During this period she went to Housie on four to five occasions per week, although this reduced following her separation when she had less money available to her.

[288] Mrs Pou began gambling on horses when she was about 28 years of age. She told Professor Sellman that she never spent more than $100 in any one day on bets, but from time to time she was obliged to borrow money from friends "till pay day". She always paid this money back, and although she was very occasionally in "tight spots" financially from gambling, she had always managed to get herself out of difficulty. She also spoke of spending money on gambling that ought to have been used to pay the rent or a hire purchase instalment. She coped with these situations by arranging to make the payment later.

[289] Mrs Pou also told Professor Sellman that she had never had anything repossessed because of gambling losses, but that occasionally (ie approximately six times a year) she would return the next day to "chase losses" she had incurred through gambling on horses. She said that the guiltiest she had ever felt was between the ages of 25 and 30 years, when she felt she was wasting her husband's money.

[290] The matters to which I have just referred do not indicate that Mrs Pou had problems with alcohol or gambling. They suggest, however, that, like many New Zealanders, she was prepared on occasions to indulge in habits that may have been contrary to her own best interests. They also suggest that, given the issues that she was confronting in 1968, Mrs Pou is unlikely to have heeded any warnings that may have been given at that time.

The manner in which Mrs Pou responded to warnings

[291] I have already referred to the fact that Mrs Pou's mother expressed disappointment that her daughter was proposing to spend money on cigarettes. There is no evidence to suggest that Mrs Pou heeded her mother's views in any way.

[292] Mrs Pou's mother gave up smoking when she suffered a heart attack in 1973 at the age of 60. Although it is reasonable to infer that Mrs Pou's mother associated smoking with her ill health at that time, Mrs Pou herself did not take any steps to reduce or stop her own smoking at that time.

[293] I have also referred to the fact that Mrs Pou considered the early warnings on cigarette packets to have been "airey fairey" and "not particularly serious". That may have been the view that she took of the warnings, but their message was, in my view, reasonably clear. They were warnings by the government that smoking may be harmful to health. The manner in which Mrs Pou effectively brushed them off suggests to me that she was not particularly interested in taking them on board.

[294] When Mrs Pou was pregnant, she recalls being aware of the dangers of smoking whilst pregnant. In particular, she knew that smoking could cause her to have small babies. This knowledge did not cause Mrs Pou to stop smoking. Instead, she rationalised her decision to continue smoking by reasoning that she did not want big babies anyway.

[295] The next matter of significance occurred when Mrs Pou's children came home and asked her to stop smoking because they had been told at school about the dangers of smoking. Given that this occurred when Brandon was at primary school, I infer that it must have been between 1982 and 1988. Mrs Pou reacted to her childrens' advice by "turning on them" and becoming angry with the school. In her evidence she said that she got angry with the school because she felt that the school was saying that she was "dirty and grubby".

[296] Mrs Pou also described how, when boyfriends made comments about her smoking, she would "just give them the look, stay out of my thing" and she would then carry on smoking.

[297] Next, Mrs Pou was treated in or about 1993 for a hiatus hernia. At that time she saw a Dr Ngaei at Kew Hospital in Invercargill, and he warned her about the dangers of smoking. She told Dr Goodwin that she had become angry at this time also.

[298] Mrs Pou also consulted doctors on at least seven other occasions between 1985 and 1996. The doctors' notes from each of these visits indicates that the issue of smoking was discussed and that she was advised to give up, or cut down, her intake of nicotine. She also confirmed that her response when told by one doctor that she was not taking care of her body was to get angry and have a cigarette. None of these warnings, coming as they did from health professionals, appear to have been acted upon by Mrs Pou.

[299] Similarly, when her sister died of lung cancer in 1998 Mrs Pou told Dr Goodwin that she had been able to dismiss the role of smoking in her sister's death. She said that she "didn't want to think about it". Mrs Pou rationalised the situation on the basis that her sister had been overseas at the time, so that she had not been faced directly with her sister's illness. She told Associate Professor Sellman that she had thought briefly about stopping smoking around this time, but "tried to believe the cancer would not kill her".

[300] The position is therefore that Mrs Pou was warned about the dangers of smoking on numerous occasions. She did not heed any of these at the time that they were given. This fact also suggests that it is unlikely that Mrs Pou would have heeded any warning that she might have received in 1968.

Objective factors

[301] Other objective factors support this proposition. I have already referred to the fact that in 1968 many people were regular smokers, and it is clear that smoking carried no social stigma. Members of Mrs Pou's immediate family smoked, as did her colleagues at work. Mrs Pou's decision to begin smoking is therefore unlikely to have been greeted with criticism from those around her. Although Mrs Pou recalls that her mother was disappointed with her decision to start smoking, that

disappointment stemmed from the inevitable expense of smoking rather than any dangers that smoking might pose to her health.

[302] It is now accepted that persons from lower socio-economic backgrounds have always been more likely to commence smoking and Mrs Pou came from such a background. In addition, her parents smoked and the children of smokers are three times more likely to smoke than those of non-smokers.

[303] Of more importance, however, is the fact that Mrs Pou was 17 years of age when she took up smoking. There has been a significant amount of evidence in this proceeding regarding the proclivity of young persons to begin smoking, and often at an early age. This particular factor is of considerable importance in considering this aspect of the plaintiffs' case.

[304] Although Mrs Pou did not begin smoking until she was aged 17, nevertheless at that time she was still an adolescent. The fact that her workmates smoked is also relevant because, as Dr Walden explained, adolescent behaviour regarding smoking is likely to be peer driven or influenced. It is also clear that adolescents appear to be notoriously non-receptive to warnings about activities that may be injurious to their health, and in particular smoking.

[305] The evidence suggests that several factors may be responsible for the apparent lack of regard held by adolescents for their health. One reason may be that, when they take up smoking, young people do not appreciate that they are beginning an activity that may become a lifelong habit. They may not, in fact, be consciously taking up smoking as a "habit" or "pastime" at all. Instead, they may view it as a casual activity that they can completely control and that they can give up at any time. The reality, of course, may prove to be very different.

