Tobacco and Tort Liability[1]

Asbjørn Kjønstad

Abstract – Summary

The first Norwegian judgements regarding compensation for health damage caused by smoking have been made. The Supreme Court ruled that a bartender who was a smoker and who worked in a heavily smoke-filled discotheque, had the right to full compensation according to the Industrial Injury Insurance Act (Act of 16 June 1989 No. 65 relating to industrial injury insurance). The Orkanger District Court ruled that a smoker did not have the right to compensation from the tobacco producer since he could have stopped smoking in the 1960s.

When making a legal assessment of liability and compensation, the following facts relating to tobacco, the industry and the injured party are important:

(1) The risk of disease, disability and death associated with the use of tobacco products is very high. This risk has been seriously underestimated. In Norway, 7.500 people die each year from tobacco-related diseases, and 300–500 die as a result of passive smoking.

(2) Tobacco products contain nicotine and are not only psychologically and socially habit-forming, but also strongly addictive. The processes leading to addiction are similar to the processes forming addiction to drugs such as heroin and cocaine.

(3) Addiction and health damage occur when tobacco products are used in the regular manner, as intended. This is an important and unique characteristic of tobacco, unlike other substances and products such as alcohol, medicines, chemicals, cars, dangerous tools and other products that can cause damage.

(4) It is difficult to see that tobacco can have any positive effects for a smoker's quality of life – apart from being relaxing and stimulating for those who are addicted.

1 I wish to thank the following people for making important contributions to the Norwegian Official Report 2000: 16 (*Tort Liability for the Norwegian Tobacco Industry):* Nicolai V. Skjerdal, Erik Dybing, Karl Erik Lund, Tore Sanner and Vidar Birkeland.

(5) Addiction occurs shortly after a child or an adolescent starts smoking, whereas health damage can appear after 20–50 years. The stimulating and relaxing effects of smoking appear immediately after lighting a cigarette. Young people are more influenced by these effects and less concerned with what the future might bring. The industry has been aware of these characteristics of tobacco.

(6) The tobacco industry makes vast profits, whereas smokers and hospitals are burdened with tobacco-related illnesses and expenses. The people who benefit from this industry should also meet some of these expenses, and as the Norwegian law Professor Nicolaus Gjelsvik said: "Profit and risk go hand in hand."

(7) The tobacco industry has denied, cast doubt and minimized the impact of scientific proof concerning the serious health risks associated with tobacco.

(8) The tobacco industry has not informed consumers of the health risks and the risk of nicotine addiction associated with the use of their products. On the contrary, the industry intensified its advertising campaigns after the tobacco reports from the directors of public health in Norway and in the USA were published in 1964.

(9) The tobacco industry worked against the introduction of governmental measures aimed at safeguarding public health.

(10) The majority of those who are now contracting cancer and other diseases began smoking at an early age, prior to the introduction of the ban on tobacco advertising and prior to the health warnings given in 1975. Most of these people were not aware of the health damage and the strong nicotine addiction associated with tobacco products, and many have tried to stop smoking many times without success.

1 Introduction

1.1 The USA and Norway

During most of the 20th century, the tobacco industry was one of the most profitable and successful industries. The tobacco industry managed to convince half the population to buy large quantities of tobacco products on a daily basis, and this generated high incomes for the owners of tobacco factories and people who had shares in tobacco companies. However, from the mid 1900s, a series of counter-attacks came from medical science, and other groups followed. Large legal settlements resulting from the "tobacco war" have been awarded in the USA.

Lawyers, judges and other members of the legal profession have been – as is often the case – the last ones to enter the arena. However, they often have greater potential than others for enforcing important changes within society, including economic redistribution. They appear in an arena where the tobacco industry can be held responsible for some of the extensive health damages and for the high death rate resulting from tobacco use. After several decades of enormous profits,

the question now arises as to whether the industry should bear some of the economic losses that are associated with tobacco-related diseases.

In both the USA and Norway, tort law is built on common legal principles and practice, which are fairly similar when it comes to grounds for responsibility. Tort law permits taking social developments and new scientific evidence into consideration. As medical science during recent decades has provided progressively greater and more reliable knowledge concerning the negative effects of tobacco on health, the time has come for the judicial system to be involved.

This article is based on Norwegian law. However, facts from the tobacco industry and arguments used in tobacco cases in the USA can be of importance when analyzing legal claims for damages against the Norwegian tobacco industry.[2]

Contrary to what some lawyers from the tobacco industry seem to maintain,[3] it is not a question of "importing American tort law" into the Norwegian legal system. This article is based on common views held by Norwegian tort law scholars and the Norwegian Supreme Court regarding questions of negligence, no-fault liability, product liability, causal relationship and assumption of risk. A major issue here is the importance of these views in possible cases against the Norwegian tobacco industry.

1.2 Governmental Measures

In Norway, we have had four " phases" of legal measures to combat tobacco damage:

(1) *The Tobacco Act* came into force on 1 July 1975 and included a total ban on tobacco advertising, and a requirement for health warnings on tobacco products. The intention was to reduce the powerful influence of the tobacco industry and to use cigarette packages as a medium for spreading an opposing message from the health authorities.

(2) *The Smoking Act* came into effect on 1 July 1988 and provided protection against passive smoking. While Norway with the Tobacco Act was a pioneer and "a champion" at international tobacco conferences, we were not in the lead with regard to protecting passive smokers.

(3) A Regulation from 1989 banned new tobacco and nicotine products from being imported, produced or distributed in Norway. The purpose of this regulation was – like the Tobacco Act and the Smoking Act – to limit the damage to health caused by tobacco.

(4) Tort law issues are now beginning to be raised in Norway. The inspiration for raising such cases comes from the USA, a country that has otherwise been in the lead in relation to product responsibility and consumer protection. Raising

---

2 Nicolai V. Skjerdal, *Tobakksproduksjon, lovgivning og erstatningsoppgjør i USA*, NOU 2000: 16 pp. 129-220.

3 Magnus Hellesylt (lawyer for Philip Morris), *Kan fylkeskommunene kreve sykehusutgifter erstattet?*, Kommunal Rapport 16 mars 2000; and Harald Hjort (advokat for Tiedemanns Tobaksfabrik), *En annen røyk*, Dagens Næringsliv 11 april 2000.

the issue of tort liability for the tobacco industry is a continuation of the process of raising the issue of the liability of the asbestos industry and the producers of silicone breast implants. The issue involves the legal protection of smokers, their survivors and passive smokers, as well as of hospitals and others who primarily must bear the consequences of the damaging effects of smoking.

Norwegians and other Europeans do not regard all that comes from the USA as good, but not everything is to be rejected either. Concerning tort liability of the tobacco industry, in the USA comprehensive legal analyses of the problems have been made, and an extensive legal practice exists that we do not have in a small country like Norway. Approaches, arguments and solutions cannot be applied in Norway without modifications. Members of the Norwegian legal profession must carefully evaluate what is appropriate within a Norwegian cultural and legal context and within our social situation. This must be done before cases of tort liability are brought before the Supreme Court for a decision in principle.

1.3 Compensation for Diseases Related to Smoking

Use of tobacco is addictive, disease producing and deadly. The relevant question is whether or not those who are directly or indirectly affected by tobacco-related diseases and deaths can claim economic compensation for their losses.

Such compensation is provided today by public welfare schemes and private insurance schemes in the event of disease, disability and death. Important rights in this respect are:

Health care provided by general medical practitioners and community nurses, accommodation in nursing homes for patients suffering from stroke, and other primary health services provided according to the Municipal Health Services Act (the Act of 19 November 1982 No. 66 relating to municipal health services).

Health care provided by medical specialists, hospitals and other specialized health services according to the Specialized Health Services Act (The Act of 2 July 1999 No. 61, relating to specialized health services).

Treatment provided at the Norwegian Radium Hospital (Radiumhospitalet), rehabilitation centres and other state institutions. The work of the National Council for Tobacco and Health is also relevant here.

Benefits from the Norwegian National Insurance Scheme. About half of national insurance payments are related to disease, disability and death. These payments consist of sickness benefits, medical expenses, travelling expenses to obtain treatment and other health services, rehabilitation expenses, invalidity pensions, supplementary benefits, pensions for survivors, funeral benefits and other death-related expenses, and expenses relating to industrial diseases and injuries.

Private insurance companies also make payments for disease, disability and death. Private hospital insurance is not common in Norway, whereas private disability and death insurances are. In addition, we have a compulsory industrial injury insurance that covers industrial injuries, diseases and deaths.

The result is that public and private schemes and systems pay huge amounts of economic compensation for tobacco-related diseases and deaths. An

important question is whether the tobacco industry should also be held liable and made to bear some of the economic burden related to tobacco.

1.4 Main Categories of Lawsuits

1.4.1 Individual Lawsuits from Active Smokers

It is possible for an individual smoker suffering from a tobacco-related disease to sue a tobacco company. Since it usually takes 20–50 years from when a person starts smoking until a disease becomes manifest, these cases mostly involve people who started to smoke between the mid-1940s and the mid-1970s. Most of them were born between 1930 and 1950.

Some cases have already been brought before the Norwegian courts. The first case concerned Robert Lund, born in 1933, who started to smoke in 1953 and was diagnosed with lung cancer in 1996. Robert Lund died in October 2000, and the Orkdal District Court reached a decision in November 2000. The court found that a causal relationship between smoking and lung cancer exists, and that the basic conditions for the right to compensation according to non-statutory no-fault liability were fulfilled. However, Tiedemanns Tobacco Factory was acquitted, since Robert Lund was considered to have accepted the risk when he did not manage to stop smoking in the 1960s. This case will be dealt with by the Appeal Court in February 2002.

The next case was brought to court by Asgeir Storvand. His case will most likely be heard in the Oslo City Court in March 2002. Storvand was born in 1942 and began to smoke when he was 15 years old. Between the age of 51 and 52 he suffered three strokes. His doctors are of the opinion that these strokes can be traced back to his smoking. Storvand started to smoke before the ban on advertising and the requirement for health warnings came into effect in 1975.

A third case was brought before the Oslo Conciliation Court in April 2000. A woman started to smoke around the age of 18, and she was granted a 50 per cent disability pension when she was 58 years old. She suffers from brittleness of the bones and a chronic lung disease. According to a medical certificate, it is highly probable that smoking caused the brittleness of her bones and certain that it caused her lung disease.

Four or five other cases involving active smokers are currently in the process of being dealt with by the Norwegian legal system. Principal verdicts from the Supreme Court concerning smokers' right to compensation from the tobacco industry for smoking-related diseases are expected within the next two to three years.

1.4.2 Individual lawsuits from passive smokers

During the 1980s, several research reports were published concerning the damaging effects of passive smoking. The Norwegian Smoking Act, which prohibits smoking in public buildings and workplaces, was prepared during the mid 1980s and came into force in July 1988.

Many lawsuits against the tobacco industry have been brought to the courts in the USA regarding the industry's liability for health damage caused by passive smoking. In Scandinavia, some passive smokers have claimed compensation from public and private industrial injury insurance schemes.

A Swedish case involving public industrial injury insurance concerned a woman who was diagnosed with lung cancer after having worked in a very smoke-filled architect's office. She worked for 14 years in a large room with eight or nine other people of whom five or six smoked continuously during working hours. She had never smoked herself, but had been exposed to passive smoking in her childhood and also by her husband. Her cancer was a typical smoking-related cancer. The Swedish Insurance Court decided that there was a causal relationship between the damaging influence of her working environment and her illness and subsequent death, and it awarded her relatives compensation in a decision from 1985.[4]

The following case in Norway relates to private industrial injury insurance.[5] A 41-year-old woman was diagnosed with lung cancer after having smoked for 20 years. This woman worked as a bartender in a very smoke-filled discotheque in Stavanger for 15 years. She sued her employer's insurance company (industrial injury insurance) for compensation. Two medical experts, appointed by the court, made an assessment of the degree to which her active smoking and her passive smoking could be said to have contributed to her lung cancer. They concluded that her active smoking had contributed to a maximum of 60 per cent, while her passive smoking had contributed to a minimum of 40 per cent. The Appeal Court decided that her passive smoking could not be regarded as insignificant. A causal relationship was therefore declared to exist between the damaging influence of her working environment and her disease (see point 5.3 below). However, compensation was reduced by 25 per cent to take account of her own contribution. The issue of contribution was appealed to the Supreme Court, where a decision from October 2000 gave her the right to full compensation. As a matter of principle, it is of considerable importance that the Norwegian Supreme Court gave full compensation to an individual who suffered from disease as a result of passive smoking.

1.4.3 Claims from Relatives

When a smoker or a passive smoker dies as a result of a tobacco-related disease, the question arises as to whether the relatives can claim compensation for the loss of provider.

The possibilities of winning such a case will normally be the same as if the deceased had claimed compensation. However, the question of the injured party's contribution and assumption of risk can be somewhat different (see point 6.2 below).

---

4 Asbjørn Kjønstad, *Retten til å puste i røykfri luft*, Lov og Rett 1986 pp. 205, on pp. 208-209.

5 Nicolai V. Skjerdal, *Kan en røyker kreve erstatning på grunn av røykfulle arbeidslokaler?* Lov og Rett 1999 pp. 193-194.

1.4.4 Class Actions

In the USA and some other countries, a lawyer representing a large group of anonymous injured parties can claim damages on behalf of the group. The most important case is the Engel case, where a class action case on behalf of half a million people with smoking-related diseases and their relatives resulted in an award of USD 150 billion. The tobacco industry has appealed this decision.

Norway does not permit class actions. Therefore, each individual case must be judged separately. However, several cases can be dealt with simultaneously in court, for example, claims from workers and others who have been diagnosed as having smoking-related diseases as a result of having been exposed to tobacco smoke in the same environment.

1.4.5 Claims from the State

The state incurs expenses in the following ways:

(1) payments from the Norwegian National Insurance related to smoking-related diseases

(2) payments from other state institutions related to smoking-related diseases.

