OUTER HOUSE, COURT OF SESSION

[2018] CSOH 86

A124/15

OPINION OF SHERIFF R B WEIR QC

(Sitting as a Temporary Judge)

In the cause

LAURA MALONE

Pursuer

against

THE LORD ADVOCATE

Defender

Pursuer: Davies; Kennedys Scotland (Edinburgh Agents for Thompson Family Law)
Defender: Springham QC; Anderson Strathern LLP

17 August 2018

Background

[1] The pursuer seeks to recover damages, in the sum of £1,300,000, from the defender for psychiatric injury which she alleges to have arisen as a result of the conditions of her employment as a member of the Procurator Fiscal Service between May 2010 and February 2013. The action is based on the alleged fault and negligence of the Crown Office and Procurator Fiscal Service, her employers, and for whom the Lord Advocate is said to be "vicariously responsible". The case called before me on the procedure roll on the defender's first and second pleas-in-law (being pleas to the relevancy and specification of the pursuer's

averments), and Miss Springham invited me to dismiss the action as irrelevant (reserving meantime her third plea-in-law, being a plea of time bar), which failing to exclude certain averments from probation.

The pleadings

[2] The pleadings are lengthy, and it will be sufficient to look at those articles of condescendence which were the subject of Miss Springham's criticism. Condescendence 1 discloses that the purser was formerly a Senior Procurator Fiscal Depute in the employment of the Crown Office and Procurator Fiscal Service ("the COPFS"), and worked for that organisation for 20 years. The defender is identified, by name, as the Lord Advocate who held office at the time when proceedings were raised. During the discussion on the procedure roll it was clarified that he was convened, not as the individual occupying the position of Lord Advocate throughout the period when the pursuer claims that the COPFS were at fault (which he plainly wasn't), but because the Lord Advocate "had responsibility for the COPFS".

[3] Condescendence 4 outlined the pursuer's employment history with the COPFS. It is unnecessary to recite it at length. However, certain highlights require to be mentioned. Thus, it is averred that, in November 2001, the pursuer suffered an episode of "stress at work". Certain steps ensued with the result that the pursuer was transferred to the District Court as a Procurator Fiscal Depute, and within months was doing the liaison function ordinarily done by a Principal Depute. If that last averment was intended to carry with it an undertone of criticism, it is met by the ensuing narrative whose conclusion is an averment that:

> "until about May 2010 the pursuer enjoyed working for the defender, was continuously being assessed as being effective, efficient and exceeding requirements in the roles she was given, and she found the work rewarding and stimulating."

[4] The narrative, however, continues with a description of the pursuer's employment, between May and November 2010, within the Health and Safety Unit ("the HSU") of the COPFS. There are references to her promotion, within that unit, to the position of Senior Fiscal Depute, and criticisms of its structure and caseload, and the extent of the pursuer's preparation and training for involvement in that unit (including the lack of initiation training in Health and Safety law – aside of a period of three weeks to enable the pursuer to read through previous cases). The pursuer complains of a lack of guidance from her line manager and more senior management (without particularisation) and that she raised grievances against colleagues (again without particularisation, or how those grievances impacted on her particular role within the HSU). She also relies on a report critical of the HSU by The Inspectorate of Prosecutions in Scotland, published in April 2013, pointing to the absence of any written protocol or remit for the HSU, and the frequently high turnover of staff.

[5] The pursuer the avers:

> "[that] the pressures of working in the COPFS departments were likely to occasion harm, including psychiatric harm, to employees should have been obvious to the defender prior to the pursuer being assigned there and throughout her stay".

Reference is then made to an excerpt from a report, published in 2002, which noted that:

> "the pressures on the Department have, as the stress audit confirmed, had a serious impact on the morale of staff and left them feeling stressed and undervalued."

[6] Condescendence 4 continues with a reference to a Stress Management Policy which, in and prior to 2010, called for each employee to have an individual stress risk assessment. Such an assessment, in the pursuer's case, did not occur when she was attached to the HSU.

It is averred that she sought transfer from the unit "for fear that exposure to the Unit's culture was adversely affecting her health".

[7] Articles 5 and 6 of condescendence touch on the dates when the pursuer briefly acted as Lead in the Forensic Gateway Unit ("the FGU"), then Principal Depute in the Solemn Department. Nothing particularly turns on those averments for the purposes of the present discussion.

[8] In condescendence 7 the pursuer avers that, from April 2011 until she absented herself from work on 7 February 2013, the pursuer was a Senior Procurator Fiscal Depute in the FGU, whose remit was to process all crimes requiring forensic examination, and to ascertain whether analyses were achievable, proportionate, and necessary for proof of alleged crimes. Her initial involvement was at a time when the FGU was in the nature of a pilot scheme within the Strathclyde Police area. Even when it answered to the Strathclyde Police area staffing levels were inadequate. In August 2011, however, the FGU became a national unit. There was no adequate provision made for sickness absence. By December 2010 the pursuer had recognised that there were staffing problems within the FGU, and raised concerns, on a number of occasions, with various named individuals. In the period between April 2011 and February 2013 the pursuer avers that she made repeated complaints in respect of "unsustainable workload and inadequate staffing". She avers that the defender should have known that these levels of excessive work pressure on staff were likely to occasion harm, including psychiatric harm to employees "in a unit working to deadlines imposed by statute in custody cases". The pursuer avers that the COPFS acknowledged staffing problems within the unit, at the time when the pursuer was employed there, in the course of preparation of the "Thematic Report in Summary Case Preparation" in August 2012, by the Inspectorate of Prosecutions.

[9] In condescendence 8, the pursuer avers that the lack of effective management of the Unit was compounded, from her point of view, by an expectation that she would, from June 2011, carry out additional work including proposed amendments to the National Forensic Science Protocol, and assisting in the setting up of the Working Group, drafting a paper on drug testing for full committal, attending and participating in meetings of various groups associated with the criminal justice system, and preparing guidance, briefing notes, and reports, arising out of the work of the FGU, all of which tasks would ordinarily have been "in the province of a Principal Depute". She avers that the defender should have known that these demands were excessive and likely to occasion harm, including psychiatric harm, to employees.

