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THE PUBLIC HEALTH RISK FROM PASSIVE SMOKING: AN INADEQUATE PATCHWORK OF PROTECTION FROM ENGLISH LAW

In the first of two articles, Stephanie Pywell reviews the piecemeal state of English law on smoking in public places and contends that a unified approach is necessary to eliminate this real risk to public health.

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Passive smoking is the exposure to tobacco smoke of persons other than those choosing to smoke. Two recent meta-analytical studies¹ indicated that even low levels of passive smoking can be seriously damaging to the health of non-smokers, and an Editorial in the same edition of the *British Medical Journal* containing those studies called for either a total ban on smoking in indoor public places or for smoking to be permitted only in areas which were physically separated and separately ventilated². A Government report³ (SCOTH) has now confirmed that passive smoking can lead to lung cancer and ischaemic heart disease, and serious respiratory illness and asthma in infants and children. Smoking is also linked, apparently causatively, with sudden infant death syndrome and middle ear disease in children. The Government's Chief Medical Officer has publicly stated that a forthcoming Government White Paper will take due note of the new medical evidence, but early indications are that the British Government will legislate to outlaw smoking in public places only if all else fails⁴. This is despite SCOTH's recommendation that:

Smoking in public places should be restricted on the grounds of public health. The level of restriction should vary according to the different categories of public place but smoking should not be allowed in public service buildings or on public transport, other than in designated and isolated areas. Wherever possible, smoking should not be permitted in the work place.⁵

This article reviews the piecemeal regulatory provisions currently applicable in three broad categories of public place, suggesting that clear and enforceable laws are necessary to protect public health.

¹ Law M R, Morris J K, Wald N J: *Environmental Tobacco Smoke exposure and ischaemic heart disease: an evaluation of the evidence*, 315 *BMJ* 18 October 1997, p 973 and Hackshaw A K, Law M R, Wald N J: *The accumulated evidence on lung cancer and environmental tobacco smoke*, 315 *BMJ* 18 October 1997, p 980

² Davis Ronald M: *Passive smoking: history repeats itself*, 315 *BMJ* 18 October 1997, p 961

³ Department of Health; Department of Health and Social Services, Northern Ireland; The Scottish Office Department of Health; The Welsh Office: *Report of the Scientific Committee on Tobacco and Health (SCOTH), Chairman Professor David Poswillo, London, The Stationery Office 1998*

⁴ See, for example, 'New push for smoking ban', *The Guardian*, 12 March 1998

⁵ *Op cit*, p 29, paragraph 2.37

The Workplace

The workplace is the only category of public place covered by binding EC law on smoking restrictions. It is also the setting for most of the (few!) legal precedents involving smoking.

The only UK legislation governing smoking in workplaces (other than where particular safety or hygiene requirements apply) is **Regulation 35(3)** of the **Workplace (Health, Safety and Welfare) Regulations 1992**. This implements almost verbatim **Article 16.3 of EC Directive 89/654**⁶ which requires employers to introduce into workers' rest rooms "appropriate measures ... for the protection of non-smokers against discomfort caused by tobacco smoke". If no rest rooms are provided, but work is frequently interrupted, workers must have access to rooms where similar conditions apply.

The **Health and Safety Executive** supports the previous and present Governments' view that a voluntary code is more effective than a legislative ban in controlling workplace risks from smoking. This expressed faith in the effectiveness of voluntary controls appears to run counter to the general trend towards increasing statutory regulation; one is left to ponder the true motives for this uncharacteristic legislative reticence, which contrasts so starkly with official responses to such perils as beef on the bone and dangerous dogs.

A recent telephone survey of 100 of the largest organisations in the country⁷ showed that, despite the lack of legislation, over 90% of respondents enforced smoking bans in the workplace. Two-thirds of those provided areas where smoking was permitted, but 10 of those 60 companies were reconsidering their position.

Goldman (1995)⁸ suggested that aircraft cabin crew whose health suffers as a result of environmental tobacco smoke (ETS) exposure could sue their employers at common law⁹ for failing to provide and maintain a safe place of work and safe system of working. This suggestion is supported by the Employment Appeal Tribunal decision¹⁰ that the solicitors' firm which forced a non-smoking secretary to work in a smoky atmosphere had breached the implied terms of her contract of employment. It was held that an employee's welfare was adversely affected by being forced to sit in a smoke-filled atmosphere, even if no health risk could be proven. The legal position of such employees must be immeasurably strengthened by the fact that a health risk from passive smoking is now established, and employers must be aware that they could be failing to comply with their duty to protect the health and safety of their staff if they do not provide smoke-free working areas.

