OUTER HOUSE, COURT OF SESSION

[2023] CSOH 17

PD252/21

OPINION OF LORD CLARK

In the cause

X

Pursuer

against

Y, THE LORD ADVOCATE
and
THE ADVOCATE GENERAL FOR SCOTLAND

Defenders

Pursuer: McBrearty KC, A McKinlay; Urquharts, solicitors
Third Defender: Springham KC, Scullion; Scottish Government Legal Directorate
Fourth defender: Pirie KC; Office of the Advocate General

2 March 2023

Introduction

[1] The pursuer, who is a legal practitioner, seeks damages in the sum of £120,000. Her claim is based upon an alleged series of assaults and harassment in 2018 said to have been committed by the first defender, who is a sheriff.

[2] The pursuer initially contended that the Scottish Ministers are vicariously liable for the first defender's actings and cited the Lord President as the second defender and the Lord Advocate as the third defender. The pursuer then amended her pleadings to abandon the case against the second defender and to aver that the Crown is vicariously liable, adding the

Advocate General for Scotland as the fourth defender. The pursuer's position now is that the Advocate General is the appropriate Law Officer to represent the Crown, with the Lord Advocate retained as a defender only because the Advocate General's position is that, if there is vicarious liability, it is the Lord Advocate who is the appropriate Law Officer.

[3] The Lord Advocate and the Advocate General raised three arguments to be dealt with at debate. Firstly that the Crown has no vicarious liability for the alleged actings. Secondly, in any event the case is, at least in part, time-barred. Thirdly, the Lord Advocate says that she is not the appropriate Law Officer to represent the Crown and it is the Advocate General, while the Advocate General says the opposite. A debate was held and this Opinion deals with these three issues. A proof will be required for determination of the pursuer's action against the first defender and, if the debate arguments fail, the Crown. The first defender did not require to take part in the debate.

[4] At an early stage in this action, in light of the particular circumstances, a Lord Ordinary granted applications by the pursuer and the first defender for anonymity, allowing the pursuer to be referred to as "X" and the first defender as "Y".

The pursuer's case

[5] The nature of the conduct alleged, and the dates when it is said to have taken place, are material factors to be considered in determining the issues in this debate. The pursuer avers that on four separate occasions the first defender assaulted her. These are claimed to be individual delictual acts at common law and, taken together, to also constitute a chain of harassment under the Protection from Harassment Act 1997. The allegations are now set out; it is important to emphasise that this is the pursuer's version of events and that the first defender denies any wrongful conduct.

First allegation

[6] On 18 May 2018, the pursuer was in a court building to conduct a jury trial before the first defender. The trial was unable to start due to technical difficulties with evidence and the jurors were sent away. The pursuer later encountered the first defender at the reception area. She apologised for the technical difficulties. The first defender told her not to worry and placed his hand on her cheek without her consent. In so doing he assaulted her.

Second allegation

[7] On 5 July 2018, the pursuer was at the court to conduct solemn business. The first defender directed his bar officer to tell the pursuer that he wanted to see her in chambers. The pursuer was led to the first defender's chambers by the bar officer. The first defender told the pursuer to sit and the bar officer to leave. The first defender came from behind his desk and hugged the pursuer without her consent. He engaged her in conversation, using inappropriate phrases such as "your pretty face". The pursuer considered she was unable to leave, given the status of the first defender and that the meeting was taking place in the secure area of the court building. The first defender again approached the pursuer and hugged her. He allowed his face to linger against her shoulder. He maintained the position until the pursuer indicated her desire to leave. She was distressed. The first defender indicated the pursuer would not be able to get out without a pass. He walked her down a corridor and opened a door which led towards a courtroom. As the pursuer passed through the door the first defender patted her twice and firmly on the bottom. The pursuer ran towards the public area. The conduct described was unpermitted and constituted an assault.

Third allegation

[8] On 19 July 2018, the pursuer boarded a train and took a seat. She was approached by the first defender. He said he had been looking for her. He sat on the adjacent seat and engaged her in conversation. As he did so, he put his left hand on the inner thigh of the pursuer's right leg. The pursuer had to move her bag onto her lap in order to prevent the first defender from doing so. The first defender's conduct was unpermitted and constituted an assault.

Fourth allegation

[9] The pursuer reported the first defender's conduct to her superiors. A complaint was made to the Judicial Office on 7 August 2018. On 24 August 2018 the first defender made a FaceTime call to the pursuer's iPhone. The pursuer did not answer the first defender's call. She reasonably believed the first defender's call to be in response to the complaint. A further complaint was made to the Judicial Office in response to this incident.

The first defender's position

[10] The first defender denies that he assaulted or harassed the pursuer and the defences set out his account of what in fact occurred. As this will be a matter to be determined at proof and, for the purposes of this debate, the pursuer's pleadings are taken *pro veritate,* the first defender's position does not require to be explained in any further detail.

