**SHERIFF APPEAL COURT**

**[2026] SAC (Civ) 57**
**DUN-A327-23**

Sheriff Principal Gillian 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

ANGELA GORDON

Pursuer and Appellant

against

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

Defender and Respondent

**Pursuer and Appellant: Colley; authorised lay representative**
**Defender and Respondent: Sloan, advocate; SCSWIS (Dundee)**

24 August 2026

**Introduction**

[1] The appellant was formerly the head of care of the New School, Butterstone, Dunkeld. Until it closed on 20 November 2018, the school provided independent educational facilities to boarding and day pupils with special needs. The respondent (which is known as the Care Inspectorate) regulated the school's care accommodation service for boarding pupils, in the first instance through an inspector whom it employed. As the

school's head of care, the appellant managed that service and was registered with the respondent for that purpose.

[2] On 24 September 2018, the head of school passed the appellant a letter from a whistleblower which alleged that two staff members had hit two school pupils. The allegations in the letter, and the manner in which they were addressed by the respondent, the head of school and the appellant until the school closed form the factual background to these proceedings. The circumstances surrounding closure of the school were the subject of media comment and an independent review instructed by the Scottish Ministers in July 2020.

[3] In these proceedings, the appellant argues that the allegations in the letter did not engage the respondent's regulatory functions and that the steps which it subsequently took defamed her, were taken maliciously, negligently, *ultra vires* of its statutory powers and in breach of her human rights and data protection legislation. As they caused substantial damage to her reputation and ability to earn a living, she seeks damages of £830,000.

[4] Appeal is taken against the sheriff's decision of 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 judgment. The first challenges his findings on their relevance and specification. The second asserts that the sheriff failed to consider them *pro veritate*. The fifth argues that the sheriff erred by regarding some disputed averments as fact.

The sixth argues that the sheriff's decision misrepresented the appellant's averments of misfeasance. To address them, it is first necessary to make some general comments on the appellant's pleadings. The appellant has been without legal representation throughout the proceedings. Her written pleadings are prolix and repetitious. The 52 Articles of Condescendence are not narrated in a logical or chronological sequence. Many contain negative assertions of fact and law, often couched in vague and irrelevant terms. Material which is essential to her case is not incorporated into her pleadings. Though the point was not taken by the respondent and the issue was not explored before us in any detail, positive averments which the appellant makes in some articles of condescendence directly conflict with 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. 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 her a degree of latitude. On a fair and generous reading, she sets out a discernible case to the following effect.

[6] As head of care at the school, the appellant managed its care accommodation service. As its Child Protection Co-ordinator ("CPC") she was responsible for reporting child protection issues to external agencies. The respondent regulated the school's operation of those functions. The appellant's role also required her to register with and be subject to regulation by the Scottish Social Services Council ("SSSC"). Her contract of employment and relevant regulatory authorities required her to follow the school's child protection guidelines, which had been approved by the respondent and Education Scotland.

[7] On or about 24 September 2018, a staff member hand delivered the whistleblowing letter to the head of school. It alleged that (a) a residential childcare worker had 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.

[8] The head of school immediately consulted the appellant about the letter in her capacity as CPC. The appellant assessed that while the letter raised issues which needed investigated, they did not at that stage need to be reported to any external agency as the letter did not allege harm to pupils. Her assessment accorded with the school's child protection guidelines. As the author of the letter was then absent from school as a result of occupational stress and had asked not to be contacted, the head of school immediately replied to the letter and asked her to co-operate with the school's investigation. On 2 October 2018, the author agreed to assist.

[9] However, the school could not then investigate, as a) the letter did not identify the staff members and pupils and b) the October school holidays were about to commence. Matters were then taken out of the school's hands when the author of the letter reported the allegations to the respondent and Police Scotland.

[10] The allegations were then investigated by each of Police Scotland, Perth and Kinross Council's social work department and the respondent's Triage and Risk Assessment Team. On 15 October 2018, social work advised the school that the allegations did not raise child protection concerns or merit investigation. On 19, 22 and 24 October 2018, the Triage and Risk Assessment Team investigated the allegations and interviewed the author of the letter. The author told the investigating team that no harm had come to the pupils. On the last of those dates, the respondent's investigation determined that the allegations did not raise a child protection concern and did not merit further action.

[11] The school did not learn of those developments until 26 October 2018. The head of school then sought clarification from the respondent on whether the school should commence its investigation. On the same date, the respondent sent him an e-mail which stated, "With regard to carrying out your own fact finding investigation … I would advise against that to protect evidence and impartiality".

[12] During an initial referral discussion on 30 October 2018, the respondent failed to disclose the outcome of its own investigation and the author's comments at interview.

