EIGHTH CIVIL DIVISION OF THE COURT OF THE STATE OF RIO DE JANEIRO

Civil Appeal no. 0000051-90.2002.8.19.0210

Appellant 1: Claudio Rodrigues Bernhardt
Appellant 2: Philip Morris Brazil S.A

Appellee: The appellants aforementioned

Rapporteur: Judge Monica Maria Costa

CIVIL APPEAL. CIVIL LIABILITY. COMPENSATION FOR TOBACCO USE.
1. Claim arising from the continued tobacco use, which may have been the cause of death of the plaintiff's wife, product user since 1965, over thirty-five years of her life. She died of cancer of the oral cavity with cervical metastasis.
2. Interlocutory appeal rejected. Issue regarding the proof, which is, at present, precluded. Absence of illegality in the performance of the magistrate in requesting that the expert, named by him/herself, clarified issues that concern the matter addressed.
3. Preliminaries removed. Absence of the sentence's nullity, which was not supported by factual elements, foreign to the proceedings, in order to serve as sentence to the defendant, but only mentioned existing precedents on the subject, in approval of the adopted thesis, being the decision duly justified according to evidence produced in the records. Information collected, which were not able to surprise the parties, since

they were disseminated by all media channels.
4. User who started the consumption of

cigarettes back in 1965, under the regulations of the 1916 Civil Code, covering thus periods prior to the Consumer Protection Statute as well as sparse restrictive laws. It is necessary to observe the values that permeated the entire duration of the contractual relationship.

5. Only on 03.11.1991, when Law no. 8,078/90 entered into force, consumer relations started to receive special attention, accruing automatically on ongoing legal relations.

6. Although in the legal system in force at the time there was no legal order requiring the supplier of products and services to inform about the risks and harms of what they were selling in the consumer market, there are other axiological driving forces that cannot be disregarded by the judge.

7. The principles of good faith and contractual loyalty must be adopted to the condition of general clause composed of normative content, disposed throughout the legal system and outlining all individual and negotiable relationships.

8. Omission of the tobacco industry as to the addictive nature of cigarettes, considering the nicotine component present in the latter; whereas misleading advertising encouraged its consumption, most of the time associated with healthy people and sports practitioner, silencing,

stealthily, the unquestionable health risk factor.

9. The application of the legality principle cannot be interpreted independently from those other principles governing the constitutional

order in force, as well as its teleological conception.

10. The degrading lawfulness of the activity of farming, industrialization and commercialization of tobacco cannot dismiss the accountability for the damage caused by the consumption of the product, as with any marketed good.

11. From the time when the victim started smoking, the malefic nature of cigarettes was not publicized by tobacco companies, neither by public bodies; it was, therefore, a risk unknown to the consumer, a risk only discovered later on, in ways that violate the legitimate expectation of the user on the safe use of the product.

12. The victim was addicted and, even in her final days, with pain and swallowing difficulties, she continued to smoke, a characteristic of her lack of interest on the issues of her cigarette dependence.

13. The consumption of cigarettes by the victim for many years, and the development of her disease, are found to be efficient and adequate causes of her death. Furthermore, the defendant did not produce any other evidence otherwise.

14. The death of a partner or parent is an inexhaustible source of pain, grief and suffering for those who lived with the family member, especially when the death comes with a long and gradual period of

physical and mental deterioration, thus, in this case, it is not necessary to require proof of suffering. Therefore, the compensation established in favor of the plaintiff is applicable.

15. Need to increase the arbitrated amount to R$100,000.00 (one hundred thousand reais), considering reasonable logic, purpose of

condemnation, and taking into account the socio-economic capabilities of the parties.
16. Grant of the first appeal (plaintiff) and denial of the second appeal (defendant).

Acknowledged, reported and discussed the records of the Civil Appeal no. **0000051-90.2002.8.19.0210**, in which the appellants are **Claudio Rodrigues Bernhardt (first appellant) and Philip Morris Brazil S.A (second appellant)** and **the same** being the appellees.

The Judges, part of the Eighth Civil Division of the Court of the State of Rio de Janeiro, agree, **unanimously, to reject the interlocutory appeal brought by the defendant and (second appellant) and, by majority vote, to grant the first appeal (Claudio Rodrigues Bernhardt) and dismiss the second appeal (Philip Morris Brazil S.A).**

VOTE

Claudio Rodrigues Bernhardt filed ordinary proceedings for compensation, against Philip Morris Brazil S.A. Claudio reports that he is the widowed of Mrs. Leticia D' Avila Bernhardt, deceased on 11.14.2001, due to the continued tobacco use, since she was a smoker of the cigarette "Luxor", whose addiction caused her irreversible sequelae, subsequently causing her death. He continues adducing that the deceased was a self-employed insurance broker. She received monthly and approximately the amount of R$842.00 (eight hundred and forty-two reais), by way of commissions. He points out that Mrs. Leticia smoked, usually, two packs of cigarettes a day, showing the first symptoms of the disease in August 2000, and died

with cancer in advanced stages (metastases), which spread all over her body. He emphasizes that, due to the poor health of his wife, she could not perform her work, and thus contribute to household expenses, since they have a child together, and his income is insufficient to pay for all daily expenses. He points out that Mrs. Leticia was forbidden from smoking, by medical advice; however, she did not manage to stop smoking due to her addiction, even when she was aware that her life was seriously threatened by the tobacco consumption. He adds that his wife has gone through a real ordeal, being subjected to countless tests and subsequent chemotherapy sessions in the

quest for her cure, which was not possible. He states that, in the final opinion, the physician that assisted his wife diagnosed that her death was caused by a tumor of oral cavity with cervical metastasis. He asks: i) the conviction of the defendant company to pay alimony, related to 2/3 of the value of the deceased's monthly income, equivalent to the amount of R$561.33 (five hundred, sixty-one reais and thirty-three cents); ii) the conviction of the defendant to pay the sum of R$6,735.96 (six thousand, seven hundred and thirty-five reais and ninety-six cents), referring to the parcels that he ceased to receive, since the date of the passing of his wife, equivalent to 12 months of pension; iii) that the defendant be sentenced to pay nine hundred minimum wages, on the grounds of moral damages experienced; iv) that the defendant be sentenced to pay the sum of R$169,190.00 (one hundred and sixty-nine thousand, one hundred and ninety reais), by virtue of overdue pension, according to the life expectancy of sixty-five years old, since his wife died at the age of fifty years old, leaving her at least fifteen years of useful life to exercise her career and participate in the collective expenses; v) compensatory legal interest, in compliance with art. 1544, of the CC.

The free legal aid was granted on page 152.

The dispute was presented on pages 168/199. Initially, the company states that it is committed and engaged in several projects for the assistance of the less privileged social groups, contributing to the creation of direct and indirect jobs in all activities related to the cultivation and trade of tobacco. In merit, defends the impossibility of the retroactive application of the new Civil Code. It highlights the widespread and notorious knowledge of risks associated with the consumption of cigarettes and the consequent personal responsibility of the smoker. Points out that, in the State of Rio

de Janeiro, where the plaintiff resided with his wife, campaigns against smoking date back from the 50’s and 60’s, when media began to increasingly highlight the harms associated with this habit. States that the Brazilian Government, since the establishment of the Republic, have proposed a differentiated taxation on tobacco, as a way of compensating for the risks that this product causes to health. Asserts that the plaintiff's wife was aware that smoking was bad for her health and yet chose to smoke, through the exercise of her own free will. Clarifies that nicotine does not deprive the smoker of the ability to abandon the habit of smoking, which depends on the individual’s motivation. Confirms the occurrence of exclusion of liability, consistent with the exclusive responsibility of the consumer. Notes that the lawful trade of products of inherent risk does not result in civil liability, highlighting the absence of fault in the product. Tackles the issue of absence of deceitfulness

and/or abusiveness in the advertising material of the defendant, noting that the advertised material does not motivate people to smoke. Pleads absence of causal relationship between the alleged illness and the consumption of cigarettes, requiring the issuance of official letters to the sites listed in the defense document, for the provision of the medical records and documents related to the latter. Refutes, specifically, the requests made by the plaintiff.

The remedial decision was rendered on page 1186 and reverse side.

Expert report attached to pages 1569/1577.

Interlocutory appeal interposed by the defendant on pages 1691/1696, against the decision of pages 1617/1618, which indicates as a controversial point whether or not the application of the new Civil Code is relevant; within this framework, it was stipulated to name the "legislation dialogue", with the Consumer Protection Code, the claim of exclusive responsibility of the consumer, the occurrence of deceitful or abusive advertising, and the impact of the precedents of the American Courts in the judgment concerned herein.

The counter-arguments were rendered on pages 1706/1708.

In preliminary hearing and trial, oral evidence was collected (pp. 1711/1713).