The Norwegian National Insurance incurs large expenses for health services, sickness payments, rehabilitation benefits, invalidity pensions, pensions for relatives and payments for industrial injuries related to tobacco. On the other hand, it saves expenses on retirement pensions, since smokers usually die earlier than non-smokers. Should deductions be made for this "advantage" according to the principle *compensatio lucri cum damno?*

There is, of course, no political goal in Norway that people should contract diseases and die as quickly as possible after reaching retirement age. On the contrary, the aim of the social security system is to give people a good and economically secure old age, where they can enjoy their well-earned leisure.

It is not necessary to go more closely into the question of what the National Insurance loses and gains from smoking, since its right to recourse was abolished (exception with intent) in 1971. An important issue is whether this principle should be used analogously or antithetically in respect to other welfare schemes. There are good arguments to support the view that the common principle of the right to recourse and access to compensation also apply to other welfare arrangements in addition to the Norwegian National Insurance.[6]

When it comes to expenses for tobacco-related diseases covered by the regular national budget, there is no statutory provision against the right to recourse. The tobacco industry maintains that state income from tobacco taxes weighs against such liability. On the other hand, taxes on tobacco are paid for by the consumers, and not by the tobacco industry. Furthermore, tobacco taxes are not earmarked for preventive work and the treatment of smoking-related diseases, but are general taxes which the state can use as it wishes. And nobody can be absolved from liability because they pay taxes.

---

6 Nicolai V. Skjerdal, *Fylkeskommunenes adgang til å søke erstatning for utgifter til å behandle tobakksrelaterte skader og sykdommer*, NOU 2000: 16 pp. 299-330.

Another issue is whether or not the state can be seen as having assumed the risk.

It could be maintained that the state has not used its legislative competence to ban the production, import and sale of tobacco. As long as tobacco was an agricultural product, this was not of importance. At the time when people started to become aware of the damaging effects of tobacco use, based on scientific evidence, such a large part of the population was already smoking regularly that a ban would have been impossible to enforce. This would have led to extensive smuggling, such as occurred when alcohol was banned during the inter-war period, and to private tobacco cultivation, such as occurred during the Second World War.

It was more realistic in the post-war period to focus on a policy that aimed at limiting the health damage caused by tobacco. The Tobacco Act of 1973 was originally called the Act Relating to Restrictive Measures Regarding the Distribution of Tobacco Products. Section 1 of the Act has not been changed and states: "The purpose of this Act is to limit the health damage caused by tobacco." This indicates how seriously the authorities regard the health risks associated with smoking.

It is noteworthy that Norway earlier and more actively than other countries has used legislation, tax policies and other state measures to reduce the use of tobacco. The tobacco industry has almost always tried to stop or delay new state measures aimed at reducing the use of tobacco and safeguarding public health. The industry has done this by denying and minimizing health risks associated with the use of tobacco.[7] Besides this, the industry has not only omitted to inform consumers of the health risks, but has also increased tobacco advertising, which has contributed to undermining the information given by the state and other organizations.[8] Of particular importance is the fact that the tobacco industry (at least in the USA) knew about the strongly addictive character of nicotine as early as the beginning of the 1960s, whereas the health authorities first knew about this in the late 1980s.[9] It seems inconsistent if the tobacco industry should then be freed from liability by claiming that the State has not used sufficiently strong measures against tobacco.

1.4.6 Claims from Hospital Owners

Court cases involving considerable sums of money can occur in Norway if any of the county authorities, in their capacity as hospital owners, decide to take action against the tobacco industry, and claim compensation for the treatment of tobacco-related diseases. This would be similar to the hospital cases raised by the states in the USA. Huge settlements were awarded, making the tobacco

---

7 Biørn Bogstad, *Rapport om tobakksindustriens høringsuttalelser til lover og forskrifter*, NOU 2000: 16 pp. 599-606.

8 Karl Erik Lund, *Meningsinnhold og effekter av tobakksreklame*, NOU 200: 16 pp. 535-583.

9 Tore Sanner, *Utviklingen av tobakksprodukter – fra enkle landbruksprodukter til høyteknologiprodukter*, NOU 2000: 16 pp. 45-77; og Erik Dybing, *Når ble de ulike helseskadelige og avhengighetsskapende virkninger av tobakksforbruk fastslått vitenskapelig og publisert i sentrale skrifter*, NOU 2000: 16 pp. 98-107.

industry pay USD 250 billion to cover hospital expenses for all 50 states. It is interesting that Minnesota, with a population of 4.2 million, the same as Norway, received USD 6.1 billion in payments. It has been estimated that about 7 per cent of health expenses in the USA are caused by tobacco-related diseases.

In the USA, arguments related to the theory of unfounded enrichment have been used: When tobacco causes diseases that necessitate treatment, and when the tobacco industry has vast profits, it should also bear the costs related to smoking. It is considered unreasonable that ordinary taxpayers and insurance holders should bear these costs. Furthermore, economic compensation from the industry could be used to increase the capacity in hospitals.

It is unreasonable for the industry to claim that hospitals have assumed the risks associated with smoking. Hospital owners have little influence over people's smoking habits and it is not their job to conduct preventive health work. However, some hospitals do offer treatment for smokers who want to stop. Most patients come to hospital when they have a serious disease, and the hospitals have an obligation to accept patients for treatment.

With regard to the right to compensation for hospital owners, it has been pointed out that they receive significant contributions from the state, and that the state itself has considerable revenue from tobacco taxes. The same arguments can be used here as were used for the State (see point 1.4.5 above). In addition, the county authority and the State are two different legal persons. Liability to pay compensation to one of them cannot be met by making payments to the other.

The cost of providing hospital treatment for smoking-related diseases in 1998 was estimated to be NOK 2.3 billion.[10]

1.4.7 Claims from Municipalities

Health services provided by the municipalities include treatment provided by general medical practitioners and physiotherapists, and accommodation in nursing homes for patients suffering, for example, from strokes.

Like the county authorities, the municipalities are legal persons, and they also receive contributions from the state to partly cover health care expenses. The municipalities have a duty to provide necessary health care according to the Municipal Health Services Act section 2-1. The legal position of the municipalities is the same as that of the county authorities.

1.5 Against Whom can Claims be Directed?

There are four tobacco companies in Norway: J.L. Tiedemanns Tobacco Factory AS (J.L. Tiedemanns Tobaksfabrik AS), Conrad Langaard AS, Gunnar Stenberg AS and A. Asbjørnsens Tobacco Factory AS (A. Asbjørnsens Tobaksfabrik AS). The two tobacco factories are members of the Association of Norwegian

10 See calculations made by Knut Ringen, *Statens helseundersøkelser og SINTEF Unimed*, NOU 2000: 16 pp. 415-534.

Tobacco Factories (Tobakksfabrikkenes Landsforening), and all four companies are members of the Federation of Norwegian Tobacco Manufacturers (Tobakksindustriens Felleskontor).

With a market share of almost 80 per cent, Tiedemanns Tobacco Factory is the major tobacco company in Norway. For a long time it was a private company owned by the Andresen Family, but it is now a limited company. The company has also gone through some major organizational changes, and is now a subsidiary company of the Danish company Scandinavian Tobacco Company (Skandinavisk Tobakkskompani AS). The Andresen Family is a minority shareholder in this company.

A large proportion of the tobacco products sold in Norway are imported from the USA, the UK and other countries. The Norwegian judge Hans Petter Lundgaard has written some reflections on lawsuits against foreign tobacco companies. His main conclusion is that the applicable law will most likely be that of the home country of the plaintiff.[11]

1.6 Basic Conditions for Lawsuits

In order to carry out a successful tort lawsuit, the injured party will almost always need a lawyer who can prepare the factual and judicial basis for the case. It is important that the rules concerning free legal aid are practised in such a way that at least some injured parties can raise the first test cases without heavy personal financial burdens. Concerning the factual basis for the lawsuit, it is important to use medical experts to demonstrate the relationship between individual tobacco consumption and disease, disability and death.

The breakthrough in compensation lawsuits against the tobacco industry in the USA is the result of an enormous amount of internal documents that were released from the archives of the tobacco companies during the trials. In the process of assessing the liability of the Norwegian tobacco industry, we have had access to the American documentation and have found some of it to be relevant to Norway.[12] The Norwegian tobacco industry should make such documentation directly available to the Norwegian courts of justice.

2 The Culpa Norm (Negligence) and Damage Caused by Tobacco

2.1 Introduction

In the discussion about whether the tobacco industry can be held responsible according to the culpa norm (negligence), I shall explain the elements that legal

11 Hans Petter Lundgaard, *Søksmål mot utenlandsk tobakksindustri – internasjonal privatrett*, NOU 2000: 16, pp. 652-661.

12 Guro Birkeland og Vidar Birkeland, *Rapport fra gjennomgang av dokumentene i Minnesota Tobacco Document Depository*, NOU 2000: 16 pp. 607-618; og Vidar Birkeland, Pål M. Andreassen og Lars Duvaland, *Rapport fra gjennomgang av dokumentene i Guilford Depository*, NOU 2000: 16 pp. 619-625.

practice and legal theory take into consideration in a culpa evaluation. I shall also analyse the significance of these elements when it comes to evaluating whether the Norwegian tobacco industry has exercised sufficient care.

I will base my analysis on the legal practice of the Norwegian Supreme Court and on standard legal theory in Norwegian tort law.[13] Kristen Andersen's textbook from 1970 mainly refers to legal practice from the 1950s and 1960s. The book had considerable influence in the 1970s. Lawsuits filed today against the tobacco industry mainly relate to smoking that started at about that time, and it is important to consider whether the industry at that time acted in a defensible manner.

The culpa norm is commonly formulated with reference to the notion *bonus pater familias*. According to this standard, one compares the actions of a person causing damage with the way in which a normal, caring and reasonable man or woman would have behaved in a similar situation.

When deciding if an action meets the necessary criteria for the culpa norm, one must make a complete appraisal of the situation in which several factors are important. The task is then to identify and evaluate the factors that Norwegian courts usually take into account in culpa evaluations.

In some legal areas one will often – when facing a new case – be able to find earlier decisions from the Supreme Court that may be similar and therefore relevant to the current case. Such cases will usually be decisive in new cases. In the case of liability of the tobacco industry, there are no decisions that are directly relevant. From earlier decisions, however, certain conclusions can be made about what the courts usually attach importance to.

2.2 Ethical Considerations

Ethically unacceptable actions are nearly always regarded as negligent, while ethically acceptable actions are nearly always regarded as non-negligent.

Moral opinions differ within a society, and one must build on those that are commonly held.

Examples of such moral norms are that one should not lie, and one should not hide important information, either from people for whom it is relevant, or from the contracting party. Important factors in this regard, are that the tobacco industry has minimized the health risks of smoking and nicotine addiction, and has refused to accept scientifically proven knowledge.

The American tobacco industry acquired knowledge about health risks and nicotine addiction long before medical science and the health authorities did so.[14] This information was not passed on to the health authorities or to consumers.[15] This shows concealment that is clearly immoral and legally negligent.

---

13 Kristen Andersen, *Skadeforvoldelse og erstatning*, Oslo 1970; Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999; og Nils Nygaard, *Skade og ansvar*, Oslo 2000.

14 Nicolai V. Skjerdal, *Tobakksindustrien, dens forskning og produktutvikling*, NOU 2000: 16 pp. 131-157.

15 Nicolai V. Skjerdal, *Tobakksindustriens to ansikter*, NOU 2000: 16 pp. 158-177.

It is not entirely clear exactly what knowledge the Norwegian tobacco industry has had about its products, or at what time it obtained such knowledge. However, the industry must have been aware of some of the knowledge about health risks and nicotine addiction published in the reports of the directors of health in the USA, Norway and Great Britain, and in WHO reports and articles in the Journal of the Norwegian Medical Association.[16] In the 1950s, Professor Kreyberg published several important articles reporting the connection between smoking and lung cancer. As his research was sponsored by the Norwegian tobacco industry, they must have read his reports, articles and interviews.[17]

Information possessed by the industry must be compared with the information the industry has given to the public, through advertising and public debates, and to the authorities: the Ministry of Health and Social Affairs, the Norwegian Government and the Storting (the Norwegian parliament), in connection with new laws, regulations, tobacco taxes and other state measures.[18]

In the light of the studies that have been carried out, there is reason to believe that the Norwegian tobacco industry must have known more about its products and their effects than it has admitted to. Over the years there has been close communication between the Norwegian and the international tobacco industry. This is clear from the documents and letters that have been accessible in the tobacco archives in Minnesota in the USA, and in Guildford in Great Britain.[19]

Today, it is evident that the American tobacco industry has been aware of nicotine addiction for a long time and that the industry, through advanced product research, has developed several methods to optimize this effect on the consumer.[20] Until recently, this has been the industry's best kept secret, and we still do not know whether the American tobacco industry shared any of this information with the Norwegian tobacco industry. However, it seems most unlikely that the Norwegian tobacco industry has not known about the addictive effect of nicotine and the significance of added substances. Since Norwegian tobacco companies import and produce American cigarettes under licence, they must know about the ingredients and their purpose.

It should also be emphasized that, according to the culpa norm, it is not necessary for the injured party to prove that the Norwegian tobacco industry has had actual knowledge about health damage and nicotine addiction. It is sufficient to prove that this is *possible* or to prove that the industry *should have* acquired knowledge of the health hazards and nicotine addiction or *should have* realized that their products had such effects.

---

16 Erik Dybing, *Når ble de ulike helseskadelige og avhengighetsskapende virkninger av tobakksforbruk fastslått vitenskapelig og publisert i sentrale skrifter?*, NOU 2000: 16 pp. 98-197.

17 Leiv Kreyberg, *Lungekreftstudier*, Tidsskrift for Den Norske Lægeforening 79, 80-72, 1955 og 76, 67-72, 1956; og Dagbladet 1952.

