STATEMENT

by

THE RIGHT HON. LORD NIMMO SMITH

when delivering judgment

in the cause

MRS MARGARET McTEAR

against

IMPERIAL TOBACCO LTD

at the

Court of Session, Edinburgh

on

31 May 2005

Copies of what I am about to say will be available as soon as I have risen and in electronic format on the Scottish Courts Website at 10.00am today.

I should like to start this morning with some words of thanks. First of all John McLean, who sits at the table as my clerk this morning, is retiring today. He has had a long career in the public service and until my recent appointment to the First

Division served as my clerk throughout my career in the Outer House. He gave excellent service both to me and I am sure to all those court users who had occasion to deal with him, and I should like to thank him very much and wish him well in his retirement. Pat Timoney was my macer for several years and he likewise gave excellent service for which I am very grateful. It is not always recognised how the administration of justice is assisted by a regular team of judge, clerk and macer, but I am sure this was apparent during the proceedings in this case and also during the more recent Luke Mitchell trial which placed even greater demands on Mr McLean and Mr Timoney.

The writing of my Opinion has been carried out by me alone. This included such tasks as preparation of the list of references and the selection and checking of all quotations. In hard copy the Opinion extends to 1121 pages and according to the computer it extends to just over 350,000 words. The number I mentioned late last year included pages in the triple spacing we use for drafts, whereas the finished product is in our standard double spacing. The hard copy has been bound in four volumes. Three sets and a CD Rom will be delivered to each of the parties as soon as I have risen. An electronic version will be available on the Scottish Courts Website at 10.00am today. It will be in two formats, PDF and Word. The advantage of the Word format is that it is searchable. There is a list of contents at the beginning of all versions, with references to paragraph numbers, so as to assist in finding any particular passage. The electronic version has been provided with hyperlinks between the list of contents and the passages referred to.

The entire Opinion has been typed by Debbie Laidlaw, who has indeed carried out the printing and binding herself. This has been a complex and demanding task, carried out over many months, which she has performed with admirable skill and

patience, and I am deeply indebted to her. Proof reading of almost all of the Opinion has been carried out by our legal assistants, Catriona Macphail, Mary Frances O'Neill and Laura Wylie, who have found time from their normal duties of preparing criminal appeal papers to undertake this for me. They have saved me from a number of errors and I should like to thank them for carrying out this task. Any remaining errors are of course my responsibility. If any are found of a purely typographic nature I should be glad if Irene Cranston in our Typing Pool could be informed so that the electronic version can be corrected.

In the course of the Opinion I refer to the late Alfred McTear as Mr McTear, to his wife Mrs Margaret McTear, who is the pursuer in this action, as Mrs McTear, and to the defenders, Imperial Tobacco Ltd, as ITL. It will be seen from the list of contents that I have organised the material into nine parts, which I call Part I: Preliminaries, Part II: The parties' positions on the main factual issues, Part III: Public awareness, Part IV: Mr and Mrs McTear: Questions of fact, Part V: The expert evidence, Part VI: Cigarette smoking, lung cancer and addiction, Part VII: Liability, Part VIII: Damages and Part IX: Conclusions and result. I shall read out most of Part IX shortly. There are references in it to earlier paragraphs, and while I shall not read out these references I strongly recommend that anybody who wishes to understand, or to give others an understanding, of what I have decided should at least go to those paragraphs.

It will be found that there are passages which I regard as of particular importance in Part I. In paragraph [1.8] I state:

"I wish to state clearly now, and shall reflect this throughout my Opinion, that:

(1) This is in no sense a public inquiry into issues relating to smoking and health; it is a proof before answer in which I have to

> consider, having regard to the facts and the law, whether ITL should be found liable in damages to Mrs McTear.
>
> (2) I must base my decision about questions of fact on the evidence, and that alone."

In paragraph [1.10] I state:

> "It must be emphasized that our system is evidence-based. My duty as a fact-finder is exactly the same as that of a jury, who in terms of their oath are bound to 'give a true verdict according to the evidence'. This brings me to a related topic."

