OUTER HOUSE, COURT OF SESSION

[2024] CSOH 84

PD301/20

OPINION OF LORD CLARK

In the cause

NM

Pursuer

against

(FIRST) GRAEME HENDERSON and (SECOND) SCOTTISH AMBULANCE SERVICE

Defenders

Pursuer: Davies KC, Fraser; Drummond Miller LLP
First Defender: Dewar KC, Forsyth; A & WM Urquhart
Second Defenders: Pugh KC, Bergin; NHS Scotland Central Legal Office

23 August 2024

Introduction

[1] This is a personal injury action brought under chapter 43 of the Rules of the Court of Session in which the pursuer seeks £800,000 in damages from the first and second defenders. The first defender worked for the Scottish Ambulance Service (SAC). In the course of his employment he attended in an ambulance to take the pursuer to hospital. On several other occasions thereafter when he visited the pursuer's home, but was not working at those times, he is said to have physically and sexually assaulted her, harassed and abused her. The first defender is averred to be liable to the pursuer in terms of sections 8 and 8A of the Protection from Harassment Act 1997 and for breach of duty at common law.

[2] The second defenders are said to be vicariously liable for the first defender's alleged course of conduct, albeit it took place when he was not actually working. Separately, the second defenders are said to have directly owed a duty of care to the pursuer and breached that duty. The breach alleged is that the second defenders failed to properly investigate whether the first defender had acted inappropriately with another woman (AB) in an ambulance just over two years before his contact with the pursuer. It is averred by the pursuer that, if a proper investigation had taken place, the first defender would have been removed from his post and could not therefore have come into contact with the pursuer, with the result that his conduct towards her would not have occurred.

[3] The case called for a diet of debate. For the first defender, senior counsel argued that a number of the pursuer's averments are irrelevant or lacking in specification and should be excluded from probation. Senior counsel for the second defenders submitted that the case based on vicarious liability is irrelevant and so is the case based upon existence of a direct duty of care. Dismissal of the action against the second defenders was sought. For the pursuer, senior counsel argued that in this chapter 43 action these challenges were not well-founded and that the whole case should proceed to proof.

Submissions

Submissions for the first defender

[4] In Statement IV, it is averred that the first defender pulled the pursuer onto a bed and had sexual intercourse with her. It was not clear whether this is alleged to be delictual or why it is founded upon in relation to a course of conduct, there being no averment of it not being consensual. It is then averred that the pursuer felt indebted to the first defender and felt under pressure. Without elaboration it was difficult to know what this means. It

was unclear whether the later reference to sexual intercourse is claimed to be delictual or not, or indeed whether the averment of it being forceful is a delict or a crime. The reference to sexually explicit remarks made to the pursuer was also unclear on whether it is a crime or a delict. Moreover it was not specified or made clear what is meant by the first defender having humiliated her.

[5] It is averred that he threatened the pursuer, but it is not explained what the threat was or where it took place. It is averred that on 25 July 2017 the pursuer was feeling suicidal. The first defender is said to have threatened her. She felt trapped and took an overdose of Cyclizine and left her home in an attempt to escape. It is pled that she rolled off a bridge, landing on her left side and sustained injury. The expression "rolled off a bridge" is unclear, nor is it clear as to how or in what way the first defender is responsible for that event. Further averments which are consequential to that incident are also irrelevant.

[6] Statement IV also avers that the first defender was made aware of the pursuer's past history of psychological problems and her history of sexual abuse. There are no averments that these issues were continuing at the time the first defender was in contact with her, nor that he was aware of the Emotionally Unstable Personality Disorder which she suffered or that she was still suicidal. The averments could not establish an ongoing knowledge of vulnerability of the pursuer in the mind of the first defender.

[7] Statement VII, which refers to a course of conduct said to amount to harassment under the 1997 Act and at common law, is not based on a relationship with the pursuer and so is irrelevant. In Statement V it is averred that the first defender ought to have reported himself to the Health and Care Professions Council (HCPC), but he was not then registered with the HCPC. The averments in Statement V regarding previous incidents of which the

first defender was acquitted and the criticisms of investigations into his conduct that were dropped are not relevant to the case against the first defender.