[10] In condescendence 9 the pursuer avers that, almost immediately on her arrival in the FGU, she began to experience a recurrence of the feelings of isolation she felt in the months she spent in the HSU. Her averments include assertions that she felt unsupported, struggled with time management, and began to exhibit odd behaviour (from April 2011) which included changing into running gear and going for a run during office hours. It is alleged that, when challenged about this by a named line manager, the pursuer could not offer an explanation. That said, that manager is criticised for not having asked why the pursuer was behaving in that manner, or considered that it might indicate underlying stress or a mental health problem.

[11] Condescendence 9 continues with a recitation of the difficulties experienced by the pursuer at work. More importantly, for present purposes, she avers that she showed signs of stress, and behaved emotionally, in meetings with Anne Marie Hicks (according to the defences, the pursuer's then line manager), in March and April 2012, and, 10 May 2012, emailed John Tannahill (according to the defences, the Head of Business Management,

Glasgow) outlining the backlog of work at the FGU and saying that she was unable to keep up with it. The pursuer then avers that she "substantially" repeated those comments at a meeting with the Scottish Police Service Authority and Mr Tannahill. The pursuer avers that, at a meeting on 1 July 2012 with Anne Kitchen (according to the defences Mr Tannahill's PA), about the problems she was suffering at the FGU, she was in tears. There is then a reference to the pursuer's unusual work pattern, her not having taken holidays in the normal fashion, and her leave pattern being indicative of the pursuer suffering from work-related stress.

[12] Still in condescendence 9, there are averments about the pursuer absenting herself from work, raising grievances against colleagues, and the effects of her work on the pursuer's private and domestic circumstances. Her behaviour from around April 2011, in conjunction with the excessive workload being carried out by her in the FGU, ought to have been clear indicators to the defender of impending psychiatric harm to the pursuer. In support of that position it is averred that the defender was aware that the pursuer had had time off work in about 2001 as a result of occupational stress. Moreover, between 2010 and 2013, the COPFS had an employee Stress Management Policy, in terms of which each employee should have been the subject of an individual stress risk assessment. Such an assessment was not carried out in the pursuer's case. The pursuer fulfilled criteria included in the list of stress indicators averred to have been included in a form issued by the COPFS to its managers to assist them in identifying signs of stress in employees. Accordingly, the stress suffered by the pursuer (and the injury she suffered thereby) ought to have been obvious to "the managers with whom she had contact".

[13] The pursuer makes reference to a Stress Audit undertaken by COPFS in July 2012 which found that over 60% of respondents reported stress to have adversely affected their

ability to be effective in their job, and 20% reported that it often did so. Contrary to a memorandum issued by Catherine Dyer in June 2013 (by which time the pursuer had, according to her own averments, absented herself from work), by way of response to the findings of the 2012 Stress Audit, which encouraged the raising of stress-related concerns, and which made reference to the availability of advice and support, no such provision was made for the pursuer.

[14] In condescendence 10 the pursuer avers that, on 4 April 2012, she became tearful at work in the presence of a senior legal manager, which breakdown she attributed to stress at work. It is averred that this was reported to the Area Procurator Fiscal. The pursuer also avers that she made further complaints of the harm being suffered by her on 12 and 17 April, and 10, 17, 19, 22, and 11 June, all 2012. She was tearful in the presence of the secretary of a Senior Business Manager, it would appear in July 2012, and in that manager's presence too. Her complaints were ignored. The final straw, as it is put, was the discovery on 7 February 2013 that a promised replacement depute, covering for maternity leave, had not been sourced. From that point on, the pursuer avers that she began to appreciate that the stress which she had suffered may have had a serious impact on her mental health.

[15] Condescendence 11 contains averments of loss said to be attributable to the occupational stress suffered by the pursuer. The dates are important. From in or around April 2012 "to date" it is averred that the pursuer has been suffering, and continues to suffer from, a recurrent depressive disorder. The precipitating factor for the pursuer's current depressive episode was the intolerable working conditions of her employment. Had the pursuer's condition been recognised in or about April 2012, and her concerns addressed, she would not have been dismissed (which she was in December 2014). The pursuer avers that

she will be unable to return to any form of professional legal work or work involving stress or meeting deadlines.

[16] Condescendence 12 opens with the averment that the defender knew or ought to have known "at the material time and in any event in or before April 2012" that the pursuer was suffering stress at work which was a risk to her mental health. He knew or ought to have known, from internal monitoring and complaints made by the pursuer, that the workload in both the HSU and FGU was excessive for the staff available to deal with it; that there was a lack of a proper management structure and defined remit, and that such an excessive workload and poor structure would put unreasonable stress on employees such as the pursuer and would be a risk to her mental health. It is averred that the defender should have taken steps (when the pursuer was working in both the HSU and FGU) to appoint a person responsible for managing the pursuer, and to define her remit, and to ensure that workload within those units was not excessive. In terms of the Stress Management Policy, the pursuer ought, when working in either unit, to have been the subject of an individual risk assessment which would have disclosed her ongoing problems. The pursuer had exhibited symptoms of the kind identified in the Stress Management Policy, and which would have been obvious to the defender. It was, in any event, the duty of managers, in terms of that Policy, to be pro-active and identify potential stressors and to work to prevent workplace stress. The pursuer invokes regulations 3 and 6 of the Management of Health and Safety at Work Regulations 1999. She avers that regulation 6 imposed a duty on the defender to ensure that employees, including the pursuer, were provided with such health surveillance as was appropriate having regard to the risks identified in the risk assessment under regulation 3. The pursuer should, by in or about April 2012, have been referred for a stress risk assessment which would have identified steps needed to reduce or avoid stress,

including the need to reduce the pursuer's workload by either appointing more staff to the unit (by then the FGU) or reducing the number of referrals; ensuring that the pursuer was not working excessive hours by reducing the accumulation of flexitime; identifying a manager to whom the pursuer was responsible; defining the pursuer's role and the work she was to do; training staff in the FGU and those referring cases to it, and regularly monitoring the work of the Unit to ensure that it had the capacity to deal with the work referred to it. Alternatively, the pursuer could have been transferred to another role within COPFS.

