Tobacco and the law: the state of the art

Gillian Howard

Consultant, Mishcon De Reya, Solicitors, London, UK

Litigation has become a major weapon in the conflict between those who seek to control tobacco and the tobacco industry. Apart from the cases arising from the high proportion of fires caused by cigarettes (including, in the UK, the disastrous fire at the Bradford football stadium and the fire at Kings Cross railway station, both of which were caused by discarded cigarette butts), in the last few years there have been and are continuing major lawsuits against the tobacco manufacturers both in the USA and in the UK. In Australia, a Court has ruled that the tobacco industry’s claims that passive smoke had not been proven to cause a variety of diseases were false and misleading. A Quebec judge ruled as unconstitutional a Canadian law which had banned tobacco advertising. A product liability suit was filed against cigarette manufacturers by airline flight attendants whose health, they alleged, was impaired by exposure to passive smoke.

To date, attempts to win damages from the manufacturers for injuries caused by smoking have failed, but several group actions are pending in the courts in England and the USA. The cases to date demonstrate the range and importance of tobacco control issues now being considered by the Courts.

Historical perspective

Any controls in the UK over the use of tobacco in the workplace and in public places have largely been voluntary. As far back as 8 March 1824, Lord Palmerston ordered that no person should smoke in the office during office hours\(^1\). It is also well recorded that King James I detested and discouraged smoking at Court.

The only positive ‘right’ to smoke expressly set out in English law is to be found in the Execution of Sentences (Army, Navy and Airforce) Regulations 1956\(^2\) which give a traitor condemned to death the right to the last rites, a visit from his family and a last cigarette!

Recently, several major airlines including British Airways have banned smoking on internal flights and several US airlines have extended the ban on internal flights to transatlantic flights as well. In the UK, recent Regulations have banned smoking on buses and trams\(^3\). But whilst
several attempts have been made to pass legislation banning smoking in workplaces and public places, these have so far failed⁴.

**‘Innocent victims’ of smoking**

Apart from the active smoker, who until 1971 had never been warned by the tobacco companies about the dangers of tobacco products, there are two classes of innocent victims of smoking—the unborn child of a mother who smokes (these babies are likely to have low-birth weight with associated susceptibilities to illness) and the passive smoker. This second category of victim is now known to be at a substantial risk of the same range of tobacco-induced illnesses as an active smoker⁵.

**Government controls**

In the UK, there are limited Governmental controls over tobacco products based in the main on voluntary agreements between Government and the tobacco industry. In 1971, the tobacco industry moved to head off possible legislation and litigation by agreeing with the Department of Health and Social Security (DHSS) to print on cigarette packets: ‘WARNING BY HM GOVERNMENT. SMOKING CAN DAMAGE YOUR HEALTH’. On all cigarette advertisements, there is a statement: ‘every packet carries a Government health warning’.

This has been renegotiated several times since, but its essence remains the same. More recently, the original warning has had ‘cigarettes’ substituted for ‘smoking’ and has been stiffened by the adverb ‘seriously’. Warnings such as ‘most doctors don’t smoke’ have been added. In addition, warnings are also given as to the risk of harm to the fetus during pregnancy. Health warnings on cigarette packets are now governed by Regulations⁶. In a European Court of Justice (ECJ) case in 1993, several tobacco manufacturers sought to have ruled void the UK Regulations relating to warning notices which require larger notices than specified in the European Directive. The challenge was unsuccessful. The ECJ held that Member States are at liberty to decide that the Government health warning ought to be larger than that required by European Directive ‘in view of the level of public awareness of the health issues associated with tobacco consumption’⁷.

However, the European Union’s Resolution seeking that Member States ban smoking in public places has not been adopted by the UK and is unlikely to be so⁸.
Ironically, the statutory controls over who is permitted to buy tobacco products means that the most serious penalty is for those who sell tobacco products to children aged less than 16 years!

