FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 18
A63/15

Lord President
Lord Brodie
Lord Glennie

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

MRS K

Pursuer and Respondent

against

CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Defender and Reclaimer

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Pursuer: McBrearty QC, E Campbell; BTO Solicitors LLP
Defender: Shand QC, Smart QC; Clyde & Co (Scotland) LLP

28 April 2020

Introduction

[1] This is a reclaiming motion (appeal) against the interlocutor of the Lord Ordinary ([2019] CSOH 9), dated 31 January 2019, in which he found that the pursuer was entitled to reparation from the defender. The nature of the liability, in terms of the pursuer's second plea-in-law which the Lord Ordinary sustained, is both personal, in respect of the acts of the defender's predecessor in office, and vicarious, in respect of that predecessor's employees. Although police officers are not employees of the chief constable, it was agreed that, for the

purpose of vicarious liability, they fell to be regarded as employees. In the course of the hearing on the reclaiming motion, it was made clear by the pursuer that it was only vicarious liability which was being founded upon. That was in relation to one particular police officer, namely Chief Superintendent Stephen Whitelock.

[2] The Lord Ordinary determined, first, that the acts and omissions which the pursuer founded upon to establish liability were all those of officers in the former Strathclyde or Grampian Police Forces, for whom their then Chief Constable was responsible (Police (Scotland) Act 1967, s 39; now Police and Fire Reform (Scotland) Act s 24). These liabilities, according to the Lord Ordinary, had been transferred to the defender by what he described as section 20 of, but must have meant paragraph 20 of schedule 5 to, the Police and Fire Reform (Scotland) Act 2012.

[3] The Lord Ordinary determined, secondly, that there was a duty on the defender, or his statutory predecessor, to "afford the pursuer fair treatment in carrying out an investigation into her conduct and performance". If psychiatric harm was reasonably foreseeable as a result of a breach of that duty, the defender would be liable in damages for that harm. The Lord Ordinary found that, in the circumstances of the pursuer, such harm was reasonably foreseeable. The defender was accordingly liable. The principal issues are whether the Lord Ordinary's interpretation of the law of quasi-delictual liability is correct and whether, on the facts found, the Lord Ordinary was entitled to the conclusion which he reached.

Procedure

The original case on record

[4] The action was raised in late 2014. By interlocutor dated 28 January 2015, the cause

was appointed to proceed as an ordinary action, rather than under the simplified procedure for personal injuries actions. The conventional rules relative to written pleadings therefore apply. The pursuer's case stands or falls on proof of the specific averments of fault (*McGuffie* v *Forth Valley Health Board* 1991 SLT 231 LJC (Ross) at 234 citing *Morrisons Associated Cos* v *James Rome & Sons* 1964 SC 160). After a prolonged period of adjustment, the record was closed and, on 4 December 2015, a proof before answer was allowed. The pursuer's claim (STAT 6) was, and is, said to be "based on the fault of the employees of the defender's predecessors". This averment of vicarious liability is followed by one which refers to the defender's predecessors having a duty to take reasonable care to avoid exposing their employees unnecessarily to the risk of injury. It was their duty to devise, maintain and enforce a safe system of work. The particular failure was not referring the pursuer for treatment and advice upon observing her ongoing distress and anxiety in relation to what was occurring at work. "They" knew or ought to have known that, if they failed to do this, it was reasonably foreseeable that the pursuer would sustain psychiatric harm.

[5] The pursuer's problems, according to her then averments, stemmed from her relationship with Detective Sergeant G (DS G), with whom she worked in the Special Operations Unit (SOU) of the Scottish Crime and Drugs Enforcement Agency. The pursuer had found it increasingly problematic to work with this officer, who had become "difficult, hostile and aggressive". Her concerns were reported to her line manager, namely DI Daniel Rae, without success. DI Rae's attitude, from about February 2011, had become:

> "increasingly hostile and aggressive. He began to regularly bully and humiliate the pursuer including shouting and swearing at her and accusing her of incompetence and threatening to have her sent back to Aberdeen to work ... The pursuer continued to be harassed, humiliated and abused by DI Rae on a very regular basis over the next couple of months. She was also verbally abused by Superintendent Ian Thomas."

[6] The pursuer discovered that DS G had been doing things, including potentially criminal acts, which might have compromised the undercover operations. She became a "whistle blower", although by this she meant only that she reported her concerns to DI Rae. DS G was retired from the police. Meantime, it was averred, the pursuer continued to be verbally abused and harassed by DI Rae and Supt Thomas. She felt that she was being blamed for what had happened to DS G. In July 2011, she was relocated from the SOU to the SCDEA's "Witness Liaison" department. She had understood that this was to be a temporary move, although it turned out to be permanent. She discovered this shortly after she had returned to work from sick leave on 3 October 2011. The pursuer was signed off sick again on 13 October and never returned to work. There are detailed averments about what had happened, in connection with internal reviews of what had occurred in the SOU. There was no mention of C Supt Whitelock in the original closed record.

[7] It was the defender's position on record that, when the pursuer had swapped roles with DS G, she had attended his covert flat and discovered that he had not been administering operations properly. A decision had been taken to close the SOU and to redeploy the pursuer in witness protection. The pursuer did not want to work in witness protection and, within a week of doing so, had gone on sick leave.

The amended case

[8] In late 2017 and early 2018, an extensive amendment procedure took place. In its final state, the record continues to focus on the allegations of bullying by DI Rae and verbal abuse from Supt Thomas. It expands upon what had occurred after the problem with DS G had been identified. On 7 April 2011, Supt Thomas had accused the pursuer of having prior

knowledge of DS G's misconduct. The Professionals Standards Unit (PSU) of the SCDEA had carried out an investigation into both DS G's conduct and the pursuer's "whistle blowing". The pursuer was interviewed over a period of several days. Towards the end of July, she was advised by the PSU that she was being temporarily moved, pending a separate review by Strathclyde Police. "[U]nknown to the pursuer, the investigation was concerned with the pursuer's conduct and performance, as well as that of [DS G]". Apart from the pursuer's obvious distress and anxiety at the time, the defender's predecessors had been aware of previous psychiatric problems which the pursuer had experienced in the 1990s and 2000s, as well as the demanding psychological nature of her role as an undercover police officer. After the pursuer had returned from sick leave, she had found out that another officer was temporarily performing her duties in the SOU. On 7 or 8 October, she was told by an HR manager that the Deputy Director General of the SCDEA, namely Johnny Gwynne, had been told by Grampian Police that she was never to return to the SOU or be an undercover officer again. Although CI Richard Craig told the pursuer that this was not true, her job had been taken over by someone else. It is averred that:

> "Accordingly, the pursuer felt that she was unable to return to her employment, and was signed off on sick leave ... from 13 October 2011 and has not worked as police office (*sic*) since then".

[9] The averments about the pursuer's claim being based upon vicarious liability, and those immediately following of a direct systems case (*supra* STAT 6), remain on record as do the allegations of bullying. The following then appears:

> "It was their duty to afford her fair treatment in carrying out an investigation into her conduct and performance and to support her in her move to another department. It was their duty not to take disciplinary action against her or to move her permanently from her post without affording her fair treatment. The duties to afford the pursuer fair treatment as aforesaid required the defenders, amongst other things: (i) not to make accusations of wrongdoing against her without first carrying out

> proper investigations; (ii) not to move her from her post, in particular, not to do so on the basis of preliminary findings which had not been the subject of proper investigations which she had not been made aware of and not had the opportunity to respond to; (iii) to advise her that her post had been re-advertised and provide her with an explanation therefor; (iv) not to give her management advice without having carried out proper investigations to support it and without giving her the opportunity to respond to it; and (v) not to seek to persuade her that she ought to accept management advice where it was proposed in the aforementioned circumstances and where she expressly disagreed with it."

There is no averment about C Supt Whitelock in the pursuer's case.

[10] The defender expanded his answers substantially. When DS G had gone on holiday, the pursuer discovered evidence that he had not been properly administering operations from his covert flat. A similar situation existed at the off-site office, which the pursuer shared with him. After the SOU had been closed down, there was no work for the pursuer. The pursuer's skill set was relevant to witness protection and she would have had a management role. Her redeployment was not a disciplinary measure. A new unit was to be "incrementally reconstructed". C Supt Whitelock of the SCDEA had assessed candidates for the new unit. The pursuer could have applied. The SCDEA was wound up with the introduction of a new single police force in 2013.

Anonymity and restriction of proof

[11] By interlocutor dated 16 January 2018, the Lord Ordinary *ad interim* ordered that all references to the pursuer's name should be removed from the process and the pseudonym "Mrs K" substituted. An order under section 11 of the Contempt of Court Act 1981 was made, whereby the pursuer was not to be identified in any report of the proceedings. Her evidence was to be taken in a court which was "closed to members of the public". On 19 January 2018, there having been no representations from any interested party, the Lord Ordinary confirmed the reporting restrictions.

[12] At the commencement of the proof on 23 January 2018, the court ordered that it "shall proceed on the issue of liability (including causation), reserving all questions of quantum for a further Proof Diet". The parties are not agreed on what this means. Further orders under the 1981 Act were made, which prohibited the identification of certain witnesses. The proof proceeded until 7 February 2018. The defender did not lead any evidence. Following the lodging of written submissions, the Lord Ordinary made avizandum on 10 April 2018.

The Lord Ordinary's narrative (with corrections relative to quoted testimony)

Duties

[13] When the case was advised on 31 January 2019, the Lord Ordinary explained that, although there had been a number of duties set out on record (*supra*), the case was presented by the pursuer, on the basis of the averment that:

> "It was the defender's predecessor's duty to take reasonable care for the safety of their (*sic*) employees, including the pursuer, and to avoid exposing them unnecessarily to the risk of injury."

Although that is an averment relating to the direct liability of the defender's predecessor, as already observed, it is preceded on record by a conflicting, or perhaps alternative or additional averment, that:

> "The pursuer's claim is based on the fault of the employees of the defender's predecessors at common law, for which, as statutory successor, the defender is vicariously liable."

The averments of unsafe system and bullying remained on record, but the Lord Ordinary states that the specific duties, which the pursuer ultimately founded upon, were restricted to the duty, already referred to (para [9] *supra*), to afford fair treatment and in particular not to

move the pursuer from her post on the basis of preliminary findings which she had not been made aware of and to advise her that her post had been re-advertised and provide her with an explanation.

The pursuer's background

[14] The pursuer was born in 1968. She became a probationary constable with the Grampian Police Force in 1990, graduating as a constable two years later. In October 1994 she became a Detective Constable. From 1995 to 1998 she was attached to the local drugs squad. She had experienced a period of depression, which required medical treatment, following upon the death of her mother in 1997. This was a matter which was discussed with Grampian's Occupational Health Department.

[15] During 1998, the pursuer completed training which would enable her to become an undercover officer. In 2000 she was promoted to Detective Sergeant. From 1998 to 2003 she worked as an uncover officer either locally or wider in the United Kingdom and abroad. In 2003 she became seriously ill with cancer and was absent from work until late 2005. Her illness caused anxiety and depression, again requiring medical intervention. She was assigned to Grampian's Special Branch until her transfer in September 2007, on secondment, to the SOU of the SCDEA. Her personnel records described this as a "permanent posting". At least every year, as a matter of routine for officers undertaking uncover work, the pursuer attended a clinical psychologist, namely Mary Ross, who was engaged by Grampian, but not employed by them.

The Special Operations Unit (SOU)

[16] The pursuer's work with the SOU of the SCDEA involved collaboration with another officer, namely DS G, who had been seconded from Strathclyde. Each had their own covert flats in the Paisley area. They occupied a single covert office. In April 2010, DI Rae took over as the operation's supervisor. One change which he made was to swap the roles of the pursuer and DS G. This required a transfer of information on covert banking and other financial arrangements. DS G was obstructive in completing the exchange.

[17] In August 2010, the pursuer's covert flat was broken into. The pursuer reported that some £5,000 of her jewellery had been stolen. The SCDEA offered reimbursement of £2,500. Shortly after receiving that offer, the pursuer discovered that the jewellery was in her flat in Aberdeen. She reported that to the SCDEA along with an apology. DI Rae determined that working in Paisley and living in covert premises there was unfair to the pursuer. It required her to maintain a covert identity whilst not at work. As a result, the pursuer sold her own flat and relocated to Glasgow.

[18] DS G's secondment to the SCDEA was due to expire in April 2011, but it was extended by some three months. On 6 April 2011, he went on annual leave. When the pursuer opened a covert mailbox, which had been operated by DS G, she discovered unopened mail. This contained bank statements and phone bills in the names of people who were not known to her. She found debt collectors' letters. The pursuer went to the covert office, which had the appearance of having been ransacked, presumably by DS G. There were boxes and bags of unopened documents. Some documents had been shredded. Other material related to pseudonyms which she did not know about, including bank cards, phone bills, more letters from debt collectors and passports. Sums of cash were discovered. The

pursuer was unaware of any operational reason for these items. She reported the matter to DI Rae.

[19] Both the pursuer and DI Rae considered that the operation of the SOU had been compromised, with potential safety implications for officers employed within the unit. Senior officers, namely Supt Thomas and CI James Reid, attended the office. Supt Thomas kicked a chair in the direction of the pursuer and said that she "must have known about this". The pursuer told him that she had not. The situation, which was reported also to the head of the intelligence department, namely C Supt Whitelock, was regarded by all as extremely serious. The pursuer was tasked with rectifying the matter, including the paying off of debts. The pursuer understood that, when DS G had returned from holiday, he had accepted responsibility and had said that the pursuer had not been involved. The Lord Ordinary states specifically that the pursuer's understanding was not challenged. The pursuer was asked to assume a welfare role in relation to DS G. He was admitted to a psychiatric unit on 15 April 2011 and shortly thereafter retired on ill health grounds.

The inquiries

[20] An internal investigation by the SCDEA's PSU, led by DCI Alistair Thompson, was commenced. On 19 April, the pursuer was interviewed in relation to how the events involving DS G "had developed" over a period of 2½ days. This was conducted in a police office interview room. The pursuer had felt degraded. She was not told of the outcome, although DS G was reported to the procurator fiscal. On 27 April, the pursuer consulted her GP about the "stressful situation". The GP noted that the pursuer was coping well and had a good insight into events. She did not go off work. By the end of July, the pursuer had thought that all was well with the remedial operation.