Submissions for the second defenders

[8] The second defenders accept that they employed the first defender, albeit as an ambulance technician rather than a paramedic and so stage 1 of the test for vicarious liability is satisfied. The stage 2 question is whether there is closeness of any connection between the conduct and the employment (or equivalent relationship): *Various Claimants* v *Wm Morrison Supermarkets Plc* [2020] AC 989, Lord Reed, paras [22], [24] and [32]; *Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB* [2023] 2 WLR 953, Lord Burrows, para [58](iii). A distinction is to be drawn between acts done by those who are engaged, however misguidedly, in furthering their employer's business (or in this case the Scottish Ambulance Service's activities) and cases where the employee is engaged solely in pursuing his own interests (*Various Claimants* v *Wm Morrison Supermarkets Plc,* at para [47]).

[9] None of the instances of rape, sexual assault and other abusive behaviour are alleged to have occurred when the first defender was on duty as an ambulance technician. On the pursuer's averments, the only aspect of the course of conduct which could be said to arise because of the first defender's employment with the second defenders was the initial contact between the pursuer and the first defender. At most, the pursuer seeks to establish that the first defender's employment with the second defenders gave him the opportunity to meet the pursuer. The mere opportunity to meet one's victim is not enough: *Lister* v *Hesley Hall Limited* [2002] 1 AC 215, Lord Clyde, at para [45] and *Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB*, Lord Burrows, at para [70] *et seq*.

[10] The pursuer avers no facts or circumstances which demonstrate how the first defender's conduct towards the pursuer was in furtherance of the activities of the ambulance service. The incidents, as averred, are remote in time from the first defender's duties as an ambulance technician. Even where there is connection to the place (ie the pursuer's accommodation) that is insufficient: *Various Claimants* v *Wm Morrison Supermarkets Plc*, Lord Reed, paras [41] - [44]. There is nothing to suggest that the alleged conduct was anything other than the pursuit of the first defender's own interests. In the absence of such averments, the pursuer's case based on vicarious liability is bound to fail.

[11] In relation to the claim that there is direct liability of the second defenders, who are said to be in breach of duty, the point made by the pursuer is that when considering unrelated complaints made to the second defenders regarding the conduct of the first defender in 2015 (ie prior to any averred contact between the pursuer and second defenders) the second defenders ought to have become aware that the first defender posed a risk to vulnerable females.

[12] The root of the pursuer's argument for the existence of any duty owed to the pursuer is her status as a prospective user of the ambulance service. No such duty is owed by the second defenders to the pursuer, essentially because of a lack of proximity between the pursuer and the second defenders. The pursuer seeks to hold the second defenders liable for criminal actions of the first defender. The law generally resists imposing such a duty outside of vicarious liability. To succeed in such a claim, a pursuer must establish a special relationship which exposes them to a particular risk of damage in the context of that relationship: *Thomson* v *Scottish Ministers* 2013 SC 628, Lord Carloway, paras [56] - [59]. The authorities show that a duty has not been found to be established in analogous circumstances and, separately, that a duty of the sort contended for in the present case

would not be a permissible extension of recognised duties of care. Assuming that is right, there is no need to go on to consider the tripartite test.

[13] If there is a need to consider the aspects of the tripartite test, the present case fails for the following additional reasons: (i) the circumstances do not disclose a sufficiently proximate relationship between the pursuer and the second defenders to give rise to a duty of care; (ii) imposing a duty of care in the manner condescended upon would potentially give rise to a conflict of interest.

Submissions for the pursuer

Response to the first defender

[14] This is a chapter 43 action and as a result detailed pleadings are not required. Nevertheless, the pursuer's averments provide fair notice of the case. The first defender's knowledge of the pursuer's condition is a matter for proof. The pursuer also offers to prove a number of actions on the part of the first defender which, taken together, amount to a course of conduct. It would be premature and artificial for isolated elements to be deleted at this stage ignoring the whole context. Sufficient notice has been given of the case against the first defender.

[15] The pursuer offers to prove that the first defender ought to have reported himself to the HCPC. The first defender is entitled to seek to prove that such reporting was not necessary, standing the stage at which his registration had reached, but that is not a basis for the pursuer's averment to be excluded. On the point made about criticisms of investigations or complaints dropped and previous incidents, these are relevant to the common law case against the first defender and should be admitted to probation.

