SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 85

A453/16

JUDGMENT OF SHERIFF PETER J BRAID

In the cause

D

Pursuer

Against

VICTIM SUPPORT SCOTLAND, a registered Scottish charity in terms of section 13(2) of The Charities and The Trustee Investment (Scotland) Act 2005 with Charity Number SC002138, and a company incorporated under The Companies Act in Scotland with Company Number SC110185, having its registered premises at 15/23 Hardwell Close, Edinburgh, EH8 9RX

Defender

Pursuer: Di Rollo QC, Thornley;
Defender: Murphy QC, Robertson;

Edinburgh, 20 December 2017

The sheriff, having resumed consideration of the cause, makes the following findings in fact:

Findings in Fact

1. The pursuer (D) is as designed in the instance.

2. The defender is Victim Support Scotland ("VSS"), a registered Scottish Charity in terms of section 13(2) of the Charities and Trustee Investment (Scotland) 2005 with charity number SC002138. It is also a company incorporated under the Companies Act in Scotland with company number SC110185 and having its registered office at 15/23 Hardwell Close, Edinburgh, EH8 9RX.

3. Between 1970 and 1984 the pursuer and his two brothers were subjected to physical and sexual abuse by their mother. In May 2009 the pursuer reported the abuse to Lothian and Borders Police. On 27 April 2011, after a trial at which she was convicted of such abuse, the pursuer's mother was sentenced to five years' imprisonment.

4. The pursuer first became aware of VSS when a VSS representative approached him in the court building after he had given evidence. She gave him a leaflet describing the services offered by VSS, which included assistance with claims for compensation to the Criminal Injuries Compensation Authority ("CICA").

5. Thereafter, in or about May 2011 the pursuer contacted VSS to make an appointment to discuss the possibility of making a claim to the CICA.

6. VSS provides a service helping victims of crime. In doing so, it employs in excess of 140 employees and also draws heavily on volunteers. In particular, as stated in the leaflet referred to in finding in fact 4, it provides a service to victims who wish to make a claim for compensation to the CICA.

7. The CICA is an executive agency which deals with applications from individuals who have been physically or mentally injured because they were the victim of a violent crime. No. 5/3 of process is a copy of the 2008 scheme ("the scheme"). That scheme regulated the pursuer's claim. CICA issues a guide to the scheme, a copy of which is number 5/4 of process.

8. Paragraph 30 of the scheme provides that:

> "where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury…no compensation in respect of loss of earnings or earning capacity will be payable for the first 28 weeks of loss. The period of loss for which compensation may be payable will begin after those 28 weeks…"

9. Under the heading "*Applying for loss of earnings and special expenses if you expect to be unable to work for more than 28 weeks*", paragraph 30 of section 3 of the guide contains the following advice:-

> "You do not need to apply for loss of earnings at the same time you make your personal injury claim, but you do need to make your claim before your personal injury claim is finalised. If you think you will be eligible for loss of earnings…, you should complete the short supplementary form called, 'Unable to work for more than 28 weeks'. If, after our initial assessment, we decide you are eligible for a tariff payment, we will ask you for the full details of your claim for loss of earnings. At this time we will ask you to provide us with the necessary supporting information."

10. The service which VSS offers in relation to CICA claims includes: assessing eligibility under the scheme; advising and providing information on how to make a claim; assistance with the completion and submission of an application form to the CICA; acting as a representative for the person injured during the application process; and assistance in making an appeal.

11. VSS holds itself out as having expertise in dealing with applications for criminal injuries compensation. For example, in the Director's annual report for the year ended 31 March 2015 (no 5/11 of process), the directors state:-

> "Victim Support Scotland has specialist staff and volunteers who have assisted victims of crime in applying for financial rewards from the [CICA]. We secured compensation awards for victims totalling £3.48 million during the year."

In the annual report for the following year (no 5/12 of process) the following statement appears:

> "VSS has helped 592 people make CICA claims" followed by the sentence:- "£3.84 million in awards have been received this year."

12. Such claims are justified. VSS trains at least some of its employees, and volunteers, on the CICA scheme. Those employees and volunteers do have knowledge of the terms of the scheme, as the use of the word "specialist" implies.

13. 6/5/1 of process was the VSS criminal injuries compensation policy. It was an internal document only, not available to members of the public such as the pursuer.

14. The CICA guide also holds VSS out as an agency which can help victims of crime, including help with a CICA claim. The guide states that VSS cannot provide legal advice.

15. Having made an appointment, the pursuer attended at the VSS premises at Nicolson Square, Edinburgh on 11 May 2011, where he met one of their employees, Caronne. He told her that he wanted to pursue a claim for compensation.

16. Caronne obtained an application form, which she filled out on the basis of the pursuer's answers to questions which she asked. The pursuer then signed the form.

17. Number 5/2 of process is a copy of the pursuer's VSS file. The form signed by the pursuer on 11 May 2011 appears at pages 53-62.

18. That form named VSS as the pursuer's representative. A separate form to that effect was enclosed. VSS was acting as the pursuer's representative in the claim in relation to all of the services described in finding in fact 10, other than providing assistance in relation to an appeal.

19. The pursuer gave brief details of the sexual and physical abuse that he had suffered at the hands of his mother. He indicated that he was still receiving treatment for his mental health problems. He gave details of the conviction of his mother.

20. During the course of their meeting the pursuer told Caronne that he was not employed at that time. He told her that he had recently been in employment but had lost that job. He did not know when or if he would return to work. He had not then been off work for 28 weeks.

21. Section 9 of the application form signed by the pursuer required the applicant to tick one of two boxes in relation to the separate form which is referred to in finding in fact 9

(although the application form describes it as the form 'I expect to be unable to work for more than 28 weeks as a result of my injuries'). The options given on the application form were "enclosed" or "not applicable". Caronne ticked the latter box.

22. The application form signed by the pursuer did not contain any other questions about loss of earnings.

23. However, in section 10, under the heading 'Additional information', the following appeared: "Since this has happened I have lost my job."

24. Caronne was, therefore, aware that the pursuer had lost his job.

25. She did not inform the pursuer of his potential eligibility for a loss of earnings claim, should he be off work for more than 28 weeks.

26. At the time of his meeting with Caronne, and throughout his dealings with VSS, the pursuer was unaware of the terms of the CICA scheme. He did not read the CICA guidance and had no understanding, beyond what he was told by VSS, as to how a claim was made up, or an award under the scheme calculated.

27. In particular, the pursuer was unaware of the potential for a loss of earnings claim should he be off work for more than 28 weeks.

28. At that time, CICA was running a pilot scheme with the VSS Linlithgow office whereby claims were submitted on-line. Consequently, the form signed by the pursuer was not submitted to the CICA. Instead, Mr Gordon England of VSS submitted the claim on-line, using the information on the form completed by Caronne and signed by the pursuer. In some respects, the questions posed on the on-line form differed from those on the form completed by the pursuer.

29. The CICA website generated a summary of the application form. A copy appears at pages 6 to 9 of the CICA file, a copy of which forms 5/8 of process.

30. That summary contains different questions, relating to loss of earnings, from those on the form signed by the pursuer. The questions posed on-line were "Has your injury prevented you from work or study?" and "Have you lost earnings as a result of the incident?", both of which Mr England answered "no".

31. At no time after the meeting with Caronne on 11 May 2011 did VSS advise the pursuer that he could apply for loss of earnings from the CICA were he off work for more than 28 weeks as a result of the abuse he had suffered.

32. Between 2011 and 2013, VSS elicited further information from the pursuer from time to time.

33. On 17 May 2013 the CICA wrote to VSS offering compensation to the pursuer of £17,552.50. The proposed award consisted of tariff awards for injuries under the 2008 scheme for permanent mental illness and physical abuse suffered as a child, reduced by 15% to reflect an unspent conviction. There was no award for loss of earnings.

34. The letter of 17 May 2013 was accompanied by a document which stated that if earnings were lost or reduced for at least 28 weeks, compensation may be available from the 29th week. It was also accompanied by standard guidance on how to seek a review of the decision, the time limit for doing so and a form to do so.

35. The pursuer did not receive a copy of the letter of 17 May 2013, or the accompanying document or guidance, at any time.

36. On 7 June 2013, the pursuer phoned CICA to ask for the award letter to be resent to his home address as soon as possible.

37. Notwithstanding that telephone call, VSS was still acting as the pursuer's representative in the claim.

38. On 10 June 2013, the CICA sent a copy of the letter of 17 May and accompanying documents, to the pursuer. He did not receive that letter.

39. On 10 June 2013 the pursuer attended the VSS office at Nicolson Square, Edinburgh to discuss the award made by the CICA. He met a VSS employee, Johnny Boyd. The relative entry in the pursuer's VSS file states:

> "D to sign for award: D came in to go over award letter. He did not want to sign for award immediately and wanted a few day's (*sic*) to think over. Explained award as best I could. D will call back or drop into office when he is ready to sign. He will call if he has any questions prior to this."

40. Mr Boyd did not ask the pursuer if he had been working for the previous two years. He did not mention loss of earnings at all. He did not tell the pursuer that it was possible to review the award. He did tell the pursuer that the offer was for the correct amount and that there was no room for improvement.

41. The pursuer did not accept the award immediately. As the VSS file note reflects, he took a few days to consider the award. He returned to the VSS office on 12 June 2013 when he signed the acceptance form.

42. In about November 2013 the pursuer discovered that his brother had received a substantially higher award than himself, including a claim for loss of earnings. He contacted VSS to ask why he had not been informed about making the loss of earnings claim. On that occasion he dealt with another VSS employee, James Palmer. Mr Palmer agreed to look into the matter.

43. The VSS file note for 26 November 2013 states:

> "Ask Johnny about D's application. Was loss of earnings mentioned him? Johnny unsur (*sic*),…".

44. Mr Palmer subsequently agreed to write to CICA on the pursuer's behalf, which he did by letter of 11 December 2013 (page 17 of 5/2 of process). Insofar as material, the letter was in the following terms:-

> "I wish to request that [D's] case be subject to review to take into account a claim for loss of earnings. [D] phoned our office to enquire about claiming loss of earnings. He has stated that this was not explained to him at all by…VSS staff and has therefore been misinformed or misrepresented by VSS. Looking back over his file it is clear that there were no fewer than three members of staff working on the case at different times. I can also confirm this information might not have been explained".

45. The CICA refused to review the pursuer's claim.

46. The pursuer relied upon the defender to advise him on his eligibility under the CICA scheme and to inform him of the entitlement to a wage loss claim after 28 weeks of loss.

47. Both Caronne and Mr Boyd had received training on the CICA scheme.

48. VSS was aware from the pursuer's meeting with Caronne on 11 May 2011 that the pursuer had lost his employment. A copy of the application form signed on that day was in the pursuer's file and was therefore available to Mr Boyd.

