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Judgment: approved by the Court for handing down | *Delivered:* **16/12/11**
*(subject to editorial corrections)**

AFTER REMITTAL, IN THE COUNTY COURT FOR THE DIVISION OF BELFAST

BETWEEN:

LOUIS McGETTIGAN

-and-

SHORT BROTHERS PLC

Her Honour Judge McReynolds

[1] Upon remittal from the High Court I heard evidence in respect of this matter at Laganside Court on 20 October 2011.

[2] **The background** is that the Plaintiff is a 56 year old man whose father was born and raised in Northern Ireland and whose mother was Belgian. The Plaintiff's religion is Catholic and he was raised and still lives in West Belfast. As a teenager he completed an engineering training course and apprenticeship in East Belfast and found employment in heavy engineering in East Belfast at the Mackie Foundry. He has been employed by the Defendant as an aircraft fitter for around 24 years. He is married and has raised a very respectable family. He describes having very much enjoyed his years with the Defendant Company and appears to have managed to remain largely unaffected by any negative issues arising from the difference between

his religious and cultural background and that of the majority of other skilled workers within this workplace and indeed that which prevailed in his previous employment. Both workforces would have been predominantly protestant.

[3] Evidence was given that in Spring 2005, another employee of the Defendant, namely P. B., also a Catholic, and employed as an aircraft fitter, sold a car to another employee of the Defendant, JB, who was a Protestant. PB had a side-line trade as a car dealer. In the context of negotiations PB met JB in the Defendant Company's car park during darkness. PB subsequently reported to the Defendant Company that during this meeting JB produced an AK47 from under a blanket on the back seat of his car and asked PB to buy it for £600.00.

[4] The court heard evidence that PB reported to his employers that he received threats and, in particular, reported that he had found in his work locker an envelope containing a live bullet, and a sympathy card with a threat which stated "we no who you lawnder money for, your names on this one taig beware." PB indicated that he reported this incident through his lead hand to his manager Gary Smith, who reported it to the Head of Security, Mr Balfour. It is accepted that Mr Balfour passed the report to the Harbour Police. Evidence was led that PB received threatening text messages suggesting he would be attacked at or about his workplace.

[5] Evidence was led that the Plaintiff inadvertently became embroiled in the situation involving PB when he too bought a car from PB, a matter which would naturally have become common knowledge within the plant.

[6] The court heard that on the 30th May 2007 the Plaintiff received a threatening text message to his mobile telephone during working hours. The message referred to the car dealer PB. It stated: "Loo we no ur m8s with dat provy bastard (PB) can u give him sum gud advice hes goin to get som of r men in shit herewe no da cunts gulty tel him 2 drop wat hes doin an fuck of r hes goin 2 get shot c can u get the fucker 2 listem cos he doesn't no how deep hes goin" Another employee (PG) received a similar message.

[7] The Plaintiff next day (31 May 2007) reported receipt of this text to his line manager. He was taken by Wendy Bailie, Human Resources Executive, to Ken Balfour the Head of Security within the Defendant Company. Mr. Balfour referred the message receipt to the Belfast Harbour Police. The Plaintiff and PG were interviewed by the police in an office in the Defendant's premises at around 2.00 pm that day. This procedure was relatively public.

[8] The Plaintiff's mobile telephone was taken by the police from the 1st June 2007 and was not returned to him until the 14th August 2007. Absolutely no forensic procedure took place over these Summer months and the telephone was simply kept in a drawer within the premises of the Harbour police. It transpires that the telephone number from which the message emanated was an untraceable 'Pay as you go' mobile number.

[9] During this period the Defendant Company took no steps in respect of any internal investigation, risk assessment or policy announcement. No-one from either Human Resources or the Company's ostensibly sophisticated Security Team accessed even the most basic employment records for JB, whose name had been put forward by EB , PG and the Plaintiff as a possible reasonable suspect or line of enquiry. Whilst the

company concedes that it holds ,for example, original job application forms with standard criminal record check questions, no-one considered it proportionate, reasonable nor appropriate to examine that of JB or any other staff working regularly in the vicinity of the Plaintiff and/or his colleagues of the same religion who had received the intimidating messages. The telephone numbers offered at recruitment stage or health and safety/accident at work contact details were also unchecked.

