

REPUBLIC AND CANTON OF GENEVA

THE JUDICIARY

P/542/01

ACJP/223/03

DECISION
OF THE COURT OF APPEAL

Criminal Division

HEARING OF MONDAY, 15 DECEMBER 2003¹

Pascal DIETHELM,

Jean-Charles RIELLE, both represented by Christian PIRKER and Charles PONCET, attorneys-at-law; address for service: offices of Christian PIRKER, attorney-at-law, place du Molard 7, case postale 3534, 1211 Geneva 3; appellants from a judgement of the *Tribunal de Police* [Criminal Court of first instance] of 24 May 2002,

v.

PUBLIC PROSECUTOR of the Republic and Canton of Geneva, Office of the Public Prosecutor, Palais de Justice, place du Bourg-de-Four, Geneva,

Ragnar RYLANDER, represented by David BITTON and Michel HALPERIN, attorneys-at-law; address for service: offices of Michel HALPERIN, attorney-at-law, avenue Léon-Gaud 5, 1206 Geneva; respondents.

Case remitted by ATF [*Arrêt du Tribunal fédéral* = decision of the Swiss Federal Supreme Court] of 17 April 2003.

Notice of the present decision is given to the parties on 17 December 2003.

¹ (Note by CIPRET-Genève and OxyGenève: The original judgement is in French. This translation has been produced by an independent professional translator at the request of CIPRET-Genève and OxyGenève. Although great care has been taken to produce an English text which is very faithful to the French original, this is not a certified translation and only the French text is official.)

FACTS

A. By judgement of 24 May 2002, notified on the same day, the *Tribunal de police* found Jean-Charles Rielle and Pascal Diethelm guilty of defamation (art. 173 CP [*Code pénal suisse* = Swiss Criminal Code]) ensuing from a press release drafted by them and publicised during a press conference on 29 March 2001: the said press release portrayed Ragnar Rylander as a fraud in the pay of cigarette manufacturers, the main perpetrator of an "unprecedented scientific fraud", "secretly employed by Philip Morris USA", and "one of Philip Morris's most highly paid consultants". Jean-Charles Rielle and Pascal Diethelm were condemned to pay each a fine of CHF 4,000 and CHF 4,000 towards the legal fees of the civil claimant, Ragnar Rylander, and to bear procedural costs in the amount of CHF 1,750, including a CHF 400 judgement fee. On the other hand, Ragnar Rylander's submissions pertaining to damages and publication of the judgement were dismissed.

Deciding the appeal lodged by Jean-Charles Rielle and Pascal Diethelm, on 13 January 2003 the Criminal Division found that the appellants had demonstrated the veracity of their defamatory statements, except for the one presenting Ragnar Rylander as a participant in an "unprecedented scientific fraud"; it condemned them to a fine of CHF 1,000 each and to procedural costs including a fee in the amount of CHF 2,500, while each party was to bear its own legal fees.

On 17 April 2003, ruling on the constitutional complaint filed by Jean-Charles Rielle and Pascal Diethelm, the Swiss Federal Supreme Court annulled the decision of 13 January 2003 and sent the case back to the Criminal Division for a new decision, finding that its argumentation on evidence pertaining to the allegation of "unprecedented scientific fraud" was not comprehensible in relation to other elements taken into account.

At the hearing of 26 August 2003 before the Criminal Division, Jean-Charles Rielle and Pascal Diethelm moved for acquittal and award of costs, claiming to have proved the veracity of all the allegations contained in the charges filed by the Office of the Public Prosecutor on 15 May 2001.

Ragnar Rylander moved for the judgement to be affirmed, with costs, and for its text to be published, notably on the Internet sites of the associations headed by Jean-Charles Rielle and Pascal Diethelm.

The Public Prosecutor moved for the judgement to be affirmed.

The arguments invoked by the parties shall be examined hereinafter to the extent deemed useful.

B. a) During the incriminated press conference, Jean-Charles Rielle and Pascal Diethelm made public a press release drafted by them and entitled:

"Geneva at the centre of an unprecedented scientific fraud: overwhelming evidence against the activities of 'Geneva' professor Ragnar Rylander!"

In substance, in the text they accused Ragnar Rylander of having been secretly employed by Philip Morris USA for over 25 years and paid by *Fabriques de Tabac Réunies*, Neuchâtel, while being attached to the *Institut de médecine sociale et préventive* [Institute for Social and Preventive Medicine], in which capacity he was in charge of several of the Institute's research projects on dietary habits and lifestyle, including one on passive smoking. According to Jean-Charles Rielle and Pascal Diethelm, the conclusion reached by one of Professor Rylander's projects on respiratory infections in young children and environmental factors, namely that tobacco smoke did not modify risks of illness in young children, was mind-boggling and, when one knew that he was one of Philip Morris's most highly paid consultants, tended to call into question the objectivity of his work.

Three pages of the press release described the – alleged – relations between Ragnar Rylander and Philip Morris USA (hereinafter "Philip Morris").

In the last part of their press release Jean-Charles Rielle and Pascal Diethelm requested in particular that an inquiry be launched within the University of Geneva regarding Ragnar Rylander's activities, that all ongoing studies based on or making direct or indirect references to his studies be immediately suspended, that the Rectorate of the University of Geneva publicly denounce Ragnar Rylander's studies in scientific journals, and that university titles conferred on him in Geneva be revoked.

b) Ragnar Rylander, environmental physician, former researcher and lecturer at various institutes and universities, notably the Universities of Stockholm, Gothenburg and Geneva, filed a criminal complaint on 18 April 2001 for defamation, or even calumny, against Jean-Charles Rielle and Pascal Diethelm. In substance, in his complaint Ragnar Rylander explained that he had never been employed by Philip Morris, that he had never oriented his research to suit the desires of Philip Morris or other cigarette manufacturers in return for funding for his research, and that he had never allowed Philip Morris to inspect his research or to influence it in any way whatsoever; as for his work on tobacco, it represented no more than 10% of his overall research and publications.

c) In the charges filed on 15 May 2001, Jean-Charles Rielle and Pascal Diethelm were accused of impugning the honour of Ragnar Rylander by portraying him as a contemptible and venal scientist on account of his being responsible for an "unprecedented scientific fraud", having been "secretly employed by Philip Morris USA" and having been "one of Philip Morris's most highly paid consultants".

d) The following chronological account of the relations between Ragnar Rylander and Philip Morris is based on the exhibits produced by Jean-Charles Rielle and Pascal Diethelm and available for the most part on Philip Morris's website (www.pmdocs.com) and on that of the tobacco industry (www.tobaccoarchives.com).

