EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 6
PD252/21

Lord Doherty
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD DOHERTY

in the cause

by

X

Pursuer and Subsidiary Reclaimer

against

(1) SHERIFF JOHN ALBERT BROWN

First Defender

(3) THE LORD ADVOCATE

Third Defender and Principal Defender

Pursuer and Subsidiary Reclaimer (X): McBrearty KC, Mackinlay; Urquharts Solicitors
Third Defender and Principal Reclaimer (Lord Advocate): Springham KC, D Scullion; SGLD
Non-participating party: Sheriff John Albert Brown

12 April 2024

Introduction

[1] These reclaiming motions (appeals) raise a number of issues, one of which is whether the Crown may be vicariously liable for the delicts of a sheriff committed when not

exercising his judicial functions, but which delicts are averred to have had a close connection with those functions.

Background

[2] At the material times the pursuer was a legal practitioner. She avers that she was assaulted by the first defender on three separate occasions, and that these incidents, and a further later one, constituted harassment in terms of section 8 of the Protection from Harassment Act 1997. The first defender is a sheriff. He denies that any assaults or harassment took place, but for the purposes of testing the relevancy of the pursuer's pleadings the court requires to take the pursuer's averments *pro veritate*.

The first alleged incident

[3] The pursuer avers that on 18 May 2018 she was involved in a case which the first defender was due to hear. As a result of technical difficulties the case required to be discharged. After the discharge she encountered the first defender in the reception area of the court building. She apologised to him for the technical difficulties. He told her not to worry. She avers that he placed his hand on her face without her consent, and so assaulted her.

The second alleged incident

[4] The pursuer avers that on 5 July 2018 when she was at court in the course of her work the first defender communicated via his bar officer that he wished to see her in his chambers. The bar officer led her there. On their arrival the first defender told the bar officer to leave. He hugged the pursuer without her consent. He used inappropriate

phrases such as "your pretty face". She considered she was unable to leave given the first defender's status as a sheriff and because she was in a secure part of the building.
He hugged her a second time and allowed his face to linger against her shoulder.
He maintained that position until the pursuer indicated her desire to leave. She was distressed. The first defender accompanied her down a corridor and opened a door for her. As she passed through the door he patted her bottom firmly twice. She ran towards the public area.

The third alleged incident

[5] On 19 July 2018 the pursuer was seated on a train travelling to work. The first defender came and sat next to her. He put his left hand on the inner thigh of her right leg. She had to put her bag on her lap to prevent him from touching her thigh.

The fourth alleged incident

[6] On 7 August 2018, through her line manager, the pursuer made a complaint to the Judicial Office for Scotland about the first three incidents. On 24 August 2018 her iPhone received a FaceTime call from the first defender. She did not answer it. A further complaint was made to the Judicial Office about the call.

The complaints to the police and the Judicial Office

[7] As is narrated in *X, Petitioner* [2022] CSOH 15, paragraphs [2] and [3], the pursuer reported the first defender to the police. Her complaint was investigated. The police took witness statements from two other women (C1 and C2). Each claimed that the first defender had acted inappropriately towards them before his appointment as a sheriff. A report was

submitted to the Crown Office and Procurator Fiscal Service. The COPFS decided not to prosecute the first defender. It notified the Judicial Office of its decision. A tribunal to consider the first defender's fitness for office was constituted in terms of section 21(1) of the Courts Reform (Scotland) Act 2014 to consider the pursuer's complaints. The tribunal reported in March 2021. The presenting officer had not been made aware of C1 and C2's allegations. The case against the first defender, and the tribunal's decision, did not take them into account. As a result of that omission, the pursuer sought judicial review of the tribunal's decision. On 8 February 2022 the Court of Session reduced the decision (see *X, Petitioner*, *supra*). The first defender marked a reclaiming motion but subsequently he abandoned it. Thereafter a second, differently constituted, tribunal to consider and report on the first defender's fitness for office was appointed. Those proceedings have not concluded.

This action

[8] The pursuer raised this action for damages against four defenders: the first defender, the Lord President as second defender, the Lord Advocate as third defender, and the Advocate General for Scotland as fourth defender. She avers that the first three incidents were assaults and that all four incidents were harassment in terms of section 8 of the 1997 Act. She further avers that the Crown is vicariously liable for the first defender's alleged conduct. The second, third and fourth defenders were convened as representatives of the Crown, the pursuer's solicitors not having reached a concluded view as to the correct defender for the grounds of action based upon vicarious liability.

[9] The pursuer subsequently abandoned the action against the second defender. The third defender and the fourth defender both averred that the other was the appropriate law officer to represent the Crown. Both law officers advanced two primary arguments.

[10] The first argument was that no vicarious liability could arise on the Crown's part, because the relationship between the Crown and a sheriff is not a relationship "akin to employment" (the stage 1 test, *Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB* [2023] UKSC 15; [2023] 2 WLR 953, at paragraph [58]). *Esto* the relationship is akin to employment, there was not a sufficiently close connection between the first defender's alleged wrongful conduct and the acts which he was authorised to do that they could fairly and properly be regarded as done by him in the course of his quasi-employment as a sheriff (the stage 2 test).

[11] The second argument was that the action was wholly or partially time-barred in terms of section 17 of the Prescription and Limitation (Scotland) Act 1973, service of proceedings on the Lord Advocate (as representing the Crown) not having been effected until 16 July 2021, more than 3 years after each of the first two alleged assaults. Service on the fourth defender was not effected until 14 March 2022.

[12] The action called for a two-day procedure roll hearing before the Lord Ordinary on the questions of (i) vicarious liability, (ii) time-bar, and (iii) whether the third or fourth defender was the appropriate law officer representing the Crown.