Response to the second defenders

[16] The pursuer's averments provide a relevant and sufficient basis upon which to seek an evidential hearing regarding vicarious liability, and in particular, the question of close connection. The pursuer offers to prove that the first defender's employment with the second defenders provided him with more than simply an opportunity to meet or come into contact with the pursuer. The grooming behaviour commenced in the ambulance while the first defender was engaged in the second defenders' business and accordingly the abuse thereafter is closely connected to his employment.

[17] The first defender himself regarded his conduct towards the pursuer as arising directly out of his employment and further the second defenders, in dismissing the first defender, directly relied upon the correlation between the first defender's conduct towards the pursuer and his employment. The first defender's employment did not simply provide an opportunity for the parties to meet, it created the whole context within which the first defender was able to form a relationship with the pursuer in breach of the trust afforded to him in his employment role.

[18] The averments support an argument that there was a close connection between the first defender's employment and the conduct. The pursuer was a vulnerable service user and through the first defender's employment he was put into a relationship of trust with her, a risk inherent in the nature of the service provided by the second defenders and the vulnerability of the class of person using such services: *Lister* v *Hesley Hall Limited*.

[19] While each case will depend upon its own facts, it is a central theme in cases where vicarious liability has been successfully argued that an employer has established an employee in the particular position, and has entrusted the employee to carry out a function, and in so doing the employer becomes liable where that position of trust has been abused,

irrespective of the motivation of the employee: *Mohamud* v *Wm Morrison Supermarkets Plc* [2016] AC 677. There is no direct Scottish authority on the issue, but there is a body of case law from North America in which employers have been found vicariously liable for sexual misconduct of employees who abused a comparable professional status ("*Loose Connections: matters of the heart and delictual liability*" by Elspeth Reid, Edin LR 2014 18(1), 97-104).

[20] Turning to the common law case, a duty of care is owed by the second defenders to the pursuer and there is sufficient proximity between the parties. As averred, the pursuer is a female falling within a class of patient with reason to use the second defenders' ambulance service. Its staff, such as the first defender, are given access to medical records and confidential information about those who access its service. Service users will be for the most part vulnerable due to underlying conditions and/or whatever acute condition has resulted in the particular need for an ambulance on the occasion of use. Such a scenario can be distinguished from that found in the case of *Thomson* v *Scottish Ministers* relied upon by the second defenders. In that case the victim was simply a member of the public at large with no special or distinguishing connection or feature alluding to any proximity with the defender. In accepting the emergency call the ambulance service had brought itself into a relationship of proximity with this particular patient.

[21] The pursuer offers to prove that she was part of an identifiable class of individuals using the second defenders' service who would have contact with the first defender as part of the health care service, such care being equivalent to that provided by hospitals and establishing the necessary proximity for a duty of care to be owed. This is not a novel situation in which the court is being asked to extend the principles of negligence and

accordingly the tripartite test referred to in *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736 does not require to be applied.

[22] However, if this case does not fall within the established principles of negligence it is fair, just and reasonable to impose a duty of care. The pursuer was not merely in a wide class of female members of the public who also happened to be vulnerable. She fell into a very specific and narrow class of vulnerable females who required the particular services of the ambulance service staff. Her requirement of those services brought her within a specific class of individuals receiving care from the employees of the second defenders. The second defenders' argument to the effect that such a duty of care, if found, would potentially give rise to conflict is not well founded. The pursuer offers to prove that the investigation into the prior complaint was flawed and by its very nature was not a fair investigation. Many employers are required to have regard to balancing public safety in respect of their employees. That latter aspect, far from giving rise to potential conflict, is an inherent part of an employer's duty in investigating any such claim.