In the early 1970s Philip Morris purchased INBIFO (*Institut für industrielle und biologische Forschung*), a laboratory located in Cologne. According to the president of Philip Morris, the idea was to have a place for certain activities that the company was reluctant to conduct in the United States. Using INBIFO would make it possible to keep certain research activities and their results confidential. There was to be no direct contact between Philip Morris and INBIFO. *Fabriques de Tabac Réunies* (FTR), Neuchâtel, a subsidiary of Philip Morris, was to serve as intermediary.

In July 1972 there were discussions on possible collaboration between Philip Morris and Ragnar Rylander. The latter wished to become a consultant, preferably for "one commitment only", but the relationship was to be kept confidential. Philip Morris was interested in having Ragnar Rylander as INBIFO's representative on a part-time basis (three days a month), in return for a remuneration of USD 250 per day plus expenses. Ragnar Rylander was to be paid by FTR and could continue to work with non-commercial organisations, such as the World Health Organisation.

In a memorandum of 18 September 1972 sent to Helmut Wakeham, Vice President of Philip Morris's Research Center in Richmond, Virginia (USA), Thomas Osdene, then scientific collaborator at the Center, detailed the duties of coordinator – the position meant to be filled by Ragnar Rylander – between INBIFO and Philip Morris. The duties included authorising expenditures for research projects, transmitting periodical technical reports to Philip Morris and advising Philip Morris on INBIFO projects. The document stated that the decision to authorise a project rested with Philip Morris alone, the coordinator being informed of such decisions. INBIFO was to submit monthly reports to Philip Morris on each project.

In November 1972 Ragnar Rylander informed Helmut Wakeham that he would be transferring his research activities to Geneva from the beginning of 1973 and that he accepted the proposal to work for INBIFO as from 1 January of the same year.

On 7 December 1972 Philip Morris and Ragnar Rylander entered into a formal agreement.

In the summer of 1973 Ragnar Rylander suggested organising a conference on the effects of tobacco smoke on non-smokers. The proposal was very favourably received by the Richmond Research Center, which advised Philip Morris to support the event through a USD 30,000 grant to the University of Geneva. (The report from the proposed conference could be invaluable in putting some sense into the legislative drive to restrict smoking in public places, and

the sooner the better... Time is important! It is easier to prevent laws than to repeal them.²) On 9 July 1973 Helmut Wakeham informed Ragnar Rylander that Philip Morris Europe would most likely support the conference.

In August 1973 Ragnar Rylander was invited to meet in New York David Hardy, an attorney for the tobacco industry in health-related law suits. Hardy felt that there were already enough publications supporting the tobacco industry's position, namely that smoking was harmless to non-smokers, and that it was not in the industry's interest to sponsor an event that might reach the conclusion that there was a risk to non-smokers. (Not everyone agrees with this position so there is hope of convincing Mr Hardy, as an influential advocate among the industry lawyers, of the potential benefits from holding the Workshop as you proposed.) Ragnar Rylander promised to do his utmost to convince David Hardy of the workshop's usefulness. In his view, it was necessary to gather all relevant information, in particular because of a recent report received by Sweden's National Health Office stating that "CO from the cigarettes constitutes an important problem for the enclosed environment. Although this conclusion is contradictory to the data in the literature, it has already received much attention and the protection of special risk groups is discussed".

On 25 September 1973 Ragnar Rylander declared himself delighted that "arrangements could be made to go ahead with the workshop on smoking effects on the non smokers". He sent Donald Hoel, a partner at the law firm of Shook, Hardy and Bacon, a provisional list of participants for Hoel to add to as he wished.

In this context, on 1 October 1973 Ragnar Rylander received a letter from Dr W. Dublin of the Veterans Administration Hospital in Martinez, California (USA). Dr Dublin was of the opinion that the problem of tobacco smoke in enclosed areas was one of the most pressing public health problems, experiments having demonstrated the negative effects of small quantities of smoke, in particular on children exposed to their parents' smoke. (Smoke is not acceptable within any contained area in which non-smokers are found.)

Ragnar Rylander forwarded the letter to Donald Hoel, asking him whether it was advisable to invite Dr Dublin to take part in the conference. (Even if he appears to be somewhat biased it is probably important to balance the participation list so that we will not be accused of having chosen only one category of people.)

It does not seem that Dr Dublin was invited to the conference. Later, proposing a meeting to discuss the summary proceedings, Ragnar Rylander informed Donald Hoel that the event had been a success – very interesting discussions, no emotional declarations (very competent discussions, no emotional declarations).

² *(Translator's note: All English excerpts incorporated in the French original have been retained and are reproduced in a different font. A parallel translation in English is given in all instances where discrepancies were noted between the French text and the corresponding excerpt in English.)*

In a letter partially produced as evidence, Helmut Wakeham remarked that he was looking forward to reading the summary report. He was hoping to get a document that would enable them to calm a certain hysteria over the issue. His main concern was the development of legislation in some local governments aimed at imposing certain restrictions on smokers. (We hope it will provide us with a document we can use to quiet some of the hysteria on the subject. Our main concern is the legislation restricting smokers now being passed in some of the local governments in the USA.)

In August 1974 Ragnar Rylander sent the latest version of the draft summary report to Helmut Wakeham: "I would be very grateful for your comments and suggestions for additions or deletions. Please be critical as this paper is going to be an important part of the Workshop proceedings."