[21] On 27 July 2011, the pursuer was informed that Strathclyde were to investigate the PSU's investigation; to which Grampian had agreed. The pursuer was not told of the remit of this investigation. She was informed, by DCI Thompson and DS Laurie Morrison of the PSU, that she was being "suspended" from her role as an uncover operative with the SOU pending completion of the investigation. DCI Thompson told her that Grampian had asked for her to be returned to them, but the SCDEA had supported her retention within that agency. The pursuer was extremely distressed during this exchange, as she could not understand why it was happening; she was an innocent party who had discovered the problem. Her distress was a reaction to being informed by colleagues that she was being used as a scapegoat and that the outcome of the investigation would mean the termination of her career. DS Morrison had been dismissive of her reaction; telling her that "it's only a job". The pursuer was "completely distraught, felt abandoned, betrayed and used". She called DI Nicholas Thom, with whom she had worked in the past and regarded as a friend, for support. He made an arrangement for her to speak to CI Richard Craig of Grampian. She met him on 29 July in Aberdeen.

[22] On either 28 or 29 July 2011, the pursuer was told that she was to be moved temporarily to the witness protection department of the SCDEA. She was upset at this and did not want to go. Although her request to remain in the SOU in a non-operational role was supported by DI Rae and Supt Thomas, it was rejected by C Supt Whitelock. When she arrived at the witness protection offices, the officer in charge was unaware that she was joining his unit. Another DS was moved to the SOU to carry out her former responsibilities. On 2 August the pursuer attended her GP again. The GP recorded that she was "clearly

suffering from anxiety and depression". She was prescribed medication and had remained on this since then.

[23] Very soon after commencing in witness protection, the pursuer went on leave. She was due to return to work on 29 August, but went to her GP and was certified as unfit. The pursuer explained that, due to the stigma which existed in the police associated with being off work due to stress, she was anxious that the medical certificate, which she produced to the police, reflected an exacerbation of a previous physical condition, rather than anxiety and depression. Apparently the GP obliged.

[24] The pursuer returned to work on 3 October. On 5 October she was told, by the officer who had replaced her in the SOU, that her job with the SOU had been advertised. That officer intended to apply for it on a permanent basis. This was the first occasion upon which the pursuer became aware that she was not going to return to her former role. This caused her distress. She arranged to meet CI Craig, who told her that there must have been a mistake. She spoke to DI Rae, who said that her replacement should not have told her about the advertisement. She assumed from that, that DI Rae had been aware of it. On 7 October, the head of HR at the SCDEA confirmed the existence of the advertisement and said that the Deputy Director General of the SCDEA, namely Johnny Gwynne, had told her that Grampian had decided that she was never to work as an undercover police officer again or to be in the SOU. CI Craig had been unaware of any such decision. On 11 October the pursuer consulted Mrs Ross and continued to do so until March 2015.

[25] On 14 September 2011, an "initial assessment report" was produced by DI James Dunbar on behalf of the DCCs of both Strathclyde and Grampian. Its purpose was to establish what responsibilities had been given to the pursuer and DS G and to highlight

possible misconduct or performance failings by either officer. The report, which was primarily a desktop exercise, contained five potential aspects of misconduct on the part of the pursuer and identified some potential performance issues. On 19 October, the DCC and C Supt Euan Stewart of Grampian decided that, on the basis of the report, the pursuer should be provided with management advice; this representing the lowest level of "sanction". C Supt Stewart met the pursuer and attempted to give her the advice, which presupposed that she had known about DS G's activities and had failed to inform her line manager. The pursuer disputed this and the meeting was closed. The head of HR at SCDEA advised the pursuer to accept the advice, as did DCI Thompson, in order to "draw a line under it". When provided with a summary of the conclusions in DI Dunbar's report, the pursuer disputed all of them. At a meeting with C Supt Stewart on 16 February 2012, she was advised that:

> "Given that you are in a supervisory rank you: should have acted sooner in voicing your concerns and must be willing to challenge colleagues in relation to inappropriate behaviour."

[26] In 2013 the pursuer applied for ill health retirement, stating that she was suffering from stress, anxiety, depression and "not being able to cope or bounce back to my former self". She was retired on the grounds of ill health in March 2013.

Other testimony

[27] DI Thom spoke to being phoned by the pursuer after her interview with the PSU in July 2011. He was so concerned about her welfare that he asked CI Craig to phone her later. CI Craig spoke to contacting the pursuer accordingly; describing her as:

> "tearful, emotional, very anxious about what was happening, seeking clarity in relation to what the procedures might be in relation to what support could be offered by myself from a welfare and occupational health type position".

She was "deeply upset". Her concern was being moved from her current role in the SOU to another part of the SCDEA. He telephoned the head of HR at SCDEA to ascertain whether the pursuer's move was permanent or temporary. He met the pursuer, along with C Supt Stewart, in November 2011 in order to give her management advice. The pursuer had disagreed with the basis for the advice and the meeting had been halted. At a later meeting on 16 February 2012, following further information being obtained, the management advice was given. The pursuer had accepted that advice, but stated that she could not have acted differently in the circumstances.

[28] DI Fiona Riddoch said that, as a DS, she had agreed to a temporary secondment to the SOU; carrying out the work which had previously been done by the pursuer. The SOU had continued to organise covert operations. She had purchased new assets for this purpose. A permanent position for the role was advertised within the SCDEA. She spoke to the pursuer about this. Her own application did not succeed.

[29] DI Rae had been the pursuer's line manager. His superior was CI Reid who, in turn, reported to Supt Thomas, whose superior was C Supt Whitelock. DI Rae had instituted a review of the work of the SOU and planned an exchange of the roles of the pursuer and DS G. The pursuer was to become responsible for the financial arrangements and accounting for covert assets. He noticed a lack of progress with the exchange. This was caused primarily by DS G's obstruction. The pursuer phoned him in April 2011 to report the material which she had discovered. He and his superiors, CI Reid and Supt Thomas, had been concerned about the potential for disclosure of the true identities of the covert

operatives. He and the pursuer were tasked with remedying the problem. They were told by the senior managers to suspend all operational activity. They worked over the following weeks to close down assets, reconcile and close bank accounts, sell vehicles and dispose of, or terminate, the leases of covert premises. The total clean-up operation took between six and eight months. His own interview with the PSU lasted about a day.

[30] DI Reid became aware of the plan to transfer the pursuer to witness protection. He asked if she could remain in the SOU in a non-operational role, but that request had been turned down. His understanding had initially been that the pursuer's move was to be "sort of temporary". He had been told, probably by Supt Thomas, that the decision to move the pursuer had been made by C Supt Whitelock.

[31] C Supt Whitelock testified that he had become aware of the problem within the SCDEA on 6 April 2011. He was not aware of the whole circumstances, but considered them to be serious. He was concerned that they might compromise operatives or officers. He could not give details of the work conducted in the SOU after the discovery of the problem. He was aware that work was needed to repair the damage. Assets were closed down and premises were disposed of. There were purchases of new assets. All of this took about six months to resolve. He was unable to say if any undercover operations had been undertaken by the SOU in that period. He would have been surprised if they had. Because of the mismanagement, the unit had been compromised. Although it had not been formally closed down, there was a hiatus in operations.

[32] C Supt Whitelock agreed that DI Rae had been told by Supt Thomas that the pursuer was not to return to the SOU. He had made this decision because: "I no longer had confidence in the officer's professional judgement." At the time, he was still establishing the

extent of damage and was looking for "freshness in the unit". His lack of confidence related to the level of integrity which was required for someone working in the unit. First, he had discovered that the pursuer had, albeit prior to April 2011, been living in covert premises in Paisley. He regarded this was a poor management decision and a lack of judgement on the pursuer's part. When he found out about it, he had taken steps to correct it. Secondly, he cited the incident involving the jewellery. This had had the potential to compromise the operations of the unit. He had required to order an investigation by the regular police. He did not consider that the incident reflected well on the pursuer. His third concern related to the mismanagement of the covert finances. Although he had been aware that the main responsibility lay with DS G, the pursuer "must have been aware" of it. He based that view on the facts that: the two officers worked together within a small office; they had worked together for many years; each had to understand the nature of the other's work; and it should have been obvious to the pursuer that there were issues about DS G's management. He had been surprised that she had not seen anything.

[33] When he put these three factors together, his judgement was that the pursuer was no longer suitable for the role which she had been fulfilling. He had not spoken to the pursuer. He had taken his decision in April 2011, when the investigation had commenced. Neither officer was to be allowed back into the unit. He could not comment on the suggestion that the pursuer had only found out that she was not to return to the SOU in October 2011. He had not been surprised that her relocation to witness protection had been described as temporary, although he thought that it should have been temporary until the investigation had been completed.

[34] C Supt Stewart spoke to being telephoned about the problem in July 2011. He was asked to investigate the matter. On 8 November 2011, he had received DI Dunbar's report. He and CI Craig met the pursuer to give her management advice. The pursuer had immediately sought to rebut the basis for the advice. He had terminated the meeting. Before he could give advice, he required to find out more about the facts. DI Dunbar's report had been based on his reading of statements and speaking with members of staff. DI Dunbar had said to him that more enquiry was necessary before the points highlighted, in respect of the pursuer, could be used in relation to giving her advice. C Supt Stewart had been concerned about the process which had been adopted in the preparation of the report. He thought that the advice should be along the lines of "Given that you are in a supervisory rank you should have acted sooner in voicing your concerns, must be willing to challenge colleagues in relation to inappropriate behaviour". He provided this advice to the pursuer on 16 February 2012. She accepted it.

Psychological evidence

[35] Mary Ross was an experienced clinical psychologist. She had been retained by the police to provide psychological services to undercover police officers. She had been engaged to do this both by Strathclyde and the SCDEA. Her task was to try to ensure that undercover officers were supported and could recognise and cope with the stresses associated with their work. The objective was to ensure that they received the appropriate counselling before a psychological problem arose.

[36] Mrs Ross saw the pursuer over an extended period from 1998 onwards. The pursuer had initially suffered depressive symptoms on the death of a parent. She saw the pursuer again in 2003 and for a period thereafter in relation to the recurrence of depressive

symptoms following upon the pursuer's illness. She saw her again in 2007 in her capacity as a psychologist providing services to the SCDEA. She had been consulted in relation to the events under consideration in 2011 and last saw the pursuer in February 2013.

[37] At a consultation on 11 October 2011, the pursuer had told Mrs Ross that she had felt compromised following her discovery of the problems in the SOU. She had initially thought that her work and life would return to normal, once the investigation and clean-up had been completed. This did not happen. The pursuer was, as the Lord Ordinary summarised the testimony, "Broken – suffering considerable anxiety and depression. She was traumatised by her treatment by the police. She was not able to cope". In Mrs Ross's opinion, the events between April and July 2011 had been psychologically damaging. The most significant damage had been caused by the pursuer's inability to return to the SOU. It was the loss of that role, and the perception of what that meant, which caused the pursuer the most damage. The problem was compounded by a lack of communication from the pursuer's employers. If she had been able to return to the SOU after a temporary move, the pursuer would have been expected to make a full recovery. A return to the SOU would have amounted to permanent closure for the pursuer. It would have sent a message to her colleagues that she had not been implicated in the mismanagement at the SOU. The management's treatment of the pursuer had kept open the issues in relation to this mismanagement and thereby occasioned psychological damage.

The Lord Ordinary's opinion

[38] The Lord Ordinary reasoned, as follows:

> "[106] The duty founded upon was to afford the pursuer fair treatment in carrying out an investigation into her conduct and performance and support her in a move to another department. ... [O]n the authority of *Gogay* [v *Hertfordshire County Council*

> [2000] IRLR 703], *Croft* [v *Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676] and *Yapp* [v *Foreign and Commonwealth Office* [2015] 44 IRLR 112] it is now clear that the law recognises a common law duty of fair treatment in circumstances where the complaint is that psychiatric harm occurred to an employee. The resultant psychiatric harm must be reasonably foreseeable. ... [T]he content of the duty of care in any case will depend upon the facts and circumstances ... The approach taken by Swanwick J in *Barbour* [v *Somerset County Council* [2004] 1 WLR 1089 at para 65] is accepted as an authoritative statement of the law."

[39] The Lord Ordinary considered that the duty of care had been breached by the defender. He recorded the events of April 2011, during which C Supt Whitelock had formed the view that the pursuer should no longer be involved in covert operations. He commented that, when C Supt Whitelock had reached his conclusion, none of the three factors, which he had relied upon (*supra*), had been investigated or determined. No concerns about them had been conveyed to the pursuer or put to her for comment. She had not been told of the conclusions of Strathclyde PSU's investigations. The pursuer had been told that she was being moved to witness protection temporarily. This was after C Supt Whitelock's decision that she should be moved permanently. The SOU had continued, albeit on a reduced basis, to conduct operations. This was in contrast to the defender's position on record.

[40] The Lord Ordinary's conclusion was that C Supt Whitelock's decision had been taken without consultation with anyone and on the basis of concerns "no doubt legitimately held by Ch Supt Whitelock, but which had not been subject to objective evaluation or scrutiny". These considerations constituted a lack of fair treatment in the context of an employee/employer relationship. "The matter does not however rest with the conclusion of C Supt Whitelock". The pursuer had been wrongfully, and in the Lord Ordinary's view deliberately, told that her move was temporary. She had been misled. This also constituted

a lack of fair treatment. In the Lord Ordinary's opinion, it followed that the pursuer had established a breach of duty.

[41] On foreseeability, the Lord Ordinary adopted a formulation which had been set out in *Attia* v *British Gas* [1988] QB 304 (Dillon LJ at 312) whereby what was reasonably foreseeable to the reasonable man was to be decided by the judge, based on his own opinion of how cause and effect in psychiatric medicine operated. The judge required to reach a view, based on the primary facts, on whether the chain of cause and effect was reasonably foreseeable. The pursuer had previously had episodes of stress, which were associated at least in part with work pressure in 1997. This was known to "the employing police force", which had been responsible for referring the pursuer to Mrs Ross at that time. The pursuer had had a further period of depressive illness, following the recurrence of a serious organic illness, in 2003 to 2005. This was also known to "the relevant police authority".

[42] The events in 2011 had been stressful. The pursuer believed, whether rightly or wrongly, that she was regarded as a suspect in the investigation. The most significant stressor had been the pursuer's transfer to witness protection. Having been told that her transfer was temporary, she discovered that her former position had been advertised. The Lord Ordinary was of the view that "these factors are either individually or cumulatively sufficient to satisfy the test set down ... in *Attia* (*supra*)". The effect of these factors was "within the knowledge of members of the SCDEA". The pursuer had contacted a colleague in Grampian on 27 July 2011 in a state of great distress. That colleague had taken steps to communicate with a senior officer. "These persons" all had knowledge of the stress which the process was having on the pursuer. The Lord Ordinary explained that:

> "There is clear authority for the proposition that knowledge on the part of some employees in cases of stress at work is sufficient. An employer cannot rely upon the

> ignorance of an individual who was the decision-maker to avoid the threshold of reasonable foreseeability (*Taylor* v *Rover Co* [1966] 1 WLR 1491)."

