SHERIFF APPEAL COURT

[2026] SAC (Civ) 56
DUN-A322-23

Sheriff Principal G A Wade KC
Appeal Sheriff P A Hughes
Appeal Sheriff G K Murray

OPINION OF THE COURT

delivered by APPEAL SHERIFF G K MURRAY

in the appeal in the cause

by

WILLIAM COLLEY

Pursuer and Appellant

against

SOCIAL CARE AND SOCIAL WORK IMPROVEMENT SCOTLAND
otherwise known as the Care Inspectorate

Defender and Respondent

Pursuer and Appellant: Party
Defender and Respondent: Sloan, advocate; SCSWIS (Dundee)

24 August 2026

Introduction

[1] The appellant was formerly the head of school of the New School, Butterstone, Dunkeld. The school provided independent educational facilities to boarders and day pupils with special needs until its closure in November 2018. The respondent (which is known as the Care Inspectorate) regulated the school's care accommodation service for its boarding pupils, in the first instance through an inspector whom it employed.

[2] On 24 September 2018, the appellant received a hand delivered letter from a whistleblower which alleged that two staff members had hit two school pupils. This and the subsequent steps taken by the appellant and his colleague were the catalyst for the chain of events which form the factual background to these proceedings. The appellant was suspended from his post by the Board of Governors of the school on 7 November 2018. On 23 November 2018, the school was closed. The circumstances surrounding the closure of the New School were the subject of media comment and an independent review instructed by the Scottish Ministers in July 2020.

[3] The present action was served by the appellant upon the respondent on 1 November 2023. The appellant contends that an employee of the respondent misrepresented to several third parties what he and a colleague, Ms Gordon, did in response after he received the whistleblower's letter. He argues that the letter did not engage the respondent's regulatory functions and that certain steps it then took were designed to bring about his dismissal from post and closure of the school. As such, the steps defamed him, were taken maliciously, negligently, *ultra vires* of its statutory powers, breached his human rights and data protection legislation. As they caused substantial damage to his reputation and ability to earn a living, he seeks damages of around £650,000.

[4] This appeal is taken against the sheriff's decision on 6 June 2025 to dismiss the case after debate. To address the grounds of appeal and parties' submissions on them, it is necessary to explain the case which the appellant offers to prove on record and to consider certain difficulties with the sheriff's judgment.

The appellant's pleadings

[5] Four of the grounds of appeal take issue with the sheriff's assessment of the appellant's pleadings in his judgement. The first contends that the sheriff erred in his assessment of the relevance and specification of the appellant's averments in support of his cases alleging misfeasance, negligence and defamation. The second asserts that the sheriff failed to consider those averments *pro veritate.* The fifth argues that the sheriff erred by regarding some disputed averments as fact. The sixth argues that the sheriff's judgment misrepresented the appellant's averments of misfeasance and negligence.

[6] To address those grounds, it is first necessary to make some general comments on the appellant's pleadings. The appellant has represented himself throughout the proceedings. His pleadings are prolix and repetitious. They are not set out in a logical or chronological sequence. They contain many negative assertions of fact and law, often couched in vague and irrelevant terms. Material which is essential to his case is not incorporated into his pleadings. Positive averments which he makes in some articles of condescendence directly conflict with potential deemed admissions in others. Though the respondent incorporates the July 2020 independent review into its pleadings, the appellant does not deny its terms and findings.

[7] Consequently, to address those grounds of appeal, this court has worked through the record to attempt to distil what, taken at highest, the appellant offers to prove. As the appellant is not legally represented, we have afforded him a degree of latitude. On a fair and generous reading, he sets out a discernible case to the following effect.

[8] On or about 24 September 2018, a staff member hand delivered a note to the appellant. The note alleged that (a) a school residential childcare worker hit two students with a book on their upper arms or shoulders to modify their behaviour and (b) a member of

the school's learning support staff approached a student from behind and placed their hands quite heavily on a pupil's shoulders and around the sides of his neck. The note stated that one pupil boarded at the school and the other was a day pupil.

[9] As a matter of practice, the respondent notifies social work and Police Scotland of any child protection issue which is drawn to its attention.

