



COMMON LAW AND PUBLIC HEALTH: TOBACCO CONTROL RULES

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Tobacco Control: Accelerating the MPOWER Package Implementation during
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The Pan American Health Organization (PAHO) is the specialized international health agency for the Americas. It works with countries throughout the region to improve and protect people's health.

Introduction

The concern of Caribbean common law jurisdictions to protect public health goes back to colonial times. The Public Health Act of the United Kingdom was enacted in 1875¹ to safeguard the health of persons against pollution caused by the Industrial Revolution, mainly by prohibiting “statutory nuisances”. Although the Caribbean did not experience the same level of industrialization, the Act of 1875 was imported into the region, mainly to deal with the social problems of burgeoning urbanization; the earliest evidence of that import probably being the Public Health Act of Trinidad and Tobago, 1917.²

In modern times, legal protection of public health emanates from three main sources: the Constitution, legislation, and the common-law or ‘judge-made’ law. Staying with the theme of this seminar, this paper illustrates some of the strategies adopted by each of these sources to prevent invasion of the private space of the individual in ways that generate poor health outcomes. Protection from second-hand smoking is the quintessential instance that warrants employment of these strategies and will be discussed as illustrative of the broader issue of public health protection.

Constitution

The constitution adopts two strategies for protecting the private health space of the individual. First, there are specific constitutional provisions that protect public health with differing degrees of generality. There are very few express assertions in Caribbean constitutions of the right health *per se*. Article 19 of the Haitian Constitution provides that “The State has the absolute obligation to guarantee the right to life, health, and respect of the human person for all citizens without distinction, in conformity with the Universal Declaration of the Rights of Man.” Somewhat less directly, Article 20 of the Suriname Constitution provides that “Everyone has the right to freedom of peaceful association and assembly, taking into consideration the rules to be determined by law for the protection of public ...health.”

Article 149J (1) of the Guyanese Constitution states that “Everyone has the right to an environment that is not harmful to his health or wellbeing”. This wording immediately raises the question of whether the presence of toxic tobacco smoke in the environment breaches this guarantee; and if so, the person against whom the non-smoker may bring suit. It should be noted that the matter gets somewhat complicated as the Guyanese Constitution goes on to say

¹ 38 & 39 c 55 (11 August 1875).

² Chapter 14 No.4 (1 January 1917).

that “It shall not be an infringement of a person’s rights under Article 149J (1) if, the environment is harmful to the person’s health or well-being only because of “an allergic condition or other peculiarity”.

There are other broad provisions in other constitutions which, possibly, could also be used to institute litigation proceedings. Jamaica’s Constitution speaks of the right to enjoy a healthy and productive environment free from the threat of injury.³ Although the right does not speak in terms of protection of public health, it may be wondered whether the provision is broad enough to include such protection. There are other provisions that allow government to pass laws in the interest of public health that would otherwise contravene the constitutional rights of citizens.⁴ In Barbados, the government is authorized by the Constitution to take possession of property where the property is injurious to the health of human beings.⁵

The second strategy stems from the fact that the Constitution is the supreme law of the land. Any law found by the courts to be inconsistent with the Constitution is void to the extent of the inconsistency.⁶ This means that any law enacted by parliament which infringes the constitutional protection of public health can be struck down. Arguably, the same applies in relation to measures authorized by the Constitution. Judicial interpretations of laws must be consistent with the Constitution.

In the Indian case of *State of Punjab & Ors vs Mohinder Singh Chawla*,⁷ the Court found that the right to health is integral to the right to life and that Government had a constitutional obligation to provide health facilities for the respondent who had a heart ailment which required replacement of two valves in the heart which treatment was not available in the State Hospitals of Punjab. *Sooden v Attorney General of Trinidad and Tobago*⁸ concerned the dumping of lead in the environment with the knowledge of the government; the lead caused severe health injuries to the applicant and the Government conceded that there had been an infringement of constitutional rights including the right to life and security of the person.

Legislation

³ s 13 (3) (l).