Decision and reasons

[23] This is an action brought under chapter 43 and the pleadings are therefore in the necessarily abbreviated form. There has been some discussion in the authorities of whether the test to be applied at a debate in chapter 43 cases is higher than in an ordinary action (see eg *Bruce* v *Brown* 2011 CSOH 165). But while it is not necessary for either party to engage in elaborate pleading, the requirement is still to give fair notice (*McGowan* v *W & J R Watson Limited* 2007 SC 272, 2007 SLT 169). Fair notice means that the averments must be set forth to meet the standard of relevancy and specification. However, in a chapter 43 debate, the court also has to take cognisance of the need for parties to use concise pleadings, and that the

averments must relate "only to those facts necessary to establish the claim" (chapter 43.2(1)(a)). The standard tests on relevancy and specification are whether the pursuer's case will necessarily fail even if all the pursuer's averments are proved (*Jamieson* v *Jamieson* 1952 SC (HL) 44; 1952 SLT 257); and, in claims of damages for alleged negligence, it can only be in rare and exceptional cases that an action can be disposed of on relevancy (*Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20). These tests fall to be applied in the context of the abbreviated pleadings, taken as *pro veritate.*

The pursuer's case against the first defender

[24] In considering the first defender's challenge to the relevancy and specification of the pursuer's averments, it is important to bear in mind that the pursuer alleges a course of conduct. While reference is made to certain potentially innocuous actings at an early stage, the account given builds up and refers to later acts such as rape. The reference to pulling the pursuer onto the bed, and having sexual intercourse with her, forms an early part of that course of conduct and assists with the context. It is not referred to as being non-consensual, which would be a rape. If a rape was to be alleged it would need to be made explicit for the purposes of fair notice. Given that requirement, which is followed when the later allegation of rape is explicitly made, the pursuer cannot be taken as claiming that this act was non-consensual.

[25] There are several parts of the averments in Statement IV which the first defender views as unclear and difficult to understand. However, when read in full they are tolerably clear. The averments that the pursuer felt indebted to the first defender and felt under pressure, interpreted in the context of the whole of what is pled, are not inspecific. There is a reference to sexual intercourse by the first defender that was forceful, which the first

defender says is unclear as to whether it was a delict or a crime. But rape is not alleged in this averment and it is said to fit within the alleged course of conduct.

[26] It is true that the references to the first defender making sexually explicit remarks, having humiliated the pursuer and threatened her, do not explain precisely what is claimed to have been said or done. But there is sufficient notice to give the first defender the opportunity to investigate and answer these points. The notice given is that there was a course of conduct constituting an abusive relationship which includes those actings. The first defender is able to see the thrust of the allegations and knows his own position as to whether or not he did anything which falls within the things alleged and the consequences stated.

[27] On the first defender's argument that the averments do not explain the causal connection between the contact she had with the first defender and her rolling off a bridge, it is important to bear in mind the averments just mentioned, as well as that she had previously felt suicidal, and that she felt trapped, took an overdose of Cyclizine and left her home in an attempt to escape. In that context she is said to have rolled off a bridge landing on her left side, sustaining injury which required spinal surgery. While I am considering here the pursuer's pleaded case, I note that the first defender avers that it is believed to be true that the pursuer "jumped off a bridge on 25 July 2017 under explanation that the first defender was told this by one of the paramedics who attended". It is sufficiently clear from the pursuer's pleadings that in light of the alleged conduct of the first defender and its effects on her, this incident of rolling off the bridge is claimed to have resulted from the abusive behaviour.

[28] Overall, I accept that there is some lack of precision in the details of certain allegations, but in these abbreviated chapter 43 pleadings there is still sufficient notice to

allow the facts to be dealt with at a proof. The broad point is that the context of their relationship is set out, building up to aver abusive behaviour and its impact upon her. The individual acts do not each require to be delictual, given that the pursuer's claim is based upon a course of conduct.

[29] Senior counsel for the first defender referred to the pursuer's pleadings about a past history of psychological problems, including specific disorders or disabilities, her history of sexual abuse, and her previous position of being suicidal. It is argued that these are not averred to have been continuing at the time the first defender was in contact with her and so could not establish an ongoing knowledge of vulnerability in the mind of the first defender.

[30] However, the pursuer avers that in the course of his interactions with the pursuer and the staff in the hostel in November 2016 the first defender learned of the pursuer's psychological problems including PTSD, diagnosis of borderline personality disorder and her history of sexual abuse. The pursuer also avers that on 17 April 2017 she had taken an overdose of Propanol, again requiring emergency treatment and transportation to hospital, and the first defender attended at the pursuer's home in the course of his employment along with his colleague to take her to hospital. It is said that he asked about her life, that she was in a vulnerable position at the time, and he provided her with reassurance. It is averred that he collected her from the hospital when she was discharged, drove her home, and she still felt suicidal. The course of conduct is said to continue from then into July 2017.