[13] The Lord Ordinary decided (*X* v *Y* 2023 SC 235, [2023] CSOH 17) that the third defender was the appropriate law officer (paragraphs [60]-[67]). It is important to be clear as to the basis upon which he made that decision. All parties had proceeded on the footing that the relevant statutory provisions were sections 1 and 4A of the Crown Suits (Scotland)

Act 1857 and section 40(2)(b) of the Crown Proceedings Act 1947. Sections 1 and 4A of the 1857 Act provide:

> "**1 Crown suits, &c. may be brought in name of the Lord Advocate**
>
> Every action, suit, or proceeding to be instituted in Scotland on the behalf of or against Her Majesty, or in the interest of the Crown (including the Scottish Administration), or on the behalf of or against any public department, may be lawfully raised in the name and at the instance of or directed against the appropriate Law Officer as acting under this Act. …
>
> **4A Meaning of 'the appropriate Law Officer'**.
>
> In this Act 'the appropriate Law Officer' means—
>
> (a) the Lord Advocate, where the action, suit or proceeding is on behalf of or against any part of the Scottish Administration, and
> (b) the Advocate General for Scotland, in any other case."

Section 40(2)(b) of the Crown Proceedings Act 1947 states:

> "**40 Savings**
>
> …
>
> (2) Except as therein otherwise expressly provided, nothing in this Act shall:—
>
> …
>
> (b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom or the Scottish Administration, or affect proceedings against the Crown in respect of any such alleged liability as aforesaid;"

The Scottish Ministers are office-holders in the Scottish Administration (Scotland Act 1998, section 126(6)). The members of the Scottish Government are the Scottish Ministers (Scotland Act 1998, sections 44(1), 44(2)). The submissions to the Lord Ordinary were advanced on the basis that either the Scottish Government or the United Kingdom Government were vicariously liable for the first defender. The pursuer and the third defender argued that the Advocate General was the appropriate law officer. The fourth

defender maintained that it was the Lord Advocate, representing the Scottish Government: that was also the pursuer's alternative *esto* position. The Lord Ordinary reasoned (paragraph [63]) that the fundamental question was whether the vicarious liability claim was against any part of the Scottish Administration. He decided that it was (paragraph [66]). It is important to keep in view that the entity said to be vicariously liable for the first defender is the Scottish Government. It is the Scottish Government that is called upon to make reparation to the pursuer in respect of that liability. It is also important to note that this aspect of the Lord Ordinary's decision is not challenged in the reclaiming motions. The contentious issues concern vicarious liability and time-bar.

Vicarious liability

[14] The Lord Ordinary considered whether a judicial office-holder is a servant or agent of the Crown in terms of the Crown Proceedings Act 1947. He noted various *dicta* and academic views on the point, but ultimately he concluded it was a straightforward question of interpreting section 2 of the 1947 Act. The first defender was a Crown servant (paragraph [25]). The pursuer submitted that this was all that was necessary for the Crown to be vicariously liable. The Lord Ordinary disagreed. Section 2 provides that the Crown is subject to liability in tort "as if it were a private person of full age and capacity". The Crown's vicarious liability for the delicts of its servants was the same as any other private organisation and therefore the stage 1 test of the relationship being akin to that between an employer and employee required to be met (paragraph [27]). Having examined the relationship between the Crown and the first defender the Lord Ordinary concluded that it could not be said at this stage, prior to a proof on the facts, that the pursuer was bound to

fail to satisfy the stage 1 test (paragraphs [27]-[32]). That conclusion related to both the common law delictual claims and the statutory harassment claim.

[15] The stage 2 test was whether there was a sufficiently close connection between the actings complained of and the work that the first defender was authorised to do that they might be regarded as having been done in the ordinary course of his quasi-employment. The Lord Ordinary reviewed some of the authorities (paragraphs [33]-[39]). Where there was a "strong causative link" between the responsibilities conferred by the quasi-employer upon the tortfeasor and the torts subsequently committed by them, vicarious liability could arise (*Lister* v *Hesley Hall* [2002] 1 AC 215, [2001] UKHL 22 and *Various Claimants* v *Catholic Child Welfare Society* [2013] 2 AC 1, [2012] UKSC 56). An employer or quasi-employer could be liable for criminal conduct where the tortfeasor was purporting to go about the former's business, "albeit in gross abuse of his position" (*Lister, supra* and *Mohamud* v *Wm Morrison Supermarkets Plc* [2016] AC 677, [2016] UKSC 11). The Lord Ordinary took "a broad view" of the first defender's responsibilities. He noted that judicial office-holders have a degree of authority and control over those appearing before them, and over the wider profession. An invitation to attend a judicial office-holder's chambers would normally be accepted. It was not possible to say that following a proof the pursuer would be bound to fail to satisfy the stage 2 test in respect of the first two incidents (paragraphs [40] and [42]). However, in relation to the third and fourth incidents the Lord Ordinary considered that the pursuer was bound to fail to satisfy the stage 2 test, concluding "No relevant case is made out, in delict or on the statutory ground of harassment, in respect of those last two alleged incidents" (paragraph [41]).

Time-bar

[16] The Lord Ordinary held that the common law delictual claims against the third defender in respect of the alleged assaults on 18 May and 5 July 2018 were time-barred. More than 3 years had elapsed between each of those assaults and service of the action upon the third defender (paragraph [49]). The Lord Ordinary could identify no good reason why the claims should be permitted to proceed although out of time (Prescription and Limitation (Scotland) Act 1973, section 19A). The only explanation offered to the court was that the pursuer's solicitors had advised waiting before raising the action. That was not sufficient (paragraph [51]). Applying "the same approach as for private parties", it was inequitable for the third defender to face time-barred claims.