49. Mr Boyd was, or ought to have been aware, at the meeting on 10 June 2013 that the pursuer may have suffered wage loss and ought to have explored with him whether the pursuer now satisfied the criteria for a wage loss claim to be met by CICA.

Makes the Following Findings in Fact and Law

1. This court has jurisdiction.

2. The defender owed the pursuer a duty to exercise reasonable skill and care in acting as his representative in his application to the CICA.

3. In the exercise of that duty, the defender owed the pursuer the following duties: to tell him that he may be entitled to a sum for loss of earnings should he be absent from work

for more than 28 weeks; to assess whether he was eligible to claim a sum for past or future loss of earnings; and to explore with him whether in June 2013 he should apply to CICA for a review of the award.

4. In all of said duties, the defender failed.

Thereafter, assigns 17 January 2018 at 9.45am as a hearing on further procedure to enable parties to address the court as to what orders are necessary at this stage in light of the above findings, and as a hearing on expenses.

Note

[1] The issue in this case is whether a duty of reasonable care was owed to the pursuer not to cause him pure economic loss.

[2] In this Note, I will consider matters under ten separate chapters, as follows:

I – Introduction.

II – The evidence led at the proof.

III – The defender.

IV – The CICA scheme.

V – Assessment of the evidence, with particular regard to several discrete factual issues.

VI – Ruling on admissibility of proposed skilled witness evidence.

VII – The pleadings.

VIII – Submissions.

IX – Discussion.

X – Decision.

I: Introduction

[3] The pursuer sues for damages of £100,000 from the defender, Victim Support Scotland ("VSS")[1], in respect of their allegedly negligent handling of a criminal injuries compensation claim on his behalf. A preliminary proof, restricted to the issue of liability, took place before me on 18 and 19 May and 1 October 2017.

[4] I discuss the pleadings in more detail below, but stated briefly the facts giving rise to the action are as follows. The pursuer made a claim to the Criminal Injuries Compensation Authority ("CICA") for compensation in respect of abuse suffered by him as a child at the hands of his mother. VSS acted as his representative in lodging that claim. The award which he eventually received did not include any element of wage loss. The pursuer avers that he did suffer wage loss, having been off work for more than 28 weeks as a result of the abuse, and that he was entitled to receive compensation therefor, but that VSS failed in what he says was its duty to explore that issue with him. If they had, he avers, he would have received a higher award, namely one which would have included wage loss. VSS denies that it owed the pursuer any such duty. The issues which fall to be resolved at this stage are whether any duty of skill and care was owed by the defender to the pursuer; if so, what was the scope of that duty; and whether any duty was breached. In the event of my holding that there was a breach of any duty owed, parties were agreed that all other questions, including questions of causation and quantum, require to be decided after a future proof before answer.

[1] In this Note, I refer to the defender as "VSS" when describing what they did; and as "the defender" when dealing with the pleadings and when discussing other matters relating to the litigation.

II: The Evidence Led at the Proof

[5] Evidence was led over the first two days of the proof. The pursuer gave evidence on his own behalf and also adduced evidence from Angela Hay and Gordon England, both former employees of VSS. The pursuer also proposed to lead evidence from a skilled witness but after hearing submissions on the defender's objection thereto, I ruled that the bulk of the proposed evidence was inadmissible, following which that witness was not called. The defender led no evidence. Parties tendered a joint minute agreeing the terms of various documents, and that copies were equivalent to principals. I then heard submissions on 1 October 2017.

The Pursuer

[6] The pursuer said, and it was not disputed, that as children he and his brothers were abused by their mother. The abuse went unreported for many years, but a report was eventually made to the police and in April 2011 his mother was convicted after a trial at which the pursuer gave evidence. She was sentenced to a period of imprisonment. He first became aware of VSS when someone representing them approached him in the court building after he had given evidence at the trial. She explained who VSS were and what they did and gave him a leaflet. The leaflet was not produced but the pursuer said that one of the services mentioned in it was assistance with compensation claims. Until then, he had not considered making a claim. Some time later, he and his brothers decided to pursue claims for compensation, so he contacted VSS by telephone to make an appointment. He was duly given one and subsequently attended VSS's premises at Nicolson Square, Edinburgh in May 2011, where he met a woman called Caronne. He couldn't say precisely how long the meeting lasted, but it was probably more than one hour. He told her that he

wanted to pursue a claim for compensation. She got a form and asked him to tell her exactly what had happened and why he was seeking compensation. Number 5/2 of process was a copy of his VSS file. The pursuer spoke to the application form at pages 53-62 having been completed at that meeting. Caronne completed the form based on his answers to the questions she asked him. He remembered her asking him about his employment position. He told her that he was not employed at that time. He had recently been in employment but had lost that job. He didn't know then whether he would get back to work. At that time, he had recently begun receiving benefits. He did not remember being asked by Caronne if he was receiving benefits, although she did know that he was on benefits so it must have been discussed. He had not been off work for 28 weeks by then. He was unaware of the terms of the CICA scheme. He had not read the guidance. He didn't know how the scheme worked. He had no understanding of how a claim was made up. He attended the meeting to find out if he was entitled to compensation and was informed that he was. He instructed Caronne to submit the form. Two weeks or so later he had to go back to VSS where he saw someone else. That was purely to sign a mandate regarding his medical records.

The Application Form

[7] At this stage it is worth recording the salient details of the form which the pursuer signed. Looking at the pages of it in the order which they appear in the copy in process, the first page is headed "Using a Representative". It begins with the following paragraph:

> "You do not need to be represented to apply for criminal injuries compensation. You can get free advice from us on 0800 3583601 or from organisations such as Victim Support on 0845 3030900 (www.victimsupport.org.uk) or Citizens Advice …"

The form then states that the CICA cannot meet the costs of paid representation. There then follows the pursuer's full name and the representative's full name – Victim Support,

Edinburgh – and their contact details. Question (g) on that page asks for confirmation that the claimant has checked if there will be a fee charged by his representative and that he will have to pay for this, which has been answered "yes". There then follows the pursuer's signature and the date (11 May 2011). The next page, which is headed "Compensation for a personal injury following a period of abuse (physical and/or sexual)", repeats the paragraph at the top of the previous page and then contains guidance about filling in the form. Various "eligibility statements" then follow, to establish that the claimant is eligible for compensation, and each of those statements is ticked "yes".

[8] The next page contains details of the pursuer's name, date and place of birth, national insurance number, gender, occupation at the time of the incident, address and other contact details. At the foot of the page a box is ticked to signify that the pursuer did not wish to be contacted directly, but that CICA were to deal with his representative.

[9] The following two pages contain details of the abuse. The page after those has details of the injuries and medical details. The following page contains a section where previous applications are asked about, and in response to the question "Have you claimed criminal injuries compensation before?" the pursuer has answered "no". On the same page, section 8 asks about previous criminal convictions in relation to which two such convictions are disclosed, including one for breach of the peace. The next page contains section 9, which bears the following heading "Please tick the relevant boxes to show what documents or additional forms you have enclosed". There then follow four separate categories of "documents or additional forms" in relation to each of which the applicant must tick either "enclosed" or "not applicable". In relation to one of these categories, using a representative, the "enclosed" box is ticked. The other three categories are:

> "Applying on behalf of someone for who you have parental responsibility";

> "Applying on behalf of someone over 18 who is legally incapable of managing their own affairs";
> "I expect to be unable to work for more than 28 weeks as a result of my injuries".

These are all ticked as "not applicable".

[10] The following page, section 10, contains certain additional information. That includes the following: "Since this has happened, I have lost my job." The next page is headed "Consent and signature form" and contains certain declarations, including the statement that the information given is true and a statement that the applicant will provide written details if any of the information provided changes. The form then bears the pursuer's signature and is dated 11 May 2011.

The Pursuer's Evidence (Continued)

[11] Reverting to the pursuer's evidence, he remembered signing another form in November 2011. He had to go in to see VSS two or three times. He saw a different person each time. Substantially, nothing else happened until May or June 2013, when he got a letter from VSS, and a telephone call, asking him to go in to discuss the award. He did go in (the file reveals that the date of this meeting was 10 June 2013). He saw someone completely different again (who, it transpired, was Mr Johnny Boyd, a VSS employee, although the pursuer did not know his name). The conversation lasted maybe 40 or 45 minutes. He was in a bad way. He was relieved that the claim was nearing an end. Mr Boyd took him into a side room. He was offered a seat and Mr Boyd explained how an offer was made. The pursuer thought that the offer was maybe £19,000 or £17,000. He didn't understand what he was being told. There was a problem with the award due to his breach of the peace conviction, which had led to a reduction. The pursuer asked Mr Boyd if that was CICA's best offer. He had been under the impression that a negotiation would take place.

However, Mr Boyd said that was no longer the case. The pursuer had no recollection of being asked if he had been working for the previous two years. He was still not working at that time. There was no mention of loss of earnings at all. Mr Boyd did not tell the pursuer that it was possible to review the award. He did tell the pursuer that the offer was for the correct amount and that there was no room for improvement; that it was a good award which it was futile to negotiate. The pursuer asked if he could have time to think about it. He did see a piece of paper at that time (being pages 24-27 of 5/2 of process i.e. the offer letter). He did go away to think about it but returned two days later on 12 June when he signed for the award (page 21 of 5/2 of process). He was not told what the effect of signing was. Some time later the pursuer found out that his brother had received significantly more. He was shocked. He phoned VSS for an explanation. He then went in and saw someone different again. This person asked the pursuer to leave it with him while he investigated, which he duly did. When the pursuer went back some time later he was told that the main difference between his and his brother's award was that his brother's claim had included loss of earnings. The pursuer immediately asked why he too had not got loss of earnings because he too had been out of work. He was told that it had not been applied for. The person he saw admitted that VSS had made a mistake because loss of earnings had not been applied for. The pursuer replied that if they had made a mistake they would have to fix it. The VSS representative said that it would be looked into. He said he would get back in touch with CICA and tell them an error had been made. The pursuer had to prepare and sign a further letter which he did (page 18 of 5/2). The VSS representative (James Palmer) then sent a letter to CICA dated 11 December 2013 (page 17 of 5/2 of process).

The Letter of 11 December 2013

[12] Digressing slightly, that letter insofar as material is in the following terms:

> "I wish to request that [D's] case be subject to review to take into account a claim for loss of earnings. [D] phoned our office to enquire about claiming loss of earnings. He has stated this was not explained to him at all by …VSS staff and has therefore been misinformed and misrepresented by VSS. Looking back over his file it is clear there were no fewer than 3 members of staff working on the case at different times. I can also confirm this information may not have been explained."

The letter was signed by James Palmer, who was designed as an Assistant Service Delivery Officer.

The Pursuer's Evidence (Continued)

[13] The pursuer said that the content of the letter was accurate, although he qualified that by saying that it was not the case that the information "may not" have been explained. So far as he was concerned, it had definitely not been explained. The outcome of the letter was that CICA nonetheless would not reopen the claim. The pursuer said that he felt let down by VSS.