[43] On causation, the Lord Ordinary had regard to the evidence of Mrs Ross, who had explained that the most significantly harmful event had been the failure of the defender to permit the pursuer to return to the SOU without explanation. Mrs Ross had said that "had this been permitted then the pursuer would have achieved closure. ... [H]ad the pursuer been allowed to return to SOU she would have made a full recovery". On this basis the Lord Ordinary was satisfied that there was a causal link between the breach and the psychiatric harm.

Submissions

The defender

[44] The defender argued, first, that the Lord Ordinary erred in holding liability established in the absence of a finding that any individual officer of the former SCDEA or Grampian had been negligent. Paragraph 20 of Schedule 5 of the Police and Fire Reform (Scotland) Act 2012 had transferred liabilities of a former chief constable and the Director General of the SCDEA in respect of any fault on the part of any of the constables for whom they were responsible. Personal liabilities of a chief constable and the Director General were not transferred. The Lord Ordinary erred in finding liability established without identifying any officer, for whose conduct the former Director General of the SCDEA would have been liable (Police, Public Order and Criminal Justice (Scotland) Act 2006, s 22), or one for whose conduct a former Chief Constable would have been liable (Police (Scotland) Act 1967, s 39), and who ought reasonably to have foreseen that, by reason of an identified act or omission on the officer's part, the pursuer would suffer psychiatric harm. The events had occurred

prior to the constitution of the Police Service of Scotland on 1 April 2013. The pursuer therefore had to establish vicarious liability, either on the part of the Chief Constable of Grampian or the Director General of the SCDEA.

[45] Before a person could be held vicariously liable for an employee, it had to be proved that the employee was negligent (*Staveley Iron & Chemical Co* v *Jones* [1956] AC 627 at 638-639, 640-642). In so far as the Lord Ordinary was critical of a specific officer, this was limited to the act of C Supt Whitelock, when he decided that the pursuer should no longer work in the SOU, without consulting anyone or giving the pursuer an opportunity to comment. The Lord Ordinary did not hold that this decision had been negligent. In so far as the pursuer was vulnerable to psychiatric harm, liability could not be established unless an officer had been aware of the pursuer's vulnerability to the particular stressors. There was no finding that any officer was aware of either the pursuer's vulnerability or the stressors referred to by the Lord Ordinary. The Lord Ordinary erred in holding that any knowledge, that may have existed within Grampian about the pursuer's previous psychiatric issues, should be taken into account in assessing any duty owed by an officer of the SCDEA.

[46] The Lord Ordinary erred in holding, secondly, that the law of delict recognised a discrete, stand alone, nebulous duty of "fair treatment". None of the authorities, which had been relied upon by the Lord Ordinary, altered the requirement to establish foreseeability of psychiatric injury as a necessary component of liability (*Bourhill* v *Young* 1942 SC (HL) 78 at 86 and 98). There was an implied contractual term of mutual trust and confidence between employer and employee, such that an employer should not, without reasonable and proper cause, conduct himself in a manner which was likely to destroy or seriously damage that relationship (*Malik* v *Bank of Credit and Commerce International* [1998] AC 20 at 34). *Yapp* v

Foreign and Commonwealth Office (*supra*) held that unfairness in disciplinary proceedings did not establish foreseeability of harm by itself (*ibid* at para 104). It was only in exceptional cases that the conduct of an employer would be so "devastating" that psychiatric illness would be foreseeable in a person of ordinary robustness (*ibid*, paras 122-127). None of the events, which had caused distress on the part of the pursuer, amounted to "devastating" conduct such as would give rise to the foreseeability of psychiatric harm. The Lord Ordinary did not hold otherwise. Even if the conduct referred to by the Lord Ordinary had been unfair, that did not give rise to a breach of a duty of care.

[47] The Lord Ordinary erred, thirdly, in holding that a duty of care existed and a breach had occurred before considering foreseeability of injury and recognising that such foreseeability was a necessary prerequisite of the existence of that duty (*Hatton* v *Sutherland* [2002] ICR 613, paras 18, 23, 29, 32 and 43; *Yapp* v *Foreign and Commonwealth Office* (*supra*), paras 58, 79, 104 and 119; *Rorrison* v *West Lothian College* 2000 SCLR 245 at 254). The Lord Ordinary erroneously held liability established in the absence of proof that any police officer knew or ought to have foreseen that the pursuer would become psychiatrically unwell because of what he had decided. The test in *Attia* (*supra*) did no more than state that the evidence of psychiatrists was not necessary for a determination. In stating that "these factors" were sufficient to satisfy the test in *Attia*, it was unclear what the Lord Ordinary was referring to. There was no basis for holding that the effect of these factors had been within the knowledge of SCDEA officers. At the material time, Grampian and SCDEA were distinct. The liability of one could not be grounded on the knowledge held by the other.

[48] The Lord Ordinary erred in his application of *Taylor* v *Rover* Co (*supra*). He had correctly made no finding that any person in the SCDEA had been aware of the pursuer's

past psychiatric history. He had made no finding that anyone, who had been aware of that history, had been negligent. There was no evidence to support the Lord Ordinary's finding that the pursuer's psychiatric history had been known to "the employing police force" or the "relevant police authority". The pursuer had concealed stress as a factor in her certificates of unfitness for work. The Lord Ordinary had failed to take into account that the pursuer's contact with Mrs Ross had been as a result of routine psychological review of, and access to confidential psychological support for, undercover officers. The case was based on vicarious liability for the supposedly negligent actings of individuals and not on any failure to operate a safe system of work (*Staveley Iron & Chemical Co* v *Jones* (*supra*) at 643 and 646).

[49] Fourthly, on causation, the Lord Ordinary had erred in finding a link between the pursuer's psychiatric illness and "the breach complained of". The Lord Ordinary had not made a finding that the pursuer had been the subject of an investigation or that there had been any negligence in relation to the support given to her at the time of her move to witness protection. He had not made any findings that would establish that, if the duty had been complied with, the pursuer would not have suffered psychiatric injury, which she had developed by 2 August 2011. At that point, she had still understood that her transfer from the SOU was temporary. The pursuer did not have a case on record for a duty based on the part of any police officer not to cause or permit her to be moved temporarily. The Lord Ordinary did not hold that, had there been an investigation into the matters which had caused C Supt Whitelock's concerns, the pursuer would not have been moved from the SOU. The Lord Ordinary did not hold that it would have been negligent to deploy her permanently to another department after she had been "afforded fair treatment". There was no basis upon which to find that, had she been afforded fair treatment, she would not have

been permanently moved from the SOU. The Lord Ordinary did not hold that there was a duty on anyone to explain the reason for the move to witness protection.

[50] Fifthly, the Lord Ordinary erred in holding that the pursuer had been deliberately misled by an unidentified person or persons into believing that her move from the SOU was only temporary. The pursuer did not offer to prove that anyone had deliberately misled her. Rather, her averments were that the decision not to allow her to work in the SOU was made only after the investigation. The defender did not come to court prepared to meet a case of deliberate misleading. C Supt Stewart had said that, on 27 July 2011, he and the DCC of Grampian had made it known to the SCDEA, through DCI Thompson, that, while investigations were ongoing, the pursuer should not be involved in undercover work. This evidence was not mentioned by the Lord Ordinary. The Lord Ordinary did not explain why he concluded that the pursuer had been deliberately misled. The evidence pointed strongly to the likelihood that the pursuer had been moved because of what had transpired at the meeting of 27 July 2011.

[51] The evidence pointed to the pursuer having been told of her move from the SOU, and that this was only temporary, at the meeting of 27 July 2011 with Supt Stewart and the DCC of Grampian. The pursuer had been told by DCI Thompson and DS Morrison that, pending Strathclyde PSU's investigation, she should not be involved in undercover work, using a legend (cover) or anything that might otherwise compromise her. Grampian had agreed, but had wanted her out of the SOU pending the investigation. C Supt Whitelock was not in the same chain of command as DCI Thompson. He had not been privy to the Strathclyde investigation. He had been unaware that DCI Thompson had told the pursuer that she was to be moved from the SOU. He had made his decision. DI Rae had thought

that the move had been temporary. He had requested that the pursuer stay in the SOU in a non-operational role, but this had been stymied by C Supt Whitelock. Even if someone had misled the pursuer, this was irrelevant. There was no finding that that person could have foreseen that doing so would result in psychiatric harm.

The pursuer

[52] The pursuer submitted that she had a simple and logical case. It was entirely conventional if the law of England were applied to it. Although the Lord Ordinary had not captured every nuance of her case, he had grasped the core elements. In relation to the nature of the duty, it was not a free-standing abstract duty, but one rooted in the law of negligence, including reasonable foreseeability. The duty of fair treatment had its origins in the law of contract. It was a derivative duty. It came from the implied contractual obligation not to act without proper and reasonable cause in a manner likely to destroy the trust and confidence of the employee (*Yapp* v *Foreign & Commonwealth Office* (*supra*)).

[53] The focus of the pursuer's criticism was on C Supt Whitelock and his unilateral decision that the pursuer's post as an undercover officer was to come to an end. The pursuer had trained for many years, and was the leading woman, in what was a recognised specialism. The decision had brought an end to her work as an undercover officer. It was a *de facto* disciplinary decision. It had been taken without investigation, consultation or having the concerns put to the pursuer. The issue was one of basic procedural justice or fairness; a matter well-established in the law of England. C Supt Whitelock had proceeded upon baseless suspicion. His decision had *de facto* punished the pursuer. The case was a plain one of vicarious liability.

[54] Prior to the proof, the pursuer had not been informed as to why she had been moved from the SOU. She had inferred that it had been because of DI Dunbar's investigation. She did not know who had made the decision or on what grounds. The defender had denied that a decision had been made as a result of adverse conclusions about her conduct. The defender had pled that the SOU had ceased operations and that there had been no work for the pursuer. It was the pursuer who had adduced C Supt Whitelock in evidence. He had explained that a decision had been made that she should not be returned to the SOU. This had been taken a week or two after the events without either consultation or investigation. It had constituted a gross and arbitrary injustice. It was not a systems case. There was undisputed evidence that C Supt Whitelock had been seconded from Grampian and therefore the Chief Constable of Grampian was responsible; his liability having been transferred to the defender.

[55] There were two strands on foreseeability. First, there was the egregious nature of the breach, which fixed C Supt Whitelock with reasonable foreseeability of the risk of harm. He ought reasonably to have foreseen that it was not unlikely that psychiatric harm would result from his actions to a person of ordinary fortitude. As distinct from her normal day to day work, this was an unusual and unexpected stress for the pursuer. The second strand related to the events of 27 July 2011. The pursuer had been spoken to by the SCDEA officers, DCI Thompson and DS Morrison, and told that there was to be an ongoing investigation and that she was to be moved temporarily. The pursuer was distraught and felt that she was being blamed. The evidence of CI Craig and DI Thom had corroborated her state of distress. The right hand of the SCDEA had made a decision whereby the pursuer was to be permanently removed from the SOU. The left hand had been telling her that she was being

temporarily deployed elsewhere. C Supt Whitelock was constructively imbued with the knowledge of these officers and their awareness of the extreme nature of the pursuer's reaction. On that basis, he ought to have known that she was likely to suffer a psychiatric reaction to a permanent move.

[56] The pursuer had returned to work on 3 October, only to be told that her job had been advertised and that she was to be moved permanently as a result of a decision of Grampian Police, although it had actually been C Supt Whitelock's decision in April. The date of the breach was when it had been communicated to the pursuer; that is to say 7 October. It was C Supt Whitelock's evidence that he had told the line of command below him that he took responsibility for the decision. The knowledge of DCI Thompson and DS Morrison was to be ascribed to C Supt Whitelock. The court should be hesitant before reversing a Lord Ordinary on foreseeability. It was a highly fact-sensitive evaluation. The Lord Ordinary had taken all the evidence into account. He had had the advantage of hearing and seeing it. It could not be said that he was plainly and obviously wrong.

[57] On causation, it had been in July 2011 when the pursuer had been told of the temporary move. On 2 August, she had seen her GP about anxiety and depression and had been put on medication. On 3 October, she returned to work, ready to start anew, but had been told that she would not be returning to her post. The psychologist had said that, if she had been able to return to work, she would have made a full recovery. It was the period after that, that sounded in damages. It was accepted that the pursuer's secondment to the SCDEA could have been terminated at any time.

[58] On the authorities, it was recognised that there was a distinction between stress at work and specific trauma or event cases. Some cases had been based on a breach of

contractual terms, but others on a breach of duty. There was no real difference in substance between the delictual formulation and the contract case. *Hatton* v *Sutherland* (*supra*) at para 43 was a stress at work case. *Yapp* v *Foreign & Commonwealth Office* (*supra*, at para 43) was nearest to the pursuer's case on its facts. It had held that, where the allegation was one of misconduct, there was a duty to put that conduct to the plaintiff. It was beyond doubt that there was a duty to afford fair treatment in a disciplinary type process. There was no difference between a breach of duty at common law and of contract. An employer was normally entitled to the view that employees will withstand procedural injustice, except where the circumstances were egregious or there was pre-existing vulnerability.

[59] There had been two breaches of the duty to afford fair treatment. The first was C Supt Whitelock's decision and the second was telling the pursuer that her move was temporary and not permanent. The real thrust of her case was the egregious nature of the action taken, rather than pre-existing knowledge of her prior medical conditions. The Lord Ordinary had fixed C Supt Whitelock with the relevant knowledge. He had accepted the pursuer's submission that there had been an egregious breach following upon the events of 11 July. The pursuer's psychological condition had been caused, or materially contributed to, by the breach of duty. The court should make an express finding that, if the pursuer had been given an opportunity to be heard, she would have been able to return to undercover policing. C Supt Whitelock had said that it had been a combination of the three reasons that had led to his decision. If one was knocked out, that was sufficient for the pursuer's purposes.

[60] The Lord Ordinary concluded that each relevant officer had been seconded to the SCDEA from a legacy force. The Lord Ordinary was able to make a finding that a particular

individual, namely C Supt Whitelock, had been responsible for the first breach of duty. Although he was unable to attribute the second breach of duty to any individual officer, there was no difficulty in principle with that, provided that whoever had been responsible had been an officer of one of the former police forces, for whom the defender now had responsibility.

[61] The law of Scotland plainly required an employer to take reasonable care to prevent psychiatric injury, if such injury were reasonably foreseeable. As a matter of principle, there was no reason why the steps, which were required of an employer to avoid psychiatric injury, should not include the duty to afford fair treatment, as was recognised in England (*Gogay* v *Hertfordshire County Council* (*supra*); *Croft* v *Broadstairs & St Peter's Town Council* (*supra*) and *Yapp* v *Foreign & Commonwealth Office* (*supra*)). The Lord Ordinary had properly recognised the existence of the duty to afford fair treatment.