⁶ *Important corrigendum in Official Journal L393, 31/12/89 p 0001*

⁷ *"Guardian" Analysis, 23 October 1997*

⁸ *Goldman L: "Smoke in recirculated air", Occupational Health 1995; 244 - 246*

⁹ *Health and Safety at Work Act 1974 c 37*

¹⁰ *Waltons & Morse v Dorrington, [1997] IRLR 488*

A Guidance Note for employers¹¹ suggests, using the analogy of Thompson and others v Smiths Shiprepairers Ltd¹², that a personal injury (PI) claim arising from ETS could be backdated to the time since which employers have been deemed to be aware of the dangers of ETS. Although employers are not required to “plough a lone furrow”, they have a duty to act on widely disseminated information. The publicity given to the October *British Medical Journal* studies cited above would seem certain to meet this requirement. Persistence may, however, yield an earlier date: lawyers acting for smokers who contracted lung cancer have recently discovered an internal memorandum from Gallagher’s research manager which shows that the company was aware of the link between (primary) smoking and lung cancer in April 1970¹³.

There are no decided court cases where an employee has been awarded damages for PI arising from exposure to ETS, but the Social Security Commissioner held in 1991 that Joan Clay, an asthmatic, had been the victim of an industrial accident by reason of the breathlessness and chest pains she suffered due to her extreme sensitivity to her colleagues' cigarette smoke¹⁴. Three out-of-court settlements to non-smokers who sued their employers¹⁵ suggest that the employers feared that they would lose if the cases proceeded to court, despite the protestation¹⁶ of Stockport's Chief Executive that the Council did not accept liability and would have defended the Bland case had it realised its insurance excess was £25,000 per claim.

It therefore seems that there may be legal redress for passive smokers who suffer PI at work, although they would face a heavy *onus probandi* in terms of causation and establishing their employer's effective date of knowledge.

Since employers have a duty to protect employees’ health, which seems now to involve providing smoke-free environments, it is appropriate to review Industrial Tribunal decisions related to workplace smoking bans. These can conveniently be divided into two categories: those arising from the introduction of smoking bans and those involving allegedly unfair dismissals for breaches of pre-existing bans.

¹¹ *Industrial Relations Law Bulletin* 543, April 1996

¹² [1984] IRLR 93

¹³ “*The Guardian*”, 16 March 1998

¹⁴ *Commissioner's File CF/364/1989*

¹⁵ *Veronica Bland v Stockport Council*: £15,000 1993;
Beryl Roe v Stockport Council: £25,000 1995;
Elizabeth Ashby v Chartered West LB limited: £2,500 1995.

¹⁶ Quoted in *Nicholson Marjorie*: “A Guide to Dealing with Workplace Smoking Restrictions”, *FOREST Information Sheet Number 2*, undated

Applicants have succeeded in constructive dismissal cases arising from the introduction of smoking bans where the introduction without warning of a smoking ban was held unreasonable¹⁷ and where the applicant had immediately voiced opposition to the proposed smoking ban¹⁸. A similar claim failed where the applicant had not objected during the four-month notice period preceding the ban¹⁹. Similar reasoning was applied by the EAT in Dryden v Greater Glasgow Health Board²⁰ where the legitimate purpose²¹ of the respondent's decision to ban smoking in hospitals after wide consultation and notice prevented the ban from amounting to repudiatory conduct by the employer. Since these cases were determined primarily on the basis of consultation about, and warning of, the impending smoking policy, they do not appear to constitute a valid reason for employers not to introduce smoking policies.

Cases involving dismissals for breaching smoking bans focus on the reasonableness of the ban and of the employer's conduct in terms of consistency and disciplinary procedures. It was thus found to be reasonable summarily to dismiss employees for smoking at a bakery²², in the "back room" of a shop with the door to the shop itself open²³ and in the female toilets at a bakery²⁴. It was, however, unfair summarily to dismiss a builder's labourer, despite the high fire risk in the paint shop where he was smoking²⁵. These cases suggest that workplace smoking bans are enforceable via dismissal provided the employer's conduct comes within the range of reasonable responses of a reasonable employer.