[10] It was conceded that it is likely Lead Hands on various work sections have current mobile telephone numbers which they use to access employees for short notice sickness cover or overtime. These were not sought or checked.

[11] The court heard evidence that there is random checking of car boots at the premises. Ultimately, in an unrelated set of circumstances, an allegation of theft of company property arose out of inspection of the boot of JB and he was afforded the opportunity to resign in 2009. It was clear, however, that during this period in summer 2007 no increase was directed in respect of the checks on the boot of JB or any other persons working in proximity to the Plaintiff.

[12] Naturally the Defendant, as a large employer, has policies on bullying. No aspect of the procedure set out in policy documents was implemented. No announcement was made to the effect that there was reason to believe unpleasant or intimidating texts had been received within the workforce. The Defendant Company did not make any announcement on notice boards or elsewhere to the effect that such conduct would be dealt with as a serious disciplinary matter and/or that the Company would actively promote prosecution.

[13] No private investigators of the type regularly engaged in embezzlement or other workplace crime situations were involved to operate in co-operation with the Harbour Police Service.

[14] On 16 August 2007, two days after the Plaintiff's mobile phone was returned to him, the Plaintiff received two further text messages on his mobile phone during working hours. The first stated; " U shudnt have went 2 da cops u yela taig cunt c wat ur provy m8s goin get now watz ur back u slimy fenian fuck we r goin shoot dat ira cunt". The second stated; "Ur as bad as dat provy cunt (PB) us r all touting 2 da rong ones we no all watz ur back we run shorts an der 2 many of u taigs der now." These texts were also received by his colleague PG. The Plaintiff informed his manager Stephen Ingram of the texts. The Plaintiff and PG tried to report these texts to Ken Balfour. However, they were told by Wendy Bailie that he was not available and that they would have to postpone their concerns until Monday, i.e. 20th August 2007.

[15] The Defendant Company does have a counselling service provider, known as Carecall. The Plaintiff, however, is a relatively private person who actually did not even want his wife to know the full extent of what was happening.

[16] Following the recommencement of the intimidating texts immediately after the return of the telephone, the Plaintiff was naturally further alarmed. I consider that this was understandable given the implication that the messenger was aware the Plaintiff had co-operated with police, and taking account of the chilling and seemingly well informed content included the observation "we run shorts".

[17] The Plaintiff was clearly concerned that he was being abandoned by local management. He decided to write to the company's Chief Executive, Michael Ryan and copied the letter to Rory Galway, Head of Equal Opportunities on 20 August 2007. He set out the history and stated that his feelings as follows; "that the company's lack of action to combat and handle the matter is now putting my own personal safety at great risk. I have little belief that this problem will resolve itself. The time that I am taken to help police inquiries is time off work, of the shop floor and now other employees seem to know what it is about. This makes things worse for myself and others concerned. I feel saddened that I have to make this formal complaint and with the way the company is handling this matter. I have been an employee of this company for 20 happy, hassle-free years and I hoped that the rest of my working years would follow this trend. It is distressing that a few individuals have the power and ability to ruin a place in which I have so many good friends."

[18] On 23 August 2007 Ken Balfour, Head of Security, responded in a letter posted to the home of the Plaintiff. The Plaintiff's wife opened it. The letter served no purpose other than upset to the wife of the Plaintiff, who had hitherto limited knowledge of the situation. Effectively, the letter set out the company's position as one of utter detachment from the experiences of the Plaintiff and/or the police investigation. It clearly stated that "the Company was not involved in the investigation and had no information to give to you." The letter is singularly unsupportive of the Plaintiff as an employee of twenty years standing. The tone of the correspondence can only have made him feel isolated and expendable.

