THE SUPREME COURT OF NORWAY

On 31 October 2003, the Supreme Court pronounced judgement in

Case no 2002/753, civil appeal,

Appellant: Unni Lund

Counsel: Asbjørn Kjønstad, under examination for the right of audience before the Supreme Court

Assistant counsel: Edmund Asbjøll

Respondent: J.L. Tiedemanns Tobaksfabrik AS

Counsel Harald Hjort

Assistant counsel: Erik Keiserud

Judgement:

(1) Mr Justice **Flock**: This case concerns an application for a declaratory judgement declaring that a tobacco manufacturer is strictly liable in damages towards an injured party who developed and died from lung cancer after smoking cigarettes for over 40 years.

(2) Robert Lund, who was born in 1933, started smoking in 1953. After about one year, he found that a roll-your-own tobacco called "Petterøes no. 3" was the product that suited him most, and he stuck with this brand right up until he died in 2000. He had been diagnosed with lung cancer four years earlier.

(3) Petterøes no. 3 was manufactured by H. Petterøes Tobakkfabrikk, which company was taken over by J. Tiedemanns Tobaksfabrik, later renamed Tiedemanns Tobaksfabrik AS and hereafter referred to as Tiedemanns, in 1972.

(4) It is not disputed that Mr. Lund died of lung cancer caused by smoking. He smoked on average three packets of roll-your-own tobacco per week, equivalent to slightly more than 20 cigarettes a day.

(5) In 1999, Mr. Lund filed a writ of summons against Tiedemanns with the Orkdal District Court, requesting judgement declaring that Tiedemanns was liable in damages for the injury he had suffered from smoking Petterøes no. 3. In the course of the proceedings before the District Court, Mr. Lund withdrew an allegation that Tiedemanns was liable in damages

on the grounds of negligence. Following this, Mr. Lund's claim was based solely on the unwritten principles of strict liability in Norwegian law. On 10 November 2000, the Orkdal District Court pronounced the following judgement:

"1. The claim against J.L. Tiedemanns Tobaksfabrik AS shall be dismissed

2. No award of costs."

(6) The District Court stated that the risk of cancer is a constant and typical consequence of smoking. When Mr. Lund started smoking in 1953, this risk was extraordinary compared to what most people at the time perceived to be the ordinary risks associated with smoking. However, knowledge about the dangers of smoking increased during the course of the next ten to 12 years, and Mr. Lund must be deemed to have accepted the risk when he nevertheless continued to smoke as before. Even though he had become addicted to smoking, his addiction was not so strong that he was unable to make a choice. The risk of lung cancer would have been reduced considerably if Mr. Lund had stopped smoking in the mid-1960s, and the District Court had no doubt that, if that had been the case, there would have been no evident causal connection between his smoking prior to this point in time and the disease that was diagnosed in 1996.

(7) Robert Lund died shortly before the District Court judgement was pronounced. His widow, the appellant Unni Lund, appealed to the Frostating Court of Appeal. On 20 March 2002, the Court of Appeal pronounced the following judgement:

"1. The judgement of the District Court is upheld.

2. No award of costs for proceedings before the Court of Appeal."

(8) The Court of Appeal stated that there could no longer be any question of strict liability for damages once knowledge had become available that there was a significant and proximate health risk associated with smoking "that extended beyond the traditional notion that smoking carried a certain risk of cardiovascular disease etc." A general awareness that approximately one in four smokers were likely to die prematurely as a consequence of their smoking must have been deemed to exist at the latest at the beginning of 1964. Since smoking was a voluntary act, any non-statutory strict liability that the respondent might have had would have ceased at the latest at that point in time. It could not be deemed to have been impossible for Mr Lund to stop smoking. Bearing in mind that Mr Lund continued to smoke for 32 years after 1964 but before the lung cancer was diagnosed, the ten-year period prior to 1964 during

which Mr Lund had smoked was not so significant to the injury suffered that it was natural to attach liability to the events of this early period.- Before the Court of Appeal, Mr Lund also claimed that Tiedemanns was liable on the grounds of negligence, but also this claim failed. Mr Lund started smoking for entirely other reasons than that Tiedemanns during the 1950's advertised its products rather aggressively. Furthermore, the Norwegian tobacco industry, Petterøes included, did not have substantially more knowledge than the general public about the risks associated with smoking in the 1950s and 1960s.

(9) The respondent Unni Lund has appealed the judgement of the Court of Appeal to the Supreme Court. The appeal relates to both the Court of Appeal's assessment of evidence and its application of law. On 12 July 2002, the Interlocutory Appeals Committee of the Supreme Court refused leave to appeal pursuant to the Civil Procedure Act section 373 subsection 3 no. 1 in so far as the appeal relates to liability on the grounds of negligence. In all other respects, however, leave to appeal was granted.