18 Biørn Bogstad, *Rapport om tobakksindustriens høringsuttalelser til lover og forskrifter*, NOU 2000: 16 pp. 599-606.

19 See note 12 above. (NOU 2000: 16, Appendices 9 and 10).

20 Tore Sanner, *Utviklingen av tobakksprodukter – fra enkle landbruksprodukter til høyteknologiprodukter*, NOU 2000: 16 pp. 47-77; and Nicolai V. Skjerdal, *Tobakksindustrien, dens forskning og produktutvikling*, NOU 2000: 16 pp. 131-157.

2.3 Normal Behaviour

What is often taken into account in the grounds for a judgement is what is the normal course of action in the area where damage has been caused. The concept of *bonus pater familias* is applied in such cases. A person who acts as a good parent shall not be held liable, while a person who does not live up to this standard shall pay compensation for the damage he or she causes.

However, a person is not always held responsible when he or she fails to follow the normal course of action. Conversely, a person is not always freed from responsibility by following a normal course of action. The norms for ordinary behaviour can be "censored".[21]

The Norwegian tobacco industry cannot be excused by claiming that its products are equivalent to those sold in other countries. It must be demanded of producers, importers and sellers of normal consumer products that they must consider what precautionary measures are necessary in order to avoid damage occurring from the regular use of their products. In this respect, it is important to assess what the tobacco industry could have done to create less damaging products.

In the USA during the 1960s and 1970s, the tobacco companies carried out secret studies to develop less health-damaging cigarettes, and through these experiments they gained very detailed knowledge about how tobacco products affect the user. However, the leaders of the tobacco companies stopped this work. They feared the consequences if the authorities and consumers found out that the industry admitted that their products were health damaging. Instead, the industry chose to "refine" the nicotine and its addictive effect, and to intensify the marketing of its products.[22] If the Norwegian tobacco industry was involved in, or had knowledge of, this research carried out by the international tobacco industry, and still chose not to disclose this information, this must be regarded as grounds for liability.

2.4 Written Norms for Defensible Behaviour

In the debate on the liability of the tobacco industry, the question is currently being raised about whether the sale of legal products can carry liability. The reasoning seems to be that when the authorities have not forbidden the sale of a product that causes damage, compensation cannot be claimed for the damage as long as the tobacco companies have adhered to the laws currently in force. This argument has been used by the tobacco industry in the American lawsuits, and in Norway, the Norwegian tobacco industry and its lawyers have also put forward the "legal business" viewpoint.

It must be said at once that a product's legality cannot be used as a decisive argument against culpa liability. The injured party needs to be protected against indefensible and unacceptable business, even if the business is legal. The fact

---

21 See for example: Rt. 1950 p. 1091 ("rulledommen"); and Rt. 1959 p. 666 ("veivesen-dommen").

22 Nicolai V. Skjerdal, op.cit. NOU 2000: 16 pp. 147-157.

that a product can be sold legally does not mean that the normal standards of due care do not apply, or that the industry is granted immunity from culpa liability.

However, it must be stressed that in a tort law culpa evaluation, emphasis is placed on whether the person causing the damage has ignored legal rules and regulations governing defensible behaviour. When creating such norms, society has decided on what should be demanded of each individual with regard to other people's values: these norms then give good guidance for culpa evaluations. Such norms are often used in legal practice. In legal theory, Viggo Hagstrøm in particular has emphasized the importance of whether preventive regulations have been infringed.[23]

Important preventive norms have been included in the Product Control Act (Act of 11 June 1976 No. 79 relating to product control). The purpose of this Act is "to prevent a product from causing damage to health or the environment" (section 1). Section 3 outlines important principles regarding the duty to act with due care:

> "A person or a company who produces, imports, processes, sells, uses or in other ways deals with products that can cause the effects stated in section 1 shall exercise due care and attention and shall employ reasonable measures to prevent and limit such effects.
>
> A person or a company who produces or imports products has an obligation to acquire the necessary information to evaluate the risks for creating the effects mentioned in section 1."

According to this act, the tobacco industry has a general duty to prevent and limit health damage. In addition, it has an obligation to acquire information. It cannot excuse itself by claiming that it did not know of the health risks and of nicotine addiction.

2.5 Expert Opinions

Expert opinions are often used in tort lawsuits. This expertise can be important in order to bring the facts to light. Here we shall look at cases where experts have assessed whether the actions of the person who has caused damage can be regarded as negligent or not.

It is clear that expert opinions regarding negligence are not binding on the judge. The experts evaluate actions based on what they, as experts believe should be demanded in a specific area. The judge can then choose how much importance to attach to these evaluations, but he or she must also take other factors into consideration in the tort law culpa evaluation according to legal practice and theory.

Importance is often attached to expert opinions in legal practice. An example of this is found in the "film case" (Rt. 1958 p. 984). A company had several films to dispose of, and these were placed on the property of a gardener. He burned the films, and this caused a fire in a nearby factory. The question was

23 Viggo Hagstrøm, *Culpanormen*, Oslo 1981.

raised about whether the company had liability for damages, since its employees had acted negligently when disposing of the films. The Oslo Fire Department and the State Film Technical Board stated that the films had been disposed of in a seriously negligent manner. The Supreme Court stated:

> "The court is aware of the fact that these expert institutions probably have a more stringent view about how film should be handled than an ordinary person would have. These statements are mentioned, because they clearly show, in the same way as the film regulations, that film must be treated with great care."

Cigarettes and other tobacco products not only represent a fire hazard, but also most importantly, a health hazard. Expert opinions concerning the health risks of the use of tobacco, and what the industry could have done to eliminate or reduce such risks, will be central in lawsuits against the industry.

2.6 Alternative Behaviour

Nils Nygaard has stressed the importance in a culpa evaluation of whether the offender could or should have acted differently.[24] He also stresses that a person with the potential to cause damage has an "obligation to think", meaning an obligation to be aware of, or make himself aware of, the relevant facts in the situation. This also includes an obligation to consider the prognosis, that is to assess possible future damage.[25]

A major issue in tobacco cases will be whether the industry could have acted in a different manner from the way in which it acted. This is particularly relevant after the first medical reports were published in the 1950s. The industry has had sufficient time to evaluate the situation in the years that have followed. As it became more and more clear that the damaging effects of smoking were enormous, stricter and stricter demands should have been placed on the tobacco industry.

One of the relevant issues is whether the industry should have developed less health damaging and addictive cigarettes. Filter and "light" cigarettes have not met this requirement: on the contrary, they have contributed to the maintenance of the level of tobacco consumption and thus health damage. This is because the new cigarettes are smoked in a different way to the way in which the old ones were smoked. Several studies have shown that smokers of low-tar and low-nicotine cigarettes smoke more cigarettes, inhale more deeply and block the air passages in order to satisfy their need for nicotine. The tobacco industry in the USA has been aware of this since the 1970s and has allowed smokers to "fool themselves".[26]

A key issue is whether the industry should have given more information to the authorities and to consumers about health damage and nicotine addiction. If the authorities had received more information about this, they could have used

---

24 Nils Nygaard, *Aktløysevurderinga*, Bergen 1973, in particular pp. 41 and pp. 233.

25 Nils Nygaard, *Skade og ansvar*, Bergen 2000 p. 172, see p. 204.

26 Tore Sanner, op.cit., NOU 2000: 16 p. 61.

different information strategies. Consumers could then also have received information much earlier.

2.7 The Potential Harm From an Activity

The greater the risk or the danger, the more caution must be shown. From the culpa evaluation view, it cannot be accepted that companies and citizens act in a way that can easily cause damage to people or to their assets.

It is not only the level of danger, but also the extent of potential damage that is decisive in the culpa evaluation. The economic impact of the damage is one issue. A more important issue is whether life and health are at stake. The more damage that is likely to occur, the more caution must be shown. In almost every legal decision, the level of danger is discussed.[27]

Considerable health risks are linked to tobacco use,[28] and therefore the demands placed on the industry must be strict.

The Norwegian tobacco industry cannot excuse itself by saying that it did not have the same knowledge of the health risks of smoking as the industry in the USA had. The investigation of the relationship between the Norwegian and the American tobacco industry in the Minnesota and the Guildford material[29] reveals that the industries in the two countries have communicated to a considerable extent.

It should at least be expected that the Norwegian industry has acquired the knowledge that has been published in medical journals and health reports. This particularly applies to reports from the health directors in Norway, the USA and Great Britain, and to WHO reports and articles in the Journal of the Norwegian Medical Association.

As mentioned in points 2.3 and 2.4, a person or a company who produces, imports, or sells a product is obliged to acquire the necessary information in order to evaluate any damaging health effects of the product. In this case this involves an obligation to study the matter fairly extensively.

2.8 The Benefits of an Activity

If an activity is unnecessary, or has little benefit, there is less tolerance for any risk of damage than if an activity is important. This kind of legal thinking can be found in section 3 of the Road Traffic Act (Act of 18 June 1965 No. 4 relating to road traffic), where it is stated that one shall drive “in such a way that other traffic is not unnecessarily hindered or disrupted.”

---

27 See for example: Rt. 1958 p. 984 (”filmdommen”); Rt. 1934 p. 204 (”kafétrappdommen”); Rt. 1950 p. 1091 (”rulledommen”); Rt. 1967 p. 697 (”Lierdommen”); and Rt. 1974 p. 41 (”stigedommen”).

28 Tore Sanner and Erik Dybing, *Helseskader ved aktiv og passiv røyking*, NOU 2000: 16 pp. 78-97.

29 NOU 2000: 16 Appendices 9 and 10.

It is difficult to see that tobacco can have any positive effects, apart from the short-term relaxaing and stimulating effects. Smoking does not cause any significant improvement in people's quality of life. It has been argued that tobacco taxes provide the state with considerable revenue, but without revenue from tobacco, it would have been possible to obtain revenue from taxes on other goods or services.

2.9 The Expenses Incurred by the Tortfeasor by Taking a Different Course of Action

An important issue is what the tortfeasor could have done to avoid causing damage. The tortfeasor has a duty to investigate and evaluate the situation, to give information and warnings about the potential risks, to supervise and control the activity and to implement safety measures.[30] A major aim of tort law is to prevent damage.

An issue that is often discussed in tort law cases is how much a potential tortfeasor would have had to have paid in order to eliminate or reduce damage (see point 2.6 regarding alternative behaviour in order to prevent damage). An example of this is the "forge case", referred to in Rt. 1947 p. 723. Some children entered an unlocked forge and one of the children used a hammer to strike the anvil, with the result that a four-year-old boy got an iron splinter in his eye. The boy was awarded compensation to be paid by the owner of the forge. In making the decision, the Supreme Court attached importance to the fact that the dangers in the forge "could have been eliminated or reduced with little cost, if the equipment had been locked up after work".

In tobacco cases, a key issue is to estimate the expenses and the other sacrifices associated with an alternative line of action by the tobacco industry. What would it cost to develop a cigarette that was less harmful to health? What would it cost to inform consumers about the health damage and nicotine dependence associated with smoking? Since these issues involve such important assets as health and duration of life, very stringent requirements must be demanded.

2.10 The Tortfeasor's Situation

Nils Nygaard has pointed out that the requirements that should be demanded of the tortfeasor, and the protection that an injured party should have according to tort law, will depend on the role expectations of the two parties:

> "If the tortfeasor holds a monopoly position with respect to the injured party, he will normally be faced with fairly stringent requirements. He has a power that the injured party more or less must accept. The weaker party has a need for legal protection; he should not be forced to give in to the stronger. [..]

30 Nils Nygaard, *Skade og ansvar*, Bergen 2000 pp. 194-195.

> A person who has expert knowledge compared to the other party must show particular consideration, for example, a lawyer towards a client."[31]

The tobacco industry has had far more information than consumers regarding the contents and the effect of tobacco. Since the Second World War, Tiedemanns Tobacco Factory has had a monopoly position in Norway.

2.11 Conclusions

The issue of whether the Norwegian tobacco industry can be held liable according to the culpa norm will partly depend upon the legal weight one chooses to give the various culpa factors, partly on the facts from tobacco cases in general and partly on the facts in each individual case.

In the legal evaluation, given the nature of the harmful effects of tobacco, a strict culpa norm is appropriate. Of particular importance are the serious risks to health and life associated with tobacco, and the way in which the industry has denied and minimized these risks. Furthermore, it would be considered very serious if the Norwegian tobacco industry has known about, and kept secret, the strong addictive effect of nicotine. The industry could have acted differently, without great losses, but at the risk of reducing their profits. It should have informed the authorities and the consumers about the health risks and the risk of nicotine dependence. It must be assumed that the industry had at least some knowledge of this.

On this basis there can be grounds for culpa liability of the tobacco industry.

The issue of whether or not smokers should loose their right to compensation because they themselves have contributed to damaging their health or to have assumed the serious risks associated with smoking, will be discussed in point 6.

3 Non-statutory No-fault Liability

3.1 Introduction

One of the arguments often used by the tobacco industry in its defence is that production, import and sale of tobacco products are legal. The argument is that when tobacco products are legal despite the proven harmful effects, then the industry should not be faced with liability "sanctions". The tobacco industry has, after all, not done anything illegal.

However, legality and liability relate in principle to two completely different issues. We have many legal activities and products in our society for which liability can be incurred in the case of damage, for example cars, medicines and explosives. When a drug causes unexpected side effects, the pharmaceutical company cannot defend itself by claiming that the product is legal.

With regard to no-fault liability, the issue is: Who should bear the economic consequences of an accident: the party causing the damage or the injured party?

---

31 Nils Nygaard, *Skade og ansvar*, Bergen 2000 p. 192.

The person causing the damage cannot be blamed for creating the risk of damage occurring or for the damage having occurred. The activity is legal.