[14] In cross-examination, the pursuer did not think that Caronne had given him any information regarding third party agencies at the initial meeting. It was not made clear that it was a no-charge service although he didn't expect to pay a fee. His initial query was whether he had a case and he was led to believe that he did. He did not read the form before signing it. He was in no fit state to do so having just opened his heart out to a stranger. He was unaware that CICA issued guidance and was unaware that CICA said that VSS could not give legal advice. He did not know that VSS was a charity. The meeting with Caronne could have lasted for two hours rather than one. She kept asking things and writing his answers down. He had been happy with the service he received until he found

out about his loss of earnings claim. He never attended at VSS without an appointment. When questioned about an entry in the CICA File (5/8 of process, page 17), which was a letter sent to him at his current address dated 10 June 2013, (apparently in response to a telephone call in which he complained that VSS was no longer acting as his agent and stated that he had asked three times for them to be removed as such), the pursuer said that VSS had messed up his brother's paperwork and there did come a point when he felt that they were not handling his case correctly. The entry for the telephone call reads as follows:

> "…appl was complaining as he received an e-mail from vss advising he has been awarded compensation when he has asked on 3 previous occasions that vss be removed as the rep from his case. Could you please resend the decision letter to his home address asap. Could you please also look into the vss issue."

The pursuer thought that he and his brother had discussed not allowing VSS to continue. He could not remember asking CICA three times to remove VSS as his agent. He was unhappy at being seen by three or four different people. He did not receive the letter of 10 June 2013 before he went in to see VSS that day. He had no recollection of having phoned CICA on 29 April to update his GP details. The CICA note of that date (number 5/8 of process, page 14) states:

> "App called to update GP address and contact number. App's new contact number [****] and his new GP practice is: ********** … – Advised I would let the team know – App Asked about case progress – advised nothing O/S and that last correspondence was from VSS – App Advised he never involved VSS but advised that his two brothers have made applications for the same incident and that one of them went through VSS".

The pursuer had no recollection of saying that to CICA. His GP did change but the other statements in the note were untrue. He was probably trying to get information for his brother as well. He was in a bad place. He couldn't think why he would want the decision letter sent to him. The pursuer was then asked about his answer on the form that he had never previously made a claim to CICA. He was constrained to admit, after being referred

to his medical records, that he had made such a claim. He said that he was unaware that it was a claim for criminal injuries compensation. He thought it was an insurance thing. He would have signed anything that day. The pursuer accepted that Caronne had ticked a box indicating that the "using a representative" form was enclosed and also a box that no loss of earnings claim was submitted. He agreed that he had been off work for only nine weeks or so at that time. The pursuer agreed that he had signed off on his claim on 27 May 2011 (page 44 of 5/2). It was not apparent to the pursuer that VSS would only have the information he gave them, although he did accept that Caronne asked him for the information that she needed.

Evidence of Angela Hay

[15] The second witness was Angela Hay, who had worked for VSS for 13 or 14 years, based in their Bathgate office, as area coordinator. In her previous employment she had worked in the Criminal Injuries Compensation Board for about 14 or 15 years. She therefore had detailed knowledge of how the criminal injuries compensation scheme operated, and was also able to give evidence about VSS as an organisation, which insofar as relevant is covered in paragraph 20 below. She had considerable experience of handling CICA claims from her time at VSS. She said that employees and volunteers were trained in the scheme, which included being given an understanding of the scheme and of the criteria for eligibility. It was reasonable to think that whoever was advising at the time of the award would inquire to find out if there had been any change in circumstances, and that all avenues would be explored to ensure that the final award was the right one. That would include suggesting a review, if appropriate. She agreed that the tariff award made to the pursuer was at a level to suggest that the possibility of inability to work should be explored.

It was for VSS to explain the award letter to the applicant. She had not had any involvement in the pursuer's case. She explained that his claim had been submitted by Mr England in the West Lothian office due to a pilot on-line scheme being operated by CICA at that time, and that the pilot was not without its difficulties in that the questions posed on-line did not always match the questions on the paper form. She did know of Johnny Boyd, who worked in the Edinburgh office as an employee.

[16] In cross-examination, Ms Hay accepted that there was no uniformity of resources across VSS local services and that different services would have different levels of expertise and experience, consequently offering differing levels of service. If a local service couldn't help in a particular area they would signpost other agencies which could assist. She spoke to the document 6/5/1 of process, which was the VSS criminal injuries compensation policy when Ms Hay was working in West Lothian and which stated that local victim services provide assistance regarding CICA claims in accordance with their knowledge and resources. The training of staff and volunteers, some of which was structured, was done at different levels. Victims of violence would be level 1. Level 2 was for those who had suffered sexual injuries. Some training was done nationally and some locally. Anything new in the CICA scheme would lead to additional training. On-the-job training was also carried out. She would have expected a conversation with the applicant regarding loss of earnings. Where the pursuer had said at page 60 of 5/2 of process that he had lost his job that might have put her on enquiry, although that might be seen as a counsel of perfection. The CICA was the main inquisitor rather than VSS. They would not offer loss of earnings if not asked for. Much of the decision as to whether or not to pursue a line of enquiry was based on what the applicant told VSS.

[17] In re-examination Ms Hay said that she would expect any local service to explain what representation by them would involve. At the review stage, VSS had a role to play to explain what potential there might be for review, if that was part of the work covered by the representation.

Evidence of Gordon England

[18] Mr England had worked for VSS for 16 years in various roles. After retiring in 2009 he had come back part-time to do criminal injuries compensation work. He had worked out of Nicolson Square, Edinburgh. He confirmed that VSS assisted the public with criminal injury compensation claims and advertised that fact in leaflets and in its annual report. The CICA could also point people in the direction of VSS, as an agency which could give assistance. Mr England had some familiarity with the pursuer's VSS file. He remembered Caronne, who was a staff member. Number 5/2 of process was a copy of the pursuer's VSS file. He hadn't seen pages 4-13 before, but they were a printout from the CRM system – a recording system, the purpose of which was to keep track of cases. Mr England's name appeared at page 45 of the file, as the pursuer's representative. That was the paper form that came back from CICA once the application had been submitted on-line. On page 52 the representative was recorded as VSS Edinburgh. It was correct that the pursuer was being represented by that VSS service in his claim. Mr England would have seen the handwritten form completed by the pursuer and he would have used it to input information on to the on-line pilot form, which was being run in the West Lothian office for criminal injuries compensation claims. Once the information was input, CICA sent back the form at page 45 of the file. There were difficulties because there were occasional glitches in the system. The 2008 scheme was the most recent scheme. When a new scheme was introduced, VSS would

inform its employees. Caronne would have had training on the 2008 scheme and would have been taught how to conduct interviews and how to elicit information. Mr England taught staff members about the separate heads of claim, including a claim for loss of earnings (the others being general injury and special damages). Anyone handling a claim would be expected to understand the scheme and how it worked. The potential for a loss of earnings claim should come out at interview. A loss of earnings claim would be processed if 28 weeks had elapsed but not otherwise. If it was uncertain at the time of interview whether a person would be off work for more than 28 weeks, the potential for a claim should be considered in due course, in discussion with the applicant. In the pursuer's case, his award had been assessed as a permanent mental illness confirmed by psychiatric prognosis which was moderately disabling (per paragraph 11 of the scheme). In his experience, following an offer, VSS would discuss it with the applicant and explain how the award was put together. If it came out at the discussion that there had been loss of earnings, a claim would be made. He would expect VSS to ask the claimant whether or not he had been at work. He would assume that they were aware of the applicant's circumstances associated with the claim. He would expect VSS to ask an applicant if he wanted to have his claim reviewed. He considered that matters such as how the claim was made up, whether there was wage loss and whether to apply for a review should be discussed with the applicant. He accepted that there was probably nothing on the VSS file to indicate that loss of earnings of the pursuer was ever enquired into. It was something he would have done. Mr England didn't know James Palmer but he did know that Johnny Boyd was an employee whose role was to handle CICA claims, who had been given training by Mr England. For information to come out about wage loss and a potential loss of earnings claim, the right questions would have to be

asked. He would expect the VSS representative to ask the right questions. Loss of earnings had to be claimed to be awarded. The client had to know that.

[19] In cross-examination Mr England agreed that VSS did not charge a fee. The reference to free and confidential support and practical help in paragraph 3 of the CICA guide 5/4 of process was a reference to discussing, preparing and submitting a claim form. Practical help consisted of processing the form, namely, conducting the interview process and completing the form. Regarding paragraph 4, it was correct that VSS could not, and did not, provide legal advice. However, to help people VSS did need to know what the scheme was and the procedures to follow. They had to write clearly and be able to communicate. As regards the pilot project, it did not always work properly. The information did not always transpose accurately to the form that came back. Often it wasn't what he had given to the CICA. The form was filled in via a website. The VSS file for 10 June 2013 did not contain any entries signifying that the pursuer had asked any questions about the award. Explaining an award may or may not be straightforward, depending on the circumstances.

III: The Defender (VSS)

[20] VSS did not lead evidence but it is helpful to pull together the evidence which emerged about it, both from Ms Hay and Mr England, and from agreed productions. It is a company limited by guarantee, and also a registered Scottish Charity. Its financial statement for year ended 31 March 2015 (no 5/11 of process) shows income received of just under £5m, and for the preceding year to 31 March 2014, income of just over that amount. At those year ends, its assets were, respectively, £293,460 and £203,959. The average number of employees during 2015 was 147, of whom 120 were full time, slightly down from the comparative figures of 149 and 124 in 2014. The objects for which it was incorporated include (per its

Memorandum of Association, No 6/3/2 of process): "*to relieve poverty, sickness and distress among persons who have suffered the same as a result of any criminal offence committed by any person or by any means whatever*" and its powers include "*1. To deliver a service to people affected by crime*". These aims are perhaps put more succinctly in the opening sentence of the Directors' Annual Report for year ended 31 March 2015 (No 5/11 of process): "Victim Support Scotland is committed to enhancing its role as the lead provider of support and assistance to victims of crime." That Report goes on to state: "Victim Support Scotland has specialist[2] staff and volunteers who have assisted victims of crime in applying for financial rewards from the Criminal Injuries Compensation Authority. We secured compensation awards for victims totalling £3.48m during the year." That theme is continued in the Annual Report for the following year (No 5/12 of process). On the page headed "2015/16 at a glance…", under the separate heading "Criminal Injuries Compensation Authority" the following statement appears: "VSS has helped 592 people make CICA claims" followed by a sentence in large bold font: "**£3.84m in awards have been received this year**." Beside that is a statement drawing attention to the training given to both staff and volunteers (although for the avoidance of doubt, nothing on that page states or implies whether the training does or does not relate to CICA claims). It can also be assumed, from the pursuer's unchallenged evidence on the point, and from Mr England's evidence, that VSS distributes, and did at the time of his mother's trial in 2011 distribute, leaflets advertising its services, including the fact that it can lend assistance with making CICA claims. We do not know what the leaflet said; however, we do have a print out from the VSS website (No 5/7 of process) which, under the heading "Criminal Injuries Compensation Scheme", contains the following statement:

"**We can help with**

[2] Emphasis added

- Assessing your eligibility about the scheme and provide information on how to make an application.
- Assistance with the completion and submission of an application.
- Acting as your representative during the application process to the point of CICA final decision.
- Assistance in making an appeal."

