O/591/5/95

OPINION OF LORD BONOMY

in the cause

AGNES RAE

Pursuer;

against

STRATHCLYDE JOINT POLICE BOARD

Defenders:

_____

Pursuer, Campbell, QC, Thompsons

Defenders, Paton, QC, Paterson, Simpson & Marwick

9 March 1999

The pursuer sues for damages for illness caused by her passive exposure to cigarette smoke at work between 1979 and 1994. The defenders are the authority which has inherited the responsibility of those authorities which during that period were responsible for the employment of the pursuer as a civilian worker at Wishaw Police Office.

The Common Law Case

I originally considered this case in February and March 1997. Then as now I was particularly conscious of the need to leave out of account the wisdom of hindsight. With the benefit of fairly common knowledge nowadays that there might in certain circumstances be a risk that a person might suffer illness as a result of exposure to the cigarette smoke of others, it is vital to take care not to read too much into averments about the state of knowledge of the risk of illness from the smoking of others in the late 70s, the 80s and the early 90s. The crucial questions in relation to the common law case are whether there are averments of fact to justify the inference that it was foreseeable by the defenders that the pursuer would become ill or sustain injury to an extent that would sound in damages because of the smoking around her at work, and whether there are relevant averments of breach of duty.

Fairly detailed averments of a developing state of knowledge from before 1979 until 1989 are set out in Article 5. For the defenders it was contended that the averments relating to the period prior to 1988 did not provide any basis for the inference that the defenders ought to have foreseen the risk of illness or injury, and those relating to the period thereafter did not indicate that the defenders had not taken appropriate steps in the light of the knowledge of risk which could, on the pleadings, only be said to be within their province from 1988 onwards.

The averments providing the watershed are at page 22D as follows:

"In November 1988 the Health and Safety Executive issued a booklet entitled 'Passive Smoking at Work'. The booklet advised, inter alia, 'It is now beyond doubt that smoking is a major cause of disease and premature death for smokers themselves. Tobacco smoke contains various substances that can cause cancer or other health problems. Raised levels of airborne harmful substances are found when smokers' homes are compared to those of non-smokers. Still higher levels may occur in poorly ventilated indoor places of work where several people are smokers .... There have been many scientific studies on passive smoking. The results of this research were reviewed by the Independent Scientific Committee on Smoking and Health in the Fourth Report. The Committee concluded that while none of the studies can on its own be admitted as unequivocal the findings overall are consistent with there being a small increase in the risk of lung cancer from exposure to environmental tobacco smoke, in the range 10% to 30% ..."

They then continue at page 23C:

"In the light of said scientific advice the booklet further advised 'Employers should consider how to limit passive smoking at work. There are various methods of preventing or limiting exposure to smoke. Every workplace is different, and there is no universal solution. Full in-depth consultation with employees and/or their representatives is highly desirable for the smooth implementation of policies designed to limit exposure to tobacco smoke ... Effective policies may include one or more of the following elements: improving ventilation so that smoke is more effectively removed from the working environment; segregating smokers and non-smokers in separate rooms where possible; letting employees in each working area decide whether smoking should be allowed there'. Also in 1988 the Health and Safety Executive published a booklet entitled 'Passive Smoking at Work'".

Shortly thereafter there follows an averment that throughout the period of the pursuer's employment with the defenders they knew or ought to have known that exposure to cigarette and pipe smoke carried the risk of injury or disease. Then at 24C there is the following averment:

"By at least 1980s, evidence of the risk of permanent and serious damage to health of passive smoking was available to health professionals, such as those employed by Strathclyde Regional Council".

There is also an averment at page 20C as follows:

"Strathclyde Regional Council, as the largest employer in Scotland and having their own Occupational Health Department, were or ought to have been well aware of the literature and the recommendations therein, and of the need to take action to avoid or minimise the risks".

Strathclyde Regional Council was a predecessor of the defenders with responsibilities for the employment of the pursuer.

It was the defenders' submission that, standing the terms of the 1988 Report, their obligation was to assess the situation of the pursuer and other employees and to consult fully, as suggested in the Report, before taking any action. There were no averments to the effect that the defenders failed to follow that guidance. Since the period between 1988 and 1994 was a relatively short period and since some of that time would be necessary for consultation of the type recommended, it was necessary for the pursuer to identify a point after 1988 at which action should have been taken before she could have a relevant case. So, assuming the risk of illness was foreseeable by 1988, the pursuer had failed to aver any relevant breach of duty in respect of the period between then and 1994.