[17] Condescendence 12 concludes with the averment that:

> "[H]ad the defender implemented each and any of these steps before February 2013 it would have reduced or avoided the stress on the pursuer and would have enabled her to remain in employment with the Crown Office."

[18] The pursuer's claim is stated, in condescendence 13, to be based on the defender's fault at common law and breach of regulations 3, 4, 5, 6, 8 and 10 of the 1999 Regulations just mentioned.

Submissions for the defender

[19] I was favoured with detailed written submissions to which Miss Springham spoke in her address to me. She advanced argument in relation to three chapters, namely (i) the case pled in relation to breach of duty, (ii) the defender against whom the claim is advanced, and (iii) foreseeability and causation. I will summarise, in turn, the arguments in relation to each issue.

Breach of Duty

[20] The pursuer avers that, from in or around April 2012, she has been suffering from a recurrent depressive disorder (condescendence 11), as a result of which she has been unable

to return to professional legal, or other, work with consequential loss. For her claim to succeed the pursuer must aver and prove that there were steps which could and should have been taken prior to April 2012 which would have prevented the occurrence of that disorder.

[21] In condescendence 12, however, the pursuer's critical averment is in the following terms:

> "Had the defender implemented each and any of these steps before February 2013 it would have reduced or avoided the stress on the pursuer and would have enabled her to remain in employment with the Crown Office. As a result she would not have suffered the loss, injury and damage hereinbefore condescended upon".

The pursuer, it is argued, fails to aver that had steps been taken, the development of her psychiatric condition would have been prevented. Moreover, there is an inconsistency between what is pled in condescendence 11 (which relates the commencement of her depressive disorder to April 2012) and condescendence 12 (which identifies February 2013 as the critical time by which certain steps should have been taken, but were not).

[22] By reference to what is said to have been explained by counsel for the pursuer to the Court at the hearing on the By Order (Adjustment) Roll on 21 February 2018,
Miss Springham said that the pursuer appeared now to be advancing a case that her psychiatric condition would have occurred even if the defender had fulfilled his duties of reasonable care but, by failing to address the pursuer's situation between April 2012 and February 2013, the defender had caused the pursuer more severe injury. That amounted to an exacerbation case which was not pled on record. Either way, the pursuer's case was irrelevant and should be dismissed.

[23] In a brief statutory interlude Miss Springham submitted that the pursuer's case under regulation 3 of the Management of Health and Safety at Work Regulations 1999 took

her nowhere. There had to be a basis for making a risk assessment in the first place. The COPFS stress policy was that assessment, and there was no basis for requiring any other. Miss Springham also made general criticisms of the lack of factual averment to justify invoking regulations 4, 5, 6, 8 and 10 of the 1999 Regulations. Regulation 3 might be thought to be the most pertinent but that case did not elide the difficulties created by the averred date of onset of the depressive disorder, and averments about steps which the defender could and should have taken, between that date and February 2013, to prevent the pursuer from suffering loss and damage.

The defender against whom the case is advanced

[24] The defender's submissions under this heading proceed on the basis that there are no averments that the Lord Advocate, at the material time, was provided with any information about the situation in the HSU or FGU, or about any of the problems the pursuer was experiencing there. That was important because the pursuer's written case was based on what the Lord Advocate "knew or ought to have known" and the steps which, in consequence, he should have taken. Moreover, although the pursuer's first plea-in-law referred to the Lord Advocate's vicarious liability for breaches of duty on the part of the COPFS, the case advanced, properly construed, was not one of vicarious liability at all (cf *Chapman* v *Lord Advocate* 2006 SLT 186, at paragraphs 45 and 49).

Foreseeability and Causation

[25] Miss Springham's note of argument on this aspect opened with a respectful salute in the direction of a well-known passage in the opinion of Lord Reed in *Rorrison* v *West Lothian*

Council 2000 SCLR 245 (at p254). Since it underpins much of what she submitted on the subject of foreseeability it merits repetition:

> "Many, if not all, employees are liable to suffer [such emotions as lack of satisfaction, frustration, embarrassment and upset], and others mentioned in the present case such as stress, anxiety, loss of confidence and low mood. To suffer such emotions from time to time, not least because of problems at work, is a normal part of human existence. It is only if they are liable to be suffered to such a pathological degree as to constitute a psychiatric disorder that a duty of care to protect against them can arise; and that is not a reasonably foreseeable occurrence (reasonably foreseeable, that is to say, by an ordinary bystander rather than a psychiatrist) unless there is some specific reason to foresee it in a particular case".

The pursuer's pleadings should, therefore, set out the facts and circumstances, made known to him, which ought to have alerted the defender to a foreseeable risk of psychiatric harm to the pursuer.

[26] In her submissions to me Miss Springham drew attention to a number of other authorities which offered guidance on how the matter of foreseeability should be approached. Foremost of those was *Hatton* v *Sutherland* [2002] ICR 613, in which Hale LJ (as she then was), at pp631C-632F, set out a series of sixteen "practical propositions" for application in cases where complaint is made of psychiatric illness brought about by stress at work (and which propositions met with the approval of the House of Lords in *Barber* v *Somerset County Council* [2004] 1 WLR 1089). These propositions were formulated in the following way:

> "(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.
>
> (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).
>
> (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it

is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.

(5) Factors likely to be relevant in answering the threshold question include: (a) the nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or same department? (b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others.

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers.

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should be doing something about it.

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.

(10) An employer can only reasonably be expected to take steps which are likely to do some good; the court is likely to need expert evidence on this.

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

> (12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.
>
> (13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.
>
> (14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.
>
> (15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
>
> (16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event."