We also know, from Ms Hay and Mr England, as well as from the VSS documentation that it relied partly on volunteers to deliver its services to victims of crime, including its service in relation to CICA claim, and that training is given on the CICA scheme to employees and volunteers alike. We also know from Mr England that both Caronne and Mr Boyd had received such training.

IV: The CICA Scheme

[21] Next, it is helpful to say something of the CICA scheme itself. The scheme which was in force at the material time was the 2008 scheme, a copy of which is lodged as number 5/3 of process. The CICA guide to the scheme is lodged as number 5/4 of process. The scheme is moderately complicated. Of note are the following paragraphs: paragraphs 6 to 12, which deal with eligibility to apply for compensation and make clear that personal injury includes mental injury or disease resulting from a sexual offence; paragraphs 13 to 17, which deal with eligibility to receive compensation and include provisions allowing for an award to be withheld or reduced for a variety of reasons, including the applicant's character; paragraphs 18 to 22 which deal with consideration of applications and provide for a time limit of two years for making the application, which time limit may be waived in accordance with paragraph 18(b); paragraphs 26 to 29 which provide for the making of a tariff award; paragraphs 53 to 55 which provide for reconsideration of decisions at any time before actual payment (para. 53); paragraphs 56 and 57 which provide for a case to be re-opened where

there is new evidence or a change in circumstances; and paragraphs 58 to 60 which deal with reviews. However, for present purposes, the most material paragraph of the scheme is paragraph 30 which provides that:-

> "where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury…no compensation in respect of loss of earnings or earning capacity will be payable for the first 28 weeks of loss. The period of loss for which compensation may be payable will begin after those 28 weeks…

At this stage I would comment simply that in comparison with some of the other provisions which applied or potentially applied to the pursuer, that provision is relatively straightforward to understand.

[22] As one would expect, the guide is more user-friendly, and covers the main points of the scheme. Of particular importance in the context of the present case are paragraphs 29 to 30 of section 3 which read as follows:

> "*Applying for loss of earnings and special expenses if you expect to be unable to work for more than 28 weeks*
> 29. Appendix 4 gives further information about who is eligible for loss of earnings and special expenses and explains how we work these out.
>
> 30. You do not need to apply for loss of earnings at the same time as you make your personal injury claim, but you do need to make your claim before your personal injury claim is finalised. If you think you will be eligible for loss of earnings…, you should complete the short supplementary form called, 'Unable to work for more than 28 weeks'. If, after our initial assessment, we decide you are eligible for a tariff payment, we will ask you for the full details of your claim for loss of earnings. At this time we will ask you to provide us with the necessary supporting information."

Again, that advice is relatively easy to understand. Paragraph 31 of the guide then gives detailed information about what evidence is required to vouch a loss of earnings claim. Appendix 4 then gives a slightly expanded and easier to read version of paragraph 30 of the scheme, making it clear that a claim for loss of earnings may be met if the loss lasted for more than 28 full weeks, but that an applicant cannot get loss of earnings for the first 28 weeks of loss.

[23] Reading the guide and the scheme together, it is clear, and indeed it is a fundamental aspect of the scheme, that a loss of earnings claim will exist if and only if the loss has lasted for 28 full weeks. Until that point, there is no claim. However, the guide also makes clear that the means of bringing such a claim to the attention of the CICA is by completing the form 'Unable to work for more than 28 weeks'. That then acts as the trigger for the CICA to make further enquiries when it has been decided that a tariff award is to be made. This ties in to the form referred to in the application form, mentioned in paragraph 9 above. It is also clear from the CICA guide that that form may be submitted before an applicant has been off work for 28 weeks, as indicated by the words "*if you expect* (emphasis added) to be unable to work for more than 28 weeks". A distinction is therefore drawn between eligibility for receiving an award – loss of more than 28 weeks – and entitlement to submit the form. I will revert to the significance of this below.

V: Assessment of the Evidence

[24] I found that both Ms Hay and Mr England were credible and reliable witnesses, and I do not understand either party to contend otherwise. Assessment of the pursuer's evidence is more difficult. He was not an entirely reliable witness, if only because, on his own account, he was "a mess" at the material times, that is, between May 2011 when he first met Caronne, and 2013 when the award was made. Although no detailed medical evidence has been led as yet, I am prepared to accept for present purposes that such a description of his mental state is likely to be accurate having regard to the tariff award which was made. So, while the pursuer at first blush had a tendency to deflect awkward questions by referring to his mental state to explain his inability to recall certain things, or to explain apparently conflicting accounts in the contemporaneous records, his explanation does tend

to be borne out by the level of the injury, which was after all investigated by the CICA and for which he received significant compensation. The defender's counsel submitted that the pursuer was not only not a reliable witness but that he was not a credible one, at least in relation to some issues. There were certainly some passages of evidence which raised some question marks over the pursuer's credibility. For example, he did appear to have given a false answer, on the CICA application form, to the question of whether he had previously applied for criminal injuries compensation. However, in the context of this case, I do not regard that as being of any significance. It is possible when the form was being completed that the pursuer thought that the question related only to the present case; such a belief would not be entirely impossible; much may depend on how the question was put to him by Caronne. It is not clear that the pursuer had anything to gain by lying on the form; and he had nothing to gain by lying in court on that point. Further, the most important aspect of the pursuer's credibility is in relation to whether or not he was abused as a child by his mother, and it has not been suggested that on that core issue he is doing anything other than telling the truth. In addition, some aspects of the pursuer's evidence do find support from other adminicles of evidence in the case. For example, his assertion that he was not informed about the possibility of a loss of earnings claim at the meeting of 10 June 2013 gets some support from the relative entry in the VSS file. On the other hand, other aspects of the pursuer's evidence were puzzling, not least his evidence about the entries in the CICA file about who was representing him at particular times. I therefore approach the pursuer's evidence on the basis that he was generally truthful, but that certain aspects of his evidence on key points should be scrutinised carefully, which I will now do in relation to the main factual issues in the case, to which I now turn.

Was the Defender Acting as the Pursuer's Representative?

[25] Indisputably, VSS was acting as the pursuer's representative when the form was submitted. That was the evidence given by the pursuer, and all the contemporaneous records are to the effect that VSS was acting for the pursuer in submitting the form. It would be perverse to find that, the pursuer having completed the form to the effect that VSS were his representative and the form then having been submitted to CICA along with the application, VSS were doing anything other than acting as the pursuer's representative at that time. By eliciting further information from him from time to time and the pursuer providing such information, it is also clear that VSS continued to act as the pursuer's representative. Leaving aside for the moment the entries in the CICA file, and what the pursuer may or may not have told them, but having regard only to the interaction between the pursuer and VSS, it is also indisputable, in my view, that VSS continued to act as the pursuer's representative at the time the award was made and accepted. The award was sent to them. They asked the pursuer to discuss it with them, which he did. He then took two days to think about whether or not to accept it before telling them that he did wish to accept it and they sent off the appropriate form to CICA on his behalf. Given those facts, it is clear that the pursuer still regarded VSS as acting as his representative, and that is borne out by the fact that he complained to them when he later found out that his brother had received more than he had. Having said all of that, the position is undoubtedly clouded by the entries in the CICA file dated 29 April 2013 and 7 June 2013. The latter is particularly interesting inasmuch as it records that the pursuer stated that VSS were no longer acting for him some three days before he went in to VSS to discuss the award, and also stated that he had asked CICA three times previously to remove VSS as his representative. However, although the CICA file does record previous phone calls from the pursuer to them direct,

there is no record of any previous request to remove VSS as his agent. Had such a request been made it is not unreasonable to think that it would not only have been recorded but would have been acted upon. The entry of 29 April 2013 (referred to above in paragraph 14) is difficult to understand on any level, particularly the statement that the applicant had never involved VSS. It is difficult to see why the pursuer would have made such a statement, which apart from anything else is difficult to reconcile with his subsequent contention that he had asked CICA to remove VSS as his agent. I did wonder whether the CICA might have confused the pursuer with one of his brothers, but if so, that does not explain the reference to the change of general practitioner, which the pursuer confirmed was accurate in relation to him. The entry of 29 April 2013 must remain something of a mystery. At most, what these entries show is perhaps that the pursuer was trying to ride two horses – being represented by VSS while at the same time trying to obtain information himself from CICA as to the progress of his claim. Such an approach would be understandable, particularly since the pursuer said that he was unhappy about seeing someone different every time he went in to see VSS and he may well have been dissatisfied with the fact that no single person appeared to have ownership of his claim. However, in relation to the question of agency, what is significant is not so much what the pursuer held the position out to third parties to be as what he told VSS. There is nothing in the VSS file to suggest that he had told them that they were no longer acting for him. Nothing in the CICA file can detract from the fact that the interactions between the pursuer and VSS both before and after 10 June 2013 show that VSS was still acting as his representative at that time.

What Was Said Between the Pursuer and Caronne at the Meeting on 11 May 2011?