Sentence of pages 1730/1736 adjudged the claim in part valid, to sentence the defendant to pay, by way of compensation for non-material damage, the sum of R$13,000.00 (thirteen thousand reais), plus arrears interest of 0.5% per month since the notification, and indexation from this date, declaring, thereafter, the merits settled, pursuant to art. 269, I of the Code of Civil Procedures. It also sentenced the defendant to pay the court and attorney’s fees, in the percentage of 20% (twenty per cent) on the amount of the conviction, in favor of CEJUR/DPGE (Judicial Training Center/ Term Deposit with Special Guarantee). The judge argued that, during the period in which Mrs. Leticia started becoming addicted to the product, the defendant made no warning regarding the harm caused to health and the risk of dependency that its product could cause. He emphasized that the defendant only started to release this information when requested by the health standards of various countries, but not voluntarily. He pointed out that, at the time when the plaintiff's wife started to smoke, it did not have any obligation to disclose the risks of tobacco consumption, which was only made

compulsory in 1988, with the promulgation of the Federal Constitution (article 220, paragraph 3), followed by Normative Acts of the Ministry of Health on the topic (Ordinance no. 490/88), and Laws nos. 8,078/90 and 9,294/96, the latter regulating the cigarettes advertising. The judge asserted that the thesis of the exclusive responsibility of the consumer is not valid, since the addict has no full determination of his/her own will. Pointed out that the lawfulness of cigarette marketing does not make the manufacturer exempt from answering for damages caused by its product. He added that, even if such product does not technically present addictive qualities or fault, it is acknowledged as evident that it causes immanent harm. He understood that the spouse of an addicted smoker, who watches his partner live as a dependent of cigarettes, and all suffering caused by such addiction and sees her, at the end of her life, smoking until her last days, suffers non-material damage.

Decision granted on p. 1739, recognizing the occurrence of clerical error, replacing the judgment according to the following terms: "In view of occurrence of clerical error, I amend the judgment of page 1736 to be replaced: "In favor of CEJUR/DPGE Banco Itau, branch 5673, checking account 3656-1”, for: "As provided by the sole paragraph of article 21 of the CPC, since the plaintiff lost the minimum of the costs application", while other terms do not suffer amendment”.

Filed motions for clarification on pages 1741/1744, the same were dismissed on page 1474.

Appeal on the merit of the case on pages 1749/1796. Reiterates, initially, the judgment of the interposed interlocutory appeal. Pleaded, preliminarily, the breach of principles of the due process of law, the adversary proceedings and the full defense, as well as infringement to articles 128, 131, 282, 398 and 458, II, of the CPC, and article 13 of the LICC (Law of Introduction to the Civil Code). Claims that the judge made use facts unconnected with the process, and on which the parties did not have the opportunity to manifest themselves. Stresses the irrelevance and inapplicability of foreign decisions, notably since the defendant was not part of the actions mentioned in the sentence, and which do not deal with the appellant’s conduct or the products manufactured by it. Defends the possibility of prejudice in favor of the party that takes advantage of the declaration of nullity. In merit, highlights the absence of tort or product fault. Points out the absence of dependency and of evidences necessary to establish a diagnosis, accordingly. Stresses that there was specific

contestation regarding the allegation that Mrs. Leticia would have developed dependency, that there is no evidence in the records leading to the conclusion that she was addicted to cigarettes, and that the diagnosis of addiction to nicotine, even when carried out, entails the assumption that people cannot quit smoking. Asserts that the plaintiff's wife was aware that smoking was bad for her health and yet chose to smoke, through the exercise of her own free will. Highlights the absence of deceitfulness and/or abusiveness in the defendant's advertising material, pointing out that no used advertising material was indicated. Claims that it does not mean that all smokers will turn into addicts simply due to the fact that smoking can cause chemical dependence, noting that the company was not even established in the country when the plaintiff's wife started to smoke cigarettes. Claims absence of causal link between the alleged illness and the consumption of cigarettes, highlighting that there is an absence of evidence that the imputed conducts may have influenced the behavior of Mrs. Leticia, as well as the inapplicability of the reversed onus of proof in the sentence.

Subsequently, the plaintiff's appeal was submitted on pages 1873/1877, aiming at increasing the arbitrated compensatory allowance and requesting clarification as to the fixed judicial fees.

Counter-arguments were provided on pages 1881/1890 and 1891/1896.

Decision rendered by this Rapporteur, voiding the sentence by official letter, since the judged party only considered the request of non-material damage choosing not to respond to other requests of the plaintiff (pp. 1900/1908), retained the provision in legal appeal stage (pp. 1926/1931).

Subsequently, the sentence on pages 1935/1942 was decided, adjudging the plea partially valid, to sentence the defendant to the payment, by way of compensation for non-material damage, of the sum of R$13,000.00 (thirteen thousand reais), to the plaintiff, plus arrears interest of 0.5% per month, since the notification's date, and indexation from the date the sentence was decided, declaring, thereafter, the merit settled, pursuant to art. 269, I of the Code of Civil Procedures. It also sentenced the defendant to pay the court and attorney's fees, in the percentage of 20% (twenty per cent) on the amount of the conviction, in favor of the CEJUR/DPGE.

New plaintiff's appeal was submitted on pp. 1943/1947, aiming at the increase of the compensatory amount decided.

Defendant's appeal on the merits of the case, reiterating the request of appeal of the interposed interlocutory appeal, and reviewing the reasons set forth on pages 1749/1796, adding the existence of recent decision of the Supreme Court of Justice on the subject (Special Appeal no. 1,113,804-RS) establishing the absence of liability of cigarette manufacturers. Advocates once again the lawfulness of the conduct, the absence of product fault, the absence of dependency, the existence of specific refutation over the claim that Mrs. Leticia developed dependency to cigarettes, the absence of abusive or deceptive advertising, absence of causal link.

This is the report.

The appeals are timely, including the other admissibility requirements.

This is with regards to the of demand filed by Claudio Rodrigues Bernhardt against Philip Morris Brazil S.A., due to the death of his wife on 11.14.2000, resulting from the continued tobacco

use, since she was a smoker of “Luxor” cigarettes, manufactured by the defendant.

The plaintiff maintains that the deceased smoked, usually, two packs of cigarettes a day and that the first symptoms of the disease emerged in August 2000. His wife died in the same year, with clinical status of cancer of the oral cavity with cervical metastasis, despite the sessions and doses of chemotherapy that she was submitted to.

Notes that, although his wife was told not to spoke by medical advice, she failed to abandon the tobacco addiction, notwithstanding the vigilance of relatives and friends.

Firstly, the analysis of the interlocutory appeal is made, reiterated by the second appellant (defendant), against the decision recorded on pages 1617/1618, defending the impossibility of producing oral evidence in order to verify the facts described in the records, as well as the impossibility of assessment of foreigner precedent by the expert.

With respect to the performance of oral evidence, and considering that the decision is precluded, although evaluated by the lower court in a previous moment (p. 1186), to which the appellant has not disagreed.

The process does not admit reversion in regards to the examination of issues covered by the estoppel.

In turn, regarding the necessity of the Court in asking the expert about matters concerning her report, notably in regards to the aspects referred to in sentence pronounced by the Supreme Court of the United States, in the U.S. Philip Morris case versus Mayola Williams, the appeal shall also not be rendered.

The discovery phase plays a vital role in the formation of the judge's persuasion, and therefore, it cannot be understood as the exclusive benefit of the party.

According to the national legal system, it is the judge’s responsibility, ex officio or at the request of the party, to identify the required evidences for the appropriate judgment of the suit (art. 130, CPC).

In fact, it is the responsibility of the judge, process officer and recipient of the evidence, to determine the relevance and pertinence of the evidence’s production, in regards to the controversial facts contained in the records.

The judge must conduct the process in search of the truth and in search of the effectiveness of justice.

The Superior Court of Justice has expressed understanding in order that the probative initiative of the judge be admissible, with realization of evidence of office, it is quite wide, since it is performed in the public interest of the effectiveness of Justice.

Thus, there is no illegality in the performance of the magistrate to request that the expert, named by the magistrate himself, clarifies certain concerns in respect to the matter addressed.

Therefore, the interlocutory appeal interposed by the defendant is declined.

Thus, the preliminary review also raised by the second appellant (defendant) is entered.

In regards to the need of annulment of the sentence, for breach of the right of due process of law, of the adversary proceedings and the full defense, as well as infringement to articles 128, 131, 282, 398 and 458, II, all set forth in the CPC, and articles 9 and 13 of the LICC, finds the defendant out of reason.

This is because the sentence was not supported by factual elements, alien to the proceedings, in order to serve as sentence to the defendant, but only mentioned existing precedents on the subject, in approval of the adopted thesis, being the decision duly justified according to evidence produced in the records.

The same reasoning is applied to the claim of irrelevance and inapplicability of foreign decisions.

It is essential not to lose sight of the fact that the material extracted from the Internet was used in the sentence as argumentative function, likewise doctrinal quotes are employed, while the lower court focused on the factual question outlined in the process.

Furthermore, information put forward is not able to surprise the parties, since this is widespread by all media channels.

Consequently, there is no need to talk about invalidity of the sentence.

Surpassed the preliminary considerations, the legal rights fund is introduced.

In this case, it is proven that the deceased, born on 04.09.1951, made continuous use, and in great quantities, of tobacco (p. 1412), for thirty-five years (pp. 1408 and 1484) of her life. She started smoking when she was fourteen years old, in 1965.

The particularities of the victim being provided, the legislation applicable to the case is established.

It is true that the legal standards of consumer's protection and defense are of public order, and shall be applied immediately to ongoing contracts, and to facts not yet consummated and not part of the legal owner's heritage, in regards to the unquestionable public interest.

Although the fact that it constitutes a public statute is insufficient to admit the retroactivity of the Consumer Protection Code, it allows, in the case of contract of continuous obligation, where obligations are renewed, its applicability, without infringing the non-retroactivity principle of laws, provided for in art. 6, heading, of the Law of Introduction to the Civil Code.