An exchange of memoranda in August and September 1974 shows that Ragnar Rylander submitted to Philip Morris and Don Hoel, for correction, an account of the workshop proceedings – actually prepared by a ghost writer – intended for the journal "Science". On 12 September 1974 Raymond Fagan, main scientific collaborator of the Philip Morris Research Center, suggested to Ragnar Rylander to include the following paragraph:

"In my opinion, healthy non-smokers exposed to tobacco smoke run no quantifiable risk of pulmonary diseases. Nor do I believe that CO generated by cigarettes presents a major hazard to non-smokers' health. It is of course true that tobacco smoke bothers certain people for reasons that have not yet been elucidated. This type of reaction may be due to allergies, psychological factors or simple distaste, but it is real. Between these two extremes there is a host of unanswered questions. In such a scientific vacuum, one may legitimately wonder whether such drastic measures as arbitrarily banning smoking in public places or separating smokers and non-smokers are justified. As long as reliable results on these matters are not available, smokers should be asked to take into account non-smokers' possible discomfort." (It is my opinion that healthy non-smokers exposed to typical levels of environmental tobacco smoke run no substantial risk of thereby developing chronic pulmonary diseases. Furthermore, I do not believe CO generated by cigarettes presents any kind of major health danger to exposed non-smokers. On the other hand, it is undeniable that cigarette smoke irritates some people for reason(s) not yet clear. The effect may be due to allergy, psychological association, or simple distaste, but in any event, it is real. Between these extremes lies a host of unanswered questions. Within such a scientific vacuum one may legitimately question the wisdom of taking such drastic steps as the arbitrary banning of smoking or segregation of smokers in public places. Until more reliable information becomes available, the best course of action is to urge smokers to exercise appropriate courtesies and to inform them of the irritating nature smoke can have in certain circumstances for some persons.)

Ragnar Rylander replied to Raymond Fagan that in substance he agreed with that opinion, which was in line with the wishes of the lawyers in particular; however, he thought it ill-advised to include the paragraph in the article because it might provoke some reactions on the part of certain participants; "this would in term [sic] mean that the whole concept behind the workshop would be endangered".

Helmut Wakeham, for his part, stated that persons who would act as “referees for this paper” should be carefully chosen.

The conference proceedings were also published in the “Scandinavian Journal of Respiratory Diseases”. The preface indicated that the event had received financial support from FTR in the amount of USD 30,000.

In January 1977 Philip Morris launched the idea of a second conference; it was deemed advisable to organise it through a university or a similar body. (You recall Rylander’s Workshop in Bermuda sponsored by us through the University of Geneva.)

A Richmond Research Center memorandum of 31 March 1977 carried a reminder that Philip Morris USA had to avoid all direct contact with INBIFO: samples and written analytical data therefore always had to be forwarded through FTR; if that procedure was not convenient, then a fictitious postal address in Cologne could be envisaged for the reception of samples.

In August 1977 Helmut Wakeham contacted a *Los Angeles Times* editor about an article entitled “Self-righteousness afflicts non smokers”, mentioning the 1973 Workshop which had brought together eminent scientists to discuss the question of passive smoking, as well as Professor Ragnar Rylander’s opinion “that the risk for the development of chronicle [sic] pulmonary effects due to environmental tobacco smoke exposure is non-existent among the population in general.”

In May 1980 Donald Hoel sent to Ragnar Rylander several scientific articles dealing with the effects of smoking. In his view, a number of scientists or the authorities concerned could be influenced by them in acknowledging or assuming that cigarette smoke constituted a real health hazard for non-smokers. (I feel sure that many scientific and lay authorities will possibly be influenced by these papers in assuming or believing that environmental tobacco smoke is truly a health hazard to the non-smoker.) He was proposing to meet Ragnar Rylander to discuss what he saw as a necessity, namely organising another gathering like the one on tobacco smoke held in Bermuda (about what I feel is the need for another Bermuda-type workshop on environmental tobacco smoke). When they met in early July 1981, Ragnar Rylander suggested holding the conference in Geneva. (Rylander prefers to conduct a closed seminar so as not to inhibit discussions among the experts [memorandum of 27 July 1981].)

In July 1981 Ragnar Rylander asked Thomas Osdene, who had become Director of the Richmond Research Center, whether he should register as a participant in the World Conference on Smoking and Health in Winnipeg. He was told that it was preferable that he not register. (I believe that they are going worldwide, I would not recommend registering.)

Following a meeting with Ragnar Rylander in August 1981, Donald Hoel drafted a memorandum stating that “[t]he workshop could or would be in a position to give environmental tobacco smoke a “clean bill of health”. However, Dr Rylander did believe that he could bring a healthy scepticism to the conference at some of the claims being made about environmental tobacco smoke.”

Besides, Dr Rylander thought that Geneva was neutral ground for Americans while Florida might strengthen the impression that the tobacco industry was involved in the conference. (Florida might increase the attention given to the US industry as being involved with the conference.) He was of the opinion that having the Tobacco Institute as a sponsor was not advisable since it was seen as the lobbying arm of the American tobacco industry. Dr Rylander also agreed to submit to Donald Hoel the draft conference report. Finally, a provisional list of participants was drawn up.

Donald Hoel had another meeting with Ragnar Rylander in January 1982 to find an alternative to a conference that his clients (i.e. Philip Morris) thought unsuitable at the time. Whatever the formula, Ragnar Rylander still had a preference for Geneva; he had no guest list, but he did not intend scientists like Garfinkel or Hirayama to take part (the former not having the approval of Philip Morris).

In the end, the second workshop was held in Geneva from 15 to 17 March 1983.

According to a memorandum of 29 March 1983, there was consensus among the participants regarding lack of evidence that cigarette smoke could cause lung cancer; the question of whether smoke could affect the health of young children required additional studies on the basis of criteria still to be determined. (There is no evidence of environmental smoke causing lung cancer. The question whether it affects youngsters deserves further study in accordance with certain criteria which will be spelled out in the proceedings.) Ragnar Rylander was to meet Donald Hoel in May 1983 to discuss publication of the workshop findings. In a letter of 22 August 1983 Ragnar Rylander informed Thomas Osdene that he had received all the participants' reports, so that his meeting with Donald Hoel looked promising. He also stated that he would go to INFIBO's premises, expecting to see Bob Seligman there. He would thus have all pertinent information from INBIFO at the Richmond meeting. He also wanted to review all smoke-related activities conducted in Gothenburg and discuss the budget. The article on the Smoking/Silica/ Endotoxin issue had been accepted for publication in "Toxicology". Ragnar Rylander enclosed a copy of the final version of the manuscript with his letter, pointing out that minor changes could still be made. (At any event, I will have a full up date of INBIFO activities to discuss when we meet in Richmond. I would also like to review the smoke inhalation activities here in Gothenburg and discuss the budget. The article on Tobacco Smoking and Silica/Endotoxim is now accepted for publication in Toxicology. Enclosed please find a copy of the manuscript in its final version. Minor changes could still be included.)