To what extent one seeks to impose no-fault liability depends on an overall assessment of a number of factors. Kristen Andersen attached particular importance to the following factors:

> "Responsibility presupposes a constant and specific element of risk that has the following characteristic: that based on a statistical calculation, the activity from time to time will unavoidably result in specified accidents." … The risk situations must not have "the characteristics of sporadic, mutually independent single phenomena, but must, based on experience, appear as unavoidable consequences of a constant activity or arrangement."[32]

A relevant case from recent legal practice is the "contraceptive pill case II" (Rt. 1992 p. 64). A pharmaceutical company was held responsible on objective grounds. This is an important decision, and the pharmaceutical industry and the tobacco industry have certain elements in common. Both industries have highly technological industrial products that have been developed during the 20th century. But whereas pharmaceutical products aim at preventing disease and easing pain, tobacco products do not have such positive purposes; they are only stimulating and relaxing for those who are addicted. Pharmaceutical products have certain side effects, but tobacco is one of the most disease-producing and addictive products of our time.

It is often said that great importance is attached to the element of risk when no-fault liability is to be determined. This is correct; however, it does not give much guidance. The problem is to determine what types of risk weigh in favour of liability of the tortfeasor and what types of risks weigh against.

3.2 A constant Element of Risk

The Supreme Court has emphasized in several no-fault liability decisions that a constant risk of damage existed.[33]

The business that the tobacco industry is running, is a permanent business. Health risks and addiction related to smoking are constant dangers to which smokers and potential smokers are exposed. Smoking often starts at a young age. The decisions mentioned in footnote 33 concern children who have been exposed to permanent risks. The industry also creates the constant need for county authorities and municipalities to provide services for smoking-related diseases.

---

32 Kristen Andersen, *Skadeforvoldelse og erstatning*, Oslo 1970 p. 322.

33 See for example: Rt. 1905 p. 715 ("vannledningsdommen"); Rt. 1909 p. 851 ("knallperledom I (jernbanen)"); Rt. 1917 p. 202 ("knallperledom II (fløtningsforeningen)"); and Rt. 1940 p. 16 ("høyspentmastdommen").

3.3 Degree of Risk and Damage

For no-fault liability, the risk must be of a certain degree. It must at least be greater than the risk the injured party is exposed to in everyday life.[34]

In many cases, statistics are used to show how often certain types of accidents occur. In the "contraceptive pill case II" (Rt. 1992 p. 64), the question was raised as to whether the pharmaceutical company should be held responsible for a 23-year-old woman suffering a cerebral thrombosis, losing her ability to speak and becoming paralysed. It was estimated that the risk of cerebral thrombosis was doubled by the use of the contraceptive pill (p. 75). Regarding the grounds for liability the Supreme Court stated (p. 79):

> "The considerations supporting no-fault liability in this case are to a large extent the same considerations that have led to non-statutory no-fault liability in other areas. Risk is created when new products are developed. It is difficult for the user to know whether he or she is in a high risk group. Although the proportion of users who are harmed is minimal, for those who are, the results can be disastrous. The reason why the contraceptive pill is allowed despite the risks, is because it is considered to have predominantly positive value for the many women who use it. On this basis, it can be maintained that the losses of the few people who suffer catastrophic consequences should be met by the manufacturer, who can calculate this as an expense. As already mentioned, there is no case law from similar cases of relevance to the decision in this case. However, I wish to refer to the decision in the smallpox vaccination case (Rt. 1960 p. 841). The state, which had made smallpox vaccination compulsory, was held to be liable, but the reasoning about the nature of the risks, on which the decision was based, has a certain relevance in our case."

It was stated here that "the proportion of users who are harmed is minimal". In other words, the risk is extremely small. The pharmaceutical firm was nevertheless held to be liable. The product involved a risk one would not normally be exposed to in everyday life. In addition, the consequences could be disastrous; the ability to cause harm was large.

Sometimes, it is clear that the damage that has occurred was an isolated incident and not the outcome of a risk that, based on experience, inevitably leads to specific injuries from time to time. One example, where the damage came as "a bolt from the blue"[35], is the "steel-wire case" (Rt. 1933 p. 475). A father and his son were marking the boundaries for a ditch with steel wire. The wire broke, flew into the air and touched an electrical high-voltage cable. The boy was hurt, but did not receive compensation from the electric company. The Supreme Court based its decision on the fact that the accident must "be regarded as such a unique and unpredictable incident that it is unreasonable that the electrical company should be held responsible for the accident".

When the health risks associated with the use of tobacco lead to health damage, this does not involve isolated incidents, but significant risks that will

---

34 See for example: Rt. 1966 p. 1352 ("svingdørdommen"); Rt. 1960 p. 429 ("tuberkulose-smittedommen"); and Rt. 1960 p. 841 ("koppevaksinasjonsdommen").

35 Kristen Andersen, *Skadeforvoldelse og erstatning*, Oslo 1970 p. 314.

inevitably lead to disease, disability and death from time to time. There is a wealth of scientific evidence about the size of these risks, and this evidence will be important in liability cases filed against the tobacco industry. The risks of disease, disability and death which we are exposed to from smoking are far greater than those which we are exposed to in our everyday life. The risk of lung cancer is ten times as great for those who smoke, the risk of cancer of the oesophagus is five times as great and the risk of heart disease is more than doubled.[36] This can be compared to the "contraceptive pill case II" where use of the contraceptive pill doubles the risk of having a cerebral thrombosis.

Most of the factors mentioned in the "contraceptive pill case II" are also relevant in connection with health damage from smoking. The risks from smoking have not been reduced with new high technology products.[37] It is difficult for smokers to know whether they belong to a high risk group. The consequences for those who suffer from smoking-related diseases and deaths are catastrophic.

In the "contraceptive pill case II", it was pointed out that the pill is "considered to have a predominantly positive value for the many women who use it". The same can hardly be said of tobacco. True, tobacco can be relaxing and stimulating, but smoking has first and foremost persisted because nicotine is strongly addictive. In addition, the combined negative health effects of smoking are extensive for most smokers.

It was also pointed out in the "contraceptive pill case II" that "the proportion of users who are harmed is minimal". The situation is entirely different for smokers. But the Supreme Court pointed out that the outcome could be catastrophic. The ability to cause harm was therefore considerable and the risks were greater than those encountered in everyday life. In this respect, the situation is the same as for smoking.

3.4 Is the Element of Risk Distinct/Typical?

The fact that a risk is typically associated with a specific product is an argument for no-fault liability.

If similar accidents are just as likely to occur in connection with almost every other business and its products, then this would be an argument against no-fault liability.[38]

The risk of lung cancer is typical for smoking. The risk of many other diseases is also typical for smoking.[39]

---

36 Tore Sanner and Erik Dybing, *Helseskader ved aktiv og passiv røyking,* NOU 2000: 16 pp. 78-97.

37 Tore Sanner, *Utviklingen av tobakksprodukter – fra enkle landbruksprodukter til høyteknologiprodukter*, NOU 2000: 16 pp. 47-77.

38 See for example: Rt. 1948 p. 719 ("bøyledommen"); Rt. 1955 p. 46 ("trekløverdommen"); Rt. 1960 p. 841 ("koppevaksinasjonsdommen"); and Rt. 1939 p. 766 ("gesimsdommen").

39 Tore Sanner and Erik Dybing, *Helseskader ved aktiv og passiv røyking,* NOU 2000: 16 pp. 78-97.

In the Engel case in Florida, the jury concluded that there is evidence that at least 20 diseases are caused by smoking. Among these were cancer of the lung, throat, tongue, kidneys and bladder, emphysema of the lung, stroke, heart diseases and pregnancy complications. When estimating the health expenses of private health insurance in the USA, 19 disease categories were considered to be smoking-related.[40]

3.5 Is the Element of Risk Extraordinary?

In the "cornice case" (Rt. 1939 p. 766), it was pointed out that the element of danger was not only distinct, but also extraordinary. The concept of an "extraordinary element of danger" is to some extent similar to the concept "of a distinct element of danger", but it also indicates that the risks must be of a certain magnitude: greater than the risks in everyday life. It can also mean that it involves risks that are new, unexpected, unusual and unforeseen by those who are potential victims. Such new risks arose in connection with the technical developments that took place a century ago in Norway. Since it was difficult for people to adapt to such new risks, this gave rise to no-fault liability for enterprises in Norway.[41]

In the "contraceptive pill case II" (Rt. 1992 p. 79) it is stated that: "Risk is created when new products are developed. It is difficult for the user to know whether or not he or she is in a high risk group".

When emphasis is put on the fact that the risk is constant, considerable, distinct and typical (see points 3.2, 3.3 and 3.4), the evaluation is made from the perspective of the tortfeasor; whereas the question of whether the element of risk is extraordinary is evaluated from the perspective of the injured party.

For most of the people who started to smoke in the 1950s and 1960s, the probability of lung cancer and other diseases seemed non-existent or very small. Smokers were exposed to an extraordinary risk of which the population at that time had insufficient knowledge. For a long time, the Norwegian medical profession was both critical and sceptical of the international research results regarding the damaging effects of tobacco.[42] As a result, most people did not obtain reliable information about these matters. Furthermore, attempts to spread information in the 1950s and 1960s were partly undermined by the intensive advertising of the tobacco industry and the industry's use of increasingly sophisticated measures.[43]

When tobacco was introduced and during many of the subsequent years, it was regarded as a natural product and a stimulant. When the first research results about the health dangers of smoking appeared in the 1950s, it became clear that tobacco was a danger. It was even clearer for the tobacco industry when it learned about the highly addictive nicotine effect. With the change from being

40 NOU 2000: 16 pp. 198-199 and pp. 425-427.

41 Rt 1874 p. 145 ("bølgeslagdommen"); and Rt. 1875 p. 330 ("nitroglyserindommen").

42 Karl Erik Lund, *Utviklingen av tobakksforbruk og røykevaner i Norge i etterkrigstiden*, NOU 2000: 16 pp. 108-127.

43 Karl Erik Lund, *Meningsinnhold og effekter av tobakksreklame*, NOU 2000:16 pp. 535-583.

an agricultural product to becoming an industrial product, tobacco represented new dangers. The introduction of filter cigarettes and "light" cigarettes made people believe that smoking such cigarettes was safer than it is in reality. This can be seen as a new danger, or at least an underestimated danger.

3.6 The Likelihood of Damage Occurring

A tortfeasor will often have a greater opportunity to be aware of the potential risks of his activities than the potentially injured person. This is particularly the case when the tortfeasor mass-produces a product and the potentially injured person is an ordinary consumer. The tortfeasor could have foreseen that damage would occur, and this supports the argument for liability.[44]

From the mid-1950s, the likelihood of tobacco smoking leading to disease or death has been increasingly acknowledged. Even if one could not find grounds for blaming the tobacco industry for continuing to produce and sell tobacco products, it could still be held responsible on the grounds of no-fault liability.

3.7 Technical Failure and Technical Imperfection

Technical failure or imperfection cannot be regarded in themselves as conditions for no-fault liability. However, such failure or imperfection can be factors which support no-fault liability.

It can be maintained that tobacco products are imperfect or unsafe, since ordinary use of these products leads to considerable health damage and serious nicotine addiction. These are important factors in determining product responsibility (see point 4), but they can also be of importance in connection with non-statutory no-fault liability.

3.8 Is it Reasonable to Hold the Tortfeasor Responsible According to an Evaluation of Interests?

There are several decisions where the Supreme Court has evaluated the business interests of the person causing damage.[45]

An important factor when evaluating the responsibility of the tobacco industry is that the industry has made a considerable profit from the sale of its products, and it is thus reasonable that it should bear (some of) the costs and the disadvantages related to the use of tobacco. "Profit and risk go hand in hand."[46]

---

44 See for example: Rt. 1909 p. 851 ("knallperledom I (jernbanen)"); Rt. 1939 p. 766 ("gesimsdommen"); and Rt. 1940 p. 16 ("høyspentmastdommen").

45 See for example: Rt. 1874 p. 145 ("bølgeslagdommen"); Rt. 1955 p. 46 ("trekløverdommen"); Rt. 1960 p. 841 ("koppevaksinedommen"); Rt. 1939 p. 766 ("gesimsdommen"); and Rt. 1969 p. 109 ("løftekrandommen").

46 Nicolai Gjeldsvik, *Innleiing i rettsstudiet*, Femte utgave, Oslo 1968 p. 170 and pp. 199.

During most of the 20th century, the tobacco industry has made the decisions about how cigarettes should be produced: the use of filters, the nicotine content, additives, the amount of tar, etc. The industry has had far more options to prevent the considerable health hazards relating to tobacco than consumers have had. These are important points that support no-fault liability for the tobacco industry

If it is possible for the tortfeasor to distribute the loss among others, it will be easier to hold him to no-fault liability. Distribution of the loss can be achieved by considering the loss as a production cost, increasing the purchase price or by taking out insurance.[47]

In the "contraceptive pill case II", emphasis was placed on the fact that the pharmaceutical firm could have reduced the loss: "On the basis of this, it can be maintained that the producer, who can regard this as an expense, should cover the losses incurred by the few people who suffer catastrophic consequences." (Rt. 1992 p. 64, on p 79.)

In respect to health damage resulting from the use of tobacco, it is easier for the tobacco companies to spread the economic losses than it is for the injured parties to do so. For the individual, the losses can be enormous; for the tobacco industry, there are several ways to spread their costs over many people. One possibility is to increase the prices of tobacco products. Another possibility is to reduce the amount of dividend paid out on shares, or to reduce other kinds of income for the factory owners. A third possibility is to reduce running costs. It seems unreasonable that the tobacco industry should spend large sums on marketing, with the aim of increasing sales, and large sums on lobbying, with the aim of preventing public measures to combat the health risks from smoking, but that they should not be made to pay compensation to the people who suffer from ill-health as a result of smoking.

3.9 Conclusions

With respect to whether or not liability should be imposed on non-statutory no-fault grounds, several factors are taken into account. Important factors relate to the risk that has been created and to whether it is reasonable to hold the tortfeasor liable. These factors clearly point towards the possibility of holding the tobacco industry liable. The production and sale of tobacco products represent a constant, considerable, typical, extraordinary and forseeable risk of strong nicotine addiction and serious health damage. It is more reasonable that the tobacco industry should bear the economic consequences of this than the individual who suffers the health consequences. The industry makes huge profits and has the possibility to spread its economic losses.

