

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH  
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 19

PN1988/17

JUDGMENT OF SHERIFF R D M FIFE

in the cause

SAMANTHA EGAN

Pursuer

against

GLASGOW CITY COUNCIL

Defenders

**Pursuer: Christine, Advocate; Thompsons, Edinburgh**  
**Defenders: McConnell, Advocate; Glasgow City Council**

Edinburgh, 31 January 2019

[1] A proof in 3 associated actions but not conjoined proceeded on 28, 29 and 30 November, 5, 6 and 7 December 2018. The proof was restricted to liability.

[2] Liability in each of the 3 cases had to be considered on its own facts but there were common facts and circumstances which applied to all the cases. Damages were agreed in this action at £3,500 inclusive of interest to 28 November 2018 in terms of a Joint Minute.

[3] The following authorities were referred to by parties:

- (1) *Connor v Secretary of State for Scotland* 2000 Rep LR 18;
- (2) *Buck v Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576;
- (3) *McGinnes v Endeava Service Ltd* 2006 SLT 638;
- (4) *Rigby v Wandsworth Borough Council* [2006] EWHC 224 (QB);
- (5) *McCarthy v Highland Council* 2010 SLT (Sh Ct) 74;

- (6) *McCarthy v Highland Council* 2012 SLT 95;
- (7) *Stark v Lothian Health Board* [2018] SC EDIN 7;
- (8) *Porter v Strathclyde RC* 1991 SLT 446;
- (9) *Collins v First Quench Ltd* 2003 SLT 1220;
- (10) *Waugh v London Borough of Newham* [2002] EWHC 802 (QB);
- (11) *Vaile v Havering LBC* [2001] EWCA Civ 246.

[4] The sheriff, having resumed consideration of the cause: finds the following facts to be admitted or proved:

### **Findings in fact**

[5] Broomlea Primary School (“Broomlea”) is a primary school that caters for pupils with complex needs. The staff for session 2014/15 included Mrs Fiona Shields (“Mrs Shields”, head teacher), Fiona Lindsay (“Ms Lindsay”, deputy head), Dianne Latto (“DL”, class teacher), and Samantha Egan (“SE”, classroom assistant).

[6] The defenders operate Broomlea and employed all of the staff for the session 2014/15 who gave evidence at the proof.

[7] Mrs Shields has worked as a teacher of pupils with complex learning needs since 1997. She has been the head teacher of a school for pupils with complex needs since 2012 and the head teacher at Broomlea since 2013.

[8] Ms Lindsay has worked as a teacher of pupils with complex learning needs since around 1989. She has been the deputy head teacher at Broomlea since 1996.

[9] The Scottish Negotiating Committee for Teachers (“SNCT”) is a tripartite organisation comprising members from teaching organisations, local authorities and the Scottish Government. It has at all material times promulgated a handbook. The handbook

offers guidance on many matters relating to teaching including staff pay and conditions and also class sizes.

[10] The SNCT Handbook contains guidance on class sizes, and specific guidance on class sizes in special schools and units. In relation to such schools or units that deal with pupils with profound learning difficulties the recommended adult to pupil ratio is one adult to two and a half pupils, based on a class size of ten pupils and four adults. There was no specific category of class size for a pupil with autism. That would fall within a number of categories. The staff ratio would be dependant on need and would have to be flexible.

[11] On 30 and 31 January 2013 DL had training with Crisis and Aggression Limitation and Management ("CALM"). CALM is an organisation that delivers consultancy advice and training in dealing with challenging behaviours. DL completed Module 1 training and passed an assessment, production 6/26.

[12] On 14 January 2014 SE had CALM training and completed CALM Module 1, production 6/24.

[13] On 21 and 22 January 2014 SE had CALM Module 1 training and passed her assessment, production 6/23.

[14] Towards the end of the 2013/14 session Mrs Shields and Ms Lindsay considered class composition for the following year. They decided to create for the 2014/15 session a primary 6 class named class Fyne. The class was to be composed of 4 pupils: HE, DB, D and K with a staff ratio of 4:4 (4 staff: 4 pupils). The decision to place those pupils in a class together was made because they were of a similar age and all required a highly structured day.

[15] It is not always helpful to have additional staff in close proximity to pupils such as those in class Fyne. Having more staff can increase arousal in the pupils and the risk to both staff and pupils. Adding more staff does not always reduce the risk to staff. Because of the

challenging behaviours in particular of HE from the beginning of session 2014/15, during the first weeks of the session, staff in class Fyne told Ms Lindsay and Mrs Shields that an additional member of staff would be of assistance to them.

[16] HE suffered from autism. She frequently exhibited challenging behaviours including scratching, spitting and attempting to grab the staff who worked in class Fyne. HE's behaviours were not deliberate or malicious. She was unable to control her behaviour at times. It was not possible to prevent her exhibiting these challenging behaviours. Staff were able to control and manage her behaviours to a degree. During the session 2014/15 HE was going through puberty which significantly increased her challenging behaviours.

[17] The defenders had an obligation to educate all of the pupils of class Fyne. Delivery of education need not be in a classroom setting.

[18] DB suffered from autism and would frequently exhibit challenging behaviour.

[19] D posed a risk as a "runner" in that he would attempt to run from the classroom from time to time.

[20] It is not possible to prevent the pupils of class Fyne exhibiting challenging behaviours. While staff were able to control and manage behaviours to a degree some level of risk to the staff working in class Fyne was inevitable.

[21] The staff working in class Fyne for session 2014/15 were DL as the class teacher, Jackie Quail ("Ms Quail") a support for learning instructor who had been at Broomlea since around the late 1980s, and SE and Julie MacLean ("Ms McLean") as support for learning workers. Ms Quail was chosen because of her long experience and because she had worked with HE and D before. SE was selected because she wished to work with challenging pupils and had been with DB the year before. Ms MacLean was selected because she was very

good with DB and knew him well. DL was selected because she had emphasised in her interview her experience of working with autistic pupils.

[22] All staff who were to work in class Fyne were informed in advance of the intended composition of the class.

[23] Class Fyne was allocated rooms 18 and 19 at Broomlea. Those rooms were adjacent and close to the offices of both Mrs Shields and Ms Lindsay. The class was taught in room 18 but room 19 was available for use.

[24] Ms Lindsay as deputy head was available to provide advice when required.

[25] A risk assessment for HE had been created in 2010 and updated from time to time. The risk assessment was updated prior to the start of the 2014/15 academic year, production 6/19, the risk being assessed as moderate. DL had no involvement in that risk assessment. The increase in the assessment of risk from moderate to substantial only occurred at the review during the autumn term 2014/15, see finding in fact [62].

[26] Staff were aware of all risk assessments and positive behaviour plans for the pupils. Risk assessment, formal and informal, was a continuing process. Staff were aware of the need for ongoing, dynamic risk assessment to manage the complex needs of the pupils and changing circumstances and worked cooperatively on risk assessment. The quality of risk assessment at Broomlea was generally high.

[27] The risk assessment for DB was updated prior to the start of the 2014/15 session, production 6/20.

[28] The staff ratio for class Fyne at the start of session 2014/15 at 4:4 was high compared to similar schools in Scotland.

[29] The staff ratio was 4:3 from around the end of August 2014 when K was moved to another class.

[30] The normal staff ratio at Broomlea was 1:3.

[31] Concerns were expressed by staff ratios for the class at the in-service day immediately before the start of the 2014/15 session.

[32] From the start of session 2014/15 there were weekly liaison meetings between the class team and Ms Lindsay. These meetings were held in the mornings one week so that the entire class team could attend and afternoons the following week when only DL was able to attend.

[33] The pupils of class Fyne frequently displayed challenging behaviours from the start of session 2014/15. Hair pulling and grabbing were frequent occurrences. No injuries were reported initially as a result of these behaviours.

[34] The class team kept a book where they recorded incidents involving the pupils. The intention was that the incidents be transcribed from the book into accident reports when time permitted. Various incidents were reported to Mrs Shields or Ms Lindsay but the book was lost at some point and some of the incidents contained in the book were not reported to management.

[35] The challenging behaviours from the start of the 2014/15 session were discussed at the weekly liaison meetings. Concerns about staffing levels were expressed by the class team to Ms Lindsay. DL and SE requested additional staff from Ms Lindsay. Ms Lindsay offered advice to the class team about steps that they might take to reduce the risk of injury from challenging behaviours. Ms Lindsay provided advice about personal protection, including wearing long sleeved tops to reduce the risk of arms being scratched, polo necks, caps to protect against hair pulling and advice about wearing hair up to reduce the risk of grabbing. Masks were made available to the staff to reduce the risks from spitting. The

circumstances in which personal protective measures should be taken were left to the class team to decide following dynamic risk assessments.

[36] The class team continued to report to Ms Lindsay that the four pupils were not working well as a group including reacting badly to noises within the group. At around the end of August 2014 K was moved to a different class. HE and DB remained in class Fyne along with D. The staff ratio in class Fyne was then 4:3.

