Unofficial Translation

County of Porto Alegre - 3rd Civil District of the Central Court

Rua Márcio Veras Vidor (formerly Rua Celeste Gobato), 10

Order Nº: 0420 - 2010

Docket nº: 001/1.05.0525891-2 (CNJ:.5258911-98.2005.8.21.0001)

Nature: Ordinary – Other

Plaintiff: ESTATE OF MILIAN CURY SIVIERI

Defendant: CIA DE CIGARROS SOUZA CRUZ

Judge: MAURO CAUM GONÇALVES

Date: June 29, 2010

1.0) REPORT:

Initially MILIAN CURY SIVIERI, identified above, brought the present Action, entitled, *REPARATION FOR MORAL AND PROPERTY DAMAGES*, against CIA DE CIGARROS SOUZA CRUZ, also identified above, alleging that he was born on November 22, 1950, and that he started to smoke at the age of 14. He stated that at that time, television ads encouraged the smoking habit through images of famous actors and actresses who radiated good health and demonstrated how successful people were who smoked, giving rise to the belief that smoking conferred health, wellbeing and vigor. He stated that, accordingly, misled by the false advertising, he became addicted and has continued to smoke since that time a pack of cigarettes per day (on average), for nearly 40 years of his life – all brands produced by the defendant (Holywood, Continental and Carlton); and that, currently, he suffers from Chronic Obstructive Lung Disease, in an advanced stage and progressively worsening, which made him dependent on the continuous use of oxygen, and had placed him on a waiting list in a lung transplant program. He stated that, as attested by physicians, his disease resulted from the long period of his tobacco addiction; that if he had been warned of the risks of that habit, he certainly would not have tried it, and would have avoided the addiction.

He added that tobacco contains nicotine and more than 4,700 other toxic substances responsible for chemical dependency (deprivation gives rise to irritation, restlessness, anxiety,

insomnia, etc.) as well as psychological dependency (*smoking makes you more relaxed, less sad, less lonely, etc.*), which take effect in roughly 9 seconds after taking a drag, it being the case that no other drug takes effect so quickly. He stated that tobacco has been considered a drug, and smoking has been considered an addiction since 1970, by the *National Drug Abuse Institute*. He made references to the medical theory of how addiction operates, and the consequences of continuous exposure of an organism's cells to a toxicological agent. He cited certain phrases and texts put out as advertising by the tobacco companies to support his contention that they made people think of associating the product with professional and personal status; and in this way, bring about consumption and addiction. He asserted that smoking is responsible for 90% of all cases of pulmonary emphysema; and that the probabilities of a smoker developing this condition were 18 times greater than for a non-smoker. He stated that the defendant, as the manufacturer, is liable on grounds of concurrent guilt for the harm caused to his health. He stated that, without intending to get into the legality or illegality of the activity engaged in by the defendant, he is of the understanding that the defendant is liable because of providing a product for consumption that is harmful to health, capable of causing even the death of its users. He argued, moreover, that nowadays, the product endangering consumers' health would be the subject of many scientific studies, and this fact so commonly accepted that even the tobacco companies themselves have already admitted the ill effects thereof, to the extent that, currently, they print notices and photos on packages warning of the risks. However, as he stated, such warnings and information were not displayed at the time when he took up the habit of smoking and became addicted, but instead, there were only campaigns to encourage more and more consumption. He added that the state of Minnesota in the United States of America has signed an agreement with the defendant and other tobacco companies, imposing on them the obligation to pay into a fund for support of the public health network, and another fund to support research, in both cases geared towards cases involving the use of tobacco; and that a similar agreement was signed with the state of Texas. He affirmed that the liability of the defendant is objective, pursuant to Art. 12 of the Code of Consumer Protection (CDC), in light of the defect of the product and the lack, at that time, of any information concerning the risk of harm to health; and that he suffered moral and material damage because of the disease to which he has been exposed. He postulated an inversion of the burden of proof, and requested the granting of the free legal services. With the judgment of the admissibility of the suit, he moved that the defendant be sentenced to pay

indemnification for the reparation of moral damages, in an amount to be arbitrated by the court; personal damages, as a result of the loss of his physical capacity due to his ailment; and material damages (referred to as 'property damages'), relating to the payment of expenses for the treatment of his health, to be assessed at the settlement of the judgment. He delivered into evidence with the complaint the documents on pages 25/251.

The award of free legal services for the plaintiff was approved (p. 258).

When called upon to amend the complaint, indicating amounts intended to make reparation for moral damages, he responded ascribing an amount equivalent to 300 National Minimum Wages for each child, and 500 for the spouse (pp. 260/261).

Upon receiving notification of the death of the plaintiff, (p. 266), it was decided for the Estate to replace him in the proceedings (p. 273 and 274, verso).

With the plaintiff advised and authorized to do whatever it may deem pertinent, it was obliged to submit a new complaint (p. 273), so that it could add among the plaintiffs third parties seeking damages (children and spouse), taking into consideration the statement on pp. 260/261.

No new complaint was submitted.

Upon being summoned, (p. 278, verso), the defendant offered a rebuttal, (pp. 279/358), alleging that its advertising had never been irregular, but always addressed to adults; that the plaintiff, as well as any consumer, would have begun to smoke as a matter of his own personal intent, being aware of the inherent risks; and that there was no evidence in the proceedings that the plaintiff's disease was associated with the use of tobacco. It stated that cigarettes are an inherently risky product, so that no risk would have been created by the producer, and thus the Theory of Created Risk would not be applicable in this instance; that cigarettes are a legal product, and that people smoke them only because they want to, and they are responsible for their choice.