[19] It appears from the oral evidence that the Harbour Police service was ultimately able to rule out any current paramilitary connection in

respect of the party identified as a possible suspect. This was only communicated during the oral evidence and it is not clear when this was first apparent to either the police or company. There was also disquieting oral evidence in respect of the antecedents of the individual in question. It is not clear whether these had been declared at recruitment stage. This is concerning given the nature of the other business of the Defendant Company. The company had not made any referrals to the charity which supplies threat assessments to Social Services and the Children Order Courts in respect of the level of paramilitary threat prevailing against, for example, any absent parent seeking to recommence contact which might place the children at risk.

[20] The Plaintiff's telephone was taken again on 20 August 2007. The Plaintiff contacted management at the offices of the parent company in Montreal in October 2007. By that stage PB had left the firm and two colleagues who had received identical text messages were on sickness leave. The Plaintiff, having received no assistance from local management, save for a room in which to speak to police, set out the history in an Email dated 25 October 2007 to the Canadian office. The response was a garbled Email suggesting "an internal investigation was conducted." It seems the Plaintiff was confused with PB as there was reference to an Industrial Tribunal. PB was bringing proceedings of this kind against the company but the Plaintiff, undoubtedly because of his considerable personal fortitude, was the one recipient of the text messages who was still working. When the error was pointed out he received an apology for the error and no further assistance. Soon after this his telephone was again returned.

[21] Almost as soon as the telephone was returned, the Plaintiff received the following message dated 22 November 2007:

"Loo keep da fuck out of things dat don't concern u r u will c a gun in ur head taig rem we can c an here wat u do in here watch ur gub r ull get hurt taig."

Thirty minutes later he received another which read:

"Wel c how hard an brave u taig cunts r now watch usins drop 1by1 rem we r da people."

Two and a half hours later he received a further message. It read:

"Rem we r beside u hearin an watching so keep ur taig gub shut r u get 1 in head no more warnins."

[22] These further messages were reported and the Plaintiff was again interviewed by Wendy Bailie. It seems the Plaintiff desisted from use of his telephone and reported the perceived flaws in the Harbour police investigation to the Police Ombudsman. The PSNI then took his telephone. He continued to work through the darker part of the year but was signed off on sickness leave on 17 March 2008. The catalyst to this sickness leave was that a colleague who had received the text messages gave the story to the press and the Plaintiff felt this rendered him identifiable and vulnerable. He was prescribed Temazepan but found sickness leave difficult and so he arranged to see a locum doctor in his GP Practice who he says he found less insistent than his regular GP and states he persuaded the locum doctor to sign him off sickness leave. Insomnia became a major issue.

[23] In November 2008, with the return of the darker evenings, his symptoms again deteriorated. By then it was clear he might be required as a witness in the Tribunal case of PB. The Plaintiff returned

to his usual work and in early 2009 a Senior member of staff who had worked with him previously asked him to move to another department. He made it clear in evidence that the move was motivated by factors other than the messages. Dr Potter, Consultant Psychiatrist for the Plaintiff, states;-

> "My initial diagnosis is post traumatic anxiety state, the initial trauma being the threatening text messages, but in my opinion his symptoms have been perpetuated and exacerbated by his perception of the failure of his employer to take action to investigate, identify and abolish this harassment."

[24] Dr Chada, Consultant Psychiatrist for the Defendant appeared to consider that his symptoms would have ICD 10 diagnosis of mild adjustment disorder but resolved so that beyond Spring 2008 they no longer met the level of intensity required for an ongoing diagnosis of ICD 10 mild adjustment disorder, so there was no lasting psychiatric injury.

[25] The Plaintiff's seeks damages pursuant to the Protection from Harassment (NI) Order 1997. It is the Plaintiff's case that the texts were sent to him by another employee of the Defendant, namely JB, and/or other employees of the Defendant. It is argued on behalf of the Plaintiff that the texts were such as to have severely harassed him in the workplace. It is the Plaintiff's case that as the said texts were sent by another employee of the Defendant, JB, and/or other employees of the Defendant, that the Defendant is vicariously liable in respect of the harassment of the Plaintiff thereby.