[26] It is difficult to be certain exactly what was said at the meeting between the pursuer

and Caronne since we have only the pursuer's evidence and his recollection of that meeting is not of the best. We did not hear evidence from Caronne nor is there a detailed file note of the meeting. I accept the evidence of the pursuer as being substantially correct, ie that Caronne asked him to tell her what happened and that he did, and that she completed the form based on his answers. It seems likely then, and I hold, that the form was used as the basis for the questions which she asked. One of the difficulties in this case is that the handwritten form which was completed was not the actual form which was submitted to the CICA, and of course it was the on-line form, submitted by Mr England, that formed the basis for the award. Ms Hay highlighted the fact that there were differences between the handwritten form, and the questions posed in the pilot. It appears from the summary which came back from CICA, following submission of the on-line data, that the question asked on-line was "Has your injury prevented you from work or study?", without reference to the 28 week period, and of course that is consistent with the CICA guidance, referred to above at paragraph 23. Had that question been asked of the pursuer then it is likely that he would have answered it in the affirmative since he was in fact absent from work at the time of the initial interview. However, the handwritten form which was completed does not in fact ask any question directly about whether the applicant has or has not been off work but simply asks whether or not the form relating to loss of earnings is enclosed, and that box is ticked "No". It is impossible to tell from this what level of discussion there was between the pursuer and Caronne regarding wage loss. It is possible that she asked the question whether the pursuer had been off work for more than 28 weeks before ticking the box; equally it is possible that she asked him how long he had been off for and ticked the box upon learning that it was less than 28 weeks. It is also possible that she did not directly discuss the question at all but simply ticked the box "No" because, as a matter of fact, the

form was not being enclosed. Although the pursuer claimed to be a mess at the time of the interview he was clearly able to retain certain information. It is likely that if there had been a detailed or even a general discussion about the 28 week trigger he would have remembered that. Moreover, the pursuer did tell Caronne that "since this happened I have lost my job", because that is written on the application form. In the absence of any competing account of what happened at the meeting I do accept the pursuer's account, which is that the extent of the conversation between them on this point, was that Caronne asked him about his employment position. He told her that he was not employed at that time and that he had lost his job. He did not know when he would return to work. There was no discussion about the possibility of a loss of earnings claim. It is also worth noting that on the basis of the information which the pursuer gave to Caronne, namely that he was not employed, then had she asked him if he expected to be off for more than 28 weeks he would have told her that he did not know. Having regard to the advice in the CICA guidance, that arguably ought to have led to the loss of earnings form being included with the hand-written form since that related to *expectation* of being unable to work for more than 28 weeks. Of course, the handwritten form never was submitted, but that would at the very least have prompted Mr England to answer the question about employment differently when inputting the information on-line. Finally, the significance of the pursuer telling Caronne that he had lost his job and was unemployed at that time was that VSS was put on notice that he had a potential wage loss claim. Even if that were not communicated to the CICA, as it ought to have been, VSS was on notice that such a potential claim was, on the evidence of Ms Hay and Mr England, something which ought to be raised with the pursuer at the time of any award.

What Service(s) Was/Were VSS Providing to the Pursuer?

[27] Leaving aside for the moment the question of what duty of care, if any, was owed, it is material to consider what service VSS was in fact providing to the pursuer. The best starting point is perhaps the VSS website, referred to above at paragraph 21, which lists four discrete areas in which the defender offers assistance. These are, stated briefly: (i) assessing eligibility "about" (*sic*) the scheme and providing information about how to make an application; (ii) assistance with completing and submitting an application; (iii) acting as representative during the application process to the point of CICA final decision; and (iv) assistance in making an appeal. The evidence of Ms Hay was that different local services would provide different services depending on their level of expertise but various comments can be made on that. The first is that the evidence of Mr England was that at least two of the persons who dealt with the pursuer had received CICA training. Second, nothing was said to the pursuer that there were any of those areas that the defender's Nicolson Square branch could not assist him with, and he was not directed to any other agency which could offer advice (such as a solicitor). Third, as a matter of fact VSS did assist him in the first three areas. Caronne did, on the pursuer's evidence, assess his eligibility, and she told him that he was eligible. It is worth noting that in this case that in itself was not necessarily a straightforward task since more than two years had elapsed since the abuse complained of which meant that the pursuer's claim was time-barred unless it was waived in the circumstances (as indeed it was). However, a person with no knowledge of how the scheme operated might have told the pursuer that he was not eligible (or that the scheme did not cover sexual abuse). Before leaving this point, it is not entirely clear to me what eligibility "about" the scheme is intended to cover. Normally, one is not eligible "about" a scheme but "under" it. Leaving that infelicity to one side (and mindful of the fact that the wording does

appear on a webpage rather than in a formal document), it is unclear, also, how widely that phrase ought to be construed. Eligibility about, or under, the scheme might mean simply whether the person is eligible to make a claim at all; or it might be construed more specifically as eligibility for the different types of award including loss of earnings. I have already referred above to the relatively straightforward test for wage loss claims – over 28 weeks – compared to the comparatively complex test for eligibility to make a claim. On the principle of the greater including the lesser, it is perhaps not unreasonable to give a wide construction to the phrase "eligibility about the scheme" to include an assessment of eligibility for a wage loss claim. Anyone able to assess eligibility to claim at all should also be able to assess whether there is or is not a wage loss claim. Moving on to the second area of service, Caronne not only assisted with the completion of the form but she completed it in its entirety. VSS also submitted the claim on the pursuer's behalf, albeit that was done by Mr England rather than by Caronne. Finally, in relation to the third area of service, VSS did in fact act as the pursuer's representative until the point of final decision, as I have found above. It follows from all of this that I cannot accept the submission of counsel for the defender that its sole function was simply to act as a conduit for the pursuer by filling in the form and sending it off on his behalf; in effect, by acting as postbox and nothing else. Its role went far beyond that. In addition, that submission does not sit easily beside the VSS boasts in its annual reports that they had helped victims of crime secure compensation in excess of £3m. That would be an odd boast to make in the context of simply being no more than a mouthpiece and mailing agency.

To What Extent Did the Pursuer Rely on the Defender?

[28] In the foregoing paragraph, I record what VSS in fact did. None of that can be seen

as particularly controversial. More difficult, perhaps, is what the pursuer was reliant upon the VSS for (again, leaving aside for the moment, any questions as to what duties were owed). I accept from the pursuer's evidence that prior to his being approached by the VSS representative outside court, he did not know that he was entitled to claim for criminal injuries compensation, let alone have any knowledge whatsoever of the terms of the scheme. Accordingly, he was reliant on VSS to tell him about the terms of the scheme. In that regard it is worth remembering that before making any claim the pursuer had one of two choices (after learning that he might be eligible). He could have pursued the claim on his own behalf. Had he done so, he would doubtless have received the guide to the claim, which is written in reasonably plain English and had he received and read that he would have discovered that a claim for loss of earnings could be met after he had been absent from work for more than 28 weeks. However, the pursuer did not choose to take that course of action. Instead, he chose to be represented by VSS, which not only had offered to help him with a claim (by giving him a leaflet which offered that service on his exiting court as a witness) but which allowed itself to be held out by CICA as an agency which could assist people with CICA claims. The pursuer was therefore reliant upon the defender either to give him the basic information about how the scheme operated, or if they were not going to do that, either to signpost him to an agency which could tell him that or at the very least to ensure that he had the guide about the scheme so that he could acquire the information for himself. The defender avers that it was reliant upon the pursuer providing him with information so that they could complete the application on his behalf, and to an extent that is true, but the pursuer could only be expected to impart information which he knew to be relevant, and he could only do that if VSS in turn gave him at least basic knowledge about how the scheme operated and what compensation might be payable. This applies equally to the stage at

which the offer was made as to the initial meeting. At the award stage, the pursuer was reliant on VSS telling him what *could* be offered for him properly to assess whether or not the offer which was made was one which he should accept or not. While it is clear, and I accept totally, that VSS could not offer and were not purporting to offer legal advice, there is a world of difference between legal advice on the one hand, and information about the scheme on the other. Indeed, the very fact that VSS could not offer legal advice to the pursuer made it all the more important that it provided him with the information which he required in order to take the decision, himself, as to whether to accept the award. As regards the distinction between information about rights on the one hand, and legal advice on the other, I do not accept the submission for the defender that information about rights under the scheme falls under the umbrella of legal advice. VSS clearly saw itself as being able to assist someone with assessing eligibility under the scheme, and if that is not legal advice it follows *a fortiori* that information about the scheme cannot be legal advice either.

Did the Pursuer Receive the Letter of 10 June 2013 (and If So, When)?

[29] The pursuer denied having received the letter of 10 June 2013 at all, and there is no evidence that he ever did so, or that if he did receive it, he had it before deciding to accept the award which had been offered. The significance of the letter is not so much the letter itself as the information about the scheme which accompanied it, including the page headed "How Compensation is Assessed", which contains information about the power to award compensation for loss of earnings from the 29th week of loss. The letter was sent to the pursuer at an address in Edinburgh which he was not clearly living in at that time. The address to which the letter was sent appears as the pursuer's new address in an entry in January 2013 in the CICA file. However, a letter subsequently sent to CICA by VSS on

10 April 2013 gives a different new address (in fact, two different addresses, since there is a typewritten new address which has been scored out by someone who has handwritten "Wrong!" followed by a different address, although the handwritten address was not communicated to CICA). To add to the confusion the superseded January address does appear to be the address at which the pursuer was residing later in 2013. This issue was not explored with the pursuer. One possibility is that the address at which he was residing in January 2013 continued to be his address throughout that year, and that VSS were wrong in stating in April of that year that he had moved from it (although what prompted them to send the letter of 10 April 2013, or to change the address on their file copy is a mystery). Another is that the pursuer led a peripatetic existence and returned to an address which he had previously occupied (perhaps that of a relative or a friend). We just do not know, but the confusion is such that there is no reason for me not to accept the pursuer's assertion in evidence that he did not receive the letter of 10 June 2013. Even if he did receive it, he could not have received it before going to see VSS on that day, and since there is no evidence as to whether it was sent first or second class, he may well not have received it until after 12 June 2013 even if it was sent to the address where he was residing at that time. Having regard to all these factors, I am satisfied on a balance of probabilities that the pursuer did not receive the letter of 10 June 2013 and therefore did not receive the information contained with such letter. He therefore had no means of knowing, short of information imparted to him by VSS, that a loss of earnings claim might be available to him (assuming for present purposes that he had been absent from work for more than 28 weeks as a result of his injuries).

What Was Said Between the Pursuer and Mr Boyd at the Meeting on 10 June 2013?

[30] Again, there is no reason not to accept the pursuer's account about what happened at

the meeting of 10 June 2013. His description of it is borne out by the VSS file note that the award was explained "as best I could". If nothing else, that confirms that an explanation was attempted, and the words "as best I could" tend to confirm that the pursuer found the explanation confusing, which was his evidence (which it is easy to accept from a lay person given the complications in working out the amount offered). I also accept that the issue of wage loss was not explored to any extent at that meeting – if it had been, it is hard to accept that the pursuer would not have said that he had been off work for considerably longer than 28 weeks, as he had been by that stage. As it was, Mr Boyd did not raise with the pursuer the question of whether he had been unable to work for more than 28 weeks.

What is the Significance of the VSS Letter of 11 December 2013?

[31] The terms of the letter of 11 December 2013 are set out above in paragraph 12. Notwithstanding the submission by senior counsel for the pursuer I cannot go so far as to hold that this letter constitutes an admission either of liability or that any duty was owed to the pursuer by the defender. The letter can be seen as an attempt to assist the pursuer by asking CICA if they would consider a claim for loss of earnings even though the time for review had elapsed. The letter falls short of unequivocally accepting that information about loss of earnings was not explained to the pursuer. However it is not inconsistent with the pursuer's assertion that it was not explained. The letter is also significant in that VSS clearly did not take the line, either to the pursuer or to CICA, that they did not consider that it was not part of their function to explain the potential for a loss of earnings claims to the pursuer.