[306] An additional factor is that adolescents are at a stage of their life when they are evolving from children into adults. This leads adolescents to experiment with behaviour that was previously forbidden to them as children. Smoking may be seen as forming part of their new-found, or developing, independence. They are likely to

be encouraged by the fact that their peers regard such behaviour as both acceptable and desirable.

[307] As Sir David Hay wrote in 1967, experience has shown that young people are "not so impressed" with the fear of cancer and heart disease. They are more likely, in his view, to be impressed that smoking might be injurious to athletic performance or that it might affect sex appeal. The evidence in this case supports that conclusion. It suggests that many young people do not, or will not, turn their minds to the fact that certain forms of behaviour may be injurious to their health.

[308] Dr Walden, a consultant psychiatrist called by the defendants, said that the literature suggests that adolescents are "rarely influenced" by information regarding the health hazards of smoking. She also said that the literature suggests that information regarding the health risks of cigarette smoking has "relatively little influence" on adolescents, who are "more influenced by their social group and family habits". She was of the opinion that this is caused not so much by a lack of information in making a decision whether or not to smoke, as by "a tendency to ignore the information given".

[309] Moreover, regardless of the reasons underlying this phenomenon, it seems that the advent of warnings on cigarette packets in 1974 have done little, if anything, to arrest the number of young persons taking up smoking. Although there were numerous references in this evidence to this issue, it suffices to refer to just one.

[310] I have already referred (see [194] to Dr Scragg's survey about teenage smoking. Dr Scragg is an Associate Professor in Epidemiology at the University of Auckland. He was the co-author of an article published in 1999 under the title "Trends in cigarette smoking in fourth-form students in New Zealand, 1992-1997". The article reported on nation-wide cross-sectional surveys of fourth-form students carried out in 85 New Zealand schools. The surveys were carried out by means of anonymous self-administered questionnaires completed by fourth-form students in 1992 and 1997.

[311] In 1992, 79 per cent of schools and 70 per cent of students responded to the surveys; in 1997, 88 per cent and 72 per cent respectively. This meant that 11,824 14 and 15 year old students responded in 1992 and 11,350 students responded in 1997.

[312] The surveys showed that daily, weekly or monthly combined smoking prevalence among fourth-form students increased from 23.4 per cent in 1992 to 28.5 per cent in 1997. The increase in daily smoking increased from 11.6 per cent in 1992 to 15.5 per cent in 1997. The increase in smoking was greater in girls than boys, it was unrelated to the socio-economic decile of schools and was greatest in Auckland and Northland.

[313] The authors concluded that this increase was large and that it was of uncertain cause. It affected both sexes as well as all regions, ethnic and socio-economic groups.

[314] The survey occurred many years after warnings first appeared on cigarette packets. By 1992 cigarette advertising had largely disappeared, and sponsorship also gradually disappeared between 1992 and 1997. Moreover, knowledge does not appear to have been a problem. The article reported that, in 1997, 86 per cent of students said that smoking was bad for them.

[315] The inference I draw from this is that, at least so far as adolescents are concerned, warnings on cigarette packets (or, for that matter, warnings of any description) do not appear to have been heeded to any significant extent during the 1990s. Given the circumstances that prevailed in 1968, I am left in little doubt that the results would have been similar if warnings had been on cigarette packets at that time.

Conclusion

[316] The conclusion that I draw from all of the matters to which I have referred is that Mrs Pou was an intelligent and strong-willed person. She had very important personal reasons that caused her to take up smoking in 1968, and she did so within

an environment in which smoking was the norm. She also fell within the category of persons who were more likely to take up smoking, the most significant of which was the fact that she was an adolescent. Such warnings as she did subsequently receive were ignored, rationalised or met with anger. None of them caused her to stop smoking.

[317] I am therefore of the view that, even if Mrs Pou had received the appropriate warnings from the defendants before 1968, she would have ignored those warnings and begun smoking in any event. As a result, the plaintiffs have failed to establish that Mrs Pou would not have begun smoking in 1968 if she had received the appropriate warnings. As a result, any breach of duty by the defendants did not cause Mrs Pou to take up smoking and it did not lead to the injury that she suffered as a result of doing so. This finding is fatal to their claim against both defendants.

8. Should the Court apply the principles referred to by the House of Lords in Chester v Afshar in deciding the issue of causation?

[318] Counsel for the plaintiffs submitted that, even if I did not accept Mrs Pou's evidence that she would not have begun smoking if she had received the appropriate warnings, I should nevertheless find causation established on the basis of the principles enunciated by the House of Lords in the recent case of *Chester v Afshar* [2005] 1 AC 134.

[319] In *Chester v Afshar* a patient sought advice from a neurosurgeon regarding chronic lower back pain. The neurosurgeon advised her to undergo elective lumbar surgery that had a one to two per cent risk of causing a form of paralysis. That risk was unavoidable, in the sense that the paralysis could occur regardless of the skill of the surgeon who performed the operation. The neurosurgeon failed to advise the patient of the risk and she agreed to go ahead with the operation. The surgery was carried out without negligence on the part of the surgeon, but the patient suffered the paralysis as a result of the operation.

[320] The patient sued the neurosurgeon. She did not claim that she would never have had the operation at all if she had known of the true situation. Rather, she said

that she would not have elected to have it at the time that she did. She would instead have delayed making a final decision so that she could take advice and investigate alternative options.

[321] By a 3:2 majority the House of Lords decided that the neurosurgeon was liable for his negligent advice to the plaintiff. Lord Hope of Craighead said at 162:

> **87** To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would find that result unacceptable. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty.

[322] Counsel for the plaintiffs contended that the principles referred to in *Chester v Afshar* ought to be applied in the present case. I am satisfied, however, that *Chester v Afshar* is not a case that was ever intended to enunciate principles of general application. The wording used by their Lordships makes it clear that they found it necessary to resort to issues of policy because the traditional principles relating to causation would have left the plaintiff without a remedy when a breach had clearly occurred and a remedy was required. Moreover, those issues of policy related specifically to situations where advice was given in a "one to one" situation involving doctor and patient. Completely different policy issues arise in relation to cases involving product liability, particularly where the product in question is manufactured and distributed for a mass market, and there is no direct relationship between the manufacturer and the ultimate consumer.