[17] In relation to time-bar and the statutory harassment claim the Lord Ordinary opined:

> "[50] The end of the alleged chain of harassment is the starting point for the time period for the purposes of time-bar in relation to a harassment claim. There were no submissions made about whether the claim in relation to a course of conduct, which is said to have amounted to harassment, is time-barred in respect of vicarious liability because the only two events for which there could be vicarious liability occurred more than three years prior to the service of the summons. Out of caution, I reach no decision on that matter at this stage and that issue will therefore remain to be determined at proof, if the Lord Advocate is the appropriate Law Officer to represent the Crown."

The Lord Ordinary recognised that the action had been served on the third defender within 3 years after each of the third and fourth incidents, and that the *terminus a quo* for a harassment claim was when the course of harassment ceased (1973 Act, section 18B). We understand from paragraph [50] that he concluded that the chain of harassment could not include the third and fourth incidents because he had decided that the pursuer was bound to fail to meet the stage 2 test in relation to them; but that he was not addressed specifically on the issue of time-bar of the statutory harassment claim. However, the matter is not entirely clear because in his conclusions at paragraph [68] the Lord Ordinary states: "…the

question whether a claim based on a chain of harassment, *or elements of that claim*, is time-barred will require to be determined at the proof." (emphasis added).

[18] The consequences of the Lord Ordinary's findings ought to have been that, in the case against the third defender, the averments about vicarious liability for all of the common law delicts should have been excluded from probation (those relating to the first and second incidents being time-barred and those relating to the third and fourth incidents being bound to fail the stage 2 test), but the averments about the first and second incidents forming a course of harassment would not be excluded. Instead, curiously, the interlocutor of 2 March 2023 did not exclude the averments about the third and fourth incidents from probation in relation to vicarious liability for either the common law delictual claims or the statutory harassment claim.

The reclaiming motions

[19] The pursuer and the third defender have both reclaimed (appealed). The third defender maintains that the Lord Ordinary erred in law (i) in finding that the stage 1 test for vicarious liability was met; (ii) in holding that the stage 2 test for vicarious liability was met in respect of the first two incidents; (iii) in failing to uphold the third defender's time-bar plea. The pursuer contends that the Lord Ordinary erred in law (i) in holding the pursuer had not pled a relevant case to satisfy the stage 2 test in respect of the third and fourth incidents; and (ii) in refusing to exercise his discretion under section 19A of the 1973 Act to allow the common law delictual claims to proceed although out of time.

[20] Both parties lodged concise notes of argument, which were developed during oral submissions.

Submissions for the third defender

[21] The principal submission for the third defender focused upon the constitutional position of judicial office-holders, and in particular the principle of judicial independence. Judicial independence was a cornerstone of a democratic society, operated in accordance with the rule of law. Reference was made to section 1 of the Judiciary and Courts (Scotland) Act 2008 which guarantees continuing judicial independence and imposes a duty among *inter alia* the First Minister, the Lord Advocate, the Scottish Ministers, and the Scottish Parliament to uphold the independence of the judiciary; to the Statement of Principles of Judicial Ethics for the Scottish Judiciary issued by the Judicial Office; and to the Basic Principles of the Independence of the Judiciary produced by the United Nations. It was important that the judiciary be independent, and be seen to be independent, of the legislature and the executive.

[22] The stage 1 test was not satisfied. The Crown, in right of the Scottish Government, did not exercise control over judicial office-holders. References in authorities such as *BXB* v *Trustees of the Barry Congregation of the Jehovah's Witnesses*, paragraph [58], to the place of the tortfeasor in a "hierarchy" or "organisation", or to the putative vicarious party's degree of "control" had to be read in this light. The Scottish Government does not, and never could, exercise control over a judicial office-holder. The judiciary is not an organisation and judicial office-holders do not fit into a "hierarchy of seniority". The Lord President might exercise a degree of administrative oversight over Senators of the College of Justice and sheriffs, and sheriff principals had some administrative control over sheriffs within their sheriffdoms, but there was no control by the Crown in right of the Scottish Government. The Scottish Government did not exercise even a vestigial level of control over judicial office-holders. The work of judicial office-holders was not "in furtherance of the aims" of

the Scottish Government - indeed, it was not uncommon for the Scottish Government to appear before the court and for findings adverse to it to be made. Appointment of judicial office-holders, although formally made by the monarch, was far removed from a typical recruitment process. By design it involved a number of parties. Control was deliberately fragmented among different bodies. The position was similar in respect of removal of judicial office-holders. Reliance was placed on Lord Prosser's observations in *Starrs & Anor* v *Ruxton* 2000 JC 208 at page 232E that judicial independence meant

> "not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether in the executive, or indeed the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him".

[23] If judicial office-holders were akin to employees of the Scottish Government that would imply that they were dependent on or subordinate to it. That would erode judicial independence. There would be a risk that judicial office-holders might feel beholden to the Scottish Government and behave accordingly; and a risk that it could be perceived that they might do so. There would also be a risk that the Scottish Government might seek to give guidance to judicial office-holders concerning the exercise of their judicial functions. The statutory and common law guarantees of judicial independence would be insufficient safeguards against those risks. Judicial office-holders were in the category of "true independent contractors", as opposed to being *sui generis*.

[24] If, contrary to the third defender's submissions, the stage 1 test was satisfied, the stage 2 "close connection" test was not met. The alleged delictual acts of the first defender all related to personal matters and were in pursuit of his own private ends. The Lord Ordinary had wrongly focused upon the first defender's status rather than upon the closeness of any connection between the alleged delicts and what he was authorised to do.