[26] The Defendant asserts that the fact the texts were drafted in such a style as to convey the impression that they were written by a co-worker

of the Plaintiff's, this does not by any means establish that the texts were actually written by an employee of the Defendant's. It further suggests that even if the Court were to find as a fact that the texts were sent by an employee of the Defendant's, such actions lay clearly outwith the scope of that unidentified person's employment. It argues that because it is a manufacturer of aircraft and aircraft parts, there is no close connection between the assembly work engaged in by the Defendant's employees and the sending of texts, threatening or otherwise, by an employee of the Defendant's.

[27] The identifiable issues for the court are the following:-

(a) Did the texts amount to harassment in terms of the definition of the Statute which gives rise to the alleged breach of statutory duty?
(b) Does the evidence satisfy the court that on the balance of probabilities the texts emanated from an employee of the Defendant Company?
(c) Was the sending of the texts done in the course of the employment of the wrongdoer as defined by the currently applicable test, so as to render the Defendant Company vicariously liable?

In the event that these questions are answered in the affirmative the question arises whether the Defendant can avail of any defence and, if not, the Court must determine what remedy is appropriate.

[28] Article 2 of the Protection from Harassment (NI) Order 1997 states:-

"2(2). In this order references to harassing a person include alarming the person or causing the person distress.

(3) For the purposes of this order a "course of conduct" must involve conduct on at least 2 occasions and "conduct" includes speech.

Article 3

(1) A person shall not pursue a course of conduct –

(a) Which amounts to harassment of another; and

(b) Which he knows or ought to know amounts to harassment of the other."

In the key judgement in respect of vicarious liability for harassment in the course of employment, namely Majrowski –v- Guy's & St. Thomas at 2006 UK HL 34 the House of Lords provided some guidance in respect of the level of gravity required for behaviour to amount to harassment. There are at least two limitations on it. The first is that, under the legislation itself, there must be a series (at least two) of acts in order to constitute 'harassment' The second is that, as the primary remedy is criminal under the legislation, in order to constitute harassment at all the conduct must be sufficiently serious to be potentially criminal. Both of these points are illustrated in Sunderland CC v Conn *[2008] IRLR 324, CA* where the judge only upheld two incidents by his superior relied on by the claimant; as the second one was merely a general display of bad temper falling 'well below' the criminal threshold the Court of Appeal held that only one incident counted, and so harassment was not established. However, in Veakins v Kier Islington Ltd [2009] EWCA Civ 1288 the Court of Appeal (drawing on the non-employment case of Ferguson v British Gas Trading Ltd [2009] 3 All ER 304, CA) held that (1) while the criminal liability point must be 'kept in mind', it does not go as far as to mean that there must be a real possibility of an actual criminal prosecution and (2) the primary test (from the speeches of Lord Nicholls and Lady Hale in Majrowski) is whether the conduct in question went beyond the normal irritations and annoyances of life and constituted **'oppressive and**

unacceptable conduct' capable of being unlawful harassment. The latter point was taken up in the first instance decision in Dowson v Chief Constable of Northumbria Police (No 2) [2010] EWHC 2612, QB with the interesting twist that the test must be applied in the social and working context in which the conduct occurred. On that basis, the decision was that there was no unlawful harassment of six police officers by their superior, given that they were case-hardened officers used to dealing with career-hardened criminals in a stressful working environment--the superior's actions may have been unacceptable and harsh, but they did not cross the threshold of being oppressive. The decision refers to one of the criteria under the equivalent English legislation being torment of the victim 'of an order which would sustain criminal liability'. In Veakins –v- Kier Islington Limited 2009 EWCA CIV 1288 the Court had referred to the words of Lord Nicholls in Majrowski where he stated:-

> "Where … the quality of the conduct said to constitute harassment is being examined, the Courts would have in mind that irritations, annoyances even major upsets, arise at times in everybody's day to day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable and conduct which is oppressive and unacceptable."

Applying the developed test to the evidence in this case I am satisfied that the texts were sufficient in number and content to pass the threshold in respect of torment of the victim which would sustain criminal liability and they were both oppressive and unacceptable.