[323] The restricted application of *Chester v Afshar* was noted in two later decisions that were referred to me by Mr Camp. In *White v Paul Davidson Taylor* [2003] EWCA Civ 1511 the English Court of Appeal rejected a submission that the principles in *Chester v Afshar* should be applied to a case involving allegations of negligence on the part of solicitors. Ward LJ described *Chester v Afshar* (at [31]) as "an unusual case of medical negligence" in which the majority of the House of Lords "were of the opinion that the dictates of justice and policy demanded that the patient have a remedy even if that necessitated a modest departure from the traditional causation principle". The Court of Appeal considered that it was not required to resort to such measures in the case before it, because the traditional approach to causation provided a just answer to it. In reaching this conclusion Ward LJ said at [33]:

> Judges are well able to decide on the totality of the whole of the evidence in the case what on a balance of probabilities would have happened.

[324] In *Beary v Pall Mall Investments (a firm)* [2005] EWCA Civ 415 the English Court of Appeal considered *Chester v Afshar* again, this time in the context of a claim of negligent financial advice. The Court of Appeal (at [38]) confirmed its view that:

> … the departure from established principles of causation in that case was exceptional, and was justified by the particular policy considerations that are in play where there is a breach of the doctor's duty to advise patient of the disadvantages.

[325] I consider that the issue of causation in this case can be determined in the traditional manner, and that the particular circumstances that led the House of Lords in *Chester v Afshar* to depart from the traditional approach are not present in this case.

9 . If Mrs Pou was not aware of the dangers of smoking in 1968, what would be the position if she subsequently became aware of those dangers?

[326] I have already found any duty to warn consumers regarding the risks of smoking in 1968 would have been negated by the common knowledge of those risks at that time. I have also held that it is more likely than not that Mrs Pou knew of the

dangers of smoking cigarettes when she began smoking in 1968. In case I am wrong on these points, I now consider what the position would be if Mrs Pou was not aware of the dangers of smoking cigarettes at the time that she began smoking in 1968, but she became aware of those dangers subsequently.

When, at the very latest, would Mrs Pou have appreciated the risks of smoking?

[327] As mentioned previously, warnings first appeared on cigarette packets in New Zealand in 1974. By that stage Mrs Pou had been smoking approximately 30 cigarettes a day for six years. Smoking must have been a very big part of her life. It must certainly have been a major expense in her weekly budget. Given that she was smoking more than a packet of cigarettes every day, she must have noticed the warnings.

[328] Mrs Pou accepts also that by that stage she was "aware in general terms of the debate in the public arena about the safety of smoking". She says that she recalls "in general terms [that] some health professionals and others warned about the risks of smoking cigarettes". Moreover, the debate about the dangers of smoking had continued in the media between 1968 and 1974. After 1968 articles about the dangers of smoking would have been of direct relevance to Mrs Pou's own situation, and not just that of her mother.

[329] An instructive exchange occurred when Mrs Pou was being cross-examined by Mr Camp on this point. It is recorded as follows:

> Q. At that time, that is in the early 1970s, is it the case that you didn't want to try to give up smoking at any event?
>
> R. Well, the enjoyment was such, and I didn't take—didn't know or take into consideration anything. And the few dregs that did get through reconfirmed that it was fine, because the companies continued. Any warnings were Health Department, Government, regulations. No. I trusted completely the tobacco companies.

[330] This passage suggests that the government warnings were getting through to Mrs Pou, but her enjoyment of cigarettes was such that she deliberately elected to trust the tobacco companies rather than those warnings. This indicates to me that the government warnings contained news that she did not want to hear, whereas the tobacco companies gave her information that she was quite happy to accept. It suggests, in other words, that she only heard what she wanted to hear and acted accordingly.

[331] I consider, however, that the introduction of warnings on cigarette packets in 1974 would have been a signal that Mrs Pou must have noticed. Thereafter she could not realistically say that she had not been warned about the risk to her health that smoking posed. I am therefore satisfied that, if Mrs Pou was not aware of the dangers of smoking in 1968, she must at the very latest have become aware of those dangers by 1974.

[332] The evidence suggests that even a heavy smoker who gives up smoking will have the same chance of developing lung cancer after fifteen years of abstinence as a person who has never smoked. This means that, if Mrs Pou had given up smoking in 1974 and had remained abstinent until 1989, she would by that date have had the same chance of developing lung cancer as a person who had never smoked. The plaintiffs' expert witness, Professor Skegg, accepted that this was the case. Moreover, if one hazards the guess (and it is only a guess) that lung cancer takes some time to develop to the stage it was at when Mrs Pou's cancer was detected in 2001, it is likely that Mrs Pou could have given up smoking some time after 1974 and still left herself with a reasonable chance of not developing cancer.

[333] In reaching my conclusion regarding this issue I reject any suggestion that the warnings were not sufficiently clear, or that their effect was diluted by the advertising and statements emanating from the cigarette manufacturers.

The wording of the initial warnings

[334] Mrs Pou considered the warnings that were placed on cigarette packets in 1973 to be "airey fairy" and "not very serious". She also seemed to say that the fact

that the government or the Health Department were involved in the warnings somehow lessened the seriousness with which the warnings should be regarded. I disagree. In my view the wording of the warnings was plain. The Government was warning consumers of cigarettes that smoking may be dangerous to their health. If Mrs Pou actually held the views that she put forward in evidence, it suggests to me that she did not want to hear the warnings that were being given. I do not think that it was open to her to disregard the warnings out of hand on the basis that they were inadequate or not particularly serious. No reasonable person would have done so.

[335] Mrs Pou also said in evidence that she was entitled to disregard the warnings on the cigarette packets because she "trusted" the tobacco companies and that they would not manufacture a product that might harm her in any way.

[336] Mrs Pou does not explain why she placed her trust in the tobacco companies. There is nothing in the evidence to suggest that she had a personal relationship with them, or that there was any other reason that could have led her to adopt such an attitude. She appears to have been in the position of any other consumer who purchases a mass-produced product on a regular basis. She must also have appreciated that cigarette manufacturers were commercial entities whose principal interest would have been financial gain. She had no basis, so far as I can tell, for any expectation that they would adopt a paternalistic attitude towards their customers. In the absence of a proper explanation, I do not consider that the trust that Mrs Pou says that she placed in the defendants is a view that would have been held by a reasonable person in her position.