[37] On 18 September 2014 DL and SE attended CALM re-accreditation. Both passed an accreditation assessment, production 6/27.

[38] In around October 2014 Ms MacLean went off work to have an elective operation. The operation was unrelated to her employment.

[39] During Ms MacLean's absence Julie Reid ("Ms Reid") took her place as a support for learning worker in class Fyne.

[40] On or about 5 November 2014 SE failed to attend Broomlea for work. Senior management were aware that SE had domestic issues and that late coming to work was a known issue. HE was unsettled that day. At around 09.30am DL was sitting with HE trying to comfort her and de-escalate her. Suddenly and without warning HE jumped up from her seat. DL stood up so that HE was not standing above her. HE then sat down on DL's hand forcing her fingers towards her wrist and causing injury to DL. Later in November 2014 DL completed an accident record form, production 6/21.

[41] There was nothing that DL could have done to prevent the incident.

[42] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[43] On or about 28 November 2014 at around 10.10am SE was on an outing at Reidvale Park with HE and others. HE seemed happy and was holding SE's hand. Suddenly and without warning HE grabbed SE's hair and pulled her to the ground causing injury to SE. Other members of staff assisted SE in loosening HE's grip. SE reported this incident and completed an accident record form, production 6/11.

[44] There was nothing that SE could have done to prevent the incident.

[45] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[46] On or about 1 December 2014 at around 10.30am SE was supervising HE in the playground. HE was showing no signs of distress. Suddenly and without warning HE grabbed SE's neck and scarf causing injury to SE. SE did not complete an accident record form in relation to this incident immediately, but did so on 7 January 2015, production 6/12.

[47] There was nothing that SE could have done to prevent the incident.

[48] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[49] On or about 1 December 2014 at around 12.00pm SE was supervising HE in the playground. SE identified that HE seemed ill at ease and sought to give her space. Suddenly and without warning HE pulled SE's hair causing injury to SE. SE did not complete an accident record form in relation to this incident immediately, but did so on 7 January 2015, production 6/13.

[50] There was nothing that SE could have done to prevent the incident.

[51] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[52] On or about 2 December 2014 at around 12.00pm SE was supervising D in the internal playground. D was going towards the nursery doors which were open. SE reached the doors first when suddenly and without warning D pulled her pony tail causing injury to SE. SE did not complete an accident record form in relation to this incident immediately but did so on 16 January 2015, production 6/15.

[53] There was nothing that SE could have done to prevent the incident.

[54] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[55] On or about 2 December 2014 at around 14.30pm SE was sitting with HE and Ms Reid. Ms Reid was supervising HE at that point. Ms Reid moved away to get HE's shoes so that HE could go home. Suddenly and without warning HE pulled SE's hair causing injury to SE. SE did not report the incident immediately, but an accident report form was completed on 18 December 2014, production 6/14.

[56] There was nothing that SE could have done to prevent the incident.

[57] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[58] On or about 10 December 2014 at around 09.30am DL was working at a work table with DB in class. DB was agitated. DB was trying to scratch DL. DL moved away from DB. DB started working again at the work table. Suddenly and without warning DB got hold of

the end of the table, tipped the table and as a result the table landed on DL's left foot causing injury to DL. Prior to 10 December 2014 DB had never tipped a table. There was no evidence of DB having tipped a table previously. There was no known risk to be included in risk management.

[59] There was nothing that DL could have done to prevent the incident.

[60] The presence of an additional member of staff would have made no difference to the incident. An additional member of staff would not have prevented the incident which was not reasonably foreseeable.

[61] After the incident on 10 December 2014 DL was off work because of her injuries. Cover for DL as class teacher was provided by Ms Lindsay on Mondays and Tuesdays and by Gill Atkinson from Wednesday to Friday. HE and DB were taught separately from December 2014.

[62] During the autumn term of session 2014/15 the risk assessment for HE was updated. The most significant change was that the assessment of risk posed by HE's pulling of hair and grabbing was changed from moderate to substantial. DL was involved in that review and update.

[63] In or around February - April 2015 D was moved out of class Fyne leaving HE and DB with a staff ratio 4:2.

### **Findings in fact and in law**

[64] The pursuer SE has failed to prove on a balance of probability that the defenders should have provided an additional member of staff and that would have prevented injury to the pursuer in this action.

[65] The pursuer SE has failed to establish fault at common on the part of the defenders on the balance of probability.

[66] The defenders are entitled to decree of absolvitor.

[67] Expenses are reserved. A hearing on expenses will be fixed by the sheriff clerk.

### **Witnesses**

[68] The following is a summary and assessment of each of the witnesses who gave evidence:

#### ***1 – Samantha Egan***

[69] Miss Egan (“SE”) was employed as a Support for Learning Worker by the defenders. SE was aged 34 at the date of proof.

[70] SE had been employed at Broomlea Primary School, Glasgow (“Broomlea”) since around 2010/2011. Broomlea was a school for pupils with special needs.

[71] SE sustained injury in a number of incidents at work: on or about 28 November 2014, on or about 1 December 2014 and on or about 2 December 2014 when she was assaulted by named pupils who were autistic. The circumstances of the assaults were not disputed.

[72] In August 2014 SE was allocated to work in class Fyne. That was the first time SE had worked in a special needs class. There were four pupils in the class: HE, DB, K and D. There were four members of staff: SE, Dianne Latto (“DL”), Julie McLean (now Julie Tough) and Jacqueline Quail.

[73] The normal staff ratio was 1:1 but the ratio should have been 2:1. All four pupils had autism. K had just started at the school. SE had assisted with the other three pupils from time to time before the school session 2014/15 but never on a full time basis.

[74] The head teacher Mrs Shields allocated classes shortly before the end of the 2013/14 session, in June 2014. Where the pupil was not known SE would go through their risk assessment when back at school in August before the new session started.

[75] In August 2014 SE had a concern there was not enough staff for the pupils in class Fyne. In particular, she referred to the size of the pupils. There was not sufficient staff to control the pupils. The pupils had different degrees of behaviours which could be extreme. SE expressed concerns about staffing levels on a continuous basis. These concerns were discussed in August 2014 before the start of term. These concerns were discussed at an in-service day with the class team. SE was just told "see how it went". That initial discussion was between the four members of the class team. Later, the concerns were taken to the deputy head Ms Lindsay to see what else could be put in place. The extreme behaviours of the pupils started from the beginning of term in August 2014.

[76] As an example HE liked to scream a lot. DB did not like noise. If two of the staff were with HE and two of the staff were with DB then two of the pupils would be on their own.

[77] When term started in August 2014 structures were in place. All members of the class team wore protective clothing: long sleeve tops so that you would not get scratched and shower caps to prevent hair getting pulled. The shower caps were not useful as they used to slide off and in any event HE would just go up the back of SE's head to pull her hair. The recommendations for protective clothing came from Ms Lindsay and Mrs Shields.

[78] HE wanted to grab SE's hair regularly. HE would also spit directly in SE's face. SE could have worn a face protector but she was fearful of receiving damage to her face were she to wear a face protector and HE were to hit her in the face.

[79] SE described repeatedly having her hair pulled by HE. She would always have her hair tied back. She worked with HE every day. HE was very strong. HE went for the same part of her hair every time "my weak spot" which was getting weaker on a daily basis. HE would go to the back of SE head, wrap her hair round her fingers and then pull SE down towards the ground. Any CALM techniques would not persuade HE to release her hair.

[80] By September 2014 SE's neck was getting weak. Her hair was being pulled on a daily basis, every day. That continued until December 2014 when SE had to go off work.

[81] There were so many incidents it was not practicable to record every incident as an incident report. The class team used to put a note in a wee book and try to catch up at the end of a week. If there was time an incident report form would be completed. When SE returned to work from absence the book had disappeared so every incident was not recorded and reported. Productions 6/9-6/16 covered incident reports and accident reports.

[82] After the two incidents in December 2014: 1 December 2014 two incidents and an incident on 2 December 2014 SE had to go off work. Before these incidents SE had asked Mrs Shields if she could be moved to another class for a few days for rest but that did not happen. SE was not the only member of staff to be assaulted. Other members of staff were subject to similar incidents on a daily basis.

[83] SE and others made complaints to Ms Lindsay. There was a weekly meeting with Ms Lindsay. Ms Lindsay was trying to put things in place to protect staff such as shower caps, etc., but the class team were asking for extra help, an extra member of staff.

Alternatively, they wanted to be able to take HE to a safe place when she was kicking off in order to calm her down. That was to be out of the classroom environment. That happened sometimes but was not available all the time. All members of the class team expressed similar concerns. Several times the class team asked for extra help, an extra member of staff,

but the response was that there was not sufficient staff across the school to provide an additional member of staff.

[84] After September 2014 one of the pupils K moved to another class leaving 3 pupils in class Fyne. A staff ratio of 4:3 did not really help. At times it needed three members of staff to deal with DB because of his size, height and weight. That left one member of staff dealing with two pupils. DB would be set off by HE. DB would then set off HE. There were no known triggers for HE becoming upset. Her behaviours were unpredictable.