**Personal injury claims – the active smoker**

An active smoker with small cell lung cancer would be a prime candidate to bring a claim for negligence against the tobacco manufacturer(s), based in the law of tort. A tort is an actionable wrong at common law. The wrongdoer does something which is foreseeably going to cause harm to someone else, to whom the wrongdoer owes a duty of care and for which it was reasonable in the circumstances to take steps to avoid doing it\(^9\).

**'State of the art'**

The Courts judge the question of negligence on the state of the knowledge at the time when it is alleged the harm was caused (or commenced). In 1950, the work of Sir Richard Doll and Austin Bradford Hill revealed that there was a causal link between smoking and lung cancer and, in 1957, after much further work had been reported, the Medical Research Council advised the government that cigarette smoking was the cause of the increased mortality from lung cancer. In 1962, the Royal College of Physicians reviewed the evidence for a harmful effect of smoking and concluded that the total death rate was greatly increased in smokers and that there was a causal link not only with lung cancer, but also with bronchitis, heart disease and tuberculosis. In 1964, the US Surgeon General published a report which came to the same conclusions. In 1988, Sir Peter Froggatt published the Report of the Independent Scientific Committee into the health effects for passive smokers.

**What are the acts of negligence?**

It is arguable that the tobacco manufacturers committed several acts and omissions which amount to negligence:

- firstly, by not warning their consumers of the risks until 1971, when the state of the art was established back in 1957, so that the consumers could exercise consumer choice.
Tobacco and health

- secondly, by continuing to manufacture and market high-tar cigarettes and failing to minimise their harm irrespective of consumer choice.
- thirdly, by continuing to manufacture and market cigarettes.

If the claim for negligence was limited to failure to warn, then liability expires or shrinks at 1971 when warnings were printed on cigarette boxes. Here claims for negligence may be defeated if the defendant can show that, even if the appropriate precautions had been taken by the defendant, the plaintiff would have ignored or failed to use them—Cummings vs Sir William Arrol\(^\text{10}\). It may be arguable on behalf of a smoker that (s)he had become addicted in the mid 1950s, had made several unsuccessful attempts to give up and, therefore, it would be established that printed warnings would have been of no use.

The failure to reduce the tar level in cigarettes would only be a relevant matter if the plaintiff continued to smoke only high-tar cigarettes.

The third possible claim, that it was negligent to continue to manufacture and market cigarettes, is fraught with difficulties. Whilst there is nothing in principle to stop a Court finding that a product is so dangerous that it is negligent to make or market it, it is unrealistic to expect the judicial process to shut down the whole of the tobacco industry. What the Courts may require are better safeguards and at an earlier stage than were actually taken.

**How do negligence claims succeed?**

For a claim in negligence to succeed, the plaintiff must show a duty of care is owed to them, that duty of care has been breached and the harm that they have suffered has been caused by that breach of the duty of care\(^\text{11}\). The burden of proof is on the balance of probabilities. Is it more likely that an active smoker's lung cancer was caused by the tobacco products or not?

In assessing the knowledge that a defendant ought to possess, the Courts have made it clear that even the remotest risk, once it is or should have been appreciated, puts a duty on anyone responsible for it to take whatever preventive measures were practicable and proportionate to the risk. The Privy Council made this principle clear in The Wagon Mound No 2\(^\text{12}\).

Any smoker who seeks legal redress for harm caused prior to 1957 is unlikely to succeed. However, those who continued to buy cigarettes after 1957, the point in time when there was established knowledge of risk, and in 1971 when manufacturers began to publish health warnings, must have a strong case for establishing that the manufacturers knew of the risks of lung cancer from 1957 and at the very least ought to have warned their consumers of those risks\(^\text{13}\).
In a landmark ruling in the US, the Supreme Court ruled that the health warnings on cigarette packets do not automatically protect the manufacturers from being sued by the victims of smoking. It may well be arguable that the tobacco manufacturers were negligent in continuing to manufacture unnecessarily dangerous high-tar cigarettes after 1957, particularly in light of the fact that in those days the manufacturers did not publish the tar levels. It may be argued that liability in this respect may go back as far as 1955, when experimental evidence was published indicating that the principal carcinogenic components of tobacco smoke were found in the tarry fraction.