The defendants' advertising campaigns and use of sponsorship

[337] The plaintiffs contend that the effect of any warnings was necessarily negated by the manner in which the defendants advertised their products. The plaintiffs also point to the fact that for a period during the 1960s the tobacco companies employed sporting figures such as Arthur Lydiard, Don Clarke and Peter Snell to speak to and coach young people as "sporting ambassadors". The tobacco companies were also heavily involved in the sponsorship of sporting and other events.

[338] I have already made reference to the effect of advertising in the context of the plaintiffs' submission that it sent mixed messages to the community regarding the dangers of smoking. Adopting the same reasoning, I do not consider that either advertising or sponsorship operated to negate the warnings. Unless it is factually misleading, even young people were likely to appreciate in the early 1970s that the purpose of advertising and sponsorship is to portray the sponsor's products in the best possible light. I do not consider that the use of sponsorship or the publishing of the advertisements to which Mrs Pou referred would have been likely to create the impression that health warnings should be ignored in favour of the message conveyed by the advertisement.

[339] Mrs Pou admits in any event that she was aware of the debate about the dangers of smoking and of the views held by health professionals regarding the same issue. I consider that the reasonable person in Mrs Pou's position would have been able to appreciate that the purpose of advertising and sponsorship is to persuade the recipient to a particular point of view. Against that, there was the government warning on cigarette packets, supported by the views of health professionals. I do not consider that a reasonable person in Mrs Pou's position would have disregarded the written warnings because of the fact that cigarette manufacturers continued to advertise their product and engage in sponsorship.

Statements made by the defendants

[340] Not surprisingly, Mrs Pou cannot say exactly where and when she "heard representatives of the tobacco companies in New Zealand challenging claims from medical people and others that smoking was harmful". In the particulars that the plaintiffs have provided they have, however, listed the statements that they rely upon in this context.

[341] Included in these are newspaper reports in which persons associated with the tobacco industry make comments to the effect that no causal effect has been shown to exist between cigarette smoking and lung cancer. The plaintiffs also rely on

comments made in a TV One "Affairs" programme in July 1975, in which Peter Snell was interviewed.

[342] Further, on 31 May 1989 a tobacco company representative said on TV One's "Eyewitness" programme that science had not established a causal relationship between smoking and diseases allegedly associated with it. The particulars also refer to comments made in 1997 by the Corporate Affairs Manager of W D & H O Wills in New Zealand. These related to the settlement of litigation against tobacco companies in the United States, and were to the effect that the settlements did not mean that the tobacco companies conceded that their product was dangerous.

[343] Finally, the plaintiffs rely on a "Frontline" programme on TV One on 29 May 1999, in which the Director of the Tobacco Institute of New Zealand, Dr Michael Thompson, said that the Institute did not accept the causal link between smoking and cancer. Similar statements were also made by Mr Thompson in an interview on the "60 Minutes" programme in May 1988.

[344] One of the difficulties with the manner in which this aspect of the plaintiffs' case was presented is that the defendants can only be held responsible for statements that they themselves have been shown to have made. An issue therefore arises as to the extent to which, if at all, the defendants can be said to be responsible for statements made by legally distinct entities such as the Tobacco Institute of New Zealand. I accept that the defendants were members of, and had a strong connection with, the activities of the Institute. It does not necessarily follow, though, that the defendants can be held responsible for all public statements that were made by or on behalf of the Institute.

[345] Moreover, each of the statements upon which Mrs Pou relies was made some years after the date upon which warnings were first placed on cigarette packets. She has no first hand knowledge about them, so she cannot rely upon them directly as having influenced her actions or beliefs. Several of the statements were reported in newspapers to which Mrs Pou did not have access, and she accepted that she had never seen them. Moreover, the vast majority of the statements were made in the mid-1980s and 1990s, more than 10 years after warnings had been introduced. By

that stage, too, the form of the warnings had changed and they had become even more explicit. In those circumstances, and even accepting that each of the above comments was made and can be attributed to the defendants, I do not consider that they could reasonably be viewed by consumers as negating the written warnings that were printed on every packet of cigarettes after 1974.

The relevance of Mrs Pou's awareness of the risks of smoking

[346] There is no dispute that, notwithstanding the fact that Mrs Pou clearly became aware of the dangers of smoking well before her death, she continued to smoke right up until she died. The plaintiffs' case is that once Mrs Pou became addicted to, or dependent on, smoking cigarettes, she was not under any obligation to take steps to quit. Counsel maintained that this was the position notwithstanding the fact that Mrs Pou might later have come to appreciate the dangers that smoking posed to her health. The plaintiffs submitted that the only relevance of any steps that Mrs Pou might have taken to give up smoking after 1969 was in relation to the issue of contributory negligence.

[347] The defendants, on the other hand, submitted that Mrs Pou had a duty to stop smoking once she learned of the dangers associated with it. If she did not do so, she thereby accepted the known risks associated with smoking, and her subsequent injury could not have been caused by any breach of duty by the defendants. They also submitted that, if Mrs Pou had stopped smoking no later than 1985, she would have had the same risk as a non-smoker of developing lung cancer in 2001.

[348] Alternatively, the defendants argued that Mrs Pou's failure to cease smoking constituted an acceptance of the risks involved. They referred the Court to various instances where it has been held that if a person is aware of dangers or risks in an activity and nevertheless chooses to accept those risks, liability cannot lie. For instance, in *Bennett v Tugwell* [1971] 2 QB 267, Ackner J referred (at 273) to such a situation as one involving an "assumption or risk". In *Morris v Murray* [1991] 2 QB 6 the English Court of Appeal concluded (at 18) that liability for negligence cannot lie where the plaintiff was aware of the risks, given that there was "consent to the lack of reasonable care that may produce the risk".

[349] These cases involved an awareness of risks by the plaintiff from the very outset, and as such focussed on the defence of volenti non fit injuria. However, the defendants' argument suggests that the reasoning is also applicable in cases where the plaintiff may have undertaken a course of conduct without knowledge of any risks, but acquired knowledge of those risks at a later stage. The defendants argued that even if Mrs Pou was not originally aware of the risks of smoking, once she did become aware of those risks and continued to smoke, she accepted the risks and thereafter waived any claim for liability.