Indeed, considering that Mrs. Leticia started smoking previous to the protective standard edition, persisting, however, the relationship between the parties after the entry into force of the mentioned statute, applicable to strict liability under the protective statute.

Therefore, the consumer legislation is applied, as well as the standards inserted in the 1916 Civil Code, whose legislation is relevant to this case.

The reason being that, in the time the deceased started smoking, there was no specific legislation on the matter. Thus, the civil liability of the product's supplier was regulated by art. 159 of the 1916 Civil Code.

Therefore, only on 03.11.1991, when Law no. 8,078/90 came into force, (Consumer Protection Code), consumer relations started to receive special attention, accruing automatically on the ongoing legal relations.

Let's then move to the analysis of the legal nature of the cigarette.

It is known that tobacco is a product of inherent dangerousness (art. 9), as its composition contains substances that bring risks to the user, and it is certain that, unlike other products, there is no safe consumption of tobacco.

However, this product cannot be regarded as at fault, since the possible harms arising from its use, do not compromise its use, taking into consideration what ordinarily is expected from the product, thus frustrating the consumer's expectation.

Consequently, it is inherent in the use of tobacco the fact that it is responsible, or a risk factor, for a range of diseases that, in most cases, lead to the user's death, in view of the seriousness of the diseases that it may cause.

With mainstay in art. 9 of the Consumer Protection Code, the supplier of products and services potentially harmful or dangerous to health or safety should inform, in an appropriate and ostentatious manner, about their harmfulness or dangerousness, without prejudice to the adoption of other appropriate measures in each particular case.

It is therefore concluded that being the cigarette a product of inherent dangerousness, the supplier may only be

liable for any damage caused by the product's use, if the failure in providing information is proven.

In the light of the consumer legislation, there is no doubt regarding the need for the supplier to inform clearly, appropriately and in large coverage about the risks that the product may cause to the user.

However, the user started smoking cigarettes back in 1965, under the regulations of the 1916 Civil Code, covering thus period prior to the Consumer Protection Code Statute, as well as sparse restrictive laws, reason why the values that permeated the entire period of time in the contractual relationship must be observed.

The 1988 Constitution of the Republic (article 220, paragraph four) imposed legal restrictions on the advertising of tobacco, which will contain, where necessary, warnings about the harm arising from its use.

In infra-constitutional stage, Decree no. 1050/90, of the Ministry of Health, was amended, bringing warnings regarding the use of cigarettes, as well as implementing restrictions and advertising in certain environments, and also prohibiting the sale of cigarettes and the like for underage individuals.

In 1996, in order to regulate article 220, paragraph four, of the 1988 Brazilian Federal Constitution, Law no. 9294 was amended, prohibiting the use of cigarettes or any other smoking product, derived or not from

tobacco, in a collective, private or public area, except in area reserved exclusively to that purpose, as well as restricting the advertising of the product and similar products.

After the legal statute was mentioned, the same was amended by Law no. 10,167/2000 that, among other provisions, prohibited cigarette association with the practice of sports activities, olympic or not, in addition to suggest or induce its consumption in dangerous, abusive or illegal places or situations.

In federal stage, the State of Rio de Janeiro amended Laws no. 2516/96 and 2947/98.

Although there are respectable arguments to the effect that, in past decades, there was no legal duty for the tobacco industry to inform consumers about the risks of tobacco, since the restrictions only came into force after the enactment of the Brazilian Federal Constitution (1988) and the Consumer Protection Code (1991), one cannot lose sight of the fact that the informative rights and values of the legal system must be respected, and those should foster social and business relations celebrated between its members.

Thus, although the legal system in force at the time did not impose any legal command requiring the supplier of products and services to inform about the risks and harms of what the company introduced in the consumer market, there are other axiological driving forces that cannot be disregarded by the judge.

Good faith entails ethical duty of good acting, to position oneself with righteousness, translated into probity and loyalty, along the principles of the common man, considering social aspects and usages and habits of the time.

About the matter, the lessons of master Clovis Couto e Silva, quoted by Claudia Lima Marques, are presented:

> "The principle of good faith, under the Brazilian Civil Code, was not established, in article expressed, as a general rule, unlike the German Civil Code. But our Commercial Code included it as a prevailing principle in the obligatory field, and also related it with traffic uses. However, the absence, in the

> Civil Code, in article similar to Paragraph 242 of the BGB does not prevent the validity of the principle in our contract laws, since it is a legal proposition, with significance of rule of conduct. The commandment of conduct encompasses all who participate in the obligatory bond, and establishes, between them, a collaboration link, in view of the end goal that they pursue... The principle of good faith contributes to determine the 'what' and 'how' of the provision..." (Breach of the Duty of Good Faith to Report Correctly, Absent Business Acts Affecting the Right/Freedom of Choice, p. 82)

According to what Celia Barbosa Abreu Slawinski highlights, objective good faith, before being implemented in the Consumer Protection

Code, was already present in the minds of national lawyers, in the Philippine Ordinances (1603), in book I, Title LXII, paragraph 53, and, later, in the Commercial Code (1850), through standard established in article 131, I.

She then talks about the matter:

> "The first insertion can be verified in the Philippine Ordinances (1603), in book I, Title LXII, Paragraph 53, and, later, in the Commercial Code (1850), through standard established in article 131, I, whose potential has not been used even by our top commentators, who made no consideration about the possibility of its use, as autonomous source of rights and obligations.
> The interpretative rule of good faith can also be found in the Commercial Code Project organized by Herculano Marcos Inglez de Souza (1911).
> In Civil Law, the same rule is first present in the Stub of Teixeira de Freitas (1855), being valid to point out that the enlightened lawyer, in the General Part, Book One, Section III, has earmarked some articles to the treatment of the good faith of legal acts, and identified it as an inherent element to the records own matter. (Dogmatic Contours and Effectiveness of the Objective Good Faith – The Principle of Good Faith in the Brazilian Legal System, Publishing House *Lumen Juris*, 2002, pp. 77/79).

The need for compliance with the duty to report can also be easily perceived in a *sensu contrario* interpretation of art. 94, of the CC/16, that

regulated as follows: "In bilateral acts, the intentional silence of one party as to fact or quality that the other party has ignored, constitutes intentional omission, proving that, without it, the contract would not have been entered into.

It is worth emphasizing that the good faith finds its roots in Roman Law; some scholars pointed out that its origin goes back to the establishment of Rome, as shows the example below:

> "The notion of good faith in Law comes from the Roman world, registered in the Law of the Twelve Tables, according to which *patronus si clienti fraudem fecerit, sacer esto*. However, historians indicate that this notion is even older than that, since the same would be linked, according to tradition chosen by Dionysus of Halicarnassus, to the very establishment of Rome, which is to say that it is as old as the

> consumer institution, although in the latter, it is registered by its antinomian value – *fraus*, and not *fides*. (Good Faith in Private Law, Judith Martins-Costa, Publishing House RT, p. 111)

Lina Bigliazzi Geri, Italian author quoted in the above work, clearly describes the normative force behind the principle of good faith, as follows:

> "The general clause of good faith assumes emergency index value of interest otherwise intended, in a formalistic use of law, to not acquire proper relevance, serving as a corrective tool of the strictness of *ius strictum*, through the evaluation of interests involved in that action.
>
> It cannot be perceived as a reference to a generic and insignificant rightful and loyal behavior, an insufficient respect of mutual trust, a requirement of choice of the less burdensome solution by the other party, or, even worse, an equivocal principle of solidarity between people belonging to the same community or to a recently recycled "material", having, otherwise, a more solid content than this.
> The existence of an exact (even if, a priori, indefinable) normative content of provisions on good faith, which are actual legal rules, and not mere recipients of generic principles stripped of perceptive immediate force, and on which it is possible to sustain the current validity of a *exceptio doli generalis*.

> One cannot exclude the incidence of other standards, whose specific and predetermined content is able to autonomously protect rights, even because, it is for the judge to impose this regulation, by reason of his/her official duties, and so it should be applicable by him/her. (Entry: Buona fede nel diritto civile private, in Digesto delle Discipline Privatistiche, tomo II, p. 172).

In this context, notwithstanding of what remains to be seated in the trial of the Special Appeal no. 1,113,804 - RS (2009/0043881-7), whose brilliant vote was delivered by Judge Luis Felipe Salomao, former alumnus of this Court, believer of the understanding that the principles of good faith and contractual loyalty must be erected to the condition of general clause comprising of normative content, including all legal system and outlining all individual and business relations.