(10) With this exception, the facts and the legal issues in the case are essentially the same as in the proceedings before the Court of Appeal. The parties have submitted extensive documentary evidence related to the issue of public awareness of the health risks associated with smoking, largely during the period between the Second World War and 1975. The appellant has placed stronger emphasis and submitted more evidence concerning addiction to smoking than in the courts of lower instance.- Unni Lund and four witnesses have been deposed. One other witness has given written testimony. In addition, the Supreme Court has received written statements with supplemental comments by way of depositions from a total of ten expert witnesses.

(11) *The appellant – Unni Lund* – has in the main submitted as follows:

(12) Tiedemanns is strictly liable for the injuries that Robert Lund suffered as a result of smoking. Tobacco smoke has been proven to contain more than 400 chemical substances, more than 50 of which have been shown to be carcinogenic. Cancer, cardiovascular diseases and respiratory illnesses are the main causes of death from smoking. In addition, smokers have an increased risk of developing a number of other illnesses that can cause major health problems and reduced quality of life. The risk of damage to health arises as a result of smoking tobacco products, an application of the products that is in accordance with the manufacturer's instructions. The nicotine in the smoke creates an addiction and makes it difficult – for a smaller group impossible – to stop smoking.

(13) These properties of the products imply that the conditions for non-statutory strict liability in this particular case are satisfied. Smoking triggers a risk that can be characterised as constant, permanent and persistent. Furthermore, the risk is extraordinary, beyond that risk to which the smoker is exposed in his ordinary everyday environment. In view of the fact that smoking carries with it a danger that the smoker can develop terminal diseases, the risk must be deemed to be very distinct. Between 1953 and 1975 – which is the period of time that is significant to the present case – Tiedemanns had considerably more knowledge than the average consumer about the scientific view on the risks of damage to health that smoking could cause. Thus, the injury must be deemed to be foreseeable for the manufacturer.

(14) The balancing of interests that has to be undertaken when considering whether non-statutory strict liability exists, weighs in favour of a finding of liability. Tiedemanns has had considerable financial gain from its business, and is able to bear its share of the financial loss that Robert Lund and other injured parties have suffered. During the period of time when the liability towards Mr Lund was incurred, the company had insurance that covered liability for the potential infliction of injury. Tiedemanns has not carried out product development to reduce the harmful effects of smoking, nor has it helped anyone to stop smoking. Instead of providing information about the risk of injury, the company advertised extensively until advertising was banned in 1975.

(15) It is not an absolute condition for liability in damages that the risk of injury is unforeseeable to the injured party. However, in the present case, there was not a sufficient general awareness of the health risks associated with smoking until 1975.

(16) This general awareness must be qualified. It must cover knowledge of the risk of damage to health and the risk of addiction. The Court of Appeal has correctly stated that it must cover essential elements of the risk, including the fact that a not insignificant proportion of smokers would die of diseases caused by smoking. On this point, the Court of Appeal required that there must be a general awareness that approximately one quarter of daily smokers could expect to contract a serious disease and die prematurely. The awareness must also be considerably widespread among the population, for instance among three quarters of the population. Finally, it is not sufficient that the information has been read or heard, it must also have been understood. The large amount of evidence in the case shows that these knowledge requirements were not satisfied until 1975.

(17) The addiction created by nicotine gives rise to particular questions in the claim for damages. What is distinctive is that the health risk and the addiction are created by the same product, tobacco. Both the risk and the addiction are fortified in the kind of tobacco – roll-your-own tobacco – used by Robert Lund. It is obvious that he developed a particularly strong addiction, which made it impossible for him to stop smoking, despite serious efforts. Thus, even if the Court should find that smokers had the requisite knowledge about the health risks prior to 1975, this cannot preclude Tiedemann's liability for damages.

(18) There is a causal connection between Robert Lund's smoking during the period for which Tiedemanns was liable and the lung cancer, even if this period is only deemed to extend as far as 1964. There is no requirement, as Tiedemanns submits, of a causal connection between the lack of knowledge about the health risk and the smoking. Mr Lund continued to smoke because he had become addicted. If he had not smoked during this period, it is highly likely that any lung cancer would first have developed at a later stage in his life. His smoking during the period for which Tiedemanns was liable cannot therefore be considered to be only an insignificant factor in the causation picture, cf the judgement recorded in Rt 1992 page 64 (the contraceptive pill case II).

(19) It is denied that Robert Lund must be deemed to have accepted the risk associated with smoking, and that he therefore cannot claim compensation. Nor can he be said to have contributed to the injury in such a manner that this deprives him of the right or reduces his entitlement to damages.

(20) Finally, it is denied that the claim for damages is statute barred.

(21) Unni Lund has entered the following plea:

> "1. The Respondent is liable in damages to the Appellant for the injury suffered by Robert Lund from using "Petterøes no. 3".
>
> 2. The Respondent shall be ordered to pay the costs incurred by the Appellant/the State in the proceedings before the District Court, the Court of Appeal and the Supreme Court."