[350] In advancing this submission the defendants relied on the well-known case of *Grant v Australian Knitting Mills* [1936] AC 86. In that case, the plaintiff suffered from dermatitis after prolonged wearing of an undergarment that contained a chemical irritant. The plaintiff was not aware of this defect at the relevant time. The House of Lords said at 105:

> The principle of *Donoghue's* case (3) can only be applied where the defence is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent : the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

[351] The defendants also referred to *Saddlemire v Coca Cola Co* [1941] 4 DLR 614, where the plaintiff consumed the contents of a bottle of drink containing a dead mouse. The plaintiff had, however, detected an unpleasant odour and a disagreeable taste in the beverage, but chose not to examine the bottle and consumed its contents regardless. The Court concluded (at 619) that in those circumstances the plaintiff "chose to incur the possibility of risk of doing himself injury by continuing to drink the beverage" and the defendant manufacturer was held not to be liable.

[352] The defendants' argument rests on the proposition that, once a consumer becomes aware of a risk or defect in a product, the consumer is under an absolute duty to immediately cease consumption or use of that product. If the consumer does not do so, the manufacturer of the product will not be liable to the consumer in negligence.

[353] I accept, following the reasoning in *Grant*, that in most cases a consumer who uses a product with full awareness of its risks will be taken to have effectively accepted or adopted those risks. There can be no later complaint of any consequential harm. Likewise, where there is no initial knowledge of those risks but where knowledge arises at a later stage, anything short of an immediate and complete cessation in the use or consumption of the product may also preclude the existence of liability.

[354] It is implicit in that proposition, however, that the plaintiff must possess the means or ability to cease consumption or use of the product immediately. A consumer cannot sensibly be regarded as having "adopted" or "accepted" the risks inherent in using or consuming a product if there is no ability to avoid those risks by immediately ceasing to use or consume that product.

[355] In the vast majority of cases this issue will not arise. In cases such as the present, however, where the product in question is known for its addictive nature, unique issues arise. I consider that in a case such as this the consumer is not under an absolute obligation to cease smoking immediately upon becoming aware of the dangers of smoking. It will be sufficient if the consumer immediately takes reasonable steps to give up smoking.

[356] The addictive nature of cigarettes was canvassed extensively in expert evidence in this proceeding. The plaintiffs contended that Mrs Pou was addicted to smoking cigarettes by about 1969 and that thereafter she could not stop smoking despite taking reasonable steps to do so. The defendants contend that, even if Mrs Pou was addicted to, or dependent upon, smoking cigarettes, nevertheless she had the ability to stop smoking and failed to take reasonable steps to do so after she became aware of the risks inherent in smoking. She is therefore to be taken as having accepted the risks by continuing to smoke.

[357] In determining this issue I proceed on the basis that there can be no dispute that Mrs Pou was in fact addicted to, or dependent upon, smoking cigarettes by approximately 1970. By that stage she was smoking heavily, with her first cigarette of the day being smoked in the early morning and her final cigarette being smoked in

bed at night. She satisfied the accepted clinical tests for nicotine dependence. There really can be no doubt that, in both lay and medical terms, she was addicted to her habit.

[358] The issue that now arises is whether, given the nature and extent of her addiction, Mrs Pou could have given up smoking.

The relevance of addiction: could Mrs Pou have given up smoking?

[359] Both parties spent considerable time at trial exploring the issue of whether or not Mrs Pou could have given up smoking. The plaintiffs, through their expert witnesses Professor Sellman and Dr Robinson, took the stance that it is unlikely that she would have been able to quit smoking. The defendants, through Dr Goodwin and Dr Walden, contended that if Mrs Pou had made a serious effort to give up smoking, it is likely that she would have been able to do so.

[360] The fact that experts such as these could not agreement upon this issue demonstrates, in my view, the artificiality of attempting to predict in hindsight whether any given person could have quit smoking. As the evidence in this case showed, it is extremely difficult at any stage to predict whether a person will be able to successfully give up smoking. Those difficulties are exacerbated if the person in question is no longer alive.

[361] The only means by which such an exercise can be undertaken at all is for the circumstances of the person to be considered against statistical data relating to persons who have successfully given up smoking. The existence of some circumstances, or factors, will support the proposition that the person may have been able to give up smoking. Others may suggest the opposite. In all likelihood, however, the factors will not be conclusive either way. The end result may leave the enquirer with more questions than answers.

[362] In the present case, for instance, there is no dispute that Mrs Pou was a heavy smoker and that she had been so for a very long time. She obviously found it difficult to resist the physical and psychological cravings that any abstinence from

smoking inevitably produced. Even short periods of abstinence rendered her extremely irritable. It is virtually inevitable that she would have found any sustained attempt at cessation to be difficult in both physical and psychological terms. Such attempts as she did make to restrict her intake or to give up smoking were unsuccessful, although in making these she never experienced the benefits that a structured cessation programme might provide. All of these factors would tend to suggest that the likelihood of Mrs Pou being able to give up smoking would have been extremely low.

[363] Surprisingly, however, the experts agreed that these factors are not particularly useful indicators, or predictors, of Mrs Pou's ability to stop smoking. Research has shown that the fact that a person may have been a heavy smoker for a very long time is not a reliable predictor of the ability to quit. Many people with such histories are still able to quit smoking. The fact that a person may score highly on clinical tests designed to establish nicotine dependence, a factor that Professor Sellman relied on as suggesting inability to quit, is in my view therefore of limited assistance. By definition all heavy smokers will score highly on such tests. That does not mean, however, that they are unable to quit.

[364] In addition, although heavy smokers are often afflicted by severe withdrawal symptoms, these do not provide a reliable guide to the ability to quit either. This is because many persons who suffer such symptoms are eventually able to stop smoking. Similarly, little weight can be placed on the fact that a person has made unsuccessful attempts to give up smoking in the past, because most people only succeed in giving up smoking after several prior unsuccessful attempts. Moreover, participation in a recognised and structured cessation programme is no guarantee of success, because long term cessation rates for such programmes are often quite low. An overall cessation rate of 20 to 25 per cent at the end of twelve months after finishing a structured programme is apparently not unusual. The statistics show, in fact, that most smokers give up of their own accord and without assistance from outside agencies.