⁴ See e.g., Barbados, ss 17 (2) (a); 19 (6) (a); 21 (2) (a) 22 (3) (b); Jamaica, s 14(h) (i); Guyana, art 143 (2) (a); Belize, s 9 (1) (2) (a).

⁵ s 16 (2) (v).

⁶See e.g., Barbados, s 1; Belize, s 2; Constitution of Dominica, Note on the Constitution and Constitutional Instruments.

⁷ (1997) 2 SCC 83 .

⁸ 1996, consent order dated 3 December 1997.

Most of the substantive rules on public health are to be found in legislation. The old Public Health Acts adopted the concept of the “statutory nuisance” which prohibited activities by persons which were “a nuisance or prejudicial to health”. There were and remain many conceptual problems with the concept (for example, it remains unclear whether the phrase ‘nuisance or injurious to health’ ought to be read “conjunctively” or “disjunctively”⁹) but the notion possesses two major strategic advances over the common law. First, statutory nuisance overcomes the fundamental restriction of standing in the common law by placing an obligation upon public bodies to themselves take specific steps to terminate the offending activity or supervise its termination. The obligation is framed in mandatory terms, and the public law tools available for enforcement include fines and imprisonment.

Second, specific activities are proscribed as being statutory nuisances. The culture of the time did not allow for the outlawry of public smoking but many of the activities proscribed include an atmospheric polluting aspect. For example, (i) smoke emitted from premises that is prejudicial to health or a nuisance; (ii) fumes or gases emitted from premises that are prejudicial to health or a nuisance; and (iii) any dust, steam, smell, or other effluvia arising on industrial trade or business premises and being prejudicial to health or a nuisance. It must be conceded that it is questionable whether one-off events such as primary cigarette smoking could reasonably qualify as a nuisance; to be actionable as a nuisance in law, the activity must be a serious and persistent one. In the case of a statutory nuisance, however, actionability would depend on whether the notion of “a nuisance or injurious to health” was conjunctive or disjunctive; if the latter, there would be no need for persistence of the activity.

In recent times, the issue of passive smoking has been confronted in the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) and in legislation implementing that Convention, though the statutes vary in this regard. The Convention imposes obligations on State parties to take action to reduce demand (Articles 6-14) and to reduce supply (Articles 15-17) for tobacco products. Nestled in this regime is Article 8 which provides that:

“Article 8

Protection from exposure to tobacco smoke

⁹ These and other conceptual problems of the ‘statutory nuisance’ are explored in Winston Anderson, *Principles of Caribbean Environmental Law*, (Environmental Law Institute, Washington, 2012).

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease, and disability.
2. Each Party shall adopt and implement ... effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.”

It is instructive to notice how the legislation varies among Caribbean State Parties as regards passive/second-hand smoking. The Tobacco Control Act of Guyana, 2017 incorporates the WHO FCTC.¹⁰ The Act places a duty on all government agencies to take steps to ensure the implementation of the Convention.¹¹ Part IV speaks to protection of the public from second-hand smoke. It provides a non-exhaustive list of public places in which smoking is prohibited. For example, smoking is prohibited in vehicles used for public transportation whether a member of the public is being transported or not. Smoking is also prohibited in any vehicle in which a minor is being transported. The onus is on individuals responsible for vehicles, places of work, and public places to take steps to ensure that smoking does not occur in these spaces.¹²

In relation to the Jamaican framework, a Bill entitled the Tobacco Control Act was tabled in December 2020. The provisions are far reaching but have not yet come into force. The Bill in its long title expressly refers to and incorporates the WHO FCTC. The Government is mandated by the Act to undertake a “comprehensive education and information campaign”.¹³ Smoking is prohibited in enclosed work and public spaces, but the provisions do not expressly speak to second-hand smoking. However, the owner or operator of a bar, club or tourism establishment may establish outdoor smoking areas which are open-sided, at least ten metres away from areas in which smoking is prohibited and where access by persons is not necessary.¹⁴ The Sixth

¹⁰ s 2.

¹¹ *ibid* s12.