(22) *The Respondent – J.L. Tiedemanns Tobaksfabrik AS* – has in the main submitted as follows:

(23) The Court of Appeal was correct in finding that there were no grounds for Unni Lund's claim for damages. This must be the case notwithstanding the presence of some of the particular features of the risk of injury that have traditionally justified non-statutory strict liability in damages. This liability is based on a weighing of risks and in the present case the determining factor why there cannot be a basis for liability is the consumers' – the smokers' - anticipation of risk.

(24) It is not denied that the assessment of this anticipation must be based on an objective standard. However, the "one quarter standard" advanced by Unni Lund is not applicable. Strict liability in damages for tobacco-related injuries must be excluded as soon as the consumer has such knowledge of the potential harm that a reasonable sensible person would take account of it when considering how he should act.

(25) From the 1950s and up until 1964, the general public received a continually increasing amount of information largely based on highly credible medical scientific health reports. From the end of the 1950s, this information was followed up with information campaigns, primarily by the National Cancer Association. Most of this information told of the causal connection between cigarette smoking and health damage, particularly lung cancer. Opinion polls from this period in time show that the information was increasingly reaching the general public, which led to a marked decrease in the number of male smokers from the middle of the 1950s. In the course of the first half of the 1960s, the government published still more information on the same subject. From then on it could not come as a surprise to a normally careful consumer that a person with a daily consumption of more than 20 cigarettes after having smoked for many years might develop lung cancer.

(26) When considering whether non-statutory strict liability shall be imposed, the relative interests must also be weighed against each other. Tiedemanns processes and sells an agricultural product. The substances that represent a health hazard and that create an addiction – tar and nicotine – are found in tobacco in its natural state. Tiedemanns had no other knowledge of the health hazard than that which was given to the general public. It was not reasonable to expect the manufacturer to provide information to its consumers about the risk, just as such information is rarely given about other potentially harmful goods, for instance alcohol. The insurance possibilities that were available were intended to cover injury caused by defective goods, for example foreign substances, glass etc in the goods, not injury caused by regular use. The large number of deaths – 8000 a year - and other injuries that today can be

traced back to smoking, fall way outside the insurance cover. If Tiedemanns is found to be liable, the cost must be recovered through the price of products and paid by tomorrow's smokers on top of the almost nine million Norwegian kroner paid every year in the form of duty on tobacco products. The dimension of the situation would necessitate a political solution. No-one has brought such a claim for damages in Norway before Mr Lund, which says something about the prevailing general sense of justice. If strict liability is to be imposed, it should be imposed by the legislator. Such liability for the manufacturers of tobacco products would hardly be good health policy as it would diminish smokers' motivation to stop smoking and reduce the consciousness that the primary responsibility for a person's own health lies with the individual.

(27) Alternatively, Tiedemanns submits that there is no causal connection between the facts upon which liability is based and the injury that is suffered. Like the assessment of a manufacturer's liability for its products pursuant to section 2-1 of the Product Liability Act, the assessment in the present case contains a dual causation requirement: in the present case, there is no causal connection between the lack of knowledge about the risks associated with smoking and the fact that Mr Lund started smoking. Mr Lund's subsequent behaviour clearly demonstrates that he would have started smoking even had the risks been known. Nor is there any causal connection between Mr Lund's smoking during Tiedemann's potential liability period and the lung cancer that he contracted many years later. The causal connection must be judged on the basis of a presumption that Mr Lund, with the general knowledge that had the effect of bringing Tiedemann's liability period to an end, had taken the consequence of this knowledge and stopped smoking. If, for instance, he had stopped smoking in 1964, the risk of him getting lung cancer would have been barely higher than for a non-smoker. And the risk would have barely increased if he had first stopped smoking in 1975.

(28) The most dominating factor in the injury picture is the fact that Mr Lund continued to smoke. Mr Lund's prior smoking during Tiedemann's potential liability period is such an insignificant element in the chain of causation that it is unnatural to attach any liability to it, cf. Rt 1992 page 64 (contraceptive pill case II). In contrast to that case, it is emphasised that the present case involves the use of a natural stimulant that is harmful to health, where the injured party by his own subsequent and prolonged use failed to ensure that the chain of causation was broken.

(29) It is denied that Mr Lund developed an addiction during Tiedemann's potential liability period that made it impossible for him to stop smoking. Stopping smoking may be difficult, but it is a question of information, motivation and the will to carry through a decision. This is supported by the large number of smokers, including heavy smokers, who have stopped over the years. In our legal system, neither addiction to natural stimulants nor addiction to intoxicating substances can free the individual from the responsibility for and the risk of his own behaviour. An alleged addiction cannot therefore have any independent relevance to the issue of causation.