Our jurisprudence has not remained far from the matter, recognizing the enforcement of the principle of good faith and the need

for its compliance in contractual relations even before the regulations established by the Consumer Protection Code:

> CIVIL LAW. CONTRACTS OF THE NATIONAL HOUSING SYSTEM. NATIONAL EQUIVALENT PLAN VERSUS WAGE ADJUSTMENT CLAUSES BY RATES APPLIED TO FREE SAVINGS.
> 1- "IN THE CONTRACTS GOVERNED BY THE HOUSING SYSTEM, IT NEEDS TO BE RECOGNIZED ITS BINDING, ESPECIALLY, BESIDES THE GENERAL, TO THE FOLLOWING SPECIFIC PRINCIPLES: A) OF TRANSPARENCY, WHEREBY THE CLEAR AND CORRECT INFORMATION AND LOYALTY ON THE CONTRACTUAL SETTLED CLAUSES MUST PREVAIL IN THE ESTABLISHMENT OF THE LEGAL BUSINESS;
> B) THAT THE RULES IMPOSED BY THE NATIONAL HOUSING SYSTEM FOR THE ESTABLISHMENT OF CONTRACTS, IN ADDITION TO BEING COMPULSORY, MUST BE INTERPRETED WITH THE EXPRESS PURPOSE OF MEETING THE NEEDS OF THE BORROWER, ENSURING HIS/HER RIGHT TO HOUSING, WITHOUT COMPROMISING HIS/HER LEGAL SECURITY, HEALTH AND DIGNITY;
> C) THAT THE VULNERABILITY OF THE BORROWER MUST BE CONSIDERED, NOT ONLY DUE TO HIS/HER FINANCIAL FRAGILITY, BUT, ALSO, DUE TO ANXIETY AND THE NEED TO PURCHASE THE HOME OWNERSHIP AND SUBMIT TO THE EMPIRE OF FINANCIAL, ECONOMIC PARTIES AND OFTEN FINANCIALLY STRONGER;
> D) **THAT THE PRINCIPLES OF GOOD FAITH AND FAIRNESS SHOULD PREVAIL IN THE ESTABLISHMENT OF THE**

CONTRACT.
2 - IT NEEDS TO BE CONSIDERED WITHOUT EFFICIENCY AND CONTRACTUAL EFFECTIVENESS THAT IMPLIES IN THE READJUSTMENT OF THE BALANCE DUE AND THE MONTHLY INSTALMENTS TAKEN BY THE BORROWER, FROM THE RATES APPLIED BY THE SAVINGS BOOKS, ADOPTING, THEREFORE, THE IMPERATIVENESS AND OBRIGATIONS OF THE EQUIVALENT SALARY PLAN.
3 - APPEAL GRANTED.
(Special Appeal 85521/PR, Reporting Judge JOSE DELGADO, FIRST PANEL, judged on 4/29/1996, CG 6/3/1996, p. 19219) - (emphasis added)

ADMINISTRATIVE - INTERNSHIP CONTRACT IN MULTIDISCIPLINARY PROGRAM OF PUBLIC HEALTH - REMUNERATION LINKED TO THE RESIDENT DOCTORS - GOOD FAITH - ECONOMIC BALANCE - FREEZE.
- IF THE STATE, IN AGREEMENT ENTERED WITH TRAINEES, PROMISES THEM COMPENSATION EQUAL TO THAT PAID TO RESIDENT DOCTORS, IT CANNOT, IN THE COURSE OF THE CONTRACT, BREAK THIS PROMISE, IN DETRIMENT OF THE TRAINEES. **ADMINISTRATIVE CONTRACTS ARE NOT IMMUNE TO THE**

PRINCIPLES OF GOOD FAITH AND ECONOMIC BALANCE. (Appeal in Writ of Mandamus 1694/RS, Reporting Judge HUMBERTO GOMES DE BARROS, FIRST PANEL, judged on 3/7/1994, CG 4/25/1994, p. 9196) – (emphasis added)

The following decision is also granted:

GOOD FAITH. CONTRACT. THE PRINCIPLE OF GOOD FAITH IMPOSES ADDITIONAL LIABILITIES, ACCORDING TO NATURE OF BUSINESS AND PURPOSE INTENDED BY THE PARTIES. AMONG THEM IS THE OBLIGATION OF THE SELLER OF A SMALL CLOTHES SHOP NOT TO CANCEL ORDERS ALREADY MADE THAT WOULD MAKE THE BUSINESS UNVIABLE AND WOULD FRUSTRATE THE RIGHTFUL EXPECTATIONS OF THE BUYER. VENIRE CONTRA FACTUM PROPRIUM. CONTRACT. THE SELLER OF A CLOTHES STORE, THAT HELPS THE BUYER IN THE EARLY DAYS OF THE NEW MANAGEMENT AND SIGNS ORDERS FOR NEW GOODS, CANNOT, LATER ON, CANCEL ALL ORDERS NOT YET RECEIVED, THUS MAKING THE NORMAL CONTINUITY OF THE BUSINESS UNVIABLE, WITHOUT HAVING REASONABLE REASON FOR DOING SO. COMPENSATORY ACTION GRANTED. APPEAL PARTLY GRANTED, TO DECREASE INDEMNIFICATION. (Civil Appeal No. 589073956, Fifth Civil Division, Court of

Justice of RS, Rapporteur: Ruy Rosado de Aguiar Junior, judged on 12/19/1989) – (emphasis added)

Therefore, the next step is to examine whether the defendant informed adequately the consumers regarding the omission of the evils caused by the continuous use of tobacco.

The answer to such question, surely, is negative.

It is unanimously that in the media channels, in the foreign and national decisions, based on numerous documents made available currently, the cigarette industry omitted the addictive aspect of cigarettes, regarding the nicotine present in them, encouraging their consumption by airing misleading advertising, most of the time associated with healthy people and sports practitioners, silencing, furtively, the unquestionable risk factor to health.

Serving as background to the topic under discussion, the precise lessons of Jose Rosemberg, scholar of the subject-matter, are presented below:

"Back in the 1950s, the tobacco industry has been developing researches that provide it with the certainty that nicotine generates a physical and chemical dependency on the body, as well as studies for its faster release and absorption by the body, and even genetic studies aiming to develop tobacco plant with higher levels of nicotine. The tobacco industry, aware of the psycho-active properties of the nicotine developing dependency, has always denied the existence of these pharmacological qualities. The episode occurred at the beginning of 1980 is uplifting: Phillip Morris forced its scientist, Victor de Noble, to remove the article that he had submitted for publication in the Journal of Psychopharmacology, which reported his research confirming that mice which received nicotine developed physical and chemical dependence. This came to light through secret documents that became public. However, the tobacco industry has, continuously, denied, with emphasis, these properties of the nicotine.

Even more incomprehensible is that in 1964, the Public Health Service's Advisory Committee of the United States, with endorsement of the Surgeon General, has declared that "nicotine only causes habit; it is not a drug that causes addiction." However, the tobacco industry that, since the 1950s, was promoting sophisticated researches on the pharmacodynamics of nicotine, had already come to the conclusion that nicotine causes organic drug dependency. So, in March 1963, a year before the above quoted report stated by the official agency for public health of the United States, denying that nicotine is addictive, the Brown and Williamson, at an executive meeting, in view of its technical research, concluded that, due to the properties of nicotine, it causes

addiction. The tobacco company Brown and Williamson, based in the United States, is a subsidiary of the British American Tobacco (BAT), as well as the Brazilian Souza Cruz. At that meeting, the Vice-President, Addison Yeaman, stated: "Besides, nicotine causes addiction. We are, therefore, in the business of selling nicotine, which is a drug that causes dependency, effective to counteract the mechanisms of stress". In fact, since the 1950s, the tobacco industry already had the conviction of the psycho-active action of nicotine, as can be inferred from the pronouncement of H.R. Hammer, Research Director of the British American Tobacco, as shown in the minutes of the meeting on October 14, 1955:
"It is possible to remove all nicotine from tobacco, but experience has shown that these cigarettes and cigars become emasculated when doing so, and the satisfaction of smoking them is gone."

In 1962, in another meeting of the British American Tobacco, Executive Charles Ellis stated: “Smoking is

a consequence of addiction... Nicotine is a drug of excellent quality".

While the tobacco industry was performing tobacco enrichment procedures with higher levels of nicotine, at the same time, through media channels, it continued denying that this drug could cause addiction, casting doubts on the validity of the investigations of the medical-scientific agencies, which proved that this drug is psycho-active.

After all, this thick veil was lifted, and the tobacco industry was unmasked on May 12, 1994, when Stanton A. Glantz, a professor at the Division of Cardiology of the University of California, San Francisco, United States, active campaigner against smoking, received a letter written by a concealed writer under the pseudonym of Mr. Butts, approximately 4,000 pages of memorandums, reports, letters and copies of minutes, corresponding to a 30-year period of activity from British American Tobacco, and its subsidiary in the United States, the Brown and Williamson Tobacco Corporation. Thereafter, Merryl Williams, former technician of Brown and Williamson (BW), provided to Prof. Glantz a large number of documents relating to the activities of this tobacco company. The documents were transferred to the Health and Environment Subcommittee of the U.S. Congress. In addition to their publication in scientific journals, which are listed in the reference notes of this document, they were published in a series of articles in the New York Times. After several appeals of the tobacco companies alleging interference in

their privacy, the Superior Court of the State of California recognized their legitimacy, deciding that these documents should become public domain.

In August 1998, the Attorney-General of the State of Minnesota, United States, and the Blue Cross Shield, of the same State, filed suit against the tobacco industry, represented in case by Phillip Morris Inc. On May 8, 1998, tobacco companies proposed an agreement with the State of Minnesota. In the clauses of the agreement, the obligation of the tobacco industry to give public access to its internal documents in minutes, memorials, letters, reports, business plans and all correspondence relating to its technical, scientific and commercial activities. Many of these documents contain statements of technicians, scientists, consultants, advisors and lawyers.