¹² *ibid* 16; The First Schedule contains the following list of public places in which smoking is banned:

(1) Health care institutions and facilities; (2) Educational institutions of all levels; (3) Childcare facilities; (4) Retail

establishments including stalls, stores, shops, and shopping malls; (5) Hotels and other places of lodging; (6) Restaurants, bars, pubs, cafes, and other eating or drinking establishments; (7) Gaming machine venues and casinos; (8) Entertainment facilities including clubs, cinemas, concert halls, theatres, game arcades, pool and bingo halls; (9) Publicly owned facilities rented out for events; (10) Any other indoor premises accessible to the public and any indoor workplace.

¹³ ss 5 &6.

¹⁴ *ibid* s 12.

Schedule imposes a \$100,000.00 fine on owners or operators of enclosed work or public spaces which do not contain a no smoking sign at the entrance.

As the Act has not yet come into force, the Public Health (Tobacco) Regulations 2013, (amended in 2014) provide the current framework. The definition of smoke includes smoking by electronic means.¹⁵ At the request of the Minister, manufacturers and importers of tobacco products must disclose information as to design features, results of tests conducted by the tobacco industry, a copy of the laboratory report where a test was performed as well as proof of the accreditation where the test was performed.¹⁶

Smoking is prohibited in enclosed public or workspaces, but the Regulations make no reference to second-hand smoking. The Regulations prevent the holding of a lit or electronic tobacco product in or within a five-metre radius of the entrance, exit, window or ventilation intake of a public place, workplace or in public transportation. The owner or lessee of premises must place a prominent 'no smoking' sign at the entrance of their premises. However, designated smoking areas are allowed if they are open-sided and located in areas where access by persons is not necessary.¹⁷

The Regulations impose a fixed penalty of \$10,000.00 or imprisonment for a maximum of three months or both on summary conviction in the Parish Court. Upon a second conviction, the penalty is a fine not exceeding \$25,000.00 or to imprisonment for a term not exceeding six months or to both such fine and imprisonment. Where a body corporate, tourist establishment, club, bar, or restaurant breaches the Regulations, each entity is liable on summary conviction in a Parish Court, to a fine not exceeding \$1,000,000.00.¹⁸

Common Law

The common law is based on judicial decisions and is embodied in reports of decided cases. The courts are entitled, subject to the Constitution and to legislation, to develop public health rules for the conduct of persons in the society, though generally judges are reluctant to be too adventurous. There are few, if any, cases in the Caribbean where judges have pronounced on

¹⁵ reg. 2

¹⁶ *ibid* reg 10.

¹⁷ *ibid* reg 12; The Second Schedule provides a non-exhaustive list of public places in which smoking is prohibited: (1) public places; (2) workplaces or places of employment; (3) public conveyances; (4) all Government-owned or occupied buildings; (5) health facilities including pharmacies; (6) sports, athletic and recreational facilities for the use of the public; (7) educational institutions; (8) bus stops; (9) areas specifically for use by children.

¹⁸ *ibid*.

liability for second-hand smoking, but based on experience in other common law countries, it may be possible that the following legal concepts could be used by Caribbean courts to advance the public health agenda.

(a) The common law of negligence

The core concept here is the duty of care. If the duty of care owed to the plaintiff by the defendant is breached, the plaintiff may maintain an action against the defendant. The categories of relationship that give rise to a common law duty of care are many but importantly, include that of employer/employee and of occupier/entrant. It is therefore the case that “Employees and members of the public who are injured by exposure to second-hand smoke may ... be entitled to sue the relevant employer or occupier, respectively, for common law damages in negligence.”¹⁹

Australian courts have assigned liability to employers and occupiers of premises for passive smoking in several cases. For example, in *Sharp v Stephen Guinery t/as Port Kembla Hotel and Port Kembla RSL Club*,²⁰ a bartender who was diagnosed with cancer of the mouth, throat and neck claimed that her cancer had been caused by exposure to second-hand smoke during her employment at the defendants’ hotels. She succeeded in her claim for negligence against the hotelier and was awarded \$466,048.00 in damages. The court found that (i) it was reasonably foreseeable that the plaintiff would suffer physical injury; (ii) there had been a reasonably practicable means of eliminating the risk; (iii) in failing to ban smoking totally or partially or to constantly operate exhaust fans, the employer had by its conduct caused or materially contributed to the plaintiff's injury; and (iv) the employer had not acted reasonably.