[62] Drawing the threads together, the move of the pursuer from the SOU had carried with it reputational issues for the pursuer. The pursuer was being moved for conduct reasons. Although there were many situations in which employers moved employees, in the case of the pursuer, C Supt Whitelock had been acting in a *de facto* disciplinary conduct matter. The move had not been a natural end to the pursuer's secondment. The decision had been taken in the territory of conduct and discipline. C Supt Whitelock had made no attempt to follow due process. His decision had been arbitrarily based on suspected conduct in circumstances in which the pursuer had been given no opportunity to explain or to respond to the concerns. This had created an obvious risk of reputational damage. It was a gross and arbitrary injustice, carrying with it the risk of psychiatric injury.

[63] Finally, the pursuer addressed the question of anonymity, which had been granted by the Lord Ordinary to the extent of removing the pursuer's real name from the steps in process. It was accepted that, following the decision in *MH* v *Mental Health Tribunal* 2019 SC 432, this would not now be appropriate. The pursuer, as an undercover officer, had been involved in many operations. She had worked at the heart of serious organised crime. On one occasion, she had been abducted and questioned about her involvement with the organisation. She had put herself at serious risk for the good of society. Criminals had long memories. Some had received long prison sentences as a result of the pursuer's work. If individuals were able to identify her, then there was a grave risk to her life. In these circumstances, a derogation from the principle of open justice was merited.

Decision

[64] The duty which applies in the employment setting is the non-delegable requirement on the employer to take reasonable care to safeguard his employees from unnecessary risk of harm. This was firmly established, in the years immediately following *Donoghue* v *Stevenson* 1932 SC (HL) 31, by the full bench in *English* v *Wilsons and Clyde Coal Co* 1936 SC 883 (LP (Normand) at 900) (affirmed 1937 SC (HL) 46), approving *Bain* v *Fife Coal Co* 1935 SC 681. This duty is traditionally expressed as being to take reasonable care to provide a safe place of work (including the provision of safe plant and equipment), competent employees and a safe system of work.

[65] The word "unnecessary" prior to "risk of harm" is an important component in the equation, since many occupations, not least the military and the police, carry with them an inevitable risk of injury, yet they are essential societal elements. The qualification does not

provide an employer, or the chief constable or armed force, with a *carte blanche* to expose those in the position of employees to risk. Whatever the occupation, the employer must take reasonable care to eliminate any unnecessary risks; that is those which can, with reasonable care, be avoided. Liability for harm in the employment context is not a discrete area of legal principle. It is part of the general field of quasi-delictual duties, but one in which there is no need to ask whether there is a duty of care on the employer to his employees, because that is inherent in the existing proximate relationship.

[66] The employer's duty extends to taking reasonable care to safeguard an employee's mental, as well as physical, health from unnecessary risk. This involves not protecting him or her from the normal vicissitudes of employment as they can intermittently create anger, resentment, depression and anxiety (*Fraser* v *State Hospitals Board* 2001 SLT 1051, Lord Carloway at 1052), but from developing a mental illness (including clinical depression) which could have been prevented by taking reasonable care. The most common complaint in the employment sphere is the existence of a system of work which is likely to create mental illness, through the imposition of excessive stress, or one which permits bullying or harassment in the workplace (cf *Rorrison* v *West Lothian College* 2000 SCLR 245). It is the latter type of allegation which largely featured on record here, in so far as the pursuer appeared to be attributing liability for her illness directly to the defender as the successor to a former chief constable or the director general of SCDEA. As such, it is a case which the pursuer expressly disavowed in the course of the hearing on the reclaiming motion.

[67] In employment contracts, there is a term, of relatively recent origin, implied by law, whereby an employer must not, without reasonable and proper cause "engage in conduct likely to destroy or seriously damage the relationship of trust and confidence" which he or

she has with an employee (*James-Bowen* v *Commissioner of Police of the Metropolis* [2018] UKSC 40, Lord Lloyd-Jones at para 16, citing *Malik* v *Bank of Credit and Commerce International* [1998] AC 20 (Lord Steyn at 45)). The House of Lords had earlier recognised:

> "an obligation on an employer, in the conduct of his business and in the treatment of his employees, to act responsibly and in good faith" (*ibid*, citing *Eastwood* v *Magnox Electric* [2005] 1 AC 503, Lord Nicholls at para 11).

Lord Lloyd-Jones continued:

> "The implied term has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship. ... Furthermore, any decision-making function entrusted to an employer must be exercised in accordance with the implied obligation of trust and confidence (*Braganza* v *BP Shipping* [2015] 1 WLR 1661)."

Lord Lloyd-Jones described this as the "portmanteau implied term of trust and confidence". He held that it did not extend to creating a duty on an employer to conduct litigation in a manner which protected employees from economic or reputational harm, or generally to conduct his or her business in such a manner.

[68] Despite the content of some of the submissions at the proof and in the reclaiming motion, this case is not based on breach of an implied term of a contract. It is not founded upon a breach of the employer's duty not to jeopardise a relationship of trust and confidence. It may not be necessary or prudent therefore to embark upon an essay on how that contractual duty might influence the quasi-delictual duty to take reasonable care to avoid unnecessary risk of psychiatric harm. Nevertheless, some exploration of this subject is required, given that there is an averment of a failure to afford the pursuer "fair treatment" in carrying out an investigation and in support of her move to another department. It is said that the defender took disciplinary action against the pursuer without affording her "fair treatment". As Lord Lloyd-Jones put it (at para 21), "the battlefield on which the conflicting

contentions as to the existence of such a duty must be fought out is the scope of the duty of care in [delict]". This involves reverting to the fundamental principle that the duty on the employer, and, as will be seen, a co-employee, is restricted to taking reasonable care to avoid unnecessary risk of psychiatric harm.

[69] The principle, that an employer must afford an employee "fair treatment", when what is at stake is the employment relationship itself, poses no difficulty. If what is involved is a disciplinary process which may result in termination of the relationship, fair treatment would seem entirely appropriate. No doubt this principle has developed alongside the unfair, as distinct from wrongful, dismissal jurisdiction which was first introduced by the Industrial Relations Act 1971. In this situation, it is the employment status of the employee alone which is involved, in so far as process (or treatment) is concerned. Similar considerations may apply where only the employee's interests are involved (eg *Braganza* v *BP Shipping* (supra)). If it is the unfair process, as distinct from the result, which causes foreseeable psychiatric harm, that may sound in damages. If it is the outcome of any such process which has caused harm, no damages will be due if that result (eg dismissal or demotion) would have followed in any event.

[70] Outwith the disciplinary context, or decisions which only affect the particular employee, the idea that every decision taken by an employer must be attended with due process is unworkable. Decisions which are taken by employers often involve multiple considerations. Operational decisions may have to be taken urgently in order to protect the health and safety of other employees and/or the public. As a generality, no duty of fair treatment of one particular employee, in the sense of giving that employee a right to be heard or any other rights which apply to quasi-judicial proceedings, applies. The employer

may act as he or she thinks fit in relation to that type of business or operational decision. If, for example, in the opinion of an employer, an employee requires to be taken off a particular task and deployed elsewhere, no general right of fair treatment arises. The decision is operational. It does not strike at the employment relationship. It does not, at least in the usual situation, undermine the relationship of trust and confidence. All that is occurring is a commonplace movement of a member of staff from one part of an organisation to another. There is no disciplinary element, be it dismissal, demotion or even censure.

[71] In all of this, whether or not a duty of fair treatment arises, a claim can only succeed against an employer if the employer, or in a vicarious case the employee taking the action, knew or ought to have known that the action would be likely to cause psychiatric harm to the affected employee. That must depend upon what the employer, or the employee taking the action, knew, or ought to have known, about the employee who is to be affected. The starting point is that psychiatric harm is not usually a foreseeable consequence of a decision, even of a disciplinary nature, in the employment context. In this area, the summary produced by Underhill LJ in his comprehensive analysis of the case law in *Yapp* v *Foreign and Commonwealth Office* (2015) 44 IRLR 112 (at para 119(1)) is correct. Although each case will depend on its particular facts and circumstances, unless there are indications of vulnerability on the part of the affected employee, of which the employer or the acting employee was, or ought to have been, aware, no breach of the duty to take reasonable care will arise.

[72] Even if the employer or the acting employee is aware of an employee's vulnerability, that does not mean that he or she is precluded from taking action which may trigger psychiatric harm. For example, an employer may require to institute disciplinary

proceedings in a given set of circumstances or to take other action which is needed to protect the interests of others. Provided that the action taken does not amount to a lack of reasonable care, having regard to all the circumstances (and not just those of the affected employee), no fault will arise.

[73] A number of difficulties arise for the pursuer when applying these principles to the facts. The first is that, if the liability founded upon is vicarious, it is necessary to identify the individual or individuals who are said to have been negligent. The Lord Ordinary did not do so. Rather he attributed liability directly to the SCDEA, or perhaps the wider police forces (Grampian and/or Strathclyde), as a whole. Such liability is eschewed by the pursuer in favour of a case, which nowhere appears on record, against C Supt Whitelock. The difficulty with that is that the Lord Ordinary found that C Supt Whitelock's concerns about the pursuer's abilities had been "no doubt legitimately held". It is not difficult to see why these concerns existed. Leaving aside the pursuer's report of the theft of £5,000 of jewellery from her covert flat and living full time in this flat, the pursuer had been working closely with DS G and sharing an office with him. Given the shambles in which the operation was when DS G went on leave, a view that the pursuer must, or ought to, have known something about what had been going on cannot be regarded as surprising. In such circumstances, it is difficult to see how C Supt Whitelock's decision to move the pursuer, whether permanently or temporarily from the SOU and undercover policing generally, can be seen as negligent. In taking that decision, C Supt Whitelock would have had to have in mind the safety of the other officers and operatives. If he had ceased to have faith in the pursuer to carry out this work, he could hardly have permitted her to continue with it.

[74] The second problem is that there is no basis for holding that C Supt Whitelock ought to have been aware that his actions, which involved no disciplinary process potentially leading to demotion or dismissal, might result in the pursuer sustaining psychiatric harm. If any disciplinary action were contemplated, the formal procedure under the Police (Conduct) (Scotland) Regulations 1996 (SI 1642) (now the Police Service of Scotland (Conduct) Regulations 2014 (SSI 68)) would have to have been invoked. In that event, the protections in the Regulations would have cut in. These protections were not necessary because no disciplinary steps were taken. The pursuer's status as a police officer and her rank as a Detective Sergeant were not under threat.

[75] Assuming that the duty of fair treatment applies not just to an employer but to a co-employee, which is doubtful, there was no finding that C Supt Whitelock had been aware of any vulnerability in the pursuer. The Lord Ordinary's treatment of this subject was in the context of direct liability resting on an employer. That analysis, of attributing the knowledge of an employee to an employer, cannot be transferred into the horizontal relationship of co-employees in a vicarious case. If, as the pursuer insisted, blame rested solely on the shoulders of C Supt Whitelock, it was incumbent on the pursuer to demonstrate that he knew or ought to have known that his actions could cause psychiatric harm. There was no proof of this. All that C Supt Whitelock did was to say that the pursuer was not to work in the SCDEA's undercover work. This could only have resulted in the pursuer being moved to other duties. On the face of things, this is an operational decision which could be made at any time, by the person responsible for the conduct of the operations, for any number of reasons or for no reason. Contrary to the Lord Ordinary's view, the move of the pursuer was not a step that required consultation or objective

evaluation or scrutiny, even if, in certain employment contexts, wisdom might suggest that a decision of such a nature might be communicated with a degree of sensitivity as well as accuracy.

[76] The third difficulty is that there is no reason to suppose that, if the pursuer had been consulted, C Supt Whitelock would have reached a different view. Even if he had, or ought to have, been aware of the risk of psychiatric harm, that could not have prevented him from taking the same decision. It may have been necessary, as a reasonable precaution in such circumstances, to ensure that an employee had access to counselling or even psychological or psychiatric services, but these services were already available to the pursuer.

[77] Even if the pursuer's case were to be looked at from the perspective of direct liability, there is no basis for attributing Mrs Ross's knowledge of the pursuer's vulnerabilities to the SCDEA or Grampian. Mrs Ross was not employed by the police. The purpose of her being engaged by the police was not to certify officers fit for duty, and to report findings to the relevant force, but to make a confidential consultation service available to individual officers. The material before the Lord Ordinary was to the effect that the pursuer deliberately withheld information about her mental state from her supervising officers. The Lord Ordinary's finding that the pursuer's psychiatric vulnerabilities were known to the relevant police force cannot stand simply on the basis that Grampian's Occupational Health Department were aware of episodes of depression not related to her employment. In short, whether it is the conduct of C Supt Whitelock's decisions, or the general conduct of the SCDEA as a whole, that is looked at, there is no basis for holding that the actions taken in relation to the pursuer could have been predicted to cause psychiatric harm.

[78] On causation, Mrs Ross's evidence, as narrated by the Lord Ordinary was that the most significant damage had been the pursuer's inability to return to the SOU. If she had been allowed to return to the SOU she would have made a full recovery. The operative cause of the harm, on the evidence, was the decision to transfer the pursuer to witness protection. It was not the process or any deception. The Lord Ordinary found that the pursuer was not treated fairly in the sense that: (1) the police had transferred her out of undercover work without objective evaluation or scrutiny; and (2) she had not been told of the permanence of the decisions. No doubt these may have caused upset and distress, but it is the actual transfer which causes the psychiatric harm. It bears repeating that, apart from the absence of any averments about a duty not to transfer the pursuer, the decision to move the pursuer was an operational one about which there is no duty of objective evaluation or scrutiny. In fact, several inquiries took place after the decision to transfer the pursuer and these culminated in the pursuer being given, and accepting, advice that, in relation to the SOU shambles, she should have acted sooner in voicing her concerns and been willing to challenge her colleagues in relation to inappropriate behaviour.

[79] For these reasons, the reclaiming motion should be allowed. The interlocutor of the Lord Ordinary dated 31 January 2019 should be recalled, the pursuer's second plea-in-law repelled, the defender's fourth plea-in-law sustained and decree of absolvitor pronounced. The pursuer's motion for anonymity will be granted for the reasons advanced (*supra* para [63]), notably the risk to the pursuer's life in the event of her name being disclosed.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 18
A63/15

Lord President
Lord Brodie
Lord Glennie

OPINION OF LORD BRODIE

in the reclaiming motion

in the cause

MRS K

Pursuer and Respondent

against

CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Defender and Reclaimer

_____

Pursuer: McBrearty QC, E Campbell; BTO Solicitors LLP
Defender: Shand QC, Smart QC; Clyde & Co (Scotland) LLP

28 April 2020

[80] I gratefully adopt the exposition of the facts and the summary of parties' submissions which has been given by your Lordship in the chair.