[31] It is therefore clear enough from the averments that the pursuer offers to prove that the first defender had information about her condition, even if not all of the precise diagnoses she had been given. The taking of an overdose could point towards vulnerability. The pursuer seeks to show that with his knowledge and experience he could have been in an informed position and could have accessed her medical records. The pursuer offers to

prove, from the cumulative picture, that he was aware of her vulnerability and it is at least implicit that her suicidal ideation formed part of that vulnerability. The averments on these matters provide fair notice.

[32] Senior counsel for the first defender expressed the view that the course of conduct was not based on a relationship with the pursuer and so is irrelevant, whether under statute or at common law. In any event, it was argued not to be a course of conduct, as some of it was not wrongful, and the case just amounted to a small number of alleged assaults. However, it is clear enough from the pleadings that the pursuer relies upon there having been a course of conduct which is alleged to breach the statutory and common law duties. While there are the alleged assaults, these are said to form part of the course of conduct of harassment.

[33] The pursuer founds on both section 8 and section 8A of the 1997 Act, the first of which does not require there to have been a relationship. In any event, the pursuer avers that during the investigation by the second defenders the first defender admitted there had been a relationship with the pursuer, albeit denying it was sexual. In Answer 5 the first defender admits that he made that concession. For there to be a course of conduct under section 8, there needs to be conduct on at least two occasions and that is plainly the proposition in the pursuer's case. On the question of whether there was a relationship that falls within section 8A, that is a matter of fact to be determined on the evidence. The pursuer is not contending that each element of the course of conduct was a delict in itself, but that taken together the statutory and common law tests are met and again this is very much a question of fact to be dealt with at a proof.

[34] In Statement V it is averred that the first defender ought to have reported himself to the HCPC and the first defender challenges that as irrelevant because he was not then

registered with the HCPC and hence under no duty to do so. I accept that the basis for why he should have reported himself is not made out. However, the pursuer offers to prove that he should have done so and while that may be challenged the fact that he was not registered does not of itself make the averment irrelevant. The pursuer will require to establish that he should have reported himself and the first defender can of course seek to show that such reporting was not necessary.

[35] The final question to be determined is whether the averments in Statement V regarding a previous incident on which the first defender was investigated, and the criticisms of the investigation being dropped by the second defenders, are relevant to the case against the first defender. These are said to be simply previous unproven allegations and not matters which the pursuer is offering to prove as true or accurate. The early parts of Statement V deal with the complaint made by AB and the investigation of it by the second defenders, which is said by the pursuer not to have been properly carried out. It explains also that the second defenders simply reinstated the first defender to his normal duties following the decision by Police Scotland not to progress the criminal case.

[36] The pursuer argues that these averments give a bit of background to the culture in this environment. However, while they are relevant to the case against the second defenders, the headline point is a failure by the second defenders to properly investigate and hence there was no actual result of the investigation. Moreover, there is no suggestion that the pursuer will seek to prove that AB's allegations were true. As a consequence, this part of Statement V is of no relevance to the case against the first defender.

[37] There are averments about the second defenders' investigation into the complaint by the present pursuer, and the investigations by the Health and Care Professions Tribunal of the complaints made by the pursuer and by others. Reference is made in the pleadings to

the nature of the other complainers' allegations and that they gave witness statements to the tribunal. The second defenders referred the first defender to the tribunal in respect of his behaviour towards his female colleagues. While the outcome of the tribunal's investigation is not averred, the pursuer refers to the tribunal holding records relating to the first defender, the complaints made in respect of his conduct and its investigation of such complaints. Recovery of these documents may take place and there may be evidence to be led. The allegations by these others are open to being construed as having some similarities with those of the pursuer and the evidence about them may potentially have a bearing on credibility and reliability. The averments about the second defenders' investigation and that of the tribunal are therefore relevant, because they relate to the present pursuer and to complaints by her and others that were heard together.

[38] As a result, on most of the averments challenged the pursuer's case against the first defender is not bound to fail and the issues will be determined at the proof. The only averments that fall to be excluded from probation are those in Statement V which deal with the complaint made by AB and the criticisms of the second defenders' investigation of that complaint.