In this context it should also be noted that there may also be legislation in place to protect workers against workplace injuries and diseases. These statutes impose certain duties on employers to ensure the workplace environment is safe and without risks to health. These risks include second-hand smoking.

(b) Occupiers' liability

Occupier’s liability is based on both common law and statutory sources. An occupier owes a duty of care to all entrants, in respect of the condition of premises and the activities carried out

¹⁹ ‘Litigation Relating to Injury from Exposure to Second-Hand Smoke’ Tobacco in Australia: Facts and Issues, A Comprehensive Online Resource < www.tobaccoinaustralia.org.au/chapter-16-litigation/16-3-litigation-relating-to-injury-from-exposure-t> accessed 9 September 2021.

²⁰ [2001] NSWSC 336.

on the premises. This is a duty to take reasonable care to protect entrants from risks of injury that can be foreseen and avoided. In *Bowles v Canton Pty Ltd*,²¹ a restaurant patron who suffered an asthma attack triggered by her exposure to second-hand smoke in the restaurant, successfully sued the restaurant on several bases, including occupiers' liability.

(c) Breach of Contract

In the case of *Bowles v Canton Pty Ltd*, the plaintiff also claimed that the restaurant had acted in breach of contract. The plaintiff had made an advance booking for a dining table in the non-smoking section of the restaurant. The court found that it had been an express condition of the contract between the plaintiff and the restaurant that the plaintiff be seated in a non-smoking area. It was also found to be an implied term of the contract that the premises would be safe for occupation by the plaintiff and not injurious to her health. It was held that the restaurant should have taken all reasonable and proper steps to ensure that any exposure to smoke in the non-smoking area was kept to a safe and not discomforting level, and this had not been done.

(d) Legitimate expectation

Caribbean courts, including the Caribbean Court of Justice (CCJ), have consistently protected legitimate expectations created by the State. The CCJ upheld legitimate expectations in *Boyce and Joseph v Attorney General*,²² in the context of human rights, and the Court has accepted the possibility that legitimate expectations could be created by promises by government in other fields.²³ Given the provisions in the Constitutions on protection of public health and given the declarations by the Caribbean Heads of Government to create smoke-free public spaces by 2022,²⁴ the question arises as to whether the failure to achieve this objective could be challenged on the grounds of a breach of legitimate expectation. The resolution of this question must obviously await the opportunity presented by future litigation.

Conclusion

²¹ *Bowles v Canton Pty Ltd* (Magistrates Court of Victoria, 13 September 2003).

²² [2006] CCJ 1 AJ.

²³ *Air Services Ltd et al v Attorney General of Guyana* [2021] CCJ 3 (AJ) GY; *Commissioner of the Guyana Geology and Mines Commission v Pharsalus Inc* [2013] CCJ 10 (AJ) GY; *Gilharry v Transport Board* [2017] CCJ 11 (AJ) BZ; *Rock Hard Cement v The State of Barbados* [2020] CCJ 2 (OJ) BB.

²⁴ The Thirty-Seventh Regular Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM), 4-6 July 2016, Georgetown Guyana; The Thirty-Ninth Regular Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM), 4-6 July 2018, Montego Bay, Jamaica.

The common law system has various strategies for advancing public health. These include opportunities presented by the Constitution, legislation, and the common law for encouraging acceptable health outcomes. Ultimately, most of these strategies place the onus on individuals and non-governmental organizations to activate the system to test the legal boundaries of what is possible. Even when the obligation is that of the Government, it may still fall to the individual to initiate court proceedings to ensure that those obligations are being complied with through legal vehicles both ancient and modern.