This topic is judicial knowledge. In the course of paragraph [1.11] I say that apart from the matters which are recognised as being within judicial knowledge, it is improper for a judge to proceed upon personal knowledge of the facts in issue, or upon personal examination of passages in textbooks. In paragraph [1.12] I state:

> "No doubt, where there is an issue of general public importance, a judge may have views about it in his or her private capacity. But it is an essential part of the judicial function that these views be put out of mind when hearing a case: otherwise, the judge would simply be at risk of pre-judging the very issue upon which he or she may be called to make a decision judicially. One of the fundamental issues in this case is whether cigarette smoking can cause lung cancer. This is an issue which I am duty-bound to approach with an open mind and to decide on the basis of the evidence led before me. As with all other disputed issues of fact, the burden of proof is on the party who seeks to establish this, in this instance on the pursuer."

In paragraphs [1.35] to [1.37] I discuss submissions on the question whether it was open to me to have regard to passages in documents which were not put to witnesses. At paragraph [1.37] I state:

> "With a few well-recognised exceptions, the terms of a document which has been lodged as a production are not evidence. There are procedures, such as the joint minutes and notices to admit which have been used in this case, under which the terms of a document may be agreed to be accurate, and in such an event is not necessary for it to be put to any witness. Otherwise, evidence is required to establish its terms. I do not regard it as being open to me to take account of any passage in any document, the terms of which were not agreed, and to which reference was not made in the course of the evidence of any witness. This is because of the fundamental rule that I must decide the case on the basis of the evidence led before me, leaving aside any other considerations. It would risk doing a serious injustice if I were to allow myself to be influenced by, for example, my reading of further chapters in a textbook, other than those to which reference had been made in the course of evidence, just as it would be if I were to read letters in a correspondence file which had not been put to any witness. Accordingly, when I come to discuss the evidence, I propose to confine my consideration to those passages in the literature to which express reference was made."

In the remainder of the Opinion it will be found that after setting out the evidence and the submissions of counsel on any particular issue I then discuss that issue under the sub-heading "Discussion". I have attempted, for various reasons, to give a fairly full and I trust accurate account both of the evidence which was led before me over thirty days and of counsel's submissions which took twelve days.

Presenting the material in this way has allowed me to express my own views reasonably succinctly and in a manner which is intended to focus on the central issues. I have used the author-date or Harvard system of reference to non-legal publications, so the list of references in Part I should be used in conjunction with the rest of the text.

In Part II I discuss the position of the pursuer and the position of ITL on the main factual issues. In Part III I set out the material bearing on public awareness under ten headings, which are (1) Ministerial statement in 1954; (2) Ministerial statement in 1956; (3) Publication of MRC 1957 and ministerial statement; (4) Publication of RCP 1962; (5) Publication of USSG 1964; (6) Ban on television advertising of cigarettes in 1965; (7) Coverage of science; (8) Coverage of views of the medical profession; (9) Giving up smoking; and (10) Newspaper reports of campaigns. In Part IV, Mr and Mrs McTear: Questions of fact, the headings are Family, education, employment and criminal history, Medical history, the Evidence of Mr McTear taken on commission, the Evidence of Mrs McTear, Mr McTear's smoking history: additional evidence followed by the Submissions of counsel and Discussion. In Part V I set out the expert evidence which was led by both parties. I wish to draw attention to the opening passage, in which I set out the submissions about and my discussion of the law applicable to expert witnesses. In paragraph [5.17] I state:

> "Having regard to all the authorities referred to above, I conclude that it is necessary to consider with care, in respect of each of the expert witnesses, to what extent he was aware of and observed his function. I must decide what did or did not lie within his field of expertise, and not have regard to any expression of opinion on a matter which lay outwith that field. Where

> published literature was put to a witness, I can only have regard to such of it as lay within his field of expertise, and then only to such passages as were expressly referred to. Above all, the purpose of leading the evidence of any of the expert witnesses should have been to impart to me special knowledge of subject-matter, including published material, lying within the witness's field of expertise, so as to enable me to form my own judgment about that subject-matter and the conclusions to be drawn from it. As will be seen, this is of particular importance in the field of epidemiology, since it is generally agreed that where an association is found, such as that between cigarette smoking and lung cancer, it is ultimately a question of judgment whether the evidence is sufficient to establish a causal relationship."