[81] As counsel for the defender submitted and as I took counsel for the pursuer to accept, given the terms of paragraph 20 of Schedule 5 to the Police and Fire Reform (Scotland) Act 2012, for the pursuer to succeed against the defender she must establish that the harm in respect of which she sues was caused by the fault of an individual for whom either a chief constable of a legacy force or the Director General of the SCDEA was, prior to

1 April 2013, vicariously liable. The short point is that in terms of the statute the vicarious liability of the senior officers of the relevant former police bodies prior to 1 April 2013 has been held now to be the liability of the defender. Other liabilities, including any personal liability which the senior officers may have incurred to their subordinate officers by reason of breach of a duty equivalent to that owed by an employer to an employee, have not been so transferred and accordingly are of no relevance for the purposes of this action. The Lord Ordinary appears to have understood this, but whether he appreciated the consequences of the pursuer having to establish fault on the part of an individual, vicarious liability for which is now by statute held to be that of the defender, is less certain. I would see there to be a question as to whether the Lord Ordinary considered the distinction between personal and vicarious duty to be of any materiality (albeit that he does record at para [92] of his opinion the defender's submissions on this point and addresses the matter of the defender's responsibility at paras [104] and [105]). At para [1] of his opinion the Lord Ordinary quotes the passages from the pursuer's pleadings which contained the duty or duties which he understood to be founded on:

> "It was the defender's predecessor's duty to take reasonable care for the safety of its employees, including the pursuer, and to avoid exposing them unnecessarily to the risk of injury."

As it happens, there are two minor typographical errors in that quotation from the pursuer's pleadings; "predecessor's" should read "predecessors'" and "its" should read "their". These errors are inconsequential. What is more important is the Lord Ordinary begins his opinion by stating a personal rather than a vicarious duty. This may have misled him.

[82] Like your Lordship in the chair I understood counsel for the pursuer to confirm that this was a case where what was founded upon was transferred vicarious liability and that

the individual officer who was at fault and whose fault gave rise to the pursuer's injury or harm and therefore damages, was Chief Superintendent Stephen Whitelock. It was C Supt Whitelock for whom the Director General of the SCDEA was vicariously liable and that liability is now that of the defender. The nature of the fault alleged was negligence, as counsel for the pursuer expressly confirmed. I shall return to the proposition that C Supt Whitelock was negligent but it is convenient first to set out, from the perspective of causation, why he, and his acts and omissions, are of critical importance to the pursuer's case.

[83] On the Lord Ordinary's findings in fact, there are two candidates for the role of an individual whose fault caused harm to the pursuer: C Supt Whitelock, who decided that the pursuer should no longer be involved in covert operations within SCDEA; and the unidentified person who deliberately misled the pursuer by telling her that her posting out of the SOU and into witness protection was only temporary. Counsel for the defender made the point that as it is not known who the unknown person was, it cannot be said that this person was necessarily a police member of the SCDEA for whom the Director General was vicariously liable, but leaving that aside, the unknown person can in any event be eliminated as a candidate for the role of individual at fault when regard is had to the pursuer's case on causation of harm and what was accepted by the Lord Ordinary in relation to that case.

[84] The pursuer avers that she suffered from and continues to suffer from a number of psychiatric symptoms which include low mood, tearfulness, insomnia, lack of confidence, diminished libido, impaired memory, anxiety, irritability, social isolation and feelings of suicidal ideation, and that she has been diagnosed as suffering from a Depressive Disorder

within the internationally recognised psychiatric classifications; and that she is unable to resume her former employment as a police officer (statement 5, reclaiming print page 30D to 31A). The pursuer attributes this psychiatric harm to her learning, on 7 October 2011, from the head of Human Resources at SCDEA, that it had been decided that a previous deployment out of the SOU was to be permanent and that she would no longer be deployed as an undercover officer, having previously, on 27 July 2011, been told that her deployment out of SOU and into witness protection was temporary. Remarkably, at what was a proof "restricted to liability and causation" where the pursuer founded on averments that she had suffered and continued to suffer psychiatric symptoms, the Lord Ordinary heard no evidence from a psychiatrist. However, he did hear that on 11 October 2011 the pursuer had attended a clinical psychologist, Mary Keenan Ross, for a session of psychological support and that the pursuer continued to have regular sessions with Mrs Ross until March 2015. Mrs Ross gave evidence and the Lord Ordinary placed weight on that evidence as establishing what had caused the relevant psychiatric harm. He summarised and adopted that evidence at para [120] of his opinion:

> "…the most significantly harmful element psychologically was the failure by the defender to permit the pursuer to return to employment in SOU in the absence of any explanation why this course was being undertaken …had this been permitted then the pursuer would have achieved closure. Her psychologically damaging concerns that her professional reputation was damaged would have been obviated by such a course. It was Mrs Ross's opinion that had the pursuer been allowed to return to SOU she would have made a full recovery."

The Lord Ordinary goes on at para [121]:

> "Having regard to that evidence and these considerations I am satisfied that there is a causal link between the breach complained of and the injury of a psychological or psychiatric nature sustained by the pursuer."

When the Lord Ordinary refers to "the breach complained of", he must be taken to mean breach of the duty of fair treatment which is averred by the pursuer. I have quoted the introductory general statement which the Lord Ordinary included as part of a more extensive narrative of the duties which he understood to be the foundation of the case as finally insisted upon. Your Lordship in the chair reproduces that more extensive narrative at para [9] of your Lordship's opinion.

[85] As already touched on, "the breach complained of" is not breach of a duty which is pled as being incumbent upon C Supt Whitelock (rather it is a duty incumbent on the defender's predecessors, in other words the chief constable of one or other of the legacy forces or the Director General of the SCDEA) but leaving that aside for the moment and focusing on causation, on the pursuer's case, and the evidence led in support of it and accepted by the Lord Ordinary, there is a basis upon which it might be found that the relevant psychiatric harm was the result of C Supt Whitelock having made and thereafter not rescinded his decision not again to deploy the pursuer in covert work with the SOU. Therefore, subject to further consideration, C Supt Whitelock is a possible "individual at fault" in that his actions can be said to have caused the relevant psychiatric harm to the pursuer. He was, to use the Lord Ordinary's expression, the "individual who was the decision-maker". However, that cannot be said of the unidentified person who deliberately misled the pursuer. He or she did not cause it and he or she did not materially contribute to it. In so far as any influence on the pursuer's psychiatric harm was concerned, he or she seems to have delayed its onset until on or after 7 October 2011. But even if that is for some reason wrong, the primary and necessary actor is C Supt Whitelock. Accordingly, only if C Supt Whitelock's acts and omissions constituted fault on his part, in the sense of

negligence, can the pursuer succeed in this action. I therefore return to the proposition that C Supt Whitelock was negligent.

[86] The Lord Ordinary was certainly critical of C Supt Whitelock. At para [108] of his opinion the Lord Ordinary records that C Supt Whitelock formed the view that the pursuer should no longer be involved in covert operations within SCDEA without there having been an adverse finding against the pursuer in relation to any of the matters which had caused him to lose confidence in her or indeed drawing these concerns to her attention. At para [112] the Lord Ordinary records that C Supt Whitelock's decision that the pursuer should not work in SOU again had been taken, without consultation, "on the basis of concerns, no doubt legitimately held by C Supt Whitelock, but which had not been subject to objective valuation or scrutiny". The concerns had not been presented to the pursuer in order to afford her the opportunity to comment thereon or to seek to rebut them. "These considerations", the Lord Ordinary continues, "would, of themselves, in my view constitute a lack of fair treatment in the context of an employee employer relationship." Nowhere, however, in these criticisms is there an explicit finding that C Supt Whitelock was negligent. This is important because, as counsel for the defender submitted, before an employer can be found vicariously liable for his employee, the employee must be proved to have been negligent (*Stavely Iron Co Ltd* v *Jones* [1956] AC 627 at 638, 639, 640, 642-643). If, contrary to my opinion, the Lord Ordinary is to be taken implicitly to have found C Supt Whitelock to have been negligent, he has not provided a coherent explanation of the basis upon which he found it possible to do so, and for that reason alone his conclusion that the pursuer has established liability on the part of the defender is open to review by this court.

[87] It is trite that for C Supt Whitelock to have been negligent he had to have been in breach of a duty to take reasonable care to avoid causing the pursuer to suffer the relevant psychiatric harm. The context therefore is one where the familiar words of Lord Atkin in *Donoghue* v *Stevenson* 1932 SC (HL) 31 at 44 are apposite, and worthy of repetition:

> "But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Now C Supt Whitelock was the pursuer's fellow officer. He had a management function. His decisions clearly had an impact on where and how she was deployed and he was self-evidently aware of that. To that extent he and she were in a relationship of proximity. The pursuer therefore can say, in the language of Lord Atkins, that she was someone who C Supt Whitelock should have had in contemplation when directing his mind to the decision as to where to deploy her and the basis for that decision. A police officer is not an employee but in relation to matters of health and safety she has the same protection as is afforded to an employee by the common law, albeit that, in the absence of a contract of employment, that protection must be formulated solely in terms of a duty of care (*James-Bowen* v *Commissioner of Police of the Metropolis* [2018] 1 WLR 4021 at para 15, *W* v *Commissioner of Police of the Metropolis* [2000] 1 WLR 1607 at 1610C, *White* v *Chief Constable of South Yorkshire* [1999] 2 AC 455 at 497E and 505C). Equally, but separately, wherever a police officer is deployed, her fellow officers owe her duties of care, equivalent to the duties that any employee owes to a

fellow employee. That takes the pursuer a certain distance. However, returning to the classic dictum of Lord Atkin, being in a broadly defined relationship of proximity is not enough, for there to be a duty of care not to act in a particular way it must be reasonably foreseeable that acting in that way would be likely to injure the person to whom the posited duty is said to be owed. For C Supt Whitelock to have had a duty of care to the pursuer to avoid causing her psychiatric harm, it must have been reasonably foreseeable to C Supt Whitelock when making the decisions complained of that the pursuer might suffer psychiatric harm in consequence.

[88] The Lord Ordinary recognised that reasonable foreseeability of resulting harm on the part of the supposed wrongdoer is a necessary pre-condition for recovery of damages for negligence; that proposition was no more controversial before him than it was before this court. There are however different ways in which the notion of reasonable foreseeability may be used for the purposes of analysis where what is in issue is the recovery of damages for psychiatric harm. For example, the Lord Ordinary, in the part of his opinion headed "Foreseeability" quoted what was said by Dillon LJ in *Attia* v *British Gas plc* [1988] QB 304. What was in issue in that case, as a preliminary issue on assumed facts was:

> "Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?"

As that formulation suggests, for the purposes of trial on the preliminary issue the existence of a duty of care and its breach were assumed; the reasonable foreseeability or otherwise of psychiatric harm was brought into play as a means of determining whether the damage founded on arising from psychiatric harm was too remote to be recovered. On the other hand, in *Hatton* v *Sutherland* [2002] ICR 613, where four cases for damages arising from

stress at work were under consideration by the Court of Appeal, Hale LJ (as she then was) said this at para 23:

> "To say that the employer has a duty of care to his employee does not tell us what he has to do (or refrain from doing) in any particular case. The issue in most if not all of these cases is whether the employer should have taken positive steps to safeguard the employee from harm: his sins are those of omission rather than commission. Mr Owen, for the employer in Mr Bishop's case, saw this as a question of defining the duty; Mr Lewis, for the employer in Mrs Jones's case, saw it as a question of setting the standard of care in order to decide whether it had been broken. Whichever is the correct analysis, *the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable*. "

Thus Hale LJ rather suggests that in many cases it may not very much matter where the litmus paper of reasonable foreseeability is applied in order to determine whether there should be a finding of liability; remoteness of damage, standard of care, or existence of a duty, but applying it to the question of whether a duty of reasonable care is owed at all puts the matter into particularly sharp focus. As Lord Steyn said in *White* v *Chief Constable of South Yorkshire* (*supra*) at 497:

> "It is a *non sequitur* to say that because an employer is under a duty to an employee not to cause him physical injury, the employer should as a necessary consequence of that duty (of which there is no breach) be under a duty not to cause the employee psychiatric injury."

Thus, it is the reasonable foreseeability of the relevant sort of harm as being caused by the activity being undertaken that gives rise to a duty of reasonable care to avoid the relevant harm. Lord Steyn was considering the relationship between employer and employee but the same can be said for the relationship between fellow employees, or indeed between any two parties.

[89] *Rorrison* v *West Lothian Council* 2000 SCLR 245 is an example of the court using reasonable foreseeability of the relevant sort of harm in order to determine whether or not

there was a duty of care to avoid that harm. In that case Lord Reed contemplated the possibility of an employee having a duty to avoid causing psychiatric harm to a fellow employee by virtue of bullying behaviour in the work setting. For the purposes of what was a debate on relevancy it had to be assumed that there had indeed been bullying behaviour by the pursuer's fellow employees. However, for any duty of care to arise it had to be reasonably foreseeable to the person whose act or omission was under consideration that the act or omission might cause the relevant kind of harm to the person to whom it is posited that the duty is owed. Applying that principle to the case before him, Lord Reed explained that the existence of a duty to avoid causing psychiatric harm depended on a finding that the relevant employees ought reasonably to have foreseen that the pursuer was under a material risk of developing a psychiatric disorder in consequence of their behaviour. What was required was reasonable foreseeability of a recognised psychiatric disorder and not simply a feeling of being "unsatisfied, frustrated, embarrassed and upset". In assessing the pursuer's pleadings as inadequate for that purpose, Lord Reed said this:

> "I can find nothing in these matters (or elsewhere in the pursuer's pleadings) which, if proved, could establish that [the fellow-employees blamed for bullying behaviour] ought to have foreseen that the pursuer was under a material risk of sustaining a psychiatric disorder in consequence of their behaviour towards her. They might have foreseen that she would at times be unsatisfied, frustrated, embarrassed and upset, but that is a far cry from suffering a psychiatric disorder. Many, if not all, employees are liable to suffer those emotions, and others mentioned in the present case such as stress, anxiety, loss of confidence and low mood. To suffer such emotions from time to time, not least because of problems at work, is a normal part of human existence. It is only if they are liable to be suffered to such a pathological degree as to constitute a psychiatric disorder that a duty of care to protect against them can arise; and that is not a reasonably foreseeable occurrence (reasonably foreseeable, that is to say, by an ordinary bystander rather than by a psychiatrist) unless there is some specific reason to foresee it in a particular case. I can see no such reason in the present case."