The entire documentation belongs to seven manufacturers of cigarettes and two of their affiliated organizations, in activity in the United States: Phillip Morris Incorporated, RJ Reynolds Tobacco Company, British

American Tobacco, Brown and Williamson, Lorillard Tobacco Company, American Tobacco Company, Liggett Group, the Tobacco Institute and the Center for Tobacco Research. On that occasion, the documents that the former BW technician had delivered to professor Glantz were disclosed. In total, there are five million documents, containing 40 million pages. These documents have a special numbering and can be checked through the Internet. They are available in the official registry of Minnesota and in Guilford Surrey, on the outskirts of London. Many articles have been published about these documents; the most important have the following references: 32, 41, 64, 80, 133, 152, 186, 322, 324, 325, 367, 377, 404, 441, 444, 482, 492, 499, 517, 534, 538, 614, 715, 829, 918, 923, 955, 957, 981, 1017, 1070, 1087. In order to make the verification of all secret documents of the tobacco industry easier, the World Health Organization published a Practical Guide with directions on how to find and identify them, and read their contents (1076).
What was found through the analysis of these documents is enough to evaluate how the multinational tobacco manufacturers have come, throughout the years, to work against the global public health, accumulating astronomical profits.

(...)

Studies on nicotine, performed by the tobacco industry, derive from projects and scientific meetings, of which the most significant are the so-called Hippo I, Hippo II, Ariel, Bettelle Researches, and 18 technical meetings. The documents related to this gigantic work reveal, in short: a) the research conducted on nicotine were more advanced than the ones performed in medical-scientific communities;

b) for a long time, these industries had a clear and proven knowledge that nicotine is a drug that causes physical and chemical addition, acting deleterious on brain nerve centers; and c) researches were conducted in order to better clarify the neuro-pharmacology of nicotine, its nature, its forms of presence in tobacco, its easier release and greater action on the brain, the elevation of its content in tobacco and the intensification of addiction.

The "cast" and the variety of researches in animals and in humans are difficult to summarize, though, the most striking items are:

- Neuroendocrine studies on the action of nicotine on various brain centers;
- Regulation of the pituitary gland function;
- Faster release of nicotine, and its greatest impact on the brain;
- Control of nicotine on stress and tranquilizer effect;
- Release of psycho-active hormones by the action of nicotine on the brain nerve centers;

- Transposition of bound nicotine into free nicotine aiming to increase its action in the body;
- Transposition of the particulate phase nicotine into the gaseous phase, more active;
- Phenomenon of tolerance of the nicotinic nervous centers;
- Degrees of nicotine dependency and its elevation;
- Genetic engineering methods to obtain tobacco with higher levels of nicotine; and
- Increase of the levels of nicotine in cigarettes through the reconstituted tobacco.

These and other lines of research have led to various discoveries, the essential being:

- The neuro-pharmacological action of nicotine is of prominent importance for people to smoke;
- Substances such as ammonia, when raising the pH of tobacco, release more nicotine;
- Studies of methods to enrich the nicotine in the tobacco: the reconstituted tobacco and genetic engineering;
- Electroencephalography as a means to measuring the degree of intensity of the nicotine dependence;
- Adjustment of smokers in ways of smoking, to obtain more

adequate levels of nicotine in the blood, providing higher "satisfaction";
- Increase the organic absorption index of nicotine, generally on an average of 11% to 40%;
- Develop tobaccos that pharmacologically trigger greater pleasant sensations in the smoker;
- Cigarettes that release less than 0.7 mg of nicotine are not commercially advantageous;
- The production of cigarettes with higher nicotine release levels is urgent; and
- For future products, larger release of nicotine is imperative.
Therefore, in addition to the searched procedures, the cooperation of genetic engineering to obtain richer tobacco nicotine is mandatory. The information summarized above is present in many of the 32 publications whose numerical bibliographic references are listed at the end. Many were condensed in the journal JAMA. (Nicotine The Universal Drug - http://www1.inca.gov.br/tabagismo/publicacoes/nicotina.pdf)

The harms caused by tobacco use are immeasurable. Even the tobacco industry was forced to recognize its harmful effects on health, and, even if it did not have the knowledge about these effects, it had the legal duty to know such circumstance, since it is the responsible for introducing the product in the market.

In this light, it is clear that for several decades there was omission about the risks that cigarettes could bring to its

consumers (dependency by information), as well as that substances that cause addition (nicotine) were added to the marketed product, practicing misleading advertising.

Assuming such concepts, it is understandable that the defendant did not proceed with its original obligation, during the course of its activities, by omitting information required for the purchase of the product, even though the company knew such facts.

The lawfulness of the manufacturing and marketing of cigarettes cannot be denied, throughout the national territory, although this fact, by itself, does not remove the adverse effect that the product causes in its consumers, public and notorious fact, among others, and duly recognized by the Federal Government pursuant to Decree no. 695/99, which confirms the addictiveness and negative influence of the nicotine found in smoke.

The application of the legality principle cannot be interpreted independently from those others governing the constitutional order in force, as well as its teleological conception.

Lucio Delfino, in his article Civil Liability of the Smoking Industry from the Perspective of the Consumer Protection Code makes an interesting approach on the issue of the legality of the activity of cigarette companies, as follows:

> "To give you an idea, the tobacco industry came to assert that nicotine would function mainly linked to cigarette flavor; always seeking to deny the relationship of substance addiction. And it could not be different. The reason for that is because to import, export, prepare, produce and manufacture, in Brazil, narcotic substances or any other that induces physical or mental dependence, without authorization or in disagreement with legal or regulatory resolution is a crime, as pursuant to Law 6369/76 – Drug Law" (Consumer Rights Magazine – 51, pp. 181/182)

Constitutional norms pursuant to art. 1, III (human dignity), art. 5, heading (right to life), art. 5, XXXII (consumer protection rights), and art. 196 (right to health), of the Federal Constitution, assign to the State the duty to watch over and ensure citizens health and physical integrity,

through the implementation of social and economic policies aimed at reducing the risk of disease and other aggravations.

On the other hand, the Consumer Protection Code brings as fundamental principle the guidance of relations governed by it, the duty of clear and adequate information of the products inserted in the consumer market (art. 37), as well as protection against misleading advertising and abuse (art. 6, IV).

There is no doubt that from the time Mrs. Leticia started smoking, the malefic nature of cigarettes was not publicized by tobacco companies, neither by public bodies; it was, therefore, an unknown risk for the consumer, a risk only discovered later on, in ways that violate the legitimate expectation of the user on the safe use of the product.

Therefore, when the relation between the consumer and the supplier began, the consumer was not informed at first, in a conspicuous and appropriate way, about the harmfulness and dependency level that the product caused, in the short and long-term, the situation persisting until warnings about the evils of cigarette consumption became obligatory.

The victim's addition to tobacco remains undisputed in the process, notably on the testimony provided by the judgment expert in stating that Mrs. Leticia was addicted to the product of the defendant, arguing that a characteristic of Mrs. Leticia's addiction is the fact that, even in her final days, with pain and swallowing difficulties, she continued smoking, characteristic of her loss of will on the issues of her cigarette dependence. (p. 1,712).

The high degree of tobacco addiction, as maintained the expert herself, is evident from the analysis of p. 1412, where it is stated that,

although unable to open her mouth, being fed only liquids, the wife of the plaintiff kept smoking.

Clearly, there is no need to consider the claim that once the cigarette consumption started, the person would have had self-determination for, in case she wished to, quit the addiction, because the product placed on the market has, in its composition, substances that influence the mental constitution of the individual.

On the properties of nicotine, please read the text below:

> "Nicotine has neurobiological characteristics: it is a psycho-stimulant drug. The pharmacological process of nicotine dependence is similar to that of cocaine and heroin. These drugs, such as nicotine and opiates in general, release dopamine and increase the production of norepinephrine. In fact, psychoactive drugs such as nicotine, especially when they act on mesolimbic, dopaminergic and cholinergic centers and nucleus accumbens, causing the increase of dopamine as well as its release, and other psychoactive hormones, leading to dependency due tog euphoriant and anxiolytic properties. This is easily provable administering these drugs intravenously. Other stimulants can act similarly and the mechanism is fundamental to the development of dependency. Any pattern of tobacco consumption, including chewing it, develops dependency; nonetheless, the most intense is smoking.
>
> The World Health Organization, aligning with international bodies of psychiatry, as already mentioned at the beginning of this item, included, since 1992, smoking in the International Classification of Diseases, registering in section F 17.2: "nicotine is a psychoactive substance whose use (tobacco) can cause mental behavioral disorder". This behavior is well described in the definition of addiction as being "a pattern of behavior in which the use of given psychoactive drug takes acute priority in relation to other behaviors that, previously, had significant value" (Nicotine The Universal Drug - http://www1.inca.gov.br/tabagismo/publicacoes/nicotina.pdf, pp. 39 and 43)
>
> "Smoking is not just a risk factor for several diseases; it is considered an illness in itself. Currently, smoking is seen as a chronic disease due to the enormous difficulty to eliminate smoking addiction. In the past, it was believed that only willpower was enough for those who wanted to quit smoking.