The pursuer's case against the second defenders

(i) Vicarious liability

[39] The two stages for the imposition of vicarious liability are well-established. In *Various Claimants* v *Barclays Bank Plc* [2020] AC 973, at [1], Lady Hale explained that the first stage focuses on the nature of the relationship between the two persons and whether this makes it proper for the law to make the one pay for the fault of the other. The second is the connection between that relationship and the tortfeasor's wrongdoing. In the present case it

is only the second stage with which we are concerned. It was recently considered further by the Supreme Court in *Various Claimants* v *Wm Morrison Supermarkets Plc* (Lord Reed, paras [22], [24] and [32]) and *Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB*, (Lord Burrows, paras [48] - [58]). In the latter case, at para [58] it is said that:

> "(iii) The test at stage 2 ('the close connection test') is whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment".

[40] Senior counsel for the second defenders accepted that the existence of a position of trust and the vulnerability of the pursuer are not challenged. The pursuer avers that the first defender qualified as an ambulance technician in 2014 and then qualified as a registered paramedic on 2 March 2018. The events alleged to have occurred against the pursuer took place between November 2016 and July 2017.

[41] There is some force in the submissions for the second defenders that none of the allegedly wrongful conduct occurred while the first defender was at work as an ambulance technician, this case not being connected in time to his employment or closely connected with the acts he was authorised to do, or linked to the second defenders' field of activities and the first defender's place in that field. On the other hand, there are abbreviated averments of fact which need to be explored in detail.

[42] As referred to in *Lister* v *Hesley Hall Limited,* if it can be concluded that there was an increased risk of exploitation by the very nature and type of trust and authority in the context of the person's employment that can suffice. If so, this would go beyond merely being in a position of trust and there being vulnerability. The pursuer seeks to show that the second defenders' involvement gave access to the pursuer as a patient with access also to information about her personal circumstances, her address, complex history and mental

health issues. There is averred to be a consistent pattern of the first defender keeping in contact and support with the pursuer, potentially not inconsistent with the more generic duties he carried out as a carer. While the pursuer does not contend that every ambulance technician or paramedic continues to have such duties at every point, the facts here are claimed to support that position.

[43] Senior counsel for the pursuer places reliance on the averment that the first defender regarded himself as carrying out his employment functions throughout the course of his relationship with the pursuer, describing that as significant. It is also said that the second defenders, in investigating and dealing with the first defender's conduct against the pursuer, also effectively said there was a connection with the workplace. Whether these ostensibly subjective views point in favour of a close connection can really only be determined after the evidence is led. Equally, the pursuer relies on a course of conduct, involving a relationship and abuse, so on the close connection point the court will need to consider whether it is a connection with that course of conduct and whether it could ever be said that a body in the position of an ambulance service is to be responsible for those activities.

[44] The conclusion I reach is that it would be inappropriate, in this chapter 43 case, to decide at this point whether the stage 2 test on vicarious liability is met. It is necessary for the court to have evidence of all the facts and circumstances averred by each side and deal with the issue at a proof. The averments for the pursuer do not indicate that the case is bound to fail.

(ii) Duty of care

[45] In contrast with the previous matter, the question of whether the second defenders directly owed a duty of care to the pursuer is more a question of law, rather than the

application of the law to as yet unseen factual evidence. The law, as it has developed, is fully and clearly explained by Lord Ericht in *Glasgow City Council* v *First Glasgow No.1 Ltd* 2020 SLT 75. The existence or scope of duties of care are amenable to determination at a debate: *Mitchell* v *Glasgow City Council* 2009 SC (HL) 21, Lord Hope at paras [10] - [12]. In *Mitchell*, the House of Lords applied the tripartite test identified in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605: (1) foreseeability; (2) proximity; and (3) fairness, justice and reasonableness.