[13] Notwithstanding this, on 2 November 2018 the respondent threatened to take enforcement action against the school or to seek its closure as a result of failings on the part of the appellant. Furthermore, it reported to the Registrar of Independent Schools that the staff member's letter had alleged significant harm to pupils of the school, that the appellant and others had failed to invoke the school's child protection policy in relation to it and had failed to advise the respondent about the allegations. The respondent also copied that report to other relevant bodies, including the Scottish Ministers, Education Scotland and Perth and Kinross Council. It did not raise any of these issues with the appellant or seek her views before taking those steps.

[14] On 9 November 2018, the respondent took enforcement action and threatened to force closure of the school unless certain demands were met. On 28 November 2018, it complained to the SSSC that the appellant had failed to appropriately address child protection concerns in the letter and to implement the school's whistleblowing policy.

[15] The respondent's report to the Inspector of Independent Schools wrongly implied that the appellant could not competently manage child protection concerns. It concealed from the school governors, Police Scotland and the Registrar of Independent Schools that the staff member did not allege harm to any pupils at interview. It failed to disclose the

outcome of the interview to the appellant, the head of school, the initial referral discussion, the school's Board of Governors, the Witherslack Group - who were at the time negotiating to take over the school - the Registrar of Independent Schools and Perth and Kinross Council. It failed to disclose to the same persons that it had previously raised concerns about the working practices of the author of the letter. Between 2 and 7 November 2018, the respondent informed the school's Board of Governors that the appellant had ignored or rejected offers of assistance by the respondent when no such offers were made. That led the governors to state that they were forced to close the school, and the Witherslack Group to state that they had been told that the respondent was "threatening to withdraw the licence for the school to operate".

[16] By making false allegations against the appellant, by using threats of reputational damage against the school governors and the Witherslack Group and by improperly seeking to force closure of the school, the respondent and its inspector acted maliciously. The respondent required to act fairly, in accordance with natural justice and human rights and its own policies, specifically that which provided that it could only issue an enforcement notice if failings and poor outcomes for service users existed. None existed before it issued an improvement notice. As the staff member concerned was not working as a residential care worker at the time the concerns arose, the respondent acted *ultra vires* by reporting a matter which did not involve the school's residential care service.

[17] The failures caused the appellant significant reputational damage and loss. Media reports caused catastrophic reputational damage to the school managers. The demands diminished the reputation of the appellant and led the Witherslack Group to withdraw from taking over the school. That prevented the appellant from assuming the role of regional manager for Witherslack following the proposed takeover. The Witherslack Group had

planned on expanding the services to include a primary school facility as well as services within the local area to help school leavers with support and accommodation. They had intimated to the appellant that she would manage these services in addition to her current role at the time. The respondent's actions resulted in the appellant being unable to work, which exacerbated the impact of post-traumatic stress which she already suffered.

**The sheriff's judgement**

[18] The sheriff's judgement is not well constructed and raises further issues. 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 positive averments and her deemed admissions. In general, and 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 and explain the appellant's case on record. It refers to a letter to the head of school from the school's Board of Governors which is not incorporated into the pleadings. Finally, it sustained the respondent's first plea-in-law, which was not insisted upon at debate. On no view can its reasoning be entirely supported.

[19] The sheriff sustained all but one of the respondent's preliminary pleas, including those which argued that the appellant's claims were time-barred.

[20] The sheriff considered that the essential flaw in the appellant's claim was her interpretation that the whistleblower's letter did not disclose an assault. That being so, the appellant considered the respondent's subsequent communication to third parties that there had been assaults at the school was made without probable cause and was malicious.

[21] The sheriff considered the essential flaw in the appellant's case was her 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.

[22] 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.

[23] The sheriff also considered the appellant's negligence claim lacked specification and relevancy. The same was true in respect of the averments alleging defamation and breach of data protection which, in any event, lacked separate pleas-in-law to support them.

[24] 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.

[25] Finally, the sheriff held that the appellant's negligence, defamation and human rights claims were time-barred, lacked specification and relevancy and were not supported by pleas-in-law.

**Submissions for the appellant**

[26] The sheriff erred by holding that the appellant's negligence and misfeasance claims had prescribed. The latter relevantly encompassed her claims for reputational damage and breach of her human rights. Reference was made to *Cornelius* v *London Borough of Hackney* [2002] EWCA Civ 1073.

[27] 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.

[28] 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 appellant'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*. Though it was aware of the allegations, the respondent did not suggest in October 2018 that the appellant acted inappropriately or seek to discuss events with her. Its 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.

[29] 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.

[30] It was accepted that the sheriff held her averments of loss lacked specification and that her 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**

[31] 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.

[32] As the sheriff recorded in his judgment, the appellant conceded at debate that her human rights claim was time-barred as it was not brought within 1 year (Human Rights Act 1998, section 7(5)). Her 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). She 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 she plead-in-law to

that effect. The appellant's attempts to shoehorn those claims into her negligence and misfeasance cases were plainly wrong.