[27] In the course of her submissions Miss Springham also referred me to *Hartman* v *South Essex Mental Health and Community Care NHS Trust* [2005] ICR 782, as an example of the application of those general principles to the circumstances of the appeals in that case. I note that, at paragraph 16 of the judgment of the court, Scott Baker LJ made the obvious point that, while the principles were of utility, there was a need for care in their application to the particular facts. So, while cases like *Hatton,* supra, and *Bonser* v *Somerset County Council* [2004] IRLR 164, also cited by Miss Springham, provide illustrations of what may or may not have previously sufficed to pass the test of foreseeability in particular circumstances (and, in each case, after evidence had been led in the lower court), the task for the court is to apply well-established principles to the circumstances disclosed in the amended closed record.

[28] Applying the guidance in the case law to which she made reference, Miss Springham invited me to consider the averments in respect of the pursuer's employment in both the HSU and the FGU, and submitted that careful scrutiny of articles 4 to 10 of condescendence

did not disclose a basis from which the court could be satisfied that it was reasonably foreseeable to the defender that the pursuer was at risk of psychiatric harm.

[29] Miss Springham submitted that the averments in condescendence 4 left it unclear to what extent the circumstances of the pursuer's employment in the HSU between May and November 2010 contributed to the development of any psychiatric condition. Neither of the two specific criticisms to which the pursuer's averments give rise, that (i) there was no written protocol for the HSU setting out the parameters on which its work was based, and (ii) there was a high turnover of staff in the HSU, could have alerted the defender to a risk of impending harm to the pursuer's psychiatric health. The proposition that it should have been obvious to the defender that the pressures of working in COPFS departments were likely to occasion psychiatric harm to employees was inadequately supported by a reference to an internal report in 2002, and a general reference within it to morale of staff being affected by pressures on the "Department", leaving them feeling stressed and undervalued. The pursuer's reliance on the COPFS Stress Management Policy did not assist in the absence of averments as to when an individual stress risk assessment should have been undertaken; that such an assessment, if undertaken, would have disclosed a risk of psychiatric injury as that is understood in the cases, and how any steps recommended as a result of such an assessment would have affected the development of the pursuer's psychiatric condition. In any event, the steps which it is said, in condescendence 12, the defender ought to have undertaken - appointing a person responsible for managing the pursuer and defining her remit, and ensuring that the workload for staff was not excessive - do not coincide with the factual averments in condescendence 4 and it is not averred when those steps should have been taken.

[30] Miss Springham made detailed criticisms of the averments in articles 7-10 of condescendence, which concern the pursuer's employment, between April 2011 and February 2013, as a Senior Depute in the FGU. She argued that those averments were insufficient to establish that the defender knew or ought to have known that the pursuer was being exposed to a risk of mental illness materially higher than that which would ordinarily affect an employee in her position, or that the defender knew or ought to have known of impending harm to her psychiatric health. Moreover, the pursuer fails to aver that it was reasonably foreseeable to the defender, based on events in the FGU, that she would suffer psychiatric injury. Indeed, there is a general criticism, which transcends all of the ensuing articles of condescendence, to the effect that there are no averments that the defender himself knew anything about the events in the FGU which give rise to criticism by the pursuer.

[31] Articles 7 and 8 of condescendence contained averments directed towards staffing and workload, and additional work, but overwork would not, in itself, be sufficient to establish foreseeability of psychiatric injury. A number of averments are directed towards events which post-date April 2012 and are, therefore, irrelevant to causation and cannot logically form a basis for establishing foreseeability.

[32] The pursuer's averments in condescendence 9 about a recurrence of feelings of isolation first felt in the HSU, feeling overwhelmed and unsupported, struggling with time management, and behaving oddly by changing into running gear during the working day, could not form a basis for establishing foreseeability in the absence of any averment that these concerns were intimated to, or known about by, the defender. Miss Springham also made general criticisms of the specification of the pleadings in relation to leave patterns, the raising of grievances against colleagues, and meetings said to have taken place between the

pursuer, a Miss Hicks and a Mr Tannahill, in March, April and May 2012. In any event, those averments relating to events which post-date the onset of the pursuer's depressive illness (including the reference to a Stress Audit in 2012 and the memorandum from Catherine Dyer dated 28 June 2013) could not be relevant to the question of either foreseeability or causation. Moreover, the reference to the defender having been aware that the pursuer had time off work in 2001, which the defender "ignored", besides being factually inconsistent with the pursuer's averments in condescendence 4, was irrelevant in the absence of any averment as to what a reasonable employer ought to have done in those circumstances. The pursuer makes averments, at p33, about the Stress Management Policy which, it is said, called for each staff member to have an individual risk assessment. The fact that, in condescendence 12, it is averred that such an assessment should have been undertaken "by in or about April 2012" means that any breach of duty could not have been causative of the psychiatric injury which manifested itself in April 2012. Finally, Miss Springham highlighted the lack of specification in the important averment, at p34, that:

> "the pursuer had repeatedly raised such issues with her line managers and other senior members of COPFS staff but was not directed to any advice or support services".

[33] Under reference to condescendence 10, Miss Springham re-iterated her point that, in so far as averments were made which related to events which post-date the onset of the pursuer's psychiatric condition, they could have no bearing on the issue of foreseeability of injury. She was also critical of the specification of averments about the pursuer making further complaints about "the harm being suffered" by her on various dates between April and June 2012, and being tearful in the presence of both a Senior Legal Manager (un-named), and "the secretary to a Senior Business Manager on [sic] July 2012 and to the Senior Business Manager himself" (pp37-38).

[34] In the foregoing circumstances, Miss Springham renewed her motion for dismissal of the action.

Submissions for the pursuer

[35] In reply, Mr Davies spoke to, and expanded upon, a written note of argument. He reminded me that no action falls to be dismissed as irrelevant unless the case "must necessarily fail", and that in the field of personal injury it would be in only very clear cases that an action will be dismissed (*Jamieson* v *Jamieson* 1952 SC (HL) 44; *Miller* v *SSEB* 1958 SC (HL) 20). He also made the point that, where individual averments are concerned, the ultimate test of relevancy was whether an averment had a reasonably direct bearing on the subject under investigation (*Strathmore Group Ltd* v *Credit Lyonnais* 1994 SLT 1023), meaning that some judicial discretion was involved in deciding upon the point at which averments had properly to be excluded as irrelevant. On the matter of specification, Mr Davies submitted that a claim of lack of fair notice would only be justified if it resulted in material prejudice to the defender in preparing for and conducting a proof (*McDonald* v *Glasgow Western Hospitals* 1954 SC 453).