Sexual assault had no connection with any judicial function. Notwithstanding the abbreviated nature of Chapter 42 personal injury pleadings, the pursuer had to plead the nature of the close connection between the acts complained of and the first defender's quasi-employment. She had not done so. All of the common law delictual claims of vicarious liability were irrelevant. If all of the common law claims were irrelevant the claim that there was vicarious liability for the harassment claim must also be irrelevant.

[25] Finally, the Lord Ordinary ought to have upheld the time-bar plea in respect of the harassment claim. He found that there was no vicarious liability for the common law delictual claims relating to the third and fourth incidents. Accordingly the chain of harassment must have ended with the second incident. However, the common law claims against the third defender in respect of the first and second incidents were time-barred. It followed that the statutory harassment claim must also be time-barred, since the relevant chain of harassment ceased at the time of the second incident.

Submissions for the pursuer

[26] The Lord Ordinary was right to hold that the pursuer was not bound to fail to establish that the Crown was vicariously liable for what the first defender was said to have done in the first and second incidents. The pursuer now accepted that the mere fact judicial office-holders were servants of the Crown did not *per se* determine that there was vicarious liability. Section 2 of the Crown Proceedings Act 1947 provides that the Crown is subject to liability in tort "as if it were a private person of full age and capacity". So both stages of the test set out in paragraph [58] of *BXB* had to be satisfied for there to be vicarious liability.

[27] The first defender was not an employee of the Crown, but nor was he an independent contractor. It was accepted that judicial office-holders were *sui generis*.

However, the use of the term "servant" was a very strong indicator that being a Crown servant is akin to employment. Judicial office-holders are appointed by the monarch, swear an oath to him, and administer justice in his name. Examination of the normal incidents of a judicial office-holder's position demonstrated that their relationship with the Crown was akin to employment. Looking at paragraph [58] of *BXB* and the potentially relevant factors identified there, they supported the imposition of vicarious liability. Judicial office-holders were paid a salary. They were integral in the Crown's administration of justice and "overall regulation of society", all for the benefit of the Crown and the public at large. There was no control over the exercise of judicial functions. There was, however, a level of administrative control by senior judges in deciding, for example, where judicial office-holders would sit, what kind of cases they would hear, and how many cases they were expected to rule upon. There was a defined process for their appointment, discipline and removal. While that control was diffused and fragmented, the bodies exercising control were emanations of the Crown. Such control as there was did not affect the performance of the judicial office-holder's judicial functions. That would be inimical to judicial independence. It was implicit in section 2(5) that there may be vicarious liability for acts and omissions committed by judicial office-holders when they are not discharging responsibilities of a judicial nature. The suggested concerns about actual or perceived interference by the Crown in the exercise of judicial functions were ill-founded given the common law and statutory guarantees of the independence of the judiciary. On the other hand, it would be odd (and the public would perceive it to be odd) if a junior member of staff employed by the Scottish Courts and Tribunals Service who was assaulted by a judicial office-holder in the same manner as alleged in the present action could not sue the Crown as being vicariously liable for the

judicial office-holder, but would have to take the risk of being unable to enforce an award against him.

[28] The stage 2 test was very fact-specific. The Lord Ordinary ought to have allowed all of the vicarious liability claims to proceed to proof before answer. After a proof the court would be much better placed to determine whether each of the stage 1 and stage 2 tests were satisfied. He had been wrong to hold that the claims of vicarious liability in respect of the third and fourth incidents were bound to fail. The authority conferred upon judicial office-holders extended beyond their interactions on the bench. It was an incident of their quasi-employment. The authority was particularly keenly felt by those, like the pursuer, who appear before them. Judicial office-holders expected, and received, deference from legal practitioners and others off the bench as well as on it. Even outside the courtroom, legal practitioners would be disinclined to disagree with judicial office-holders for fear of antagonising them. The first defender's alleged conduct was inexplicable unless he felt he had authority over the pursuer. The first two incidents had taken place within a court building, the physical proximity between the parties being created by their respective roles. The discussions which preceded both incidents concerned professional matters. The alleged assaults arose from the normal incidents of the first defender's judicial office. The third and fourth alleged incidents had to be viewed in the context of the two previous alleged incidents. They were part of a course of conduct which flowed from the alleged assaults in the courthouse. While the first defender was not exercising his judicial role *per se* while on the train, the course of conduct could be traced back to his position as a judicial office-holder. The pursuer could not, in these circumstances, be said to be bound to fail to establish a close connection. The court required to hear evidence to determine whether it was correct to conclude that the third incident fitted into a course of conduct.

[29] An employer could be vicariously liable for delictual conduct which occurred away from the workplace where the conduct flowed from acts committed by the tortfeasor in the course of his employment (*London Borough of Haringey* v *FZO* [2020] EWCA Civ 180). Whether *Haringey* could be applied to the present action could only be determined on the evidence. There was no common law delictual claim in respect of the fourth incident. Its only relevance was as the final act of the statutory harassment claim. Whether it formed part of a chain of harassment for which the third defender might be liable was a matter for proof.

[30] The Lord Ordinary ought to have exercised the section 19A discretion to permit the common law delictual claims against the third defender in respect of the first and second incidents to proceed although out of time. There was no forensic prejudice to the Crown. The first defender would give evidence at the proof. There was no issue of lost evidence or stale claims. The pursuer would be prejudiced if she was forced to proceed only against the first defender. It was unknown whether he had the means to meet a successful claim. There was a public interest, if vicarious liability was established, in requiring the Crown to meet a claim in the present circumstances. The Lord Ordinary had considered none of these matters when assessing the issue of prejudice (or at least he did not address them in his Opinion). His decision did not narrow the scope of the proof, since evidence would still require to be led about all of the incidents.