The pursuer's averments in Article 6 are firstly of a duty to take reasonable care to protect the pursuer against the risk of suffering injury or contracting disease caused by the inhalation of cigarette and pipe smoke. The particular duties pled thereafter relate to the provision and maintenance of ventilation to supply fresh air, the provision of exhaust appliances and the designation of the workplace as a no smoking area. There are also averments of a duty to devise, institute, maintain and enforce a system of work which avoided or minimised the risk of danger, in particular by segregating smokers from non-smokers. For the defenders it was submitted that the duty that arose post-1988 was to devise, institute, maintain and enforce a system of work avoiding risk of danger to health, and there was no relevant averment that the defenders' predecessors, Strathclyde Regional Council, a very large employer, had failed in their duty to do so following on the 1988 publication. One could not expect instantaneous changes in practice following on the publication of such a document which recommended full in-depth consultation.

While it is easy to see the significance of the averments in relation to that publication, it would be wrong to judge the relevancy of the case in relation to the period after 1988 without reference to the preceding averments in Article 5 about other documents which relate to a developing state of knowledge prior to 1988. The defenders had criticisms to make of the relevancy of each document on its own. Some documents referred to, if taken on their own, would not support its averment that the defenders knew or ought to have known of the risk of injury or disease. However that is not the issue. The issue is whether the averments taken as a whole justify that averment. Only if averments relating to a particular document could have no bearing on the issues of the case at all would it be proper to exclude these averments from probation. While they analysed the relevance of each individual document, defenders' counsel recognised that, taken together, these documents disclosed a developing state of knowledge of the consequences of passive

inhalation of cigarette smoke. Their case was that taken together they did not support the averment that the defenders knew or ought to have known of the risk to the health of the pursuer from passive smoking in respect of the period prior to 1988.

Among the averments in Article 5 are the following:

"In 1983, the Royal College of Physicians on 'Health and Smoking' commented upon the adverse social consequences of passive smoking exposure .... commented that the commonest symptoms experienced by the non-smoker was irritation of the eyes, and that irritation of the throat, cough and headaches were also common. The report noted that 'The problem may be particularly bad in places of work, where the non-smoker may not have the option of getting away from a smoky environment'. .... At the same time the third Report of the Independent Scientific Committee on Smoking and Health (The Froggatt Committee: HMSO, 1983) appointed by the Government commented on the recent scientific evidence indicating that there might be a significant risk, in numerous respects (including not only the known effects on eyes, nose and throat, but also to increases in blood levels of harmful nicotine and carboxyhaemoglobin, and to increased risk of lung cancer (sic)), to the health of the non-smokers exposed to tobacco smoke. ... In 1984 a survey by ASH of Borough and District Councils in England and Wales showed that 83% banned smoking in meetings of full council ..... In 1985 the booklet funded by the Health Education Council entitled 'Action on Smoking at Work' was published. The Report referred to evidence of an increased risk of lung cancer and an increased frequency of respiratory symptoms in persons exposed to passive smoking at work. Recommendations for the elimination of passive smoking at work were detailed. They included improving ventilation so that smoke was effectively removed from the environment; separating smokers and non-smokers in separate rooms where possible; discouraging or banning smoking in common areas; banning smoking from all the designated smoking areas; and restricting smoking to certain times of day or agreeing a total ban".

There follow averments about action taken by the DHSS in May 1985 by issuing to Health Authorities a circular including the statement:

"The medical evidence that cigarette smoking can seriously harm health is now overwhelming".

It is then averred at 21E that that circular was indicative of the fact that by May 1985 it was Government policy, at least in so far as regards Health Authorities, that smoke-free environments should be provided for staff members. At page 22C there are averments about a World Health Assembly resolution passed in May 1986 that "passive, enforced or involuntary smoking violates the right to health of non-smokers ...". There then follow the averments about the position from 1988 onwards.

Senior counsel for the defenders, Mrs Paton, recognised that some of the material referred to was indicative of a risk to health. However she pointed to the averment at page 23A made in relation to the 1988 Report:

"The Committee concluded that while none of the studies can on its own be admitted as unequivocable, the findings overall are consistent with there being a small increase in the risk of lung cancer from exposure to environmental tobacco smoke ..."