[29] Having established that the texts amount to harassment in terms of the definition of the Statute which gives rise to the alleged breach of statutory duty, the court must ask whether based on the evidence it is satisfied on the balance of probabilities that the texts emanated from an

employee of the Defendant Company. The Defendant Company points out that an employee could purchase a pay as you go telephone and purport to harass himself in a false claim. This is true, just fabrication is possible for as any tripping or minor whiplash claim. The psychiatric reports in respect of this Plaintiff, however, speak volumes in terms of his integrity. They make it clear that, for example (as verified by personnel records in the possession of the Defence Psychiatrist), many years ago he refused promotion on the basis he considered it an unfair 'Fix'. Similarly the downplaying of his anxiety displayed in what the psychiatrist describes as his 'stoical' personality is quite significant. I had the opportunity to hear the evidence of the Plaintiff and the two colleagues who gave evidence and I observed their demeanour. The Plaintiff is an impressive witness. Cross reference to contemporaneous documents reinforces the view that he is an accurate historian. In addition, I have considered the content of the messages. Initially they appeal to the Plaintiff as an 'old hand', a mature man who demonstrates the wisdom of adopting a low profile within a workplace in which he is part of a religious minority. When it is apparent he has reported the incident the level of threat escalates. The content of such superfluous asides as "rem we r da people" runs contrary to the suggestion of fabrication. I take account of the limited likelihood the Plaintiff's colleague would knowingly have colluded in a fabrication which involved his submitting a phone to the police on which there were inappropriate jokes of the type which appeared on the forensic report.

[30] Having rejected the speculation as to fabrication, I then take account of not only the content but also the timing of the texts which arrived on 16 August and 22 November, very soon after return of the telephone on each occasion. I have considered the finding of fact in the tribunal case brought by PB that the gun, bullet and sympathy card episodes had 'a

work connection'. I have taken account of the fact all recipients were employees and co-religionists. Finally, I have had regard to the evidence of the previous (albeit very historic) record and of the evidence of subsequent bad character of JB. On analysis of the totality of the evidence, I am satisfied on the balance of probabilities that these messages emanated from an employee of the Defendant Company.

[31] In respect of vicarious liability in recent years the courts have moved some distance from the confines of the long established restrictive 'Salmond test' , also known as the 'authorisation test'. This covered wrongful acts authorised by an employer and a wrongful or unauthorised mode of doing something authorised by the employer. In Lister-v- Hesley Hall Ltd 2001 UKHL 22 the basis for holding an employee vicariously liable for his employees' acts was expressed to have a wider more fundamental basis. Lord Steyn defined it as follows:-

> "The question is whether the employee's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."

The catalyst for much of the development within this area has come from claims in respect of child sex abuse both in this jurisdiction and in Canada. Counsel for the Defendant argues that the facts of the instant case have very little in common with the sex abuse authorities such as Lister. There are, however, acknowledgeable parallels between the two forms of wrongdoing.

[32] As I have indicated, the key decision on vicarious liability for harassment is the House of Lords decision in Majrowski which owes much to the analysis of developments set out by Auld LJ at Court of Appeal stage. He referred to Lord Steyn's judgment in Bernard –v- The Attorney General of Jamaica (Privy Council Appeal No. 30 of 2003)

where he combined the Lister and Dubai Aluminium –v- Salam & Others 2003 2AC407 tests of closeness of connection, and reasonably incidental risk, with the broad proposition, "whether, looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable." Auld LJ said, "the criteria of "close connection" and "reasonably incidental risk" are the means in this context by which the justice and reasonableness of imposing vicarious, that is, absolute liability are determined." He went on to say:-

> "Nowadays, employers, whether public or commercial undertakings, are expected to be alert to all sorts of discrimination and expectation by their employees, which may include harassment, in or from the workplace, whether of fellow employees or third parties, and to establish good working practices and procedures to warn and/or guard against such abuse. If, for want of such practices or procedures falling short of negligence, or if, despite them, the nature of the employers undertaking and/or circumstances of a claimant's exposure to his employees' conduct are such as, in the view of the Court, to render harassment in breach of the Act a reasonably incidental risk of the undertaking and/or employment, it may consider it just and reasonable in the circumstances to hold the employer vicariously liable."