[36] Mr Davies submitted that the duty of an employer to prevent an employee from suffering injury as a result of workplace stress was the same as in relation to other risks of injury in the workplace, the test being the conduct of a reasonable and prudent employer taking positive thought for the safety of his workers in light of what he knows or ought to know (*Stokes* v *Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, per Swanwick J at p1783C/D, approved in *Barber* v *Somerset County Council* [2004] 1 WLR 1089 at 1110A/C). However, he recognised that cases arising from workplace stress raised issues about foreseeability of risk, and that guidance can and should be drawn from the sixteen

propositions of Hale LJ set out above. That guidance made it clear that, where there is information that a particular employee cannot cope with, or is subjected to more than, the normal pressures of a job, this may indicate to a reasonable employer that there is a risk of injury to the employee if the work situation remains unchanged (see also *Daw* v *Intel Corpn (UK) Ltd* [2007] ICR 1318; *Flood* v *University Court of the University of Glasgow* 2010 SLT 167 – a successful reclaiming motion following dismissal of an action). Mr Davies submitted that there could be many factors, ranging from work conditions to the characteristics and history of a particular individual, which might, depending on the circumstances, contribute to the foreseeability of injury which should be acted upon by a reasonable employer. Every case would depend on its own facts (*Barber* supra, p1109H).

[37] Before, however, embarking on an examination of how foreseeability was dealt with in the pleadings, Mr Davies addressed the first two chapters of Miss Springham's submissions.

Breach of Duty

[38] Mr Davies pointed out that it was already averred, in condescendence 11, that from April 2012, the pursuer was suffering from a depressive disorder. The pursuer was not aware, at that time, that she had passed a diagnostic threshold, which was identified retrospectively when a diagnosis was made in 2013. Mental illness, however, exists as a continuum. The pursuer was suffering from the diagnosed condition in April 2012 and it arose from problems going back to 2010. So, by February 2013, she could no longer cope. There had been an accumulation of circumstances from 2010 to 2013. Fixing a hard deadline in April 2012 was, for that reason, inappropriate.

[39] What the pursuer was offering to prove was that, by April 2012, and for a whole range of reasons, the defender ought to have known that the pursuer was suffering stress at work – principally due to overwork – which was a risk to her mental health, and which the defender ought to have addressed by taking steps to reduce her workload. Read fairly, the pursuer's case was that steps should have been taken long before February 2013 in response to her complaints, and indications that she was struggling with work. Had the defender implemented the steps set out in condescendence 12 before February 2013 it would have reduced or avoided the stress on the pursuer and, critically, that would have enabled her to remain in employment with the Crown Office.

The defender against whom the case is advanced

[40] Mr Davies submitted that the action was correctly directed against the Lord Advocate *as the minister responsible for the pursuer's employer* (my emphasis), namely the COPFS. It was, he said, clear that the pursuer, as an employee, was owed duties by her employer. Her employer was the COPFS. In that context it made perfect sense to plead duties relating to safe places of work and to address issues such as workplace stress. The duties owed, to its employees, by COPFS were no different from those owed by private companies.

[41] Mr Davies submitted that it was no more necessary to identify each individual within the organisation responsible for any particular failing than one would if suing, as defender, a private company. The critical point to stress was that, according to her pleadings, there was enough known to managers within the COPFS for action to have been initiated to address the pursuer's working conditions. By whom, precisely, that action should have been taken did not matter.

[42] The legal nature of vicarious liability, and the specific terms of the pursuer's first plea-in-law (which employs the wording "vicariously responsible"), were not examined during Mr Davies' response.

Foreseeability and Causation

[43] Mr Davies submitted that there was ample notice on record of what the defender knew or ought to have known and which, individually or cumulatively, should have alerted a reasonable employer exercising reasonable care, to the risk that the pursuer might suffer psychiatric injury as a result of workplace stress. In his written note of argument, amplified by oral argument at the procedure roll hearing, Mr Davies referred, in particular, to the following specific matters:

(i) In or about November 2001 the pursuer suffered an episode of stress at work vouched by a medical certificate tendered to the defender; (p7)

(ii) The workload in the HSU was excessive for the level of staffing, and the caseload allocated to the pursuer was unsustainable given her level of experience, the lack of specific training provided by the defender, and the lack of support from prosecutors with relevant experience; (pp8-9)

(iii) The pursuer had raised concerns about the workload in the HSU with a number of colleagues; (p10)

(iv) A review in 2002 had identified that pressures of work within the COPFS had had a serious impact on staff morale and had left them feeling "stressed and undervalued". (p11)

(v) The COPFS has failed to follow its own employee stress management policy by making a stress risk assessment of the pursuer's position. Had they done so the

defender would have known about the risks arising from the pursuer's working conditions in the HSU and about the pursuer's concerns about the pressures of her work. (p11)

(vi) The pursuer reported concerns in relation to lack of training and feelings of lack of control and hopelessness arising from her work to colleagues in the HSU. (pp11-12)

(vii) The staffing levels in the FGU were inadequate even at the start when it was serving just the Strathclyde Police area. There was no cover for staff absences with the result that the remaining staff in the FGU would be overworked. (p19)

(viii) The pursuer raised concerns about the workload with her manager and other senior staff on a number of occasions verbally and by email. (pp19-20)

(ix) The FGU was without its full complement of staff from the period between October 2011 and August 2012. (p21)

(x) The staff complement assigned did not reflect the increase in growth of the work in the FGU. (p21)

(xi) Between April 2011 and February 2013 the pursuer made repeated complaints to the defender in respect of the unsustainable workload and inadequate staffing. (pp22-23)

(xii) There was pressure on staff arising from deadlines imposed by statute in custody cases to ensure work was completed on time, whether or not the member of staff had adequate time to deal with the matter. (p22)