[10] The whistleblower notified the respondent of the allegations on 19, 22 and 24 October 2018. The allegations were then separately investigated by Perth & Kinross Council's social work department, by the respondent's Triage and Risk Assessment Team and by Police Scotland. The respondent's investigation included an interview with the author of the note. Each investigation concluded that the allegations did not merit any action being taken.

[11] On 30 October 2018, the allegations were considered at an internal referral discussion convened by the social work department of Perth and Kinross Council.

[12] On 2 November 2018, an inspector employed by the respondent reported the allegations to the Registrar of Independent Schools, the Scottish Ministers, Education Scotland, and the school's Board of Governors. Its report was inaccurate, did not refer to the investigation outcomes and its content was defamatory of the appellant.

[13] Between 2 and 5 November 2018, the respondent informed the school's Board of Governors that the appellant was not prepared to investigate the allegations in the note and that his failure to do so breached his safeguarding obligations towards pupils of the school. The respondent threatened to cancel the school's care accommodation service registration. It told the board that the school would be closed unless the appellant was suspended from his post. It told the Witherslack Group, which planned to take over operation of the school, that it would not allow the takeover to proceed unless the appellant was dismissed from his

post. The respondent's actions diminished the appellant's reputation and led the Witherslack Group to withdraw from the planned takeover.

[14] On 9 November 2018, the respondent served an improvement notice on the school and threatened to close it down.

[15] On 28 November, the respondent complained about the appellant's handling of the note to his regulatory body, the General Teaching Council for Scotland.

[16] The appellant had no responsibility for the school's care accommodation service. The investigation outcomes showed that the allegations in the note were baseless. As such, there was no basis for the respondent to send the report to the Registrar of Independent Schools and other regulatory bodies, to issue the improvement notice or to make threats to the Board of Governors and the Witherslack Group. The respondent deliberately omitted to refer to the investigation outcomes when it took each of those steps. The respondent acted maliciously and *ultra vires* by doing so.

[17] The respondent's actions caused the Board of Governors to suspend the appellant from post, the Witherslack Group to withdraw from the planned takeover, the board to close the school and the appellant to suffer loss.

The sheriff's judgment

[18] The sheriff's judgment is not well constructed and raises further issues. Parts appear to have been copied and pasted from a separate judgment which dismissed parallel proceedings brought by Ms Gordon, in which the parties' averments are materially different. It does not fully take account of the statutory functions of the respondent and other relevant bodies, an issue which bears upon determination of the case. It does not consider the conflict between the appellant's averments and potential deemed admissions. In relation to

a key issue, whether the appellant's actions were informed by a mistaken understanding of the law of assault, it fails to accurately characterise his position on record. Finally, it sustained the respondent's first plea-in-law, which the respondent concedes was not insisted upon at debate. On no view can the sheriff's reasoning be supported in its entirety.

[19] In his judgment, the sheriff sustained five of the respondent's preliminary pleas, including those which argued that the appellant's claims were time barred. The sheriff considered the essential flaw in the appellant's case was his claim that the whistleblower's letter of 24 September 2018 did not disclose assaults by staff members on school pupils. The sheriff considered that the letter did allege such assaults, an assessment which formed the cornerstone of his decision. On that basis, the appellant's averments alleging that the respondent acted *ultra vires* and with malice were based on no more than mere assertion. No substantive averments were pled alleging personal animus by the respondent's inspector towards the appellant nor was there any averment of a coordinated conspiracy on the part of the respondent and its employees to close the school. The only misrepresentation averred was the purported failure to disclose assaults. However, as the whistleblower letter did disclose assaults, it was appropriate for the respondent to notify the allegations to the other third parties.

[20] The sheriff considered that the appellant's proposed distinction between actions within the school and those within the residential facility on the school grounds was irrelevant. The duties and obligations of the respondent were engaged and they acted appropriately by reporting the assaults to third parties who did have the power to investigate. The appellant's action alleging malicious actings in public office by the respondent was, consequently, without any basis.

[21] The sheriff also considered the appellant's negligence claim lacked specification and relevancy, as did his averments alleging defamation and breach of data protection which, in any event, lacked separate pleas-in-law in support of them.