Until that point, she submitted, the risk of injury or illness was not, on the averments, foreseeable. There was no suggestion that the defenders had failed to take action which was commonplace among employers. So it was necessary for the pursuer to aver facts and circumstances which brought home knowledge to the defenders. It could not be said on these averments that prior to 1988 the defenders ought to have foreseen the risk.

The question for me in relation to this argument is whether I can say that on no view of these pleadings could the pursuer possibly establish at proof that the defenders ought to have foreseen prior to 1988 that the pursuer might be injured or contract an illness as a result of smoking around her at her workplace. In my opinion the averments in Article 5, particularly those I have identified so far, are sufficient to entitle the pursuer to endeavour to establish that risk of injury or illness was foreseeable from 1983.

It follows that the starting point for the defenders' submissions about the absence of relevant averments of a breach of duty after 1988 is not established. I will return to these and other submissions about the absence of relevant averments of breach of duty later in this Opinion. Meanwhile I will complete consideration of the submissions about foreseeability and deal in particular with those made about the period prior to 1983.

The pursuer's case dates from 1979. The averments relating to the period prior to 1983 start with the claim that by 1979 it had been obvious for decades to anyone exposed to other persons' tobacco smoke in confined spaces such as on buses and trains that said smoke irritated the eyes, nose, throat and respiratory tract. That is followed by a statement that in that year the Surgeon General of the United States had in a report identified hazards to health posed by passive smoking. While there may be substance in the defenders' criticism that "irritation" of the eyes and parts of the respiratory tract are not necessarily consequences which would sound in damages in the context of a social practice largely tolerated in 1979 rather than a noxious manufacturing process to which a person was subjected, if the pursuer can prove that irritation of the eyes and parts of the respiratory tract were recognised regular and persistent features of sitting in a smoky environment, then these are in my opinion plainly effects which could sound in damages depending on the evidence given of their nature and extent. The averments about common experience are relevant to the question whether at a stage from the commencement of the pursuer's employment it was foreseeable by the defenders' predecessors that she might be injured or sustain illness working in the environment to which she was exposed. Similarly while there may also be substance in the defenders' criticism that it is not immediately obvious why an American report should come to the attention of the defenders' predecessors, the pursuer may well prove that it should have on the basis of the averments at page 24C and 20C identified earlier in this Opinion.

Intimately bound up with the defenders' submissions about foreseeability was a submission that there were no relevant averments of fault, i.e. of breach of the standard of care appropriate to an employer's liability case of this kind. There were two parts to this submission. In the first place, under reference to Morton v William Dixon Ltd 1909 S.C.807, it was submitted that, where the fault was one of omission, it was necessary to aver that the thing which was not done was one commonly done by other employers in like circumstances, or that it was a thing which was so obviously wanted it would be folly in anyone not to do it. However, as Mr Campbell pointed out in reply, in distinguishing these two situations Lord President Dunedin was not laying down a rigid rule of law but was emphasising the requirement that negligence must be established. That the test is what precautions a reasonable and prudent employer would take in the circumstances is plain from various subsequent cases in which comments on the dictum of Lord President Dunedin have been made, such as Brown v Rolls Royce Ltd 1960 S.C.(H.L.)22 at 26, Cavanagh v Ulster Weaving Co Ltd [1960] A.C.145 at 165-6, Stokes v Guest Kean & Nettlefold (Bolts & Nuts) Ltd [1968] 1 W.L.R.1778 at 1783 and Paris v Stepney Borough Council [1950] A.C.367. The absence of averments in the present case that certain precautions were adopted by other employers simply demonstrates that the pursuer does not found her case on the practice of others. It does not, however, follow that there must be averments of folly or stupidity on the part of the defenders before there can be a relevant case. In my opinion the question will always be whether there are averments that the precautions desiderated are precautions a reasonable and prudent employer would have adopted in the particular circumstances of the pursuer's employment and that the defenders failed to do so.

The second submission made by the defenders, under reference to Stokes, was that in a case where the pursuer does not rely on the defenders' failure to adopt precautions taken by others, whether or not a duty exists depends upon the relationship between the materiality of the risk of injury and the likely consequences thereof on the one hand and the expense, practicability and consequences of taking a precaution on the other. That it was the duty of an employer to weigh up those factors in deciding whether to take a precaution was made clear in the recent case of Brisco v Secretary of State for Scotland 1997 S.C.14. Mr Campbell did not demur from that proposition. He submitted, however, that these were matters for the Court to consider in the light of the evidence led at proof. For the moment the question for the Court was one of the foreseeability of injury. It was not for the pursuer to aver detailed evidence about the various factors to be weighed in the scale in assessing whether a precaution should be taken. The pursuer had at page 28 pled a number of precautions, and in the light of the evidence led at proof the Court would determine whether a duty to take any particular precaution arose in the particular circumstances of this case and whether that duty was breached.