It argued that claims such as that of the plaintiff have been repeatedly dismissed by courts in the country, (5th, 6th, 9th and 10th Chambers of the TJRS – 'Court of Justice of Rio Grande do Sul') and foreign courts; that the agreements signed with states in the United States of America do not have any bearing on the current case, and that they were paid for by a tax assessment lower than that applied in Brazil. It reiterated that its activities were fully legal, which in and of itself would put it out of the reach of any claim for indemnities (dependent on and contingent upon the commission of an illegal act); that the Federal Constitution recognizes the subjective right to the commercialization of cigarettes and their advertising (Art. 220, § 4). It stated that the CDC has not issued regulations for *the utopia of products without risk to the consumer. On the contrary, risks to the health and safety of consumers are acceptable, as long as they are normal and predictable (Arts. 8 and 9);* that the CDC *does not require products to offer absolute safety, but only the safety that can be legitimately expected.* It argued that, if the contention is upheld, the sale of alcoholic beverages would also be prohibited, since it is capable of leading to alcoholism; as well as pork, butter and dairy products, because they are associated with an increase in cholesterol and heart disease; and salt, since it is a cardiac risk factor for people with hypertension. It stated that, in the case of cigarettes, for a long time information has been disseminated on the health risks associated with their consumption; and that consumers, even with the requirement for such information to be disclosed, were already aware of the risk; that it had complied, always strictly, with public provisions controlling advertising and cigarettes, both at the time when the plaintiff began smoking (1964), as well as at present; that on August 25, 1988, prior to the Constitutional assembly of 1988, Ordinance nº. 490 of the Union was published, which would constitute the *first legal provision bearing on warnings to be made by manufacturers concerning their products*. On this issue, it stated that the fact that these warnings were not disseminated in advertisements prior to that date, of August 25, 1988, is not significant to the resolution of the dispute, since it was not legally required conduct at that time (it mentions the application of what is set forth in Art. 5, II, of the Federal Constitution). It argued that the risks associated with the consumption of tobacco have been known for many decades, so that the omission relating to the act of warning is legally irrelevant; that the law is not retroactively applicable, given the Principle of Legality; that *seeking to hold the defendant liable for freely selling its products, when there was no provision with the intent of restricting its commercial activities, is an assault on the Constitution*. With respect to the addiction caused by smoking to

which the plaintiff was subjected, it stated that it was only starting with Ordinance No. 695/99 that the Ministry of Health issued to *require the industry to communicate the statement affirming that "Nicotine is a drug and it causes addiction"* - with which it disagrees completely, though it complies with the requirement; that the word *addiction* has had its meaning watered down, since it has been extended to include any pleasurable activity, such as the consumption of coffee, teas, chocolates and soft drinks; that traditionally, addiction refers to a slavish compulsion capable of *separating the individual from practices and habits considered important* (and provided an illustration stating that *it is not unusual for users of heroin to prefer to inject the drug to having sexual relations, in the same way that alcoholics lose interest in food. On the other hand, cigarettes allow individuals to have a fully normal life, and do not separate them from the activities they normally engage in*). It argued that the classic concept of addiction involves *intoxication*, *tolerance and a syndrome of abstinence*, it being the case that the consumption of cigarettes does not meet any of these requirements. It affirmed that the concept of good faith should be applied in accordance with the historical, social and cultural context of the period – more than 40 years ago – whereby it would be inappropriate to apply current concepts, having to do with the duty to inform people of the matter at issue. It stated that the CDC was inapplicable, since it was not in effect at the time of the facts in question; and deceitful advertising is not pertinent, since advertising could only be construed as flawed that omitted some essential fact about the product capable of changing the consumer's intention, to the point of not purchasing the product – which, in its understanding, does not apply to the facts of the case. Its advertisements, it stated, perfectly met legal requirements; and between the advertisements and the plaintiff's decision to smoke, there is no nexus of cause and effect, due to the absence of a determining or conditioning factor. It stated that the causes of death could not be proven by the death certificate signed by the Public Registrar; and that the existence of medical attestations to the effect that the plaintiff suffered from other respiratory problems other than pulmonary emphysema would be indicative of external factors in the evolution of that disease – such as *bronchial asthma,* which can have a genetic cause. Finally, it alleged that about 4 to 6% of non-smokers suffer from pulmonary emphysema, as opposed to 10 to 15% of smokers, which would demonstrate that smoking is not a determining cause of that disease – and stated that there are a number of other factors (such as environmental pollution, occupational exposure, diet etc.); and

that the inversion of the burden of proof is impracticable. It requested a finding of inadmissibility. It entered the documents on pp. 359/964 into evidence for the defense.

There was a rebuttal, (pp. 969/994), in which the plaintiff alleged that the matter is not regulated by the CDC, since it was not in effect at the time of the primary fact, but by the Law of Introduction to the CC; that the claim for reparation is not based on a flaw in the product, but in its essential quality of causing the addiction and diseases that have beset him; that there is no binding judgment on the matter, and that there are judicial precedents of many kinds, both in favor of as well as against the defendant (and, for the latter case, it made reference to the names of ADÃO SÉRGIO DO NASCIMENTO CASSIANO; NEREU JOSÉ GIACOMOLLI; LUIZ AUGUSTO COELHO BRAGA; LUIZ -ARY VESSINI DE LIMA; ARTUR ARNILDO LUDWIG; UMBERTO GUASPARI SUDBRACK AND UBIRAJARA MACH DE OLIVEIRA); that the civil illegality of the act depends on the verification of guilt, damage and causality, and not the permissibility of the business activity performed; that the intention to put in and maintain the levels of nicotine in the product, ensuring addiction and increasing consumption constitutes premeditation on the part of the defendant; that guilt is present, also, because of subjecting consumers to a risk of which there was prior notice/awareness. He argued that, although the business activity performed by the defendant is legal, since it pays taxes and has a location permit and a license for the production de cigarettes; even so, no permit or license would authorize the production of cigarettes with the inclusion of doses of nicotine capable of causing addiction and serious illnesses for people, wherein the illegality in question is purported to lie, because of an abuse of a right. He went on to add that the license for the manufacture of cigarettes granted to the defendant is generic and would not serve to exclude liability for an illegal act, pursuant to Art. 159 of the CC/16. To illustrate restrictions of rights, he stated that the right to freedom of expression does not cover racist statements. He argued that, in his case, at the time when he started to smoke, information was not disclosed on the risk of the smoking habit – which only began to occur in 1988; that the admission of the defendant with respect to the *inherent* risk of the product is equivalent to a confession of his awareness for a long time with respect to the harmful effects of cigarettes; that the defendant would not spend so much on advertising (one of its main costs) if it did not obtain concrete returns; that its advertisements and disclosures with regard to cigarettes would not have been restricted by the Government if the

latter did not recognize that they served as an inducement to consumption; that it was not a single advertisement, but rather mass dissemination, the subliminal message, that entails an inducement to consumption; that governmental and legal measures aimed at reducing the consumption of tobacco represent public recognition concerning the harm caused by cigarettes; that if the industry did not sell cigarettes, the plaintiff would not be addicted to that vice; that if tobacco use did not cause addiction it would not be classified as a disease by the World Health Organization (CID-10); that the statistical data provided by the defendant in its defense do not find support from any evidence, except from documents whose origin is not indicated; that there is no dispute among scientists as to whether cigarette is a drug and addictive; that it is proven through medical attestations introduced into evidence in the complaint, and evidence introduced from proceeding 10300068963 (information provided in a hearing by a physician concerning tobacco use), the nexus of cause and effect between tobacco consumption and addiction and the disease that caused the death of the plaintiff. In rebuttal, it introduced into evidence the documents on pp. 995/999.