For a plaintiff with lung cancer who has smoked 40 cigarettes a day for decades, even the most bullish of medical experts used by defendants to contest lung disease cases is likely to admit defeat in the light of the present statistical knowledge and of the recent ‘all or nothing decision in the House of Lords in Hotson vs East Berkshire Health Authority'.

In this case, it was established that if a plaintiff would have suffered lasting injury in any event, a negligent act which ensures that he does so, is not on balance of probability, responsible for his final condition. As a necessary corollary it must be arguable that where more probably than not the plaintiff would be in good health but for the defendant’s acts or omissions, the defendant is liable if his acts or omissions were negligent.

But, beyond this, there is a now a soundly established body of law which relieves a plaintiff of the need to pin either the entire blame or a proportion of it on the defendant—McGhee vs National Coal Board.

Both the Hotson and McGhee cases establish that the defendants are not entitled to any discount for the extent to which they did not contribute to the risk. This means that the defendant gains nothing by pointing to other contributory or alternative causes of lung disease unless the evidence is strong enough to make the proof of them disproof of the materiality of smoking to the plaintiff's condition. In other words, the plaintiff need go no further than proving that more probably than not the smoking of the defendant’s cigarettes has materially contributed to his ill-health.

Two caveats

The Courts will attribute the damage to health to two distinct periods, the pre-negligent and negligent period. In other words, the tobacco manufacturers may seek to argue that the latent damage was all done prior to 1957, in the early years of the smoker’s life and so the manufacturers should carry no liability.

The tobacco manufacturers may also argue for an apportionment of damages to exclude the damage done in the pre-negligent period. Even if
both these arguments succeed, they will not defeat a claim but only diminish the damages awarded.

**Hoist with their own petard**

The defendants in any litigation are bound to attack the research before 1971 (as they continue to do in 1995), taking their classic stance that the findings of the research before this date were ambivalent, it would have been wrong to alarm the consumer and their mutually exclusive duties to their shareholders and employees.

However, they may be hoist with their own petard. Their success in dissuading the Government from imposing statutory controls on tar levels or statutory requirements of printed warnings means that they have no benchmark of implied statutory licence.

In a case involving Shell and BP, Budden vs BP and Shell\(^\text{18}\), the Court accepted the defendants' argument that they could not be held to be negligent for the damage caused to two children alleged to come from the lead content of petrol fumes because the lead content of their petrol fell within the prescribed limits set out by regulations having the force of law\(^\text{19}\). They were in effect immunised against negligence claims even if the lead content could be proved to do foreseeable harm. The fact that warnings have, since 1966, been required under the Federal Cigarette Labelling and Advertising Act in the US has likewise saved the manufacturers there from claims for failing to warn.

**Exemplary damages**

Damages awarded for the harm caused by tobacco products could be significant. For pain and suffering, the Courts would take into account the agony of contemplating an early death. They will also reflect the loss of earnings and of future earnings for a living plaintiff and his/her dependants.

One of the few classes of case in which exemplary damages are available to punish or make an example of a wrongdoer is the case of defendant who has knowingly committed a tort in the expectation that the profits to be made outweigh the risk of being sued or stopped — Rookes vs Barnard\(^\text{20}\).

**UK group action**

A group presently comprising some 200 English smokers believe that their various illnesses are caused by smoking and are commencing a claim for negligence against several English tobacco companies\(^\text{21}\). Their claim is
that the manufacturers failed to take any or any sufficient steps to reduce the risks, nor did they give adequate warnings of them. The plaintiffs say that, from the 1950s at least, the tobacco industry knew or ought to have known that smoking caused many diseases and that the warnings from 1971 initially misled the public about its risks, merely saying that 'smoking can damage your health'.

Legal aid of £100,000 has now been granted in respect of 200 smokers so that, in the first instance, expert opinion may be sought on the effect of advertising and warnings and other matters connected with failure to reduce the nicotine content of cigarettes. Leading defence counsel have pointed out that there are several hurdles to surmount. The smokers will have to show that he or she did not know of the dangers of smoking; that they tried to give up; that their injury was caused by smoking; and that their claim is not out of time because it was launched more than 3 years after the plaintiff first knew of the injury.