> Science undertook to prove otherwise, that is, in practice, even if the person wants to, it is very difficult to quit smoking. Subject matter experts are of the opinion that the smoker should be subjected to a lifelong treatment. Just like a hypertension person should not abandon physical exercise, which brings he/she enormous benefits, a former smoker must also adopt and maintain habits even healthier than a person who never smoked. And, if necessary, to resort to some chemical treatment and psychological programs to learn how to deal with the absence of tobacco. RIGOTTI, Nancy. Desire is Not Enough. (interview) Veja Magazine. Sao Paulo: April, year 37, no. 23, 06.09.2004. p. 14-15. (Delfino Lucio, The

> inter-temporal law and the application of the Consumer Protection Code in indemnifying actions filed by smokers against the tobacco industry, Consumer Rights Magazine, Publisher RT, p. 132/133)

The precious lessons of Luiz Guilherme Marinoni are as follows:

> By logic, if the State has the duty to protect the health and safety of the population, it is not acceptable that it can authorize the sale of a product which it recognizes as harmful or dangerous, unless such authorization is founded in the society's needs for protection in itself.
>
> As for pesticides, information must also be *ostensible*, since the risks that these products can cause, when considered the benefits they can provide, are regarded as *acceptable*. With regard to alcoholic beverages, one could say that the harmfulness of its consumption cannot legitimize its sale, as its use is not essential to the development of society. It turns out that, in the last case, it is again necessary to distinguish between risk *acceptability* and *foreseeable* use. The consumption of alcoholic beverages, when done sparingly, does not generate an *unacceptable* risk of injury. In this case, it is the *misuse* of that product that can cause harm to health. If the risk is not in the consumption, but rather the *way* it is consumed, the product may only be sold when accompanied by restrictions on its use by minors, and information regarding the damage to health that its misuse can cause.
>
> With regard to tobacco, harmfulness does not arise from the way it is consumed, but rather the consumption in itself.
> (...)
>
> In fact, if the Public Administration recognizes the high *dangerousness* or *harmfulness of a product*, and still allows its sale without such danger or harmfulness being legitimized, because it is protecting another asset worthy of protection, the

> act of the Public Administration lacks *justification*, and so does not need to be accepted by the judge, who then holds responsibility for prohibiting the sale of the product. There is a simple reason for this: the State is responsible for the duty to protect, and therefore, this is also the responsibility of the judge, who cannot keep an assistant position in relation to the deviances and omissions of the Administration. When the latter recognizes the high harmfulness of the product, the authorization of the product's consumption is totally irrational without the guard of other asset that may justify it.

> (...)
>
> And it is not true that one needs to consider a constitutional provision that *allowed* the *commercialization of cigarettes* – although the inverse should be obvious. As already mentioned, that standard, after a certain point in time on the scientific development, imposed duties to the producer on cigarette advertising, *making the intention to protect the consumer's health clear*. If the passage of time was necessary to demonstrate that smoking causes cancer, etc., there is no need to fight the constitutional provision, *since this did not state that smoking can be sold even though it causes cancer (of course), but only that the advertisement of cigarettes should suffer restrictions*. *That is, there is no incompatibility between the norm that, at a certain point in the development of science, imposes restrictions on the advertising of a product and information duties to its producer and the norm that, in another stage of technological development, prohibits its commercialization following the technical conclusion that the product is "highly harmful." Such ideas are based in completely different factual situations.* (Marinoni, Luiz Guilherme, Consumer Protection Regarding the Notions of "Defective" Product and Service. The Tobacco Issue. Legal Magazine 370, August 2008, pages 37/39)

The duty to inform should not be conceived simply as a means to broadcast warnings on advertising media, but rather must be able to discourage the user, for the most part, already addicted.

Lucio Delfino points out in article, interesting questions about external influences detrimental to the idea of free will in tobacco cases:

> "In the beginning, it could be said that the initial decision to start smoking, and to keep it going in the daily life, arises from one or a few *external* stimuli. These are *external excitations* that somehow influence the will of the individual, leading to his/her action towards the initial and continuous consumption of

> tobacco. Being this argument true – and it certainly is – the thesis of the smoker's free will should be dismissed, especially given that there would be no point in defending a prone freedom to act, when the will of the individual is tarnished, since shepherded to a certain behavior by factors other than his/her own conscience.
> There are several factors responsible for leading people to try a cigarette. Curiosity for the product, its low cost, the imitation of

> adult behavior by young people, and the need of the latter to increase their self-confidence are just a few of these external determinants. However, and more often than not, these determinants are mere supporting factors, acting in aid to a powerful master force and, some times, imperceptible, coined artificially for the sake of stimulus. (Legal Magazine Year 55 – November 2007 – no. 361, pages 67/68)

It should be noted that, according to the registered in the sentence, the defendant did not deny in its defense that the deceased person consumed its products exclusively, as well as that she (the deceased) developed tobacco dependence.

Therefore, given the absence of specific refutation of such facts, the same remain uncontroversial, in compliance with art. 302, of the CPC, dismissing the presentation of evidence (art. 334, III, CPC).

We shall now proceed to the analysis of the causal link.

The fact that smoking is harmful to health, being the cause of numerous diseases, is evident, mainly, the assertion that it causes several types of cancer.

On the topic, once again, the precise lessons of Jose Rosenberg are presented, as follows:

> "Tobacco contains about 70 carcinogens. The vast majority belongs to three groups: polycyclic aromatic hydrocarbons, aromatic amines and nitrosamines. The latter are strictly related to nicotine". (Nicotine The Universal Drug, p. 78- http://www1.inca.gov.br/tabagismo/publicacoes/nicotina.pdf)

> "(...) It is known that nicotine has angiogenic properties. This characteristic of nicotine promotes the development of cancer. For a cancer to proliferate, it requires the amplification of the network of blood vessels to nourish the cancer cells. There is a constant ratio between the volume of the tumor, the number of

cells and the vascular network. It is likely that cancerous cells produce a carcinogenic factor to support the greater blood supply. This, for instance, is well established in melanoma. The nature of this factor is unknown. It appears to be proteins that have mutagenic properties for endothelial cells. In its turn, nicotine promotes proliferation of vascular endothelial cells. In short, nicotine, due to its angiogenesis

properties, increases the arterialization of the cancerous tissue, and promotes faster multiplication of neoplastic cells and their dissemination". (Nicotine The Universal Drug, p. 79 - http://www1.inca.gov.br/tabagismo/publicacoes/nicotina.pdf)

In turn, the World Health Organization asserts that:

"Tobacco is a risk factor for six of the eight causes of death in the world, and kills one person every six seconds. Tobacco kills one third to half of all people who consume it, on average 15 years prematurely. Today, tobacco use causes more than five million deaths per annum; the forecast for 2030, unless urgent measures are taken, is that this number will increase for more than eight million. If current trends continue, it is estimated that around 500 million people alive today will die as a result of tobacco consumption. During the twenty-first century, it could kill up to a billion people.

Tobacco smoked in any of its forms causes up to 90% of all lung cancers, and is a significant risk factor for cerebrovascular accidents and fatal heart attacks. The second hand environmental tobacco smoke also causes small but serious and fatal consequences for health. Smokeless tobacco is also highly addictive and causes head, neck, esophagus and pancreas cancer, as well as many oral pathologies". (http://www1.inca.gov.br/tabagismo/publicacoes/OMS_Relatorio.pdf, extracted in 17.03.2011)

In another work, relevant data from is also extracted:

"Currently, it is estimated that tobacco causes 4.9 million deaths per year. If measurements are not taken, it is expected that, by 2020, the mortality attributable to smoking doubles. Around 70% of these deaths will occur in developing countries.
Along with HIV/AIDS, smoking is the fastest growing cause of deaths in the world, and will be the leading cause of premature death in 2020.

In recent decades, there has been a drastic increase of smoking in developing countries, especially among men. This contrasts to the slow but steady reduction of smoking, especially among men, in many industrialized countries. Smoking rates are increasing in some low-and middle-income countries, especially among young people and women, and remain

relatively high in most of the former Socialist Republics. Smoke increases substantially the risk of mortality from lung cancer, cancer of the upper airway and the high digestive tract and in other parts, heart diseases, cerebrovascular diseases, chronic respiratory diseases, and a wide range of organic disorders (see **Table 1**). In populations where smoking is a common habit for many decades, it accounts for a substantial proportion of all deaths.
(...)
Table 1: Smoking-related Diseases
Main diseases caused, in part, by smoking:
Mouth, Pharynx and Larynx Cancers
Esophagus Cancer
Lung Cancer
Pancreatic Cancer
Bladder Cancer
Coronary Artery Disease
Arterial Hypertension
Myocardial Degeneration
Cardiopulmonary Disease
Other Heart Diseases
Aneurysm of the Aorta
Peripheral Vascular Diseases
Atherosclerosis
Cerebrovascular Disease
Chronic Bronchitis and Emphysema
Pulmonary Tuberculosis
Asthma
Pneumonia
Other Respiratory Diseases
Peptic Ulcer
Other adverse effects caused in part by smoking:
Lip Cancer
Crohn's Disease
Nose Cancer
Osteoporosis
Stomach Cancer
Periodontitis

Cancer of the Renal Pelvis
Smoking-Related Amblyopia
Kidney Cancer
Age-Related Macular Degeneration
Myeloid Leukemia
Reduced fecundity
Reduced-size fetus
Source: Doll 1998 Tables 11, 12 and 13.
Smoking also harms third parties. There are, certainly, risks to health arising from passive smoking: smoking during pregnancy brings an adverse effect to the development of the fetus. In June 2002, the International Agency for Research on Cancer (IARC) concluded that involuntary smoking ("secondhand" or environmental exposure to smoke of products derivative of

tobacco) was carcinogenic for humans. 6 Chewing tobacco can cause oral cancer, as well as smoking cigar or pipe. In industrialized countries, it is estimated that smoking causes more than 90% of all lung cancers in men and about 70% of all lung cancers in women. In addition, smoking is responsible for 5680% of all chronic respiratory diseases and 22% of all cardiovascular diseases". (Smoking and Health in Developing Countries, OMS, extracted from the website: http://www1.inca.gov.br/tabagismo/frameset.asp?item = link = tabagismo_saude.pdf & publications)

There are evidences of the disease developed by the plaintiff's wife (cancer of the oral cavity) and its diagnosis in the records, as well as evidences of the various examinations and hospitalizations to which she was subjected.