Counter-rebuttal on pp. 1004/1028, presenting the arguments of the defense.

With the presentation of expert testimony (p. 1029), the parties formulated their queries, and a report thereof appears on pp. 2171/2183, which was submitted to the parties for review.

With the end of the evidentiary phase, the proceedings were brought to a close for judgment (p. 2244).

This is the report.

I proceed to set forth the basis for the decision that I shall make at the end.

2.0) REASONING:

The question of fact alleged in the complaint and admitted by the defense that the disease that afflicted the late plaintiff, now represented by his Estate, is called Chronic Obstructive

Bronchopulmonary Disease (COBPD). It is a matter of undisputed fact that the late plaintiff smoked since the age of 14 (reached on January 22, 1964).

These matters are presumed to be true, independent of evidence, pursuant to Art. 319, c/c Art. 334, II and III, of the CPC.

On the nexus of causality, a question that is prejudicial to the analysis of the claim for indemnification, it is held that the expert medical report was conclusive in its assertion that, according to the record of the proceedings, the pathology of the plaintiff was attested starting in 1999, reaching a stage in which it required a lung transplant, and subsequently, death; that ***the relationship between tobacco use and COPD has been well-established for a number of years. Smokers of cigarettes present a risk that is 10 to 14 times greater of death by COPD*** (see p. 2173); and that ***about 85% to 90% of all deaths by COPD can be attributed to tobacco use*** (...) ***there is sufficient evidence to arrive at the conclusion that there is a causal relationship between tobacco use and morbidity and mortality due to COPD*** (p. 2174). EMPHASIS ADDED.

Although this same technical report indicates other risk factors for the development of the disease, such as air pollution, occupation, climate, genetic constitution, sex, age and race, there is a fair conclusion to the effect that the predominant cause of the development of the disease is tobacco use – hence it is established as the chief and injurious risk factor (on p. 2177 there is a reference on this point).

In the case before us, there are several medical attestations (see documents entered into evidence in the complaint) indicating the nexus of causality between the causes of disease of the late plaintiff and tobacco use, so that the possibility is excluded that other factors were causative factors in development of the ailment.

Although other factors may have contributed to the exacerbation of the disease, the evidence in the proceedings is substantial and definitive in indicating that the predominant cause, though it may not necessarily have been the exclusive cause, was tobacco use (see the opinion on p. 2179, stating that ***the etiology of Chronic Obstructive Bronchopulmonary Disease has as its***

principal causative factor the use of* tobacco**; and on p. 2180, responds ***directly in the affirmative to the following queries: *Was death caused directly or indirectly by COPD? Did the consumption of cigarettes exacerbate or accelerate the development of COPD?*).

Thus, the defendant's contention to the effect that tobacco use was not the sole and exclusive cause for the onset and exacerbation of the disease is absolutely without importance.

There is no doubt, then, regarding the existence of the nexus of causality between tobacco use and the disease that afflicted the plaintiff, as well as its exacerbation.

On the other hand, with regard to the chemical and psychological possibility or impossibility of tobacco use causing addiction: on the defendant's denial, it should be noted that it was given without evidence to support it (failing to observe what is set forth in Art. 333, II, of the CPC); and with regard to the assertion of the plaintiff, it is supported by the declarations that the Ministry of Health has required to be printed on cigarette packs – which is a matter of widespread public knowledge (such that it does not require the submission of evidence on the matter).

Now then, the allegation that such a requirement by the enforcement authority does not constitute evidence with respect to such a pharmacological effect (addiction), is silly. Such a conclusion of addiction is obviously the result of scientific studies and research conducted by the public agency, and in any case, there is a presumption of public trust in what has been declared (the party making the statement is a federal public institution exercising its police power – the Minister of Health). Such an assertion and conclusion, to the effect that cigarettes are a *drug and that they cause addiction*, can only be overturned by specific evidence to the contrary, which the case before us does not present.

With regard to the *propriety* of the advertisements published by the defendant at the time of their publication, I should clarify that a lack of status as a crime or observance of the constraints of any special law (with respect to advertising and publicity), does not in any way set aside possible illegality due to abuse or arbitrariness with respect to the consumer, in relation to

which there is no perfect juridical act, no acquired right or final judgment (it does not fit within any of the hypotheses set forth in Art. 6 of the LIC).

Although neither the CC/2002 nor the CDC were in force at that time, it cannot be said that the propriety characterizing the dissemination of the advertising could set aside a possible right to indemnification (arising from the failure in the duty to provide notification of the risk of the product), since this has to do with an unrelated question, unrelated to the legality of the act of advertising. The two things are not at all the same.

On the matter of the risk being inherent to the product, as alleged by the defendant, I clarify that any product, whether defective or not, flawed or not, that in any way involves a risk to the health of the consumer, has a flaw at its source that is, then, inherent to it, and there is no practical or formal distinction regarding the kinds of risk. Any and all risk that is intrinsic (from the very beginning, as in the case of cigarettes) is inherent to the product (basically, any and all risk is intrinsic, is inherent).

The same applies to road or air transport, whose risks of accidents and death is always inherent to the service – but even this does not set aside the obligation to indemnify for objective liability, regardless of guilt, as recently ascertained in the cases of the air accident at the São Paulo Airport (where a TAM plane crashed into a building), and in the case of the Legacy private jet four years ago (where a jet collided with the wing of a Gol plane, causing it to crash in the middle of the Amazon rainforest – a case in which disputation is still going on as to whether there was an error on the part of the American pilots of the Legacy). In all of these cases the Brazilian justice system has been granting indemnifications to the relatives of the victims due to the results of inherent risk, without addressing proof of guilt, given the objective liability for the risk of the product.

Inescapably, risk is part of the product or service. This is how it is in any domain, whether it is the tobacco market or the provision of air travel services. **The tobacco companies do not comprise a separate category, and are not subject to different rules (of exception), but rather, to the Theory of Created Risk** of CAIO MÁRIO.

With all the respect that is due and received by the Honorable Minister of the Superior Court of Justice, Luis Felipe Salomão, whom I admire for his career and his actions, a person of undeniable brilliance and competence, I believe that his position as set forth in REsp/RS 1113804, handed down on April 24, 2010 (which has not yet been published on the internet), on the exclusion of the obligation to indemnify on the grounds that inherent risk obviates liability for any and all cases of product or service risk, is at variance with all of the country's legislation in force, not only the Law for the Defense and Protection of the Consumer.