(xiii) The FGU had no effective management for much of the time the pursuer spent in the unit. That was likely to make the work environment for staff more difficult. (p27)

(xiv) In addition to her substantial workload in the FGU the pursuer was expected to contribute to the work of the policy group and working parties. (p27)

(xv) When working in the FGU the pursuer began to behave inappropriately around the office as would have been obvious to her fellow employees and the defender, and she became emotional or tearful at meetings. (pp30-31)

(xvi) The pursuer's pattern of taking less leave than was her entitlement was indicative of someone who was unable to cope with the quantity of work. The level of her leave was known to, and being monitored by, the manager of the FGU. (p32)

(xvii) The COPFS undertook a stress audit in July 2012 which identified the adverse effects of stress on the majority of those responding. A memo from Catherine Dyer in July 2013 encouraged staff who were concerned about stress to raise the matter with line managers, and that assistance would be available. The pursuer had repeatedly raised issues with her line managers without being directed to any advice or support services. (p34)

[44] Mr Davies submitted that this combination of factors were all matters which were, or ought to have been, known to the defender and which made it foreseeable that the pursuer was at risk of injury due to workplace stress. At all events, what had been averred was sufficient to pass the test of relevancy, and the court should allow a proof before answer.

[45] Under reference to condescendence 12, Mr Davies also contended that regulations 3 and 6 of the Management of Health and Safety at Work Regulations 1999 were engaged by the circumstances of the pursuer's employment, and, in particular, the averments about the stress to which she was exposed through overwork. In that connection, Mr Davies submitted that there was ample time between April 2012 and February 2013 for her work conditions to be addressed following a statutory risk assessment (which addressed the risks

arising from the nature of the pursuer's work), if undertaken by April 2012, whether that be a reduction in workload or transfer to a different post, and, in terms of regulation 6, for her health thereafter to be monitored. The circumstances of the case also engaged regulations 4, 5 and 10 of the 1999 Regulations. Mr Davies did, however, concede, following discussion, that regulation 8 was not in point.

Reply on behalf of the defender

[46] Miss Springham adhered to her earlier submissions which concentrated on the pursuer's common law case. She did, however, expand on her submissions relating to the pursuer's case under the 1999 Regulations (which, otherwise, did not feature in her written note of argument). The requirement for a risk assessment under regulation 3 was tied to the measures required for an employer to comply with the requirements and prohibitions imposed by "the relevant statutory provisions". Section 53 of the Health and Safety at Work etc. Act 1974 defined that term as including the provisions of part I of the 1974 Act itself and "any health and safety regulations". Miss Springham cited, as an example, the Provision and Use of Work Equipment Regulations 1998. The pursuer did not aver that any specific regulations otherwise applied to the circumstances averred. In other words, the pleadings failed to disclose those statutory provisions in reference to which a regulation 3 risk assessment should have been carried out. Regulation 3 was not, therefore, engaged. Nor were regulations 4, 6, and 10, each of which was tied to the assessment undertaken for the purposes of regulation 3. She referred, in this connection, to *Cross* v *Highlands and Islands Enterprise* 2001 SLT 1060.

Discussion and Decision

[47] I propose to address each of the three chapters of Miss Springham's submissions in turn.

Breach of duty and the case pled

[48] There is an attraction in the simplicity of the argument advanced by the defender about the apparent inconsistency between what is averred in condescendence 12 and what is sought by way of damages in condescendence 11 (her claim for damages being referable to a recurrent depressive disorder). The succinct argument was that by offering to prove that she has been suffering from the depressive disorder since April 2012, the pursuer had to aver and prove that there were steps which could and should have been taken prior to April 2012 which would have prevented the occurrence of that condition. There being no case advanced that failures on the part of the defender after April 2012 exacerbated the pursuer's condition, the averment, at p45, that:

> "[H]ad the defender implemented each and any of these steps *before February 2013* it would have *reduced or avoided* the stress on the pursuer and would have enabled her to remain in employment with the Crown Office"

was irrelevant.

[49] The pursuer's pleadings are not a model of clarity. I have, however, come to the view that, taking a generous view of those pleadings, it would be wrong to dismiss the action on this basis alone. What, as I understand it, the pursuer offers to prove is that her work conditions were such that, by April 2012, she had contracted a depressive disorder. She made no connection between the symptoms of that disorder and her conditions of employment until February 2013. In the period between the commencement of the disorder and February 2013, the pursuer's employers did nothing to address the issues of work

overload which had been a consistent feature of the pursuer's employment since 2010, despite her exhibiting behaviour of a kind which was included amongst the list of potential stressors identified in the COPFS Stress Management Policy. Had they undertaken an individual risk assessment at any time during the pursuer's employment within the HSU and the FGU, the problems of the pursuer in coping with work overload there would have been identified and addressed. In any event, a stress risk assessment undertaken in or about April 2012 would have identified steps, of the kind averred in condescendence 12 (p45) which, if implemented before February 2013, would have produced a situation in which the pursuer would have been able to continue working, in some capacity, within the Crown Office. Standing the date of onset of her condition, the pursuer's case, as so framed, may face considerable challenges at proof. At this stage, however, I am unable to hold that it is a case that is bound to fail.

[50] In reaching this conclusion I acknowledge Miss Springham's point that the pursuer was not advancing a case to the effect that she would have suffered from a depressive disorder anyway, but that this had been exacerbated by a lack of any action on the employer's part between April 2012 and February 2013. However, this is not a case where the circumstances averred point to an exacerbation of an unrelated pre-existing condition. It is tolerably clear that what the pursuer is offering to prove is that, but for the failure to address her work overload from 2010, she would not have developed a depressive condition at all.

[51] Accordingly, on this ground, I am not prepared to dismiss the action.