[85] After SE went off work some changes were put in place. HE and DB were put in classes on their own and D was moved to another class around April 2015. HE and DB were then taught separately on a 1:1 basis.

[86] Asked in examination in chief if there had been an extra member of staff would that have made a difference, SE replied: "maybe slightly, not completely".

[87] While SE had been CALM trained none of the techniques taught worked with HE. The class environment of four pupils was not appropriate for HE or DB. It did not work with the two of them being taught together.

[88] Concerns about staffing levels were expressed at weekly meetings with Ms Lindsay. In addition SE went with Jacqueline Quail to see Mrs Shields round about September 2014 to express concerns.

[89] The CALM training records for SE were contained in productions 6/23, 6/24 and 6.27.

[90] There were two risk assessments relating to HE, productions 6/19 and 6/20. The risk assessment for session 2014/15 (6/19) assessed the risk as "moderate". SE had no input and no involvement with that risk assessment. SE had input and involvement with the revised risk assessment production 6/20 which assessed the risk as "substantial".

[91] SE told of an incident which had taken place two years before the start of session 2014/15 when HE had pulled the hair of another member of staff which resulted in the staff member sustaining a head injury and having to attend hospital. That led to the staff ratio 2:1. Before SE started session 2014/15 she was told not to be on her own with any of the pupils. That was as a result of that earlier incident.

[92] SE was a candid, credible witness. The only occasions when her reliability might be in question was due to the passage of time. SE was very nervous when giving evidence but she was a truthful witness.

*2 – Julie McLean now Julie Tough (Ms McLean for the purpose of the proceedings)*

[93] Ms McLean was a Pupil Support Assistant currently a Support for Learning Worker at Broomlea. She was aged 43 at the date of proof.

[94] For the session 2014/15 there were four pupils in class Fyne at the start of the session. There was not a normal ratio for the class as the class was quite high tariff. There were two pupils with violent behaviours who were physically strong and two pupils who were runners, slight risks. Ms McLean had previous experience working with DB two years prior to the 2014/15 session.

[95] Everyone was told of their classes for the 2014/15 session, which pupils and what staff, just before the summer holidays in June 2014. Ms McLean did have concerns at the time. Each of HE and DB needed two staff for support when they were upset and violent and K and D were slight risks. These concerns that they needed more staff were expressed to Mrs Shields when the classes were allocated.

[96] Every day was different depending on the mood of each of the pupils. In the mornings DB tended not to want to come off the bus so two staff were required to get him

off the bus. HE would often start the day on a high, spitting, grabbing clothes and grabbing hair. Sometimes HE would drop to the ground which required two staff to get her back on her feet. HE would spit a lot and staff had to protect others walking nearby. HE would spit at them so staff had to stand in front of her to take the spitting. HE would gouge staff hands causing them to bleed; she would grab and twist clothing; she would grab and pull hair; she was very strong. It needed two staff to calm her down and that did not always work. Many times each day HE would grab and pull hair.

[97] School management were aware of this. The advice was to tie hair up, wear long sleeve shirts, wear shower caps and wear hats. None of these worked. HE would grab through the shower cap. HE was just able to get hold of hair such as grabbing a ponytail and twisting her hand round that so that it was difficult to release the hand.

[98] The class team told management they needed more staff: "it's not working". Emotionally it was very hard. Ms McLean was very fond of HE and DB who were on the spectrum. Ms McLean did not know how many times she had been hurt but it was many times. Management were aware of that. Management had seen Ms McLean crying, upset, cleaning herself up and filling in forms about incidents. At the end of a day anyone would see it was a hard day, every day.

[99] Ms McLean was off work from October 2014 until January 2015 for elective surgery. Ms McLean returned to work in class Fyne. Ms Quail then went off work with an injury. Ms McLean was working with Ms Lindsay and two new staff members. None of the team was comfortable being on their own with the three pupils. It was not safe. Too many staff were being injured.

[100] Ms McLean went to see Ms Lindsay to tell her she did not wish to be on her own with the pupils. The two of them went to see Mrs Shields. Mrs Shields suggested that one

of the pupils who was a runner, K, be moved to another class immediately. That was agreed but Ms McLean did not want to work on her own with the pupils. It was to be a staff ratio of 2:1. At that time there were four staff and three pupils. The class team were not happy being on their own with the pupils. There was a meeting with Ms Lindsay and Mrs Shields together. Sometime after K was moved to a different class D was also moved to a different class. It ended up with HE and DB being in separate classes on their own. That was less stressful and easier to manage. Staff were still being injured. When Ms McLean was working with HE it was always 2:1 but Ms Lindsay was always willing to take a pupil such as HE on her own.

[101] That system of work with HE and DB being in separate classes on their own, in separate rooms, continued the following session 2015/16. HE and DB were only together at snack time and swimming. HE needed two members of staff with her all the time, for reasons of safety.

[102] Ms McLean was a matter of fact, credible and reliable witness.

### ***3 – Dianne Latto***

[103] DL was a class teacher aged 37 at the date of proof. She had been a teacher since January 2013. DL started at Broomlea in August 2014. DL had previous experience of working with autistic pupils at Middlefield Residential School in Glasgow.

[104] DL first met staff at in-service in August 2014. She had access to the risk assessments for each pupil. She spoke to colleagues as she had no prior knowledge of the pupils. It was going to be a challenge. She had concerns because of their individual behavioural needs that the pupils had been grouped together.

[105] DL started teaching at Broomlea in August 2014. She continued to have concerns about the challenging behaviour from all four of the pupils. There was aggression. There was a pupil looking to escape. There was hair pulling. There was scratching. There was spitting. That was on a daily basis.

*Incident 5 November 2014*

[106] There were three pupils in class Fyne at the time. K had moved to another class. Because of the challenges the class was facing DL was continually filling out critical incident reports, on a daily basis. The team were in talks with management because of the pressures they were under. Following that K moved to another class.

[107] On the morning of 5 November 2014 DL collected HE from her bus and escorted her to class Fyne. Ms Quail and Ms McLean had escorted DB from the bus. DB was having a difficult morning and was showing challenging behaviours. They were one staff member down as SE was late.

[108] DL was in the class on her own with HE and D. HE went over and climbed on a table. D headed to a window. DL managed to get HE down from the table to be safe. Ms Quail and Ms McLean came into class with DB but he was agitated so they went out of the room. DL moved to a bench near the door with HE. She was trying to de-escalate HE, to calm her down and made sure D was not a runner. Ms Quail and Ms McLean came back into class with DB again. DB was still in a very heightened state.

[109] HE became agitated. She jumped up off her seat. DL's natural reaction was to stand up. HE went to sit back down and landed on the back of DL's wrist causing injury.

[110] When HE had come off the bus that morning she was agitated. Transitions were a particularly difficult time of the school day for HE and other pupils in the class. Ms Quail

and Ms McLean thought DB was so upset that morning they tried to de-escalate him outwith the class. They risk assessed and took that decision as they knew how HE would react to DB being upset. With DL sitting at a bench with HE that agitated DB even more when he came back into class. When one of the pupils was in a heightened state that would heighten the state of other pupils.

[111] Usually there would be two members of staff at the bench. DL had two pupils to consider safely, HE and D. She had to reduce HE's anxiety levels which would also have impacted on D. An additional member of staff would have made a difference. HE was used to structure and routine. She was used to having two members of staff. DL was in the class on her own with two pupils. If there had been two members of staff then one of the staff could have kept an eye on D.

[112] Asked in examination in chief if there had been an extra member of staff would that have made a difference, DL replied: "possibly none". Asked would the incident have happened anyway DL replied "it's hard to say".

[113] Concerns about the class dynamics were expressed at the weekly meetings with Ms Lindsay, that is the impact of one pupil's behaviour on another pupil and on staffing levels.

[114] Ms Lindsay appreciated the difficulties, encouraging the class team to try different strategies and suggesting strategies that could be tried. These did not work.

#### *Incident 10 December 2014*

[115] On the morning of 10 December 2014 at around 09.30am DL had assisted the transition of DB from the bus to the class. There were difficulties with transition. DB was in the class. He responded well to routine which should reduce his anxiety levels. DB was

working through tasks at the work table. DB became agitated. DL tried to get DB to focus on work activities. DB reached across the table to try and scratch her. DL moved away. DB started working again. DB then got hold of the end of the table, tipped the table and the table landed on her foot causing injury.

[116] The CALM training records for DL could be found in productions 6/30 and 6/37. The key principle was to employ de-escalation techniques in an attempt to reduce challenging behaviour.

[117] DL was a straightforward witness. There was no reason to doubt her credibility. DL was not cross examined on the facts of the two incidents forming the basis of the claims and damages. DL was a truthful witness.

#### *4 – Jacqueline Quail*

[118] Ms Quail was a special needs instructor at Broomlea. Ms Quail had 31 years' experience and was aged 50 at the date of proof. Ms Quail had spent her whole career at Broomlea. As a special needs instructor she was part of a team working with the class teacher and pupil support assistance. She would share teaching activities with the class teacher including delivery of lessons.