[22] The sheriff considered that the appellant's averments of loss and damage also lacked specification. Although they superficially attempted to quantify loss of earnings and loss of employment, the lack of specification created a real risk that the respondent would be ambushed at proof. There was no fair notice to the respondent.

[23] Finally, the sheriff held that the appellant's negligence, defamation and human rights claims were time-barred, lacked specification and relevancy and, again, were unsupported by pleas-in-law.

Submissions for the appellant

[24] The sheriff erred by holding that the appellant's negligence and misfeasance claims had prescribed. The latter relevantly encompassed his claims for reputational damage and breach of his human rights. Reference was made to *Cornelius* v *London Borough of Hackney* [2002] EWCA Civ 1073 and *Whitehouse and Clark* v *Chief Constable, Police Scotland* (2019) CSIH 52.

[25] While the pleadings alleging malice and negligence on the part of the respondent were prolix and repetitive, there was nonetheless a sufficient and relevant case on record to allow the case to proceed to proof. On malice, reference was made to *Philp* v *Highland Council* [2021] CSIH 28 and, on negligence, to *Caparo PLC* v *Dickman* [1990] 2 AC 605, *Sebry* v *Companies House* [2015] EWHC 115 (QB), *Tindall* v *Chief Constable of Thames Valley Police & Buckinghamshire County Council* [2022] EWCA Civ 25 and *Robinson* v *Chief Constable of West Yorkshire Police* [2018] UKSC 4.

[26] The sheriff erred by holding that the letter alleged assaults on school pupils; such a determination could only be made after proof. He also erred by failing to take into account the school's child protection duties and the respondent's failures to follow child protection guidance during its investigation. By doing so, the sheriff failed to take the appellant's case on record *pro veritate*. The respondent's reports to the relevant parties were false and were made with malicious intent. They negligently misrepresented what occurred. As such, the respondent acted *ultra vires* by submitting them. That was sufficient for enquiry at proof.

[27] The sheriff erred by rejecting the appellant's negligence claim. He placed too much emphasis on the decision in *Caparo* whereas the appellant relied particularly on *Robinson* and *Tindall*. The respondent created "the source of danger", ie negligent misstatements which caused the appellant economic loss; these statements were then relied on by third parties, who went on to cause harm to the appellant.

[28] It was accepted that the sheriff held his averments of loss lacked specification and that his Note of Appeal did not challenge that finding. Nonetheless, it was submitted that the need to specify loss was more general in nature in personal injury cases.

Submissions for the respondent

[29] The respondent conceded that the sheriff erred by holding that any obligation to make reparation was time-barred by reason of limitation, as that plea was not insisted upon at debate. While other aspects of the sheriff's judgment could be criticised, they did not alter the findings established within his interlocutor. The sheriff was correct to dismiss the action.

[30] As the sheriff recorded in his judgment, the appellant conceded at debate that his human rights claim was time-barred as it was not brought within 1 year (Human Rights

Act 1998, section 7(5)). His defamation claim was not brought within 3 years of the acts complained of (Prescription and Limitation (Scotland) Act 1973, section 18A as then in force). He did not argue or plead that equitable considerations might allow the court to exercise its discretion to allow either claim to be brought late, nor did he plead-in-law to that effect. The appellant's attempts to shoehorn those claims into his negligence and misfeasance cases were plainly wrong.

[31] Counsel set out the statutory basis of the respondent's powers and maintained that it did possess power to regulate the appellant. The school and the school care accommodation service were inextricably linked. That was demonstrated by the definition of a school care accommodation service as:

> "A '*school care accommodation*' service is a service which: (a) consists of the provision of residential accommodation to a pupil in a place in or outwith a public, independent or grant-aided school; (b) is provided (whether or not during term-time) for the purpose of or in connection with the pupil's attendance at the school (whether current or otherwise); and (c) is provided to the public by: (i) an education authority or the managers of an independent or grant-aided school; or (ii) any person under arrangements made between that person and any such authority or managers": Public Services Reform (Scotland) Act 2010, Schedule 12, paragraph 3(1).