(30) In the further alternative, Tiedemanns submits that weight must in any event be attached to Mr Lund's own behaviour. Through his persistent smoking, Mr Lund accepted a known risk. He has, through his own behaviour, contributed considerably to the injury that he suffered. cf. the provisions relating to contributory behaviour in section 5-1 of the Damages Act. These circumstances must independently result in the discharge of or at least the reduction of the claim for damages.

(31) In any event, any claim for damages must be statute barred pursuant to the now-repealed 20 year limitation period in section 9 of the Limitation Act.

(32) J.L. Tiedemanns Tobakksfabrik AS has entered the following plea:

> "1. The claim against J.L. Tiedemanns Tobaksfabrik AS shall be dismissed.
>
> 2. J.L.Tiedemanns Tobaksfabrik shall be awarded costs for the proceedings before the District Court, the Court of Appeal and the Supreme Court."

(33) My views on the case are as follows:

(34) I have come to the conclusion that the appeal cannot succeed on the grounds that I cannot see that the conditions for imposing Tiedemanns with strict liability in accordance with unwritten principles in Norwegian law are fulfilled.

(35) I. By way of introduction I find it appropriate to repeat that the case before the Supreme Court only concerns the question whether Tiedemanns is liable pursuant to Norwegian principles of non-statutory strict liability. In the proceedings before the Court of Appeal, Unni Lund also argued that Tiedemann's conduct towards its consumers was blameworthy, and that the company was therefore also liable for damages in negligence. The main argument for liability in negligence was that tobacco advertising, both at the time when

Robert Lund started smoking and later, portrayed an incorrectly positive picture of smoking, while information on the health risks associated with smoking and of which the tobacco industry was well aware, was totally lacking. In this regard, the Court of Appeal expressed the general view that "during the 1950s and 1960s, the Norwegian tobacco industry acted quite soberly, bearing in mind that they were selling a lawful product", and that the industry had no more information to give to the public than what they could read in the press. Otherwise, I might add that the issues concerning the tobacco industry's use of additives is of particular significance to the assessment of culpa liability. As I have already mentioned, leave to appeal to the Supreme Court on this point was not granted to Unni Lund. The Interlocutory Appeals Committee, referring to section 373 subsection 3 no. 1 of the Civil Procedure Act, found that an appeal on these grounds would obviously not succeed.

(36) The question of whether a tobacco manufacturer is liable for damage to smokers' health has been decided by the courts in a number of lawsuits in both the USA and in Europe, with varying outcomes. It should be noted that liability for this kind of injury – at least on the whole – appears to be built on proof of negligence on the part of the tobacco industry, that is to say a basis of liability that is not relevant in our case.

(37) The question of liability for the individual tobacco manufacturer could be complicated if the smoker has smoked tobacco manufactured by different manufacturers. In Robert Lund's case, however, the situation here is simple. He smoked the same product, Petterøes no. 3 roll-your-own tobacco, from 1954 right up until he died in 2000. Tiedemanns took over all assets and liabilities when it acquired H. Petterøes Tobakkfabrikk in 1972, and has not denied that any liability for this company would now be Tiedemann's liability.

(38) The Court of Appeal started its remarks by listing in six points the connection between smoking and health damage. Before I move on to discuss the question of strict liability, I too consider it appropriate to highlight certain central aspects of this connection as it appears according to current knowledge. There appears to be agreement on the main issues here. I restrict myself to referring to items that are largely contained in the statement made by professor dr. philos. Tore Sanner to the Supreme Court on "Damage to Health from smoking, developments in knowledge on the subject and calculation of Robert Lund's risk of lung cancer":

(a) Between one third and a half of those who smoke daily die prematurely.

(b) Half of these die before retirement age and lose 20-25 years of their lives.

(c) In total, about 8000 people a year die in Norway due to tobacco-related disease. Slightly more than half of these deaths are caused by cardiovascular disease, about one-quarter are caused by cancer and the remainder mainly respiratory illnesses.

(d) An even higher number of smokers develop smoking-related diseases that cause considerable pain and reduce the quality of life.

(e) The damage to health normally first becomes apparent many years – perhaps 30-40 years – after the individual started to smoke.

(39) II. The development of non-statutory strict liability for damages in Norwegian law has taken place through extensive case law. This court practice is the appropriate starting point when seeking to determine the extent of liability.

(40) The development began in the latter half of the 1800s when liability was imposed on defendants for so-called "dangerous undertakings". It wasn't until the 1900s that liability was extended to cover damage caused by "a constant risk to the surroundings", see the decision reported in Rt 1905 page 715 concerning water damage caused by a broken water main. Today, liability can be said to be based on considerations of risk and on the balancing of interests.

(41) The liability that a manufacturer has for damage caused by his products is now regulated in the Product Liability Act of 23 December 1988 no. 4. Section 2-1 of the Product Liability Act provides that the manufacturer is liable to compensate for "damage which his product causes because it does not offer the safety which a user or the public could reasonably expect." The travaux preparatoires to the Act (Ot. prp (1987-88) page 126) states that safety expectations must be very high for traditional food items and stimulants –"however, with a reservation for known risks like the use of alcohol and tobacco". Thus, injury caused by tobacco falls outside the scope of liability in section 2-1.