The defender against whom the case is advanced

[52] The substantial criticism advanced by Miss Springham was that there were no

averments of fact to support those averments, in condescendence 12, which purport to address what the defender "knew or ought to have known" and the steps which he, the defender, ought to have taken. Miss Springham submitted that this was a fundamentally flawed approach which she illustrated by reference to *Chapman* v *Lord Advocate.* It is instructive, in that case, that the pursuer's claim had two aspects to it. The first was a case against a named line manager for whom the Lord Advocate was said to be vicariously liable. The second was a case against the Lord Advocate himself and alleged breaches of duty on the basis that he knew or ought to have known various things about the pursuer, her work, the organisation and administration of the office in which she worked, and the complaints she had made against her line manager, but without any supporting factual averments. The case against the line manager failed in the absence of relevant averments to support the existence of a duty on the part of that individual to take reasonable care not to cause the pursuer psychiatric injury. The case against the Lord Advocate also failed, and was addressed, at paragraph 49 of the Opinion of the Temporary Judge, in the following way:

> "[The pursuer] avers that [the Lord Advocate] was responsible for all the employees, including the pursuer, who worked within the service. She then goes on to aver that he knew or ought to have known various things about her, her work, the organisation and administration of the office in which she worked, and the complaints which she had made against [her line manager] and "that the staff resources made available to her were insufficient for her to carry out her very demanding workload and that this was causing her stress related symptoms and absence from work due to illness. Impressive though these averments appear to be on first reading, there are simply no averments of fact to support them. There are no averments that the Lord Advocate of the day was provided with any information about the situation in the Stirling office or about any problems the pursuer was experiencing there. Indeed, there is nothing in the averments which would provide a factual basis for suggesting that the Lord Advocate knew that the pursuer was employed in the Stirling office or anywhere else in the COPFS, in other words that he knew of her existence as a procurator fiscal depute. Accordingly, I conclude that the case against the Lord Advocate is bound to fail."

Miss Springham invited me to conclude that the same result should follow in this case, for the same reasons.

[53] It respectfully seems to me that the present case does not replicate either of the two bases upon which the pursuer's claim in the case of *Chapman* proceeded. Notwithstanding the terms of the pursuer's first plea-in-law, I agree that the case as pled certainly does not read like a case of vicarious liability (which, in *Chapman*, identified the purported failures on the part of a named individual). Indeed Mr Davies' position, as I understood it, was that it was unnecessary to identify any particular individual alleged to have been at fault because he likened the case against the defender to a case made against any defender for breach of duties owed to an employee by reason of being that person's employer. Equally, however, Mr Davies disavowed any suggestion that the duties pled on record in the present case were of the kind, directed at the Lord Advocate individually, which were rejected in *Chapman*. The Lord Advocate was properly convened as the Minister responsible for the COPFS.

[54] The argument before me did not examine in any detail the nature of vicarious liability in matters involving the Crown, from where it is derived, or how it might arise in particular cases. Little certainty is to be found in the pleadings. In condescendence 2, the defender is described as having "responsibility for the Crown Office and Procurator Fiscal Service". In condescendence 3, jurisdiction is invoked by virtue of the pursuer having suffered injury in the course of her employment "with the defender in COPFS in Scotland". The pursuer's first plea-in-law refers to the "fault, negligence *et separatim* breach of statutory duty of the COPFS as her employers for whom the defender is vicariously responsible". There references disclose a measure of uncertainty as to the legal relationship between the Lord Advocate and his department for the purposes of this action.

[55] Indeed, it seems to me that confusion may have arisen from a conflation of two potentially different situations. There is, of course, no doubt that the Crown can, in Scotland, be sued in respect of wrongful or negligent acts. That was put beyond doubt by the application, to Scotland, of section 2 of the Crown Proceedings Act 1947. However, section 2(1) of the 1947 Act makes separate provision for liability in respect of (a) delicts committed by servants or agents of the Crown, and (b) breach of those duties which a person owes to his servants or agents at common law by reason of being their employer. The former provision clearly gives rise to vicarious liability of the Crown for the negligence of individuals in its service. In the latter case the Crown would clearly be liable to persons in its service for negligence in failing to provide, for example, a safe system of work or safe place of work (a point made by Mr Davies). In the present case no specific individual is identified as having been at fault. Mr Davies submits that it is unnecessary to do so. As I understood his position, the pursuer relies on a systemic failure (or failures) on the part of the COPFS to address work overload, giving rise to breach of the employer's primary duty of care. In that situation it seems to me to be, at the very least, doubtful that the issue of vicarious liability arises at all.

[56] That said, I am conscious of not having heard full argument on this particular point. Having heard Mr Davies in reply, however, I am satisfied that the situation which arose in *Chapman* falls to be distinguished. Contrary to Miss Springham's understanding of the position, it is – or has become – clear that the pursuer in this case does not advance a claim on the basis that the Lord Advocate, as an individual, knew or ought to have known of the matters condescended on, at length, in articles 4 to 10 of condescendence. The reference to "the defender" in that context may be regarded as infelicitous where a reference to the COPFS would have been more precise. It does not render the pleadings irrelevant. Doubt

has only arisen, in my view, because of the reference to vicarious responsibility in the first plea-in-law. That is not, in my view, a justification for dismissing the action.

Foreseeability and causation

[57] Miss Springham's approach to this chapter was to examine, and criticise averments in, each factual condescendence individually. It seems to me that a preferable approach is to look at the totality of the pleadings in order to reach a conclusion on the question whether sufficient has been averred for the court to be satisfied that it was reasonably foreseeable that the pursuer was at risk of psychiatric harm. In that respect I agree with the pursuer's submission that, where relevancy is concerned, the issue is whether or not an averment has a reasonably direct bearing on the subject under investigation, and in this case there will be averments about the history and surrounding circumstances, which may include aspects of the pursuer's employment history, which may be relevant (see *Strathmore Group Ltd* v *Credit Lyonnais,* supra, per Lord Osborne at p1031G/J).