[32] Consequently, the sheriff was correct to hold that, in undertaking its statutory regulatory role, the respondent was entitled to consider matters outwith the care service at the school which had the prospect of affecting that care service. The allegations of assaults at the school amounted to such matters.

[33] The appellant's averments were insufficient to establish an action of malicious actings in public office by the respondent's employee. The sheriff was correct to hold that the appellant baldly asserted within his pleadings that there was malice on the part of the respondent's employee without providing sufficient specification to found a basis for them. For such an action to be relevant, a pursuer required to aver the following: (i) that the

defender was a public officer; (ii) that the conduct complainer of must have been in the exercise of public functions; (iii) that there was malice (whether targeted or untargeted); and (iv) that there was damage: *Robertson* v *Keith* 1936 SC 29; *Ballantyne* v *City of Glasgow District Licensing Board* 1986 SC 266; and *Advocate General for Scotland* v *Galbraith Trawlers Ltd* 2021 SLT (Sh Ct) 211. The appellant's averments were insufficient in respect of malice and damage. *Esto* his averments of malice were sufficient and relevant, he did not challenge the sheriff's determination that his averments of loss were not. The sheriff was also correct to conclude that the appellant's defamation claim was irrelevant as it was inextricably linked to his averments of malice. In any event, it was not supported by a plea-in-law.

[34] While the sheriff erred by finding the appellant's negligence claim was time-barred, he was correct to conclude that the appellant's averments of negligence were irrelevant and lacked specification. The appellant's only averment on proximity was that his position established the requisite degree of proximity. That was unsound; the relationship between the parties was too indirect to create a duty of care. Moreover, there was no averment as to what the duty of care actually comprised. The law on a public body's duty of care was set out by Lord Reed at paragraphs 64 and 65 of his opinion in *N and another* v *Poole Borough Council* [2019] 2 WLR 1478. Under reference to that, and also to Lord Hoffman's opinion in *Stovin* v *Wise* [1996] AC 923 at 946G to 947A, the respondent's statutory duties to make reports available for inspection and to publicise them required to be taken into account when determining liability for acts which might otherwise give rise to delictual liability.

Decision

[35] The sheriff's interlocutor of 6 June 2025 *inter alia* sustained the respondent's third and fourth pleas-in-law. The third argued that the action should be dismissed as the appellant's

averments lacked specification and relevancy. The fourth argued that the appellant's averments should not be admitted to probation.

[36] Paragraph 11 of the respondent's rule 22 Note in support of those pleas submitted that the appellant's averments of loss entirely lacked relevancy and specification. That submission was maintained at debate, accepted by the sheriff, as shown in his interlocutor and explained in his judgment (paragraphs 43 and 62). As the grounds of appeal do not challenge those findings, there is no basis for this court to interfere with that part of the sheriff's decision. The appellant accepted before us that none of the grounds of appeal challenged the sheriff's decision on the point. Grounds of appeal are an important part of appellate procedure, which give advance notice of the case to be met by the respondent and addressed by the court. Any argument not included in the Note of Appeal therefore falls to be rejected. The appellant's status as a party litigant does not excuse his failure in this respect – *Khaliq* v *Gutowski* (2018) CSIH 66 per Lord Justice General Carloway at paras [34] - [36] and [40]. As the appellant's averments of loss lack relevancy and specification to the extent that the action must be dismissed, the appeal falls to be refused.

[37] Notwithstanding that inevitable outcome, we have also addressed the parties' remaining submissions for the sake of completeness. To do so it is necessary to explain the identity and roles of the various bodies who regulated the school's activities and to examine the appellant's case on record in light of those.

Underlying legal framework

[38] The Scottish Ministers were obliged to regulate the school's activities: Education (Scotland) Act 1980, Part 5. To exercise that function, they also held power to inspect the school, to impose conditions on its operation and to close it down: 1980 Act, section 99(1A)).

Inspections of the school were undertaken by Education Scotland, a Scottish Government executive agency. Action taken by the Ministers under the 1980 Act in relation to independent schools was administered by the Registrar of Independent Schools, a Scottish Government official.