In the absence of better judgment, the position of the Honorable Minister goes against Material and Procedural Ordinances in force (the regulation of Article 927,sole §, of the CC/2002 – which speaks of the risk of the product or service*, due to its nature,* the rights of others, extending the effects of the law to those of inherent risks; Art. 931, of the CC/2002; Art. 5, V, of the Federal Constitution/88), as well as the Magna Carta, and runs up against a hypothesis of absolute juridical insecurity – since it **opens up a limitless range of cases of exceptions to the law.** In plain words, it is CONTRARY to the **precepts and principles that** guide the legal system as a whole.

Now then, with regard to inherent risk, it is on firmer grounds that it incurs liability and the obligation to indemnify.

And **the fact that the defendant expressly admits that it was already aware in 1964 of the harmful effects and risks inherent in cigarettes cannot be disregarded**. The defendant, in its capacity as an industry endowed with technical and scientific resources, **was obliged, based on the principles of objective and contractual good faith, to be transparent and provide a warning in this regard, which it visibly and avowedly failed to do** (except after requirements imposed by the Ministry of Health).

In this particular, with regard to the Principles of objective and contractual good faith, which have always guided the law of obligations and contracts, I offer the reminder that its application had already been inscribed in a number of Articles of the CC/1916 (Art. 622, 968,

221, 490, 491, 546, 549, 935, 1443, 1446, 1404 – as examples), so that its application in this particular case (whose origins date back to 1964) is unavoidable.

In the case under discussion, the matter began in 1964, when the late plaintiff began to consume cigarettes produced by the defendant. Initially, then, the Constitution in force at that time, as well as the Civil Code of 1916, in force up until 1988, were applicable to the matter.

The existing relationship of consumption between the parties, however, according to the allegations in the record of the case, lasted up until the **death** of the late plaintiff, **which occurred on February 23, 2005**, so that, starting in 1988, the Constitution of the Federative Republic of Brazil (CRFB) in force at that time came to apply to the matter at hand; starting in 1991, the CDC; and starting in 2003, the CC/2002.

From the outset of the established relationship, however, the Theory of Risk applied, as SILVIO RODRIGUES pointed out in his 4th volume of *Coleção de Direito Civil*, volume on Civil Liability, 7th ed., of 1983, p. 11: *The theory of risk is that of objective liability. According to this theory,* ***anyone who, through his actions, creates a risk of harm to third parties, must be obliged to make reparation for it,*** *even if his liability and behavior are exempt from guilt. The situation is to be examined, and if* ***a relationship of cause and effect is objectively ascertained between the behavior of the agent and the harm*** *experienced by the victim, the latter is entitled to indemnification by the former.*

GAUDEMET, under French law in force through the Napoleonic Code, stated that ***any engagement in activity involves a risk, exposes interests to injury, and every individual must bear the risk of harm cause by one of his acts*** (*in Théorie Generale des Obligations*, *with CAIO MÁRIO DA SILVA PEREIRA – Responsabilidade Civil,* 6ª ed., Ed. Forense, 1995, p. 267).

And among us, the predecessor was ALVINO LIMA, in the case presented before the Faculty of Law of the University of São Paulo, **in 1938**, with the title "Da culpa ao risco [From guilt to risk]," republished in 1960 under the new title "Culpa e Risco [Guilt and Risk]" (*with* CAIO MÁRIO, *op. cit.*).

The applicability of the hypothesis in this case is unavoidable, then, both in terms of contractual good faith as well as in terms of the theory of risk (which are intimately related), of the duty of transparency and the duty to provide warning of risks, as well as, in particular, the duty to make reparations for harm resulting from such risk created through consumption.

Under the theory of risk, a *liable party* **is any party that, in seeking to extract benefit or profit from the situation and by his own act, creates risk and exposes others to harm** (CAIO MÁRIO, *op. cit*., p. 270; CAVALIERI FILHO, SÉRGIO, *Programa de Responsabilidade Civil*, 8th ed., 2009, p. 137; and PABLO STOLZE, *Novo Curso de Direito Civil,* 7th ed., 2009, p. 136).

This hypothesis perfectly characterizes the defendant, and the difficulty of characterizing the illegality of its act is of no avail (and it does not for that reason cease to be illegal), in departing from its duty to repair the harm that it invariably caused (harm that it could have and ought to have avoided but did not).

The Theory of Risk has been enshrined for many decades in the jurisprudence of this country, so much so that it was already stated in Art. 872 (*Anyone who, as a result of his actions or occupation creates a hazard, is subject to repairing any damage it may cause, unless there is evidence that he took appropriate measures to avoid it*), from the Draft Code of Obligations of **1965** (thus contemporary with the beginning of the facts in question).

Subsequently, this Theory was gradually recognized and accepted in special legislation that followed (especially in relation to the objective liability of the state; of parents for children or animals; for damage to the environment and of the employer with respect to occupational risk, e.g.: Decree. No. 2681/1912; Law 5.316/67; Decree No. 61784/67; Law 8213/91; Law 6194/74; Law 6938/81, and so on), culminating in its being enshrined in the sole paragraph of Art. 927 of the CC/2002.

The **Theory of Risk**, especially risk that is **inherent to the act or the product,** after all, **has for some time been upheld by the Superior Court of Justice,** as for example, in the brilliant opinion drafted by the Hon. Nancy Andrighi, in REsp n. 401397/SP, published on September 9, 2002, whose summary is as follows:

> Special Appeal. Claim for indemnification. Air Transport. Delay in flight with postponement of travel. Civil Liability. Hypotheses for exclusion. Acts of God or *Force Majeure*. Birds. Intake into airplane turbine.
>
> - The assignment of liability to the airline for damage caused to passengers due to flight delay and a postponement of scheduled travel, even though it is considered objective, is not impervious to factors that exclude civil liability.
>
> - **Damages caused in airplane turbines, by intake of vultures,** are a commonplace occurrence in Brazil, **to which the element of unpredictability characterizing acts of God cannot be attributed.**
>
> - It is the responsibility of all airlines not only to transport passengers but also to take them unharmed to their destination. If the aircraft is damaged by the intake of large birds, it imposes the need for cautionary measures, either of a mechanical review or having passengers rerouted on alternate flights by other airlines. The delay resulting from this operation in and of itself imposes **liability on the airline, based on the risky activity that it offers.** EMPHASIS ADDED.