[33] Lord Steyn's approach of looking at the situation " in the round " was echoed in the Court of Appeal decision in Gravill-v- Carroll [2008] EWCA Civ 689 which concerned an assault by a semi professional rugby player on another. Sir Anthony Clarke MR reviewed the development of the test as follows:-

> "These principles were affirmed by the Privy Council in *Bernard v Attorney General of Jamaica*, where the judgment of the Judicial Committee was given by Lord Steyn. At [18] he summarised the relevant principles:

"18. In *Lister* a warden of a school boarding house had sexually abused resident children. The question was whether the employers were vicariously liable. In the leading opinion a single ultimate was question posed, namely [at 230C]:

"…whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."

The four substantial opinions delivered in *Lister* revealed that all the Law Lords agreed that this was the right question. On the facts the members of the House unanimously took the view that the answer was "yes" because the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the boarding house. This decision did not come out of the blue. On the contrary, it was a development based on a line of decisions of high authority dating from *Lloyd v Grace, Smith & Co* [1912] AC 716 where vicarious liability was found established in cases of intentional wrongs. *Lister* is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment. It was held that the traditional test of posing, in accordance with Salmond's well known formula, the question whether the act is "a wrongful and unauthorised *mode* of doing some act authorised by the master" is not entirely apt in cases of intentional wrongs: *Salmond, The Law of Torts,* 1907, 83, now contained in the current edition of *Salmond and Heuston, The Law of Torts,* 21st ed., 1996, 443. This test may invite a negative answer, with terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability. The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable…."

20. Lord Steyn then referred in [19] to *Dubai Aluminium* and the leading opinion of Lord Nicholls, from which he cited this passage from [23]:

"…Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was

authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

Lord Steyn added:

"Throughout the judgments there is an emphasis on the proposition that an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carried on."

21. As we see it, the authorities show that the essential question is that posed in *Lister* and adopted in *Mattis,* namely whether the tort is so closely connected with the employment, that is with what was authorised or expected of the employee, that it would be fair and just to hold the employer vicariously responsible. In answering that question the court must take account of all the circumstances of the case, as Lord Steyn put it, looking at the matter in the round. The authorities show that it will ordinarily be fair and just to hold the employer liable where the wrongful conduct may fairly and properly be regarded as done while acting in the ordinary course of the employee's employment (per Lord Nicholls). This is because an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business being carried on (per Lord Steyn).

[34] Sir Anthony Clarke MR, in applying the test to the facts in Gravill-v-Carroll observed the following:-

25. "On any view of the relevant test, the first defendant was acting in the course of his employment when he punched the claimant. Not only was there a close connection between the punch and his employment but the punch amounted, in the words of Lord Hobhouse, to a failure to perform his duty. His employment as a second row forward did not merely give the first defendant the opportunity to punch the claimant, it was an act done in the course of that employment.

26. The next question is whether the close relationship between the punch and the employment is such that it would be fair and just to hold the club liable. In our judgment the answer to that question is plainly yes. It is now recognised that it is possible to be very seriously injured as a result of foul play during a rugby match. It is incumbent on both players and clubs to take all reasonable steps to eradicate, or at least minimise, the risk of foul play which might cause injury. As we see it, this involves clubs taking proactive steps to stamp it out. There is an obvious temptation for clubs to turn a blind eye to foul play. They

> naturally want their side to win and, no doubt, to play hard to do so. The line between playing hard and playing dirty may be seen as a fine one. The temptation for players to cross the line in the scrum may be considerable unless active steps are taken by clubs to deter them from doing so.

The Master of the Rolls quoted from the decision of the Canadian Chief Justice in one of the sex abuse cases as follows:-

> 28. In the course of her judgment in *Bazley* McClachlin J said at [41] that vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. She added:
>
> "Where this is so, vicarious liability will serve the policy considerations of an adequate and just remedy and deterrence."