VI: Ruling on Admissibility of Proposed Skilled Witness Evidence

[32] Next, I will explain why I ruled at the proof that the evidence of the defender's

proposed skilled witness, a solicitor, was inadmissible. Parties addressed me on this issue, under reference to *Kennedy* v *Cordia (Services) LP* 2016 SC (UKSC) 59. It was submitted by senior counsel for the defender that it appeared to be the case that the witness would be giving evidence as a solicitor, but speaking to a so-called normal practice of advisors such as VSS. However, he was not qualified to give evidence about that, there being no profession comprising such advisors. There was therefore no usual normal practice to which he could speak. To the extent that the evidence would not be of usual normal practice, it was unnecessary since the matter could be dealt with by the court without the proposed evidence. In response, senior counsel for the pursuer submitted that while the report perhaps contained more material than was necessary, the witness would draw attention to certain features of the CICA scheme. This was a quasi-professional negligence case and expert evidence should be allowed. The witness was not only a solicitor but a CICA judge and could give evidence about how the scheme worked. He could also give evidence about what should happen at the review stage. I decided that the proposed evidence was inadmissible. First, I noted that in *Kennedy* the Supreme Court drew a distinction between expert opinion evidence and expert factual evidence. In the present case, nothing that was said by senior counsel persuaded me that the witness had relevant knowledge and experience such as to qualify him to give relevant factual evidence which would be of any assistance to the court (bearing in mind that so far as the terms of the scheme are concerned, I am capable of reading those for myself). As regards expert opinion evidence, one of the criteria for admissibility is whether the evidence will assist the court, the threshold being the necessity of such evidence (*Kennedy*, paragraph 44). Applying that to the present case, it did not seem to me that the evidence which it was proposed the witness would give would assist me in my task. To the extent that he offered an opinion, it fell fairly and squarely

within the matter which I had to resolve and in my view such evidence would not assist, but would usurp the function of the court. I therefore ruled the evidence to be inadmissible.

VII: The pleadings

[33] I now turn to the pleadings. In article 3 of condescendence, the pursuer avers the following:

> "3.1 In or about May 2011, the pursuer contacted the defender. The pursuer attended the defender's offices at 5 Nicolson Square, Edinburgh, EH8 9EH. The defender provides a service helping the victims of crime. The defender provides a service to victims who wish to make a claim for compensation as a result of injuries and loss suffered as a result of a crime. The defender assists victims who wish to make an application to the Criminal Injuries Compensation Authority (CICA). The CICA is an executive agency that deals with applications from individuals who have been physically or mentally injured because they were the victim of a violent crime. The defender's service to members of the public wishing to make an application to the CICA includes assessing eligibility to the scheme; advising and providing information on how to make a claim; assistance with the completion and submission of an application form to the CICA; acting as a representative of the person injured during the application process; assistance in making an appeal. The defender holds itself out as having expertise in dealing with applications for criminal injuries compensation".

[34] The defender admits that the pursuer contacted it in about May 2011; that he attended at its office; that it helps the victims of crime; that it assists victims who wish to make a claim for compensation as a result of injuries and loss suffered as a result of crime and who wish to make an application to the CICA; that the CICA is an executive agency that deals with applications from individuals who have been injured, under explanation that it is the CICA's responsibility to consider each application on its merits and deal with it in accordance with its statutory obligations; and that the defender's staff will from time to time assist or help individual applicants in connection with applications under the explanation which follows. The remainder of article 3.1 is denied. The defender goes on to aver that:

> "an applicant may arrange for different people to be a representative. The CICA guide to making an application explains this in a section headed 'Free Independent Advice'. That guide explains that 'Victim Support gives free and confidential support, and practical help to victims and witnesses of crime. This can include helping you with your claim… Victim Support cannot provide legal advice'. After dealing with paid representation, the CICA guide states 'You can ask a friend or a relative to represent you and help you make a claim'. The defender is a charitable organisation and offers help essentially as a friend on a similar basis to this last category."

[35] I consider that the pursuer has proved his averments in article 3.1 in their entirety, for the reasons already given when discussing the evidence. In particular, I consider that the defender does hold itself out as having expertise in dealing with applications for criminal injuries compensation, at least in relation to the four areas in which it states it can offer assistance. The fact that an applicant may arrange for different people to be a representative is, in my view, neither here nor there. It is true that the CICA Guide states that an applicant can ask a friend or a relative to represent him or her and help them make a claim, but the situation where someone approaches a friend or relative to ask for assistance in filling out a form is very far removed from that where a national organisation which clearly prides itself on the success it has in assisting victims of crime with criminal injuries compensation claims actively encourages such persons to avail themselves of its services. For that matter, the friend or relative who holds himself out as having expertise in dealing with the CICA claims may well find that he or she is in a different position from the friend or relative who is approached and is asked for assistance. Finally, it is true that the defender is a charitable organisation, but having regard to its resources as described above in paragraph 21 and to the fact that it is also a limited company, that is not of any particular significance. My final observation on the defender's answer 3.1 is that having regard to the number of persons whom it assists annually, the overall size of the awards subsequently made and the training

which VSS gives its staff and volunteers, it is somewhat understating the position to aver that the defender's staff "will from time to time" assist or help individual applicants.

[36] Article 3.2 of condescendence begins in the following terms:

> "The pursuer was given a CICA application form to sign by the defender. The pursuer signed a CICA application form dated 11 May 2011 and passed the form to the defender. The form named the defender as the pursuer's representative in the application to the CICA. The pursuer gave brief details of the sexual and physical abuse that he suffered at the hands of his mother when he was younger. The pursuer indicated that he was still receiving treatment for his mental health problems. The pursuer gave details of the conviction of his mother in May 2011, for the offences against the pursuer and his brothers. It was written on the form that he had lost his job since the events and his marriage had broken down".

All of those averments are admitted by the defender.

[37] Article 3.2 then goes on to aver:

> "Any reasonable representative ought to have been aware that the injuries and effects of the injuries had potentially caused the pursuer to lose his job. Any reasonable representative ought to have been aware that this would require an assessment of whether the pursuer has suffered a loss of earnings. The pursuer was not provided by the defender with a CICA form called "Unable to Work for More than 28 Weeks". This is a form that the CICA asks is completed at the same time as the application if a person thinks they may have suffered loss of earnings. At that point the CICA do not require evidence of loss of earnings, simply an indication that the person thinks they may be eligible. The assessment of loss of earnings by the CICA is carried out at a later date after the CICA have decided whether a person is eligible. The pursuer was not advised by the defender that he could apply for loss of earnings from the CICA. The defender submitted an application to the CICA authority… on the pursuer's behalf".

[38] The defender's answer to those averments is as follows:

> "Admitted that the pursuer was not provided by the defender with a CICA form called "Unable to Work for More than 28 Weeks' under explanation that this was because (1) the pursuer provided no information to suggest that he was wishing to make such a claim; (2) the pursuer said nothing and produced no material to indicate that he was able to make such a claim and (3) the pursuer was asked the question whether he was unable to work for more than 28 weeks and answered "no". Believed to be true that the CICA do not require evidence of loss of earnings but simply an indication that the person thinks they may be eligible under explanation that the applicant did not indicate to the defender that he thought he might be eligible. Believed to be true that the assessment of loss of earnings by the CICA is carried out at a later date after the CICA have decided whether a person is eligible

> under explanation that this only arises if the applicant answers "yes". Admitted that the defender submitted an application to the CICA on the pursuer's behalf… *Quoad ultra* denied. The [pursuer] was aware that he could apply for loss of earnings because he was directly asked the question. It was not the role or responsibility of the defender to give the pursuer legal advice as is clear from the CICA Guide".

[39] I will come back to the averments about what a reasonable representative ought to have done, or have been aware of, when discussing the question of duty. Beyond that, I have again concluded that the pursuer's averments have been proved. The defender admits that the pursuer was not provided with the "Unable to Work for More than 28 Weeks" form and, again , as set out above, the CICA request that that form be completed at the same time as the application when the person thinks that they may have suffered loss of earnings. I have also found as a fact that the pursuer was not advised that he could apply for loss of earnings. As for the defender's answer, the explanation as to why the pursuer was not provided by the defender with the "Unable to Work for More than 28 Weeks" form has not been established on the evidence. I do not accept that the pursuer said nothing to indicate that he was able to make such a claim. On the contrary, he told Caronne that he was at that time unemployed and the information about his mental health was on any view information which indicated that he might be able to make such a claim. Second, it is factually incorrect that the pursuer was asked the question whether he was unable to work for more than 28 weeks and answered "no". The form did not require the question to be asked in that way. There is therefore no reason to suppose that the pursuer was asked that question, and I have found that he was not. Even if he had been asked that question then, having regard to the terms of the form, it was the wrong question because the question should have been whether he *expected to be* unable to work for more than 28 weeks. Third, the defender cannot be heard to say that the pursuer provided no information to suggest that he was ready to make a claim for loss of earnings when the pursuer (as I have found) was relying on it to tell

him at least the salient features of the scheme so that he knew what sort of information he ought to be providing. Finally, the averment that the pursuer was aware that he could apply for loss of earnings because he was directly asked the question quite simply has not been proved.

[40] In article 3.3 the pursuer avers that on 17 May 2013, the CICA wrote to the defender offering compensation of £17,552.50. That consisted of tariff awards for injuries under the 2008 scheme for permanent mental illness and physical abuse suffered as a child, reduced by 15% to reflect an unspent conviction. There was no award for loss of earnings. The proposed award was accompanied by a document which stated that if earnings were lost or reduced for at last 28 weeks compensation may be available from the 29th week. The proposed award was accompanied by guidance on how to seek a review of the decision, the time limit for doing so and a form to do so. Those averments are admitted, subject to an explanation that the accompanying document referred to was a standard form.

[41] In article 3.5 the pursuer avers:

> "On or about 10 June 2013, the pursuer attended the offices of the defender at Nicolson Square, Edinburgh to discuss the award made by the CICA. The pursuer went to the defender's office direct from a counselling session with his therapist. The pursuer met with a representative of the defender. The pursuer was advised to accept the award as it was the correct award in his case. No advice was given to the pursuer about seeking a review. No advice was given to the pursuer about a claim for loss of earnings. The defender's log of the meeting states – "I explained the award as best I could". Any reasonable representative ought to have discussed with the pursuer whether he had been unable to work as a result of his injuries that formed part of his claim. Had the representative asked the pursuer about his work the representative would have been advised by the pursuer that he had been unable to work for prolonged periods since before the criminal trial of his mother in April 2011. It would then have been obvious to any reasonable representative that the pursuer is likely to have suffered a loss of earnings as a result of the injuries, which formed part of the CICA application. The defender failed to advise the pursuer about a claim for loss of earnings from the CICA. The pursuer signed the acceptance form on 12 June 2013".