All the cases cited above occurred before the latest medical evidence about passive smoking became available. It seems likely that the legal position of an employer wishing to introduce a smoking ban now or in the future would effectively be unassailable, and it may be that the precedent set by Dryden would now be extended to employers outside the health sector.

¹⁷ *Watson v Cooke, Webb & Holton Ltd*, 5 September 1984, Case No 13852/84

¹⁸ *Wright v Ladbroke Racing Ltd*, 26 March 1993, Case No 54266/91

¹⁹ *Rogers v Wicks and Wilson Ltd*, 14 December 1987, Case No 22898/87

²⁰ [1992] IRLR 469

²¹ Cited earlier in the judgment as: "to protect the non-smoking public, to create areas of a smoke-free environment, to demonstrate the advantages of non-smoking and heighten public awareness of the issue, and to carry out the respondent's specific responsibility to promote good health."

²² *W G Unkles v Milanda Bread Co Ltd*, [1973] IRLR 77, where the Food Hygiene (Scotland) Regulations 1959 were breached by the appellant

²³ *May T/A Sainsbury Brothers v Pearson*, EAT; unreported 22.1.93; Case No EAT/612/92

²⁴ *Hughes and Another v Lyons Bakeries (UK) Ltd*, EAT; unreported 18.1.96; Case No EAT/1162/94

²⁵ *J Bendall v Paine & Betteridge*, [1973] IRLR 44

Public Transport

The **World Health Organisation** called in 1991²⁶ for effective protection from passive smoking on public transport, and a 1993 survey²⁷ (NOP1) showed that 88% of respondents supported smoking bans or restrictions in "travel" establishments²⁸.

Public transport is the only area apart from workplaces where UK legislation against smoking exists for reasons not directly linked with fire risks or hygiene. A 1996 survey²⁹ revealed that 83% of "travel" establishments had permanent smoking policies in 1995, compared with 47% in 1992.

London Underground was unusual in introducing a total smoking ban as early as 1984; subsequent experience suggests that the ban is seldom flouted.

The **Public Service Vehicle (Conduct) Regulations 1990**³⁰ provide that "[n]o passenger on a vehicle shall ... smoke or carry lighted tobacco or light a match or a cigarette lighter in or on any part of the vehicle where passengers are by a notice informed that smoking is prohibited...". This statutory authority was invoked in **West Midland Travel's** "blitz" on smokers on buses during May 1996. The cases were dealt with by Youth or Magistrates Courts, usually in the defendants' absence; most led to fines of £10 - £75, similar sums being imposed for costs.

Regulation 58 of the **Air Navigation (No 2) Order 1995**³¹ provides that "[a] person shall not smoke in any compartment of an aircraft registered in the United Kingdom at a time when smoking is prohibited in that compartment by a notice to that effect...". The author was informed by **British Airways' Legal Department** that two anonymous cases brought under this Statutory Instrument were settled out of court.

Most UK charter airlines impose smoking bans on domestic flights³², and some plan to apply similar restrictions on all routes. Airlines have opted for this provision without statutory obligation because of customer demand.

²⁶ Cited in Roemer R: *Legislative Action to Combat the World Tobacco Epidemic*, World Health Organisation, Geneva 1993

²⁷ *NOP Social and Political for the Department of the Environment: Smoking in Public Places Survey Report*, London HMSO 1993

²⁸ "Bus and coach waiting rooms and buffets, Railway station waiting rooms and buffets, Ticket offices/foyers, Motorway service stations, Airport/seaport communal areas"

²⁹ *NOP Social and Political for the Department of the Environment: Smoking in Public Places Second Survey Report*, London HMSO 1996

³⁰ *SI 1990/1020, Regulation 6, made pursuant to the Public Passenger Vehicle Act 1981*

³¹ *SI 1995/1970*

³² *Britannia Airways has a ban on all flights of less than 6½ hours' duration; British Airways bans smoking on all "short" flights*

Philip Kanal was awarded £300 out-of-court by BA in 1994 for severe discomfort suffered by his family during a Heathrow - Toronto flight because their non-smoking seats were close to smoking seats. A stranger close to Mr Kanal vomited because of the smoke, and his pregnant wife and baby daughter developed coughs. The claim alleged a breach of an implied term relating to the family's being conveyed in reasonable comfort; BA's defence was based on Article 6 of the Warsaw Convention under which the passenger agrees to accept any seat of the appropriate class on the flight. **Gold (1994)**³³ suggests that the pursuit of such litigation would require courage, but could succeed.