[119] During the session 2014/15 Ms Quail was working as an instructor in class Fyne which had four members of staff and four pupils. Staffing levels would depend on the needs of the pupils. At the start of term in August 2014 Ms Quail knew the class was going to be difficult. Ms Quail knew the class was going to be high tariff. There would need to be a high number of staff for the four pupils as compared with classes where you could have six pupils and four staff.

[120] Ms Quail knew the pupils were difficult with severe autism. Ms Quail had worked with DB in primary 1. Ms Quail had worked with HE three to four years prior to August 2014.

[121] During the session 2014/15 HE was going through puberty. That had a huge impact on her behaviour. HE always had challenging behaviour but that increased tenfold during puberty. HE had problem behaviour. During puberty HE would: "hurt you more" and "spit continually". Her behaviour was unpredictable; she was very noisy; she knew that would upset DB; she would be very noisy in order to cause upset to DB; she had pulled hair previously with one hand but then used two hands to pull hair; she would pull hair quite vigorously. HE was a very strong girl for her age. The noise made by HE really triggered DB's heightened behaviour.

[122] At the start of the term Ms Quail did not know how everything was going to work but it was a matter of giving it a bit of a try to see how everything was going to gel. Ms Quail had always worked in classes with high tariff pupils as a matter of choice so that did not faze her.

[123] The challenges were pretty much immediate. From the onset of puberty that significantly impacted on HE's behaviour so that she needed more support. That behaviour agitated DB. Staff needed to move in to support both HE and DB. That meant withdrawing support from the other pupils K and D who also needed support. From the start it was "pretty heavy going". The class team had weekly liaison meetings with Ms Lindsay. Concerns about staff ratios were passed on to Ms Lindsay.

[124] Dynamic risk assessments were carried out as a team as they were going along. The behaviour of HE and DB impacted on the other two pupils who were less challenging. K and D were "free running". D would run out of the class whenever he could. Someone

would then have to leave the support for either HE or DB to follow him. D would run up to the mainstream primary and lock himself in a class. Overall class Fyne was a difficult class: "it was a very difficult situation".

[125] The staff ratio was not sufficient. On regular occasions HE was agitated and needed support. DB was regularly agitated and needed support. That meant staff running between these two pupils who both needed support, often at the same time.

[126] Violent assaults were a daily occurrence. Everyone on the team was injured. HE would dig her nails into fingers and gouge skin to cause bleeding. DB's mother could not cut his nails. His nails were razor sharp. DB would come after members of staff and cut them on the face, arms and wherever skin was exposed. HE would spit and pull hair.

[127] All of this was discussed at the weekly meetings with Ms Lindsay. Ms Lindsay was aware of all the problems. She always gave suggestions. She was very hands on. She would come into the class at times to provide support. Ms Quail had a lot of respect for Ms Lindsay. She would take things on board. She would listen. She was very good.

[128] Eventually K was moved to another class. That did some good. That reduced the staff ratio. That was the reason for K moving to another class.

[129] There was a high number of incidents. Ms Quail had witnessed assaults on a daily basis. Ms Quail was present on the occasions when SE had her hair pulled by HE and was injured and when DL was injured by HE and separately by DB. Because of HE's puberty her behaviour was more excitable and more unpredictable.

[130] DB could come into the class in the morning and be fine but within five minutes he was angry and upset. There were a number of triggers.

[131] Members of staff were cut regularly; hair was pulled almost daily; staff were spat on daily. Ms Quail injured her back when she was pulled across a table. She was absent from work because of that injury.

[132] Transitions, particularly first thing in the morning, were always difficult to do, always quite hectic. Both HE and DB each required 2:1 support whereas K and D needed 1:1 support. Extra staff were not available.

[133] K moved from class Fyne late September 2014. D moved from class Fyne when Ms Quail was off work following injury. That was during the second term. That left HE and DB as the only two pupils in class Fyne which was the position when Ms Quail returned to work. By that time the plan was to separate HE and DB as much as possible. DB would be taken into another classroom for teaching. HE was separated with a screen so that she could not see DB otherwise that would trigger her behaviour, making loud noises in order to upset DB.

[134] Ms Quail really thought that for each of HE and DB the support needed was a staff ratio of 2:1. Their behaviours were very unpredictable and staff were being injured on a regular basis. When it was just HE and DB in class Fyne there still needed to be a staff ratio of 2:1 that is two members of staff for each of HE and DB. When transitioning the pupils to access different parts of the school and to prevent injury to staff there needed to be two staff for each of HE and DB. That did not happen.

[135] HE would deliberately noise up DB. That was why a screen was put up so that HE could not see DB and DB would not then react to her. The pupils were difficult to manage but not impossible to manage. A lot of incidents happened during transitioning. As one example if HE was being transitioned to soft play, a short distance from the class of perhaps 5-10m, she might leave the class quite happy but halfway there suddenly stop and drop to

the ground. There was no way one staff member would be able to move her. HE's behaviour could escalate very quickly and a staff member on their own would be very vulnerable with a high risk of being injured while on their own. The team did not feel that was safe. Two staff members were necessary for the safe transitioning of HE.

[136] Ms Quail had many years' experience in managing high tariff pupils. There was no cross examination on the factual evidence. Ms Quail was a credible and reliable witness.

### *5 – Julie Reid*

[137] Ms Reid was a Senior Learning Support Worker aged 47 at the date of proof.

Ms Reid had worked at Broomlea for about two years. She had been working at East Park School, an independent school, for the last three years. After attending college her first professional post in the sector of pupils with special needs was at Broomlea although she had previously undertaken voluntary work at various places.

[138] During the session 2014/15 Ms Reid had worked in class Fyne from about October 2014 until February 2015 to cover a member of staff who was having elective surgery, Ms McLean.

[139] Ms Reid described the class as "hardcore; quite intense, no downtime, staff constantly alert and on their toes all day every day".

[140] Ms Reid had concerns about staff ratios. All the pupils had very challenging behaviours. The make-up of the group could change the dynamics. There were too many triggers. If one of the pupils was in a heightened state then all the pupils could be in a heightened state. That happened every day.

[141] Ms Reid expressed concerns about staff ratios on many occasions to Ms Lindsay and Mrs Shields. HE and DB needed two members of staff all the time even when on their own.

[142] Transitions were an issue. Latterly DB refused to go into the playground. There was nothing that could be done to get him to move so he had to remain indoors. DB would be very aggressive; he would scratch; he would pull hair, etc.. There were a number of triggers. One member of staff had no chance on their own as DB was 15 stone and 5'5" in height at the age of about 11 or 12. That happened most days, sometimes every day.

[143] Ms Reid was present when each of SE and DL were injured.

[144] Ms Reid described the class team situation as "putting out fires" and "reacting to situations". If there had been more staff that would have reduced the risk of injury to staff.

[145] Ms Reid was a straight talking, forthright witness. I had no reason to doubt her credibility. Ms Reid appeared to have legitimate concerns about staff ratios. Ms Reid was not cross examined on the facts. Ms Reid gave evidence about an injury to herself while working at Broomlea but I did not consider the incident to be relevant to this case.

## ***6 – Fiona Shields***

[146] Mrs Shields was head teacher at Broomlea, aged 44 at the date of proof. Mrs Shields had been head teacher since January 2013. She had extensive experience of pupils with complex needs and special needs.

[147] On the factual background K moved to another class at about the start of September 2014. D left the class in February 2015 with HE and DB remaining in class Fyne.

[148] A risk assessment would be undertaken where there was some risk. Sometimes a risk assessment would be raised following an incident. Sometimes a pupil would be coming to school who was a known risk so that a risk assessment would be prepared in advance. The purpose of the risk assessment was to set out how to reduce risk to staff and pupils. HE had an individual risk assessment. The risk assessment for session 2014/15 was production

6/19. Under the section measures on page 2 there was reference to "safe space". A member of staff should not be within striking distance of the pupil when the pupil was agitated. The preventative strategy for pupils with autism was to structure the day, to plan the day from the moment the pupil was met at the bus so that the pupil knew what was happening throughout the day. Pupils who were autistic did not understand a lot of language. They had strong visual skills. A structured day was predictable for the pupil and calming for the pupil.

[149] The positive behaviour plan was part of the risk assessment. By P6 there was a wealth of information on HE. That information was then in an easily accessible document for staff to see.

[150] Class Fyne for session 2014/15 was a P6 class. All the pupils were in P6. One did always group the same year pupils together. Pupils could be grouped slightly differently but the risk of putting older pupils with younger pupils had to be considered. Known triggers were triggers known from previous experience which might trigger behaviour and to let staff be aware these triggers could resurface. The heading "setting conditions" were either most likely to happen or had happened. Mrs Shields was not involved in putting together either of the risk assessments for HE, production 6/19 or the revised risk assessment production 6/20.

[151] Note: As Mrs Shields had no involvement in either of the risk assessments 6/19 and 6/20 her evidence was of a general nature only and not fact specific.