[365] There are some factors in the present case that do suggest that Mrs Pou may have been less likely to be able to give up smoking than other persons. These

include the fact that she had separated from her husband and that, possibly as a result, she was in a lower socio-economic group than many people who are able to quit. The correlation between these factors is based solely on statistics, however, and few would deny that many people in these two categories have been able to give up smoking in the past.

[366] Although they probably go without saying, two factors that appear to be fundamental to any successful attempt to quit are motivation and determination. Without the motivation, or desire, to quit it is difficult to see how success will ever be achieved. Motivation alone, however, may not be enough given the physical and psychological effects that withdrawal from nicotine may produce. Determination is therefore essential to a successful attempt to quit smoking, particularly if it is to be undertaken by a heavy smoker. I have already held, in the context of Mrs Pou's decision to start smoking, that Mrs Pou was a person of strong will and determination. The question that remains, however, is whether she was sufficiently motivated to rid herself of her reliance on cigarettes to put herself through the trauma that quitting was sure to involve.

[367] In the end, and as the experts agreed, Mrs Pou's ability to quit smoking is not one that can now be predicted with any degree of accuracy. As matters presently stand, even experts are not equipped to carry out the exercise with any degree of confidence. A comparison between the formal qualifications or experience held by the experts who gave evidence in this case does nothing to resolve the issue; neither does comparing the nature and quality of the articles that each has written or read in scientific journals. Rather, a different approach is required.

[368] The appropriate starting point, in my view, is the proposition with which all the experts agreed. This is that it was not impossible for Mrs Pou, any more than it may be for any other person, to have given up smoking. If that proposition is correct, can it seriously be suggested that the law does not expect a person who learns of the dangers of smoking to do nothing at all to guard against them?

[369] For myself, I do not accept that this can be correct. It could only be correct if, once Mrs Pou began smoking, it was impossible for her to stop. In some cases of

dependence, or addiction, that may be the result of beginning to consume a particular substance. That is not the case, however, with tobacco. The corollary of the fact that it was not impossible for Mrs Pou to stop smoking is that it was possible for her to quit. It may have been extremely difficult given the obvious and undisputed level of her dependence, but it was possible. And it is not insignificant that people are regularly required, for all kinds of reasons, to give up doing things that they greatly enjoy in circumstances where it will be extremely difficult to do so.

[370] Moreover, liability for the voluntary actions of an individual is not likely to be passed to a defendant unless there is a high degree of impairment: see for example *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 207 ALR 52. Although a person may be addicted to smoking cigarettes, the experts agreed that this does not mean that cognitive functions are impaired in any way or that the power of self-control is lost. Viewed in this light, each and every cigarette that is consumed is the result of a conscious and voluntary act.

[371] Although there are differences, there are also some similarities between addiction to cigarettes and addiction to gambling. It would be difficult to suggest, however, that a person could seek to place the responsibility for an addiction to gambling at the door of a gaming establishment. Such a claim was made, but rejected, in *Reynolds v Katoomba RSL All Services Club Ltd* (2002) 189 ALR 510. In that case the plaintiff was diagnosed by clinical tests as being a "pathological gambler." Previous attempts to stop gambling had failed, and he said that once he started gambling he could not stop. He alleged that the gaming establishment that he frequented had negligently failed to warn him about the lack of prudence involved in gambling.

[372] The New South Wales Court of Appeal upheld the trial judge's conclusion that the fact that the plaintiff was a "problem gambler" did not mean that he had been deprived of the ability to control his own actions. He was able to appreciate the risks involved in gambling, he had the ability not to gamble excessively and he also had the ability to refrain from gambling at all.

[373] It follows that, whilst I accept that Mrs Pou's addiction was such that she was not under an absolute duty to immediately cease smoking once she became aware of the dangers of smoking, it was nevertheless incumbent on her at that point to immediately take reasonable steps to do so. If she did not, she must accept the consequences that follow. Those consequences would not be caused by any failure to warn, but rather by her deliberate decision to continue smoking in the face of the risks of which she had knowledge.

Did Mrs Pou take reasonable steps to give up smoking?

[374] Mrs Pou's evidence, which I accept, was that she often wished that she could give up smoking. I also accept that Mrs Pou felt that cigarettes had a degree of control over her that amounted in her own mind to an addiction. The feeling that she was controlled by the need to smoke is a signal feature of her evidence. I therefore have no difficulty in accepting that, from time to time at least, Mrs Pou desperately wished to rid herself of this aspect of her life. The issue is whether that desire led her to take what could objectively be regarded as reasonable steps to give up smoking.

[375] Mrs Pou said that she had made 20 or 30 attempts, some of which she categorised as "intentions", to give up smoking. She described these as being "spectacular failures".

[376] Mrs Pou's evidence regarding all but two of these failed attempts was, however, quite vague. She said that most of them were so short that nobody else would even have known that they had occurred. She said that they generally consisted of trying to ration the number of cigarettes that she smoked every hour or every day. Mrs Pou did not say exactly when these attempts occurred. For present purposes, however, I am prepared to accept that they are likely to have begun reasonably soon after Mrs Pou became aware of the dangers of smoking.

[377] Mrs Pou was only able to describe two periods during which she was actually abstinent for any length of time. The first occurred shortly after her separation, at a time when she did not have sufficient money to be able to purchase both cigarettes

and Christmas presents. Mrs Pou described the severe depression and irritability that this period of enforced abstinence, which appears to have lasted for two days, caused her. It ultimately ended when a friend gave her a packet of cigarettes. It is clear, however, that this particular incident was not an attempt by Mrs Pou to give up smoking. Rather, it occurred as a result of the fact that Mrs Pou had no money. It was therefore totally unrelated to any desire by Mrs Pou to give up smoking. For this reason it would not qualify as a failed attempt to give up smoking at all.

[378] The second period of abstinence occurred on an occasion when Mrs Pou obtained some nicotine patches from a friend. She did not have access to instructions as to how to use the patches. She wore the patches for a day or so, and continued to smoke whilst wearing them. On or about the second day Mrs Pou experienced unpleasant sensations in her chest and arms, and she took the patches off. She did so because she took the view that the patches "were not working".