Returning to the case in hand, it is necessary to establish that the defendant expressly admits that it was aware all along (and therefore including the period of the facts under discussion here), of the harmful effects and risks caused by cigarettes (products manufactured by it to ensure profitability); as well as the fact that it only began to alert the public in this regard when it was required to do so by the Ministry of Health, in 1988 – which fact is not dependent upon the introduction of evidence, pursuant to Art. 334, II, of the CPC.

The illegality is clear, now, as indicated in the **deliberate omission by the defendant in the fact of its duty to inform**, certainly based on the intention to obtain greater profits as a result of the ignorance of society and consumers.

In this regard, SANTIAGO DANTAS, *with* CAVALIERI FILHO, SÉRGIO, *Programa de Responsabilidade Civil*, 8th ed., p. 9, states: *The illegal act is the transgression of a juridical duty.* The *juridical* duty (and not the legal duty, because legal elements result from law and particular regulations, whereas juridical elements result from standards that can be moral and

based on principle) violated in this specific case was the duty to act in good faith, and consequently, to be transparent and provide warnings about risks to life and health.

Assessing things in terms of a special standard (the CDC) is, then, dispensable in this specific case to ascertain the duty to indemnify, since simply on the basis of the tried and true Theory of Risk, the duty to indemnify could be invoked. Even so, it is necessary to understand that harm to health, in connection with the physical personal health of the plaintiff, only became evident starting in 1999 (see documents from the record of the proceedings and the statement of the expert witness), since which time the CDC was already in force and applicable, thus delimiting the relationship established and maintained between the parties.

And there are precedents from our Court of Justice of Rio Grande do Sul, which I shall profile, concerning the applicability of the CDC even to facts prior to its entry into force – considering that it is a comprehensive standard, given its public character, and impervious to time (Civil Appeal Nº 70016845349, Ninth Civil Court, Court of Justice of RS, Judge: Odone Sanguiné, Handed down on December 12, 2007).

And, along the same lines, the following merits citation:

> CIVIL APPEAL. CLAIM FOR INDEMNIFICATION FOR MORAL AND MATERIAL DAMAGES. SMOKING ADDICTION. ASSIGNMENT OF LIABILITY TO THE COMPANY THAT PRODUCED THE CIGARETTE. REQUIREMENT FOR CIVIL LIABILITY NOT DEMONSTRATED. Because it is evident that a **company that manufactures cigarettes, although it acts within the law in force, is not exempt, by the theory of risk, from undesirable effects that its products may cause to certain individuals,** particularly in light of the CDC, whose provisions of a public character **have a bearing on facts not yet established prior to its entry into force.** On the other hand, the claim based on the alleged flaw of the product (cigarettes) does not do away with the demonstration of the existence of harm and the causal nexus, requirements for liability to indemnify, which has not been ascertained. On the other hand, the photocopies appended with the reasons for the appeal shall in no way influence the judgment, since they do not represent any injury to the plaintiff to recommend removal from the proceedings. APPEAL DENIED. PRELIMINARY MOTION SET ASIDE. (Civil Appeal Nº 70013363718, Tenth Civil Court, Court of Justice of RS, Judge: Luiz Ary Vessini de Lima, Handed down on 06/04/2006). EMPHASIS ADDED.

It is concluded, finally, that although its applicability is dispensable for purposes of resolving the matter, it is inescapable that the CDC and its special provisions must regulate the

matter of fact set forth herein, inasmuch as mandatory provisions of law are involved, that are cogent, impervious to time, and the right safeguarded is indisposable (life and health). Furthermore it is not irrelevant that the Code is for the PROTECTION and Defense of Consumers.

Thus, and holding it to be well known that **advertisements circulating at that time (1964) totally lack information or warnings regarding the risks *inherent* to the product** (so that the introduction of evidence in this regard is dispensed with, pursuant to Art. 334, I, of the CPC), excess or abuse in the exercise of the right to marketing/advertising is established.

But even considering current advertisements, I believe it is a case of liability, as I have been saying, precisely because of the application of the Theory of Risk.

And it is not to be forgotten that it is not the legality of the activity engaged in by the defendant, or even the legality of the advertising disseminated, that serves to avert liability for the excess committed at the time of the exercise of those rights (to advertise and to commercialize).

On the lack of information on risks at the time when the plaintiff began to smoke; on excess in the exercise of the right to advertise; and on the aforementioned concurrent culpability of the late plaintiff, a smoker or consumer of cigarettes produced by the defendant, it is also appropriate to quote the useful and very well stated opinion of MARA LARSEN CHECHI, whose words I make my own, as follows:

> (...)
>
> **The exercise of the broad and indefinite power to act resulting from the** absence of a legal prohibition**, does not confer anything more than a fragile presumption of legality upon the act** committed (whether an omission or commission).
>
> **The improper use of the freedom to engage in the activity of a tobacco producer is illegal** through fraudulent manipulation of tobacco seeds and chemicals used in the industrial production of cigarettes, inspired by an exclusive desire for profit, and this constitutes an illegal act. **The appropriate fact for the public domain,** due to the faster and

more comprehensive means of communication available at present, is subsumed within the terms of Article 334, I, of the CPC, which **dispenses with evidentiary activity.** In the control of the legality of the freedom to engage in commerce, as well as freedom of circulation, **it is not the nature of the right that counts, but compliance with the general duties of prudence in the exercise of such freedom.** The rejection of abuse in the exercise of the right and the rejection of what is illegal committed on the occasion of or in tandem with the exercise of such right, are not be confused: acts in the second category are situated outside the "outer" boundaries of the right and amount to nothing wrong other than the improper use of a freedom. Theory of JACQUES GHESTIN. The theory of acceptance of **risk** only applies to habitual ordinary, and normally predictable hazards associated with an activity. **The consent of the injured party only operates as a factor to exclude illegality concerning disposable legal rights. When rights to life and health are at issue, which are obviously indisposable, a legal regimen imposes itself, rendering such consent ineffective.**

Theory of APARECIDA AMARANTE. If the conduct of the offender aggravates the chances that harm will actually result, the victim is entitled to indemnification proportional to such **risk**. Moral damage, in cases of the death of a father and spouse, is intrinsic to the relations of affection which, as a rule, characterize family and marital ties. Indemnification for the grief of the family is assessed at 500 (five hundred) minimum salaries, pursuant to Art. 1.537 of the CCB, covering pain and suffering and a series of other losses. The time limit on the death allowance owed to the youngest child is in inverse proportion to achieving the capacity for employment, which is presumed by court precedent to be twenty four (24) years of age, and does not have a relationship to civil majority as defined in Art. 9 of the CCB. Allocation for the widow. Amount of the allowance owed to dependents restricted to 2/3 of the remuneration of the victim, deducting 1/3 for personal expenses, if he is alive. JUDGMENT REVISED. (Civil Appeal Nº 70004812558, Ninth Civil Court, Court of Justice of RS, Judge: Mara Larsen Chechi, Handed down on October 13, 2004)

And furthermore:

Therefore, because the industry, the defendant in particular, has manufactured and sold **cigarettes, with full knowledge and awareness of the harmful effects that the product it manufactures causes to the health of smokers and non-smokers (bystanders)**, including chemical and psychological addiction, there is no doubt that the party that manufactured and sold them **consciously created the risk of the result, for which reason it had and has the obligation to stop it. Flagrantly failing in this requirement, there is no doubt that its guilt by omission is established,** and in this particular case, by the resulting death of the victim, Eduardo. This is the situation establishing omission in the lawsuit in question. (our emphasis).