[152] If any changes were made to transitions that could make HE agitated. In the positive behaviour plan known triggers included transitioning. The setting conditions included transitioning from playtime to class.

[153] The risk assessment for DB was production 6/22. The positive behaviour plan covered least favoured activities and known triggers including transitions. Page 2 of the risk assessment noted active strategies. There was a good amount of detail.

[154] Mrs Shields was involved in the selection of staff and pupils for class Fyne. All four pupils needed a highly structured day, reduced stimulus and a slower pace of progress to other pupils. It was a small group of pupils with the same curriculum which was responsive to their needs. They needed support regularly from staff members. They needed help with transitions.

[155] Four staff were selected: Ms Quail was an instructor who had been at Broomlea since the 1980s. She was very experienced in autism and complex needs. SE had worked with DB the year before and knew DB. Ms McLean knew DB very well from working with him a couple of years earlier. DL came into school in August 2014. She had made it very clear she had experience in autism with particular experience in that area. Mrs Shields had no reason to doubt that.

[156] There were two rooms available to class Fyne, room 18 and room 19 which was known as the library but was just another room. Room 19 had been successful the year before for DB. In addition the rooms for the head teacher and deputy head were adjacent, all within listening distance.

[157] K was moved to another class at about the start of September 2014. The class team had reported that all four pupils together was not working well. There was some reaction to noise. Mrs Shields and Ms Lindsay "listened to them (the class team)" and moved K at that stage to reduce stress. Four staff remained in place, a staff ratio of 4:3. That was a greatly enhanced staff ratio, much more than was required elsewhere. In her experience class Fyne were given a lot more staff than Mrs Shields had had with other pupils who were much

stronger. It was not always a good thing to increase staff numbers. The more people, the more difficult it can be to manage pupils, to manage noise and to manage consistency.

Increasing staff numbers was not always the best solution to a problem. It needed good leadership from a class teacher in planning for class and planning for communication with the class and the class team.

[158] Mrs Shields did not attend the regular meetings with the class team and Ms Lindsay. After K was moved to another class the feedback from DL was that things were improving in the class. DL also prepared reports in September 2014 for a meeting with parents. DL reported the pupils were doing well.

[159] Note: None of the reports for the meetings with parents as at September 2014 were lodged as productions. Mrs Shields also spoke of the annual review which she chaired and ingathered information. There was no evidence of the date of the annual review. While Mrs Shields stated DL had emailed a report of how well DB was doing and how well he was settled into the class that report was not lodged as a production and was not put before the court.

[160] Any time staff came to see Mrs Shields she listened and gave advice such as distancing themselves from hair pulling and reducing language. The pupils responded better to less language. Mrs Shields was of the view that SE talked too much at times. Mrs Shields advised on what had worked from her experience. Mrs Shields knew Ms Lindsay was meeting the class team regularly. The class team often asked for additional staff but they had four staff for three pupils. Any additional staff would not have been appropriate.

[161] The first principle of CALM training was de-escalation. Staff also had to provide pupils with a safe space. For DL's hand to come into contact with HE (incident 5 November

2014) she must have been within striking distance, within the space where the pupil could come into contact with her hand.

[162] CALM also stated escape was a good option as well. A dynamic risk assessment was required. That dynamic risk assessment would be ongoing. There may be a time to withdraw from a pupil and escape rather than putting oneself in danger.

[163] SE reported incidents involving HE on 1 December and 2 December 2014. DB was absent from school on those dates as he had chickenpox. Note: Mrs Shields stated she had emails and attendance records with her confirming the position but no vouching was put before the court.

[164] D moved to another class in about February 2015. His education had become quite disrupted over a number of months. The level of anxiety was quite unprecedented for him. D joined another class of five other pupils with a principal teacher in order to reduce his level of anxiety.

[165] Mrs Shields accepted that the risk assessment for HE 6/19 at page 1 detailed CALM techniques most of which were unhelpful. HE was more agitated going through puberty in session 2014/15. This was referred to LD CALMS (Learning Disability). They carried out a review and concluded others were better placed to address the matter. Occupational Therapy was also involved but they advised they felt they had no place in a supporting role for HE.

[166] While DB was hypersensitive to noise and there were issues with HE over noise two rooms had been available from the start of the 2014/15 session. Room 19 had been used successfully the year before with DB. It was Mrs Shields' understanding that DL chose not to use room 19 and that she tried to get HE and DB to work together.

[167] Overall it was Mrs Shields' position that class Fyne had more staff than was needed for the number of pupils. Each year the school had to re-group pupils in terms of spaces within the school. It could take time to re-structure. From her experience pupils might be unsettled during first term but she would expect improvement over a period of time.

[168] On the requirement for additional staff Mrs Shields would have taken guidance from Ms Lindsay who had worked in Broomlea much longer than herself.

[169] While there was a collective discussion why the four pupils were put together, ultimately it was Mrs Shields' decision. The discussion had involved the Leadership Team being herself, Ms Lindsay and Leslie Connagher. Near the end of term (June) staff would be told which class they would be allocated for the next session. A lot of factors were taken into account including discussion with the previous class teachers as to what would be beneficial for the pupils; based on knowledge the school had at the time and that seemed the best solution and the best way of moving forward with all the pupils. Mrs Shields emphasised the four pupils were not in one place, room 18, but that two classrooms were assigned: 18 and 19.

[170] The reality was that the pupils needed to be educated. A lot of the issues for the pupils concerned anxiety levels.

[171] Mrs Shields was an experienced head teacher. Mrs Shields was of the view that the staff ratios for class Fyne were "greatly enhanced" and "much more than elsewhere". There was no need for additional staff with a staff ratio 1:1 or 4:3. Mrs Shields relied on Ms Lindsay for communication and advice with the class team. Mrs Shields was at least one stage removed from the day to day working of class Fyne. At times Mrs Shields was not answering questions put to her in cross examination but giving a general response, often too general in my view. The absence of documentation to support her evidence was

unfortunate. Mrs Shields seemed detached from what was going on in class Fyne towards the end of 2014 with a number of staff going off work through injury. I had an impression there may have been too much delegation to Ms Lindsay and that Mrs Shields placed too much reliance on her own experience rather than addressing the actual concerns of the class team at that time. Mrs Shields appeared to play down the problems being faced by the class team on a daily basis from at least September to December 2014.

### *7 – Fiona Lindsay*

[172] Ms Lindsay was deputy head at Broomlea, aged 54 at the date of proof. Ms Lindsay had many years' experience in the teaching of pupils with special needs.

[173] Ms Lindsay was involved in the selection of the class team for class Fyne for the session 2014/15. Ms Quail had worked with HE the year before. Ms McLean had a good relationship with DB. SE was chosen as she said she was interested in working with young people with challenging behaviour, that it was an interesting environment to work in and that she wanted to extend her skills in that area. DL had just started at Broomlea in August 2014. Ms Lindsay had met DL and had a brief chat before the school session started in August 2014.

[174] As for the four pupils Ms Lindsay had fairly extensive discussions with the head teacher about the 2014/15 session during the previous term (term 4) and the best way of developing their learning and allocating classes. The four pupils were selected to be in the same class as they learned in a similar way. If they were put together the school could fine tune the environment to support their learning. K was in P5. The other three pupils were in P6.

[175] All four pupils had challenging behaviour. Ms Lindsay had discussed this with DL. A lot of pupils who were severely autistic operated at an age level of three, some under an age of two and some at an age of one. When under stress they would communicate that physically.

[176] K moved out of the class within about the first two weeks of term. He was not in the class by September 2014. DB and K were not compatible. K's vocalisations were distressing for DB. DB was easily affected by some noises. It was assessed early on in the session that sounds made by K disturbed DB. That could not be circumvented. The only way to solve this was to move K to another class.

[177] Once K left the class the staff ratio was 4:3. Ms Lindsay had experience of teaching similar pupils. The 4:3 ratio was a very high staff ratio when compared with elsewhere.

[178] While Ms Lindsay recalled there were regular meetings with the class team she could not remember any of the meetings at all due to the passage of time.

[179] On additional staff generally, from her experience Ms Lindsay stated that commonly that was not the best solution to an issue. Frequently additional staff would result in more of an issue and not always a solution. Ms Lindsay looked at solutions to meet the needs of young people rather than "packing the room with people". Ms Lindsay would not have done anything to endanger staff or any pupils intentionally.

[180] After DL went off work following injury Ms Lindsay taught HE for the rest of the 2014/15 session and the 2015/16 session on a 1:1 basis. Ms Lindsay stated she was not unsafe or she would not have done that.

[181] DB did not require a staff ratio 2:1 all the time. The risk assessment identified that at certain times it was advisable to have a staff ratio 2:1 with him. This was all about dynamic risk assessment, looking at and reading the young person. Some days DB would be quiet.

Some days he would be aroused. Ms Lindsay worked with DB for about one and a half years. There was not always a staff ratio 2:1.