The victim died at fifty years old, and smoked for thirty-five years of her life, according to documents and photographs attached to the records and was, without a shadow of a doubt, an addict.

At this rate, it is true that the consumption of cigarettes by the victim for many years and the disease developed by her, lies on the line of efficient and appropriate cause of her death, whereas the defendant did not produced any evidence otherwise, i.e. that the disease developed could not arise from the continuous use of its product, but from any other cause.

Although the court expert has stated in the conclusion of her technical report, that the cause-effect correlation remains undermined among the existing risk factors (p. 1573), in her testimony in court she certifies that the difficulty in establishing, in the report, the inherent risk of cigarettes is because the documentation submitted was not detailed enough to establish histological type and primary localization of the evil (p. 1712).

Regarding the victim's illness, the opinion is given below:

> In the field of oral health, smoking is directly related to the development of oral cancer, which affects the lips and the interior of the oral cavity. "Inside the mouth, gums, jugal mucosa (cheeks), palate (roof of the mouth), tongue

> (mainly the edges), floor (area under the tongue) and tonsils must be observed for a proper diagnosis. Lip cancer occurs mostly in the lower lip", explains Prof. Dr. Renata Tucci, PhD in Oral Pathology of the University of Sao Paulo, and coordinator of Cedoc, Dental Diagnostic Center of CETAO.
>
> The oral cavity being an organ that allows direct visual analysis, it is assumed that there would be a greater likelihood of early diagnosis of oral lesions, unlike other organs such as the breast, bowel and lung, for example. "Still, we observe many cases of late oral cancer diagnosis in Brazil. Patients come into their first appointment with lesions in advanced stages and often visit various health professionals until the final decision of the diagnosis", says the dentist.
>
> Tucci explains that mouth cancer usually appears as a wound that never heals and grows progressively, rapidly infiltrating neighboring tissues. Treatment is performed through surgery for tumor removal and/or radiotherapy. "We have a lot to do in order to prevent the onset of oral cancer. **We support and encourage initiatives anti-tobacco due to proven relationship between this disease and smoking.** We also believe that we must involve dental surgeon and patient, in order to enable them to perform an early detection of the disease, when the chances of improvement and control are greater", reinforces the Coordinator of Cedoc.
>
> For Renata Tucci, the biggest problem of oral cancer is the few specialized programs and projects in the work of early diagnosis and prevention of this disease. "On a day-to-day basis, patients often seek help too late. For the most part, cases are discovered in an advanced stage, which complicates treatment and cure", she alerts. (http://www.inca.gov.br/tabagismo/frameset.asp?item=updates = link & ver.asp? id = 1459)

After all the evils caused by the tobacco industry in society, one cannot allow its harmful to keep perpetuating in the legal world, exempting it from the liability for the death and diseases developed by users of the product that it places on the market, knowing its evils.

This is the business risk, and it is minimal given the huge amounts collected by cigarette companies to the detriment of many lives cut short, and numerous diseases caused due to the use of

tobacco, still in large quantity and increasingly in the world.

Clearly, whoever creates the risk of damage has a duty to stop it. Thus, the tobacco industry should be liable if this risk turns to cause actual damage.

The degrading lawfulness of the activity of farming, industrialization and commercialization of smoke cannot dismiss the accountability for the damages caused by the consumption of the product, as with any marketed good.

It is therefore concluded that if the defendant, with its performance, caused injury to users of its product, it has the legal duty to repair the damage, because it has the obligation not to injure.

Hence, if the defendant created the risk for the consumer, it had the legal duty to stop it.

As support, some judicial decisions on the topic are shown below:

> NON-MATERIAL DAMAGE. CIGARETTES. MORTAL CAUSES THAT CAN ARISE FROM: 'PULMONARY EMPHYSEMA', 'CARDIAC ARRHYTHMIA' AND 'LUNG CANCER', AMONG OTHERS. PROVEN CAUSAL LINK, RELATED TO CIGARETTE CONSUMPTION AND THE DEATH EVENT. PRINCIPLE OF OBJECTIVE GOOD FAITH THAT APPLIES TO THE CCv/16, INCIDENCE OF THE CONSUMER PROTECTION CODE (arts. 6, sections I, III, IV, VI and VIII, and 12, paragraph 1) AND ART. 159 of the CCv/16, IN MODE OMISSION IN ACTION. APPLICATION OF ARTICLE 335 OF THE CPC: "COMMON EXPERIENCE RULES". DUE COMPENSATION. (PRECEDENT: Civil Appeal no. 70000144626, editor for judgment, Judge Adao Sergio do Nascimento Cassiano, j. on 10.29.03, 9th Civil Division). APPEAL PARTLY GRANTED. UNANIMOUS. (Civil appeal no. 70007090798, Ninth Civil Division, Court of Justice of RS, Rapporteur: Luis Augusto Coelho Braga, judged on 11/19/2003)

> CIVIL APPEAL. CIVIL LIABILITY. DEATH OF SMOKER WHO BECAME ADDICTED TO TOBACCO BEFORE THE EFFECTIVENESS OF THE CONSUMER PROTECTION CODE. LIABILITY *STRICTU SENSO* OF THE MANUFACTURER OR SUPPLIER DUE TO THE FACT THE PRODUCT (ART. 6, ITEM VI, 9 AND ART. 12, OF THE

THE CONSUMER'S HEALTH. CAUSALITY NEXUS UNDER A MEDICAL AND LEGAL PERSPECTIVE. ABSENCE OF GOOD FAITH ON THE GROUNDS OF OMISSION IN ALERTING CIGARETTE CONSUMERS THAT THE ACT OF SMOKING A PRODUCT INHERENTLY DANGEROUS CAUSES DAMAGE TO HEALTH ALREADY KNOWN BY THE MANUFACTURER. CONTRIBUTION OF THE VICTIM. INDEMNITY QUANTUM 1. INTERLOCUTORY APPEAL. An objection incident was not presented regarding the value of the claim, in a timely manner; therefore, a temporal estoppel was established, pursuant to art. 183 of the CPC. Even if the objection were presented, the original request of action states, in its legal basis, to sentence the defendant to pay compensation for moral damages, in value to be arbitrated by the court. The plaintiff, therefore, did not specify the contested amount, leaving it to the discretion of the Judge, in accordance with the evaluation of relevant criteria. This is a generic application manifest, for which reason it is perfectly appropriate to determine the value of the cause as per the purview. It is evident the feasibility of deducing sentencing request for moral damages, based on psychic, emotional suffering, which does not have an exact economic measurement at the time of the action, and relies on judicial arbitration, not finding obstacles in the legal interdiction of art. 286 of the CPC. 2. APPLICATION OF THE CONSUMER PROTECTION CODE (INTERTEMPORAL LAW) For express manifestation of the legislator, legal standards of consumer protection and defense are of public order, and shall be applied immediately to ongoing contracts or consumer relations, and to facts not yet consummated and not part of the legal owner's heritage, with respect to the existing public interest. Since the habit of smoking was acquired previously, and the consumer relationship persisted after the entry into force of the Consumer Protection Code, including, the diagnosis, hospitalization and the victim's death also occurred in the period of the validity of this protective legislation, the liability *strictu senso* is applied, pursuant to the Consumer Protection Code. On the other hand, the axioms of *mihi factum, dabo tibi ius* (give me the fact, I will give you the right) or else the *iura novit curia* (the judge knows the law) are applied. Therefore, the sentence judge was acting lawfully when he/she recognized the applicability of the Consumer Protection Code, even though the application of the indemnity action was based on the subjective civil liability of the 1916 Civil Code. 3. THE