The report on the workshop was finally published in Geneva in 1983, with Ragnar Rylander and two of his associates as editors. The foreword mentioned financial support for the workshop from the Tobacco Institute in Washington (USA), without indicating the amount involved.

In a letter of 17 April 1984 to the Vice-President of R.J. Reynolds Tobacco Company, the Tobacco Institute indicated that the above publication had been largely disseminated in the specialised press and that a request would be sent to the University of Geneva for

authorisation to have it distributed in the United States, in particular to members of Congress, entities in charge of health issues, and the press. According to Don Hoel, who was its “contact” with Ragnar Rylander, the latter was upset about the way in which the Institute had exploited the publication, and a solution had to be found. (Don Hoel, who is our contact with Rylander, has reported that Rylander is concerned about this much exploitation by the Institute and we are still working on that problem.)

Within the framework of his activities in the Department of Environmental Hygiene at the University of Gothenburg, in the spring of 1988 Ragnar Rylander drafted a paper entitled “Analysis of ETS information – evaluation strategies”. This was a summary of discussions held in May 1988 in Tucson, Arizona (USA) with Dr Michael Lebowitz, a scientist active in research on pulmonary diseases, concerning the state of research and information on passive smoking (environmental tobacco smoke (ETS)). In the paper Ragnar Rylander stated that little new information had been obtained in recent years but that a wide-ranging epidemiological study had been conducted in the United States on the relationship between passive smoking and cardiovascular diseases. Although such a relation had not been demonstrated and the risk of passive smoke having such effects had been judged weak at the Geneva workshop, claims were being made that they existed nonetheless. The concept that passive smoking led to increased risk of lung cancer and increased risk of infection among children was now widespread in spite of the weaknesses of the studies devoted to such effects. This was true in particular of the link with upper respiratory infections in children, for which there was no consistent data. (Although the evidence for such a relation was weak and the risk for such effects was judged to be extremely low at the Geneva ETS meeting, claims are now made for this effect to be of importance... The concepts that ETS is related to an increased risk for lung cancer (...) and an increased risk for infections among children, have now been broadly established in spite of the inherent weaknesses in many of the studies where such effects are studied. This is particularly true for the relation between upper respiratory infection in children where data are very inconsistent).

A meeting in Richmond having been scheduled for late September 1991, in late August 1991 Ragnar Rylander sent to Thomas Osdene for approval a summary of various projects that might be of interest: “I would like your approval first concerning content and scope. Please let me know and I will make the necessary adjustments and additions.”

One study on respiratory diseases in children did indicate a link between the number of cigarettes smoked by the mother and the occurrence of bronchitis, but it highlighted an even stronger link between bronchitis and the consumption of certain green vegetables. The project seemed very interesting, initial data suggesting that dietary factors had an equal or even greater influence on the occurrence of respiratory problems. (But a stronger relationship was found between the same disease and consumption of certain vegetables... The project looks very promising as the first data suggest that diet factors may be of equal or even larger importance for children’s respiratory disease than ETS.)

Writing to Thomas Osdene on 2 November 1991, Ragnar Rylander stated that the data resulting from the study on children was extremely interesting: “The data from the child study now start to look extremely interesting. After corrections in the data base, there is now no correlation

between ETS exposures and the frequency of upper respiratory infections. There is however, surprisingly, a very close relationship between consumption of eggs and cheese and milk products and respiratory disease.”

A brief report on a meeting of the *Association des épidémiologistes de langue française* (ADELF) [Association of French-speaking epidemiologists] held on 26 March 1992 indicated – regarding respiratory disease in children and environmental factors, a topic presented by Ragnar Rylander and Isabelle Mégevand – that preliminary results had enabled them to find a correlation between passive smoking in children and the frequency of bronchitis; certain other correlations were becoming apparent, too, in particular between a tendency to cough and the consumption of green vegetables.

Nevertheless, barely two months later, in May 1992, reporting to an international conference of the American Thoracic Society (ATS) on “Respiratory infection in children, ETS exposure, social factors and diet” and after presenting the results of a questionnaire completed by the mothers of some 90 children aged between 4 and 5, Ragnar Rylander explained that there was no significant link between passive smoking and any of those respiratory diseases. (There were no significant relationships between ETS exposure and any of the respiratory diseases.)

During the summer of 1994 Ragnar Rylander and Philip Morris held talks about continuing the study aimed at better evaluating the relative importance of different dietary factors in relation to lung cancer (for a continuation of the present study with the aim to further evaluate the relative importance of different dietary factors and lung cancer).

On 25 September 1994 Ragnar Rylander wrote to Richard Carchman as follows: “Thank you for great discussions in Washington last week. From confidential data at the National Cancer Institute, I learnt that when the intake of fat was corrected for, the risk due to ETS disappears. This is good news and supports our CIAR.”

