



## *Overcoming the cancer of cigarette promotion*

The defeat of the Bill to impose a cigarette-advertising ban in Western Australia, due to a huge lobbying effort by the nicotine pedlars, is more evidence of the failure by governments to forgo short-term tax and jobs advantages in favour of much greater long-term savings on national health.

It seems that impressionable children will continue to be psychologically lured into believing that cigarettes have more to do with competitive sport than with defeated patients in hospital beds.

When governments fail, individuals should act — within the law. Some people have already begun. Late last year a man was acquitted of fraud after he cancelled cheques for airline tickets because the journey had been marred by other passengers smoking. The airlines, of course, might still take a civil action to recover the fares, but the passenger could claim breach of contract, saying a journey should not include being subjected to lethal smoke.

The tactic could be widened. People could walk out of restaurants (after eating half the meal) as soon as another diner lit up. They could claim breach of contract because their meal had been ruined by unpleasant smoke.

Ultimately businesses would realise it would be in their interest to enforce no-smoking rules. The attacks on billboard cigarette advertising have been less successful. People with a heart of gold and the best intentions in the world have been convicted of malicious damage to property. It is a further illustration of the "property-before people" allegation that is levelled at the law. Members of BUGAUP (Billboard Utilising Graffitists Against Unhealthy Promotions) who face charges after using spray paint to expose the cancer of cigarette advertisements need to change their legal tactics.

Instead of concentrating on their motives they should concentrate on the nature of the billboard advertisement. Is it really property? Objects such as heroin, unlicensed pistols and posters inciting people to murder their aunts with small doses of methylated spirits in their coffee are not capable in law of being regarded as property for the purposes of stealing or malicious damage. You are entitled to destroy heroin, the poster, or take an unlicensed gun (for the purposes of surrendering it to police) without facing criminal charges.

Is the cigarette billboard much different? The member of BUGAUP could argue that there is no property in the advertisement because it is really part of a criminal conspiracy to effect an unlawful purpose (enticing people to injure or kill themselves). At common law it is criminal conduct to conspire to effect an unlawful purpose, even if the unlawful purpose itself is merely a civil wrong and not a criminal one.

BUGAUP could go further and charge all the tobacco companies and their managers with conspiracy. The recent trend has been to restrict conspiracy to breaches of the criminal law, though there are cases of "conspiracy to create public mischief. It was held in *R. v. Young* in 1944, for example, that it was a public mischief to build an air-raid shelter with a "dud" and "shoddy" roof so that large public expenditure (£17,674) was required to rectify it. That is equivalent to saying that it is a public mischief to sell dangerous substances that cause a breakdown in public health requiring large public expenditure to rectify it.

Lord Caldecote said in that case, "Offences which tend to the prejudice or cause expense to the public justify charges under the common law of misdemeanour of causing a

public mischief. It is obvious that this is a class of offence which can be extended very widely, and indeed almost indefinitely."

An enormous amount of medical evidence could be brought to show beyond a reasonable doubt that smoking causes health damage.

It would not be an offence to smoke, but it could be an offence to conspire to encourage people to smoke. People are allowed to kill and injure themselves, but they are not allowed to encourage others to through the use of insidiously subtle psychology. As Colin Howard says in his book on criminal law: "Under some circumstances an agreement between two or more people to do certain things is a social menace which should be an offence against the criminal law regardless of whether the actions they have in mind are criminal offences."

The idea is far-fetched, but mere by bringing the action would cause a public airing of the tobacco smoke screen, and if successful, tobacco would be restricted to grow-your own's being smoked by consenting adults in private.

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