The issues

[11] The court had the benefit of detailed written submissions for each party, and then oral submissions over the two-day diet of debate, with reference to many authorities. The

issues are now dealt with in turn and, for each issue, it will suffice to briefly summarise the parties' submissions and then explain my decision and the reasons for reaching it.

Issue 1: Does the Crown have vicarious liability for the conduct alleged against the first defender?

Relevant statutory provisions

[12] For present purposes, the key provisions of the Crown Proceedings Act 1947 are as follows:

> "2 - Liability of the Crown in tort.
>
> (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—
>
> (a) in respect of torts committed by its servants or agents; …
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.
>
> …
>
> (5) No proceedings shall lie against the Crown by virtue of this section 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.
>
> …
>
> 38 - Interpretation
> …
>
> (2)…
> 'Agent', when used in relation to the Crown, includes an independent contractor employed by the Crown;
>
> …

> 'Officer', in relation to the Crown, includes any servant of His Majesty, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown and a member of the Scottish Executive;…"

Submissions for the Lord Advocate

[13] On the first part of the test for vicarious liability (the nature of the relationship), the law was now as stated by Lady Hale in *Various Claimants* v *Barclays Bank plc* [2020] AC 973 at [27], under reference to *Various Claimants* v *Catholic Child Welfare Society* [2013] 2 AC 1 at [35]; *Cox* v *Ministry of Justice* [2016] AC 660 and *Armes* v *Nottinghamshire County Council* [2018] AC 355. Given what is said in those authorities, the admissions by the pursuer alone pointed strongly in the direction of their being an insufficient relationship to give rise to a vicarious liability. The Scottish Ministers have only a formal role in the appointment of a sheriff or in the process for determining whether a sheriff remains fit for office. The appointment is made by the monarch. The First Minister makes a recommendation. Pay and conditions for sheriffs is a reserved matter. The Scottish Ministers are prohibited by statute (and constitutional principle) from interfering with a sheriff's exercise of his or her functions (section 1 of the Scotland Act 2008). These factors meant that the Scottish Ministers have no vicarious liability for the first defender.

[14] Vicarious liability for the acts of members of the judiciary would be inimical to judicial independence. Such reported cases as exist (of judicial office holders being sued for damages) have not been based on vicarious liability. Rather the individual office holder has been sued alone: eg *Russell* v *Dickson* 1997 SC 269; *McPhee* v *Macfarlane's Excrs* 1933 SC 163; *McCreadie* v *Thomson* 1907 SC 1176. Where there has been any discussion of vicarious liability, it has either been conceded as inapplicable (*Mazhar* v *Lord Chancellor* [2020] 2 WLR

541, at [15]) or seen as incompatible with the separation of powers (*Wood* v *Lord Advocate* 1996 SCLR 278).

[15] On the second part of the test (the connection between the relationship and the wrongdoing), the pursuer's averments did not set out a sufficient closeness of connection: *Various Claimants* v *Wm Morrison Supermarkets plc* [2020] AC 989, Lord Reed at [23]. The mere fact that employment gave the person the opportunity to commit the wrongful act would not in and of itself suffice for imposing vicarious liability (Lord Reed at [35], citing *Morris* v *C W Martin & Sons Ltd* [1966] 1 QB 716). Under reference to *Warren* v *Henlys Ltd* [1948] 2 All ER 935, Lord Reed explained (at [41]-[43]) that if a delict is committed in relation to a personal matter affecting the wrongdoer's personal interest (or in pursuit of his own private ends), vicarious liability will not arise. There was nothing to suggest any connection between the first defender's position as a sheriff and the wrongdoing (beyond the mere fact that being a sheriff gave him the opportunity to commit the acts).

[16] Separately, if the alleged acts of the first defender were considered to be closely connected to that which he was authorised to do, the consequence of section 2(5) of the 1947 Act (quoted above) is that there can be no liability on the part of the Crown.

Submissions for the Advocate General for Scotland

[17] The Advocate General adopted the Lord Advocate's argument on the second stage of the test for vicarious liability. To find that the wrongdoer was in pursuit of a personal interest rules out vicarious liability: *Various Claimants* v *Wm Morrison Supermarkets plc*, at [24], [26], [36] and [47]. Sexual assault has nothing to do with any shrieval function. On the first stage, and the questions of whether the sheriff is one of the Crown's "servants or agents", and, if so, whether he was, in the alleged acts, "discharging or purporting to

discharge any responsibilities of a judicial nature vested in him", the Advocate General wished to reserve the right to make submissions on those matters should the case against him go to proof.

Submissions for the pursuer

[18] In relation to the first stage of the analysis there was a relationship that is "akin to that between an employer and an employee": *Various Claimants* v *Catholic Child Welfare Society*, Lord Phillips at [47]; *Various Claimants v Barclays Bank plc.* In terms of section 2(1) and 2(5) of the Crown Proceedings Act 1947, sheriffs are "servants or agents" of the Crown. They are appointed by the monarch on the recommendation of the First Minister after consultation with the Lord President. The exclusionary wording in section 2(5) implied that the Crown would otherwise have vicarious liability for judicial office and there was no question of the exclusion in section 2(5) applying on the facts of this case.