In paragraph [5.18], I discuss the need for expert witnesses to be independent and I mention in particular issues arising from the fact that all the expert witnesses for the pursuer provided their services without remuneration, while the expert witnesses for the defenders charged fees for their services. I put this passage at the beginning of Part V so that it can be borne in mind when the remainder of Part V, which is more than half the entire Opinion, is read.

Part VI, Cigarette Smoking, lung cancer and addiction has three sections, which are entitled Causation and the law, General causation and individual causation, and Addiction. In the course of Part VI I decide whether three averments for the pursuer are proved. These are that cigarette smoking can cause lung cancer, that Mr McTear's lung cancer was caused by his smoking and that tobacco is addictive in the sense that once individuals such as Mr McTear have started smoking it is difficult for them to wean themselves off the habit. In Part VII I discuss the question of liability under the headings Negligence and *Volenti non fit iniuria*, which require no

further comment at this stage, and in Part VIII I discuss the amount of damages which it would be appropriate to award to the pursuer in the event of success. I see no need to say more this morning about Parts VI, VII and VIII, beyond repeating that reference should be made to the passages headed "Discussion".

Accordingly, I shall now proceed to read out most of Part IX: Conclusions and result, which is as follows:

"Conclusions

[9.1] I now set out my main conclusions, which should be read in conjunction with the passages of discussion to which cross-references are given.

[9.2] It is not in dispute that Mr McTear died of lung cancer (para.[1.4]). I accept that he smoked the John Player brand or brands of cigarettes manufactured by ITL for many years, as part of his consumption of cigarettes. I am not, however, prepared to hold it proved that it was ITL's products that Mr McTear smoked at any time prior to 1971. I do not accept that he smoked John Player brand cigarettes exclusively from the early 1970s onwards until the last few years of his life. I conclude that he smoked a significant quantity of roll-ups made from Old Holborn tobacco along with his smoking of John Player brand cigarettes for many years, perhaps as many as twenty years, but I am not able to decide in what proportion he divided his smoking between John Player brand cigarettes and roll-ups. They both made a material contribution to his total consumption from about 1971 onwards (para.[4.228]).

[9.3] Mr McTear started smoking no earlier than 1964. I am satisfied that advertising had nothing to do with his reasons for starting to smoke. He started smoking because it was socially acceptable and most young people

started smoking as part of becoming adults (para.[4.226]). I am prepared to accept that Mr McTear found it difficult to wean himself off his habit once he had started smoking and in that sense could be described as addicted. I do not accept that he was for this reason unable to stop smoking (paras.[4.229] and [6.202] to [6.208]). The averment that tobacco is more addictive than cocaine is not proved.

[9.4] I am satisfied that at all material times, and in particular by 1964, the general public in the United Kingdom, including smokers and potential smokers, were well aware of the health risks associated with smoking, and in particular of the view that smoking could cause lung cancer (para.[3.1] and Part III generally). I am also satisfied that Mr McTear was aware, in common with the general public, well before 1971 of the publicity about the health risks associated with smoking, and in particular the risk of lung cancer. Therefore by the time he is shown by acceptable evidence to have started smoking the John Player brand of cigarettes he was already aware of the publicity about the health risks. As with many other aspects of his life, he chose to ignore it (para.[4.230]).

[9.5] The pursuer can succeed in this case only if she proves all of the following (paras.[1.5] and [6.29]):

(1) That cigarette smoking can cause lung cancer, in the sense that both in the general population and in any individual case it can be said that but for the smoking of cigarettes lung cancer would probably not have been contracted (general causation).

(2) That cigarette smoking caused Mr McTear's lung cancer, in the sense that but for his having smoked cigarettes he would

probably not have contracted lung cancer (individual causation).

(3) That Mr McTear smoked cigarettes manufactured by ITL for long enough and in sufficient quantity for his smoking of their products to have caused or materially contributed to the development of his lung cancer.