[58] Employing that approach, and bearing in mind my conclusions in relation to the first two chapters of Miss Springham's submissions, I am satisfied that, subject to deletion of certain averments which are mentioned below, the pursuer's pleadings are sufficient to justify the allowance of proof before answer. I have already set out the factors which Mr Davies submitted were, or ought to have been, known to the COPFS and which, individually or cumulatively, should have alerted a reasonable employer to the risk that the pursuer might suffer psychiatric harm as a result of workplace stress. I do not propose to repeat them. However, certain points are worth emphasising. In condescendence 4, the pursuer avers that she raised concerns about both lack of training and lack of control in the HSU with the head of that unit, and that the defender maintained records of staff training

which would have included the pursuer. In condescendence 7, there is an explanation for how the workload of the FGU expanded from covering the Strathclyde Police Force area to a national unit, but without a commensurate increase in the staff complement. The pursuer avers that between April 2011 and February 2013 she repeatedly complained to the COPFS in respect of the unsustainable workload and inadequate staffing. There is an averment that a report, published in August 2012, noted that, in October 2011, the COPFS had identified the need for further training of staff within the FGU, or who referred cases to the unit, but no action was taken. It is also averred that internal monitoring at the material time showed that staff in the FGU were failing to meet deadlines in cases, and that there were staffing issues and work backlogs. In April 2012, at the time when the pursuer avers that she developed a depressive disorder, there is reference to an email being sent to the PF Glasgow expressing concern that the pursuer was not coping, given that there had been a substantial increase in the work of the FGU but no corresponding substantial increase in staff. In condescendence 8, there are averments relating the increase in the FGU's Standard Forensic Instruction workload, and police and procurator fiscal liaison functions. In condescendence 9, there are references to the pursuer behaving emotionally, or tearfully, in meetings, and, in May 2012, complaining that she was unable to cope with the backlog of work in the FGU. The pursuer avers that she began to exhibit odd behaviour, which included changing into running gear and openly going for a run during office hours, and that this was observed by a manager. Those averments Miss Springham criticises on the basis that there is nothing said about why, given the pursuer worked flexi-time, her employer should have regarded that behaviour as odd, or that it was observed by the defender. Her argument ignores the terms of her own answer 9, which relates that such conduct was not allowed under the terms of the Flexible Working hours system, and that

her line managers had spoken to the pursuer informally about her conduct. Moreover, there is also an averment about the pursuer's unusual leave pattern in the year 2012 being indicative of a person suffering harm through work-related stress, and that the manager of the unit monitored the pursuer's leave taking. There is then an averment that the pursuer raised grievances against colleagues. That averment is criticised for want of specification. However, it has to be read in the context of other behaviour which, the pursuer offers to prove, should have provided indicators to her employers of impending psychiatric harm. The pursuer also avers that, during the period of her employment with the FGU, the COPFS provided its managers with a form to assist them in recognizing the signs of stress in employees. She recites a number of such signs (pp33-34) all of which ought to have been obvious to the managers with whom she had contact. In condescendence 10, the pursuer avers that, on 4 April 2010, she became tearful at work in the presence of a Senior Legal Manager, and that this was reported to the Area Procurator Fiscal. It is also averred that at no time during her employment in either the HSU or the FGU was the pursuer made the subject of an individual risk assessment which would have identified her ongoing problems at work. That was said to be a requirement of the COPFS Stress Management Policy. Whether it was, or not, is a matter for proof. I am persuaded that this is a case where the effect of the pursuer's averments, if proved, are capable of establishing that the pursuer was required to perform duties, particularly in the FGU, in excess of that which she would have been entitled to expect had her employers paid attention to staffing levels and the increasing workload in that unit, and that failure to address that situation created a foreseeable risk that the pursuer would suffer the kind of harm of which she complains (cf. *Hatton v Sutherland*, supra., and, in particular, those principles previously referred to and numbered 2, 3 and 5). I am also satisfied that there is sufficient notice in condescendence 12 of what

they could and should have done to prevent damage to the pursuer's health (cf *Flood* v *Glasgow University Court,* supra, at paragraph [6]).

[59] In the view that I have reached I am not prepared entirely to exclude from probation the averments which invoke the Management of Health and Safety at Work Regulations 1999. Miss Springham's argument, that regulation 3 is not engaged, appeared to rest on the proposition that the risk assessment contemplated by that regulation must be tailored to the requirements and prohibitions of other statutory provisions. However, ultimately, that argument is circular. It ignores the obvious point that the 1999 Regulations themselves contain requirements (of which regulations 5 and 6, which are pled in this case, are examples), and that the statutory definition of "relevant statutory provisions" in section 53 of the Health and Safety at Work etc Act 1974 includes the general duties imposed on employers, relative to their employees, by virtue of part 1 of that Act. The reference to *Cross* v *Highlands and Islands Enterprise* does not seem to me to be in point since that case was decided before the removal, from regulation 22, of the exclusion of civil liability for breach of regulation 3, and other regulations. Besides, there is a tension between Miss Springham's submission that regulation 3 is not engaged and what I understood to be her earlier point that the "Stress Policy" previously referred to was to be regarded as an assessment for the purposes of regulation 3. Mr Davies accepted that regulation 8 was not engaged by the circumstances of his pleadings and I will, accordingly, exclude from probation the reference to that provision.

[60] During submissions Miss Springham identified certain other averments which were so lacking in specification that they should be excluded from probation. In that connection I agree that the averments, in condescendence 10, identified in paragraphs 26.2 and 26.3 of the defender's note of arguments are wholly lacking in specification, and fail to give notice, at

the most basic level, of the nature of the complaints and to whom they were made. The averment about being tearful "to the Senior Business Manager himself", or his secretary, is, frankly, difficult to comprehend, and gives no notice of the context in which that occurred. Excluding those averments from probation does not alter my conclusion that the case should otherwise be dealt with by way of proof before answer.

Conclusion

[61] For the foregoing reasons I shall sustain the second plea-in-law for the defender to the extent of excluding from probation: (i) the following averments in condescendence 10, at pp37-38:

> "The pursuer made further complaints of the harm being suffered by her on 12th April, 17th April, 10th May, 17th May, 19th May, 22nd May and 11th June all 2012. The pursuer was tearful in the presence of the secretary to a Senior Business Manager on July 2012 and to the Senior Business manager himself being then desperate for help."

and (ii) in condescendence 13, at p46, the figure "8" in line 3 thereof. *Quoad ultra* I shall allow a proof before answer.

[62] I have reserved, meantime, the question of expenses.