[19] On the second stage (closeness of connection), in *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215 it was held that an employer could be liable for the criminal acts of his employees if those acts were committed in circumstances brought about by the nature of the employment. The precise nature of the necessary link between the employment relationship and wrongful acts has proved difficult to define, as shown in several cases: *Vaickuviene* v *J Sainsbury Plc* 2013 SLT 1032; *Brayshaw* v *Partners of Apsley Surgery* [2019] 2 All ER 997; *Mohamud* v *WM Morrison Supermarkets Plc* [2016] AC 667; *WM Morrison* v *Various Claimants* [2020] UKSC 12. In the last case Lord Reed recognised (at para [23]) that the "close connection" test was applied differently in cases concerned with sexual abuse. In *Various Claimants* v *Catholic Child Welfare Society* the Supreme Court quoted with approval (at [64]) Canadian authority referring to the risk created by the employer's enterprise by putting the employee in his or her position and requiring him or her to perform the assigned tasks.

[20] A broad view of the wrongdoer's employment role or functions requires to be taken when applying this stage of the test: *Mohamud* v *WM Morrison Supermarkets Plc*. The position of a judicial office holder cannot be seen as being restricted simply to the exercise of judicial functions on the bench. The very nature of a judicial office holder's position meant that they are in a position where they have power and authority over those who appear before them. The wrongful conduct alleged against the first defender was so closely connected with acts which he was authorised to do that, for the purposes of the liability of the Crown, it may fairly and properly be regarded as having been done by the first defender while acting in the ordinary course of his duties as sheriff.

Issue 1: Decision and reasons

[21] In considering whether the pursuer's case is relevant, in other words not bound to fail, I note that the concept of vicarious liability has developed over the years, with some quite significant recent decisions. Put shortly, there are two parts or stages for the test of vicarious liability to be met: that the relationship between the Crown and a sheriff is akin to that between an employer and an employee; and there is a sufficiently close connection between the conduct alleged against the first defender and that relationship.

The first stage

[22] The pursuer's contention that sheriffs are "servants or agents" of the Crown as stated in section 2(1) was not openly accepted by senior counsel for the third and fourth defenders, but no contrary submissions were made. The expression "Crown servant" for the purposes of vicarious liability is not the subject of statutory definition. (The term is defined for certain purposes, such as in the Official Secrets Act 1989, section 12(1), where there is no express

reference to judicial office holders, but that definition is, of course, only in the context of that legislation.) In the submissions, I was not taken to any judgments in which the issue of whether a judge is a Crown servant has been discussed but there is one useful example: in *Mackay and Esslemont* v *Lord Advocate* 1937 SC 860, Lord Robertson (at 868) referred to "Servants of the Crown who hold judicial offices".

[23] There is also some support for that view in academic writing, although I do not suggest that it is the prevailing view. For example, in *The Nature of the Crown* (Michael Sunkin and Sebastian Payne) the author Robert Watt, in his essay in chapter 11, describes the employment status of Crown servants in Great Britain and identifies three main classes of Crown servants, which are the civil servants, military servants, and (at p.307 *et seq*) a third class of servants that includes the police, members of the judiciary, and Ministers of the Crown. Judges are said to "Crown servants in a number of senses" (p.309). In *Wade & Forsyth's Administrative Law* (12th ed, at p.658) it is noted that:

> "Judges and magistrates are appointed by the Crown or by ministers. They are paid (if at all) out of public funds, and so may be said to be servants of the Crown in a broad sense – a sense that was brought home to them when their salaries were reduced as 'persons in His Majesty's service' under the National Economy Act 1931."

However, the authors then go on to say:

> "But the relationship between the Crown and the judges is entirely unlike the relationship of employer and employee on which liability in tort is based. The master can tell the servant not only what to do but how to do it. The Crown has had no such authority over the judges…The master can terminate their servant's employment, but the superior judges are protected by legislation, dating from 1700, against dismissal except at the instance of both Houses of Parliament. Their independence is sacrosanct, and if they are independent no one else can be vicariously liable for any wrong they may do."

[24] There are no doubt also some other pointers against judges being Crown servants. Taking an example from one Commonwealth country, the Crown Proceedings Act 1950 in

New Zealand contains specific reference to judges not being Crown servants or officers, but that is in the different context of them not being appointed by the Crown.

[25] However, there is no need to embark upon an extensive analysis of views or opinions on the matter. It is primarily a question of interpretation of the relevant statutory provisions. Section 2(1) of the 1947 Act plainly applies vicarious liability for tortious acts of Crown servants. There would be no need for section 2(5), excluding vicarious liability where responsibilities of a judicial nature are being discharged, if a judicial office holder is not a Crown servant. On that basis alone, I conclude that the pursuer is not bound to fail in her contention that a member of the judiciary is a Crown servant for the purposes of section 2(1).