(42) The basis of liability for the injury that Robert Lund suffered arose long before the Product Liability Act entered into force. The Act cannot therefore in any event be directly relevant to the present case. Nor can I see that the Act can in any other way be relevant to the determination of any liability that Tiedemanns might have.

(43) The conditions for non-statutory strict liability have in case law largely been linked to considerations related to various aspects of the risk of damage. I will therefore briefly examine the relationship between the risk of health damage from smoking cigarettes and those aspects of the risk of damage that have been emphasised in case law.

(44) As already mentioned, the health risks that smokers face are generally of a nature that demonstrable damage only arises after many years and usually after many years of smoking. Nonetheless, the risk may be characterised as both constant and persistent. During the period of time that is relevant to the present case, both Tiedemanns and other tobacco manufacturers had at all times reasonably available knowledge about the health risks involved. There can therefore be no doubt that we are talking about a typical risk. It was not unforeseeable for the defendant that some smokers sooner or later would suffer damage to their health, including serious damage. Thus, so far it would seem that there are special features of the risk that are consistent with strict liability.

(45) Some of the cases upon which non-statutory strict liability is based also stress that the risk must be extraordinary. This question arises irrespective of whether one views the risk from the point of view of the defendant or from the point of view of the injured person. The purpose of this requirement is, among other things, to distinguish against what can be described as the risk of everyday life, which will normally fall outside the scope of strict liability. In the present case, smoking is undeniably an everyday event. However, the risk of damage, which strikes many smokers very hard in later life, must be deemed to exceed "the dangers that everyday life brings with it", see Rt 1966 page 152, where the injury inflicted by a revolving door was deemed not to give rise to liability.

(46) The fact that a risk that appears as extraordinary to the plaintiff can more easily lead to strict liability for the defendant is a consequence of the need to protect the interests of the plaintiff: an extraordinary risk will more readily seem unexpected or unforeseen, and the plaintiff will then have fewer possibilities of taking steps to protect himself against injury. Earlier cases stress that non-statutory strict liability shall cover unexpected and unforeseen damage, see e.g. the judgement in Rt 1939 page 766, where liability was imposed after a cornice fell off a building and, on the other hand, the judgement in Rt 1957 page 1011 where missing railings on a bridge did not give rise to liability. As I will come back to later on, it is difficult to argue in the present case that the risk appeared to Robert Lund to be unexpected or unforeseen.

(47) III. In their arguments before the Supreme Court, the parties have largely focussed on the knowledge that ordinary consumers had about the health risks associated with smoking in the period from 1950 until 1975. The appellant has conceded that the level of knowledge that the public in general and Robert Lund in particular had about the risk in 1975 was sufficiently high that those who continued to smoke after that time did so at their own risk. The choice of this date is connected to the Tobacco Act, which entered into force on 1 July 1975. From then on, there was a ban on tobacco advertising and tobacco packaging carried a health warning. Furthermore, at about this time the government launched extensive information campaigns about the dangers associated with smoking.

(48) The question in the present case is therefore whether Tiedemanns is liable in damages for the injuries to health that can be traced back to Robert Lund's smoking in the period prior to 1975, or possibly prior to an earlier date. The possible cut-off dates that have been suggested before the Supreme Court are the late 1950s, 1964 and 1970.

(49) The parties have submitted very substantial written material to the Supreme Court to shed light on public knowledge about the damage that smoking could cause to health. Some of this is primary sources in the form of cuttings from newspapers, periodicals etc. In addition, both parties have called expert witnesses who have summarised and considered this material in written reports. The expert witnesses have also given testimony by way of deposition. – The parties agree that the question of knowledge about the connection between smoking and health damage is not a question of what the individual victim – in our case Robert Lund – knew or did not know. On the other hand the parties differ in their views about which part of the population is interesting in this connection, the general level of knowledge at which a claim for damages must be eliminated, and whether it is necessary that the knowledge has been comprehended and indeed resulted in a change of attitude before there can be talk of denying a claim for damages. As I view the case, it is only necessary to a limited extent for me to go into these matters in more detail.

(50) The knowledge most people have had about this health risk has first and foremost been based on the results derived at any given time from medical research. In the 25-year period that is relevant in the present case, research was being carried out continuously both in Norway and not least abroad. To put it simply, the health risks that the medical profession as early as the 1950s had reason to believe existed were not only confirmed during this period, but also strengthened. The research concerned a health risk that was most definitely

associated with the everyday habits of ordinary people, and which every individual had the possibility of removing through his or her own conduct. It is therefore understandable that there was enormous interest in the results derived from the research. Notwithstanding, it necessarily took some time after the results were published for the medical profession before they were available to the ordinary man and woman.