[31] In any case, the pursuer had amended her pleadings since the debate before the Lord Ordinary. She now averred that she had not considered a personal injury claim until relatively close to the expiry of the 3 year periods following the first and second incidents; that up to then her focus had been on the judicial disciplinary process and then on the judicial review of the tribunal's decision. She had been advised of the potential time-bar

dates for claims against the third defender for the first and second incidents, but at that time she did not have funding in place to proceed. Funding was confirmed on 2 July 2021. Her solicitors advised that, while there were risks of the court holding otherwise, all things considered she could proceed on the basis the case against the third defender would not time-bar until 19 July 2021 (the date of the third incident). An alternative remedy for professional negligence against the pursuer's solicitors would have doubtful prospects of success. Having regard to the whole circumstances, including the additional averments added by amendment, the court should exercise the section 19A discretion to allow the common law claims against the third defender for the first and second incidents to be brought though late.

Decision and reasons

Vicarious liability

[32] The pursuer's pleadings are clear as to the capacity in which the third defender is sued (Stat II):

> "The third defender is the Lord Advocate, representing the Scottish Ministers. The Scottish Ministers have responsibility for the administration of justice in Scotland. They have a role in the appointment and removal of sheriffs."

The case against the third defender was "only maintained on the hypothesis that the fourth defender is correct that the third defender is the appropriate Law Officer to represent the Crown."

[33] The Lord Ordinary found that the appropriate law officer was the third defender. He treated the claim as being against the Scottish Government in respect of the Crown's vicarious liability for the first defender (paragraphs [60]-[67]). There is no appeal against that part of his decision. As we have observed already, that is important. It is, therefore, an

essential part of the pursuer's case that sheriffs are akin to employees of the Scottish Government. Unless the pursuer has pled a relevant case that they are, the case against the third defender is bound to fail.

[34] It was submitted for the pursuer that her position had "moved on" from her pleadings (where, as already noted, the third defender was convened as representing the Scottish Ministers). However, the issue is very far from being a mere pleading point. The identity of the entity which the third defender represents is critical. A feature of the pursuer's submissions was an absence of clarity as to the capacity in which the third defender was sued. At times senior counsel for the pursuer referred to the Crown as being the State. At other times he focused on the position of the executive, and in particular, the Scottish Government. On occasions the submissions seemed to shift almost imperceptibly from the one to the other. There was a failure to face up to the fact that the Crown acts and incurs liabilities through the executive branch of government. In light of the Lord Ordinary's unchallenged finding that the third defender, representing the Scottish Administration, is the appropriate law officer, if there is vicarious liability it could only be on the part of the Scottish Government. If the case against the third defender is established it is the Scottish Government that would have to make reparation to the pursuer.

[35] In *BXB* v *Trustees of the Barry Congregation of the Jehovah's Witnesses*, at paragraphs [30]-[57], Lord Burrows JSC reviewed the main 21st century UK authorities on vicarious liability, *viz. Lister* v *Hesley Hall Ltd* [2002] 1 AC 215; *Dubai Aluminium Co Ltd* v *Salaam* [2003] 2 AC 366; *Majrowski* v *Guy's and St Thomas's NHS Trust* [2007] 1 AC 244; *Various Claimants* v *The Catholic Welfare Society* [2013] 2 AC 1 ("*Christian Brothers*"); *Cox* v *Ministry of Justice* [2016] AC 660; *Mohamud* v *Wm Morrison Supermarkets plc* [2016] AC 677; *Armes* v *Nottinghamshire County Council* [2018] AC 355; *Various Claimants* v *Barclays Bank*

plc [2020] AC 973; and *Various Claimants* v *Wm Morrison Supermarkets plc* [2020] AC 989.

His summary of the modern law at paragraph [58] bears repeating in full:

> "58. Having examined the main 21st century decisions on vicarious liability of the highest court, it is now possible to pull together the legal principles applicable to vicarious liability in tort that can be derived from those authorities particularly the most recent cases of *Barclays Bank* and *Morrison*.
>
> (i) There are two stages to consider in determining vicarious liability. Stage 1 is concerned with the relationship between the defendant and the tortfeasor. Stage 2 is concerned with the link between the commission of the tort and that relationship. Both stages must be addressed and satisfied if vicarious liability is to be established.
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> (ii) The test at stage 1 is whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment. In most cases, there will be no difficulty in applying this test because one is dealing with an employer-employee relationship. But in applying the 'akin to employment' aspect of this test, a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment. Depending on the facts, relevant features to consider may include: whether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the tortfeasor, the extent of the defendant's control over the tortfeasor in carrying out the work, whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the relevant role fits. It is important to recognise, as made clear in *Barclays Bank*, that the 'akin to employment' expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant.
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> (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. This is the test, subject to two minor adjustments, set out by Lord Nicholls in *Dubai Aluminium*, drawing on *Lister*, and firmly approved in *Morrison*. The first adjustment is that, to be comprehensive, it is necessary to expand the test to include 'quasi-employment' as one may be dealing with a situation where the relationship at stage 1 is 'akin to employment' rather than employment. The second adjustment is that it is preferable to delete the word 'ordinary' before 'course of employment' which is superfluous and potentially misleading (eg none of the sexual abuse cases can easily be said to fall within the 'ordinary' course of employment) and was presumably included by Lord Nicholls because 'in the ordinary course of business' were