[26] That view is also supported by Lord Robertson's comment and what is said about the 1931 Act in the text quoted above. Unlike the position in New Zealand, the 1947 Act makes no mention of excluding judicial office holders from that role. In addition, the fact that judicial office holders are paid their salaries by public funds on behalf of the state is relevant. It is also of importance that they are appointed by the monarch (Courts Reform (Scotland) Act 2014, section 4(2)), on the recommendation of the First Minister (Scotland Act 1998, section 95(4)). All sheriffs and judges derive their authority from the commission given by the King. Judicial office holders take the judicial oath, or give the affirmation, swearing to "well and truly *serve*" (emphasis added) the monarch. In Scotland, as a reserved matter they are paid a salary that is determined by the Ministry of Justice, as part of the UK Government, which also deals with pension matters. However, payment of the salaries is not covered by the reservation. As is noted in the explanatory notes on section L1 of Schedule 5 of the Scotland Act 1988, the Scottish Ministers are responsible for paying the salaries, which are charged on the Scottish Consolidated Fund. So far as removal of a sheriff

from office is concerned, the First Minister has that responsibility (Courts Reform (Scotland) Act 2014, section 25) albeit Parliament may intervene.

[27] But the pursuer's position that simply being a Crown servant suffices for the purpose of satisfying the first stage of the test for vicarious liability is not, in my view, correct. Section 2(1) in effect provides that the Crown will have vicarious liability, but only in the same way as others. The test of the relationship being akin to that between an employer and employee still requires to be met. The key features of Crown and government involvement in the position and payment of sheriffs have just been noted and in my opinion meet this part of the test. The independence of the judiciary does not negate the relationship being akin to that of an employer and an employee. It may seem somewhat odd that a judicial office holder, hearing a case that involves the Crown (such as this one, with the Crown present, or represented, in two guises) can do so while being a Crown servant. But the absolute and fundamental, indeed sacrosanct, principle of judicial independence excludes any conflict of interest.

[28] If there is vicarious liability, then one might arguably expect a desire on behalf of the Crown, if akin to an employer, to properly supervise judicial office holders, which the Crown does not, and indeed cannot, do. But again that is just a factor which I weigh in the balance. There are matters upon which clear guidance is given to judicial office holders. The effect of the first part of the test for vicarious liability being satisfied is not therefore inimical to judicial independence.

[29] I am unable to accept the argument by senior counsel for the Lord Advocate that section 2(5) means that there is no vicarious liability. Section 2(5) would not be expressed in those terms unless it was creating an exception to the application of vicarious liability. It is plain that the exception is restricted to matters that fall within responsibilities of a judicial

nature or which the office holder has in connection with execution of the judicial process. The concept of vicarious liability can of course catch conduct for which the person has no actual responsibility. Accordingly, the provision strongly restricts the circumstances in which the Crown can be vicariously liable for the acts of judicial office holders, with liability only for those acts outside their responsibilities of a judicial nature. It thereby leaves open the possibility of such liability in other, albeit limited, circumstances, largely dependent upon whether the second part of the test for vicarious liability is satisfied.

[30] The case law referred to by senior counsel for the Lord Advocate, about judicial office holders being sued for damages, does not support the absence of vicarious liability in those limited circumstances. In the first one, *Mazhar* v *Lord Chancellor,* the claim was principally under the Human Rights Act 1998, but importantly the "judicial act" complained of was an order made by the court. It involved discharging responsibilities of a judicial nature for which there can be no vicarious liability under section 2(5) of the 1947 Act and the concession of no vicarious liability is therefore fully understandable. In passing, it is perhaps worth observing that section 9(4) of the Human Rights Act 1998 provides that claims for damages for the judicial acts referred to in that section are to be made against the Crown. This statutory provision is of no relevance in my assessment of vicarious liability at common law, but it is of interest that it makes the Crown liable for certain judicial acts. In the other case referred to, *Wood* v *Lord Advocate*, an act by a sheriff clerk (failing to engage with a caveat) was viewed as falling within section 2(5). These cases do not therefore assist with, let alone preclude, vicarious liability for the kind of alleged acts referred to in this case.

[31] For the pursuer, reference was made to a case that was proceeding in England (and in the meantime has now settled) where a judicial office holder sued the Crown as vicariously liable for alleged mistreatment by high-ranking members of the judiciary. In

July 2021, the Ministry of Justice conceded that the Crown has vicarious liability. Senior counsel for the fourth defender confirmed that this had occurred. The fact that the Crown made such a concession can be of no material influence upon my decision, but it is perhaps an illustration of the Ministry of Justice or its advisers reaching that view when applying the modern case law.

[32] The pursuer is not therefore bound to fail in meeting the first part of the test for vicarious liability.