In June 1997 FTR asked Ragnar Rylander to meet Dr Ake Thorn, a Swedish hygiene specialist, one of its long-standing associates (one of the contacts we have made over the past few years) to discuss a research project that was of interest to FTR as well. (Possibly a joint project could be developed that we would support.) In his letter of 23 June 1997 to Richard Carchman, Ragnar Rylander explained that while he certainly wished to cooperate, he saw a possible conflict in such a meeting. He had always been very strict about reporting only to Richmond and in particular about not getting engaged in the activities of the Neuchâtel group. With regard to the specific project, he had been in contact only with Richmond and CIAR. He had never been involved with anyone from Philip Morris, in order to retain as far as possible the image of an independent scientist. This approach had worked well in all circumstances – except for the “tarnish” episode (*sic*) that had obliged him to stay out of certain bodies in Sweden and the United States – and he had encountered no problems in being engaged in scientific work or lecturing at the American Thoracic Society. (Whilst I will help out as much as possible, I see a potential conflict in the task. Throughout the years I have always been very strict to report to Richmond only and particularly not get engaged in the activities of the

Neuchâtel Group. Also regarding specific project, I have also adhered uniquely to Richmond and to CIAR. Finally, I have never been involved with any Philip Morris executive in meetings or contacts with outside persons, to retain as far as possible the image as an independent scientist. So far this has worked very well except for a little “tarnish” that kept me out of certain committees here in Sweden and the US. There have been no problems to be engaged in scientific work or lecturing at the American Thoracic Society).

An interoffice memo of 10 July 1997 addressed to Richard Carchman, Philip Morris USA, described over several pages and in full detail (remuneration, activities, fields of expertise, articles and other scientific contributions) the collaboration between Philip Morris and Ragnar Rylander from 1972 to 1996.

(Dr Ragnar Rylander signed a consultant agreement with Philip Morris in 1972 as “our representative to INBIFO”. At that time he was an Assistant Professor with The National Swedish Environment Protection Board. Dr Rylander is currently a Professor in the Department of Environmental Medicine, University of Gothenburg, Sweden. He is an expert in the area of Environmental Health Effects and continues to provide consulting services to Philip Morris USA R&D.

Fees (including travel expenses) range from: \$2,500 (1972) to \$85,000 (1997)

Note: limited financial data available beginning in 1984.

Major contribution[s] to R&D include:

- Visit INBIFO on a monthly basis to discuss scientific methods and product evaluation.
- Provide advice/expertise, e.g.
 - Cardiovascular disease
 - Pulmonary disease

Additional contributions to R&D include:

- Scientific presentations on the general situations regarding ETS include:
 - Swedish EPA workgroup of standard for nitrogen oxide
 - Australian Thoracic Society on Diet and Pulmonary Disease
 - Occupational Health authorities in Perth, Australia
 - Hearing by the Public Health Institute of Sweden on childhood allergies
 - Epidemiology meeting in Raleigh, NC
 - Lung Cancer workshop in China
- Host numerous international workshops:
 - e.g. Confounding Factors in Tobacco Smoke Related Research
- General consulting support:
 - Comments submitted on the progress of Alzheimer Study – to RAC
 - Comments on Indoor Air Quality Proposed Rule by OSHA – to OSHA
 - Interactions with scientist[s] worldwide
- Training postdoctorals – e.g. China in the use of good epidemiological practices

In addition, Philip Morris has provided funds for various research activities at Geneva University since 1974. Dr Rylander has been either the Principal Investigator in the research, or the administrator of these funds (He has a faculty appointment at the University).

Grant allocations range from: \$40,000 (1985) to \$80,000 (1997)

Note: limited financial data available beginning in 1984.

The following is a brief overview of PM R&D sponsored research work at Geneva:

1974-1984

Inhalation toxicology. Establishment of acute and chronic inhalation facilities. Methods to sample lung lavage and lung interstitial cells. Exposure to various organic dusts, carbon monoxide, bacterial endotoxin. In collaboration with the Department of environmental medicine at Gothenburg University exposure to cigarette smoke with focus on simultaneous exposure to other inhalants.

1983

Epidemiology studies. Establishment of epidemiological know-how, equipment and training.
1989-1997

Magnesium in drinking water. Investigations on the role for magnesium in drinking water for the risk for cardiovascular disease. Register studies, cohort studies in Geneva in collaboration with the department of internal medicine. Planning of intervention studies.

1987-1996

Environmental factors and respiratory infections in children. Elaboration of questionnaires with particular focus on dietary factors. Three field studies during the winter months with subsequent modifications of the epidemiological technique.

Outcomes include:

- peer reviewed publications
- presentation at scientific meetings
- scientific workshops – chair/participate

Note: Continuation of research funding for Geneva is scheduled for discussion at the August 15, 1997 SRRC meeting).

As regards Ragnar Rylander's remuneration, an internal memorandum of 18 September 1984 detailing the budget earmarked for Philip Morris consultants shows that he was to receive USD 120,000 in 1986, USD 125,000 in 1987, USD 130,000 in 1988 and USD 135,000 in 1989. The remuneration of the other consultants was considerably lower – only FTR and the American Health Foundation were to receive higher amounts. It has been established that in 1989 Ragnar Rylander received USD 140,000.

A confidential Philip Morris document prepared in July 1998 lists the projected 1999 remuneration of the various consultants as ranging between USD 15,000 and USD 75,000. Ragnar Rylander was to receive USD 92,000, it being pointed out that the salaries for the three staff members working full time amounted to USD 116,800, USD 127,700 and USD 276,300 respectively.

Regarding INBIFO, it should be mentioned as an example that for 1989 Ragnar Rylander approved bills for a total amount of DEM 12,460,536.

On 5 February 1998 Ragnar Rylander submitted to the editor of the "European Journal of Public Health" for publication an article entitled "Dietary habits for non-smoking females living with smokers or non-smokers". In his submission, made on behalf of all the persons who had collaborated in drafting the article, he affirmed that "[n]o part of the research presented has been funded by sources that might lead to a conflict of interest."

The article was published in the "European Journal of Public Health" in 1999. It drew critical reactions, which were published in the Journal during the following year. In them, several scientists requested that the authors of such articles be required to provide full details on any connections they might have with the industry and that might give rise to a conflict of interest. They affirmed that "Professor Rylander has a long history of collaboration with CIAR and documents which describe in detail his long standing association with the tobacco industry are now in the public domain and can be accessed by anyone through the Internet."

Asked by the Journal's editor in chief about his links to the tobacco industry, Ragnar Rylander replied in writing on 26 June 2001, stressing that it was "[i]mportant to state that I was never a formal consultant to Philip Morris – non contract [sic] was signed, I never received a regular payment for consultancy as such (only travel and per diem) and I never participated in product development or company scientific policy."

e) The following pertinent elements emerged in the course of the investigation carried out by the *Tribunal de Police* and the Criminal Division.