[39] Perth and Kinross Council was obliged to oversee the operation of the school in the exercise of its duty to secure the adequate and efficient provision of education in its area: 1980 Act, section 1.

[40] The respondent was obliged to regulate the operation of the school's care accommodation service: Public Services Reform (Scotland) Act 2010, section 47. For that purpose, the school was obliged to be registered with the respondent. In the exercise of its functions, the respondent inter alia held powers to serve improvement notices on the school and, ultimately, to cancel its registration: 2010 Act, subsections 62 and 64. It was also obliged to co-operate and co-ordinate its scrutiny of the school with the Scottish Ministers and other bodies: 2010 Act, section 114 and Schedule 20.

[41] As a teacher, the appellant was subject to regulation by the General Teaching Council for Scotland.

Assessment of submissions

[42] We are satisfied that the sheriff did not err in his assessment of the appellant's human rights and defamation claims. They were not brought within the relevant prescriptive periods. The appellant does not argue that equitable considerations might enable them to be brought late. In the course of his oral submission the appellant sought to rely upon *Cornelius* and *Whitehouse and Clark*. However, neither was included in the expanded list of authorities allowed for the appeal. In any event, neither supports the

appellant: a submission in *Cornelius* that misfeasance and defamation could overlap was not insisted on and the sum claimed in that case did not include an amount for reputational damage (see eg paragraphs 4 and 6); defamation was not argued in *Whitehouse and Clark*; limitation generally was not argued in either case. Finally, even if the appellant's human rights claim was brought timeously, it is not supported by a plea-in-law. It follows that the appellant's eighth ground of appeal falls to be rejected insofar as it bears upon his claims for misfeasance and defamation.

[43] Against that background, the sheriff found that the appellant's negligence claim was time-barred, and in any event his averments in support of it lacked proper specification. The pleadings did not clarify whence the alleged duty of care arose nor how it was established. He could not understand how the requisite relationship of proximity had arisen between the parties. He considered that the appellant's pleadings' emphasis on *Caparo* was misplaced; that precedent could only be invoked if the situation were novel. However, even if that authority was engaged, the sheriff considered that public policy factors required to be considered when assessing whether a duty of care arose in the circumstances of this case. The respondent regulated institutions, not individuals, and had to be reasonably free to act within its remit as a matter of public policy.

[44] At the hearing before us, counsel conceded that the sheriff had erred in his analysis of time-bar regarding this claim. Consequently, the only issue which needs addressed in relation to the appellant's negligence claim is the sheriff's analysis of its specification and relevancy.

[45] In our view, the duty contended for by the appellant falls to be characterised as novel. It arises from a situation in which the respondent is alleged to have caused pure economic loss through a misstatement. However, unlike the situation in *Hedley Byrne* v

Heller 1964 AC 465 and the majority of the decisions which have followed thereon, the statement is not one upon which the appellant himself would ever have placed reliance. Rather, the contention is that others placed reliance on it; that it was inaccurate; and that as a result of the reliance by others on this inaccurate statement, the appellant has suffered economic loss. There is no established principle according to which a court can decide whether a duty of care should be owed in such a situation. Therefore, following *Caparo*, the court must consider the closest analogies in the existing law, as well as the reasons for and against imposing liability in order to decide whether the existence of a duty of care would be just and reasonable.

[46] From the various authorities cited, the closest analogy to his claim is found in *Sebry*, in which a winding-up order was registered against the wrong company, ultimately causing it to be placed in administration. At paragraph 17, Edis J described the error as involving no error of judgment, but rather being comprised of both a systemic failure to ensure that policies were applied, and also an individual act of carelessness. At paragraph 109, referring to dicta of Lord Nolan in *White* v *Jones* [1995] 2 AC 207 at 294, he went on to state:

> "I understand this to mean that if a person does an act which is capable of causing harm to a particular person if done carelessly he will be held to have assumed responsibility to that person in respect of that task unless (where the act is done further to a contractual duty or statutory function) the terms of the contract or the statute negate or limit that responsibility"

[47] This decision predates that given by the UK Supreme Court in *N and another* v *Poole Borough Council*. We consider that the law on the point is more completely set at paragraph 65 of Lord Reed's opinion:

> "It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties,

> even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

[48] In this case, the statutory functions of the respondent were those of a regulator, not, as in *Sebry*, a registrar. Unlike a registrar, the respondent required to exercise discretion; and some of the actions it might require to take in the exercise of that discretion might well - necessarily - be prejudicial to the interests of persons in the appellant's position. "Proximity" should be understood to denote a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care; in other words, that when assessing the requirements of fairness and reasonableness, regard must be had to the relationship between the parties - *Stovin* per Lord Nicholls of Birkenhead at 932B-C. The parties' relationship was one of regulator and employee of an institution that was - at least to some extent – subject to that regulator's oversight. The imposition of a duty by the respondent towards persons in the appellant's position would be inconsistent with the legislation under which the respondent operates. The effectiveness of the respondent in its regulatory function would be inhibited by the imposition of such a duty. It would not be fair, just or reasonable to impose such a duty. We do not understand the appellant to claim that such a duty is owed to persons such as himself as a generality; but rather, that by identifying him under reference to his position, the respondent created the requisite degree of proximity. Like the sheriff, we find the pleadings insufficient to demonstrate the requisite degree of proximity between the appellant and the respondent.

[49] The closest analogy in the existing law to the duty contended for by the appellant lies in the law on delictual liability for defamation. Viewed properly, that is what the appellant

complains of; that the respondent has made a false statement about him which has caused him harm. Given that a remedy for such harm already exists in the law of delict, it is unnecessary to infer the duty of care for which the appellant contends. We further consider that there is force in the sheriff's analysis that - for the reasons discussed above - public policy militates against inferring such a duty. Consequently, we do not consider that a duty of care of the nature contended for by the appellant has been relevantly averred as a matter of law. For those reasons, the appellant's seventh ground of appeal fails.

[50] The appellant's averments of malice merit detailed consideration. It is now settled that: a third party may recover loss and damage sustained as a result of a public body's misuse of statutory powers, provided such misuse was malicious or was taken in the full knowledge that the public body did not possess the power it purported to exercise; to determine such questions, it may be relevant to consider the public body's motives for taking the action in question (*Micosta SA* v *Shetland Islands Council* 1986 SLT 193; *Philp* at 33 - 34; *Galbraith Trawlers* at [26]).

[51] When those principles are applied to the underlying legal framework and the above summary of the appellant's case, the following picture emerges.

[52] The letter at the heart of the case contained allegations about actions of school staff members towards school pupils. Though it did not identify the staff members or pupils, it disclosed that at least one staff member worked within the school's care accommodation service and that one pupil boarded at the school; in other words, areas which sections 44 - 47 of the 2010 Act obliged the respondent to regulate. Separately, section 114 of the Act obliged it to co-ordinate with other relevant bodies, such as the Registrar of Independent Schools, the Scottish Ministers and Education Scotland. The appellant expressly admits that the respondent's policy was to notify social work and police when it

became aware of such a matter. In context, the sheriff did not err by holding that the allegations engaged the respondent's regulatory role. Insofar as the third ground of appeal argue that the sheriff erred in his assessment of that issue, it falls to be rejected. As noted above, the fifth ground of appeal is well-founded, in that the sheriff failed to accurately characterise the appellant's position on record as to whether his actions were informed by a mistaken understanding of the law of assault. However, as with our analysis of the sheriff's assessment of the pleadings on misfeasance, which we address below, this defect in the sheriff's decision is immaterial to the overall outcome of this appeal.

[53] As regards the appellant's case of misfeasance, he argues that the allegations in the note were unfounded, as the investigations into them by the respondent, police and social work all concluded. As such, there was no need for the school to investigate them, nor was there any basis for the respondent to take any action about them in the exercise of its regulatory function. The steps which it did take suggested that the respondent breached the *Micosta* test: they manifestly inferred malice on its part and suggested that its motives were to ensure closure of the school or the appellant's suspension or dismissal from post; it sent a report which criticised the appellant's handling of the allegations to the Registrar of Independent Schools and copied it to other relevant bodies, including the Scottish Ministers; it informed the Board of Governors that the appellant was not prepared to investigate the allegations; it threatened variously to close the school, cancel its registration or to refuse to sanction the proposed Witherslack Group takeover unless the appellant was suspended or dismissed from his post; and it reported the appellant's conduct to his own regulatory body. The respondent's reports were not merely untrue; they also maliciously concealed relevant information which suggested that the appellant and Ms Gordon did not fail in their duties.