The second stage

[33] In *WM Morrison* v *Various Claimants* a supermarket was held not to be vicariously liable when an auditor, who had a grudge against the company, released confidential data relating to a large number of employees. In relation to this second part of the test, Lord Reed, at para [25], referred to the authoritative statement of Lord Nicholls of Birkenhead in of *Dubai Aluminium Co Ltd* v *Salaam* [2003] 2 AC 366, at [23]:

> "in a case concerned with vicarious liability arising out of a relationship of employment, the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. "

However, Lord Reed also recognised (at [23]) that the "close connection" test was applied differently in cases concerned with sexual abuse "which cannot be regarded as something done by an employee while acting in the ordinary course of his employment". Lord Reed observed that:

> "Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused".

[34] The law regarding this second stage of the test was reviewed in *Various Claimants* v *Catholic Child Welfare Society* (at [62] *et seq*). The Supreme Court quoted with approval (at [64]) Canadian authority to the effect that:

> "…there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks."

Lord Phillips also stated, (at [86]):

> "Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link."

[35] It is well-established that vicarious liability can extend to liability for a criminal act if the act was committed in circumstances brought about by the nature of the employment: *Lister* v *Hesley Hall*. In that case, there was vicarious liability for sexual assault by a warden, with pastoral duties towards children whom he abused. Lord Millett stated, (at [82]):

> "In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable. The same would be true of the groundsman or the school porter. But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys."

[36] If the underlying wrongful conduct is harassment, vicarious liability can again apply: *Majrowski* v *Guy's and St Thomas's NHS Trust* [2006] UKHL 34, although it must of course

depend upon the facts. In *Vaickuviene* v *J Sainsbury Plc*, the employer, Sainsbury's, was held not responsible for the harassment and murder of a member of staff by a fellow employee. It was held to be impossible to categorise his actions as closely connected with what he was employed to do. Sainsbury's objectives from employing the wrongdoer did not carry with them a serious risk of him committing the kind of wrong which he in fact committed. The mere bringing together of persons as employees was insufficient to impose vicarious liability for all the actings of each employee towards the other. The Lord Justice Clerk (Carloway) (as he then was) said at para [38]:

> "the courts must be careful to ensure that the future development of the law, particularly in an effort to deal with particular controversies such as child sex abuse, does not undermine too deeply the need for certainty in the field of employers' liability in general."

[37] In *Brayshaw* v *Partners of Apsley Surgery*, a medical practice was held not to be liable for a locum GP employed by them who caused harm to a patient by negligently advising her to stop taking conventional medicine and instead to find healing through God. The court distinguished *Lister* on the basis that it had involved a warden with pastoral duties towards children who he abused, whereas the GP locum in this case had not been engaged to evangelise or indoctrinate anyone. In *Mohamud* v *WM Morrison Supermarkets Plc*, an employer was held to be vicariously liable in respect of an unprovoked assault carried out by a petrol station attendant on a customer. The Supreme Court held that a broad view of the functions or "field of activities" assigned to the wrongdoer must be taken once the nature of his or her job is ascertained. The court must then

> "decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice".

It was the wrongdoer's job to attend to customers and respond to their enquiries and the view was taken that the wrongdoer was purporting to go about his employer's business, albeit through a gross abuse of his position.

[38] The question in this second stage does not merely involve a matter of principle; rather, it is fact specific. In relation to the four alleged incidents (as already noted, taking the pursuer's position *pro veritate*) the contention is that first defender abused and took advantage of his office in order to commit assaults amounting to a course of harassment. Following the approach in *Mohamud* v *WM Morrison Supermarkets Plc,* I take a broad view of the first defender's role and functions. In my opinion, there was, in this post of sheriff, conferral of a degree of authority over practitioners such as the pursuer. The position of a judicial office holder is not restricted simply to the exercise of judicial functions on the bench, or the type of responsibilities excluded by section 2(5) of the 1947 Act. Practitioners will commonly give deference to the judicial office holder and if, for example, that office holder requests the practitioner to come into his chambers, that will normally be done. There is, to an extent, a degree of control. By having that authority, the relationship with the Crown went beyond merely providing the opportunity for his wrongful conduct. On the third defender's point that section 2(5) is effectively saying that if there is a close connection with judicial responsibility there is no liability on the Crown, I do not accept that position. A distinction falls to be drawn between, on the one hand, a close connection between the position of the sheriff and the alleged conduct and, on the other hand, the judicial responsibility mentioned in section 2(5).

[39] It is not necessary for the employer or person akin to the employer to foresee that the individual poses a risk. The vast majority of judicial office holders will certainly not pose a risk. However, in principle the risk does arise for individuals coming into contact with

judicial office holders and who are subject to their authority or control. Authority and control have been relied upon for vicarious liability in cases of sexual abuse. Such an office holder could, in certain circumstances, abuse the special position in which the Crown has placed him.

[40] The discussion above about the second stage of the test has been about the key authorities and principles and the possibility of that part of the test being met. Turning to the specific circumstances here, on the first two alleged incidents (in the court reception area on 18 May 2018 and in the sheriff's chambers on 5 July 2018) whether or not there is a sufficiently close connection between the alleged wrongful actions and the first defender's position as sheriff is a matter that would require to be considered in light of the full factual evidence at the proof and I make no conclusions on these points.