The issue of whether or not smokers should loose their right to compensation because they themselves have contributed to damaging their health or to have assumed the serious risks associated with smoking, will be discussed in point 6 (see especially point 6.4).

---

47 See for example: Rt. 1940 p. 16 ("høyspentdommen").

4 Product Liability for the Tobacco Industry

4.1 Introduction

An important issue is whether or not the tobacco industry, in its capacity as producer, importer and seller, can be held liable for the health damage resulting from the use of tobacco products. Three stages are discussed here:

(1) In Norwegian legal literature a comprehensive discussion has taken place about the seller's liability for dangerous or damaging characteristics of a product. The classic examples are poisoned animal feed that harmed the buyer's animals, a stone in a Danish pastry that caused damage to teeth, and soft drinks bottles that exploded and injured people in the vicinity. The issue was whether such incidents come under the provisions about compensation in the case of default in the Sale of Goods Act.

(2) Inspired by the legal developments in the USA and some European countries, the term "product liability" was introduced into Norwegian legal theory in the mid-1970s. At the time, it was not a question of introducing a new liability concept in addition to the culpa norm, non-statutory no-fault liability, the Sale of Goods Act, etc.

(3) The Product Liability Act of December 1988 came into force on 1 January 1989. Tobacco cases will involve people who started to smoke both before and after this date.

4.2 Liability for Dangerous Characteristics of a Product, According to the Sale of Goods Act

4.2.1 Legal Practice

The Sale of Goods Act of 1907 section 43 had provisions regarding "the purchase of products that are of a generic type". Section 43, third paragraph obliged the seller of a defective product to pay compensation "even if he is without blame".

An important decision (Rt. 1937 p. 323) is related to the tobacco industry, but not directly to our specific topic. A box factory bought white paraffin that was to be used in the production of tobacco packets. The paraffin was defective and caused damage to the packets. The buyer was given compensation for the damage and for losing a profitable contract with the tobacco company.

If defective packets had been used, and if the paraffin had led to health damage for the tobacco users, smokers could have claimed compensation as well. The gap is not wide between this and the health damage caused by tobacco products.

We also have a Supreme Court decision regarding the classical area of the sale of products of a "dangerous nature" (Rt. 1945 p. 388). A consignment of whale meat was sold as animal feed for foxes; the meat turned out to be poisonous, and it caused the death of several foxes. The seller was not held liable.

The Oslo City Court decided in a case in 1957 that the seller of a consignment of gramophone record sleeves should be held liable for damage to records caused by the glue used in the sleeves. The reason for the decision was that it involved "obvious damage caused by the only possible practical use of the product and in its close surroundings."

4.2.2 Legal Theory

Kristen Andersen stated that the seller would be found liable when the damaging characteristics of a product "are such that the product is dangerous when the buyer uses it according to the way in which the product is intended to be used".[48]

Karsten Gaarder reached a similar conclusion. He stated that the Sale of Goods Act section 43 should encompass "damage that is particularly obvious that occurs when a product is used as intended, and that is not of an unusual degree".[49]

Johs. Andenæs concluded that no-fault liability according to the Sale of Goods Act section 43 third paragraph does not apply to "risks that are of such an extraordinary and far-reaching nature, that, given the relationship between the parties, it would be unreasonable for the seller to bear the loss. In this assessment of reasonableness, consideration should be given to whether the seller should have envisaged that such risks were to be expected. There can also be grounds to take the seller's position into account. Although it seems unreasonable to hold a retailer liable for damage caused by a production fault in a product which he has sold, it is not certain that it is unreasonable for the *factory's* responsibility to go so far".[50] (our italics)

Ole Lund wished to establish a broad evaluation of fairness: "Is it fair that the seller should bear the loss, or should the buyer? When evaluating this, one must also take into account the parties' possibilities for insuring against loss. [...] I would [...] more readily suggest no-fault liability if the seller were a large factory, than if he were a small retailer. The producer is more in a position to bear the losses than the retailer, who has little or no influence on the nature of a product."[51]

The person who dealt with this issue in the greatest depth in Norway during the 1960s was Tore Sandvik.[52] He concluded that the damage caused by a product would, in principle, fall within the area covered by the Sale of Goods Act. The manner in which several decisions are expressed suggests that Sandvik regards the issue of the scope of responsibility as a question of adequacy. Responsibility "shall not include damage which is too remote or indirect, or that

48 Kristen Andersen, *Norsk kjøpsrett*, Oslo 1962 pp. 197-201.

49 Karsten Gaarder, *Forelesninger over kjøp*, Oslo 1960 p. 99, new edition, Oslo 1966 p. 93.

50 Johs. Andenæs, *Selgerens ansvar for farlige egenskaper ved den leverte gjenstand*, in: Andenæs, Avhandlinger og foredrag 1962 pp. 57-65, on p. 63.

51 Ole Lund, *Enkelte kjøpsrettslige spørsmål*, TfR 1963 p. 303, on p. 310.

52 Tore Sandvik, *Ansvar for skadevoldende egenskaper*, Norsk forsikringsjuridisk tidsskrift nr. 49, Universitetsforlaget 1964. Also published in: TfR 1964 pp. 503.

has an extraordinary extent, or that has occurred in such an exceptional manner that it does not have a reasonable association to the grounds for responsibility".

4.2.3 Health Damage Associated with the use of Tobacco

Disease and mortality associated with the use of tobacco cannot be said to be the result of remote and indirect risks or to have occurred in exceptional ways. On the contrary, health damage occurs when the buyer uses the product "according to the way in which it was intended to be used" (Kristen Andersen); damage occurs as a result of the buyer's normal use of the product.

It is often emphasized that what is special about tobacco products is that they cause disease, disability and death when used as intended. An American health minister once said: "Cigarettes are the only legal product that are deadly when used as intended."[53] Similar statements have been made by many other prominent persons regarding health and tobacco, among them, the Director General of the WHO, Gro Harlem Brundtland.

One problem with using the Sale of Goods Act is that basically it only regulates the relationship between buyer and seller. This article does not deal with the question of holding sellers liable, but holding the producers and importers liable. The statements by Andenæs and Lund (see point 4.2.2 above), however, indicate that it should be possible to make the liability also apply to producers. In 1974, the Sale of Goods Act from 1907 was given a new section 49 a, which gave consumers a certain degree of access to claim compensation from the person or company that sold the product to "the seller" (running recourse). There has been a tendency to accept claims such as this.[54] However, it is still doubtful whether the person who buys and uses cigarettes or other tobacco products can claim no-fault liability against the tobacco producers according to the Sale of Goods Act.

4.3 The Introduction of the Concept of Product Liability During the Mid-1970s

Three Norwegian articles and reports on product liability were published during the 1970s.[55] These were written immediately prior to and immediately after the Tobacco Act came into force, with its ban on tobacco advertising and its requirement for health warning labels. These articles and reports show that we were in a phase of dynamic legal development. Many similar articles, reports,

---

53 Dr. Louis W. Sullivan (Minister of Health in the USA in Ronald Reagan's period as president), *letter of 17 January 1990 to Reynolds Tobacco Company*.

54 See for example: Asbjørn Kjønstad, *I hvilken utstrekning kan misligholdsbeføyelsen gjøres gjeldende mot medkontrahentens hjemmelsmenn?* Jussens Venner 1978 pp. 166-189; and Stephan Jervell, *Misligholdskrav mot tidligere salgsledd*, Tidsskrift for Rettsvitenskap 1994 pp. 905-1010.

55 Peter Lødrup, *Produktansvaret*, Institutt for Privatretts stensilserie nr. 4, Oslo 1974; Ole Steen-Olsen, *Produktansvaret i norsk ret*, Norsk forsikringsjuridisk forenings publikasjon nr. 63, Oslo 1977; and NOU 1980: 29 (*Produktansvaret*).

and books on product liability were written in the USA and industrialized countries in Europe, including Denmark and Sweden.

Ole Steen-Olsen remarked that "it is easy to be convinced that the views that have motivated the development of no-fault liability also favour a broad producer responsibility in Norwegian law". He then discusses "development failure" and "system failure" (causes of damage that are known about, but unavoidable): "It is unlikely today that the courts will impose responsibility for production failure that is commonly accepted and which affects most users of the product, such as is the case with the use of alcohol and cigarettes."[56]

It appears that Steen-Olsen's reservation regarding freedom from responsibility with respect to the use of cigarettes relates only to system failure; responsibility could then be possible with respect to other types of failure. In addition, the statement relates to the information and awareness people had in 1977. More recently, it has become apparent that the damaging effects of tobacco have been underestimated and that a great deal of information has not been disclosed to the public, particularly the strong addictive effect of nicotine. Steen-Olsen's statement is not at all definitive; there is a possibility that the courts could impose liability. Finally – and most importantly – Steen-Olsen used tobacco as an example only. The purpose of his article was not to go into details regarding the liability of the tobacco industry.

4.4 The Product Liability Act

4.4.1 Introduction

The Product Liability Act of 1988 introduced a special basis for compensation – safety deficiency – that can provide better protection for consumers than the culpa norm, the non-statutory no-fault liability, the Sale of Goods Act and other grounds for liability. Four main conditions must be fulfilled for consumers to claim compensation under the Product Liability Act:

The claim must be directed to the responsible party, according to section 1-3. A "responsible" producer is "anyone who processes or produces a product"; this would without doubt apply to tobacco manufacturers. Furthermore, "an importer of a product from abroad" is also responsible "as a producer". This is important in relation to Norwegian companies which import tobacco from the USA and other countries.

The liability concerns "products" which are given a broad definition in section 1-2. The term includes both natural products and industrial products. It is clear that cigarettes, cigars, snuff, chewing tobacco, cigarette paper and other tobacco products are included in the term "product".

The product must have caused injury to a person or an object, see section 2-3. Disease and death caused by smoking are clearly included in the term "personal injury". This must also apply to expenses incurred for the treatment of tobacco-related diseases. This must apply regardless of whether the individual pays these expenses himself, or whether they are paid by hospital owners or by others. In

56 Ole Steen-Olsen, op. cit pp. 214 and 216.

the preliminary work of the Product Liability Act, it is specified that personal injury also includes damage to one's assets, and that the issue of the extent of the liability must be evaluated according to tort law provisions with respect to adequacy and legal protection.[57]

The damage must be caused by a safety deficiency of the product (see point 4.4.3).

4.4.2 In Principle Damage Caused by the use of Tobacco is not Exempted

With reference to the preparatory works of the Product Liability Act, it has been maintained that tobacco products are exempted from product liability. More extensive studies indicate that this is incorrect. It is true, however, that the preparatory works state that tobacco producers cannot be held liable according to the Product Liability Act:

> "...for most people [it is] reasonable that responsibility should not apply when the injured party knew about the risk that caused the damage to occur, and did not take the precautionary measures that in the concrete case appear to be reasonable. The outcome of such ideas is that tobacco producers are assumed not to be responsible for a person harmed by smoking, and that the State Wine and Spirit Monopoly (Vinmonopolet) is assumed not be responsible for the alcoholic."[58]

> "Safety expectations must also be very high for traditional food products and stimulants – subject to reservations for known risks such as those associated with the use of alcohol and tobacco."[59]

These statements can in no way be seen as exempting tobacco from the law. On the contrary, it is stressed in the following quote that even products with a known risk can lead to liability according to the Product Liability Act:

> "But this point of view must also be subject to certain reservations. First of all, responsibility should be based on the fact that the producer should have provided information regarding the product risks. In addition, in some cases, a producer should also be held liable for uncommon, yet serious damaging effects, even if these are unavoidable. In addition, the knowledge of the injured party will not always be of importance if the product's damaging characteristics are more extensive than can be considered defensible."[60]

It must be pointed out that the Ministry of Justice has emphasized the fact that when evaluating the extent of product liability, one must be extremely careful in placing too much significance on the assumption of risk.[61]

---

57 NOU 1980: 29 (*Produktansvaret*) pp. 107-108; and Ot. prp. nr. 48, 1987-88 p. 55.

58 NOU 1980: 29 (*Produktansvaret*) p. 85.

59 Ot. prp. nr. 48, 1987-88 p. 126.

60 NOU 1980: 29 (*Produktansvaret*) p. 85.

61 Ot. prp. nr. 48, 1987-88 p. 127.

Based on this, it is clear that tobacco products should also be evaluated according to the criteria of safety and expectation on which the law is built. It would be strange if tobacco products were given immunity against product liability. If so, this should have been clearly expressed in the Act.

The somewhat categorical statements in the preparatory works of the Act regarding liability of the tobacco industry must be seen against the background of the lost tobacco cases of smokers in the USA prior to 1980. Today, the tables are turned and assumption of risk is given less importance both in the USA[62] and in Norway (see point 6.3). The major point of view of the Product Liability Committee (NOU 1980: 29) was at this stage neither followed up in the government's Proposition to the Storting (the Norwegian parliament) nor in the report of the committee in the Storting.

The question of whether product liability includes damage caused by tobacco products is not further discussed in Norwegian tort law.

Peter Lødrup has provided a brief comment. He maintains that a system failure can hardly be said to involve a safety deficiency. In one place he defines a system failure as damaging effects that are "known and accepted", and in another place as products that have "damaging characteristics, but these characteristics are desired and give the product its appeal".[63] In connection with these definitions, he mentions alcohol and tobacco.

It seems incomprehensible that the large amount of health damage, the large number of deaths and the strong addiction related to tobacco, are "desired" or can be the main reason for people using tobacco. Tobacco's attraction for young people is mainly the result of adolescents trying to act like adults, group pressure, the desire to be slim and similar reasons. The continuation of smoking is mainly caused by nicotine addiction.