[42] In answer 3.5 the defender admits that the pursuer attended its offices on or about 10 June 2013; what the log of the meeting states, under explanation that this "reflects the role and responsibility of the defender as a friend rather than professional advisor and the reality that the defender's member of staff did not and could not know the precise reasons that lay behind the CICA's assessment"; and that the pursuer signed the acceptance form on 12 June 2013, under explanation that he wanted to go away and consider this before signing. The remainder of the pursuer's material averments are denied. The defender avers that the pursuer:

> "appeared pleased with the level of award and talked about donating some of it to charity. There was nothing in the pursuer's file to indicate that any other issues required to be considered. There was no reason to consider loss of earnings at this stage when none had been claimed. The pursuer again made no mention of loss of earnings."

[43] Again, I will deal with the issue of what a reasonable representative ought to have done below. Beyond that, I consider the pursuer's averments in article 3.5 to have been proved (with the exception of the averment about attending direct from a counselling session, about which there was no evidence). As I have stated above in paragraph 31 I do accept that if the defender's representative (Mr Boyd) had asked the pursuer about his work he would have been told that the pursuer had been unable to work for long periods since about April 2011. As far as the defender's averments are concerned, I cannot accept that the words "explained the award as best I could" do reflect the role and responsibility of a friend. There is no reason to suppose that a friend or relative would be in any better position than the applicant to explain an award, whereas there is every reason to think that the defender, as a body which provides training to its staff and volunteers about the scheme, whom it promotes as "specialist", is able to do so. It is true that the pursuer wanted to go away and consider the form before signing. It is nothing to the point that the pursuer appeared

pleased with the level of award and talked about donating some of it to charity, which I accept that he was, and did, but that was before he knew that he had not received the full compensation to which he might have been entitled. The averment that there was nothing in the pursuer's file to indicate that any other issues required to be considered, is true in so far as it goes, but begs the question as to whether there ought to have been something in the file to indicate that loss of earnings should have been considered. The averment that "there was no reason to consider loss of earnings at this stage when none had been claimed" has not been established. If there had been a change in circumstances there was every reason to claim loss of earnings and the CICA rules make clear that that would have been possible, not even necessarily as a review but as a request to reconsider before the award had been paid, under paragraphs 53 to 55. Finally, it is true that the pursuer again made no mention of loss of earnings, but that was because he was not asked and did not know, because he had never been told otherwise by the defender, that he was potentially entitled to make a claim in respect of loss of earnings.

[44] In article 3.6 the pursuer avers:

> "In about November 2013, the pursuer discussed the application for criminal injuries compensation with one of his brothers. He discovered that his brother had received a substantially higher award than himself, including a claim for loss of earnings. The pursuer contacted the defender to ask why he had not been informed about making a loss of earnings claim. The defender's log for 26 November 2013, records: "Was loss of earnings mentioned to him?... Unsur (*sic*). By letter dated 11 December 2013, the defender wrote to the CICA requesting the reopening of the pursuer's case."

There then follows the terms of the letter as set out above at paragraph 12. The article continues:

> "The Criminal Injuries Compensation Authority replied by telephone, stating that they were not prepared to reopen the case on the grounds that the award had been accepted".

[45] In response to that, the defender admits that in about November 2013 the pursuer contacted it to ask why he had not been informed about making a loss of earnings claim, under the explanation that this was the first occasion this had been mentioned. It admits the terms of the letter of 26 November 2013, under explanation that this reflected uncertainty about what discussion had taken place and not uncertainty about whether the question had been put to him. It admits the letter of 11 December 2013, under explanation that it was phrased to maximise the pursuer's prospects of an appeal being entertained. It admits that the case was not reopened by the CICA and the pursuer's discussions with his brother are not known and not admitted.

[46] I have found that the pursuer's averments in Article 3.6 have been proved. They are in any event substantially admitted. I accept that the pursuer raised the matter because of a conversation with his brother. As regards the defender's explanations, I do not accept that the log for 26 November 2013 necessarily reflected uncertainty about what discussion had taken place rather than uncertainty about whether the question had been put to him. We did not have the benefit of any evidence from the defender on this point. In the circumstances, the entry in the log must be given its normal meaning which is that the person writing it was unsure whether loss of earnings had been mentioned to the pursuer. In any event, the distinction between uncertainty about what discussion took place and uncertainty about what questions had been put is perhaps one which is difficult to draw. Finally as regards the explanation for the letter of 11 December 2013, I do accept that it is one interpretation of that letter that it was phrased so as to maximise the pursuer's prospects of appeal although it is difficult to say more than that in the absence of any evidence from the author of the letter.

[47] In Article 4 of condescendence the pursuer avers:-

> "The pursuer's loss and damage were caused by the fault and negligence of the representatives of the defender. The defender was acting as the representative of the pursuer in his application to the CICA. The defender gave the pursuer advice about his CICA application through its representatives. The pursuer relied upon the advice of the defender. The defender owed the pursuer a duty to exercise reasonable skill and care in acting as his representative in his application to the CICA. The defender failed in its duty to advise the pursuer that he may be entitled to a sum for loss of earnings. The defender failed to assess whether the pursuer may be entitled to a sum from the CICA for past and future loss of earnings. The defender failed to advise the pursuer that he should apply to the CICA for a review of the award. The defender failed to assess whether the tariff reward was appropriate on the basis of medical evidence. The defender failed to advise the pursuer about the fact that he was entitled to see the medical evidence obtained by the CICA upon which they based their tariff award. But for the failures by the defender, the pursuer would not have suffered loss and damage."

[48] In response, the defender admits simply that it was acting as a representative of the pursuer in his application to the CICA under reference to previous answers. *Quoad ultra* the pursuer's averments are denied. Article and answer 4 lie at the heart of this case.

VIII: Submissions

[49] Both parties lodged written submissions, which were subsequently augmented by full oral submissions on 1 October 2017. Space does not permit me to repeat these submissions at length. Many of the submissions I have already dealt with in the context of discussing the evidence and the significant factual issues, and I do not propose to record here the submissions in relation to those matters. Suffice to say that I have taken into account all submissions made by both parties. A joint bundle was lodged, referring to the following authorities:- *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465; *Henderson* v *Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145; *Smith* v *Eric C Bush* [1990] 1 AC 831; *Spring* v *Guardian Assurance PLC* [1995] 2 AC 296; *Rhesa Shipping Co SA* v *Edmonds (The "Popi M")* [1985] 1 WLR 948; *Caparo Industries plc* v *Dickman* [1990] 2 AC 465; *Customs & Excise Commissioners* v *Barclays Bank plc* [2007] 1 AC 181; *NRAM plc* v *Steel and Bell & Scott*

LLP [2016] SC 475; Charities and Trustee Investment (Scotland) Act 2005; Criminal Injuries Compensation Act 1995; Parliamentary Commissioner Act 1967. Counsel for the pursuer also referred to the case of *Lejonvarn* v *Burgess* [2017] EWCA Civ 254.

Pursuer's Submissions

[50] I will, however, make brief reference to parties' submissions. Senior counsel for the pursuer moved me to repel the defender's first and second pleas-in-law and to allow a proof before answer. The pursuer's case was that he was approached by the defender and invited to make a claim for criminal injuries compensation. The defender made the claim on his behalf and the pursuer relied upon the defender. The pursuer was not advised by the defender about the possibility of making a claim for loss of earnings. The defender owed a duty to advise him of the possibility of making such a claim. The defender had a duty to tell the pursuer that there was the potential for wage loss claim and to explore with him whether he had suffered wage loss. The pursuer was relying on the defender. The pursuer's averments did not amount to an assertion that the defender should have given legal advice. The defender having represented that they could assist and the pursuer being allowed to believe that the defender could assist with his claim would entail the defender having knowledge of how the scheme operated and what kinds of claim could be recovered. The averments did impose a requirement on the part of the defender to tell the pursuer that he may have a claim for loss of earnings and that, if he did have such a claim, it could be included. Such a duty did not impose a burden of a high degree of skill and care on the defender. As regards review, one of the things which should have been included in the discussion at that stage was a question of whether there had been wage loss for more than 28 weeks.

[51] As regards the legal test for imposition of duty, there was a duty of care whichever test was applied. The Inner House case of *NRAM plc* v *Steel and Bell & Scott* was binding. Where a person assumed a responsibility to provide a service to another person and there was a concomitant reliance upon the service provided, liability arose if the service fell below what could reasonably be expected. It was reasonable to expect the defender to consider the possibility of including a claim for loss of earnings and to advise the pursuer accordingly. The same result was arrived at by applying the tripartite test. The pursuer's loss was foreseeable. There was also a proximate relationship between the parties, of a quasi-contractual nature. There might well have been a contract between the parties although that had not been averred. It was fair, just and reasonable to impose liability. If a person took on this kind of work it was fair to expect them to provide a minimum service which included explaining whether someone had a claim for loss of earnings, which was a basic component of a claim under the CICA scheme. The defender had public liability insurance. Particular reference was made to dicta in *Henderson* v *Merrett*; *Spring* v *Guardian Assurance*; *Caparo; Henderson* v *Merrett* and *Lejonvarn*.

Defender's Submissions

[52] In response, senior counsel for the defender invited me to sustain the pursuer's first plea-in-law and to dismiss the action as no relevant duty of care had been averred. Alternatively, if it was held that a duty of care was to be imposed, decree of absolvitor should be granted on the basis that there had been no breach of any such duty. If the defender failed in both these submissions, then a proof before answer on causation and quantum should be fixed. The pursuer's pleadings did not set out a duty of care which could be said to be (or ought to be) incumbent upon the defender. The averment that "any

reasonable representative ought to have been aware that the injuries and the effects of the injuries had potentially caused the pursuer to lose his job" was vague and uncertain and could not inform a positive duty. The pursuer had not averred any factual material which could provide any reasoned basis for desiderating that the reasonable representative ought to have been aware that an assessment of whether the pursuer had suffered a loss of earnings was required. A similar criticism was made of the assertion in Article 3.5 that it would have been obvious to any reasonable representative that the pursuer was likely to have suffered a loss of earnings as a result of his injuries. A duty of "skill and care" begged the question of whether the defender's employees or volunteers had any particular "skill". The posited duties were in effect assertions of duties to give legal advice but that was expressly excluded. As regards the averred duty to advise the pursuer that he should apply for a review, there were no averments (and no evidence to make out any such case) to the effect that the defender's staff member dealing with the matter at that point had any material upon which to make such a judgement. The duties asserted by the pursuer were akin to those one would expect of a professional advisor, which the defender was not. The defender simply acted as a messenger or a mouthpiece, not as an advisor. It had not been given information for the purpose of giving advice or making an assessment, but purely for the restricted purpose of transmitting the form to the CICA. There was no proximity of relationship between the parties where information was received for the purpose of completing a form. As far as the case law was concerned, most of the cases cited could be distinguished on the basis that they were concerned with reliance on information which had been supplied to a third party. The circumstances here were quite different. This was not a case where special skill or special knowledge was relied upon. It was simply administration of a form based on information provided by the pursuer. The defender had not assumed

responsibility. The responsibility for providing accurate information rested with the pursuer. He signed a certificate to the effect that the information given was true and that he would advise of any change in circumstances. In considering the law there was no real need to look further than *Customs & Excise Commissioners* v *Barclays Bank plc*. That contained a useful discussion of the earlier authorities. Particular reference was made to the speech of Lord Bingham at page 189, to the effect that the imposition of a duty was something of a moving feast in terms of what test should be applied. The courts should have regard to the facts in deciding which test to apply. The question of whether a duty of care existed was inextricably bound with the scope of the duty of care. Here it was simply to submit the application to CICA and nothing else. Nothing in *NRAM* v *Steel* impacted on the defender's submissions. In summary, the defender's submission was that the defender had fulfilled any limited duty incumbent upon it.