[41] However, in relation to the last two alleged incidents, there are no averments which can allow the test of a sufficiently close connection to be met. The sheriff was not in some way entrusted by the Crown to behave in a particular manner on the train or in a video call. These events did not fall within even a broad view of his functions or field of activities and are not sufficiently connected with the position in which he worked. They do not show abuse of the special position in which the Crown has placed him. On the contrary, in the circumstances averred they can only properly be viewed as personal matters, for personal interests or ends, with no close connection to the first defender's position as sheriff, and hence not something fairly and properly to be regarded as done while acting in the ordinary course of his duties. There is nothing to suggest that vicarious liability will apply to parts of a chain of harassment that do not meet the test for vicarious liability. No relevant case is made out, in delict or on the statutory ground of harassment, in respect of those last two alleged incidents.

[42] I therefore conclude that on the first two alleged incidents the pursuer is not bound to fail, either on the individual delictual acts or the chain of harassment, on the second stage of the test for vicarious liability. It is enough that the wrongful conduct alleged on those two occasions against the first defender is capable of being established, on the evidence, as being so closely connected with acts which he was authorised to do.

[43] For those reasons, there is a relevant case for the pursuer on vicarious liability of the Crown on the first two alleged incidents.

Issue 2: Is the pursuer's claim for vicarious liability time-barred, in terms of the 3-year limitation period in of the Prescription and Limitation (Scotland) Act 1974?

Submissions for the Lord Advocate

[44] If the case is restricted to the course of conduct amounting to harassment under the 1997 Act, limitation would require to be determined after proof. However, the case on individual delicts involved two alleged incidents, the first two of which were outwith the triennium and were thus time-barred. Service on the Lord Advocate was not equivalent to service on the Advocate General, albeit this was not a matter directly relevant to the claim against the Lord Advocate. That argument for the pursuer wrongly assumed that the Crown is a single entity. The pursuer was incorrect to say or contend that the Lord Advocate was initially convened as a Law Officer representing the Crown. In fact, she was sued as representing the Scottish Ministers.

Submissions for the Advocate General for Scotland

[45] The pursuer served this action on the Advocate General on 14 March 2022, more than 3 years later than all of the dates on which the alleged misconduct took place. Her case for

extending the three year period under section 19A of the Prescription and Limitation (Scotland) Act 1973 was irrelevant: she offered no reason why the action was raised late or why an extension would be equitable. Her averments that the action was served on the Lord Advocate before it was served on the Advocate General did not amount to a reason why an extension would be equitable. The action was not served on the Lord Advocate as a representative of the Crown. There was no mention in the pursuer's pleadings of Crown liability or representation until the minute of amendment on 10 March 2022. Her case against the Lord Advocate before then was that the Lord Advocate represented the Scottish Ministers.

[46] In any event, serving the action on the Lord Advocate was analogous to suing a different person. The Lord Advocate and the Advocate General represent different capacities of the Crown. Hence Parliament has made them alternative representatives. The interests of the Scottish Ministers and the Ministers of the Crown may conflict. In this case, for example, they disagree about which Law Officer should represent the Crown. Service on the Lord Advocate (on 16 July 2021) was also late in respect of the first two alleged incidents.

Submissions for the pursuer

[47] Evidence will generally be required in order to determine whether harassment has occurred: *Marinello* v *Edinburgh City Council* 2011 SC 736. This action was served on the first and third defenders on 15 and 16 July 2021 respectively, which is within three years of the final two events upon which the pursuer founds as having formed part of the course of harassment. Section 18B of the 1973 Act provides that the three year limitation period in actions for harassment runs from when the harassment ceased.

[48] When there was service on the Lord Advocate in July 2021, the Crown received service of the action within the three year period provided for in section 18B of the 1973 Act. Service on the Lord Advocate should be treated as the relevant date for limitation purposes. The true defender, the Crown, is the same in respect of the third and fourth defenders. The identity of the Crown as defender has been clear throughout. The position is analogous to that in *Perth & Kinross Council* v *Scottish Water & Anr* 2017 SC 164. In any event, it would be equitable, in the particular circumstances of this case, to allow the pursuer's case against the Advocate General to proceed. There would be no prejudice to the Crown. The action was served on a different Law Officer timeously. Proof will be required to resolve the pursuer's action. There is accordingly no prejudice to the Advocate General in terms of loss of witness evidence.

Issue 2: Decision and reasons

[49] The first point is whether service on the Lord Advocate on 16 July 2021 was service on the Lord Advocate as representing the Crown. The pursuer's pleaded position at that stage was that the Lord Advocate represented the Scottish Ministers, who were said to be vicariously liable for the sheriff's delicts because they have responsibility for the administration of justice in Scotland and have a role in the appointment and removal of sheriffs. The absence of any reference in the initial summons to the Crown could create some concerns but, for the reasons I explain in my decision on Issue 3 below, the Scottish Ministers (or Scottish Administration) are part of the Crown. I conclude that service on the Lord Advocate would suffice, even if the Lord Advocate was, in the version of the summons at that time, said to represent the Scottish Ministers. It would be inequitable to treat such

service as ineffective simply on the basis that the Lord Advocate was, as it were, wearing a different hat.