(51) I consider it appropriate to look more closely at the events that took place in the beginning of 1964, a point in time which in my view in many ways marks a break-through as far as reliable information to the general public about the health risks associated with tobacco smoking is concerned. That year also distinguishes itself as being the year in the course of the relevant period in the present case when most was written in the newspapers about smoking and health.

(52) In January 1964, the American Surgeon General published a unanimous and comprehensive report, the main conclusion of which was that cigarette smoking represented a serious health problem, among other things with a high risk of developing lung cancer.

(53) Twelve days later, the Norwegian Director of Health, Karl Evang, delivered his report on "Cigarette Smoking and Health". The most alarming conclusion in the report was that there is a definite causal connection between cigarette smoking and lung cancer. The report referred among other things to a study that showed that smokers with a daily consumption of 21-39 cigarettes had an 18.1 greater chance of dying of lung cancer than non-smokers. The conclusion states, inter alia:

> "1. Comprehensive scientific studies have established that there is a definite causal connection between cigarette smoking and lung cancer. Furthermore, cigarette smoking is an important causal factor in the development of throat cancer and chronic bronchitis. It is also proven that there is a significantly higher rate of other very widespread illnesses among smokers, including cardiac thrombosis, heart spasms (angina pectoris) and emphysema. Women smokers tend to give birth to underweight babies – although there is no absolute proof that this affects the baby's chance of survival.
>
> 2. The risk of consequential damage to health, including lung cancer, can be reduced significantly by stopping smoking even after many years of smoking.

3. It is far from unusual for even chain-smokers to decide to stop smoking and to in fact do so. The facts about the seriously harmful effects of smoking cigarettes have for many people been the key factor in reaching this decision. Every smoker ought now to reflect carefully upon this."

(54) At the same time, the report suggests measures to "combat the injurious effects of smoking", among other things through educational work, by considering higher taxation of cigarettes and roll-your-own tobacco compared to other kinds of tobacco and by imposing considerably restrictions on cigarette advertising.

(55) In a statement to the Supreme Court, dr. med. Kjell Bjartveit states that 1964 marked "a crossroads in the work with tobacco and health. There is no longer any doubt: smoking is a serious health problem". The material that has been submitted by the parties shows that the mass media paid considerable attention to both the American report and the report of the Norwegian Director of Health. Dr. polit. Karl Erik Lund, who has written about "The social basis for the general public's perception of the risks of smoking in the 1950s and 1960s", writes:

> "After 1964, the newspapers show that almost only representatives of the tobacco industry were of the opinion that the relationship between smoking and lung cancer was not yet proven."

(56) Notwithstanding that a great many cigarette smokers still did not take the consequences of the medical knowledge that the research revealed, it is my opinion that at least by 1964 consumers had received sufficient information on the injurious effects of smoking that any normal sensible person would have taken these into consideration when deciding how he wished to act. As I see it, there can be no doubt that after this point in time Robert Lund continued to smoke at his own risk.

(57) IV. Consequently, if Tiedemanns is to be strictly liable, then such liability must be linked to Robert Lund's smoking during the ten-year period prior to 1964. The question remains as to what knowledge most people at that time had about the connection between smoking and health damage. The information available at that time is far thinner.

(58) I begin by going all the way back to 1899, where we find an example of a general perception that tobacco was harmful to health in the Act relating to the Prohibition against the Sale of Tobacco to Children below 15 Years of Age. Moving on to the 1950s, the Journal of

the Norwegian Medical Association posed the question in an editorial in 1954 whether there was proof that cigarette smoking was a cause of lung cancer. It was stated that there appeared to be consensus among most members of the medical profession at that time that there had been a genuine increase in the rate of lung cancer in recent decades. There could however be other causes than smoking. Doctors were advised to "avoid making statements to the public and the press that could be interpreted to mean that there existed confirmed conclusions about the causes of lung cancer". At that point in time, almost three quarters of male doctors smoked daily.

(59) In his statement to the Supreme Court, Kjell Bjartveit states that he has studied the Journal from the entire 1950s. In 1956, two articles were published by Norwegian professors on smoking and lung cancer, which referred only to the relationship – not the causal relationship – and "the very greatest possibility" and "the presumed cause". In an editorial from 1958, the view was expressed that an extremely long period of observation would be necessary before we could learn whether smoking was harmful to the cardiovascular system. Strokes were not mentioned whatsoever. Bjartveit states that this Journal was probably the only scientific journal regularly read by the majority of Norwegian doctors during the 1950s. He states that during this period there was a total absence of any debate in the journal about lung cancer and cardiovascular diseases and smoking. "No letters to the editor, objections or protests from readers – such as we often see today when news breaks".

(60) One major source of information on the results of important research about the health of the population is statements to the general public from central health authorities. Firstly, such statements are formulated so that their contents are comprehendible to ordinary readers and listeners. And secondly, such statements are normally newsworthy, so that the mass media is generally quick to broadcast them to ordinary men and women.