**Litigation in US: class actions**

Recent litigation in the US is based upon the addictive effects of nicotine. Cases are now being brought against manufacturers for their failure to warn of the risks of smoking including the risk of addiction, and/or for the failure to take steps to reduce the risks. In the US, class actions are likely to increase the power of litigants by combining resources and expertise.

In February 1995, the New Orleans Court permitted a class action to be brought in the name of Castano against an American tobacco company on behalf of over 100 million smokers, including those living and the estates of persons who have died from smoking related illness. The case is brought on behalf of the plaintiff and ‘all other nicotine-dependent persons’ seeking punitive damages as well as compensation for economic loss, emotional distress and medical costs arising out of the fact that tobacco companies (including Philip Morris, RJ Reynolds and a subsidiary of BAT) had concealed their knowledge of the addictive capacity of nicotine. It is estimated that damages could run to $50 billion.

**Passive smoking**

**The harm**

The significant harm caused by passive smoking has been further established, following the Foggatt Report, in a US study into environmental tobacco smoke published by the Environmental Protection Agency. The Report states that about 3000 US non smokers die every year from lung cancer caused by exposure to tobacco fumes. In
addition, between 150,000-300,000 cases of bronchitis and pneumonia in children under 18 months of age are reported each year.

Also in the US, the Florida Appeal Court has ruled that a class action may proceed by 30 non-smoking airline cabin crew, representative of 600,000 fellow employees, against various tobacco companies24. The plaintiffs state that they were obliged to inhale environment tobacco smoke on flights where smoking was permitted. They now suffer from diseases attributed to passive smoking, including lung cancer, asthma and other diseases. Damages are sought in the region of $5 billion. The case is of interest as it is the first time that the American courts have recognised possible harm from passive smoking.

Claims against employers

Probably one of the best-known claims for passive smoking against an employer involved Mr Sean Carroll, an Australian bus driver, who sued his employers on account of his lung cancer caused, he claimed, by 35 years’ exposure to the tobacco fumes of his passengers and co-workers. He accepted an out-of-court settlement of $65,000 and died one year after the settlement25.

In another well-publicized case involving a British woman, Veronica Bland, Stockport Metropolitan Borough Council made an out-of-court settlement of £15,000 to her after proceedings had been issued for negligence and breach of statutory duty. She alleged that she had suffered serious health complaints, including chronic bronchitis, which she alleged was caused by her exposure to passive smoke26.

More recently, Chartered West LB Ltd, an investment bank in the City of London made an out of court settlement of £2,500 to one of its employees who had a long history of asthma. The Employment Department had recommended that as registered disabled, she should work in a smoke-free environment. However, other employees smoked around her and she eventually was forced into hospital with severe asthma27.

In an Australian case, Scholem vs New South Wales Health Department28, a Court awarded $85,000 to a plaintiff who had alleged that her employers had negligently caused her to contract lung disease by requiring her to work with colleagues who smoked.

And . . . , an irate non-smoker who was made uncomfortable by cigarette smoke from the room adjacent to that in which his daughter was recovering from an operation was awarded damages of £50 against the private hospital which permitted smoking in patients’ rooms29.
It is not, perhaps, surprising that following the publicity about these cases, many more employers in the UK have introduced bans or radical restrictions on smoking in their workplaces.

**Other legal actions for smokers**

Smokers may consider bringing a legal action under the *Sale of Goods Act 1979* or the *Consumer Protection Act 1987*. Under the Sale of Goods Act, it is an offence not to sell goods of a merchantable quality and defects must specifically be drawn to the buyer's attention before the contract is made. The goods must also be fit for the purpose for which they are bought. It is arguable that under the Limitation Act 1980 s.11, it is possible for a smoker to sue on a contract for the sale of cigarettes made before the health warnings were published by the manufacturers, provided that the injury to health has only recently manifested itself.

It may be that since warnings have been placed on cigarette packets since 1971, it is only pre-1971 contracts of sale which are actionable. It may be that any action has more likelihood of success for negligence.