[379] In summary, all but two of Mrs Pou's attempts to give up smoking resulted in her being abstinent for no more than a few hours. On her own evidence, they would not have been noticed by those around her. I consider that these are more aptly described as "serious intentions" rather than serious attempts to give up smoking. In order for these episodes to qualify as reasonable attempts, Mrs Pou would in my view have needed to go much further than she did on each occasion. At the very least, she needed some sort of plan or strategy. Without that, the chances of success were very low. The plan would not need to go so far as a structured cessation programme, because she may not have been able to afford that. It would need more, however, than a self-imposed decision – not communicated to anyone else - that she would ration herself to a certain number of cigarettes per day or per hour.

[380] Mrs Pou must also have known that it was unlikely that she would be able to achieve her objective unless she took some sort of advice regarding the process that she should follow, and the manner in which she could deal with the stresses and difficulties that she was likely to encounter. She could easily have sought such advice from her doctor or a chemist, or even from a friend or relative who had been down the path that she was contemplating. The most that Mrs Pou appears to have

done is to call Helpline on one occasion. When she was unable to get through on the first attempt, she did not call again.

[381] If Mrs Pou had spoken to others she could also have ensured that those around her would be in a position to provide her with the encouragement and support that she would undoubtedly need in the times ahead. Mrs Pou said in cross-examination, however, that she never sought help from her family because "it was harder if you told people, because they watched". I consider, however, that the reasonable person in Mrs Pou's position would have discussed their desire to give up smoking with those around them.

[382] Moreover, Mrs Pou's motivation for giving up smoking clearly waxed and waned. She told Dr Goodwin that she often thought "No, I won't try [to give up] today. I will smoke up large today, and I may try to give up tomorrow." In cross-examination she also said this:

> No. Sometimes I would have to have morning ones. And I would think, "Right, now, I can do it. I will get busy". But the minute I knew I couldn't smoke, the clock was in my face all the time. The clock. So, then it would become, "Well, I went as long as I can. If I can cut it by so many today, then maybe I can do it gradually.
>
> And then something – I might read something, and see something, or anything could happen, and I might go, "Start next Monday, Monday's a good day".

[383] This passage will, no doubt, strike a chord with many who have tried to give up smoking or who have resolved to lose weight. It demonstrates, in my view, that unless such an attempt is accompanied by an appropriate degree of planning and support, it is highly unlikely to succeed.

[384] I consider that the way in which Mrs Pou approached her attempts, or intentions, meant that they were doomed to fail. They failed without anyone else even knowing that they had occurred. They cannot, in my view, qualify as reasonable efforts to give up smoking.

[385] Of the remaining attempts, the enforced abstinence caused by a lack of funds can immediately be put to one side. It was not, and was never intended to be, an attempt to give up smoking.

[386] The attempt involving the nicotine patches is in a different category, because it demonstrates that Mrs Pou had a general plan when she set out to use them. It therefore had the potential to amount to a serious attempt to give up smoking. The problem with this attempt, however, lay in its execution. Mrs Pou obtained the patches from a friend who had already used several of the patches from the packet. The friend had ripped the packet when opening it, and had thereby obliterated half of the instructions. Mrs Pou said that the friend "basically just told me what he remembered." Mrs Pou then proceeded to use the patches without seeking any further advice or instruction as to how they might be used to best effect.

[387] She said that she kept one patch on for 24 hours, and then replaced it with a new patch. Although Mrs Pou thought that she had used the patches correctly, she said that she "couldn't refrain from still having a cigarette at the same time". Had she been able to read the instructions, she would have seen that they included a direction not to smoke or use any other nicotine product while on the programme. The instructions also warned that users might suffer an overdose of nicotine if they smoked or used any other product containing nicotine while using the patches. Mrs Pou subsequently experienced discomfort and pain in her chest and arms. She sought no advice regarding these symptoms, and instead concluded that nicotine patches did not work for her. She then removed the patch and never tried a similar programme again.

[388] Whilst the incident involving the nicotine patches started out as a serious attempt to give up smoking, I consider that it was hamstrung from the outset by a lamentable lack of planning. It seems that Mrs Pou was prepared to use the patches without reading the instructions and without seeking advice about how to use them from a reliable source. She therefore had absolutely no idea of how the patches worked, or what she should do to ensure that the best chance of success. She was also prepared to smoke whilst wearing the patches when she did not know what effect that might have. She did not know whether, or to what extent, smoking might

impair the effectiveness of the patches or whether it could produce side effects. She did not seek advice when she experienced the pain in her chest and arms. In effect, Mrs Pou was "flying blind' when she used the patches. It is therefore no surprise that the experiment did not work. Mrs Pou's attempt to use the nicotine patches was, in my view, so poorly executed that it could not realistically be classified as a serious attempt to give up smoking.

[389] The end result of the matters to which I have referred is that I do not consider that Mrs Pou ever made any reasonable attempts to give up smoking. As a result, she must be taken to have accepted the risks inherent in smoking once she became aware of those risks. The causative effect of any initial breach by the defendants was superseded by Mrs Pou's own conduct. Any breach of duty could no longer be considered as the operative cause of Mrs Pou's injury, and the chain of causation was broken. It was therefore not open to Mrs Pou to seek redress from the defendants once she developed lung cancer, because the possibility that she might develop lung cancer was one of the risks that she had assumed.

An alternative approach : the individualist philosophy of the law

[390] Although I have decided this aspect of the case on a different basis, the result coincides with a concept that has been described as "the individualist philosophy of the law". This philosophy is based on the principle that individuals are autonomous beings who are taken to be responsible for their own actions.

[391] In *Tomlinson v Congleton Borough Council* Lord Hoffmann noted (at 85F) that "the balance between risk on the one hand and individual autonomy on the other is not a matter of expert opinion. It is a judgment which the courts must make and which in England reflects the individualist values of the common law."

[392] Described in that way, the philosophy could be taken to have some relevance to the issue that I have just decided. Counsel for the plaintiffs submitted that the theory should not be extended into the field of product liability. Although I am not required to decide the point, it seems to me that it may in fact apply with equal force

in the area of product liability. There is no reason why individuals who have the ability to control their own actions should not also be responsible for them.