[182] While Ms Lindsay accepted that a number of staff going off work with injuries might indicate an ongoing problem with the class she had worked with the pupils for one and a half years and had not been off work at all with injury.

[183] Ms Lindsay was a disappointing witness. While Ms Lindsay was a credible witness, her recollection of events during the session 2014/15 was at best sketchy. The tenor of her evidence was to be general rather than fact specific to the circumstances of the incidents spoken to by other witnesses. Her evidence was of little assistance to the court.

*Expert witnesses: Joint Note*

[184] 2 expert witnesses gave evidence: Mr Colley for SE/DL and Mr Allen for the defenders. The experts had a joint meeting in advance of giving evidence and a Joint Note was prepared dated 4 December 2018, number 15 of process.

*8 – William (Bill) Colley*

[185] Mr Colley was an independent educational consultant specialising in additional support needs. Mr Colley was aged 57 at the date of proof. Mr Colley had prepared three reports: production 5/2/4 in the SE case, production 5/2/5 in the DL case 1 and production 5/2/4 in the DL case 2.

[186] Mr Colley had heard most of the factual evidence during the proof with the exception of Ms Lindsay and Mrs Shields but he had received transcripts of their evidence from the solicitors for the pursuer.

*Risk Assessment*

[187] While there was a lot of evidence to indicate Broomlea had a very good understanding of autism with good quality risk assessments these risk assessments were not comprehensive for the transitioning of pupils.

[188] While there were individual risk assessments there should also be an aggregate risk assessment which would capture the overall level of risk looking at the group as a whole and which might differ from the sum of individual risk because of the interaction between pupils. Management had to look at the dynamics and compatibility of the group when multiple difficulties could arise at the same time. There was no risk assessment for the class as a whole.

[189] Where there was a predictable increased risk there should be an additional member of staff at these particular times. A change of staff in some circumstances could have a modifying effect on the behaviour of the pupil.

[190] Mr Colley was not advocating that a risk assessment for the class as a whole should have been prepared prior to the class being put together. Mr Colley did not have sufficient information of the pupils prior to the class being put together; sometimes things had to be tried for a period of time; it was reasonable to put pupils in a class for a period of time to see if this can be successful. There was a recognition in advance of the start of the 2014/15 session that this was a high tariff group of pupils and staff were alert to the level of risk.

[191] At the time of preparing the reports Mr Colley was not aware there was another room available for separating pupils. That would have been one of his recommendations.

[192] The authority was obliged to educate the pupils. That did not necessarily have to be in a school or a classroom as long as the authority met the educational needs of the pupil.

Providing a room or space even for short periods of the day was a sensible option to consider.

[193] While Mr Colley had heard witness evidence about the difficulties in the class and the principal difficulties between HE and DB he did not have sufficient information about K and D to express an opinion on whether class Fyne at the time of the various incidents was not manageable. Mr Colley did not have a complete picture of incidents: how many times each day and whether there was any pattern to the incidents.

#### *Management of transitions*

[194] In terms of planning transitions were particularly problematic. A bus journey itself was part of transition. Was a bus the most appropriate way if causing a heightened state of arousal? It was necessary to look at the whole transition. It might be better to use a taxi rather than a school bus. It could be very stimulating for a pupil coming into school by the street rather than another entrance. Again, Mr Colley did not have sufficient information to express a view on the management of transitions for the pupils in class Fyne.

[195] The planning of staggered transitions during the course of the day could be as important as curriculum planning. Mr Colley did not recall any evidence of staggered transitions or the planning of staggered transitions. A transition was complete when the mood was stabilised, not just transition from bus to class. Staffing levels could have been adjusted to allow for staggered transitions.

[196] While there had been evidence of another room available for the pupils Mr Colley did not have sufficient information to comment on the suitability of that room. For example, he did not know the layout of the room or if there were any hazards.

*Incident 5 November 2014 - Dianne Latto 1*

[197] The accident record was production 6/21 when DL injured her wrist. The incident occurred at a transition time when DB entered the room. While that could have been a contributory factor Mr Colley was not able to say that the incident occurred as a continuation of a transition.

[198] There were significant gaps in planning. For example, there could have been a planned withdrawal of specific pupils to a safe place to lower arousal levels. That would have provided a different teaching environment. In Mr Colley's view HE could have been withdrawn for part of the day for her to be taught separately in the other room.

[199] K was removed from the class first. Mr Colley would have removed HE first to a separate teaching environment and to address the root cause of the disruption and incidents.

[200] The first principle of CALM was to de-escalate and manage the situation. CALM was not designed for autistic pupils. Physical intervention was not appropriate for either HE or DB. That created a dilemma for staff.

[201] Whether additional staff were available depended on the use of the word "available". If additional staff were specifically allocated that would be proactive. If additional staff might be available or might not be available that would be reactive. Mr Colley was of the view additional staff should have been specifically allocated to meet the needs of the class. That additional member of staff would be proactive and reactive.

[202] Having heard the evidence Mr Colley would have taken HE out of the classroom situation earlier. Mr Colley qualified that view by stating there had been insufficient information on the number of incidents on a daily basis to determine whether there was any pattern. Further, he did not have the full picture of D's circumstances. Overall, his

inclination would have been to have removed HE rather than remove K. HE was the main factor for the disruption in the class.

[203] In cross examination it was the view of Mr Colley that at times 5 members of staff would have been helpful in mitigating risk. There should have been 5 staff available which would have allowed HE to be educated in a separate room. The situation with the class in August 2014 was unusual and required a different level of planning. Broomlea appeared to be a good school with a very strong understanding and planning for pupil needs. The case was "abnormal". Mr Colley agreed that significant planning had taken place: see list of 13 steps noted in the DL case 2 production 5/2/4 page 5.

[204] At page 6 of that report (DL case 2 production 5/2/4) Mr Colley had identified further procedures which could be considered:

- i. an alternative arrangement for the start of school day, such as a "soft start";
- ii. increased staffing levels to manage difficult behaviours associated with the transition into school;
- iii. a staggered start for pupils entering the school to ensure that arousal levels were lowered and appropriate staffing available.

[205] Mr Colley discounted i. the provision of a "hard start" was appropriate.

[206] Mr Colley accepted ii and iii were not mandatory but rather "could be considered". Mr Colley had insufficient information to specify ii. and iii. as procedures which required to/must be taken.

[207] As already stated Mr Colley was not aware of the other room being available at the time of writing his report. He could not comment whether that would be a suitable alternative environment for HE. He did not know when and how the room would be used. That would be at the discretion of the class teacher DL. He did not know if there would be

additional expenses such as the requirement for more furniture. School management would have the responsibility to oversee the suitability of the room. If the room was generally satisfactory it would be a decision of the class team when the room should be used.

[208] Mr Colley accepted he had not had full information on K and D when preparing his report. For example, he had heard in evidence that D was a runner. That was important information. Mr Colley would have preferred more information such as any incidents relating to K and D and what was the nature of their needs. Mr Colley did not know about other classes. He did not know the number of staff available. He did not know the educational needs of the other pupils, only for HE and DB.

[209] Mr Colley had posed four questions in the report in the SE case, production 5/4, at page 9:

1. Whether the procedures in place by the school were sufficient having regard to HE's behaviour?
2. Whether further procedures ought to have been put in place by the school which would have prevented injury to SE?
3. What further steps or provisions of what should have been put in place?
4. Had such measures been taken could they have prevented injury to SE?

*Sufficient procedures*

[210] Mr Colley was not suggesting procedures were insufficient. There had been high quality planning but the level of need of the class required "other thinking" and "other planning" at that stage.

*Further procedures*

[211] In the report Mr Colley did not consider further procedures but he would have taken HE out of the situation to the other room if appropriately equipped for her.

[212] While Mr Colley expressed views about staggered transitions he accepted there was no evidence HE or DB had been transitioned at the same time.

[213] Mr Colley was referred to an extract from the SNCT (Scottish Negotiating Committee for Teachers) Handbook production 6/5 and the guidelines for class sizes. Mr Colley considered these guidelines did not apply to autistic pupils. It was necessary to look at the individual needs of a pupil. HE was eventually educated on a staff ratio 1:1.

[214] If HE was removed to another room a very clear routine could be developed. That would reduce arousal levels then one could reduce staff numbers and then consider re-integration at times to the class. Class Fyne was not working from the very beginning.

[215] Mr Colley was well qualified to be an expert witness but I had concerns attaching weight to his opinion and the conclusions of his report. On a number of occasions he had to qualify his opinion as what he described as having "insufficient information". Further, he was not aware of the other room available to pupils in class Fyne at the time of preparing the report and his evidence suggested he had not given this particular attention until the proof, whether or not he was aware of the other room in advance of the proof. Mr Colley explained he did not have information about the needs of K and D. Curiously the reports are undated but looking at the information made available to him suggests the reports were completed some time in the course of 2017. There was no obvious reason why any additional information required by Mr Colley could not have been made available to him in advance of the proof.