[90] Much the same was said by Hale LJ in *Hatton* v *Sutherland* (*supra*). At para 43, Hale LJ formulated a number of "practical propositions" applicable to cases where a complaint has been made of psychiatric illness brought about by stress at work. Among these practical propositions were the following:

> "(2) The threshold question is whether [psychiatric] harm to this particular employee was reasonably foreseeable… this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) …
>
> (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large… An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability"

One of the four cases, reported as *Barber* v *Somerset County Council* [2004] 1 WLR 1089, was taken on a further appeal to the House of Lords. There the judgment of the Court of Appeal was reversed but no issue was taken with Hale LJ's statement of the law and in the dissenting opinion of Lord Scott the practical propositions were specifically endorsed (at para 7). *Hatton* has been repeatedly cited in stress at work cases and is regarded as the leading authority.

[91] In *Hatton* Hale LJ made the point that an employer is entitled to assume that an employee "can withstand the normal pressures of the job" without succumbing to psychiatric illness, in the absence of information known to the employer and pointing to particular susceptibilities on the part of an individual employee. In *Rorrison* Lord Reed makes a similar point in the context of relationships between employees: interactions at work are potentially productive of stress and other negative emotions; that is "a normal part of human existence". However, experiencing negative emotions is different from

developing a psychiatric disorder. One employee is entitled to assume that while another employee might find "problems at work" stressful she will be able to cope with the experience without becoming psychiatrically ill. In other words, one reasonable person is entitled to assume that another reasonable person is sufficiently psychologically resilient not to suffer psychiatric harm in the face of even the quite unpleasant behaviour complained of in *Rorrison*. That position can change. What is reasonably foreseeable to a particular person of necessity depends on what information that person has available to him or her, or is deemed to have available to him or her. Thus, if a person has "some specific reason to foresee it in a particular case" he or she may be held to have been able reasonably to foresee the onset of psychiatric disorder in another person consequent upon that other person having a particular experience. But the default position as it were, in the absence of "some specific reason", is that it is not reasonably foreseeable that someone will sustain psychiatric harm of the sort that is relevant for the recovery of damages (the development of a medically recognised psychiatric disorder) simply by reason of exposure to stresses which are of the sort which are "a normal part of human existence".

[92] Indeed, what might be described as the general assumption of psychological resilience goes further. For reasons that are probably more to do with pragmatism than medical science, the courts treat the reasonable man as able to cope successfully with quite extreme experiences. In *White* at 501 to 505 Lord Hoffmann discusses the hesitant and not entirely consistent approach of the courts over time to the issue of the recovery of damages for psychiatric harm. A reflection of that hesitancy is the assumption made as to the foreseeability of such harm. Notwithstanding the evolution of medical knowledge since then, the modern position is not very different from that demonstrated in the speeches in

Bourhill v *Young* 1942 SC (HL) 78, a decision which, according to Lord Hoffmann, appeared to combine what was in theory a simple foreseeability test with a robust wartime view of the ability of the ordinary person to suffer horror and bereavement without ill effect. In the absence of evidence to the contrary the ordinary person is taken to be able to deal with stressful events and experiences without suffering significant psychiatric harm. Thus, there is this in the opinion of Lord Hoffmann in *Rothwell* v *Chemical & Insulating Co Ltd* [2008] 1 AC 281 at para 30:

> "In the case of psychiatric illness, the standard description of what should have been foreseen, namely that *the event which actually happened* would have caused psychiatric illness to a person of "sufficient fortitude" or "customary phlegm", has been part of the law since the speech of Lord Porter in *Bourhill* v *Young* … The general rule still requires one to decide whether it was reasonably foreseeable that the event which actually happened (in this case, the creation of a risk of an asbestos-related disease) would cause psychiatric illness to a person of reasonable fortitude."

Again, in *Robertson* v *Forth Road Bridge Joint Board* 1995 SC 364 at 373, Lord President Hope noted that what Lord Porter had said in *Bourhill* about the "fortitude" of the ordinary frequenter of the streets, had been approved by Lord Bridge in *McLoughlin* v *O'Brian* [1983] 1 AC 410. Lord Hope then went on, under reference to Lord Wilberforce's speech in *McLoughlin*, to refer to the assumed ability of the ordinary bystander to endure without adverse consequences "the calamities of modern life".

[93] I stress how resilient the person of reasonable fortitude is assumed to be because, appreciating that for C Supt Whitelock to be under a relevant duty of care it had to be reasonably foreseeable to him that the pursuer would suffer psychiatric harm as a result of his decision, counsel for the pursuer submitted that C Supt Whitelock's losing confidence in the pursuer and his consequent decision not to deploy her in the SOU without having carried out an investigation into the factual basis for that loss of confidence, was so

egregious that he ought to have foreseen that a person of ordinary fortitude in the position of the pursuer might react to learning of the decision by developing a recognised psychiatric illness. With great respect to counsel, that cannot be so. The Lord Ordinary made no such finding. It may be that C Supt Whitelock's concerns were ill-founded. It may be that he did not treat the pursuer well. That is not to the point. What is in issue is whether it was reasonably foreseeable to C Supt Whitelock, as the person said to have been under a duty of care and as having breached that duty, that as a result of his decision the pursuer would suffer psychiatric illness. Counsel's assertion that that must have been reasonably foreseeable simply by reason of the nature of the decision made by C Supt Whitelock and the basis for him making it is simply unsupportable. It is contradicted by what was said in *Rorrison*, *Hatton*, *White*, *Rothwell* and *Robertson* (all *supra*). To these references I would add *Croft* v *Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676 at para 76 where Tuckey LJ said this:

> "I have great sympathy for the claimant. The council's letter … and some of their subsequent conduct were unfair and hurtful, but that did not give the claimant a good claim of the kind made on her behalf unless she could show that the council were aware that she was a psychiatrically vulnerable person and that it was foreseeable that their letter and subsequent conduct might cause her to have a nervous breakdown. I think the judge's sympathy for the claimant and his outrage at what had happened led him to make findings on these two issues in favour of the claimant which were not open to him ... This case illustrates the need for judges to guard against allowing sympathy and outrage to lead them astray."

[94] The Lord Ordinary' reasoning, leading to the conclusion that the pursuer has established the case set forth on record against the defender, is at paras [104] to [122] of his opinion under the heading "Critical examination of evidence and submissions". He allocates paras [114] to [119] to his consideration of "the question of foreseeability". There,

he directs himself, under reference to what was said by Dillon LJ in *Attia* v *British Gas plc* (*supra*) at 312:

> "Whether it was reasonably foreseeable to the reasonable man - whether a reasonable onlooker, or, in the context of the present case, a reasonable gas fitter employed by the defendants to work in the plaintiff's house - is to be decided, not on the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect in a person of normal disposition or customary phlegm, but by the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, treating himself as the reasonable man, and forming his own view from the primary facts as to whether the chain of cause and effect was reasonably foreseeable."

He then proceeds, "adopting that approach".

[95] No exception can be taken to what is set out by Dillon LJ as a method of determining what would have been reasonably foreseeable to "a reasonable gas fitter" and therefore the "individual who was the decision maker", in so far as what he means is that the decision is one for the judge, treating himself as a reasonable man with a reasonable man's general knowledge as to cause and effect and attributing to this notional reasonable man such particular knowledge as might have been had by the person said to have been at fault (the gas fitter in *Attia*, and C Supt Whitelock in the present case). It is this method, contrasted with that of relying on the evidence of psychiatrists, that was endorsed by Lord Bridge in *McLoughlin* v *O'Brian* (*supra*) at 432, as Dillon LJ acknowledged. However, while I have emphasised the use of reasonable foreseeability as a tool in the toolkit for identifying the existence of a duty of care, by this stage in his opinion the Lord Ordinary had already accepted (at para [106]) that "it is now clear that the law recognises a common law duty of fair treatment in circumstances where the complaint is that psychiatric harm occurred to an employee"; and then found at para [112] that the duty had been breached by C Supt Whitelock (and also by the unknown person who had misled the pursuer (para [113])

although how that might be causally relevant is not explained). Thus, although at para [119] of his opinion the Lord Ordinary uses the expression "the threshold of reasonable foreseeability", he did not treat reasonably foreseeability of psychiatric harm as a threshold requirement in the sense of a necessary pre-condition for the existence of the relevant duty. Rather, he applied the test of reasonable foreseeability as a tool to determine whether the development of psychiatric illness was too remote a prospect to sound in damages (which is what Dillon, LJ had been doing in *Attia*).

[96] Here the supposed wrongdoer was C Supt Whitelock. As I have argued and as I would take the Lord Ordinary to have accepted, it is not reasonably foreseeable that a person of ordinary fortitude will suffer psychiatric harm simply because she is not deployed to a particular professional role even in circumstances where her competence and probity may have been doubted and she perceives her change of role as reflecting adversely on her reputation. Therefore, looking at the matter from the perspective adopted by the Lord Ordinary, for C Supt Whitelock's acts and omissions to give rise to a claim for damages which is not too remote, he must have had special reason to foresee that the pursuer might react as she did. It would appear that the Lord Ordinary found that special reason in the episodes of the pursuer's medical history referred to in paras [3] to [6] and [115] of his opinion and the three stressful incidents following April 2011 which are referred to in paras [14], [17], [20] to [22] and [116] to [118], the effect of which were "within the knowledge of the SCDEA" (para [119]).

[97] The pursuer's medical history includes two episodes of depressive illness, one associated with the death of the pursuer's mother and work-related stress in 1997, the other with the pursuer suffering from a long spell of serious physical illness in 2003 to 2005. These

episodes were known to Grampian Police Occupational Health Department and I can see that they may point to a susceptibility to depression on the part of the pursuer at least when faced with significant life events. Whether they point to a susceptibility to the development of psychiatric illness when faced with less stressful events is a matter which the Lord Ordinary does not address in his opinion. The Lord Ordinary refers at para [6] of his opinion to the pursuer attending regular sessions at least annually from 1998 to 2013 with Mrs Ross, the clinical psychologist, but, as defender's counsel submitted, these were confidential and such assessments as Mrs Ross may have made were not available to Grampian, the SCDEA or anyone else. It is not entirely clear how the Lord Ordinary uses the three stressful incidents subsequent to April 2011 to inform his judgement on special reason to be aware of a risk of psychiatric harm. They point to reasons for the pursuer feeling under stress; and to police members of the SCDEA knowing that she was under stress, that she had reason to feel stressed and was in fact stressed, but although paras [116] to [119] are to be found in the section of the Lord Ordinary's opinion headed "Foreseeability" it is not obvious how these stressful post April 2011 incidents bear on a particular susceptibility on the part of the pursuer to develop psychiatric illness as a result. It is certainly not obvious as to how these incidents bear on anyone having knowledge of such a susceptibility prior to C Supt Whitelock making his critical decision in April 2011.

[98] However, whatever might reasonably be made of the pursuer's history and experience, either prior to April 2011 or later, it is only relevant if that history and experience was known to C Supt Whitelock, as the person who was allegedly negligent by reason of not affording the pursuer fair treatment. As the Lord Ordinary appears to accept at para [119] of his opinion, C Supt Whitelock was in a state of ignorance about the pursuer's history and

experience in so far as that history and experience might point to special reason to think that the pursuer was at risk of psychiatric harm consequent upon workplace pressures.

[99] The Lord Ordinary elides what might be thought to be an insurmountable hurdle to the pursuer's success as follows (at para [119] of his opinion):

> "There is clear authority for the proposition that knowledge on the part of some employees in cases of stress at work is sufficient. An employer cannot rely upon the ignorance of an individual who was the decision maker to avoid the threshold of reasonable foreseeability."

The Lord Ordinary's approach is reflected in para 10(v) of the pursuer's note of argument:

> "the knowledge relevant to reasonable foreseeability of all those who were involved in the line management, investigation and welfare of the pursuer (both at the SCDEA and Grampian Police, given the crossover of responsibility for the pursuer's welfare) fell to be imputed to individual decision-makers whose acts and omissions gave rise to the breaches of duty. That was true, in particular, of Ch Supt Whitelock in relation to the first breach of duty, but equally of the unknown officer or officers responsible for the second breach of duty."

Two cases are relied on by the pursuer: *Taylor* v *Rover* [1966] 1 WLR 1491 and *Yapp* v *Foreign and Commonwealth Office* at first instance, [2013] EWHC 1098 (QB) at para 145.

[100] I do not accept that the propositions set out by the Lord Ordinary at para [119] apply to a case which depends on establishing the negligence of a fellow employee (or fellow police officer) and I do not accept the soundness of the propositions set out in para 10(v) of the pursuer's note of argument. Neither of the decisions cited supports the Lord Ordinary or what appears in the pursuer's note of argument. What these cases vouch is the uncontroversial proposition that the knowledge of a suitably responsible employee (a leading hand with the authority to withdraw a defective tool from use in the one case, and the head of Health and Welfare in the other) will be imputed to the employer. That proposition does not assist the pursuer in the present case. There are reasons why, when

what is in issue is the extent of a duty of care owed by an employer to an employee, the knowledge of suitably responsible employees is imputed to the employer. An employer, unless an individual with a small enterprise, can only act through its employees who, when acting within the scope of their employment, are its agents. Generally speaking, the knowledge of an agent will be imputed to his principal. More to the point, an employer cannot delegate its duty to take reasonable care for the health and safety of its employees. A proper discharge of that duty will generally require systems to be put in place, with a number of employees having various responsibilities, each of whom must act appropriately and perhaps proactively if the employer's duty of care is to be fulfilled. Acting appropriately may be dependent on having particular knowledge. Accordingly, it will be for the employer to put in place a system for the sharing and indeed perhaps the acquisition of such knowledge. If the system is not in place or if the responsible employee does not do what he is required to do with the relevant knowledge then there will be a breach of the duty of care owed by the employer in the event of an employee suffering harm. Cranston J put the point more pithily in *Yapp* at para 145:

> "If an employer were able to avoid liability for psychiatric injury by assigning its welfare duties to a particular individual, and then claiming it had no knowledge of what that individual was told, an employee's entitlement to be treated in accordance with the employer's duty of care would be severely curtailed."

However, these considerations do not apply where the duty in question is not one owed by an employer to its employee but rather by one employee (or person in an equivalent position) to another. C Supt Whitelock had no reason to believe that the pursuer was not a person of ordinary fortitude and therefore not able to withstand "the normal pressures of the job" and there is no reason to treat him as if he did.