(61) In Norway, the first public statement on the dangers of smoking appeared in the Director of Health's report in 1964. In his statement to the Supreme Court, Kjell Bjartveit expresses the view that this was due to the fact that the Director of health did not wish to convey "conclusions other than those that had received medical approval at any given time".

(62) After having reviewed what had been written about tobacco and health in newspapers and weekly magazines, professor Rune Ottosen summarises a number of the main features in his statement to the Supreme Court in the following main points:

"1. 1948-1954: Realisation about the health risks associated with smoking tobacco.

2. 1954-1958: Documentation and incipient mobilisation of anti-smoking campaigns.

3. 1959-1963: New documentation – campaigns and educational work.

4. 1964-1969: Mobilisation by health authorities and politicians – ambivalence to means.

The quantity of material on "tobacco and health" varied enormously during the period under examination. The coverage during the 1950s was sporadic, with a rise in the mid-1950s, whilst the quantity of material dropped until the beginning of the 1960s with a rise in 1962. The quantity of material increased in 1964, and that year is conspicuous as having the most extensive coverage."

(63) My overall impression of the material that has been submitted on the situation from the first half of the 1950s up to 1964 is that medical science at that time did not yet have reliable knowledge about the direct causal relationship between cigarette smoking and lung cancer and other serious health disease. As already mentioned, it would require a lengthy observation period before it was possible to draw unambiguous conclusions. Although we were coming towards the end, it was not possible during this period to draw conclusions with a sufficient degree of certainty. However, the material that gradually emerged provided clearer and clearer indications that there was indeed such a direct relationship.

(64) During the ten-year period immediately before any final conclusion could be drawn, the connection between smoking and health damage was not unknown to the average man or woman. However, in the absence of absolutely clear evidence, it was to a larger degree than later a matter of individual choice whether one wanted to believe what from time to time could be read or heard about the harmful effects of tobacco. And just as is the case now, it was completely up to the individual whether he chose to take the risk. The crucial factor for me is that already then it must have been generally known that smoking cigarettes *could involve a risk of serious damage to health* and that the risk of such damage at least to some extent would increase if the cigarette consumption was high. As I view the case, there is no need for a finer analysis of this issue.

(65) V. The question whether strict liability for damage should be imposed depends not only on a more detailed assessment of the different aspects of the risk of damage caused by the defendant's business or his products. It is necessary to make an overall assessment, where both regard for the parties in the specific case and more superior interests of a public policy nature must be taken into account. In Part II, I have already expressed my doubt as to whether all the aspects in the assessment of the risk of damage weigh in favour of strict liability, and I refer to my comments on the question of whether this risk was unexpected for the plaintiff. There are also elements in the final overall assessment that support this. In the following, I will mention four different factors, related to the issue of pulverisation of liability, the attitude of the public authorities, equal treatment of injured smokers and the subjective position of the parties.

(66) As already mentioned, the health risk associated with smoking cigarettes is not caused by any defect in the product. If it were, strict liability would enable the defendant to distribute – pulverise – the liability among several parties. In many cases, this kind of insurance or pulverisation way of thinking has served to justify the imposition of strict liability.

(67) Injury from tobacco has afflicted and will in the future afflict a large proportion of smokers. The statistics show that the number of people who develop various kinds of health disease each year is very high. Even though it normally takes a long time before such disease develops, cigarette smoking has now been the norm for a large proportion of the population for such a long time that a very large number of people have already been afflicted. In these circumstances, I have difficulty in finding that the opportunity to insure against or pulverise the costs can contribute to justifying the imposition of strict liability. It will hardly be possible to take out insurance. And it is not a viable alternative to let the manufacturers of tobacco products calculate into the retail price an amount to cover compensation payable to those who have suffered financial loss as a result of health damage caused by smoking.

(68) As already mentioned, experience has shown that a large proportion – indeed a very large proportion – of cigarette smokers are afflicted by various kinds of health disease, sometimes terminal. However, this often first occurs at a mature age and after prolonged smoking, and not as a relatively immediate consequence of smoking. This factor distinguishes the present case considerably from the case reported in Rt 1992 page 64 (the contraceptive pill case II), where the manufacturer of a contraceptive pill was deemed to be strictly liable towards a women who suffered a stroke. Women who used this pill could hardly know

whether they belonged to the risk group. The differences from our case are striking: in the contraceptive pill case, a "diminishingly small proportion of users" were affected. The reason why permission was given to market the pill was that it was deemed to have predominantly positive benefits. The position is entirely different for tobacco. I refer to the judgement in Rt 2000 page 915, which concerned the serious side-effects of using the Dispril drug, and where the Supreme Court stated that cases with rare side-effects coupled with a risk of serious harm were a particularly important group within the area of strict liability.