[46] The most recent Supreme Court authority on this issue is *Robinson* v *Chief Constable of West Yorkshire Police*. As Lord Reed explains, at paras [26] - [29], it is for the court to examine whether a duty has been found to exist in analogous circumstances, resulting in existing principles. It is only in a novel case, where existing principles do not answer the issue, that the court ought to go on to examine whether, by an extension of existing principle, a duty exists. In relation to a novel case, Lord Reed notes the earlier *dicta* (as applied in *Caparo*) referring to proximity and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope. Lord Reed goes on to say:

> "In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

[47] In *Thomson* v *Scottish Ministers* the law on the liability of public custodians for the criminal actions of those in their care was considered by (as he then was) the Lord Justice Clerk (Carloway) at paras [43] - [55]). In relation to proximity, at para [56], the Lord Justice Clerk explained that:

> "In order to succeed, the pursuer must establish a special relationship which exposed the deceased to a particular risk of damage as a result of negligence by the defenders in the context of that relationship (ie *Dorset Yacht Co*, Lord Diplock, p 1070) or, put in another way, that she was the subject of a special or distinct risk as a consequence of the defender's actions (ie the majority in *Couch v Attorney-General*, para 112)."

Has a duty of care of this kind been found to exist in analogous circumstances?

[48] Senior counsel for the second defenders placed reliance upon *Glasgow City Council* v *First Glasgow No. 1 Ltd* as being analogous to the present case. However, he also acknowledged that he has not been able to find any case that says when an employer is performing a disciplinary investigation the employer does, or does not, owe a duty to someone down the line. *Glasgow City Council* is said to have similarities, including events that precede the critical event and failures in investigation by the then employer.

[49] The issue in that case was whether the former employer who gave a reference to the new employer had a duty of care to a person who came to be injured by the person for whom the reference was given. Lord Ericht decided that there were no analogous authorities which gave an existing principle to be followed and, as it was a novel case, the tripartite test fell to be applied but was not met. His reasons focussed on the reference and whether or not it affected the injured person. That person was not in a relationship of proximity with the giver of the reference. While that case has some similarities with the present case, it also has a number of important dissimilarities and it is not closely analogous.

[50] Senior counsel for the pursuer also argued that there are analogous cases. Once the ambulance service has accepted a call and the patient, or those caring for the patient, have been informed an ambulance will attend, the service assumes a duty of care. Reference was made to *Kent* v *Griffiths* [2001] QB 36, followed in *Aitken* v *The Scottish Ambulance Service* 2011 SLT 822. In *Aitken* it was held that a duty could be owed by the ambulance service to a

patient who had suffered a severe epileptic seizure and who died after the ambulance summoned to take her to hospital took thirty-three minutes to arrive. It was submitted that the present case is not a novel situation and the basics apply, with the second defenders owing a duty of care to its service users. As part of their duty of care the second defenders must have employees who are qualified and properly able to carry out their duties.

[51] There is little doubt that the existing principles deal with a situation in which the ambulance service will owe a duty of care to its service users (eg *Kent* v *Griffiths* and *Aitken* v *The Scottish Ambulance Service*). However, the cases are about a duty of care after the service has accepted a call for an ambulance to be sent and it does not arrive within a reasonable time. In other words, the specific individual who is known to the service and is to be seen by an employee is owed a duty. These cases do not deal with whether a person who has not been identified, but who may possibly in the future phone an ambulance, is owed a duty of care at a point in time some years before.

[52] There is some lack of clarity in the pursuer's averments as to when the duty of care is claimed to have arisen. However, it is said that the pursuer is a vulnerable individual who would in due course have contact with the first defender in his role with the second defenders. This is plainly a reference to a duty said to be owed to her at the time when the second defenders were investigating the allegations made earlier against the first defender by another person. At that time there was no contact by or on behalf of the pursuer with the service. There is certainly no case found in which a duty of care was owed at that stage, to unidentified members of the public.

[53] In their pleadings, the second defenders called upon the pursuer to specify the nature of the duty of care and any breach thereof. In the pursuer's response, there is no clear

explanation as to the nature or scope of the duty of care or indeed precisely when it arose. However, the pursuer's averments on breach of duty include the following:

> "…in light of the complaint made in 2015, the second defenders knew or ought to have known that the first defender posed a risk to vulnerable females such as the pursuer who had reason to use its service. The second defenders did not deal with the prior complaint adequately. As a user of the Ambulance Service the pursuer was within an identifiable class of vulnerable individuals who would have contact with the first defender in his role with the second defenders and were foreseeably at risk from his behaviour…The second defenders ought to have investigated and upheld the prior complaint made by AB and dismissed the first defender."