[33] Counsel set out the statutory basis of the respondent's powers and maintained that it possessed 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:

> "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 out with 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)).

[34] 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.

[35] 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 in her 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 complained 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 both malice and damage. *Esto* her averments of malice were sufficient and relevant, she did not challenge the sheriff's determination that her 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 her averments of malice. In any event, it was not supported by a plea-in-law.

[36] While the sheriff erred by finding the appellant's negligence claim was time-barred, he had been correct to conclude that her averments of negligence were irrelevant and lacked specification. The appellant's only averment on proximity was that her 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**

[37] 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.

[38] 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 judgement (paragraphs 46 and 58). 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 her 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.

[39] 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**

[40] 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.

[41] 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).

[42] 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 appellant and the school were 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).

[43] As the school's head of care, the appellant was subject to regulation by the SSSC.

**Assessment of submissions**

[44] 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's lay representative 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. The appellant's seventh ground of appeal, which argued that the sheriff failed to give reasons for his decisions on those issues, also falls to be rejected.

[45] Against that background, the sheriff found that the appellant's negligence claim was time-barred and, in any event, that her 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 reliance on *Caparo* was misplaced; that precedent could only be invoked if the situation were novel. However, even if that authority were 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 their remit as a matter of public policy.

[46] 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 is his analysis of specification and relevancy.

[47] 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 herself 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.

[48] From the various authorities cited, the closest analogy to the appellant's 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 comprised 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".

[49] *Sebry* predated the decision of the UK Supreme Court in *N and another* v *Poole Borough Council* [2019] 2 WLR 1478. We consider that the law on this 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."

[50] 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; 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 herself as a generality; but rather, that by identifying her under reference to her 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.

[51] 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 her which has caused her 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, and the appeal on this ground fails.

[52] 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* [26]).

[53] When those principles are applied to the underlying legal framework and our summary of the case which the appellant offers to prove, the following picture emerges. The letter at the heart of the case made allegations about the 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 section 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. In context, the sheriff did not err by holding that the allegations engaged the respondent's regulatory role. In addition, as the appellant herself avers that the outcome of the three investigations was that the allegations in the letter were baseless, the issue of whether or not the letter alleged assaults on school pupils was

irrelevant to her case. Insofar as her third ground of appeal argues 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.

[54] As regards misfeasance, the appellant argues that the head of school consulted her about the letter. As the letter did not name the staff members or pupils and did not state whether the actions caused the pupils to suffer harm, it was impossible for her to determine whether the allegations engaged her child protection role without investigation. However, for a number of reasons, she could not then investigate. First, she could not contact the author of the letter, who was absent from school as a result of work-related stress and had asked not to be contacted and as the head of school said that he would do so. Second, the school holidays intervened. Third, during the school holidays, and without her knowledge, the author of the letter reported the allegations to police and the respondent. Later, it became obvious that investigation was unnecessary and that her child protection responsibilities were not engaged, as the respondent, police and social work all concluded that the allegations were unfounded and the author of the letter confirmed to the respondent that the pupils in question had not suffered harm. It followed that there was no need for her to take any action. The respondent confirmed as much in its e-mail to the head of school on 26 October 2018.

[55] In that context, the appellant’s averments attempt to advance two points. First, in the exercise of its regulatory function, there was no basis for the respondent to take any action

about the allegations and, second, that the steps which it did take from 2 November 2018 onwards breached the *Micosta* test, as they manifestly inferred malice on its part which was designed to ensure closure of the school and/or caused harm to the appellant. She avers that the respondent and its inspector: sent a report which criticised her to the Registrar of Independent Schools and copied it to other relevant bodies, including the Scottish Ministers; informed the Board of Governors that the appellant was not prepared to investigate the allegations; threatened variously to close the school, cancel its registration or to refuse to sanction the proposed Witherslack Group takeover; reported the appellant's conduct to her own regulatory body; and that the degree of malice was exacerbated by the respondent's failure to refer to the investigation outcomes in its reports to the relevant bodies.

[56] 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.

[57] 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. They also offer to prove an ulterior motive (as in *Philp*), in this case a desire on the part of the respondent to close the school. Importantly, she 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.

[58] 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 went on to allege. As has been observed in relation to other aspects of the sheriff's judgment, he was constrained by the pleadings. Accordingly, 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.

[59] 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 whistleblower 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.

[60] The sheriff was therefore correct to hold at paragraph 51 of his Note that the:

> "school/residential facility dichotomy is irrelevant: the pursuer was in the school building but was also the registered care manager"

and that "the buildings have to be seen as a unit for the purposes of the allegations."

[61] 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**

[62] For the foregoing reasons, we shall delete the word "one" 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.