(69) The situation in the present case is that the regular use of a product that has no form of manufacturing defect has shown itself to have various harmful effects – some of a serious nature – which over time afflict a large number of people. As far as tobacco is concerned, we have seen that it took several decades before it was possible to establish conclusively that smoking caused serious damage to health. Despite current regulations on public food control, there is no guarantee that new research will not reveal similar health risks associated with the prolonged or excessive consumption of other products that are generally accepted today, but which are subsequently shown to contain harmful substances. It has long since been ascertained that the consumption of alcohol – at least above a certain amount – can be seriously damaging to health. It is my view that if non-statutory strict liability for damages should cover damage from tobacco, we would distance ourselves from the kind of risk of harm that this form of liability was developed to cover. A judgement imposing such liability on Tiedemanns would therefore extend the scope of this liability. Such an extension might pave the way for consequences which today are not easy to envisage.

(70) In my view, this impression is reinforced by the attitude of the authorities towards the health risks associated with smoking. The health consequences of smoking are an issue that has very much attracted the attention of the authorities. Particularly significant in this regard is the Act of 9 March 1973 no. 14 relating to Prevention of the Harmful Effects of Tobacco, and related government regulations. Damage to health caused by smoking imposes a substantial burden on the public authorities too, both on the health service and on the social services and social security system. Neither Norway nor other comparable countries have intervened by banning the sale and use of tobacco. Attempts have however been made to reduce its use through advertising bans, information – including on packaging – and tax duties. Thus, it has always been a case of the lawful sale of a product that is harmful to health. The imposition of strict liability in damages for the manufacturer that also includes injury caused by the regular use of non-defective products would in these circumstances be totally

contradictory to the acceptance by the authorities of tobacco as a lawful product. If such strict liability is to be imposed it ought in my view to be imposed by statute, and not by the judiciary in the absence of such legislation extending the scope of non-statutory strict liability for damages.

(71) As I see it and as I have already said, there cannot in any event be any question of imposing strict liability for damages for injury that can be traced back to the period after 1964. But even if we restrict ourselves to the period prior to that date, a very substantial number of smokers have suffered serious injury to health and died as a consequence of smoking. Many of these will have died a long time ago. The injuries of many of the survivors will have been diagnosed so long ago that any claim for damages must now be statute barred. Yet there remains a group of plaintiffs who could still claim damages. Mr Lund has argued before the Supreme Court that the total number of claims for damages is hardly likely to be large. Even though it is not decisive, my point here is that strict liability towards precisely this group of plaintiffs could appear somewhat arbitrary compared to the many people who both previously and subsequently have suffered from the harmful effects of tobacco and who have had to make do with the health care and social security benefits that society has managed to give them.

(72) The Court of Appeal concluded, referring amongst other things to this point, that the imposition of strict liability prior to 1964 could not satisfy any justifiable existing or future public need, and that time in a way "has run away from the problem". I see it in the same way.

(73) I find that the tobacco industry in Norway – and in the present case the manufacturer of Petterøes no. 3 roll-your-own tobacco – was at any given time reasonably well informed about the medical risks involved and about the on-going public debate concerning the possibility that smoking could cause injury to health. We are talking about a product that had been manufactured and sold legally for several generations. The requirements and expectations that consumers have today with respect to information about the potentially harmful properties of a product are not transferable to the situation as it was in the ten-year period prior to 1964. Thus, the subjective circumstances of the manufacturer do not weigh in favour of strict liability either. - Similarly, there is little reason today to reproach those who started smoking during that period of time. Both advertising and social influence made smoking both normal and socially acceptable. However, in the assessment of strict liability, it is nevertheless difficult to avoid pointing out that the question whether one wished to start

smoking remained a matter of individual freedom of choice. We are talking about the use of a natural stimulant, not food and even less a medical drug. And it was, as already mentioned, generally known that a large daily consumption of cigarettes did carry with it the risk of contracting serious health disease at a later date.

(74) As I view the case, it is not necessary to discuss in more detail the question of causation, including the relevance of addiction and limitation.

(75) Accordingly, the Court of Appeal's judgement – item 1 of the decision – is upheld.

(76) VI. The appeal has failed. The case has given rise to questions of principle that have not previously been determined by the courts. I find that costs should not be awarded for the proceedings before the Supreme Court, cf. the rule of exception in section 180 subsection 2 of the Civil Procedure Act, and that this ought also to be the case for the proceedings before the lower courts.

(77) I vote in favour of the following

JUDGEMENT:

1. The judgement of the Court of Appeal is upheld.

2. No award of costs for proceedings before the Supreme Court.

Mr Justice Støle: I agree with Mr Justice Flock both in the essence and in the result.

Ms Justice Utgård: The same.

Ms Justice Coward: Likewise.

Mr Justice Dolva: Likewise.

After voting, the Supreme Court pronounced the following

JUDGEMENT:

1. The judgement of the Court of Appeal is upheld.

2. No award of costs for proceedings before the Supreme Court.