Now then, **there is no doubt that that the activity of the defendant is legal, but there is also no doubt that it knew and always had full awareness, from the beginning, many years ago, that cigarettes are addictive and cause cancer**. Accordingly, **not only did the defendant constantly create the hazard, but it also constantly failed to take**

> **possible precautions in relation to the harm to smokers and non-smokers**.
>
> Moreover, this is so with regard to non-smokers especially, because the smoke that reaches them most of the time does not even pass through the filter or mouthpiece of a cigarette. And **this failure to act was always deliberate, conscious, extending,** as already noted, to the boundaries of premeditation, as revealed by the secret files already referred to. **It is true that it cannot be said that there was premeditation in the causation or targeting of the injury, such that there was only guilt involved in this instance, but one cannot fail to acknowledge that, both in the failure to act in terms of avoiding and preventing the chemical and psychological addiction and the other harmful effects of cigarettes, a situation is established that reaches the boundaries of premeditation, precisely because of the concealment of these facts, and because of the advertising strategy that constantly conveyed a message that omitted facts, was deceptive, delivered on a mass scale, coopting and enticing.** (our emphasis)
>
> (...)
>
> However, if it is understood, as I understand, that the Rule of Law or the legal order is a system and does not exhaust itself in the mere cold letter of the law imposed by the State; if it is understood that in addition to the law there are general principles of law, among them, those mentioned above; and if it is understood that the legal order, the general principles of law, as well as the higher values of justice, do not concur with injustice, especially when the will is nullified by chemical and psychological addiction, and that no one can manufacture and place on the market a product that causes disease and death, then **there is no way not to conclude that the manufacturer and the seller of such product, has actual and concrete liability for the damages and harmful consequences caused by the product,** and this liability is reinforced, in this particular case, especially by another element, which is the extraordinarily high profitability as a peculiar characteristic of the activity. (Court of Justice of RS (TJRS) – AC nº 70000144626 – Ninth Civil Court – Hon. Adão Sérgio do Nascimento Cassiano – Judgment handed down on October 29, 2003). EMPHASIS ADDED.

Getting past the question of legislation and standards and principles applicable to the case before us, it remains to overcome certain arguments of the defendant, although they are childish, and addressing them rationally shall serve to uphold and elucidate the law invoked.

It should be noted that, returning to the topic of product risk, it is appropriate to point out that the risk under consideration here (the risk to which cigarettes expose people) is not just any risk, and nor is it a risk tolerated by the legal system of this country: it is a risk that affects indisposable rights, and affects collective and public interests (lack of infringement of the duty of transparency and the duty to uphold contractual and social good faith, and the lack of injury to public health and the right to

life). So that the **risk to which the product sold by the defendant exposes people is not acceptable or tolerable and is not, I repeat, at the fringes of the legislation in force**. Quite the contrary, the risk is grave and worthy of serious repression, calling for the proper and prudent condemnation that accomplishes the appropriate instructive purposes that the case demands.

We are not speaking of absolute product safety, obviously, but of a minimum safety, that was and is within the reach of the defendant, who failed to act upon his duty of caution, and continues in this failure.

And even if it were not the case that the defendant is failing to act with respect to risk (which definitely is not the case in the record of the proceedings), even if it were cautious and prudent in terms of warning society about the risks and harmful effects of cigarettes, EVEN SO, its duty to indemnify and answer for the harm caused would not be set aside, since it was the result of its action, undertaken in commercial activity intended to obtain easy profits.

Any omission or shortfall in relation to the duty of caution serves only to aggravate the illegality of the act, and calls forth the duty to indemnify all the more authoritatively.

In this specific case, in which the injured party commenced tobacco use in 1964, the flaw of the product was concealed, since no information was passed on to him concerning any risk tied to cigarettes at that time (such as becoming habituated, addiction and other harmful effects to health).

The advertisements at that time gave no warning in this respect, but rather **induced the belief** (reasonable for the society and customs of the period) **that cigarettes were a sign of sophistication, charm and seductiveness, and above all, of health**. During this interlude, the marketing images are noteworthy, portraying young slender people, attractive and well-dressed, engaged in athletic and university activities (see p. 101 – where people are in a sail boat and *know what they want* also smoke; pp. 102 and 112 – where an evidently happy, sophisticated couple smokes as part of their *lifestyle*; p. 107, where *successful fishermen are* smokers; p. 109, in which figures representing successful executives next to a helicopter make a show of their smoking habit and having *class*; p. 111, where college students dressed in vests in front of a blackboard and holding folders and notebooks represent the high spirits, success and health of the smoking habit; p. 117, where there appear two slender youths, evidently healthy, linked to the image of cigarettes; p. 118 and 119, which shows natural landscapes and figures of people in moments of relaxation together with the phrase

naturally *smooth*; p. 124, in which the image of hippies is tied to tobacco use; p. 139, in which a couple is smoking in a natural setting and accompanied by a dog; p. 142, where a Formula 1 race car is associated with the image of cigarettes; and p. 144, where the figures of beautiful women appear smoking as a clear sign of sophistication and high spirits).

It is clearly apparent, then, that the initial involvement of the late plaintiff was not predominantly with the unfolding of the addiction or habit of smoking. What was established was an initial liberality, flawed by a sequence of tendentious and false information that was conveyed by the marketing of the tobacco companies. And the addiction did not result from this initial liberality, but from the flaw of the product, and the lack of forthrightness about it.