Both Miss Paterson, junior counsel for the defenders, and later her senior pointed out that the pursuer had gone into considerable detail about the developing state of knowledge of the effects of passive smoking. None of the publications founded upon pre-dated the commencement of the pursuer's employment. The state of knowledge about the effects of smoking plainly developed over the period as the pursuer highlighted in the first sentence of Article 5 of Condescendence. On the pursuer's pleadings the magnitude of the risk and

the various other factors that required to be taken into account in assessing whether there was a duty on the defenders to take a particular precaution were not constant factors and must have changed materially at various stages between 1979 and 1994. Yet there was no hint of notice in the pursuer's pleadings of the stages at which it was appropriate to take the various precautions desiderated, in spite of that developing state of affairs. At the very least there was a change in circumstances at 1988 when the Report of the Independent Scientific Committee and the Health and Safety Executive booklet showed that passive smoking was recognised as an industrial issue. However, the Independent Scientific Committee's report suggested that full in-depth consultation with employees was required and the pursuer had failed to indicate the steps that should have been taken between then and 1994, the absence of which had an effect on the pursuer's health. Mr Campbell on the other hand submitted that this case was quite simply one of a series of industrial cases where there came a point in time at which the Courts held the duty of care established. By way of example Mr Campbell referred to Thompson v Smith's Shiprepairers Ltd [1984] 1 Q.B.405 and Knox & Others v Cammell Laird Shipbuilders Ltd & Others (Simon Brown J, unreported 30 July 1990).

Although these cases illustrate well the submission Mr Campbell made about there coming a time when the duty to take precautions is recognised in relation to particular potential causes of injury, the two examples he gave and the other circumstances to which he referred all related to industrial processes which gave rise to a risk of illness or injury. When Mrs Paton came to address me, she submitted that that point strengthened the defenders' case. Smoking is a social habit tolerated for centuries. In addition her junior referred to two employment cases, viz Dryden v Greater Glasgow Health Board (1992) IRLR 469 and Waltons & Morse v Dorrington (1997) IRLR 488 which demonstrated the strong feelings and sensitive issues which arose in regard to the implementation of smoking policies in the workplace.

While there may be delicate issues in relation to the implementation of employment policy in relation to smoking in the workplace, that is not the issue raised by the present case. In the present case smoking is a non-industrial activity, indeed a social activity indulged in by workers and tolerated by employers, which has got absolutely nothing to do with the industrial process. If to the knowledge of an employer smoking in the workplace gives rise to the risk that an employee will contract illness through working regularly in close proximity to smokers, then it may well, depending on the circumstances, be very easy to regard the employer as under a duty to stamp out smoking, or at the very least mitigate the effects of smoking, since there may well in the circumstances be no difficult issues of practicability or expense to be weighed against the risk. No question arises of modifying the method of production. Some of the precautions suggested, such as ensuring a door and window are kept open or segregating employees at the workplace, are not on the face of them precautions which are likely to prove expensive to the employer. Once it is established that the contraction of illness by an employee is foreseeable, it would not be possible for me to say, on the pleadings and without hearing the evidence, that in this case the pursuer could not possibly succeed in establishing either a duty or a breach of duty on the part of the defenders.

In my opinion the question whether there was a duty on the defenders to take precautions to protect the pursuer from exposure to smoke created by others in the workplace, or at the very least minimising her exposure, is relevantly raised in this action. Smoking is not obviously a necessary part of the working process. Near the beginning of Article 5 the pursuer avers that prior to commencement of the pursuer's employment with the defenders it had been obvious for decades without the need for specialist medical knowledge that the exposure of people to smoke in confined spaces, such as on buses and trains, caused irritation to the eyes, nose, throat and respiratory tract. It is against that background that the averment in the first sentence of Article 5, that throughout the periods from about the late 1970s to the present time there has been an increasing body of evidence that exposure to passive smoking involves a risk to health, and the subsequent averments, setting out the terms of various publications, have to be viewed. All of these averments follow on specific averments in Article 2 that most of the other personnel working with the pursuer smoked cigarettes heavily throughout the day at work, that her workplace was accessible to a number of people who came in there while smoking, about how side stream smoke was given off by cigarettes left to burn in ashtrays and held by people in the room between puffs and that the atmosphere in the room was usually visibly affected by smoke arising from that tobacco smoking. The condition of the room is set out in further detail. That summary is, however, sufficient to identify a basis on which it could be said that there was a duty on the defenders to take action. I could not possibly determine that the pursuer could not on any view of the pleadings succeed in the common law case.