[393] Lord Nimmo Smith applied the concept in *McTear*. He considered that Mr McTear was actually aware of the risks of smoking, but failed to take adequate steps to quit. In considering the impact of Mr McTear's own conduct on the potential liability of the cigarette manufacturer in negligence, Lord Nimmo Smith conceptualised the issue as one of personal responsibility.

[394] Lord Nimmo Smith rejected (at [7.177] and [7.178]) an "insidious" suggestion that because Mr McTear was from a lower socio-economic class, he was thereby "somehow to be regarded as more a victim of circumstances and as having less than full responsibility for his own choices and actions". Although the learned Judge accepted that the prevalence of smoking may be higher among members of lower socio-economic groups, he did not accept any approach that would accord less individual responsibility to such people as Mr McTear. This was because the policy of the law views all adults of full age and not suffering from mental incapacity as being equal. As such, each "is presumed to be reasonable, and to have the responsibility of making reasonable choices, not least in matters affecting his or her safety, health and welfare". His Lordship described this approach as being "fundamental to the workings of our society".

[395] Lord Nimmo Smith then went on to say (at [7.179]):

> At the centre of my thinking is the individualist philosophy of the common law, described by Lord Hoffmann in *Tomlinson v Congleton Borough Council*, in the passage quoted at para. [7.46]. As he said, people of full age and sound understanding must look after themselves and take responsibility for their actions. There is no duty to save people from themselves. If they are, or may reasonably be supposed to be, in possession of information about harm which they may suffer if they choose to follow a particular course of action, the responsibility is theirs alone. They have the right of self determination which was recognised in *Law Hospital NHS Trust v Lord Advocate*, quoted at para. [7.49]. If, in knowledge that they are taking a chance, as the pursuer did in *Titchener v British Railways Board*, they expose themselves to a risk of harm, there is no breach of any duty of care. As was said in *Grant v Australian Knitting Mills Ltd* (para. [7.8], "the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or uncertainty of mischance." In *Murphy v Brentwood District Council* Lord Keith, in the

> passage quoted at para. [6.67], said that a person who was injured through consuming or using a product of the defective nature of which he was well aware had no remedy against the manufacturer. It is not difficult to find instances today of people who, rather than blaming themselves for the consequences of their own decisions, seek to negate responsibility by claiming that a condition, such as obesity or addiction to a controlled drug, has just happened to them, independently of their own volition, or is someone else's fault, as was claimed in *Pelman v McDonald's Corporation*, referred to at paras. [7.130] to [7.132]. For sound reasons the law gives no countenance to such a tendency. The individualist philosophy requires that individuals must live with the legal consequences of their own informed choices.

[396] His Lordship noted (at [7.180]) that this approach is consistent with Australian authority and that it is likely to underlie the basis upon which similar claims have been rejected in the United States. He then said that "all of these cases support the view that the individual is well enough served if he is given such information as a normally intelligent person would include in his assessment of how he wishes to conduct his life, thus putting him in the position of making an informed choice".

[397] Lord Nimmo Smith also said (at [6.208]):

> For an individual to say that he has found difficulty in altering or giving up a habit, as Mr McTear did of his smoking, because he is "addicted", appears to me to be little more than an attempt to absolve himself of individual responsibility for his own decisions and choices. In my view a smoker such as Mr McTear makes a deliberate choice as to whether to start smoking, whether to continue smoking or to stop smoking, and indeed whether or not to smoke a cigarette on any particular occasion. The fact that smokers like Mr McTear may find it difficult to give up does not appear to me to deprive them of the element of free will which is fundamental to the individualist philosophy of the common law.

[398] With respect, I consider that the passages to which I have referred could be applied with equal effect in the present case.

Conclusions regarding the relevance of Mrs Pou's failure to quit smoking

[399] I therefore conclude that, even if Mrs Pou had not initially been aware of the risks of smoking when she first started, she must have been fully aware of those risks by 1974 at the latest. The expert evidence in this trial has indicated that while quitting smoking may involve various levels of discomfort or difficulty, it is not

impossible to do so. Mrs Pou was therefore under a duty to immediately take reasonable steps immediately to stop smoking, but she did not do so.

[400] As a result, the law presumes that Mrs Pou continued to smoke in the exercise of her own free and informed choice. From the point when she became fully aware of the risks of smoking and failed to take reasonable steps to quit, the causative effect of any initial breach of duty was superseded by the effect of Mrs Pou's own conduct. This is particularly significant given the evidence that after 15 years of abstinence even a heavy smoker will have the same chance of developing lung cancer as a non-smoker. As a consequence, no redress is available to Mrs Pou for any injury that she suffered as a consequence of continuing to smoke.

Defences

10. The defences of volent non fit injuria and contributory negligence

[401] For the reasons set out above I have found that the defendants are not liable to the plaintiffs in negligence. For this reason I do not propose to consider the defences that I would have needed to consider in the event that I had found liability in negligence to have been established.

[402] I merely record in relation to the issue of *volenti* that a logical difficulty would arises in any attempt to consider it in light of the factual findings I have already made in relation to the issue of negligence. This difficulty is discussed in *McTear* [7.206] and [7.207]. Like Lord Nimmo Smith, I prefer to leave matters on the basis that in a case such as this the factual issues that arise in relation to the issue of negligence also necessarily encompass the issues that arise in considering a *volenti* defence. It is not logically possible to assume that negligence has been established in this particular context and then to ascertain whether a *volenti* defence (in which the defendants would bear the onus) has also been established. It is sufficient to say that, if I had found that negligence had been established, the defence of *volenti non fit injuria* would not have been established.

Result

[403] For the reasons I have given the plaintiffs' claim cannot succeed and is dismissed.

Costs

[404] Ordinarily costs would follow the event. I am aware, however, that the plaintiffs are legally aided. If the defendants wish to advance submissions on the issue of costs counsel should file a memorandum no later than 2 June 2006. Counsel for the plaintiffs will then have a further month to file a memorandum in response. In the absence of any request for a hearing, I will then deal with the issue of costs on the papers.

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Lang J