[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.

[51] I see no good reasons for viewing it as equitable that the common law delictual claims in respect of the first two alleged acts should be allowed to proceed, although out of time. It was plainly a matter for the pursuer and, depending on when advice was sought, for her legal advisors to decide when the action should be raised. The court was given no basis as to why the delay occurred, other than the lawyers' decision. Applying the same approach as for private parties, there is some prejudice to the Crown in facing claims which are out of time.

[52] In relation to the fourth defender, if the Advocate General is indeed the appropriate Law Officer for the Crown, service was effected many months after the end of the triennium. However, as I have noted above, practically speaking service on the Crown took place (apart from in relation to two of the alleged acts) in time, albeit to the Lord Advocate. As is explained below, there are clearly different parts of the Crown (the Scottish Administration and the UK Government) and there is some force in the view that service on one part should not count as service on the other. But it would be overly harsh to take the case against the

Advocate General as time-barred when there had, if mistakenly, already been service on the Lord Advocate, albeit as representing the Scottish Ministers. If the Advocate General is the appropriate Law Officer to be sued (a matter dealt with in the next section) it would be equitable in all of the circumstances to allow the case against the Advocate General to proceed, apart from in relation to the first two alleged acts relied upon in the common law delictual claim, which are time-barred. The issue of time-bar in relation to the course of harassment would be determined at proof.

[53] Accordingly, the claims in delict based on the first two alleged acts in the case are time-barred.

Issue 3: If the Crown does have vicarious liability and the pursuer's claim is not time-barred, who is the appropriate Law Officer to represent the Crown?

Relevant statutory provisions

[54] There are two relevant sections from the Crown Suits (Scotland) Act 1857:

> "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."

[55] The Crown Proceedings Act 1947 states:

> "40(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…"

Submissions for the Lord Advocate

[56] As the pursuer has admitted, a sheriff is not part of the Scottish Administration. Accordingly, if proceedings are to be raised against the Crown in respect of allegedly delictual conduct by a sheriff, under clause 4A of the 1857 Act the correct defender is the Advocate General. Imposing vicarious liability upon the Scottish Ministers for the same acts would run contrary to, and undermine, the statutory framework that Parliament has put in place.

Submissions for the Advocate General for Scotland

[57] The Advocate General was not the appropriate Law Officer against whom to institute this action, firstly, as a result of section 40(2)(b) of the 1947 Act; and secondly on the correct interpretation of sections 1 and 4A of the 1857 Act. The Crown's liability for any delict by the sheriff depends on section 2 of the 1947 Act. The conditions within section 2(1) of the 1947 Act are therefore necessary but insufficient for Crown liability. The other necessary condition is the one in section 40(2)(b) that the alleged liability arises "in respect of" one of the two governments: see *Ponnusamy* v *Secretary of State for Foreign and Commonwealth Affairs* [2015] EWHC 1760 (QB) at [41]-[42] and [50]-[53].

[58] If the pursuer satisfies the conditions in section 2(1)(a), then of the two governments mentioned in section 40(2)(b), only the Scottish Administration has had any involvement.

Its involvement was in the creation and continuation of the service/agency relationship because its First Minister had the contingent powers, in accordance with the legislation that it promoted, to recommend the sheriff for appointment and to remove him from office. Those powers are exercisable on behalf of His Majesty: Scotland Act 1998, section 52(2). The Crown's alleged liability in this case does not arise "in respect of" the UK Government because the UK Government has had nothing to do with either the delicts or the relationship of service/agency that the pursuer avers. The pursuer does not aver otherwise. Under section 4A of the 1857 Act, the appropriate Law Officer to represent the Crown is the Lord Advocate.

Submissions for the pursuer

[59] The "Scottish Administration" is defined in section 126(6) to (8) of the Scotland Act 1998. It includes members of the Scottish Government and their staff. Sheriffs do not form part of the Scottish Administration. They are not members of the Scottish Government or staff of members of the Scottish Government. Whilst the First Minister and Lord President have a role in their appointment, this does not make them part of the Scottish Administration either. It follows that the Advocate General would, under section 4A of the 1857 Act, be the correct Law Officer to represent the Crown's interests in a claim based upon section 2 of the 1947 Act.

Issue 3: Decision and reasons

[60] It is clear that the Scottish Administration and the UK Government are manifestations of the Crown, or means by which the Crown operates. The precise meaning of "the Crown" is not a concern in this case. The question is which of the two Law Officers

who represent the Crown is the appropriate one for this action. On this issue, the key propositions for each of the parties founded upon wording in the legislation. The pursuer, and the Lord Advocate, found heavily on section 4A of the Crown Suits (Scotland) Act 1857, which provides that the Lord Advocate is the appropriate Law Officer, "where the action, suit or proceeding is on behalf of or against any part of the Scottish Administration" and it provides that the Advocate General for Scotland is the appropriate Law Officer "in any other case".