[54] Reading those averments fairly and objectively, they again indicate that the alleged breach of duty was in 2015. In any event it seems obvious that the breach could not have been later, as it is not averred that the second defenders had at that later time actual knowledge of the first defender having assaulted AB; rather, the point argued is that the second defenders did not properly carry out the investigation. There are certainly no authorities analogous to the contention that a vulnerable individual who might at some later stage be dealt with in an ambulance is owed a duty of care by the ambulance service.

Is the tripartite test met?

[55] In *Robinson,* Lord Reed said:

> "[37] A further point ... is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: see, for example, *Smith v Littlewoods Organisation Ltd* [1987] AC 241 and *Mitchell v Glasgow City Council* [2009] AC 874. In Michael's case [2015] AC 1732, para 97 Lord Toulson JSC explained the point in this way:
>
> > 'It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.'
>
> There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the

> individual has relied. The first type of situation is illustrated by the *Dorset Yacht* case, and in relation to the police by the case of *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, discussed below. The second type of situation is illustrated, in relation to the police, by the case of *An Informer v A Chief Constable* [2013] QB 579, as explained in *Michael's* case [2015] AC 1732, para 69."

[56] On behalf of the pursuer it is argued that if the tripartite test is to be applied there is proximity, the pursuer being a vulnerable female patient requiring the services of an ambulance. Senior counsel for the pursuer submitted that on the question of who would be in contemplation at the time, it was misconceived for the second defenders to restrict it to service users. It was argued that if the result of a failure to investigate is to have a dangerous member of staff, that should not mean that only service users at the time of the failure are in contemplation, when the staff member will continue in his employment to present that same danger. This again confirms the breach alleged and thus when the duty of care is claimed to have arisen.

[57] At the time of the events in 2015, and in particular the investigation said to have not been conducted properly, there was no relationship between the pursuer and the second defenders which placed her at a greater risk than the general public. The pursuer does not aver any distinct or special risk, other than a general position of vulnerability. The fact that at that stage she had vulnerability and might in the future require an ambulance does not suffice to show a proximate relationship. The pursuer was not in any defined class of persons under special contemplation of the second defenders. *Kent* v *Griffiths* and *Aitken* v *The Scottish Ambulance Service* are not closely analogous, as they deal with a duty to provide an ambulance within a reasonable time following a 999 call.

[58] If for any reason the pursuer's case can be interpreted as alleging a breach of duty at the time when the first defender was in contact with the pursuer, there is again no sufficient proximity to establish a breach of duty. It cannot be said that everyone with a physical or

medical condition satisfies the test for proximity. It goes too far to contend that every patient calling for or being in an ambulance is owed a duty of care, the scope of which includes the consequences of not having properly investigated the ambulance technician's previous conduct. The investigation by the second defenders is described as inadequate, but the averments do not provide a basis for knowledge by them of a previous assault. The pleadings do not show that the SAC knew or ought to have known that the first defender had in fact touched AB inappropriately in an ambulance. AB complained to the police, who interviewed the first defender and carried out their investigation. Police Scotland did not progress the complaint.

[59] Having weighed up the reasons for and against imposing liability, the existence of a duty of care of the kind sought here would not be fair, just and reasonable.

Conclusions

[60] For the reasons given, I conclude that the submissions for the first defender succeed only on certain parts of Statement V in the record, and the submissions of the second defenders succeed in respect of the alleged direct duty of care owed to the pursuer. The remaining matters will be dealt with at a proof before answer.

Disposal

[61] In relation to the parts of Statement V noted above, I shall sustain the first defender's argument on relevancy and exclude certain averments from probation. The other submissions for the first defender about excluding averments on the grounds of relevancy and specification are refused. I shall sustain the second defenders' argument that there is no relevant basis for the second defenders being directly liable to the pursuer under a duty of

care and dismiss that part of the pursuer's case. The second defenders' argument about dismissing the case on vicarious liability is refused, leaving that issue to be determined at proof.

[62] Senior counsel were each of the view that, after my decision is reached, it would be appropriate to have a by-order hearing to address precisely which averments fall to be excluded. A by-order hearing will be fixed for that purpose. In the meantime, all questions of expenses are reserved.