The Consumer Protection Act 1987 introduced product liability, making the producer of a product liable for any damage caused wholly or partly by a defect in the goods. However, s.10(7) excludes various potentially or actually dangerous products including medicinal products and tobacco — the industry has evidently succeeded in nipping this form of liability in the bud!

**Employer's duties to the workforce**

**The criminal law**

There is no positive legal protection for workers to work in a smoke-free environment, neither is there an overall legal duty on employers to ban or restrict smoking in the workplace. There are some specific prohibitions on smoking at workplaces where, for example, flammable materials, gas, radioactive materials and chemicals are present.

*The Health and Safety at Work Act 1974* requires employers to provide a safe place of work, a safe system of work and a safe working environment so far as is reasonably practicable. Health and Safety Regulations which came into force on 1 January 1993, derived from European Directives, hardly mention smoking as a health issue save for one reference where smoking is described as a ‘discomfort’. Here, employers must provide a separate rest rooms and rest areas for non-smokers in order to ‘protect non-smokers from discomfort caused by
tobacco smoke. It is a curious anomaly that this still leaves the areas dedicated to work not being subjected to any express statutory control on smoking.

Under the Management of Health and Safety at Work Regulations, there is a duty upon employers to carry out risk assessments on 'significant and substantial risks' and adopt control measures to eliminate or reduce the risk. It is highly arguable, that the risk of exacerbating asthma for those who already suffer and the increased risk of lung cancer for non-smokers is a significant risk. Whether the Health and Safety Executive (HSE) would take action against employers who had failed to address the risk of passive smoking under these Regulations is debatable. The view of the HSE appears to be that whilst 'Health and Safety Inspectors can take enforcement action if necessary in these circumstances, ultimately it would be for the courts to decide in a particular case whether the risk to health was significant'.

The Courts view what is reasonably practicable in terms of the quantum of risk, in this case, the risk to non-smokers of contracting lung cancer, exacerbating or causing asthma and other chest complaints, causing or making worse eye complaints, etc., with the time, trouble and expense in averting that risk. It could be argued that it is cost effective and cost-saving for any employer to ban or restrict smoking in his office, factory or workshops since this would reduce the risk of accidental fire, reduce the cleaning costs and would reduce absenteeism amongst both smokers and passive smokers. This argument has yet to be tested.

This Health and Safety at Work Act imposes criminal sanctions—fines and imprisonment—on employers and also upon directors and managers if they consent or connive in any breach of their statutory duty, and also upon workers. Workers must take reasonable care of their own and others' health and safety and co-operate with their employer over matters of health and safety and not to intentionally or recklessly interfere with anything provided in the interests of health and safety (ss.7 and 8).

In addition to fines and terms of imprisonment for breaching the statutory duties, the Health and Safety Inspectors and Environment Health Officers who enforce the Act in respect of factories and offices respectively have the power to issue Improvement and Prohibition Notices on workplaces and on individuals. There have been rare cases where the threat of such Notices has prompted employers to introduce no smoking policies. There have to date been no prosecutions under this Act for permitting smoking in the workplace.

The Health and Safety Executive (HSE) has published a second edition of its booklet Passive Smoking at Work relying mainly on the voluntary action of employers to introduce no smoking policies rather than threaten legal action under the Health and Safety at Work Act.
Smoking and recruitment

Since the law in the UK at present only recognises limited forms of discrimination as unlawful, for example on the grounds of sex (Sex Discrimination Act 1974) or race (Race Relations Act 1975) and discrimination for permanent disability (Disability Discrimination Act 1995), it is not unlawful for employers to seek to recruit only non-smokers or to discriminate against smokers who might wish to smoke at work. This could be one way for employers to introduce a policy of non-smoking.

Introducing no smoking policies

Employers are required to act carefully when proposing new rules which would either ban or restrict smoking in the workplace. They must take care not to breach their workers’ contracts of employment and not to offend the employment protection legislation which protects employees from unfair dismissal if they are dismissed for refusing to comply with any new no smoking rules.