It should also be emphasized that Peter Lødrup was a member of the Product Liability Committee, and the purpose of his comment with respect to the Product Liability Act was not to provide an in-depth analysis of the liability of the tobacco industry. The same can be said about the following statements from Stein Rognlien who chaired the Product Liability Committee:

> "Perfect food products and stimulants will not normally cause damage which it is natural to include under product liability, even though certain system failures occur, for instance, as a result of alcohol or tobacco consumption."
>
> […] "Safety expectations must also be extremely high for traditional food products and stimulants – however with reservations for known system risks such as those associated with the use of alcohol and tobacco."[64]

Professor of tort law in Bergen, Nils Nygaard, does not say that system failure or tobacco and alcohol are in any exceptional position with respect to the Product Liability Act.[65]

---

62 Richard A. Daynard and Mark Gottlieb, *Casting blame on the tobacco victim: Impact on assumption of risk and related defenses in United States tobacco Litigation*, NOU 2000: 16 pp. 383-410.

63 Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999 p. 231, see p. 220.

64 Stein Rognlien, *Produktansvaret*, Oslo 1992 pp. 144 and 190.

In my opinion, health damage caused by smoking must be evaluated on the basis of the normal principles of safety deficiency in the way these principles are stated in the Product Liability Act section 2-1. The decisive factors are on the one hand, risks/safety related to tobacco products, and on the other hand, risks/safety users can expect.

4.4.3 The Term "Safety Deficiency"

The Product Liability Act section 2-1 contains more detailed provisions regarding no-fault liability:

> "(1) The producer is obliged to compensate for damage that his product has caused and that is the result of the product not providing the safety that the consumer or the public could reasonably expect (hereafter called safety deficiency). When evaluating the expected safety, consideration must be given to all circumstances that are related to the product: its presentation, marketing and intended use.
>
> (2) In the normal evaluation of the level of safety (safety standard), the circumstances existing at the time when the product was put out for sale shall be used as the basis."

The Act provides instructions that the actual safety that the product is shown to have, shall be compared with the safety that the consumer of the product/the public can reasonably expect of the product. If the actual safety and the expected safety are the same, then safety deficiency is not present and the producer is not liable. If the actual safety is less than the expected safety, the producer could then be held liable. The Act does not say anything about how great the difference must be in order for safety deficiency to exist.

On the other hand, the Act provides guidance on how the expected safety should be determined: The decisive factor is not the injured party's individual expectation, but what a "consumer" in general or "the public" can expect. In addition, it is not ideal conditions that shall be used as basis, but what one could "reasonably expect". Finally, the Act refers to important factors that shall be taken into account when evaluating the safety that can be expected. These are the "presentation, marketing and intended use" of the product.
In the preliminary work to the Product Liability Act, it is stated that:

> "The consumer must have the right to expect that the product can be used as intended, and that it does not provide a greater risk for causing damage than is the case with other products in the same category."[66]
>
> […]
>
> "According to the Act, the decisive factor regarding the liability of the producer is whether the product provides the safety that the consumer objectively must expect. Attention should be directed at the product and the safety

65 Nils Nygaard, *Skade og ansvar*, Bergen 2000 pp. 440-445.

66 NOU 1980: 29 (*Produktansvaret*) p. 83.

> expectations of the consumers, and not at the situation of the producer and the cause of the product's safety deficiency."[67]

It is worth emphasizing that the Product Liability Act also includes products that are dangerous by their very nature, such as guns, certain tools, etc. When evaluating whether such products have a safety deficiency, an assessment must be made of whether the product in question represents a risk of damage that exceeds the level of risk of other products in the same category[68].

The advertising run by the tobacco industry prior to the introduction of the Tobacco Act of 1975 is important in this respect. Other types of marketing and presentations directed at the public are also of importance. Particularly important are the statements made by the tobacco industry on television and on the radio, in newspapers and in other mass media. It will be important to investigate whether they have suppressed, trivialized or withheld information about the serious health damage and the strong nicotine addiction related to smoking. This might have given people an unrealistic view of the dangers of smoking and of the possibilities for stopping using such an addictive drug.

The Product Liability Act states that consideration should also be given to "intended use". For a daily smoker, such use is approximately 15–20 cigarettes per day. People who are "party-smokers", "week-end smokers", or "occasional smokers" do not expect to become addicted so that they become daily smokers.

4.4.4 The Period Covered by the Product Liability Act

The Product Liability Act came into force on 1 January 1989, and chapters 1 and 2 do not apply to products that were outside the control of the producer prior to this date.

People who started to smoke after 1 January 1989 can, of course, plead the provisions of the Product Liability Act. On the other hand, the Act does not apply to people who both started and stopped smoking before this date (pursuant to the Norwegian Constitution Article 97 regarding the general prohibition against giving laws retroactive effect).

It is doubtful whether the Act pertains to those who have smoked both before and after 1 January 1989, and this applies to most people who are now considering raising a claim for compensation. Addiction occurs shortly after a person starts to smoke, but we cannot know for certain whether it was the smoking before or after 1 January 1989 that caused the disease.

This question is not of great importance, since the current law was not significantly changed by the Product Liability Act. Nils Nygaard states that the main change that this Act brought about was "to make the provisions about liability statutory, whereas previously liability had been covered by non-

67 Ot. prp. nr. 48, 1987-88 p. 33.

68 NOU 1980: 29 (*Produktansvaret*) p. 84.

statutory law".[69] Peter Lødrup states that basically even before the Product Liability Act the producer had extensive no-fault liability.[70]

As far back as 20 years ago, the Product Liability Committee stated that:

> "During this century in all Western countries, tort law has developed strongly in the direction of stricter liability provisions and better protection for the injured parties. In Norway, this development has mostly taken place through legal practice, and Norwegian law – along with American law – has probably come the furthest in making no-fault liability provisions. ..."[71]

In the "contraceptive pill case II" (Rt. 1992 p. 64), the Supreme Court decided that the pharmaceutical producer was liable on non-statutory no-fault grounds for damage that occurred before the Product Liability Act of 1988 came into force. This indicates that during the 1970s and 1980s there had been a gradual legal development, placing stricter demands on producers and providing stronger legal protection for consumers.

4.5 Conclusions

It is uncertain to what extent the provisions relating to no-fault liability according to the Sale of Goods Act of 1907 apply to damage associated with the dangerous or damaging nature of the product. Kristen Andersen's statement provides a good basis for deciding this. According to him, the tortfeasor is liable when the characteristics of the object "are such that the product is dangerous when the buyer uses it according to the way in which the product is intended to be used". It is precisely when tobacco is used as it was intended to be used that disease, disability and death occur.

The provisions of the Product Liability Act relating to liability for compensation in the case of "safety deficiency" also apply to the tobacco industry. There is such a large discrepancy between the health risks associated with tobacco and the level of safety that consumers should be able to expect, that there are great possibilities for holding the tobacco industry liable in accordance with the basic principles of the Product Liability Act.

It is uncertain whether the Product Liability Act is applicable for people who smoked both before and after the Act came into force on 1 January 1989. However, this is not of great importance, since the culpa norm and non-statutory no-fault liability, as they have been applied in Norwegian legal practice, have gone far in protecting the injured party and consumers.

The various statements from legal theory and from the report of the Product Liability Committee referred to above indicate that it will be difficult for smokers to win liability cases against the tobacco industry according to the Sale of Goods Act and the Product Liability Act. However, these statements are not conclusions based on extensive discussions about the liability of the tobacco

---

69 Nils Nygaard, *Skade og ansvar*, Bergen 2000 p. 441.

70 Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999 p. 222.

71 NOU 1980: 29 p. 82.

industry. These statements must, therefore, be viewed only as opinions of lawyers, who could easily have come to entirely different conclusions if they had had the time to delve further into the subject. The statements are also founded on incomplete facts about tobacco as a modern industrial product, and about the health risks and nicotine addiction related to the use of tobacco.

The issue of whether or not smokers should loose their right to compensation because they themselves have contributed to damaging their health or to have assumed the serious risks associated with smoking, will be discussed in point 6 (see especially point 6.5).

5 Causal Relationship and Adequacy

5.1 Introduction

In some cases, it can be difficult to establish whether smoking was the cause of the damage, and how much of the damage was caused by smoking and how much was caused by other factors. In such cases it is important to employ medical expertise in order to obtain the best possible description and analysis of the situation for each individual.

In addition, there is the question of evidence. Usually one can apply the greater weight principle: the most probable facts shall be used as the basis for the judgement.

The legal issues are mostly related to the synergetic causes of damage, for instance, the combination of smoking and a genetic disposition, and the combination of smoking and exposure to asbestos. In such cases, should one then use conditional theory, the theory of main causality or the theory of division of responsibility?

5.2 Establishing the Facts

In tobacco cases, medical certificates and the expert opinions of doctors and other experts will be important when deciding whether it is smoking or other factors that have caused the health damage. The issue will often be about how much each of the different factors have contributed to the damage.

It will rarely be possible to determine exactly what has happened. It is not possible to know with certainty how much each person has smoked and what other risk factors the person has been exposed to. There is no exact medical evidence about how substances which enter the body during given periods of time lead to specific diseases.

However, these problems must not be exaggerated. Extensive medical research has been carried out on the relationship between the use of tobacco and the development of disease that can help us to understand what has happened in each individual case.

Often, there will be doubts about the significance of the use of tobacco for the development of disease. Here, it should be mentioned that medical science and natural science place stricter demands on evidence than is the case with the law.

I will not discuss here in more detail the common rules of evidence within procedural law. It is sufficient to mention only a few major principles. One basic principle is that the person who makes a legal decision must use as a basis the alternative that appears to be the most probable (the greater weight principle).[72]

In the "contraceptive pill case I" (Rt. 1974 p. 1160), there was the question of whether a woman's heart disease and death were caused by the use of the contraceptive pill. The Supreme Court acquitted the producer of the contraceptive pill, based on the fact that a "reasonable level of probability that the contraceptive pill had caused her death" was not found.

In the "contraceptive pill case II" (Rt. 1992 p. 64), the majority of the Supreme Court decided that the producer of the contraceptive pill should be held liable for the injured party having suffered a brain thrombosis, having become paralysed and having lost her ability to speak. Other causal factors apart from the use of the contraceptive pill could also have played a role. The woman had a congenital deformity that could have caused a predisposition to stroke, during a game of handball she could have been injured, for about five years she had smoked one packet of cigarettes a week, and she had been drinking alcohol the night she became ill. After a comprehensive evaluation of a large amount of material, the decision was that "there was a high level of probability that the contraceptive pill had caused A's thrombosis" (p. 77).

In connection with her smoking, it should be mentioned that the woman was 23 years old when she became ill, that she had been smoking for only five years, and that she was a moderate smoker. In this case, it is reasonable that her use of the contraceptive pill was considered to be a more probable causal factor than smoking.

As a main rule the injured party has the burden of proof. But in certain cases, the burden of proof is reversed, so that the person causing the damage is the one who must prove that a reasonable probability for a causal relationship does not exist.[73] An example of this is found in the Pollution Control Act of 1981, section 59: "A person or company who causes pollution that alone or in combination with other causes of damage could have caused the pollution damage is considered to have caused the damage if it is not more probable that it was caused by another factor."

Peter Lødrup emphasizes that the burden of proof can be reversed if the person causing the damage is concealing material and "does not show his cards", if he has the greatest possibilities to clarify the facts, if he has had the greatest possibilities to secure evidence, if there is "a disparity between the parties with respect to means – for instance an individual against a large company", or if the tortfeasor is responsible for major damage.[74]

These factors favour the burden of proof being placed on the tobacco industry. The industry has had information about the ingredients in cigarettes and it has had the greatest possibilities to clarify the facts. It has also been in a

---

72 Jens Edvin A. Skoghøy, *Tvistemål*, Oslo 1998 pp. 654; and Jo Hov, *Rettergang I*, Oslo 1999 pp. 262.

73 Nils Nygaard, *Plassering av tvilsrisiko for hypotetisk årsak*, Lov og Rett 2000 pp. 515, in particular pp. 523.

74 Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999 p. 317 and pp. 327-330.

position to secure evidence about its products. Most tobacco companies are large industrial companies and they are responsible for major damage. They should be held liable if they cannot prove that there is no causal relationship between their possible negligence and the disease and death caused by smoking.

Pursuant to the Industrial Injury Insurance Act (Act of 16 June 1989 No. 65 relating to industrial injury insurance), the insurance company carries the burden of proof that there is no causal relationship. In the so-called "bartender case" from Stavanger (see point 1.4.2 above), the insurance company could not provide satisfactory evidence that the smoke in the bartender's working environment was insignificant in the development of his lung cancer, and the insurance company was held liable.

5.3 Theories of Causality in Relation to the Law

Normally there are several factors that, when combined, lead to disease or death. For instance, the combination of active smoking, passive smoking, asbestos in the working environment and other factors can lead to lung cancer.

It is possible that a medical evaluation could establish the contribution of each factor. The question of whether a causal relationship exists between smoking and disease/death depends on which theory of causality is used as a basis. Conditional theory,[75] the theory of main causality,[76] and the theory of division of responsibility[77] are especially important in Norwegian law.

There are many cases where decisions have been made regarding causal relationships. There is also an extensive legal literature where the different theories of causality have been discussed. There is not enough space here to discuss this subject in greater depth, but I refer to the decision that is regarded as the most important legal source on causality in Norwegian law: the "contraceptive pill case II" (Rt. 1992 p. 64). Here, a general and extensive account of the relevant causal theory is given. The decision implies that conditional theory applies in Norwegian law, but that a modified theory of main causality is used to supplement and define more precisely the legal concept of causality.[78] This legal view was also used as the basis for another important decision regarding liability in relation to pharmaceutical products (Rt. 2000 p. 915.)

---

75 Fredrik Stang, *Erstatningsansvar*, Kristiania 1919 pp. 64; Johs. Andenæs, *Alminnelig strafferett*, Oslo 1997 pp. 118; Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999 pp. 296-304; and Nils Nygaard, *Skade og ansvar*, Bergen 2000 pp. 323-324.