[61] Senior counsel for the pursuer (supported also by the submissions for the Lord Advocate) took the reference to "in any other case" to be a catch-all, so that if the case is not to be taken against the Scottish Administration, the Advocate General must be the appropriate Law Officer. If the proceedings did not involve something for which the Scottish Administration is responsible, then even if it is something for which the UK Government is not responsible, the argument was that the Advocate General is still, as a result of section 4A, the appropriate Law Officer. So, it is argued, if the claim involves the Crown, other than either government, the Advocate General is the right person to sue.

[62] This does not fit with what is said in section 40(2)(b) of the 1947 Act, which makes it clear that the Act is only about proceedings in respect of the alleged liability of the Crown against the UK Government or the Scottish Administration. I therefore reject the proposition that the reference in section 4A to "any other case" is a catch-all, which brings the Advocate General in as the appropriate Law Officer even where the UK Government is not being pursued. I also do not accept the submission for the pursuer that section 40(2)(b) is really about territorial matters, that is restricting proceedings to those within the UK. Rather, it is about identifying the only two parts of the Crown which can be sued.

[63] The reference in section 4A of the 1857 Act to proceedings against any part of the Scottish Administration is in the context of actions, suits or proceedings against the Crown, which can, as section 1 makes clear, include the Scottish Administration. The 1857 Act is not dealing with the circumstances in which the Scottish Administration or the UK Government is the right part of the Crown to be sued. The fundamental question is whether this claim is against any part of the Scottish Administration, in respect of, or as the relevant part of, the Crown.

[64] There was significant focus in the submissions for the Lord Advocate and the pursuer on the lack of involvement on the part of the Scottish Administration with judicial office holders. For example, the Lord Advocate averred and the pursuer admitted that: a sheriff is not employed by the Scottish Ministers; sheriffs are independent of the Scottish Ministers; a sheriff is not part of the Scottish Administration; whilst a sheriff is in office, the Scottish Ministers (including the Lord Advocate) have no role (and could not constitutionally have a role) in how that sheriff behaves or otherwise discharges their duties. But of course there is no suggestion that the UK Government has any of these forms of involvement.

[65] The background papers for the Scotland Act 1988 make the distinction between the Law Officers fairly clear. The explanatory notes on what was then clause 82 of the Scotland Bill state:

> "It is intended that the Law Officer functions of the Lord Advocate which relate to reserved matters will be transferred to the Advocate General".

That point is reiterated in the explanatory notes on section 87 of the 1998 Act. The explanatory notes on paragraph 2 of schedule 8 to the 1998 Act state that the amendments to the 1857 Act

> "enable actions by or against the Scottish Administration to run in the name of the Lord Advocate while actions by or against the UK Government may be brought by or against the Advocate General".

Put short, if the case should proceed against part of the UK Government the Advocate General is the appropriate Law Officer. A straightforward example is when the Advocate General is cited in a case against the Home Office for judicial review. This fits with the observation made by Lord Rodger in *Tehrani* v *Secretary of State for the Home Department* 2007 SC (HL) 1 (at [86]).

[66] Standing back from the details, it would be strange that in a devolved nation, with its own legal system, with the Scottish Ministers paying the salaries of judicial office holders and the First Minister recommending who is to be appointed, and being the person responsible for removal of a sheriff from office, and the UK Government having no real interest or involvement (except in determining the amount of salary and pensions, as a reserved matter) that this claim does not arise against the Scottish Administration in respect of the Crown's liability in this case.

[67] I therefore conclude that the Lord Advocate is the appropriate Law Officer. In passing, I note that section 17 of the 1947 Act (which does not apply to Scotland) sets out which authorised government department is liable, including that the Ministry of Justice is liable in respect of English judges. By implication, this suggests that the Scottish Administration is to be sued in right of the Crown in relation to Scottish judicial office holders.

Conclusions

[68] The conclusions I have reached can be summarised as follows. In relation to the first two alleged acts of the judicial office holder, but not the other two alleged acts, the Crown

may be vicariously liable, although it will only be after the evidence is led that a final conclusion on liability can be reached. On the first two alleged acts, the delictual claim at common law against the Lord Advocate as representing the Crown is time-barred, and that would also have been the case if the Advocate General was the appropriate Law Officer to be proceeded against. However, the question of whether the claim based upon a chain of harassment, or elements of that chain, is time-barred will require to be determined at the proof. The Advocate General for Scotland is not the correct person to be sued. For the reasons explained, I conclude that it is the Lord Advocate.

Disposal

[69] I shall dismiss the pursuer's case against the fourth defender. In relation to the third defender, on the pursuer's common law claim based upon delictual liability at common law, I shall exclude from probation the pursuer's averments about the acts alleged to have been done by the first defender on 18 May and 5 July 2018. Those averments are not however excluded in respect of the claim based on harassment under the 1997 Act. A proof before answer will be fixed for the remaining issues. All questions of expenses are reserved.