LAWFULNESS OF THE DEFENDANT'S CONDUCT, to manufacture and market cigarettes, does not matter for the resolution of the lawsuit, since it is essential to examine the characteristics of the product placed on the market, either internally or externally. The unlawful acts, without the intention to exhaust them, are considered: (a) in the omission of the tobacco suppliers to report, at the time when the teenager started smoking, in a proper and clear manner, about the

characteristics, composition, quality and risks that smoking could cause to their consumers (information addiction); (b) in the insidious and hypocritical widespread advertising disseminated by tobacco suppliers, linking cigarettes to situations such as professional success, beauty, pleasure, health, refinement, etc.; (c) in the fact that the tobacco industry adds to the cigarette substance that causes dependency to its users (nicotine), forcing them to consume the harmful product even more, not by conscious choice, but due to a chemical necessity. 4. LIABILITY *STRICTU SENSO* OF THE SUPPLIER. In the field of health protection and consumer safety comes into force the general notion of legitimate expectation, i.e., the idea that products and services placed on the market must meet the expectations of safety that is legitimately expected of them. Firstly, it is required that the existence of dangerousness is in accordance with the specific type of product or service (objective criterion). Secondly, the consumer must be total and perfectly able to foresee this danger, i.e., the risk does not surprise (subjective criterion). Paragraph 1, of art. 12, of the Consumer Protection Code, after pointing out that there is only civil liability of the supplier if there is any defect in the product placed on the market, establishes, by way of example, that the product is defective when it does not offer the security that was rightfully expected of it. Therefore, the concept of fault does not relate exactly to the inadequacy of the product for its purposes, but rather, to the violation of a legitimate expectation of security, which is capable of causing harm to consumers. The fact that some smokers can quit the addiction on their own or with medical help, does not exclude the responsibility of the manufacturer, since the abandonment of the addiction depends on subjective factors and individual characteristics of consumers. However, the addiction has the same genesis for all smokers: cigarette consumption and nicotine addiction. The act of quitting smoking does not mean that nicotine is not addictive or that cigarettes do not have other components that induce their consumption. The abdication of smoking addiction does not depend only on the smoker's own decision or his/her self-determination. Thereby, the inherent risks in cigarette consumption are not considered normal and predictable due to their nature and fruition (art. 8

of the CPC), since the expectation of tobacco smokers is not to enjoy diseases associated to cigarette consumption or result in death in the long run. Rather, they sought to enjoy the soothing and pleasant sensations brought by the consumption of cigarettes, these considered normal and predictable. 5. COMPARATIVE LAW. The recent third great wave of litigation against tobacco companies in the United States of America changed its course so that condemning tobacco companies is now becoming the tendency.

Since May 1994, internal documents (known as ‘cigarette papers’) of a few smoking companies were made public, they would reveal that the tobacco industry knew the health risks of tobacco consumption since the beginning and mid-fifties and, nevertheless, would have omitted relevant warnings to the point where, recently, governments of the Union States have decided to sue, by means of 'class actions’, the cigarette industry to obtain the reimbursement of sanitary-medical expenses for damages related to treatment of diseases presumably related to the use of tobacco. 6. CIGARETTE AS AN INHERENTLY DANGEROUS PRODUCT. Tobacco is considered an inherently dangerous product because it may be a risk to victims, and whose own design or nature implies a number of features in virtue of which it is not possible to have a safer alternative, since if it were one, the product would lose its very nature. These are products with ‘paradoxical status’ that can cause serious negative consequences, however, it cannot be said that they can be considered unsafe or unreasonably dangerous. 7. CAUSAL LINK BETWEEN SMOKING AND DEATH. Epidemiology as a generic method to determine causality in the civil liability for the product. According to the causation theory, applied to the scope of civil liability for the product, in order to constitute casual link, the existence of high likelihood of occurrence of damage is sufficient, as long as this is not attributable to extraordinary circumstances or unlikely situations, that would not be considered by a wise judge. In this causal epidemiological link perspective, provided by rules of ordinarily events, the evidence collected in the records comforts the presence of causal link between smoking and lung neoplasm, which cause the victim's death. 8. ABSENCE OF GOOD FAITH IN THE CONDUCT OF THE DEFENDANT. It is true that the duty to inform was only expressly instituted with the advent of Law 8,078/90. Nevertheless, the principle of objective good faith (rule of conduct) already existed in the civil legislation, which, in essence, imposed restrictions on the sale of harmful products. Indeed, one is not arrogating, herein, the provisions of the Consumer Protection Code, but rather, the so-called principle of good faith that although it was not expressly provided for in the 1916 Civil Code, it was accepted by the civil

liability system, which stipulates a straight line between the parties, in order to protect the legitimate expectation of the other. Although a legal provision of the duty to provide information was inexistent in the time when the plaintiff started smoking (1963), it is clear that the defendant did not warn the consumers

when it supposed to do so, or should the manufacturer know necessary, incurring violation of the required good faith in the commercial traffic, by omitting essential information about the product, since the concealment of this information in itself constitutes the deceitfulness. Indeed, the existence of fanciful artifice used in order to attract the audience's sympathy makes advertising misleading. 9. INDEMNITY QUANTUM There is no doubt about the sadness, grief and anguish faced by the partner and the son of the deceased, to have witnessed the gradual deterioration of the health of a loved one, without achieving success in attempting to help her get rid of the addiction. The defendant induced addiction directly, by means of advertisements, with the single purpose of making a profit, without concern for the health of the consumer. It is appropriate to recognize the contribution of the victim to her own death, to the extent that she was alerted by people close to her about the danger of continuing smoking, as the initial application itself exposes, reason for which the reduction in the trial was perpetrated to 2/3 of the compensation value. A higher reduction of the quantum is unreasonable, given that the triggering for the addiction shall be attributed to the defendant. "THE INTERLOCUTORY APPEAL, THE APPEAL ON THE MERITS OF THE CASE AND THE MANDATORY REVIEW WERE DENIED; THE INTEREST ON ARREARS WAS FIXED FROM THE LEGAL SENTENCE. UNANIMOUS." (Civil Appeal no. 70016845349, Ninth Civil Division, Court of Justice of RS, Rapporteur: Odone Sanguine, judged on 12/12/2007)

The assumptions of civil liability being established, namely, the fact, the causal link and the damage, the duty of the defendant arises to compensate the non-material damage experienced by the plaintiff.

It is clear that the plaintiff's grief for the death of his wife is not liable for compensation. The remedial funds shall only lessen the pain.

The death of a partner or parent is an inexhaustible source of pain, grief and suffering for those who lived with the family member, especially when the death comes with a long and gradual period of physical and psychic deterioration; thus, in this case, it is not necessary to require proof of suffering.

Therefore, the compensation established in favor of the plaintiff is applicable.

In turn, regarding the need to increase the compensatory fixed amount, the plaintiff's appeal is justified.

The sum must be arbitrated, paying attention to its repressive and compensatory aspects, and an amount compatible with the intensity of suffering, meeting the criteria of reasonableness and socio-economic conditions of both parties.

Therefore, the arbitrated amount shall be necessarily increased to R$100,000.00 (one hundred thousand reais), considering reasonable logic, purpose of condemnation, and taking into account the socio-economic capabilities of the parties.

The amount fixed is founded under the terms of the jurisprudence of the Supreme Court, in cases of death of family members.

> SPECIAL APPEAL - CLAUSE "A" AND "C" - ADMINISTRATIVE - STATE CIVIL LIABILITY - POLICE CAR COLLISION - DEATH OF MOTHER AND UNBORN CHILD - LAWSUIT FOR DAMAGES - APPLICATION INITIAL PROCEEDINGS - APPLICATION FOR COMPENSATION FOR NON-MATERIAL DAMAGE IN THE AMOUNT OF THREE HUNDRED MINIMUM WAGES FOR BOTH DEATHS - SENTENCE THAT DETERMINED THE COMPENSATION IN THE SUM OF THREE HUNDRED MINIMUM WAGES FOR THE DEATH OF THE MOTHER AND THIRTY MINIMUM WAGES FOR THE DEATH OF THE UNBORN CHILD - VALUES CONFIRMED BY THE JUDGMENT OF THE APPEAL - ALLEGED OFFENSE TO ARTICLE 460 OF THE CPC - INCIDENT - ULTRA PETITA SENTENCE - REDUCTION OF THE INDEMNITY AMOUNT TO QUANTUM REQUIRED BY THE PLAINTIFF - ALLEGED OFFENCE TO THE PROVISIONS OF ARTICLES 20, PARAGRAPH 4 & 70, SECTION III, OF THE CPC, 1,524 OF THE CIVIL CODE AND 38 OF THE BRAZILIAN TRAFFIC CODE - ABSENCE OF PREVIOUS QUESTIONING - JURISPRUDENCE NOT DEEMED.
> The Illustrious Court of origin decided that the sentence terms that sentenced the State Government to pay the plaintiffs a compensation in the amount of "300 (three hundred) minimum wages for each, for the death of the mother and 30 (thirty) minimum wages for the unborn child, both by way of non-material damage, representing the net and sole amount of R$79,200.00 (seventy-nine thousand and two hundred reais), incurring interest on arrears for late payment, from this date,

on the basis of half per cent per month and monetary correction, both until the effective settlement".
(...)
It is good advice, therefore, on behalf of the promptness and procedural economy, the reduction of the indemnity amount to 300 minimum wages for each one of the plaintiffs of the action, by way of compensation for both deaths.
(...)
Jurisprudence divergence not demonstrated.

Special appeal partially granted to reduce compensatory allowance for 300 minimum wages for each one of the plaintiffs of the action, by way of compensation for the death of his/her mother and of the unborn.
(Special Appeal 472276/SP, Reporting Judge FRANCIULLI NETTO, SECOND PANEL, judged on 6/26/2003, CG 9/22/2003, p. 299)

Furthermore, in the face of the absence of resources of the parties regarding the remaining terms of the sentence, notably with regards to legal consequences, the judicial decision is maintained.

All things concerned, **the defendant's appeal (second appeal) is dismissed, and the plaintiff's appeal (first appellant) is granted in order to increase the fixed indemnity amount for the sum of R$100,000.00 (one hundred thousand reais), maintaining the other terms of the sentence.**

Rio de Janeiro, March 22, 2011

Monica Maria Costa
Justice Rapporteur