Editorial

This Noxious Weed

Even lawyers, who should know better, accept the popular fallacy that the law offers a panacea for all social ills. But they would, wouldn't they? Thus, we all mutter furiously "There ought to be a law against it", "it" being whatever social ill or injustice we have encountered. We have not learned from bitter experience that the law can neither prevent all social ills, nor ensure that all victims receive proper compensation.

Among the social evils that have so far escaped the law is the use of tobacco. That "noxious weed", to borrow King James's happy term, causes as much harm as any defective product, but no court has as yet been persuaded that tobacco is a defective product. Many attempts have been made to bring tobacco within the scope of product liability law in the USA, but those efforts have failed. There is now news that an attempt is being made in the English courts to obtain compensation from a tobacco company, and perhaps success is just round the corner.

A Michigan court has in fact recognised the harm in cigarette smoking but not as the result of a direct attack on the manufacturer. In previous cases the argument has been that manufacturers have not given adequate warnings about the dangers of cigarettes. The Michigan plaintiff was actually suing an asbestos manufacturer, and the courts have had no difficulty in making the suppliers of asbestos liable for the shocking harm caused by asbestos dust. The defendant manufacturer in this case said that the plaintiff's injury had been caused not only by inhaling asbestos dust but also by smoking two packs of cigarettes a day for 30 years. The court agreed that the plaintiff had been negligent and apportioned the damages under the State's comparative negligence statute: *Brisboy v Fibreboard Corp* Michigan Supreme Court, January 25, 1988.

The US courts do not necessarily believe that the manufacturers' warnings have been adequate. They have been unable to consider the issue because of the interaction in America of state and federal laws. The doctrine of pre-emption requires a state court to stay away from any field of law which the federal government has adopted for its own. Federal law requires that cigarette manufacturers put a warning on their packs and advertisements, and state courts are not allowed to consider whether the statutory wording is adequate or not.

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A New Jersey court is considering a direct attack on a manufacturer for the death of a long-term smoker. Evidence at the trial has alleged that in the 1950s research showed a connection between tar in cigarettes and cancer. If this evidence is accepted a jury may find the manufacturer liable for its failure to warn in the 1950s. Federal warnings were first required in 1966 and it is open for a court to consider the adequacy of warnings before that date without the restraint of pre-emption: *Cipollone v Liggett* (NJ DC, 83–2864).

Whatever the outcome may be, plaintiffs in the cases against tobacco manufacturers deserve at least a medal for persistence.