76 Carsten Smith, *Om lovgivning, solidaritet og regress i erstatningsretten*, Tidsskrift for Rettsvitenskap 1961 pp. 361; Kristen Andersen, *Skadeforvoldelse og erstatning*, Oslo 1970 pp. 31; Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999 pp. 304-306; and Nils Nygaard, *Skade og ansvar*, Bergen 2000 pp. 335-336.

77 See more about this principle and this clause in: i Knut S. Selmer, *Forsikringsrett*, Oslo 1982 pp. 249-251 and 296-299.

78 Slik også Nils Nygaard, *Plassering av tvilsrisiko for hypotetisk årsak*, Lov og Rett 2000 pp. 515 , on pp. 520-523.

5.4 The Condition of Adequacy

The condition of adequacy requires primarily that the causal relationship between smoking and disease must be foreseeable. The tortfeasor shall not be held liable for unexpected, extraordinary, atypical, diverted, indirect, remote or unpredictable damaging effects.

From the 1950s onwards, it must have been foreseeable to the tobacco industry that tobacco-related diseases would occur. The industry had, or should have, acquired knowledge of this by going through relatively easily accessible medical literature. The industry should at least have been familiar with the information that can be found in the Journal of the Norwegian Medical Association and in the reports from the directors of health in Norway, Great Britain, the USA and the WHO. Lung cancer and some other diseases are typical, common and obvious results of smoking.

When evaluating adequacy, emphasis is not only placed on predictability, but also on how blameworthy the actions of the person causing the damage have been and on the extent of the economic loss.

The question of how blameworthy the actions of the Norwegian tobacco industry have been can hardly lead to the acquittal of the industry according to the condition of adequacy.

If the tobacco industry loses several cases, the cost for them could be enormous. This is illustrated by figures from cases in the USA. In Norway, it is difficult to imagine that the amount of compensation could lead to the causal relationship being viewed as inadequate. That would rather (in exceptional cases) raise the issue of reducing the liability pursuant to the Tort Act section 5-2.

5.5 Conclusions

Whether or not the condition of establishing a causal relationship between (active and passive) smoking and disease is fulfilled, will normally depend on the medical statements in each individual case. The facts that are the most probable will form the basis for the case (the greater weight principle). In the case of heavy smoking and lung cancer, the condition of a causal relationship will almost always be fulfilled. Concerning more sporadic smoking and other diseases, the relationship will be more uncertain.

Prevailing Norwegian tort law is based on conditional theory combined with a modification of the theory of main causality. This means that the condition of a causal relationship is met when smoking has been a necessary condition in order for disease or death to occur, unless smoking has been minimal.

Not only is a causal relationship a necessary condition, but the relationship must also be adequate. It is difficult to imagine that the condition of adequacy could lead to the acquittal of the tobacco industry.

6 The Injured Party's Contribution and Assumption of Risk

6.1 Introduction

Most people who for the first time become aware of the possibility of holding the tobacco industry liable for paying damages, usually think that a person who has been a smoker cannot claim compensation. The basic principle must be that a person, who at a mature age intentionally takes a risk, must bear the responsibility for his own actions. In the USA and other countries, the arguments relating to the smoker's own responsibility were for a long time the most important defence argument of the tobacco industry.

Here, one must first consider why people start to smoke. Many older people who are smokers today were young when they started to smoke, and they knew little or nothing of the health risks and nicotine addiction related to smoking. This particularly applies to those who started to smoke in the 1950s and 1960s. People who start smoking today are primarily young people between the ages of 14 and 18. Smoking is appealing to young people; it has been, and still is, considered adult behaviour to smoke; smoking gives them a sense of belonging within their social group and is part of their everyday life.

Second, one may wonder why people have not stopped smoking after it became known that smoking can seriously damage one's health. Many people have managed to stop, but many more have tried several times and failed. For the majority of these people, nicotine addiction has been the decisive factor. For a long time it was believed that the use of tobacco led only to a psychological and social dependence. Today, however, medical science has established that smoking involves a strong physical addiction, and that nicotine can be compared to hard drugs such as heroin and cocaine. In the USA, the tobacco industry was aware of this at least as early as the 1960s,[79] but medical science and health authorities did not know about this until the late 1970s and early 1980s.[80] Furthermore, it is not until very recently that medical science has understood the *degree* of nicotine addiction. Most people are not aware of the seriousness of this addiction. Damage to health is a different matter from nicotine addiction. People have known for a long time that smoking is dangerous, but how extensive and complete has this knowledge been at different times?

In debates in the media and in society, there is a certain tendency for *phase displacement* to occur: One uses arguments based on today's knowledge regarding health damage caused by smoking that started 30–50 years ago. But when people who are claiming compensation today are evaluated, they must be evaluated according to the rules of the injured party's contribution and assumption of risk, based on the conditions that existing at the time they started to smoke, and when the tobacco industry claims that they should have stopped smoking.

---

79 Nicolai V. Skjerdal, *Tobakksindustrien, dens forskning og produktutvikling*, NOU 2000: 16 pp. 129, on pp. 137-147.

80 Erik Dybing, *Når ble de ulike helseskadelige og avhengighetsskapende virkninger av tobakksforbruk fastslått vitenskapelig og publisert i sentrale skrifter*, NOU 2000. 16 pp. 98, on pp. 104-107.

It seems morally inconsistent that the tobacco industry can defend itself by claiming that a person who suffers from a smoking-related disease should not have started to smoke or should have stopped using a product that the tobacco industry itself has marketed. This applies particularly to the time when the tobacco industry advertised its products. After the ban on tobacco advertising was introduced, the situation is somewhat different. However, it must be taken into consideration that tobacco advertising was stopped because the authorities decided that it should be stopped, not because the tobacco industry wanted to protect people's health.

Concerning the contribution made by the injured party and their assumption of risk, one must compare what the injured party knew or should have known about the health risks and nicotine addiction with what the tobacco industry knew or should have known. The discrepancy between these two levels of knowledge was particularly large in the 1950s and 1960s.

A very important characteristic of tobacco as a product is that it contains both nicotine, which is addictive, and tar and other substance, which cause disease. Addiction occurs shortly after a person starts to smoke,[81] whereas health damage can occur after 20–50 years. The stimulating and relaxing effects of smoking appear immediately after lighting up a cigarette. Young people are more concerned with the immediate effects than with what the future might bring. The tobacco industry has been aware of these factors that are so typical of tobacco.

6.2 The Injured Party's Contribution

According to the Norwegian Tort Act section 5-1 nos. 1 and 2, claims for compensation can be reduced or dropped if the injured party by his or her own fault has contributed to the damage, if this is reasonable when considering his or her behaviour, its importance in relation to the damage that has occurred, the extent of the damage and other circumstances. The injured party or the plaintiff is also considered to have contributed to the damage if he or she has not to a reasonable extent removed or reduced the risk of damage, or reduced the extent of the damage to the best of his or her ability.

Peter Lødrup stresses that in general one must exercise caution when considering reducing compensation according to section 5-1. One should "emphasize that most people should not be obliged to exercise maximum caution at all times.

81 Per Schioldborg (Professor in psychology), under examination as an expert witness in the Robert Lund case in the Orkdal District Court on 10 October 2000, stated that addiction occurs among 80-90 per cent of people who have inhaled the smoke of 4-5 cigarettes in the course of 2-3 days. Reference: Howard Leventhal and Paul D. Cleary. *The Smoking Problem: A Review of the Research and Theory in Behavioral Risk Modification*, Psychological Bulletin, 1980, Vol. 88, No. 2, pp. 370-405, on p. 384. Erik Dybing (Professor in medicine stated, in the same case, that the first symptoms of nicotine addiction among 12-13 year-olds can occur in the course of days to weeks after the start of occasional smoking, often before daily smoking. Reference: Joseph R Di Franza et al, *Initial symptoms of nicotine dependence in adolescents*, Tobacco Control 2000, 9, pp. 313-319.

[...] I cannot see that consideration to prevention has any particular significance in relation to personal injury."[82]

One should be especially understanding towards children and young people, and perhaps also towards adults who have not acted with gross negligence. One can hardly say that starting to smoke at a time when more than half the population started is an act of gross negligence. Smoking has earlier been, and in some groups still is, viewed as a social norm.

In an amendment to the Tort Act in 1987, it was decided that contribution by a person under the age of 10 could not be considered negligence. The Standing Committee on Justice of the Storting assumed that caution should also be shown when considering reducing compensation for older children.[83]

A child who started to smoke before the age of 10 will have the right to full compensation. Caution should also be exercised when considering reducing compensation for children older than 10 and for young people who started to smoke at an early age. The legal age restriction for the right to purchase tobacco products was 15 years until 1975, 16 years until 1995, and then 18 years. These restrictions can be of guidance in deciding when a reduction cannot be made.

Can claims for compensation be reduced or dropped because a person has not stopped smoking as an adult? Since strong nicotine addiction is involved, a person who has tried to stop smoking but failed should not be blamed for this, and should therefore not have his compensation reduced according to section 5-1.

With passive smoking, section 5-1 can hardly be of any significance. It must at least apply to the time period prior to the Smoking Act of 1988 came into force. A person who involuntarily inhales other people's smoke has not by his own actions contributed to his tobacco-related disease. This applies particularly to children and young people who have been exposed to passive smoking.

A particular question concerns relatives of deceased active or passive smokers. What significance should be attached to the smoking habits of the deceased? Are the relatives to be "identified with the deceased" in such a way that if the "deceased" had survived and had been given reduced or no compensation, should the relatives also receive reduced or no compensation?

In connection with the preparation of the provision regarding contribution, in the Tort Act section 5-1, the Standing Committee on Justice of the Storting stated that:

> "The committee agrees that the relatives' claim for compensation for loss of provider should not automatically be reduced or dropped because the injured party contributed to the damage that caused his own death. [..] In the opinion of the committee, it seems unreasonable that the possible careless behaviour of the injured party should be at the expense of his widow and children. The relatives` need for compensation is, of course, totally independent of concomitant conditions in connection with the fatal event. [...] In the opinion of the committee, the relatives' claim for compensation for loss of provider should stand alone."[84]

---

82 Peter Lødrup, *Lærebok i erstatningsrett*, Oslo 1999 pp. 362-363.

83 Innst. O. nr. 19, 1987-88 p. 8.

84 Innst. O. nr. 92, 1984-85 p. 6.

In 1985, section 5-1 was given the following wording: "The provisions expressed in nos. 1 and 2 apply correspondingly in the case of contribution to persons or situations that the injured party or plaintiff, in this connection, is subject to."

Based on section 5-1 nos. 1 and 2, which point to a broad evaluation of reasonableness, and to statements from the preliminary legal work mentioned above, the court can treat the relatives more mildly than it would have treated the deceased if he or she had survived and claimed compensation himself/herself. This view is the basis for legal practice (see Rt. 1990 p. 829 and p. 835 and Rt. 1997 p. 149). The same applies to legal theory, see for instance Viggo Hagstrøm's statement: "On the whole, I believe that identification first of all will be relevant where the provider has shown gross negligence [...] the idea of identification seems to be on the way out of the personal damage sector."[85]

Concerning the injured party's possibilities for understanding the dangers of smoking , the following factors are important:

- Lack of knowledge about the many serious types of health damage
- Lack of knowledge of the fact that even light smoking involves serious health risks
- Lack of knowledge about nicotine addiction
- Lack of knowledge about the degree of addiction that nicotine causes
- Lack of knowledge of the fact that the tobacco industry has largely controlled the level of nicotine in tobacco products and its effects
- Lack of knowledge of the fact that tobacco products are high technology products and not natural products
- The delusion that filter cigarettes and "light" cigarettes are less damaging to health than other cigarettes.

6.3 Assumption of Risk

6.3.1 Has the Injured Party Voluntarily Accepted the Danger?

In most cases, it could be claimed that the injured party has more or less voluntarily accepted the dangerous situation. In cases where he or she has special qualifications for assessing the danger, the person will often lose the right to compensation. One can then claim that the injured party has accepted the risk created by the tortfeasor. However, not all risk situations in which the injured party has been involved will result in the loss of the right to compensation.

In the past, the tobacco industry has minimized, denied and cast doubt on the impact of scientific research on the harmful effects of tobacco. In addition, the tobacco industry in the USA has kept information of nicotine addiction secret. It is then morally and legally problematic that the tobacco industry blames the victims of tobacco for having started, continued and not managed to stop

85 Viggo Hagstrøm, *Læren om yrkesrisiko og passiv identifikasjon i lys av nyere lovgivning*, Norsk forsikringsjuridisk forenings publikasjoner nr. 67, Oslo (undated), on pp. 8 and 9.

smoking. Professor Richard Daynard has remarked that the tobacco industry in fact argues in the following manner: "Anyone stupid enough to believe us when we tell them that smoking our products will not cause disease, deserves to get the diseases that our products cause."[86]

One factor to which importance has been attached in legal practice is the injured party's professional knowledge. The following examples illustrate this. In the "roller case" (Rt. 1950 p. 1091), the injured party was a child. A housewife "had to" bring her child into the laundry where she pressed her clothes. The child was injured by an unprotected toothed wheel, and the producer was held liable. In the "fire extinguisher case" (Rt. 1957 p. 985), there was no liability; the injured party was a professional. The tobacco industry is professional, but most consumers are ordinary people

6.3.2 The Age of the Injured Party

In the "roller case" (Rt. 1950 p. 1091), it was emphasized that the roller was used by housewives who often had to bring their children with them into the laundry.

Another example where age was important, was the "forge case" (Rt. 1947 p. 723). Some children were playing in a forge, and one of them got an iron splinter in his eye as a result of another child hitting the anvil with a hammer. The Supreme Court stated that:

"a forge, and the work that goes on there, has a natural attraction for children and for boys in particular, as in this case. If one has built a forge in an urban district close to where children usually play, it is to be expected that they will visit it. In my opinion one must also expect that there is a possibility that accidents can happen. "

Here, it was emphasized that the person who was hurt was a child. The decision would probably have been different if the injured party had been an adult. The age of the injured party is thus a relevant factor in deciding whether the tortfeasor has acted in a negligent way.