[101] Accordingly, however factually ill-founded C Supt Whitelock's loss of confidence in the pursuer may have been, his decision in April not to re-deploy her to the SOU breached no duty of care owed to the pursuer to avoid her suffering the relevant psychiatric harm because no duty arose. He was entitled to consider what he was concerned with to be an operational decision with no significant ramifications for the pursuer's health. The Lord Ordinary should have so found with the result that he should have gone on to find that the pursuer had not established an entitlement to recover damages from the defender. In my opinion the reclaiming motion should be allowed and the defender assoilzied.

[102] On my approach to the resolution of this reclaiming motion, consideration of the implications of the reception into the law of Scotland of duty to afford fair treatment breach of which is actionable in the event of the occurrence of psychiatric harm, can wait for another day. However, had it been necessary to give the matter consideration it appears to me that it would be necessary to address quite difficult questions about how this suggested duty and its breach might relate to the facts of the pursuer's case.

[103] The Lord Ordinary based his conclusion that the law recognises a common law duty of fair treatment in circumstances where the complaint is that psychiatric harm occurred to an employee on three cases which had been relied on by the pursuer: *Gogay* v *Herefordshire County Council* [2000] IRLR 703, *Croft* v *Broadstairs & St Peter's Town Council* (*supra*) and *Yapp* v *Foreign & Commonwealth Office* (*supra*). Counsel for the pursuer submitted that these decisions had received an endorsement in the Supreme Court from Lord Lloyd-Jones in *James-Bowen* v *Commissioner of Police of the Metropolis* (*supra*) at para 16.

[104] *Gogay*, *Croft* and *Yapp* have similarities to the facts in the present case: the inept or inconsiderate handling of misconduct allegations resulting in an employee developing

psychiatric illness, but their legal basis is significantly different from that of the present case; they were pled or at least argued exclusively or primarily in contract and in so far as they relied on breach of duty of care to afford fair treatment it was on the basis of a personal duty being owed by the employer to its employee. They are not vicarious liability cases. They are not based on one employee having a duty of care towards another employee. *James-Bowen* was a different case on the facts: it relied on a supposed duty on the part of the Commissioner to protect the reputation of subordinate police officers in the conduct of litigation in which the officers had been alleged to have been at fault. Lord Lloyd-Jones was summarising the effect of decisions in the field. Again, the focus was on contract. He noted:

> "The mutual obligation of employer and employee not, without reasonable and proper cause, to engage in conduct likely to destroy or seriously damage the relationship of trust and confidence required between employer and employee is a standardised term implied by law into all contracts of employment"

And, after giving other instances of how the term had been applied in the caselaw, he continued:

> "The implied term has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship"

The present case does not involve an employer taking positive action directed at the very continuance of the employment relationship. It is not even concerned with disciplinary proceedings, as *Gogay*, *Croft* and *Yapp* all were. Before this court, counsel for the pursuer recognised that. His response was that because of the perceived reputational damage consequent upon the pursuer not being redeployed and C Supt Whitelock's suspicions of wrongdoing on her part, his decision not to redeploy her had to be regarded as the equivalent of the imposition of a disciplinary sanction. Now this is a bold assertion in

circumstances where the pursuer faced no formal sanction beyond the proposal that she receive management advice to the effect that she should be more willing to challenge what she saw to be a failure on the part of a colleague.

[105] This court does not have the benefit of the Lord Ordinary's views as to why he saw the authority of *Gogay*, *Croft* and *Yapp* as extending beyond the conduct of disciplinary proceedings and into the area of operational decision making as to where officers are most appropriately deployed. Nor does it know why the Lord Ordinary thought that a duty which originated in the implied term in the contract of employment that the parties, and particularly the employer, will not without reasonable cause act in a manner likely to destroy or seriously damage the relationship of confidence and trust between the parties to the contract, as enunciated in *Malik* v *Bank of Credit and Commerce International* [1998] AC 20, might be incumbent upon one police officer when deciding what should be the operational role of another police officer.

[106] Neither does this court have the benefit of the Lord Ordinary's views, after what had been a proof on "liability and causation", on the causal connection between any failure to afford fair treatment (the duty said to have been breached) and the injury of which the pursuer complained (cf *Hatton* para 35). What I have in mind is the Lord Ordinary's summary of the evidence of Mrs Ross at para [120] where he says that the most significantly harmful element psychologically was the failure to permit the pursuer to return to the SOU in the absence of any explanation why this course was being taken. It may be that a failure to permit a return to the SOU and a failure to give an explanation can be said to be a consequence of an absence of fair treatment or an aspect of an absence of fair treatment, but it is not clear from this evidence that it was not being afforded fair treatment *per se* which

caused the pursuer to suffer psychiatric harm. Counsel for the pursuer explained that the pursuer's case was that a fair investigation would have displaced all C Supt Whitelock's concerns and therefore led to him either not to losing confidence in the pursuer or to restoring his confidence in her and therefore redeploying her to the SOU. Counsel recognised that the Lord Ordinary had made no such finding. That may be because the Lord Ordinary does not seem to have applied his mind to why a duty of fair treatment arose in the circumstances of this case, just precisely what such a duty required from those involved and why, had these precise requirements been fulfilled, the pursuer would not have suffered psychiatric harm.

[107] Applying a duty to afford fair treatment to someone in the position of C Supt Whitelock making the sort of decision he did seems to me to raise issues of policy which again are not discussed in the Lord Ordinary's opinion. I would question whether it would make for good policing to require senior officers to justify their operational decisions as to which of their subordinates is fitted for a particular sensitive role.

[108] If, as the pursuer's counsel invited us to do, what C Supt Whitelock was doing is seen as conducting disciplinary proceedings, a different policy-related question arises and that is how the duty founded on by the pursuer fits with the decision (admittedly not referred to in argument) of the House of Lords in *Calveley* v *Chief Constable of Merseyside* [1989] AC 1228. In that case police officers against whom disciplinary proceedings had been taken and who had been suspended from duty but thereafter reinstated, sued the chief constable as vicariously liable for the investigating officers responsible for the investigations which were part of the proceedings, alleging that the officers had failed to conduct the proceedings properly or expeditiously and claiming damages in respect of the loss of

overtime earnings they would have received during the periods of suspension, and in respect of injury to reputation. The claims were struck out by the judge at first instance as disclosing no course of action on the grounds that no duty of care was owed by an investigating officer to an officer under investigation, and no private law claim arose in negligence in respect of any alleged breach of statutory duty under the Police (Discipline) Regulations 1977. That decision was upheld in the Court of Appeal and in the House of Lords.

[109] Considering the case based on negligence, Lord Bridge (*supra* at p 1238), in a speech with which the other members of the Appellate Committee agreed, began by addressing the submission that just as a police officer investigating an allegation of criminal conduct by a member of the public owed a duty of care to that person so he owed a duty to a police officer whom he was investigating in respect of a disciplinary offence. Lord Bridge rejected the premise and the conclusion. He first addressed the proposition put forward by counsel from the perspective of reasonable foreseeability:

> "Leading counsel for the appellants submitted that a police officer investigating any crime suspected to have been committed, whether by a civilian or by a member of a police force, owes to the suspect a duty of care at common law. It follows, he submits, that the like duty is owed by an officer investigating a suspected offence against discipline by a fellow officer. It seems to me that this startling proposition founders on the rocks of elementary principle. The first question that arises is: what injury to the suspect ought reasonably to be foreseen by the investigator as likely to be suffered by the suspect if the investigation is not conducted with due care which is sufficient to establish the relationship of legal neighbourhood or proximity in the sense explained by Lord Atkin in *Donoghue v Stevenson* … as the essential foundation of the tort of negligence? The submission that 'anxiety, vexation and injury to reputation may constitute such an injury' needs only to be stated to be seen to be unsustainable. Likewise, it is not reasonably foreseeable that the negligent conduct of a criminal investigation would cause injury to the health of the suspect, whether in the form of depressive illness or otherwise."

Lord Bridge then considered the difficulties a criminal suspect who had been acquitted or whose conviction had been quashed would face in suing the investigating police officer in negligence in respect of pure economic loss but, leaving that aside, concluded:

> "Finally, all other considerations apart, it would plainly be contrary to public policy, in my opinion, to prejudice the fearless and efficient discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect."

Therefore:

> "If no duty of care is owed by a police officer investigating a suspected crime to a civilian suspect, it is difficult to see any conceivable reason why a police officer who is subject to investigation under the Regulations of 1977 should be in any better position."

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 18
A63/15

Lord President
Lord Brodie
Lord Glennie

OPINION OF LORD GLENNIE

in the reclaiming motion

in the cause

MRS K

Pursuer and Respondent

against

CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND

Defender and Reclaimer

_____

Pursuer: McBrearty QC, E Campbell; BTO Solicitors LLP
Defender: Shand QC, Smart QC; Clyde & Co (Scotland) LLP

28 April 2020

[110] I agree that this reclaiming motion (appeal) should be allowed. I reach this view for substantially the same reasons as your Lordships. However, it may be that we approach the case from slightly different angles and focus on different aspects. Because of this, and in view of the potential importance of this case for other cases raising the same or similar questions, I propose to set out my reasoning on what I regard as the central (albeit mundane) issue in a little detail.

[111] Although this line of argument does not appear clearly either from the pursuer's pleadings or from the manner in which the case was dealt with in the Opinion of the Lord Ordinary, the pursuer's case before this court was periled on the proposition that the chief constable of the relevant legacy force (Grampian Police) and/or the Director General of the Scottish Crime and Drugs Enforcement Agency ("SCDEA") were vicariously liable for breaches of duty owed to the pursuer by Chief Superintendent Whitelock; and that that vicarious liability had been transferred by statute to the defender, the chief constable of the Police Service of Scotland. Mr McBrearty QC, who appeared for the pursuer, made it clear that he sought to establish liability by this route and only by this route.

[112] Mr McBrearty's reason for taking this approach to liability was straightforward; and it reflected the detailed written submissions lodged by Ms Shand QC, for the defender, in advance of the hearing of this appeal. The defender in this action is the chief constable of the Police Service of Scotland. It is sought to make him liable for the actions of Chief Superintendent Whitelock. However, the Police Service of Scotland was established only in April 2013, pursuant to section 6 of the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act"). It did not exist in 2011, when the events with which this action is concerned took place. Chief Superintendent Whitelock was at that time a police officer serving within the legacy force and/or, on a temporary basis, within the SCDEA. Liability for his actions would, *prima facie*, lie with the legacy force and/or the SCDEA. Any liability of the defender, if the defender has any liability, must be as transferee of the liabilities of the chief constable of the Grampian police force and/or as transferee of the liabilities of the Director General of SCDEA.

[113] This transfer of liabilities to the defender is achieved by para 20 of Schedule 5 of the 2012 Act, brought into effect by section 98(5) of the 2012 Act, which provides as follows:

> "*Transfer of liabilities of chief constables etc.*
> 20 By virtue of this paragraph, any liabilities of a chief constable of a police force under section 39 of the 1967 Act and of the Director General of the SCDEA under section 22 of the 2006 Act are, on and after the appointed day, to be treated as liabilities of the chief constable of the Police Service under section 24 of this Act."

Section 24 of the 2012 Act is headed "Liability for unlawful conduct" and provides as follows:

> "24(1) The chief constable is liable in respect of any unlawful conduct on the part of any person falling within subsection (2) [i.e. constables and members of staff] in the carrying out (or purported carrying out) of that person's functions in the same manner as an employer is liable in respect of any unlawful conduct on the part of an employee in the course of employment."

The effect of this sub-section is to make the defender, the chief constable of the Police Service of Scotland, vicariously liable for the unlawful actions of police officers and other defined members of staff within the Police Service of Scotland. That the liability is a vicarious liability is made clear by the legislative technique of stating that the chief constable is liable for their unlawful conduct "… in the same manner as an employer is liable in respect of any unlawful conduct on the part of an employee in the course of employment." This brings into play the common law rules concerning the vicarious liability of an employer for the acts of his employees acting within the course of their employment.

[114] What para 20 of Schedule 5 to the 2012 Act does, therefore, on the relevant commencement date, is to transfer to the chief constable of the Police Service of Scotland liabilities incurred before that date by the chief constables of the relevant legacy forces and by the Director General of the SCDEA. But not every liability of the legacy forces and SCDEA was transferred to the Police Service of Scotland by this paragraph. As is clear from

its terms set out above, this paragraph only transfers to the Police Service of Scotland (a) the liabilities of a chief constable of a legacy police force under section 39 of the Police (Scotland) Act 1967 ("the 1967 Act") and (b) the liabilities of the Director General of SCDEA under section 22 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 ("the 2006 Act"). Those liabilities – i.e. the liabilities of the chief constables of the legacy forces under section 39 of the 1967 Act and of the Director General of SCDEA under section 22 of the 2006 Act – are expressed in slightly different terms but are to precisely the same effect. They impose a regime of vicarious liability on the chief constable and/or the Director General for the wrongful actions of a member of the relevant police force. Thus, section 22 of the 2006 Act, dealing with the position in respect of the SCDEA, is headed "Liability for wrongful acts of police members of the Agency" and provides:

> "22(1) The Director General of the Agency is liable in reparation in respect of any wrongful act or omission on the part of any police member in the performance or purported performance of the member's functions in the same manner as an employer is liable in respect of a wrongful act or omission on the part of the employer's employee in the course of the employee's employment."

Section 39 of the 1967 Act, headed "Liability for wrongful acts of constables", is in virtually identical terms but uses the terminology of master and servant rather than employer and employee. Its effect is the same.

[115] Accordingly, the only liability that was transferred to the present defender, the chief constable of the Police Service of Scotland, in terms of paragraph 20 of Schedule 5 to the 2012 Act was such vicarious liability of the chief constables of the legacy forces and/or of the Director General of the SCDEA as existed up to that date for the wrongful acts or omissions of police officers serving with them at the time of the events giving rise to the complaint. None of this was challenged by Mr McBrearty on the hearing of this appeal.

[116] Before us, Mr McBrearty confined his criticisms to the wrongful acts or omissions of Chief Superintendent Whitelock. He was an officer within Grampian Police but at the relevant time was serving as a police member of the SCDEA: section 12 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. In terms of section 38A of the Police (Scotland) Act 1967, while on temporary service with the SCDEA, Chief Superintendent Whitelock fell to be treated as if he were not a constable of Grampian Police – he was therefore acting as a police member of SCDEA. On this basis any vicarious liability for his wrongful acts or omissions would lie with the Director General of SCDEA rather than with the chief constable of Grampian Police. But the details of this do not matter for present purposes, since the current defender assumes the relevant vicarious liabilities of the chief constable of Grampian Police and the Director General of SCDEA for the wrongful acts or omissions of officers within those two organisations. Vicarious liability of either that chief constable or the Director General would be passed on to the Police Service of Scotland under paragraph 20 of Schedule 5 to the 2012 Act.