– If Geneva's *Institut de médecine sociale et préventive* (IMSP) [Institute of Social and Preventive Medicine] had known that Ragnar Rylander had entered into a consultancy agreement with Philip Morris, he would have been asked to choose between that activity and his post at the Institute (witness André Rougemont, Director of the IMSP).

– Since in the field of science nothing is totally right or totally wrong, black or white, scientific findings should be evaluated advisedly in order to be translated into the domain of prevention and public health. To ascertain its degree of credibility, it is important to know by whom a piece of research was conducted and financed. Tobacco-related research and ensuing publications are screened by lawyers who authorise or prohibit the latter depending on the results obtained. Public health authorities thus sometimes base themselves on incomplete sources. One of the ways used by the tobacco industry to influence public opinion was to organise scientific gatherings presenting an opinion favourable to the industry. To do this, conference participants were carefully selected so as to be globally favourable to the tobacco industry (witness Chung-Yol Lee, physician, WHO-mandated research officer on smoking-related issues).

– From the 1980s on, at least three studies showed that the effect of poor eating habits on the development of cancer was weak compared to that of passive smoking. Although he was aware of those findings, Ragnar Rylander never reported them in his various publications. As regards the 1974 and 1983 symposiums organised by him, most of the scientists taking part had close links to the tobacco industry (witness Theodor Abelin, physician, professor of social and preventive medicine, Vice-President of the *Commission fédérale pour la prévention du tabagisme* [Swiss Federal Commission for the prevention of smoking], and President of the World Federation of Public Health Associations).

– At the start of an epidemiological study the basic criteria are laid down by the experts in charge of the study. It is absolutely imperative to comply with these criteria throughout the study in order to subsequently analyse its findings. Modifying the parameters in the course of the study so as to get closer to the desired outcome is inadmissible and would amount to manipulation. If a researcher were to do this the results would no longer be credible (witness Hubert Varonier, physician, specialist in paediatrics, allergology and immunology, former Deputy Director of the *Service de santé de la jeunesse* [Youth Health Service] in Geneva).

– A study initiated in 1999 by the World Health Organization (WHO) on the influence of the tobacco industry showed that the latter had devised a whole range of strategies with a view to hindering WHO activities on problems related to smoking in general. A study published in 1998 had been conducted earlier by a specialised WHO agency, the International Agency for Cancer Research, based in Lyons, particularly on the effects of passive smoking. Tobacco manufacturers took prompt action against the researchers, threatening not to finance the study and attempting to delay publication of the report. The manufacturers had set up companies or institutes with the aim of holding public debates without the media or the scientific community being aware of the fact that these companies or institutes were actually connected to the tobacco industry. Therefore, the key element was transparency: as long as it was known that a study was funded by the tobacco industry, neither the researcher nor the study was discredited. On the other hand, if there was no transparency or no clear indication as to the financing of the study, this could give rise to possible confusion when analysing the research (witness Thomas Zeltner, physician and jurist, Director of the *Office fédéral de la santé publique* [Swiss Federal Office for Public Health]).

– The fact that Ragnar Rylander’s research was financed by Philip Morris was classified “top secret”. As for INBIFO, it was controlled completely by Philip Morris; information on research done by the Institute was forwarded to Philip Morris in an extremely confidential manner through the intermediary of Ragnar Rylander. Philip Morris had known at least since 1965 that there was a direct link between passive smoking and cancer, but refused to acknowledge its existence until 2000. Professor Ragnar Rylander, who was aware of this fact, had taken part in the denial. Several court decisions in the United States had found Philip Morris guilty of fraud for concealing scientific reality, but no scientist was similarly sanctioned in a personal capacity (witness William Farone, Ph.D. (Physical Chemistry), author of 77 scientific articles, specialist in the field of passive and active smoking and its relation to cancer, Director of Applied Research at Philip Morris from 1974 to 1986).

– When Ragnar Rylander’s article “Dietary habits for non-smoking females living with smokers or non-smokers” was published in the “European Journal of Public Health”, the Journal’s editor did not know that CIAR was financed by the tobacco industry; he had received a letter signed by Ragnar Rylander affirming that the research in question did not lead to any conflict of interest. Existing uniform rules governing the publication of articles in scientific journals or publications of public interest required submitting authors to declare any potential conflicts of interest. Funding for research or an article from one or more organisations having an interest in the research findings constituted such a conflict. The publication of Ragnar Rylander’s article effectively sparked off a controversy, whereupon the editor referred the matter to the Committee on Publication Ethics. The editor was not aware either of Ragnar Rylander’s contractual ties to Philip Morris. The Committee on Publication Ethics reached the conclusion that the public had to be informed of the situation and that Ragnar Rylander should be denounced to the Swedish ethics committee dealing with honesty in medical and scientific publications (witness Martin McKee, Editor in Chief of the “European Journal of Public Health”).

f) Reacting to the press release of 29 March 2001, the Dean of the Faculty of Medicine at the University of Geneva requested that an investigation be opened into the links between the tobacco industry and researchers associated with the University. On 2 April 2001 the Rectorate set up a commission of inquiry consisting of three deans to examine the nature of relations between three former professors or lecturers – Ragnar Rylander among them – and Philip Morris, to shed full light on the facts denounced, to identify financial backing or funding from the tobacco industry as well as scientific work and research supported by such funds, and to establish whether the persons implicated had committed any breaches of the deontological and ethical rules in force at the University of Geneva.

The commission of inquiry submitted its report on 25 June 2001, without hearing the appellants or requesting the production of exhibits from the criminal proceedings.

The report was the basis for the document of 6 November 2001 entitled “*Conclusions et mesures du rectorat faisant suite à la dénonciation sur l’existence de liens entre l’industrie du tabac et l’Université de Genève*” [Conclusions and measures of the rectorate following the denunciation in respect of the existence of links between the tobacco industry and the University of Geneva].