> the words in section 10 of the Partnership Act 1890. The application of this 'close connection' test requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's authorised activities. That there is a causal connection (ie that the 'but for' causation test is satisfied) is not sufficient in itself to satisfy the test. Cases such as *Lister* and *Christian Brothers* show that sexual abuse of a child by someone who is employed or authorised to look after the child will, at least generally, satisfy the test. But, as established by *Morrison*, the carrying out of the wrongful act in pursuance of a personal vendetta against the employer, designed to harm the employer, will mean that this test is not satisfied.
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> (iv) As made particularly clear by Lady Hale in *Barclays Bank*, drawing on what Lord Hobhouse had said in *Lister*, the tests invoke legal principles that in the vast majority of cases can be applied without considering the underlying policy justification for vicarious liability. The tests are a product of the policy behind vicarious liability and in applying the tests there is no need to turn back continually to examine the underlying policy. This is not to deny that in difficult cases, and in line with what Lord Reed said in *Cox*, having applied the tests to reach a provisional outcome on vicarious liability, it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy. What precisely the underlying policy is has been hotly debated over many years by academics and judges alike. See, for example, PS Atiyah, *Vicarious Liability in the Law of Torts* (1967) chapter 2; Jason Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alberta Law Review 287; Anthony Gray, *Vicarious Liability: Critique and Reform* (2018); *Vicarious Liability in the Common Law World*, ed Paula Giliker, 2022. As we have seen at para 38 above, Lord Phillips referred to five policies in *Christian Brothers* but, as Lord Reed recognised in *Cox*, a couple of those have little, if any, force. At root the core idea (as reflected in the judgments of Lord Reed in *Cox* and *Armes*: see paras 42 and 47 above) appears to be that the employer or quasi-employer, who is taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost (or, one might say, should bear the risk) of the wrong committed by that person in the course of those activities.
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> (v) The same two stages, and the same two tests, apply to cases of sexual abuse as they do to other cases on vicarious liability. Although one can reasonably interpret some judicial comments as supporting special rules for sexual abuse, this was rejected by Lord Reed in *Cox*. The idea that the law still needs tailoring to deal with sexual abuse cases is misleading. The necessary tailoring is already reflected in, and embraced by, the modern term."

[36] We deal first with the stage 1 test. What we say in relation to it applies to both the common law delictual claims and the harassment claim. The issue is whether judicial office-

holders are akin to employees of the Scottish Government. We are conscious that the factors mentioned in paragraph [58](ii) of *BXB* were not intended to be an exhaustive list, and that, depending on the facts, other factors might be important. One such factor here is the importance of maintaining judicial independence.

[37] It is common ground that sheriffs are not employees of the Scottish Government. Nor do they appear to us to be true independent contractors. They are more aptly described as being *sui generis*, but that does not shed much light on whether they are akin to employees.

[38] Whether or not judicial office-holders are Crown servants (see eg Glanville Williams, *Crown Proceedings*, page 38; Professor E C S Wade in (1932) 173 Law Times 246, page 247; cf. Holdsworth in (1932) 48 LQR 25; Hogg & Monahan, *Liability of the Crown* (3rd ed), page 122; *AHQ* v *Attorney General* [2015] 5 LRC 542 at paragraphs [14]-[16], [35]) is a contentious issue. We note that Professor Mitchell (Mitchell, *Constitutional Law* (2nd ed), page 263) thought the matter "debatable, the more so in Scotland where many incidents of [a judge's] office have been attributed to the fact that that office is a *munus publicum*." In our view, because of the absence of control by the Crown over them, judicial office-holders are not Crown servants for the purposes of the 1947 Act. They are officers of the Crown. Unlike the Lord Ordinary, we are not convinced that section 2(5) settles the issue (see also Mitchell, *supra*, page 263). Section 2(5) excludes proceedings against the Crown by virtue of section 2 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process. The Lord Ordinary reasoned that section 2(5) would have been unnecessary if judicial office-holders were not Crown servants. We disagree, for two reasons. Section 2 applies to torts

committed by servants and agents of the Crown. Since subsection (5) applies to "any person" discharging or purporting to discharge the relevant responsibilities, it is unnecessary to decide which of the two (servants or agents) judicial office-holders are. The drafters may have been conscious of the controversy as to whether judges were Crown servants; the language of section 2 made it unnecessary to resolve the question. In any case, section 2(5) applies not only to judicial office-holders, but also to a range of other persons, some of whom may clearly be employees of the Crown whose responsibilities are mainly not of a judicial nature, but who may occasionally also require to exercise a responsibility of a judicial nature or a responsibility in connection with the execution of judicial process. Accordingly, we are not persuaded by the pursuer's contentions (i) that judicial office-holders are Crown servants; or (ii) that section 2(5) indicates that is so; or (iii) that judicial office-holders being Crown servants goes a long way towards showing that they are akin to employees of the Scottish Government. Even if, contrary to our view, judicial office-holders are Crown servants, we do not think that would be a weighty factor in favour of them being akin to employees.

[39] The Scottish Courts and Tribunal Service is a body corporate (Judiciary and Courts (Scotland) Act 2008, section 60(1)) which is independent of the Scottish Government. Its functions (as to which see the 2008 Act, Part 4 and Schedule 3) include providing, or ensuring the provision of, the property, services, officers and other staff required for the purposes of the Scottish courts, and the judiciary of those courts (2008 Act, section 61(1)). Sheriffs are remunerated by the SCTS (Courts Reform (Scotland) Act 2014, sections 16(1), 16(12)), albeit that the levels of salaries and allowances are a reserved matter for the Treasury: section 16(1)(cf. the position of summary sheriffs (section 16(3)). The salaries and allowances are charged to the Scottish Consolidated Fund (section 16(13)), payments from

which are made by the Scottish Government. Sheriffs also enjoy other benefits that employees usually have (paid holiday leave, retirement pension etc.). Judicial pensions are governed by statute (Public Services Pensions Act 2013 as amended by the Public Service Pensions and Judicial Offices Act 2022). Pension entitlement accruing from 1 April 2015 onwards arises under the Judicial Pension Regulations 2015 (SI 2015/182) (as amended), but pension payments are made by the Scottish Government from the Scottish Consolidated Fund. Accordingly the Scottish Government may be said to be the ultimate funder of sheriffs' remuneration, allowances and pension benefits. It might be argued that that tends to support the proposition that judicial office-holders are akin to its employees.