And the decision of the STJ (Resp nº 886.347 – RS) that was aimed at removing the tobacco industry from liability, based on the smoker's argument in the proceeding of free will ('I smoked because I wanted to') is not being overlooked. However, the rational reflection to this effect is only half true, and like any half-truth, is a complete lie. It is noted that, in the judgment indicated above, the judicial decision recognized it was the smoker's free will, based on the argument that,

> the Plaintiff **began to smoke at the end of 1988, the same year in which warnings against the harmful effects caused by smoking began to appear on cigarette packs** (...) with the warnings, explicitly printed on packs, the plaintiff spontaneously chose to take up the habit of smoking, acting of his own free will.

In the case before us, however, the plaintiff began to smoke in 1964, when there were not yet any warnings accessible to the public, so that the precedent does not apply to this specific case. But even if it is admitted that anyone who starts smoking does so of his own free will, it cannot be forgotten that there are addictive chemical substances in cigarettes that lead to addiction, from which one does not free oneself through simple 'free will.' Rigorous treatments that were not made available to the interested parties would be necessary.

I underscore once again, however, that even if it had been by free will, even though the production of cigarettes is legal, even if the appropriate warning had been given in the advertising, even if the smoker knew that he was taking risks, EVEN SO, there is liability for the tobacco company due to the effect of the Theory of Risk created or assumed (if the risk of causing harm results from its profitable activity, it is liable for it – this is fundamental in the Brazilian legal system).

At best, the occurrence of concurrent factors between created or assumed risk and the act of smoking would only serve to moderate the intensity of a possible assignment of liability.

Thus, finally, the ailment that afflicted the plaintiff is necessarily linked to tobacco, as the expert opinion described and concluded.

Accordingly, with the establishment of the relationship between the ailment and the habit of smoking, it remains to take up the questions of the existence of the alleged harm and the verification of the causal nexus.

And it is necessary to mention that the defendant did not demonstrate that the plaintiff consumed other brands of cigarette other than that manufactured by its company, therefore failing to meet the requirement imposed on it for the inversion of the burden of proof.

In any case, even if it were successful in demonstrating this fact – which it was not – it is not the defendant that would be helped by the exclusion of liability, since the source of that argument would only have the effect of invoking the liability of a manufacturer of cigarettes of another brand.

This is because, in light of the **theory of joint liability for an alternative causality** – which is included for the sake of protection of the injured party – the impossibility of exact identification of the agent that caused the harm does not remove liability; rather, on the contrary, it has the effect of **projecting the effect of joint liability on all of those parties who may potentially have contributed to the harmful event**.

Accordingly, **if the plaintiff smoked cigarettes of one brand or of several, it is of little importance**. Liability will be present in both cases, with the tenuous difference that, in the first instance, it will be borne exclusively by the company identified, and in the second, it will be jointly shared among all of them.

Very well, then.

At present it is **unquestionable that tobacco companies in general were fully aware of the harm caused by smoking. Despite being aware of all the harmful effects brought about by smoking, they continued (and continue) seeking mechanisms to expand the consumer market for their product, through**

advertisements that associate tobacco with images of beauty, success, power and intelligence, among other characteristics desired by all people.

In the United States of America, a suit filed by member states against big cigarette companies brought to light the secret files of these companies (available at http://www.inca.gov.br/tobacco use/frameset.asp?item=atento&link=arquivos_secretos.pdf, as per a visit dated June 21, 2010), which demonstrate, on one hand, the public position of these companies, which reveals their intention to deceive the public to attract more and more consumers, and, on the other hand, their real position, aware of all the harmful effects caused by smoking.

Currently, in fact, there is no doubt about the harmful effects of smoking, which are widely disseminated in a public campaign against the smoking habit.

However, we cannot lose sight of the fact that the plaintiff began to smoke when he was 14 years old, that is, his first cigarette was smoked in 1964, at a time when, I repeat, there did not exist as their does today the dissemination and broad public knowledge of the effects resulting from the consumption of tobacco (although these effects were already known by the tobacco companies, according to the document cited above), which began chiefly in 1996, with the publication of Law 9.294, concerning restrictions on the use and advertising of tobacco products, among other things, regulating Art. 220, § 4 of the Federal Constitution.

In spite of all the knowledge of the health disorders caused, the tobacco companies, in particular the current defendant, continued in the conduct of their activities, unquestionably legal, it is true, but with no concern at all about disclosing such consequences.

On the contrary, a solid investment can be observed in advertisements to encourage smoking, aimed especially at young people, as in the case of the plaintiff, who, as already noted, was 15 (fifteen) years old when he smoked his first cigarette. In this connection, it is appropriate to reproduce passages from articles published on the website of the National Cancer Institute (http://www.inca.gov.br/tobacco use/frameset.asp?item=jovem&link=namira.htm, based on a search dated June 21, 2010):

> The promotion and marketing of tobacco derivative products **with the youthful public are** essential for the tobacco industry to be able to maintain and expand its sales. **Tobacco is the second most heavily consumed drug among young people in the world and in Brazil, and** this is due to the ease and encouragement of obtaining the product, including its low cost. To this should be added promotion and advertising, which associate tobacco with images of beauty, success,

> freedom, power, intelligence and other **attributes especially desired by young people.** The dissemination of these ideas over the years made the habit of smoking a socially acceptable and even positive behavior. The proof of this is that **90% of smokers began to smoke before the age of 19. Seducing young people comprised part of a strategy adopted by all tobacco companies seeking to replace those who quit smoking or died with other consumers who will be their regular customers in the future**." (EMPHASIS OURS)
>
> The advertising disseminated by the companies understood how to harness social demands and the fantasies of different groups (adolescents, women, low-income groups, etc.) to get people to smoke. The psychological manipulation embedded in the advertising for cigarettes seeks to create the impression, **chiefly among young people,** that smoking is much more common and socially accepted than it is in reality. To accomplish this, it uses the image of idols and models of behavior of a given target audience, holding cigarettes or smoking them, that is, in an indirect form of advertising. Direct advertising was done by attractive, well-produced advertisements, but it was prohibited in Brazil. With Law 10.167, which restricts advertising for cigarettes and tobacco derivative products, this scenario tends to change in the medium and long term. (EMPHASIS OURS)

It can be observed that, in addition to all of this investment to capture consumers, the tobacco companies attempt to create mechanisms to diminish the impact caused by the consequences associated with the tobacco addiction, as in the case of the defendant, that it sought to distribute coupons to its customers so that they could cover up the disagreeable images printed on the rear face of cigarette packs.

However, this measure was not allowed.

> Souza Cruz has just lost another battle to Anvisa. The court denied the right to continue distributing graphically arresting coupons for customers. It was a clever scheme. When applied to the pack, the prize that the company was offering hid those horrendous images that the Ministry of Health created to scare off students from smoking (Source: *Veja* magazine – July 07, 2004).