Where an employer chooses to impose a smoking ban in the workplace, employees who are dedicated smokers have sometimes found that they are unable to cope with the new conditions, leave their jobs and claim constructive dismissal, alleging that the employer has unilaterally changed a fundamental term of the contract of employment making it impossible for them to continue working.

In Dryden vs Greater Glasgow Health Board36, (the only appellate decision on this point) the employee, a nurse, who was prevented from smoking at work when a no smoking policy was introduced, was held not to have been constructively dismissed. The Employment Appeal Tribunal held there is no implied term in a contract of employment permitting an employee to smoke at work.

The introduction of a no smoking policy did not constitute a breach of . . . contract. . . . There was no specific implied term . . . that she would be entitled to have access to facilities for smoking during working hours. . . . The rule against smoking was lawful. . . . The fact that it bears hardly on a particular employee does not . . . justify an inference that the employer has acted in such a way as to repudiate the contract . . .

Action by the State

In countries other than UK, the State has taken action to restrict smoking in public places. The criminal law has been invoked in Western Australia
by the Department of Occupational Health, Safety and Welfare under state legislation following complaints by employees of a gambling casino that they were subjected to passive smoke. The maximum penalty under statute is $50,000.

In France, legislation passed in 1992 places severe restrictions upon smoking in public places including trains, planes and restaurants.

In Norway, additional legislation was passed in 1987 tightening up the Norwegian Tobacco Act of 1973 imposing a ban on smoking in all public places.

In the USA, the states of Mississippi, Minnesota, Florida and West Virginia are suing the American tobacco companies, claiming punitive damages, reimbursement of past health care of victims of smoking related disease, compensation for future cost of health care for current and future victims and injunctions forbidding the promotion of cigarettes to minors.

The aim is to recover the enormous and increasing outlay of individual states on treating tobacco-related disease. West Virginia’s health budget for smoking related illness is presently $500 million per year, and Minnesota spends $350 million. Minnesota and the Blue Cross Health Insurance Company are jointly suing to recover welfare and health insurance expenditure arising from smoking-related illnesses, alleging that the tobacco industry illegally hid the health hazards of cigarettes and manipulated nicotine levels to ensure that customers would become addicted. Similar cases are being brought by Mississippi and Florida.

Other claims

In New South Wales, Australia, Dr Sarah Hodson is claiming A$1,000 from WD & HO Wills for treatment for nicotine addiction. However, the tobacco company is disputing the claim and has succeeded in their application for the matter to be heard in a higher court. The hearing will take place in late 1995, if Dr Hodson has the resources to pay for the increased level of costs of continuing her case in the higher court.

Deskiewicz vs Philip Morris is a similar current case in the US, in which the plaintiff is suing for $1,153 to cover the cost of medical treatment for nicotine patches and health club membership fees. He claims that Philip Morris owed him a duty of care to warn him that nicotine is addictive and that he would require treatment to enable him to stop smoking.

Conclusion

The tobacco manufacturers will fight the cases against them with vigour, as success for any plaintiff, whether on the small or large scale of damages, will open the flood-gates of litigation.
With the onus of proving that smoking was not the main cause of a plaintiff's illness, defence experts will become increasingly hard put to justify the use of tobacco products, especially if the US Food and Drug Administration declares that nicotine is a drug whose levels should be reduced to non-addictive levels, probably zero. They will need to be aware of the Finnish doctor who gave evidence to support the defendants in a smoking case and is now being charged with perjury.

Acknowledgements

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References

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3 The Public Service Vehicles (Conduct of Drivers, Inspectors, Conductors and Passengers) Regulations 1990 SI 1990 No. 1020, Regulation 6 (d)
4 Mr George Foulkes, Labour MP for Cumnock and Doon Valley, sponsored a Private Member's Bill seeking to control smoking at work in the Health and Safety at Work (Tobacco Smoking) Bill, on 2 March 1992
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34 *Management of Health and Safety at Work Regulations* 1992, Regulation 3
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37 Aurejarvi E. *The Battle in Finland Against the Tobacco Industry*. Paris: 9th World Conference 1994