[117] It is, however, necessary to consider the basis upon which either of those individuals could be held vicariously liable for the acts or omissions of Chief Superintendent Whitelock.

[118] There is no contract of employment between the chief constable of a police force and constables within that force. Nonetheless, it has long been recognised that a chief constable is vicariously liable for the wrongful acts or omissions of a police constable within his force. If there were any doubt about it, the position is made clear by the terms of section 39 of the 1967 Act and the equivalent provisions in section 22 of the 2006 Act. The chief constable of the relevant force, and the Director General of SCDEA, is liable for the wrongful acts or omissions of police officers carrying out their duties within the force and/or the Agency "…

in the same manner as an employer is liable in respect of a wrongful act or omission on the part of the employer's employee in the course of the employee's employment", to use the language of section 22 of the 2006 Act. The decisions on vicarious liability in an employer/employee relationship are therefore of direct relevance to the present case.

[119] In order for vicarious liability to attach to an employer, it must be shown that the employee was himself negligent or in breach of duty. That means, in the case of delictual liability, that the employee must be in breach of a duty which he himself owes to the pursuer. It is not enough to establish vicarious liability that the employee does something in the course of his employment which, if done by the employer, would put the employer in breach of a duty owed by it to the employee. That would, in most cases, give rise to a direct or personal liability on the part of the employer. By contrast, vicarious liability is a liability imposed on the employer in respect of the wrongful act or omission of his employee. Before the question of vicarious liability can arise, it must be shown that the employee was himself negligent or in breach of duty owed by him to the injured party: see *Staveley Iron & Chemical Co Ltd* v *Jones* [1956] AC 627, per Lord Morton of Henryton at 638 – 639

> "My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is "Yes", the employer is liable vicariously for the negligence of his servant. If the answer is "No", the employer is surely under no liability at all. Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute."

See also per Lord Reid at 640 – 643. As Lord Pearce put it in *Imperial Chemical Industries Ltd* v *Shatwell* [1965] 1 AC 656 at 686, in the context of a discussion about vicarious liability: "Unless the servant is liable the master is not liable for his acts …".

[120] On what basis, then, is it contended that Chief Superintendent Whitelock was himself in breach of a duty owed by him to the pursuer? More precisely, what duty, if any,

did he owe to the pursuer? Mr McBrearty relied upon a "duty of fair treatment" which, he submitted, is well established in English law and therefore should be accepted as part of Scots law. He relied in particular on *Gogay* v *Herefordshire County Council* [2000] IRLR 703, *Croft* v *Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676 and *Yapp* v *Foreign & Commonwealth Office* [2015] IRLR 112, and the summary of the case law on this topic in the judgment of Lord Lloyd-Jones (with whom all the other justices agreed) in *James-Bowen* v *Commissioner of Police of the Metropolis* [2018] 1 WLR 4021.

[121] In *James-Bowen* Lord Lloyd-Jones emphasised, at para 15, under reference to earlier authority, that although police officers are not employees, the relationship between the Commissioner (or the chief constable of a force and no doubt the Director General of SCDEA) and a police officer within the force "… is closely analogous to that of employer and employee". A chief constable owes the same duties to his officers as an employer does to his employees. He was therefore content, for the purpose of the discussion, to proceed on the basis that the Commissioner (or chief constable, etc.) and police officers within the relevant force:

> "… should be treated as if they were employer and employee, while recognising that, in the absence of any actual contract, any duty derived by analogy with the standard terms implied in an employment contract must necessarily sound as a duty of care, rather than be absolute."

He went on at para 16 to set out the "standardised term implied by law into all contracts of employment" and how this "portmanteau" term could be considered the source of more specific implied obligations on the part of the employer:

> "16. The mutual obligation of employer and employee not, without reasonable and proper cause, to engage in conduct likely to destroy or seriously damage the relationship of trust and confidence required between employer and employee is a standardised term implied by law into all contracts of employment rather than a term implied from the particular provisions of a particular employment contract

> (*Mahmud* v *Bank of Credit and Commerce International SA* [1998] AC 20, 45D, per Lord Steyn). It was described by Lord Nicholls in *Mahmud*, at p 35A, as a portmanteau concept. In that case the House of Lords considered it the source of a more specific implied obligation on the part of the employer bank not to conduct its business in a dishonest and corrupt manner, the breach of which gave rise to a cause of action for damage to the economic and reputational interests of its employees. Similarly, in *Eastwood* v *Magnox Electric plc* [2005] 1 AC 503 the House of Lords recognised an obligation on an employer, in the conduct of his business and in the treatment of his employees, to act responsibly and in good faith: per Lord Nicholls at para 11. The implied term has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship: *Gogay* v *Hertfordshire County Council* [2000] IRLR 703; *Eastwood v Magnox Electric plc* [2005] 1 AC 503; *Bristol City Council* v *Deadman* [2007] IRLR 888; *Yapp* v *Foreign and Commonwealth Office* [2015] IRLR 112; *Stevens* v *University of Birmingham* [2017] ICR 96. Furthermore, any decision-making function entrusted to an employer must be exercised in accordance with the implied obligation of trust and confidence (*Braganza* v *BP Shipping Ltd* [2015] 1 WLR 1661)."

[122] This, to my mind, is an authoritative summary of the case law on this point, and it helpfully sets out how far the law has developed. I note the points made by your Lordship in the chair about the applicability of these duties in the present context, and I agree with them. I also have some sympathy for the views expressed on this point by Lord Brodie. For present purposes, however, and in order to consider whether a similar duty is owed horizontally by Chief Superintendent Whitelock to the pursuer, I proceed upon the basis that there is such a general portmanteau duty in the relationship between the pursuer and the chief constable and/or the Director General.

[123] A number of points emerge from that summary of the case law on this issue. It is sufficient to refer to two of them. First, so far as the decided cases are concerned, the "portmanteau" concept arises in the context of an employer/employee relationship (or a relationship analogous to that). Its necessity stems from the relationship of trust and confidence required between the parties to that relationship. The specific derivative duties are just that – they derive from that portmanteau obligation – and, as such, therefore attach

only to that type of relationship. None of the cases referred to suggest that such derivative duties exist outwith such a relationship. Second, the specific derivative duties identified by Lord Lloyd-Jones under reference to the decided cases are all duties owed to the employee by the employer: an obligation on the employer, in the conduct of his business and in the treatment of his employees, to act responsibly and in good faith; an obligation on the part of an employer "… to act fairly when taking positive action directed at the very continuance of the employment relationship"; and an obligation on the employer to exercise any decision-making function entrusted to him in accordance with the implied obligation of trust and confidence. None of the decided cases impose a similar duty on an employee in his dealings with another employee.

[124] Against this background, and adapting the question asked by Lord Lloyd-Jones at para 17 of *James-Bowen*, the issue in this case becomes whether, in unpacking this particular portmanteau implied term of trust and confidence, it is possible to extract a duty of care owed by one employee (Chief Superintendent Whitelock) to another employee (the pursuer) to act fairly towards her or, more specifically, as the Lord Ordinary put it, to "… afford [her] fair treatment in carrying out an investigation into her conduct and performance"? To my mind there are insuperable difficulties in the way of imposing any such duty on Chief Superintendent Whitelock. Three in particular may be mentioned. First, the absence of case law supporting the existence of such a term. Second, the lack of any evidence that Chief Superintendent Whitelock was aware of the pursuer's vulnerability to any particular level of distress, let alone psychiatric injury. Third, it would not be fair, just and reasonable to impose such a duty on him. I deal with each of these points in turn.

[125] The first point, the absence of any decided case holding that one employee owes a duty to act fairly to another employee is, to my mind, highly significant. The absence of any such decided case is hardly surprising, since the duty of care contended for derives from the implied term of the employer/employee relationship as applied to analogous situations such as the relationship between a chief constable and an officer within the relevant police force. To suggest that the same duty applies in the relationship between individual police officers within the same force separates the alleged duty from its original context. There is simply no basis for it. Beyond the mere assertion that Chief Superintendent Whitelock owed such a duty, Mr McBrearty advanced no arguments as to why that should be the case. If the suggestion was that, because of his superior rank within the police force and/or the Agency, Chief Superintendent Whitelock was to be treated in some way as though he were the *alter ego* of the chief constable and/or the Director General – and I did not understand it to be so argued, nor could it be – this would not help the pursuer; it would simply support an argument that the chief constable and/or the Director General was directly liable for breach of duty to the pursuer, whereas (as explained above) what the pursuer seeks to establish is not direct liability but vicarious liability.

[126] The second point relates to foreseeability. A duty of care does not exist in the abstract. In order to establish a duty of care, manifested in this case by a duty to act fairly, it would need to be shown that Chief Superintendent Whitelock knew or ought reasonably to have known that it was foreseeable that the pursuer would suffer psychiatric or other injury if she was not treated fairly in the investigation into her conduct and performance or, more generally, in the circumstances in which she came to be removed from her role as an undercover police officer. Mr McBrearty founded upon the egregious nature of the conduct

itself, but I cannot accept that. As to prior knowledge, that would require evidence from which, at the very least, it could be inferred that he knew about her previous mental fragility and/or her reaction in April and July 2011 when she was made aware, at different times, of what was going on. But there was no evidence at all about his knowledge of her condition. He was not asked about it; nor were the other police officers who gave evidence asked anything to do with Chief Superintendent Whitelock's knowledge of the pursuer and her circumstances. Mrs Ross' knowledge of the pursuer's vulnerability cannot be attributed to the chief constable or Director General. Even if it could, that would not help the pursuer. While it may be that the knowledge of individual police officers within the force and/or the Agency could, were the question to arise, be imputed to that force and/or the Agency, and therefore to the chief constable and/or the Director General, there is no principle upon which it can be argued, as Mr McBrearty sought to argue, that that knowledge can then be imputed back down the hierarchical chain to each individual officer in a position of authority within the force.

[127] The third point is whether the imposition of such duty (a duty to act fairly) would be fair, just and reasonable: *Caparo Industries plc* v *Dickman* [1990] 2 AC 605. As was made clear in *James-Bowen* at para 22, this ingredient will be of critical importance in a situation where what is proposed is a novel duty of care or a duty of care in novel circumstances. The argument for the pursuer proceeds upon the basis that such a duty is owed by the chief constable of the relevant police force at the time and/or the Director General of the SCDEA. But if such a duty is owed by the employer (or the equivalent in an analogous situation like this) then why is it necessary to impose the same duty concurrently upon all employees, or at least all those in a position of responsibility within the force? There is no need for it. Why

is it fair, just and reasonable to expose individual employees, individual officers within the police force, to potentially open-ended liability for acting towards a colleague in a manner which runs counter to an employer/employee relationship to which they are not a party? That is not to say that one police officer may not in some circumstances owe a duty of care to another police officer, but that is not the duty alleged here which is a duty to act fairly, a duty of fair treatment. Further, a duty imposed upon the police officer to act fairly in the conduct of an investigation of a complaint against another member of the police force might well prejudice his investigation of the complaint by requiring him to act under the shadow of a potential action for damages for negligence: *Calveley* v *Chief Constable of Merseyside* [1989] AC 1228. I can see no basis for the contention that it would be fair, just and reasonable to impose such a duty.

[128] In this context, it is useful to bear in mind that the only reason for seeking to impose a duty to act fairly on Chief Superintendent Whitelock in the present case is to allow the vicarious liability argument to be advanced. That only needs to be advanced because of the perceived need for the pursuer to establish vicarious liability rather than direct liability, as explained above. The events with which this action is concerned, however, took place before the enactment of the 2012 legislation which gives rise to the possible importance of that distinction. The subsequent introduction of that legislation does not provide a sound basis for seeking to impose a duty to act fairly on Chief Superintendent Whitelock in addition to the duty which, if the pursuer's case is to be accepted, is already placed on the chief constable and/or the Director General.

[129] For all of these reasons, I would hold that there was no duty imposed upon Chief Superintendent Whitelock to act fairly or to afford the pursuer fair treatment in carrying out

an investigation into her conduct and performance. If any such duty was owed to the pursuer, it was owed by the chief constable of the relevant legacy force and/or by the Director General of the SCDEA. If, in those circumstances, Chief Superintendent Whitelock acted in such a way as to contravene any such duty, that would result in a finding that the chief constable of the legacy force and/or the Director General of the SCDEA were directly liable to the pursuer. But no vicarious liability would arise so as to be passed on to the defender in the present case in terms of paragraph 20 of Schedule 5 to the 2012 Act.

[130] I agree that the reclaiming motion should be allowed and decree of absolvitor granted in terms of the order proposed by your Lordship in the chair.

[131] I would just add the following reflection. The particular difficulties for the pursuer in this case arise out of the perceived necessity of fitting her case within the ambit of paragraph 20 of schedule 5 to the 2012 Act, a provision that requires a finding that the chief constable of the relevant legacy force and/or the Director General of the SCDEA was vicariously liable for the wrongful acts or omissions of police officers within that legacy force and/or the Agency. That has lent a certain unreality to the arguments in the case. For most purposes it matters not whether liability is direct (personal) or vicarious; what matters to the pursuer is to establish liability. I do not know, because the point was not raised in argument, whether that particular difficulty could have been avoided if the pursuer had instead relied upon para 9 of schedule 5 to the 2012 Act. This provides as follows:

> "*Acts done before transfer*
>
> 9(1) Anything done before the appointed day by or in relation to a police authority, a joint police board, the SPSA or the SCDEA in respect of an individual transferred under any of paragraphs 6 to 8 is to be treated on and after that day as having been done by or in relation to the Scottish Police Authority."

There may be very good reasons why no case has been advanced on this basis. On the face of it that paragraph might be thought to provide that the actions of Chief Superintendent Whitelock in relation to the pursuer should now be treated as having been done by the Scottish Police Authority. It would not be the same defender as in the present case, but it might provide a route to liability which avoids the need to try to establish vicarious liability. The case would be one of direct liability, without needing to worry about whether the underlying liability in 2011 was direct or vicarious. Whether such a case could succeed would depend on a number of factors, not least the existence or otherwise of a duty imposed on the chief constable of the legacy force and/or the Director General of the SCDEA to act fairly, to afford the pursuer fair treatment in carrying out an investigation into her conduct and performance; and proof of breach of such duty. I express no firm view about it, though on the basis of your Lordship's opinion, with which I agree, I can see many obstacles to success. I raise the matter here not to encourage further litigation but simply to explain why I have focused on the point that was argued before us rather than on the direct (personal) liability point which was not argued.