It is therefore to be concluded that the defendant encourages disinformation and projects subliminal messages to its customers, as in the case above, in which at attempt is made to conceal the shocking images inserted on cigarette packs by distributing coupons, as if this measure were capable of immunizing smokers against any harmful effect that might be caused to their health.

Finally, it is unquestionable that cigarettes cause a series of health problems, which was already known by the defendant and by other tobacco companies decades ago, well before the start of the disclosure of such information.

Thus, **there is nothing to say about free choice, not even in relation to the first cigarettes, especially for young people, considering that since the emergence of the tobacco companies they have always used the enticing tendentious advertising as shown that is geared towards misleading its audience.**

Now then, having ascertained the harm, it remains to establish the causal nexus.

Having verified the harm and the nexus of causality, we move to the examination of guilt.

At the time of the facts of the case, the Civil Code of 1916 was in force, which stated as follows:

> Art. 159. Anyone who by his action or deliberate omission, negligence, or imprudence, violates the rights of others, or causes injury to others, shall be obliged to repair the damage.

It can be seen that Brazilian law contemplates two hypotheses for establishing guilt: action or omission.

The defendant always knew that the composition of tobacco contains a series of components that cause chemical and psychological addiction of its users and innumerable diseases resulting from the continued use of the product, creating, with the placement of cigarettes on the market, the risk of the result; and having, therefore, the obligation to prevent it.

Failure to act and acting negligently fall into the category of guilt due to omission, in the present case, for the ailment developed by the plaintiff – without setting aside its liability resulting from guilt due to action: the action of exposing the market for consumption to risk, due to the harmful effects of the product made available / produced.

It is important to mention the inadmissibility of the allegation concerning the concurrent or exclusive guilt of the victim, particularly if we consider (as already noted) the excessive advertising promoted by the defendant, as well as the chemical and psychological addiction caused by smoking. But even if there were this ‘concurrent guilt’ on the part of the smoker (who started to smoke because he wanted to), I emphasize once again that this would not remove liability for the risk of the activity that the defendant chose to engage in.

I proceed to determine the amount of the indemnification.

When concerned with moral damage, the indemnification has a dual character: at the same time that it seeks to punish the party that caused the damage through the offense that it committed, it seeks to compensate the victim for the harm suffered.

> In the legal system of our country there are disputes of jurisprudence and legal theory regarding the criteria for setting the amount of indemnification to make restitution for moral damages resulting from civil liability, in the absence of specific legal provisions.
>
> (...)
>
> in accordance with the so-called Theory of Discouragement, in sum, **the amount of indemnification for moral damages cannot and must not improperly enrich the injured party, but it must be sufficiently high to serve as a discouragement of new offenses.** (Cravo, Roldenry. Setting the amount for indemnification in claims for moral damages. In: *Revista Jurídica Consulex*, year VIII, nº 189, December 2004, p. 30) (EMPHASIS OURS)

Indeed, it is relevant to analyze not only the intensity of the economic suffering caused in order to estimate the amount for indemnification, but also the financial capacity of the offender, in order to arrive at an amount sufficient to prevent the occurrence of new, identical conduct.

In other words, with regard to the amount of indemnification, it is important to affirm that it must be set in accordance with the economic strength of the defendant, so that it does not lose its character as a sanction, considering that the penalty should always produce a disadvantage greater than the advantage gained from the illegal act, in order for it to have a preventive effect on the harmful act (Theory of Prevention).

In addition to this, the amount of indemnification should also adhere to criteria of reasonableness and proportionality, as well as the definitive circumstances of the case at hand.

The defendant company has immense economic stature, being

> one of the five largest private Brazilian groups, a subsidiary of the British American Tobacco group, the world's second largest company in the tobacco market, with operations in nearly 180 countries. (*Jornal Tribuna Catarinense*, issue no. 801 of May 23, 2006, in the article under the headline: 'Cargas da Souza Cruz são campeãs em assaltos [Souza Cruz shipments are in first place for assaults]')

Having ascertained the compromising of the physical integrity of the plaintiff, as well as his emotional condition, caused by illness that results directly from smoking,

which led to his death, the defendant company must be held liable, based on all of the arguments set forth in this decision, with the indemnification to be set at R$ 500,000.00 (five hundred thousand reais), to be monetarily adjusted by the principal official index for adjustment, verified from month to month, as of this date forward.

Lateness interest is 1% per month, since the date of the fact (first hospital admission of the plaintiff).

With regard to material damages, restitution must also be made for them through indemnification of the amounts spent for the treatment of the lung disease caused by the tobacco use of the late plaintiff, to be assessed at the settlement of the judgment.

Such expenses must be monetarily adjusted at the time of settlement by the principal official index for adjustment, verified from month to month as of each disbursement, with the addition of lateness interest of 1% per month, since the date of the fact (date of the first hospital admission of the plaintiff).

3.0) RULING:

THIS BEING SAID, I judge the claim filed by the ESTATE OF MILIAN CURY SIVIERI to be admissible, in the proceedings for the Suit for Indemnification that it brought against SOUZA CRUZ S/A, to sentence the latter to pay the plaintiff:

• By way of **indemnification for moral damages**, the amount of R$ 500,000.00 (five hundred thousand Reais), adjusted by the principal index for monetary adjustment that can be identified, verified month to month (the use of different indexes for different months is possible) as of the handing down of this judgment, and with the addition of lateness interest counting from the injurious event (Summary 54 of the STJ), considering for this purpose the date of the first hospital admission of the plaintiff, corresponding to 6% per annum until the entry into force of Law 10.406/02 and, from this point onwards, at 12% per annum;

• By way of **indemnification for material damages**, the amount of all expenses for medical-hospital treatment for Chronic Obstructive Bronchopulmonary Disease, duly adjusted by the principal index for monetary adjustment that can be identified, verified month to month (the use of different indexes for different months is possible) as of the date of each disbursement, and with the addition of lateness interest of 1% per month as of the date of the first hospital admission – to be assessed at the settlement of the judgment.

In light of the death of the plaintiff, I sentence the defendant to pay court costs and attorneys' fees to the counsel of the plaintiff, with the latter set at 20% of the total amount of the updated sum of the sentence, pursuant to what is set forth in Art. 20, § 3 of the Code of Civil Procedure.

Let this be published.

Let this be registered.

Let notice hereof be given.

Porto Alegre, June 29, 2010.

MAURO CAUM GONÇALVES,

Judge – 3rd Civil District, 1st Court