As a preliminary remark, the authors pointed out that while researchers were free to define the subject of their research and to adopt the scientific method they found most appropriate, they could not disregard the impact of their research in the wider social, economic and political context. It also had to be determined whether it was ethically and morally admissible for a University researcher to be financed by the tobacco industry. Such funding appeared acceptable by virtue of the principles of equality and equity since all branches of industry had to be given equal treatment and the University was a place where research could be conducted in an impartial manner. However, the University nowadays had the duty to be more circumspect about accepting research funding from the tobacco industry, since the latter had used various strategies to discredit international organisations such as WHO and try to reorient national policies on public health protection. The report read as follows:

“By choosing to focus on factors such as indoor air humidity and dietary habits in evaluating the development of lung cancer, and by concluding that these factors could have a confounding effect, Professor Rylander and his team could not ignore the fact that the main consequence of this approach was to relativise and even minimise the effect of tobacco smoke on the development of these tumours, and that the said approach could be used by the tobacco industry to cast doubt on the very harmfulness of tobacco for public health. Furthermore, while in the commission’s view the choice of these topics is not in itself open to criticism from an ethical viewpoint, its persistence in a context as exposed as that of the harmfulness of tobacco for public health does not appear to be innocent in all respects. Indeed, one may wonder about the systematic use of a scientific approach that may tend to minimise the influence of tobacco smoke, continuously diluting this last factor among others. The complex

nature of the subject, combined with its political topicality, would require greater respect for methodological plurality.”

Nevertheless, since the Institute of Social and Preventive Medicine had known about the links between Ragnar Rylander and the tobacco industry, it bore a certain responsibility in its capacity as supervisory body. Moreover, the University’s accounting service was unable to assess whether Ragnar Rylander’s transfers to one of the Institute’s accounts corresponded to the amounts paid by Philip Morris into his private account. On this point, the report stated the following:

“Such opaqueness may have been considered normal twenty years ago, but it is no longer in keeping with what may be and is required today. It should be noted however that until very recently the University accepted Mr Rylander’s personal cheques without reacting.”

On the basis of the commission’s report and the analysis thereof, the Rectorate concluded that Ragnar Rylander had probably not evaluated adequately the consequences of his work for society, but that no instance of scientific fraud had been uncovered. Given the responsibility laid at the door of the management of the Institute for Social and Preventive Medicine, administrative measures had to be taken with respect to the duty of supervision and research funding. It was recommended to all members of the University no longer to accept, in the current circumstances and until a new decision was taken, any new financing from the tobacco industry.

In September 2002 the University of Geneva mandated Professor Timothy Harding, Director of the University Institute for Forensic Medicine and Chairman of the Commission on research ethics of the Faculty of Medicine, to draw up a supplement to the report in the light of new facts that had emerged in the context of the criminal proceedings.

A press release based on the supplementary report was issued by the University after the oral pleadings of 21 October 2002 in the appeal proceedings.

C. Jean-Charles Rielle was born on 13 August 1952. He is married and has a grown-up daughter from a previous marriage. He is a physician with the *Service de santé de la jeunesse*, as well as co-director of the *Centre d'information et de prévention du tabagisme* (Cipret) [Centre for Information and the Prevention of Smoking], consultant to the State of Geneva and associate judge at the *Tribunal de la jeunesse* [Juvenile Court]. He earns between CHF 10,000 and CHF 12,000 a month. He owns an apartment, on which he is paying off a mortgage. Jean-Charles Rielle has no prior criminal record.

Pascal Diethelm was born on 1 December 1944. He is married and has a grown-up daughter. Econometrician by training, he is a retired official of WHO, where he worked for thirty years. Since January 2000 he has been general manager of a company active in developing software for the art market. Through his business he earns some CHF 10,000 a month. Pascal

Diethelm is founder and president of OxyGenève, an association active in the defence of non-smokers. He owns a villa. Pascal Diethelm has no prior criminal record.

LEGAL BASIS

1. The question of the admissibility of the appeal is not being addressed; besides, it has already been settled in the affirmative (ACJP/12/03 of 13 January 2003, point 1).

2. a) In its decision of 13 January 2003, the Criminal Division recognised that proof of veracity had been given for two of the three defamatory elements listed in the charges filed by the Public Prosecutor, in the sense that the appellants had demonstrated that Ragnar Rylander had been secretly employed by a cigarette manufacturer and that he had been one of its most highly paid consultants. Although the Swiss Federal Supreme Court has annulled the decision of 13 January 2003 in its entirety, it appears from the Court's ruling that the Criminal Division's consideration is henceforth limited to the question of the veracity – proven or not – of the defamatory statement that Geneva was "at the centre of an unprecedented scientific fraud".

Moreover, the parties' pleadings before the Criminal Division on 26 August 2003 dealt exclusively with this point.

b) With regard to proof of veracity within the meaning of art. 173(2) CP [*Code pénal* = Swiss Criminal Code], the Swiss Federal Supreme Court has pointed out that in the specific case such proof was brought when the allegation of fact contained in the incriminated expression was conform to the truth and that, consequently, the value judgement was objectively justifiable (ATF 121 IV 76 ff = JdT 1997 IV 75).

On (re)reading the press release of 29 March 2001, it must be recognised that it reflects very largely and accurately the facts as described above on the basis of the numerous exhibits produced in the present proceedings, in particular the correspondence between Ragnar Rylander and Philip Morris, its lawyers, or associated organisations.

Those exhibits attest to a long, close and fruitful collaboration between the researcher and professor Ragnar Rylander and one of the major players in the tobacco industry. It thus appears conform to the truth that Ragnar Rylander did have contractual and long-standing ties with Philip Morris. Consequently, when he stated that he had never been employed by the cigarette manufacturer, he was playing on the words. The presence of a conflict of interest in a given situation obviously does not depend on the sole existence of an employment contract in the technical sense of the term (for example art. 319 CO [*Code des Obligations* = Swiss Code of Obligations]). By affirming, most recently to the "European Journal of Public

Health" in 2001, that no contract had ever been signed between Philip Morris and himself, Ragnar Rylander had lied.

The extracts from the correspondence between Ragnar Rylander and Philip Morris or its associated organisations, as well as their American lawyers, as cited in the section "FACTS" above, clearly show that the main aim of the symposia organised in 1974 and 1983 was to convey the message to both researchers and the general public that the available data on the harmful effects of smoke on non-smokers was insufficient and inconclusive, notably in view of other factors susceptible of influencing their health.