[216] I was troubled with the conclusions of the report 5/4 at pages 9 and 10 where Mr Colley highlighted absence of information and uncertainty to support an opinion that there should have been additional staff in all the circumstances. The following are examples, not exhaustive:

- This primary evidence is not available to me;
- It is not known whether or not school managers explored the possibility of securing additional resources...
- There is a much stronger possibility that additional staffing might have made...
- Increased staffing could have facilitated staggered transitions...
- Alternative learning environments could have been exploited...
- Without a full picture of the frequency and severity of instance, it is not possible for me to form a secure opinion on this...

[217] In view of these qualifications and uncertainties the court was not able to make positive findings in fact based on the report and the evidence of Mr Colley.

### ***9 – Mr Bernard Allen***

[218] Mr Allen was an educational consultant aged 64 at the date of proof.

[219] Mr Allen adopted as part of his evidence in chief his report dated 27 June 2018, production 6/29. After hearing the factual evidence he had reviewed the report but had no changes to make.

[220] Mr Allen did not see any basis for not placing the 4 pupils together at the start of the 2014/15 session. His understanding was that two rooms were available to the class. While

one strategy could have been to remove HE from the classroom and teach her in the other room early on in the session any changes could have an upsetting effect for a pupil with autism. In Mr Allen's opinion all schools were very unsettled at the beginning of a new term. He would have been loathe to make dramatic changes after a short period of time such as removing HE from the class.

[221] Based on the evidence of Ms Lindsay and Mrs Shields the two rooms were available from the beginning of the 2014/15 session but the new teacher DL wanted to teach all the pupils as a group. The use of two rooms was a strategy Mr Allen would have recommended. The pupils could have settled in the class after a couple of weeks in which case it would not be necessary to make more changes, just see how things worked out. As to what would have been a reasonable period to assess change Mr Allen thought it could be a couple of weeks or it could be a month. It was a matter of professional judgement.

[222] The initial staff ratio was 4:4. That was a high staff ratio in comparison with other schools. K departed in around late August/early September 2014 so the staff ratio became 4:3. That was a very high staff ratio. Mr Allen agreed with the maximum class sizes and staff ratios shown in the extract from the SNCT Handbook, production 6/5 at page 2. That would be the baseline for whether a staff ratio was generous or not generous. The staff ratio was generous in the present case. For pupils with severe learning difficulties the class size would have a maximum of eight pupils. The pupils in class Fyne might also have social and emotional difficulties but even where there were profound difficulties the staff ratio was recommended in the handbook at 1 adult to 2.5 pupils.

[223] On the other hand, one could not be dogmatic about figures for pupils with autism. There was no specific category of class size for a pupil with autism. That would fall within a

number of categories. The staff ratio would be dependant on need and would have to be flexible.

[224] While Mr Colley had argued for additional staff who could be proactive and reactive Mr Allen's position was that all staff should operate that way: proactive and reactive. All the staff did not need to be in the class all the time but nearby. In the opinion of Mr Allen there was sufficient staff for the number of pupils in the class.

[225] Mr Allen did not accept the approach from Mr Colley that the school should have removed HE from the class not K. Mr Allen explained Mr Colley was in no position to make that sort of judgement. For his own part Mr Allen did not have sufficient information why it was best for K to be removed from class as opposed to HE. The idea of taking HE immediately out of the class had not occurred to Mr Allen.

[226] While there had been a number of incidents it was necessary to look for trends or patterns in order to reduce the risk of injury. Sometimes pupils were unsettled and then settled again and there was no pattern. Youngsters could have a very challenging pattern of behaviour. There were no trends or patterns in the present cases.

[227] Transitions from transport into class were carefully managed. Transitions were staggered so that all pupils were not moving at the same time. None of the incidents in class occurred during transition between transport and the classroom.

[228] Mr Allen demonstrated expertise. He was a very measured witness. He adopted a fair and reasoned approach to questions. I formed a favourable impression of Mr Allen as an expert witness.

**Submissions**

[229] Written submissions were lodged for both parties. Parties adopted their written submission briefly expanded upon at the hearing on 7 December 2018. The submissions are commented upon as appropriate and otherwise are referred to for their terms.

***Submissions for pursuer***

[230] The defenders owed a duty of care to take reasonable care to provide the pursuer with a safe place of work and a safe system of work and not to expose the pursuer unnecessarily to risk of injury. Risk assessments required to be carried out to prevent or minimise the risk of injury. Transitions were not staggered or adequately assessed. The staff ratio was inadequate. An additional member of staff would have minimised the known risk of injury to staff. HE was not removed from class far earlier than happened and injury to staff would have been avoided on the balance of probability. The pursuer invited the court to take a broad brush approach to each of the cases and not to be too mechanistic. If the court was too mechanistic it would be very rare for a pursuer to succeed in this type of case. The defenders had taken a very different approach, a mechanistic approach. There was no fundamental difference between parties on the law. Causation was often a crucial factor, very often the rock on which a case founders. The motion for the pursuer was to grant decree in each of the 3 actions in terms of the joint minute of agreement. Expenses should be reserved.

***Submissions for defenders***

[231] The defenders owed duties of care as employers to the pursuer. They fulfilled those duties of care.

[232] Challenging behaviours and assaults on staff in schools such as Broomlea cannot be prevented. There had been no previous cases when it had been argued that there should be a staff ratio of 2:1. In no previous case had a court concluded that a staff ratio of 2:1 was reasonable in the exercise of reasonable care.

[233] The pursuer had failed to prove a breach of the duty to take reasonable care on the balance of probability. The defenders moved for decree of absolvitor in relation to each of the three actions. Expenses should be reserved.

#### **Note**

[234] SE claims damages for the fault and negligence of the defenders at common law.

[235] This was expanded upon in the written submissions:

“... there were actions that the defenders could have undertaken which would either have prevented or minimised the risk of injury occurring here and they breached their duty of reasonable care to their employees by failing to undertake these actions”.

[236] The factual background was that there was a serious problem in class Fyne very quickly after the start of term. Staff were being attacked and injured on a daily basis; staff were voicing their disquiet and demands for extra staff on at least a weekly basis; there was a known deterioration in the behaviours of HE due to her puberty; the defenders knew or ought to have known HE was deliberately engaged in the agitation of DB who was extremely strong and who could not easily be managed even by two staff when agitated. In these circumstances and in the exercise of reasonable care it was the duty of the defenders either to provide extra staff as requested by staff or to take positive action to transfer HE out of the classroom environment far earlier than was in fact done.

[237] The pursuer relied on the evidence of Mr Colley that increased staffing levels should have been put in place. The following extract comes from his report production 5/2/4 at page 10:

“There is a much stronger possibility that additional staffing might have made a positive contribution to class and interpersonal dynamics, especially during key transitions, and thus reduced the incidents that might lead to injury”.

Mr Colley concluded:

“Increased staffing could have facilitated staggered transitions, separate playtimes, and the opportunity to make better use of the school environment, in order to reduce the demands being made of HE. For example, if noise levels within the classroom were becoming challenging for her, alternative learning environments could have been exploited without compromising the safety of staff”.

[238] The pursuer submitted an extra member of staff within class Fyne during the period between August 2014 and February/March 2015 would probably have prevented or at least materially reduced the risk of injury to the pursuer and her colleagues.

[239] Separately, if HE had been removed from the classroom and taught separately on a 1:1 basis in August/September 2014 when it was obvious there was not going to be a settling down of the class then... the majority of incidents involving SE would have been avoided and given that her injury was a cumulative one, on balance of probability, that too would have been prevented.

[240] The quality of risk assessment at Broomlea was generally high. The planning in place for the pupils in class Fyne for the session 2014/15 was detailed and of a high quality. That planning demonstrated an understanding of the pupils' needs and provided the staff with clear guidance of their management of challenging behaviours. The case for an aggregate risk assessment as proposed by Mr Colley has not been made out.

[241] There was no evidence the four pupils should never have been placed in a class together. Mr Colley agreed it was reasonable to put the group of pupils together at the start of the session 2014/15. It was reasonable to see whether the group was successful.

[242] There were difficulties from the start of the term. K was removed from the class by end of August/beginning of September 2014, within a matter of weeks of the start of the term. Mr Colley did not have sufficient information about K to express any view on his personal circumstances or on the reasons for removing him from the class.

[243] While the submission for the pursuer was that HE should have been removed from the class at an earlier time that was not consistent with the evidence of Mr Colley.

Mr Colley's position was that he had insufficient evidence to express a view whether HE should have been taken out of the class and that there would have been a bigger, positive impact on removing HE from the class rather than K. He had no information on the personal circumstances of K or indeed D including, for example, any individual risk assessments.

Mr Colley was hampered in his opinion in the absence of further information about all the pupils in class Fyne.

[244] That can be compared with the evidence of the defenders' expert Mr Allen. Mr Allen stated he was not in a position to make a judgment on removing HE rather than K on the information available. There was insufficient information to make any such judgment.

[245] Accordingly, both expert witnesses were not able to express any opinion that HE should have been removed from the class rather than K who was removed from the class by the defenders within a matter of weeks of the start of the school term.