The Statutory Case

The statutory case in Article 7 is that the defenders failed to comply with section 7(1) of the Offices, Shops and Railway Premises Act 1963 which is in the following terms:-

"(1) Effective and suitable provision shall be made for securing and maintaining by the circulation of adequate supplies of fresh or artificially purified air, the ventilation of every room comprised in or constituting premises to which this Act applies, being a room in which persons are employed to work".

When the case came before me on procedure roll in 1997, I rejected a number of criticisms of the relevancy of the statutory case but sustained one. It was my opinion then that the pursuer had made no relevant averment indicating that effective and suitable provision was not being made for the ventilation of her workplaces. There was no averment indicating what would have been effective and suitable provision in the circumstances and what difference that would have made to the inhalation of impurities from smoke by the pursuer. The Record has now been amended. The following averments have been added:

"The air in the pursuer's work room was never fresh. It was continually contaminated to a material extent by tobacco smoke. No steps were taken by the defenders to secure or maintain fresh air. They did not instruct or require the window and door to be kept open. They provided no artificial means of purifying the air or maintaining its purity".

There are accordingly now averments of a failure to ventilate the pursuer's work room, since it is said the air there was never fresh but was continually contaminated by tobacco smoke. It is also said that no steps at all were taken by the defenders to ventilate the room by providing fresh air. It is further said they did not instruct that the window and door should be kept open and did not make use of any artificial means to comply with their obligation.

The defenders submitted that there were no relevant averments of the action they ought to have taken to comply with section 7. The averment at the top of page 31 that they did not instruct or require the window and door to be kept open and that they provided no artificial means of purifying the air or maintaining its purity were irrelevant in view of the averments in Article 5 at page 19E that in 1983 the Royal College of Physicians had noted the difficulty of achieving adequate ventilation by opening a window and the expense of efficient air conditioning and suggested segregation of smoking and non-smoking areas as the best solution. The submission was that the pursuer accepted in her averments of fact that one of two alternative forms of precaution desiderated in Article 7 would be ineffective. The defenders further submitted that the averment in Article 7 that they provided no artificial means of purifying the air or maintaining its purity was so inspecific as to be irrelevant. There should be averments of the mechanism by which the air could be artificially purified. The point was important because what the defenders were bound to do was circulate "adequate" supplies of fresh or artificially purified air, and what was "adequate" might be different in 1979 and 1994 and at any time in between, being the period of the claim. The defenders were entitled to notice of what was required at the various stages of this period.

The pursuer's averments at page 19E have to be read in context, which is the identification of material parts of a report by the Royal College of Physicians in 1983 to show what was then known about passive smoking. The averments are not of some insurmountable difficulty but a quotation of the view expressed in the report. It is open to the pursuer in the present case to lead evidence that opening a window and door or purifying the air by some mechanical means could achieve the objective of section 7(1). The pursuer now starts from the standpoint that air in the work room was never fresh and was continually contaminated to a material extent by tobacco smoke. The obligation of the defenders is to make "effective and suitable provision ... for securing and maintaining by the circulation of adequate supplies of fresh or artificially purified air the ventilation of every room ...". That can be done by natural means through a window and/or door or by ensuring that the air is purified artificially. The pursuer now specifically avers that no steps were taken to ensure that naturally fresh air nor artificially purified air freshened the air in the work room. While the particular circumstances in the pursuer's work room may have differed from time to time throughout the period of the claim, and while what particular steps were necessary might have varied throughout the period of the claim depending upon the evidence led, that does not seem to me to alter the pursuer's case that throughout the period action was necessary to secure and maintain the ventilation of her workplace and no action was taken.

I accordingly consider the pursuer has pled a relevant case of breach of statutory duty by the defenders. The factual position in relation to the state of the pursuer's work room and the action required of the defenders under section 7(1) may be complex on the evidence. In addition it may be extremely difficult, for all I know, for the pursuer to establish a causal link between any breach of section 7(1) and the various ailments she has experienced. These are difficulties of proof. The case necessary to allow proof to be led in relation to the claim of breach of section 7(1) has in my opinion been adequately pled.