Public opinion has evolved considerably over the past few decades, of course; authorities and individuals alike have become aware of the issue of passive smoking as a factor with negative effects on public health. This being said, the juxtaposition of the statement by witness William Farone, former collaborator of Philip Morris – according to whom the cigarette manufacturer had known since the mid-1960s of the link between smoking and cancer – and the view defended by Ragnar Rylander before the American Thoracic Society in 1992, namely that there was no significant correlation between passive smoking and respiratory diseases, shows to what extent the tobacco industry, together with certain scientists, played a part in concealing that opinion for profit.

According to the majority of scientists who testified in the course of the proceedings, it is generally accepted for industries, whatever their sector of activity, to finance research or a substantial part thereof since universities are notoriously underfunded; however, it is essential that any interest ties be known.

Ragnar Rylander revealed only a tiny portion of the truth – the tobacco industry's sponsorship of the 1974 and 1983 symposia – and kept quiet about everything else, in particular his role within the INBIFO research laboratory, his continuous links with Philip Morris's lawyers and the fact that his writings were regularly submitted to Philip Morris prior to publication.

In those circumstances, the *raison d'être* of the secrecy put in place and maintained by Ragnar Rylander and Philip Morris on the subject of their "commercial" relations is easily explained.

The proceedings have shown that as late as 1999 the editors of a scientific publication like the "European Journal of Public Health" were still unaware of Ragnar Rylander's links to the tobacco industry and believed his statements denying their existence.

The elements already underscored in its decision of 16 January 2003 and the additional elements mentioned above lead the Criminal Division to recognise that the appellants did not exaggerate in using the term "scientific fraud" to qualify this double role: that of professor in the field of environmental medicine and independent researcher, a role Rylander attributed to himself, and, at the same time, the role of collaborator at the service of an industry that has always positioned itself against public health.

This conclusion is not in contradiction with the stand taken by the Rectorate of the University of Geneva on 6 November 2001. Indeed, without being familiar with the exhibits in the criminal proceedings, the Rectorate considered that Ragnar Rylander had chosen the subjects of his research and persisted in that choice knowing that his approach minimised the harmful consequences of smoking on health and that the tobacco industry would exploit the results thus obtained, which was open to criticism. It should also be recalled that the Rectorate has opened an additional inquiry precisely because of the present proceedings and the judicial decisions already handed down.

An examination of the incriminated press release shows that the expression “scientific fraud” concerns only Ragnar Rylander’s deception regarding his links with Philip Morris and not the fact, criticised later on, that he had altered a data base so that the results of a study might correspond to the expected outcome, as it emerges from the very letter that Ragnar Rylander sent to Thomas Osden concerning the study on passive smoking and respiratory diseases in children.

There is however no reason to limit the expression “scientific fraud” to the case of a researcher who knowingly alters the results of his work in one way or another, since the expression found to be defamatory must be grasped in the sense attributed to it by an unbiased person, and account must be taken of the text as a whole (ATF 121 IV 76 point 2a/bb = JdT 1997 IV 75; 119 IV 44 point 2.a).

As regards the term “unprecedented”, it is more a value judgement than a precise fact requiring formal proof (Basler Kommentar, Riklin, n° 13 *ad* art. 173 CP, Helbing & Lichtenhahn 2003; ATF 102 IV 176, 180; 121 IV 76, 83).

A deception that, as is the case here, spanned some thirty years and was kept up even at the cost of lies – reference being made to Ragnar Rylander’s declaration to the “European Journal of Public Health” concerning the absence of a conflict of interest – certainly deserves the qualification that was used.

Geneva has indeed been the centre of an unprecedented scientific fraud in so far as Ragnar Rylander, acting in his capacity of associate professor at the University, took advantage of its influence and reputation, not hesitating to put science at the service of money and not heeding the mission entrusted to this public institution, a mission which consists in particular in disseminating a culture founded on scientific knowledge and raising public awareness of the responsibilities that teachers assume towards society.

Given that the press release focused exclusively on Ragnar Rylander’s activity relating to questions of interest to the tobacco industry – which represented only some 10% of his scientific activities – the Criminal Division’s argumentation to the contrary, as expressed in its decision of 13 January 2003, cannot be maintained.

According to the “Uniform Requirements for Manuscripts Submitted to Biomedical Journals”, established by the International Committee of Medical Journal Editors, “[c]onflict of interest for a given manuscript exists when a participant in the peer review and publication process – author, reviewer, and editor – has ties to activities that could inappropriately influence his or her judgment, whether or not judgment is in fact affected. Financial relationships with industry (for example, through employment, consultancies, stock ownership, honoraria, expert testimony), either directly or through immediate family, are usually considered to be the most important conflicts of interest.”

Having re-examined the whole file, the Criminal Division reaches the conclusion that the veracity of the incriminated expression has also been demonstrated, the expression in question constituting simultaneously a fact and a value judgement.

The appeal is therefore upheld, the judgement of the Tribunal de Police of 24 May 2002 annulled, and the appellants are acquitted.

3. Ragnar Rylander, whose complaint is dismissed, shall bear the costs of the procedure.

For the above reasons, the Court:

Annuls judgement JTP/639/2002 (2nd Division) handed down on 24 May 2002 by the *Tribunal de police* in the case P/5421/2001.

Acquits Jean-Charles Rielle and Pascal Diethelm.

Condemns Ragnar Rylander to bear procedural costs, including a CHF 2,500 judgement fee, and to pay CHF 10,000 towards the legal fees of Jean-Charles Rielle and Pascal Diethelm.

Informs the parties that they can appeal from the present decision to the Swiss Federal Supreme Court within thirty days of receipt hereof (art. 272 and 273 PPF [*Loi fédérale sur la procédure pénale* = Federal Rules of Criminal Procedure]).

Standing to appeal and other conditions relating thereto are governed by art. 268 ff PPF.

Renate Pfister-Liechti, Presiding judge; Laurent Kasper-Ansermet and Jacques Delieutraz, Judges; Joëlle Bottallo, Clerk.