The starting age for smoking has become progressively lower. For the period 1950–75, the average age for starting to smoke was 17–18 years for men and 23 years for women at the beginning of the period, and 17 years for both sexes at the end of the period. Between 1957 to 1975, the proportion of daily smokers increased among 15-year-olds from 12 per cent to 23 per cent for boys, and from 3 per cent to 28 per cent for girls.[87]

The 1964 report of the Norwegian Director of Health stated that as many as 55 per cent of boys in the seventh grade (14-year-olds) at secondary school in 1957 smoked, 4 per cent of them daily.[88] The Director of Health emphasized the

---

86 Richard Daynard, *Litigation by States against the Tobacco Industri*, The 10th world Conference on Tobacco or Health, Beijing, China, August 26, 1997.

87 Karl Erik Lund, *Utviklingen av tobakksforbruk og røykevaner i Norge i etterkrigstiden*, NOU 2000: 16 pp. 108, on pp. 112-115.

88 Karl Evang, *Sigarettrøyking og helse. En redegjørelse fra helsedirektøren*, Tidsskrift for Den norske Lægeforening 1964; 84 pp. 300, on p. 301.

importance of combating smoking among children and young people. What did the tobacco industry do?

It is important to look at how the tobacco industry at different times has related to children and young people. Has it produced advertising aimed specifically at this group? Has it done anything to actively prevent children and young people from starting to smoke or to stop smoking?

In lawsuits against the tobacco industry, an important factor will be whether the plaintiff started to smoke as a child or at a young age. Let us take a statement from the "forge case" and apply it to people who started to smoke in the 1950s, 1960s, and 1970s: Smoking "has a natural attraction for children, and boys in particular". For the latter part of the 1900s, we can add "girls".

6.3.3 The View on Assumption of Risk in Preparatory Legislative Work and Legal Theory

In connection with the preparation of the Tort Act section 5-1, the question of assumption of risk was raised. The Tort Law Committee suggested that the injured party's claim for compensation could be reduced or dropped if he were regarded as "having accepted the risk of damage".[89] The Ministry of Justice proposed that if the injured party had "placed himself in a situation that he knew, or should have known, involved the risk of damage occurring", that this should be regarded as negligent contribution. The Standing Committee on Justice of the Storting removed this clause from the bill. The clause could give the impression of establishing by law an old legal practice that represented "assumption of professional risk".[90] The Committee maintained that such practice was not in accordance with today's legal opinion.[91]

Viggo Hagstrøm believes that according to this, one should "limit assumption of risk cases to cases that objectively are closer to intentional contribution, and otherwise apply the rules of assumption of risk in the areas of sport and other leisure activities. In these two areas, the injured party's claim for compensation does not have such a strong legal basis, because it is in the interests of society to prevent leisure activities from being exposed to too many liability claims."[92]

6.3.4 The Assumption of Risk in the USA [93]

In an investigation on assumption of risk in American law by Richard Daynard and Mark Gottlieb, it is emphasized that the view "assumption of risk" has for the most part not convinced American judges. On the contrary, the argumentation can make the strategy of the tobacco companies inconsistent: The

89 NOU 1977: 33 (*Om endringer i erstatningslovgivningen*) p. 50 and p. 54.

90 Ot. prp. nr. 75, 1983-84 p. 37.

91 Innst. O. nr. 92, 1984-85 p. 6.

92 Viggo Hagstrøm, *Læren om yrkesrisiko og passiv identifikasjon i lys av nyere lovgivning*, Norsk forsikringsjuridisk forenings publikasjoner nr. 67, Oslo (udatert), on p. 4.

93 Richard A. Daynard and Mark Gottlieb, NOU 2000: 16 pp. 383-410.

tobacco industry denies that their products cause health damage**,** but at the same time maintains that smokers are aware of the health risks.

There is a difference between the injured party's understanding of the general health risks, and the numerous, specific risks known only to the tobacco industry. The most important ingredient in a cigarette is the addictive drug, nicotine. The chemical composition is controlled by the tobacco industry.

In this way, the smoker's freedom to choose whether or not to continue smoking is reduced. Most people start smoking when they are teenagers, before they are capable of understanding the risks involved, and before they have the capacity to effect legal transactions and for instance enter into contracts. In addition, the tobacco industry has cast doubt on and minimized the impact of the findings of medical science about the health risks, which has made it even more difficult for people who are already addicted to stop smoking.

The view "assumption of risk" is no longer a restriction for smokers claiming compensation from the American tobacco industry. Less blame is put on smokers than previously, due to the following reasons:

(1) The product is highly addictive, so that the freedom to choose is reduced.
(2) Most people began to smoke before reaching adulthood and were not able to make a mature and informed decision before the onset of addiction to the product.
(3) There is a vast and deliberately maintained difference between the consumer's and the industry's knowledge of the specific risks posed by tobacco products.

After many defeats for plaintiffs in the USA for several decades, more than half of the lawsuits raised against the tobacco industry during the last three years have been successful.

6.3.5 Assumption of Risk and the Principles of Informed Consent

The concept "assumption of risk", involves the condition that the potential injured party has consented to being exposed to the risk of damage.

Consent is only valid if the person is over the age of majority, no force has been used, there has been no deceit or dishonesty, etc. There is also the requirement that consent must be given after a person has been informed of the risks, their consequences, or has been clearly able to understand the risks. This means that a potentially injured party must know what risks he or she is being exposed to and what the consequences will be if these risks are realized.

The demands for informed consent are different with respect to medical experiments and medical treatment. With experiments, the demands are very strict.[94] The Patients' Rights Act (Act of 2 July 1999 No. 63, relating to patients'

94 Asbjørn Kjønstad, *Krav om samtykke fra forsøkspersoner/pasient ved medisinsk forskning*, Lov og Rett 1983 pp. 403-431.

rights) chapter 4, includes provisions regarding informed consent to medical treatment: these can be described as fairly strict.[95]

Less strict demands for informed consent can hardly be applied in the case of smoking than in the case of medical experiments. And even stricter demands should apply in the case of smoking than in the case of ordinary medical treatment. Medical treatment clearly aims to improve health – to cure disease and to reduce pain, whereas smoking is addictive, disease-producing and deadly.

The issue of informed consent to be afflicted with tobacco-related diseases and death has been discussed by the Canadian lawyer, David T. Sweanor.[96] In his opinion, there are two key principles for informed consent in relation to tobacco products:

- The first key principle is that many smokers never manage to make fully-informed decisions about smoking. This is the result of a combination of the age when they started to smoke and the addiction they have developed.
- The second key principle is to show what smokers need to know in order to make informed decisions. This should include the following:

(1) Consumers would need to know about the diseases and injuries that smoking can cause.
(2) Consumers would have to know about the probability of contracting these diseases.
(3) Consumers would have to know about the prognosis if they were to contract one of these diseases.
(4) Consumers would have to know about the benefits of changing their behaviour.
(5) Consumers must learn how to change their behaviour.
(6) Consumers need access to the products and services that can help them change their behaviour.

Opinion poles can throw light on the question of whether smokers have been given enough information in order to make fully-informed decisions. Twenty years ago, the USA Federal Trade Commission carried out a study using data from 1978–1980, mostly from the tobacco industry. The investigation showed, for instance, that:

- 40 per cent of smokers were unaware that “light” cigarettes were dangerous.
- 49 per cent of smokers were unaware that smoking causes most cases of lung cancer.
- 37– 47 per cent of smokers were unaware that smoking causes heart disease.
- 63– 85 per cent of smokers were unaware that smoking causes most cases of bronchitis and emphysema.

---

95 Aslak Syse, *Lov om pasientsrettigheter*, i Karnov kommenterte lovsamling, Oslo 1999 pp. 3129-3131.

96 David T. Sweanor, *Informed Consent: what smokers know and what they need to know*, NOU 2000: 16 pp. 411-414.

- 49 per cent of smokers were unaware that smoking is addictive.

It appears from these investigations that there is a considerable difference between the health risks and addiction people believe are related to smoking and the reality. People cannot be regarded as having accepted the consequences of smoking that they were unaware of, or that are far more extensive than they believed.

6.3.6 My View on "Informed Consent" and "Assumed Risk" Concerning Damage Caused by Tobacco

There is reason to stress the fact that the term "informed consent" provides insight into the question of when a risk can be regarded as assumed. It indicates that strict requirements must be met before an injured party's claim for compensation can be rejected.

The risk of damaging one's health by smoking is considerable. The risk involves serious disease and death. Most people are very young when they start to smoke, nicotine addiction develops very quickly, but 20–50 years may elapse before health damage occurs.

People's knowledge about the damaging effects of smoking has changed a great deal during the past 50 years. The individual smoker must be judged according to the knowledge he or she had or should have had at the time when he or she started to smoke. It is often claimed that "everyone must know that it is dangerous to smoke", but there is a great discrepancy between the knowledge the tobacco industry has and the knowledge most people have, and this discrepancy was even greater in the past.

Should people have stopped smoking when they became aware of the damaging effects of smoking? Many people have stopped smoking, but many more have tried and failed many times. The reason for their failure is primarily the strong addictive effect of tobacco. This was known by the tobacco industry since the 1960s and kept secret. The Minnesota and Guildford material shows that there has been close contact between the tobacco industry in the USA and Norway.[97]

Most people believed (and still believe) that filter cigarettes and "light" cigarettes are less damaging to health and less addictive than other cigarettes. Barclay is a successful brand of cigarette that many people in Norway started to smoke or changed to instead of trying to stop smoking. This is something that the tobacco industry knew about, or at least should have known about.

Should a cut-off point be made on 1 July 1975 when the Tobacco Act came into force? Those who started to smoke prior to the implementation of this Act were exposed to advertising pressure and did not receive clear warnings. Those who started to smoke after the Act came into force have not been exposed to the same advertising pressure and have been given warnings about the health risks related to smoking. However, if they started to smoke at a young age, they have probably not understood the serious damage of smoking, and can therefore hardly have accepted the risks involved.

97 NOU 2000: 16, Appendices 8 and 9.

A paradox in attaching great importance to the cut-off point on 1 July 1975 is that it was the public authorities which were responsible for banning tobacco advertising and imposing health warnings. The tobacco industry was opposed to the ban on advertising.[98] The industry has minimized and denied the impact of the damage that smoking causes to health, and has spread doubt about the effects of preventative measures. It therefore seems inconsistent that the tobacco industry should attain a stronger legal position because of the Tobacco Act. The decisive factor must be the changes brought about by the Act for most people. The Act meant a radical change with respect to the measures taken, but it took some time before the implications of the Act were understood by the population.

6.4 No-fault Liability and the Assumption of Risk by the Injured Party

Kristen Andersen remarks that no general rule can be established with respect to an injured party, who, by entering into a business or another arrangement, by accepting the risk, has cut himself off from claiming no-fault liability.[99]

People who smoke have obviously involved themselves with the risks of smoking, but for the most part they have had only vague ideas about the serious damage to health caused by smoking and the strong nicotine addiction, at least compared with what the tobacco industry knew or should have known.

What has been said about assumption of risk in relation to the culpa norm in section 6.3 above, is also mainly valid with respect to no-fault liability.

In connection with the preparation of the Tort Act section 5-1 in 1985, the Standing Committee on Justice of the Storting deleted a sentence in the bill that could "give an impression of establishing by law an old legal practice that represented assumption of professional risk". According to the opinion of the committee, "this legal practice is not in accordance with today's legal opinion".[100]

6.5 Product Liability, Assumption of Risk and the Injured Party's Contribution

The committee that examined product liability wanted to stress the view of assumption of risk, and referred to the "ladder case" (Rt. 1974 p. 41).[101] The Ministry of Justice stated the following:

> "On the other hand, the committee seems to want to ascribe views about assumption of risk and the injured party's negligent behaviour with respect to the use of products, as having a major significance concerning decisions about whether the product has a safety deficiency. …

98 Ot. prp. nr. 3, 1972-73 pp. 15-16.

99 Kristen Andersen, *Skadeforvoldelse og erstatning*, Oslo 1970 p. 345.

100 Innst. O. nr. 92, 1984-85 p. 6.

101 NOU 1980: 29 (*Produktansvaret*) pp. 84-85.

> The Ministry of Justice does not completely agree. According to the considerations that form the basis for no-fault product liability, it is only in exceptional cases that assumption of risk and contributory negligence by the injured party with respect to no-fault liability can be taken into consideration. In any case, this applies to personal injuries. The comprehensive American legal practice on which the product liability of the EU Directive is based, has mainly rejected attaching importance to assumption of risk when deciding whether or not safety deficiency exists with respect to the damaging product."[102]

This means that only in exceptional cases will the injured party forfeit his or her right to compensation, or have the compensation reduced based on contributory negligence and assumption of risk, when compensation is claimed pursuant to the Product Liability Act.

6.6 Conclusions

The provisions regarding assumption of risk and the contribution of the injured party cannot be used against those who started to smoke before the age of 10, and probably not against those who were a few years older either.

One must be careful about reducing compensation according to the provisions concerning the contribution of the injured party when no intent or gross negligence exists.

The provisions on assumption of risk have received less and less importance in Norwegian law.

The question of assumption of risk must be evaluated from the perspective of the knowledge about the risks the individual had when he or she started to smoke, not from today's level of knowledge. One can hardly blame smokers who are addicted to nicotine for not having managed to stop smoking after several attempts.

People who started to smoke before the ban on tobacco advertising and the health warnings were introduced in 1975 cannot be considered to have assumed the risks associated with smoking. The same goes for those who started to smoke at a young age after 1975. Those who started to smoke at a mature age after 1 July 1975 must be evaluated on the basis of the knowledge they had, or should have had, compared to what the tobacco industry knew, or should have known, at that time concerning the strong addictive effect of nicotine and the serious health risks involved.

---

102 Ot.prp. nr. 48, 1987-88 p. 127.