[246] The staff wanted another member of staff because of the demands, particularly during transitions in the course of the school day and when there was agitation within the classroom.

[247] The undisputed evidence was that at the start of the session for 2014/15 the staff ratio was 4:4. When K was removed from the class around the end of August 2014 the staff ratio was 4:3. When D was moved to another class in around February - April 2015 the staff ratio was 4:2.

[248] It was the opinion of Mr Allen the staff ratio was generous and that two classes were available to enable the group of pupils to be split. Mr Colley was of the opinion there should have been an additional member of staff (total of 5) available - that is in the classroom - when HE or DB were agitated and during transitions but that opinion was qualified because of, in Mr Colley's words "an absence of information and uncertainty". In these circumstances even if the court accepted the opinion of Mr Colley the court would not in a position to make any positive findings in fact that an additional member of staff was required based on the qualified report and evidence of Mr Colley. I preferred the opinion of Mr Allen on staffing levels.

[249] Transitions were covered in the risk assessments. Mr Allen expressed the opinion that transitions were staggered so that all pupils were not moving at the same time and that none of the incidents in class occurred during transition between transport and the classroom. Mr Colley stated there was no evidence transitions were staggered. There was insufficient information to make any findings in fact that staffing levels were inadequate during transitions.

[250] There were two rooms available for the pupils during the session 2014/15. Mr Colley was aware of the second room at the date of proof but not when he prepared his reports. The provision of a second room would have been one of his recommendations. In the absence of any knowledge of the suitability and use of the second room Mr Colley was restrained in what he was able to say about additional staffing levels in that context. None of

the witnesses from Broomlea who gave evidence suggested the second room was not suitable. The evidence was that the room was suitable and was used as and when required.

[251] There was no evidence about staff resources and pupil requirements of Broomlea as a whole. Mrs Shields and more particularly Ms Lindsay with her greater experience of this school, made decisions on staffing levels in the exercise of their discretion having regard to the resources available. In these circumstances it could not be said the staff ratios attributed to class Fyne were not reasonable.

### **Causation**

#### ***Incident 28 November 2014 10.10am***

[252] The accident record form completed by SE states:

“HE was happy holding my hand walking into park she then grabbed my hair pulling me to the ground”.

The injury sustained was recorded:

“Lots of hair loss causing a bald patch also hurt(ed) my neck in the process”.

[253] Mr Colley did not address this incident in his report or in evidence. His views on this incident are silent. Mr Allen concluded this was an accident. While HE had a history of hair pulling there was no evidence to suggest this particular incident was reasonably foreseeable. HE was known to have unpredictable behaviours.

[254] It was not suggested by SE that an additional member of staff would have prevented this incident.

[255] SE has not established fault on the part of the defenders for the incident on 28 November 2014 on a balance of probability.

## **2 Incidents 1 December 2014**

[256] 1 December 2014 – 10.30am:

The incident occurred in the playground.

SE completed an accident report form which states:

“HE grabbed my neck and scarf at same time. No signs of being distressed prior to incident”.

The pursuer sustained a neck strain. In his report Mr Colley notes:

“In the incidents recorded on 1.12.2014 and 2.12.2014, there were apparently no witnesses, which raises a question about the staffing levels at these times, and whether or not they fulfilled the requirements of the risk assessment for HE”.

Mr Colley was not asked in evidence about this incident. The question raised about staffing levels by Mr Colley was speculative.

The incident was without warning as HE had shown no signs of distress before the incident.

There was no evidence the incident was reasonably foreseeable. There was no evidence an additional member of staff would have prevented the incident.

The pursuer has failed to establish fault on the part of the defenders for the first incident on 1 December 2014 on the balance of probability.

### **1 December: 12.00 noon.**

[257] The incident occurred in the playground. SE completed an accident record form which states:

“HE distressed resulting in hair pulling yanking at my neck”.  
No injury was recorded.

According to the violent incident report form HE went out to playtime after her lunch but was showing signs of unease (“dis-ease”). SE attempted to give HE a safe space around her

in accordance with the risk assessment for HE and applying the first principle of CALM training being de-escalation.

There was no evidence an additional member of staff would have prevented the incident.

SE has failed to establish fault on the part of the defenders for the second incident on 1 December 2014 on the balance of probability.

## ***2 Incidents 2 December 2014***

[258] 2 December – 12.00 noon:

The incident happened in the internal playground. SE completed an accident record form which states:

“D was going towards nursery doors which were open. I got there first. He yanked my ponytail”.

SE recorded an injury: “neck strain final blow due to previous incidents”.

There was no evidence D had pulled the hair of a member of staff on any previous occasion.

D had been described as a “runner”. Mr Colley had commented there was an absence of information about D. For example, Mr Colley had not seen any risk assessment for D. There was no suggestion the incident was reasonably foreseeable. The incident was not reasonably foreseeable. SE has failed to establish fault on the part of the defenders for the first incident on 2 December 2014 on the balance of probability.

[259] 2 December – 14.30pm:

The incident happened in class. SE completed an accident record form which states:

“HE pulled my hair yanking at my neck”.

The injury was recorded as “neck strain”.

According to the violent incident report Ms Reid was supervising HE that day with SE present in the class. The class were sitting for a Christmas story. SE was sitting beside Ms Reid and HE. Ms Reid went to get HE's shoes which were in the classroom to prepare for home time. As Ms Reid approached HE with the shoes HE pulled SE's hair. There was no evidence an additional member of staff would have prevented the incident. SE did not think it would have been feasible to have an additional member of staff at the time.

SE has failed to establish liability on the part of the defenders for the second incident on 2 December 2014 on the balance of probability.

### **Diane Latto - Case 1**

#### *Incident 5 November 2014 0930am*

[260] Incident 5 November 2014 – 09.30am:

The incident occurred in class. DL completed an accident record form which states:

“HE was having an unsettled morning. I was helping her calm on the bench. As DB entered the room HE became excited jumping up. As she moved towards the bench, her bottom pushed my hand downwards bending it awkwardly”.

DL sustained a sprained wrist.

This wrist strain damages claim has to be considered on its own merits. There are no other incidents averred.

On record it was averred HE threw herself backwards into DL injuring her left wrist. That is inconsistent with the accident record form and the evidence of DL. In evidence DL stated HE became agitated. She jumped up off her seat. DL's natural reaction was to stand up. HE went to sit back down and landed on the back of DL's wrist causing injury.

There was no evidence HE had acted in this way previously. There was no suggestion HE had deliberately sat down on DL's wrist causing injury. There was no evidence of an

assault. In the particular circumstances of this claim it was not reasonably foreseeable HE would sit down on DL's wrist. There was no evidence an additional member of staff would have prevented the incident.

I refer to a passage in the written submissions for the defenders (paragraph 75):

"No obvious causal mechanism is suggested in relation to this incident. There is no evidence that even allows the implication to be drawn that the presence of an extra member of staff would, for example, have led to HE not jumping up (there would have been no reason to inhibit that movement by HE, and the witnesses were unanimous that the first tenet of CALM is to de-escalate before considering any form of physical intervention), or sitting down more slowly (to allow DL to remove her hand)."

That passage provides a useful summary. This was an accident.

[261] DL has not established on the balance of probability that an additional member of staff would have prevented the incident. DL has not established liability on the part of the defenders for the incident on 5 November 2014 on the balance of probability.

### *Diane Latto – Case 2*

[262] Incident 10 December 2014:

The incident occurred in class. An accident record form was completed but not by DL:

"Reported that (tel conversation Diane Latto absent) DB unsettled, pushed away table working at, legs of table slid away causing table to overturn onto Diane Latto's foot. nb consider foot grips for legs of table?"

DL sustained broken bones in the foot.

DB tipped the table for reasons unknown. It was reasonably foreseeable a member of staff could be injured if DB tipped the table but there was no evidence of DB of tipping a table previously. There was no evidence DB had a propensity to overturn tables. There was no known risk to be included in risk management.

In his report Mr Colley refers to a statement by Ms Quail indicating DB had tipped over a table previously and as such there was a known risk. However, Ms Quail was not asked any questions whether DB had tipped over a table previously. There was no such evidence before the court. The only evidence was that there was no known risk. The incident on 10 December 2014 was not reasonably foreseeable.

There was no evidence an additional member of staff would have prevented the incident. DL has not established on the balance of probability that an additional member of staff would have prevented the incident. It was not suggested in evidence that DB should have been managed in some other way at the table or that the table should have been secured.

DL has not established any fault on the part of the defenders for the incident on 10 December 2014 on the balance of probability.

### **Decision**

[263] In all the circumstances the pursuer SE has failed to prove on a balance of probability that the defenders should have provided an additional member of staff and that would have prevented injury to the pursuer in this action.

[264] In any event the pursuer SE has failed to establish fault at common law on the part of the defenders on the balance of probability for any of the incidents on 28 November, 1 and 2 December 2014 in the particular circumstances of this case.

[265] Expenses were expressly reserved. The Sheriff Clerk will fix a hearing on expenses.