[40] On the other hand, these financial arrangements - carefully put in place in order to preserve judicial independence - are very different from those in a normal employer/employee relationship. Moreover, the Scottish Government has no control over the performance by sheriffs of their judicial functions, and nor does it exercise control over the judiciary as an institution. While sheriffs are formally appointed by the monarch (Courts Reform (Scotland) Act 2014, section 4(2)) and the First Minister has a formal role in that process (2014 Act, section 4(3); Scotland Act 1998, sections 95(4), 95(5)), the Judicial Appointments Board is primarily responsible for recruitment and recommending appointment (2014 Act, section 4(4) and section 11 of the Judiciary and Courts (Scotland) Act 2008). Similarly, effective control over discipline and removal lies with persons and bodies independent of the Scottish Government (2014 Act, section 25). There is a hierarchy of seniority among the judiciary. The Lord President is head of the Scottish judiciary and sheriffs principal exercise administrative control over matters such as case and court allocation, but, to the extent that those factors involve control, it is control by the judiciary not by the Scottish Government. The fragmentation of responsibility for the judiciary has

been highlighted as an important distinction between the positions of judicial office-holders and persons employed under a contract – *Gilham* v *Ministry of Justice* [2019] 1 WLR 5905 at [19].

[41] The lack of control by the Scottish Government over the judiciary, individually and institutionally, is marked, and, we think, telling. We recognise that as the law relating to vicarious liability has developed the courts have shown increasing willingness to attach greater weight in some cases to "enterprise risk" than to the issue of control (*Cox* v *Ministry of Justice*, Lord Reed JSC at paragraphs [24], [34]; *Armes* v *Nottinghamshire County Council*, Lord Reed JSC at paragraph [67]; *BXB*, Lord Burrows JSC at paragraphs [42]-[47], [49]-[52], [58]). However, we doubt if that approach is apposite here. First, the absence of any effective control by the Scottish Government is deliberate, and based on sound constitutional principles: the operation of the rule of law, central to which are judicial independence and the separation of powers. We will return to the importance of judicial independence shortly. Second, although it may be said that the provision of justice is a core duty of the Scottish Government, it is the judiciary which is primarily responsible for the administration of justice. The Scottish Government's duty is auxiliary, to do all that it reasonably can to assist the judiciary to administer justice effectively and in accordance with the rule of law.

[42] Judicial independence is a fundamental principle of our constitutional law. The judiciary is a branch of government separate from and independent of both the legislature and the executive. There are two dimensions to judicial independence, the individual judge's adjudicative independence, and the judiciary's institutional independence from the other branches of government, in particular the executive (Page, *Constitutional Law of Scotland*, paragraphs 6-13 to 6-18). The upholding of both dimensions is essential to the rule of law. The long-standing convention that government ministers must uphold the

independence of the judiciary has been formalised in the guarantees contained in the Constitutional Reform Act 2005, section 3 (the definition of "judiciary" for the purposes of section 3 includes the judiciary of the Supreme Court and the judiciary of any other court established under the law of any part of the United Kingdom (section 3(7)); and in the Judiciary and Courts (Scotland) Act 2008, section 1. As senior counsel for the third defender put it, judicial independence means not just independence of mind or attitude in the exercise of judicial functions, but independence in status and in judicial office-holders' relationships with others.

[43] We agree with the third defender that treating judicial office-holders as akin to employees of the Scottish Government, and thus (where the stage 2 test was met) rendering the Scottish Government vicariously liable for them, would be inimical to judicial independence, notwithstanding the common law and statutory guarantees that judicial independence be maintained. The public may struggle to see that the judiciary was institutionally independent of the Scottish Government were the courts to treat judicial office-holders as being akin to its employees.

[44] In *Starrs* v *Ruxton* Lord Reed (page 248 C-D) emphasised the importance of judicial independence:

> "Judicial independence can be threatened not only by interference by the executive, but also by a judge's being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the executive. It is for that reason that a judge must not be dependent on the executive, however well the executive may behave: 'independence' connotes the absence of dependence."

Where an action for damages is raised against both a judicial office-holder and the executive (as being vicariously liable for the office-holder) the executive will be faced with making choices which impact upon the office-holder. The action would create a nexus between the office-holder and the executive. The office-holder might feel grateful or beholden to the

executive for defending the action. If the pursuer succeeded and enforced the decree against the executive, the executive might have to decide whether to seek contribution or indemnity from the office-holder. The executive's decision could have financial consequences for the office-holder. The public might well perceive that the office-holder might have become dependent to some degree upon the executive and that his or her judicial independence was weakened.

[45] The lack of control by the Scottish Government and the importance of maintaining judicial independence (both actual and perceived) are cogent factors which weigh heavily against judicial office-holders being akin to employees. In our view these factors are not outweighed by the factors which it is suggested point the other way.

[46] We recognise that a consequence of our conclusion is that in some cases pursuers will bear the risk of judicial office-holders not satisfying awards of damages and expenses made against them. We think it is important to put that in context. Judicial office-holders have immunity from suit in relation to the performance of their judicial functions (Page, *Constitutional Law of Scotland*, paragraph 6-39 for a convenient summary of the position). The pursuer's claims do not concern the performance or purported performance by the first defender of his judicial functions. Fortunately, claims of the sort advanced here are rare. There is a very strong public interest in maintaining judicial independence and the separation of powers, both of which are fundamental to the rule of law. In our opinion the undermining of judicial independence which would be caused by treating judicial office-holders as akin to employees of the Scottish Government in cases like this one would be a much greater mischief than the risk that pursuers might not obtain full recovery.