IX: Discussion

[53] The problem of when to impose a duty of reasonable care in respect of pure economic loss is one which has often come before the courts, resulting in a myriad of cases. Although parties referred to a number of authorities, as counsel for the defender submitted there is little need to look far beyond *Customs & Excise Commissioners* v *Barclays Bank plc* [2007] 1 AC 181 for guidance as to which test or tests to apply when considering whether the defender owed the pursuer a duty of care, and the scope of any such duty. The speeches in the House of Lords contain a useful review of the authorities and of the three tests which have been used in deciding whether a duty of care is owed: the assumption of responsibility test, applied in cases such as *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465; the

threefold test, applied in *Caparo Industries plc* v *Dickman* [1990] 2 AC 465; and the incremental test.

[54] Parties were agreed, as I understood it, that the appropriate test in the present case was the assumption of responsibility test. I am content to adopt that approach by considering that test first: as Lord Bingham said in *Customs and Excise* v *Barclays Bank,* in paragraph 4 of his speech, page 190, an assumption of responsibility is a sufficient but not a necessary condition of liability. In other words, it is but a first test which, if answered positively, may obviate the need for further enquiry. That appears to have been the approach in the Scottish case of *NRAM plc* v *Steel and Bell & Scott LLP* [2016] SC 475, where the majority of the Inner House stated that the appropriate question was: "whether this was one of those cases where the law attributes assumption of responsibility to the solicitor and, in doing so, provides a complete answer to the duty of care question, obviating the need for further enquiry…" (para 47 at page 488).

[55] In the passage from *Customs and Excise* v *Barclays Bank* above referred to, Lord Bingham also observed that the paradigm situation where a party can be said to have assumed responsibility, is where there is a relationship having all the *indicia* of contract save consideration. He went on to say (para 5) that the assumption of responsibility test was to be applied objectively and was not answered by consideration of what the defendant sought or intended. However, the further the test was removed from the actions and intentions of the actual defendant the more notional the assumption of responsibility became and the less difference that there was between this test and the threefold test. It is also worth having regard to the speech of Lord Hoffman in that case at para 38 where he said that:

> "the notion of assumption of responsibility serves a different, weaker but nevertheless different purpose in drawing attention to the fact that duty of care is ordinarily generated by something which the defendant has decided to do: giving a

> reference, supplying a report, managing a syndicate, making ginger beer. It does not matter why he decided to do it; it may be that he thought it would be profitable or it may be that he was providing a service pursuant to some statutory duty..."

[56] Before going on to apply the law to the facts of this case, it is instructive to consider other guidance by the House of Lords regarding the assumption of responsibility test. Lord Goff of Chieveley in *Henderson* v *Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 at page 180 discussed *Hedley Byrne* v *Heller*, concluding that the breadth of the principle underlying that case rested on the relationship between the parties which may be general or a specific to a particular transaction and which may or may not be contractual in nature. Lord Morris had spoken of "special skill" but, at least in Lord Goff's view, that concept must be understood broadly, certainly broadly enough to include special knowledge. He went on to say (at page 181) that:

> "the concept of assumption of responsibility provides its own explanation of why there is no problem in cases of this kind about liability for pure economic loss, for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other, in respect of economic loss which flows from the negligent performance of those services."

[57] Lord Goff returned to this theme in *Spring* v *Guardian Assurance PLC* [1995] 2 AC 296 where he made comments to the same effect. At page 318 in that case he said:

> "it is clear that the principle [in *Hedley Byrne*] is not limited [to the provision of information and advice] but extends to include the performance of other services for example the professional services rendered by a solicitor to his client".

[58] I take from these *dicta* that there are various factors which, depending on the particular facts and circumstances, serve as an indication that there may have been an objective assumption of responsibility by a person such as to impose a duty on that person to take reasonable care not to cause another party loss; what the Inner House in *NRAM plc* v *Steel* refer to as signposts. These factors may include, depending on the particular nature of the case: whether the relationship is akin to a contractual one; whether the party on whom

the duty is to be imposed has decided to do something (which, by implication, he need not have done); and whether that party has some special skill or knowledge.

[59] Bearing the foregoing guidance in mind, and turning to the facts of the present case, the following factors, or signposts, in my view are relevant and all point towards the defender's having resumed responsibility to the pursuer:-

1. The relationship between the parties, which was akin to a contractual one, whereby the defender agreed to provide a service to the pursuer which comprised assessing his eligibility under the CICA scheme; completing and submitting the application on his behalf; and acting as his representative throughout the progress of the application. In this regard, it is nothing to the point that the defender did not charge the pursuer a fee; that was simply part and parcel of its charitable status, but is not an indicator that no responsibility is to be attributed to the defender.
2. The holding out by the defender (and allowing itself to be held out by CICA) as an agency which could assist victims of crime with CICA applications.
3. The fact that the defender did not require to provide anyone assistance with CICA claims, but has chosen to do so; and having so chosen, takes credit in its annual reports for the number of successful applications and the amount paid, implying a certain degree of expertise and knowledge and an ability to secure for victims of crime that which was due and payable under the scheme.
4. The fact that on its own account, the defender employs specialist staff (including volunteers) to deal with claims, to whom it provides training and who do in fact have knowledge of the CICA scheme.
5. The fact that the service offered by the defender included an assessment of eligibility.

6. The fact that both Caronne and Mr Boyd, the VSS representatives who dealt with the pursuer at the material times, had been trained in the CICA scheme.
7. The fact that the defender did not pass on to the pursuer the CICA guide about the scheme, or the information included about the award letter, thus having the practical effect not only that the pursuer was wholly reliant for his knowledge of the scheme on what he was told by the defender but that the defender was aware, or ought to have been aware, that he was so reliant.
8. The availability of other agencies, who could equally have assisted the pursuer with a claim.

[60] Those factors point towards an assumption of responsibility by the defender to be aware of the terms of this scheme and to inform the pursuer of those terms, and to explore with him whether he had a claim for loss of earnings, that being a key element of the scheme. I am not dissuaded from this view by, either, the document 6/5/1 of process, which is a VSS internal document or the evidence of Angela Hay in cross-examination. I accept that different local services offered differing levels of service. However, the fact remains that both Caronne and Mr Boyd had been trained in the CICA scheme, and I have dealt with the question of what services were in fact provided to the pursuer in paragraph 27 above.

[61] To impose such a duty is not unduly burdensome, particularly when the pursuer was so wholly reliant on the defender as D was. Having regard to the factors listed, it is reasonable to expect a minimum level of knowledge by the defender and its representatives – both employees and volunteers – about the scheme, particularly when one of the functions which the defender expressly offers to do is to assess eligibility "about" the scheme. If that particular service was carried out negligently, and as a result a potential claimant did not make a claim which was likely to succeed, it is hard to envisage that a court would hold that

there had not been a clear breach of duty. The failure to advise properly in relation to a loss of earnings claim is no different in principle.

[62] Strictly speaking, it is unnecessary to consider the other tests but by way of a check it is appropriate to have regard briefly to the threefold test. Application of that test would arrive at the same result. The parties were in a proximate relationship which as I have pointed out was akin to a contractual one. The loss was clearly foreseeable. In all the circumstances, including the factors mentioned above, it is fair, just and reasonable to impose liability on the defender.

[63] For all these reasons, I conclude that the defender did owe the pursuer a duty of reasonable skill and care. The defender did give the pursuer advice about his CICA application and the pursuer relied upon that advice. The defender owed the pursuer a duty to exercise reasonable skill and care in acting as his representative. As regards the scope of the duty, having regard to the evidence of Ms Hay and Mr England, and to the factors listed above, I accept that a reasonable advisor should have known the basic terms of the scheme and of the potential for claiming wage loss after 28 weeks of absence. It was a basic component of the duty incumbent on the defender that the pursuer be advised of that potential, so that he was aware of what information the defender required. Further, I have found that the defender, through Caronne, was aware, from the first meeting, that the pursuer had lost his job. Caronne therefore knew, or should have known, that this was something which should be explored with the pursuer at that time, to ascertain whether his unemployment was linked to the abuse he had suffered (although the implication from putting it on the form, under the heading "additional information" was that it was).
Mr Boyd, for his part, was on notice by reason of the application form in the defender's file, that this matter ought to be revisited with the pursuer when the award was received, to

ascertain whether he was by now eligible to claim wage loss. To some extent, the problem was brought about by the disconnect between the form which Caronne completed for the pursuer, and the on-line form. Had Caronne gone over with the pursuer the actual questions on the on-line form, which formed the basis of the application to the CICA, then the potential for a loss of earnings claim would almost certainly have emerged, because the questions the pursuer would then have been asked would have been "Has your injury prevented you from work" and "Have you lost earnings", the answers to both of which would have been "yes". However, none of this detracts from the basic obligation on the defender, whichever form was used, to ask the relevant question of the pursuer in order that they could properly inform him about his entitlement to claim for loss of earnings. I therefore find that in the exercise of their general duty of skill and care, the defender had specific duties to tell the pursuer that he may be entitled to a sum for loss of earnings; to assess whether he was eligible to claim a sum for past or future loss of earnings, by exploring the issue of wage loss further with him; and to explore with him whether in June 2013 he should apply to CICA for a review of the award. To that extent, I have found the pursuer's averments of duty to be proved. Further, since, as I have found, none of the steps which I found ought to have been taken were taken, it follows that all of the said duties were breached. Stated simply, the defender's employees owed the pursuer a duty to tell him about the scheme insofar as it allowed him to claim for wage loss and to explore with him whether he could make such a claim; and this they failed to do.

Decision

[64] In summary, the defender owed the pursuer a duty to exercise reasonable skill and care in acting as his representative, and the particular duties listed in the preceding

paragraph, which duties were breached. I will therefore allow a proof before answer on dates afterwards to be fixed. Before formally doing that, I have assigned a hearing for 17 January 2018, to consider questions of expenses, and as a procedural hearing, to give parties an opportunity to address me as to whether any further order is necessary at this stage, by way of repelling any pleas-in-law or by excluding any passages in the pleadings from probation.