He concluded;

"We answer the question whether the tort was so closely connected with the employment, namely the playing of rugby for the club, that it would be fair and just to hold the club vicariously responsible for the injury to the claimant in the affirmative. The punch is fairly and properly regarded as having been carried out while the first defendant was acting in the ordinary course of his employment, albeit part time employment, as a rugby player. Looking at the matter broadly, it is fair and just to hold the club liable for the punch in circumstances in which it can fairly be regarded as a reasonably incidental risk to the playing of rugby pursuant to the contract"

[35] The approach of looking at the situation of **close connection** 'in the round' taking account of the nexus between creation or enhancement of risk and the wrong which accrues therefrom is an approach which our courts have extended therefore considerably beyond the clear risk enhancement/wrong accrual scenario of sex abuse and indeed as far as the semi professional part-time rugby field.

[36] Two years before Gravill, the House of Lords in Majrowski stressed the policy considerations in similar terms to those used by the Master of Rolls in Gravill and by the Canadian Chief Justice in Bazley. Lord Nicholls stated:-

> "If, acting in the course of his employment, one employee insults another, the employer is liable. Why should harassment be treated differently?"

He had earlier set out;

> "In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of good practice by their employees."

[37] Applying the test in Majrowski, as developed in the line of cases from Lister, the Court is obliged to ask the question whether the harassment was so **closely connected** to the employment on the shop floor of this aircraft factory to render the Defendant vicariously strictly liable for the consequences of the intimidation implicit in the harassment. Clearly the court is obliged to 'look at the situation in the round' and take account of the policy considerations which underpin the revised test. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. The nature and circumstances of the Plaintiff's employment were that this company had a predominantly Protestant workforce and is located in a predominantly Protestant part of the city. It was aware of the receipt by the Plaintiff of a series of intimidating messages. It had policies which were not implemented. In this case there is a significant identifiable nexus between the creation or enhancement of risk resulting from the 'hands off' approach of the Defendant Company (typified in the letter of Mr Balfour dated 23 August 2007 stating that the company was 'not involved' in the investigation) and the wrong which demonstrably accrued from the openly expressed position of the Company typified in the text despatched a week earlier stating "yes r touting 2 da rong ones we no

all watz ur back we run shorts an der 2 many of u taigs der now". The reality of this shop floor is that, with full knowledge that a long serving employee of good standing and proven integrity reported chillingly frightening sectarian texts to various managers, the employer did nothing beyond providing a room for police interviews. It is the conclusion of the Court that the harassment in the form of text messages emanated from an employee and was so **closely connected** with the nature and circumstances of the Plaintiff's employment (and was reasonably incidental to it) that it is fair and just to find this employer liable in the absence of any valid defence.

[38] By way of defence, the Defendant refers to the possibility of floodgates being opened by a finding being entered against the Company in this case. That argument was specifically rejected in the Majrowski case. At Paragraph 30 of the House of Lords judgement of Lord Nicholls stated "These difficulties, and the prospect of abuse, are not sufficient reasons for excluding vicarious liability." It is also suggested that the Plaintiff should have availed of counselling. Case law does not provide any absolute defence of this kind and the medical evidence does not tend to suggest that the Plaintiff would necessarily have benefited from this. None of the statutory defences have been established.

[39] In respect of damages the court takes account of the content of the medical reports to which reference has been made. In assessing general damages I have had regard not only to the relevant civil authorities but also to the level of damages awarded in certain Criminal Injury Cases arising out of terror induced mild adjustment disorders and post traumatic anxiety involving insomnia, including the cases of the children involved in the Holy Cross dispute and those involved in the aftermath of the Banbridge and Omagh bombings. I quantify general damages in this case in the sum of £11,000.00. I do not consider

aggravated damages to be appropriate. I award special damages of £500.00 and enter a decree in favour of the Plaintiff in the sum of £ 11,500.00.