[47] We think it significant that the pursuer was unable to cite any authority from Scotland or elsewhere which supports the existence of vicarious liability in circumstances

such as those of the present case. We also take comfort from the fact that our conclusion is consistent with the approach which has been taken in other jurisdictions: see eg *Kemmy* v *Ireland* [2009] 4 IR 74, McMahon J at paragraphs [55]-[59]; and *AHQ* v *Attorney General* [2015] 5 LRC 542, Chao Hick Tin JA, delivering the judgment of the Court of Appeal of Singapore, at paragraph [35]. Both of those cases concerned alleged delicts committed while a judge was exercising their judicial functions. Even in cases where claims have been based on direct State liability for a breach of a State's constitution (as opposed to vicarious liability for the delict of the judge) the courts have been astute to find that the maintenance of judicial independence, the separation of powers and the rule of law have militated against the imposition of State liability (see eg *Visagie* v *Namibia* (2018) 46 BHRC 614, Damaseb DCJ at paragraphs [84] - [106]).

[48] In our opinion the Lord Ordinary ought to have found that the pursuer was bound to fail the stage 1 test. Her averments as to vicarious liability are irrelevant. The facts critical to the application of the stage 1 test did not require to be ascertained at a proof - there was no material dispute in relation to them. The action against the third defender should have been dismissed.

[49] That is sufficient to dispose of the reclaiming motions, but for completeness we shall outline our views on the other arguments which we heard.

[50] The application of the stage 2 test is very fact sensitive, and many of the relevant facts are disputed. Had we agreed with the Lord Ordinary's approach to the stage 1 test, we would also have agreed with him that the pursuer was not bound to fail to establish that the stage 2 test was satisfied in relation to the first and second incidents. The alleged incidents took place in a courthouse while the first defender was at work, and the first of them is said

to have occurred when he and the pursuer were discussing a case where she had been due to appear before him in court very shortly beforehand but the hearing was discharged.

[51] We recognise that on the face of things the third incident appears to be less obviously connected with the first defender's duties than the first and second incidents. It did not take place in a courthouse. It is said to have happened when the pursuer and the first defender were travelling to their workplaces. It does not seem to have involved a discussion about professional matters. Nevertheless, we think the Lord Ordinary went too far too fast in holding that the pursuer was bound to fail to satisfy the stage 2 test in relation to this incident. There might have been force in the pursuer's submission that the incident required to be viewed in the context of the first and second incidents which preceded it, and that it was a continuation of that earlier behaviour; and that, as is said to have been the case on those occasions, the first defender may have been exercising a degree of control over the pursuer because of his position as a sheriff. In our view these factors, and all of the other factors relevant to the application of the stage 2 test, would have been better considered once the evidence had been heard.

[52] The only relevance of the fourth incident is as part of an alleged course of harassment. The Lord Ordinary appears to have sought to apply the stage 2 test separately to each of the four incidents said to constitute harassment. We doubt if that is the correct approach when the question is whether there is vicarious liability for harassment. Generally, unless parts of an alleged course of harassment are clearly distinct and severable, we would expect the test to be applied to the course of harassment as a whole. Here, as we have already observed, the first and second incidents are more clearly connected with the first defender's duties than the third incident; but, as we have said, we would not have concluded at this stage that the pursuer is bound to fail to establish the necessary link.

Moreover, depending upon what it made of the evidence at the proof, the court might infer that the fourth incident was prompted by, and was connected to, the fitness for office complaint about the first three incidents. Applying the stage 2 test to the entirety of the course of harassment we would have concluded that the pursuer was not bound to fail to satisfy that test.

Time-bar

[53] It was common ground that the pursuer's common law delictual claims that the third defender is vicariously liable for the first two alleged assaults are time-barred. The Lord Ordinary declined to exercise the court's section 19A discretion to allow them to proceed. We would have allowed the pursuer's appeal on this point. At the time the Lord Ordinary considered the section 19A application all that the pursuer averred in support of it was that the four incidents were a course of conduct amounting to harassment. Since then the pursuer has amended her pleadings. The court now has an explanation for her failure to raise the action timeously which the Lord Ordinary did not have. Until very soon before the limitation dates for claims relating to the first and second incidents her whole focus had been on the disciplinary proceedings, the judicial review, and the reclaiming motion against Lord Woolman's decision. She only obtained litigation funding for raising an action on 2 July 2021, after the *triennium* relating to the first incident had expired and very shortly before the expiry of the *triennium* for the second incident. She took legal advice. While she was told there was a risk of not raising the action sooner, the ultimate recommendation seems to have been that service should be effected before the triennium for the third incident. She followed that advice. Since she was advised of the risks it is not clear that she would have an alternative remedy against her solicitors which

would have good prospects of success. She has, of course, her remedy against the first defender, but she would bear the risk of non-recovery from him. The delay in raising the action was not lengthy. There would have been no prejudice to the third defender other than the loss of the time-bar defence. In any case it would also have been material to bear in mind that the third defender will have to address the harassment claim at the proof, and that evidence of all four incidents will require to be heard (in relation to the harassment claim and in relation to the common law delictual claims against the first defender). In the whole circumstances it would have been equitable to exercise the court's section 19A power to allow the delictual claims of vicarious liability for the first and second incidents to proceed.

Disposal

[54] We shall allow the third defender's reclaiming motion and dismiss the action against the third defender. Since the pursuer's reclaiming motion was contingent upon the action against the third defender not being dismissed, it is refused.