(4) That Mr McTear smoked cigarettes manufactured by ITL because ITL were in breach of a duty of care owed by them to him.

(5) That such breach caused or materially contributed to Mr McTear's lung cancer either by making at least a material contribution to the exposure which caused his lung cancer or by materially increasing the risk of his contracting lung cancer (fault causation).

[9.6] There is no direct evidence that ITL, as a company, have ever accepted that there was a causal connection between smoking and disease, and the evidence before me does not satisfy me that this is the inference which should be drawn (para.[2.76]). The fact that they have never sought to challenge the public health message, that cigarette smoking does cause lung cancer, does not in my opinion constitute such an admission (para.[2.78]). Accordingly, in my opinion, ITL are entitled to put the pursuer to proof of her averment that cigarette smoking can cause lung cancer (para.[2.80])."

In paras.[9.7] and [9.8] I repeat the main points from paras.[1.8], [1.12], [1.37] and [5.17], which I have read out in full. I then continue:

"[9.9] The pursuer relies on epidemiology to prove general causation. I have not been sufficiently instructed by the expert evidence relating to this discipline to be able to form my own judgment as to whether or not this averment is proved. Special knowledge of this subject-matter was not imparted to me, so as to enable me to form my own judgment about it. The pursuer has accordingly failed to prove this averment (paras.[6.149] to [6.171]).

[9.10] In any event, the pursuer has failed to prove individual causation. Epidemiology cannot be used to establish causation in any individual case, and the use of statistics applicable to the general population to determine the likelihood of causation in an individual is fallacious. Given that there are possible causes of lung cancer other than cigarette smoking, and given that lung cancer can occur in a non-smoker, it is not possible to determine in any individual case whether but for an individual's cigarette smoking he probably would not have contracted lung cancer (paras.[6.172] to [6.185]).

[9.11] In any event there was no lack of reasonable care on the part of ITL at any point at which Mr McTear consumed their products, and the pursuer's negligence case fails. There is no breach of a duty of care on the part of a manufacturer, if a consumer of the manufacturer's product is harmed by the product, but the consumer knew of the product's potential for causing harm prior to consumption of it. The individual is well enough served if he is given such information as a normally intelligent person would include in his assessment of how he wishes to conduct his life, thus putting him in the position of making an informed choice (paras.[7.167] to [7.181]).

[9.12] In any event, there is no basis upon which I could hold it established that, if ITL had not manufactured cigarettes at any material time, so that Mr McTear did not smoke their products and accordingly their products could not have made a material contribution to his contracting lung cancer, it would have made any difference. On the contrary, all the evidence is that Mr McTear would have started smoking when he did, and would have continued to smoke, for the same length of time and in the same quantities, as he in fact did. Fault causation would therefore not in any event be established (paras.[7.182] to [7.183]).

[9.13] On my interpretation of the law relating to the maxim *volenti non fit iniuria*, and in the circumstances of this case, I would not have been disposed to sustain the fourth plea-in-law for ITL, if the pursuer had otherwise succeeded on the foregoing issues (paras.[7.204] to [7.208]).

[9.14] The damages which I would have awarded, had the pursuer succeeded, would have been £25,000 for her claim for compensation under section 1(4) of the Damages (Scotland) Act 1976 (as amended), £45,000 for her claim under section 2(1) of the Act as Mr McTear's executrix for solatium for the pain, suffering and loss of the amenities of life experienced by him, and £8,000 for her claim under section 8(1) of the Act for services rendered by her to him during his final illness (paras.[8.20] to [8.22]). With interest to 31 May 2005 the total award of damages would have been £138,823.32 (para.[8.23]).

Result

[9.15] In my opinion therefore, for all the foregoing reasons, the pursuer's case fails on every issue on which I would have needed to find in her favour

were I to hold the defenders liable to her in damages. I accordingly sustain the second and third pleas-in-law for the defenders and assoilzie them from the conclusions of the summons."

The full opinion will be available on the website from 10.00 am at this location: http://www.scotcourts.gov.uk/opinions/2005CSOH69.html