The degree of malice was exacerbated by the respondent's failure to refer to the investigation outcomes in its reports to the relevant bodies.

[54] In contrast, as the 2020 independent report illustrated, the respondent argues that many different factors led to closure of the school and that it was entitled to act as it did.

[55] To resolve that factual dispute, it appears that the appellant's averments of malice, properly understood, taken at their highest, were relevant for proof. For misfeasance in public office to be established, it is essential to show either malice or knowledge of the invalidity of the purported action; there must be "deliberate abuse" - *Micosta* per Lord Ross at 197 F-I and 198 G-H. The appellant's averments offer to prove either malice or, at least, recklessness. He also offers to prove an ulterior motive (as in *Philp*), in this case a desire on the part of the respondent to close the school. Importantly, he offers to prove deceit and deliberate concealment on the part of the respondent's employee. In that respect, the sheriff erred by failing to correctly comprehend the nature of the appellant's averments, in part as a consequence of his misunderstanding of the appellant's position on the *mens rea* of assault. The appellant's averments include allegations of conduct by the respondent which could not be anything other than malicious or at least recklessly indifferent to the illegality of the act and to the consequences for the victim; in other words, by acting with no honest belief that the act was lawful and in awareness that the act would probably injure the appellant. As it cannot be said that the appellant's case of malice must necessarily fail, the sheriff erred by not holding that it was relevant for proof.

[56] The appellant's third ground of appeal, which contended that the sheriff acted *ultra vires* and beyond the competence of the court by paying no regard to national child protection guidance and policies, was not further developed during the appeal hearing, save as to insist that the appellant was bound by the national child protection guidance and

followed it appropriately, contrary to what the respondent's inspector later alleged. As has been observed in relation to other aspects of the sheriff's judgment, he was constrained by the pleadings. He could have no regard to any such guidance and polices because they were not incorporated into the pleadings. In any event, the appellant's averments lack specification as they do not identify the national child protection guidance and policies, who issued them and in what respect they bound the appellant or the court.

[57] Finally, the fourth ground of appeal argued that the sheriff acted *ultra vires* of the powers of the court by extending the jurisdictional remit of the respondent beyond that intended by the Scottish Parliament in the Public Service Reform (Scotland) Act 2010. The appellant contended that the functional separation between the school and the school care accommodation service meant that the respondent had no regulatory role in relation to the matters referred to in the whistleblowing letter. The statutory framework within which the school's accommodation service operated is outlined above. The inextricable link between the school and the accommodation service is demonstrated by the definition of "school care accommodation service" in the Public Services Reform (Scotland) Act 2010 narrated above. The sheriff was therefore correct to hold at paragraph 54 of his Note that:

> "the school/ residential facility and whether the pursuer had strategic or operation (*sic*) child protection duties, dichotomy is irrelevant: where the student might be at any given time within the school campus cannot be known to the defender. The buildings have to be seen as a unit for the purposes of the allegations."

[58] We also agree with the respondent's submission that it can take account of matters which occur outwith the care service where they are relevant to or have the potential to impede, impact or affect the operation of the care service. Accordingly, neither the sheriff nor indeed the respondent acted *ultra vires* by taking account of matters which had arisen in

the school nor, by doing so, did they extend the respondent's jurisdiction beyond that intended by the Scottish Parliament.

Disposal

[59] For the foregoing reasons, we shall delete the numeral "1" in the sheriff's interlocutor of 6 June 2025 and, notwithstanding the shortcomings which we have identified in his judgment and reasoning, *quoad ultra* refuse the appeal and adhere to his interlocutors of 6 June and 24 July 2025. As parties agreed that expenses should follow success, we find the appellant liable to the respondent in the expenses of the appeal process, as taxed.