The most high-profile case involving public transport is that of Boddington v British Transport Police³⁴. Peter Boddington is a cut-price cigarette trader and a commuter who makes a point of flouting the Byelaw³⁵ banning smoking on trains where notices to that effect are displayed. His July 1995 conviction by a stipendiary magistrate resulted in a £10 fine with £100 costs and led ultimately to an appeal to the House of Lords. The House held that a defendant to a criminal charge could contend in defence that the measure under which he was charged was *ultra vires*. On the facts, however, Network South Central's Byelaw was valid because banning smoking was a form of regulating the use of the railway. Mr Boddington, already £25,000 poorer for his legal foray, now proposes to take the matter to the European Court of Human Rights³⁶. An interesting corollary is that a subsequent customer survey by Network South Central revealed 86% support for its no-smoking policy³⁷.

These cases suggest that there is a legal framework for effective and enforceable legislation against smoking on public transport, although life would be simpler for all parties if it were clarified by a single statute.

Other Public Places

The dearth of material for this section is the clearest possible indication of the *laissez-faire* attitude which continues to prevail in the UK.

95% of the respondents to **NOP1** supported a smoking ban or smoking restrictions in restaurants and cafés, yet the matter is still, as **Roemer (1993)**³⁸ notes, determined by the owners of individual establishments. Both **Roemer** and **FOREST**³⁹ point out that such

³³ *Gold S: "No smoke without litigation" [1994] NLJ 786*

³⁴ *"The Times" Law Report, 3 April 1998*

³⁵ *Byelaw 20 of the British Railways Board's Byelaws 1965, made pursuant to s67 of the Transport Act 1962*

³⁶ *'Railway champion fumes in defiance after loss', "The Times", 3 April 1998*

³⁷ *Reported in "The Times", 6 July 1996 and 23 July 1996*

³⁸ *Op cit*

³⁹ *Unattributed: "Airing a Problem" in Free Choice, Freedom Organisation for the Right to Enjoy Smoking Tobacco (FOREST), Autumn 1995*

establishments present a particular problem, because of the strong views of smokers and non-smokers concerning their right to relax and enjoy themselves in such venues. **FOREST** applauds the British Hoteliers' Association's "Courtesy of Choice" programme, which advises proprietors on the best way of making adequate provision for smokers and non-smokers in individual establishments. The present situation involves each proprietor in commercial decisions about his clientele; uniformly applicable legislation would obviate the need for such considerations.

An isolated case involving an award of damages for the stress caused by passive smoking is that of Hurlstone v Nuffield Hospital, Brentwood⁴⁰, where the plaintiff was awarded £50. This case, although not officially reported, is important because it was the first judgment signifying judicial recognition of the potentially deleterious effects of ETS on plaintiffs to whom no identifiable injury is caused.

A convicted murderer, Alex Deas, is threatening to sue the Prison Service because the authorities at Winson Green prison have refused his request to prevent his having to share a cell with a smoker. His solicitor alleges that this refusal is "failing to protect his health and is endangering his life"⁴¹. If the case comes to court, it will be interesting to see whether the courts are willing to extend protection to those serving mandatory life sentences.

Conclusions

As the foregoing demonstrates, there exist quite a number of situations in which there is effective legislative protection from the effects of passive smoking. It does not, however, seem that such piecemeal provision is appropriate to counter a significant risk to public health, and it is likely that very few people are aware of the protection afforded by some of the rather obscure regulatory instruments involved. Although clear and coherent legislation would run into opposition from those opposed to a "nanny state", it is submitted that the State has an overriding duty to make easier the task of those who seek to protect the health of workers, visitors and the general public. It should shirk this duty no longer.

⁴⁰ *Romford County Court* - reported in "The Times", 11 April 1994

⁴¹ "The Guardian", 18 October 1997