Averments about the pursuer's smoking history

In the event that I decided that the pursuer's case in either its common law or statutory branch was not irrelevant, defenders' counsel invited me to exclude from probation the whole of Article 3 of Condescendence except the first sentence "The pursuer does not smoke". That article deals with the history of the pursuer's exposure to smoke in circumstances other than at her employment with the defenders. The submission was that, since the pursuer had to show that the smoke for which the defenders were responsible caused or materially contributed to her condition including the increased risk of lung cancer, she was bound to give fairly detailed specification of her exposure to smoke elsewhere. That was particularly so where the perception of the risk altered over time. That there was a general exposure of members of the public to tobacco smoke was recognised in the pursuer's pleadings at page 23A-C. The pursuer was bound to give details of her previous employments and more details of the identity of the persons she was related to, or into contact with whom she came regularly, who were smokers. It would be a defence to show that her exposure in the employment of the defenders did not materially contribute to her illness. In the context of this case the pursuer was particularly obliged to specify her previous employment.

In response Mr Campbell made four submissions. (1) The pursuer had pled adequately her lack of exposure anywhere other than in the course of her employment with the defenders. (2) The defenders' case was that any condition from which the pursuer suffered or was likely to suffer was not smoking related. (3) If the defenders sought more detail, all they had to do was either write to the pursuer's agents asking for more detail or apply to the DSS or Inland Revenue for an employment history. (4) Under reference to the Opinion of Lord Stott in Bryce v Allied Ironfounders Ltd 1969 S.L.T.(N) 29 calls should have been made for the additional information required.

In answering Mr Campbell's submissions Mrs Paton for the defenders submitted that Bryce did not correctly state the position, and that to suggest the onus was on the defenders to identify to the pursuer the additional information required was inconsistent with our form of pleading - see Boulting v Elias 1990 S.L.T.596 at 597C and 600C-F. In any event the same point had been made when the case was before me 21 months or so earlier.

Article 3 is largely as it was when the case was before me. Parts have been added to the third sentence. It previously read: "She has not been exposed to tobacco smoke in her home". It now reads: "She has not been exposed to tobacco smoke to any material extent,

either in her home or in places other than her work with the defenders". The result is that Article 3 is slightly more specific than it was. When I considered the matter before, I was of the opinion that adequate notice of the areas in which the pursuer might have been exposed to smoke was given in Article 3 and that the extent of her exposure and whether that materially contributed to her illness were matters for evidence. I was not persuaded then, and I am not persuaded now, that the averment that she has not been exposed to tobacco smoke on a regular basis in any previous employment was so lacking in specification as not to give fair notice of her case. If the defenders had submitted to me that in spite of efforts made over the past 21 months or so they had been unable to identify the pursuer's previous employers and were thus prejudiced in their conduct of the case, then I might have begun to see some justification for the submission. However, the defenders have long had notice that the pursuer intends to demonstrate that neither at work nor in her domestic and social life has she been exposed to any material extent to the adverse effects of the smoking of others, and the defenders accordingly have notice of the areas to be investigated. The indications given by counsel for the pursuer of the ways in which investigation might be done are not exhaustive. Indeed, in the event that satisfactory information cannot be obtained to identify the witnesses who should be precognosed then resort may be had to the Administration of Justice Act 1972, section 1(1A). The defenders do not at present plead a defence based on the possibility that the pursuer is suffering from a smoking related illness. It was frankly conceded before me that the defenders are not in possession of medical evidence pointing to that possibility. Yet they do not suggest that they are prevented in any way from investigating that medical issue. This case is quite different from Boulting where the pursuer had made averments about things said by the defender to "several friends in Edinburgh" and specification of theses friends was sought by the defender. Here the pursuer makes averments about the lack of exposure to smoke elsewhere and deals with that lack of exposure in relation to various aspects of her life. The defenders do not make a case that she is suffering from an illness which could be smoking related. The question for me is whether in all the circumstances presented to me fair notice of her case is given to entitle the pursuer to a proof on these averments. I consider fair notice has been given of her case that her condition of health resulted from her exposure to smoke in the employment for which the defenders are now responsible and not elsewhere and that she should have a proof on her averments in Article 3.

I shall accordingly accede to the motion made for the pursuer to allow a proof before answer.