SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 22
PD301/20

Lord Justice Clerk
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the cause

by

NM

Pursuer and Reclaimer

against

(FIRST) GRAEME HENDERSON and (SECOND) SCOTTISH AMBULANCE SERVICE

Defenders and Respondents

Pursuer and Reclaimer: Davie KC, Fraser; Drummond Miller LLP
First Defender and Respondent: Dewar KC; Urquharts (for Livingston Brown, Glasgow)
Second Defender and Respondent: Pugh KC, Bergin; NHS Central Legal Office

15 July 2025

Introduction and background

[1] In this reclaiming motion (appeal), NM, the pursuer and reclaimer, claims that the Lord Ordinary was wrong to decide that her direct case of breach of duty of care against the second defender and respondent, the Scottish Ambulance Service, was irrelevant in law. She seeks a proof on the entirety of her pleadings on record. The Scottish Ambulance

Service contends that the judge was correct to conclude that the direct case against it for breach of duty was irrelevant, but cross-appeals on the issue of their vicarious liability for the actings of their employee, the first defender and respondent, Graeme Henderson, which the Lord Ordinary allowed to go to proof. Mr Henderson was represented at the hearing before us but played no active part in it.

[2] NM seeks damages for personal injury. Her action is brought under chapter 43 of the Rules of the Court of Session. That procedure involves an abbreviated written case, but one that still requires fair notice to be given of the legal basis of a party's claim. NM seeks to make out two cases against the Scottish Ambulance Service. The first is a case of vicarious liability against them as having responsibility for the wrongdoing of Mr Henderson as their employee. The second case is a direct case brought against them for their own negligence.

[3] When the case was argued before the Lord Ordinary, the timing and circumstances of NM's use of the Service may have lacked clarity. This was remedied by an amendment procedure while the case was before us. The references below to NM's written case are to the amended pleadings. An issue was also raised in relation to the competency of the reclaiming motion, which purported to be taken against the Lord Ordinary's Opinion, rather than an interlocutor (order of court). The order that accompanied the issued Opinion merely fixed a hearing to discuss which averments required to be deleted in light of the judge's decision. Before us the parties sought to address that issue by agreeing at least most of the alterations required if the Lord Ordinary's Opinion was correct in law, although no concession was made in relation to the competency challenge.

[4] In her written case, NM avers that she has been a regular user of the Ambulance Service since at least 4 January 2015. She is a vulnerable user who has regularly overdosed and required transportation to hospital by ambulance. She offers to prove that at some point

prior to 23 February 2015 a female service user (LM) complained that the first defender had, the previous year, during the course of his employment as an ambulance technician, touched her inappropriately. LM's complaint was reported to the police and the Service was made aware of that. The incident was alleged to have happened in the rear of the ambulance in which LM was being transported. NM offers to prove that the second respondent failed to investigate LM's complaint adequately and then re-instated Mr Henderson to normal duties following a decision by Police Scotland not to progress the criminal case. There are averments about a further allegation of Mr Henderson sending inappropriate text messages to another female colleague (PM) in 2018. In 2019 the Service dismissed Mr Henderson from his employment on the grounds of gross misconduct following a complaint made by NM in 2018.

[5] It is claimed that the Service placed Mr Henderson in a position of trust, permitting him access to the pursuer when she was vulnerable. It allowed him access to her medical history. It is averred that through his position and employment, Mr Henderson established contact with the pursuer, gained knowledge of her vulnerabilities and her trust which provided an opportunity for him to take advantage of her. It is averred that he persisted in a course of abusive conduct against NM during several months in 2017.

[6] The nub of the pursuer's direct case is that, in light of the complaint made in 2015 by LM, the Service knew or ought to have known that the first respondent posed a risk to vulnerable females such as the pursuer who had reason to use its service. As they had failed to address the complaint properly and remove Mr Henderson from duty, they had exposed an identifiable class of vulnerable individuals such as the pursuer who would have contact with the first respondent in his role and who were then foreseeably at risk from his behaviour.

Submissions for the reclaimer

(i) The direct negligence case

[7] It is well-established that only rarely will a personal injury case be dismissed prior to evidence (*Miller* v *South Scotland Electricity Board* [1958] SC (HL) 20). It was clear from statement of fact 7 that NM was offering to prove that a competent investigation would have resulted in the dismissal of the first respondent. Contrary to the position advanced by the Service, there was nothing novel about the direct case alleged against them. This was not a situation where the court required to decide how to approach consideration of a novel case. The facts might be unusual but no novel proposition of law required to be advanced and the case could be accommodated within established principles. The Service had a duty to take reasonable care to avoid acts or omissions which it could reasonably foresee might cause harm to persons who might be affected by those acts or omissions.

[8] The Lord Ordinary had erred in his approach to the issue of proximity in a manner that appeared somewhat circular. On the basis of his analysis of the existence of some temporal distance between the negligence and the harm, he had decided that there was no relationship of proximity between NM and the Service that placed her at a greater risk than the general public. He considered that it went too far to contend that every patient who called an ambulance was owed a duty of care of the nature alleged in the present case (Lord Ordinary's opinion,[2024] CSOH 84, at paragraphs [57] and [58]). That conclusion sought to rely on the decision in *Robinson* v *The Chief Constable of West Yorkshire Police* [2018] AC 736. While that case provided a useful articulation of how to approach cases where it is thought that there might be a novel point in law, this was not such a case. In *Robinson* the court had cited the dictum of Lord Bridge in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605

and considered that the decision had been misunderstood. The import of *Caparo* was that it was only *"… in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised"* (*Robinson,* per Lord Reed at paragraph 27). The Lord Ordinary in this case had failed to address properly stage one of the established approach, namely to consider whether the existence or non-existence of a duty of care can be said to be owed on established principles. He had analysed matters on the assumption that it was a novel case. In *Robinson* the court ultimately accepted that the police owed a duty of care to the public not to increase the risk of harm to them and the pursuer ultimately succeeded on that basis. The facts had been unusual but the case did not fall outside the established principles on the law.

[9] It had also been an error to rely on *Kent* v *Griffiths* [2000] PIQR 57 and *Aitken* v *Scottish Ambulance Service and another* [2011] CSOH 49 to distinguish between the established duty of care on the part of an ambulance service after it has accepted a call requesting an ambulance and the situation of those who may possibly in the future become ambulance service users. The correct question to ask was whether the reclaimer fell within the class of persons who ought to be in contemplation of the ambulance service. Asking an initial question about when someone became a service user was the wrong starting point. In *Thomson* v *Scottish Ministers* [2013] SC 628 the court had explored what created a "special relationship" but that case was in the category of being a special and novel one. By conflating the notions of "analogous circumstances" and "existing principle", the Lord Ordinary had made the leap from there being no analogous cases (which the reclaimer accepts because the facts here are unusual) to concluding that in the absence of analogous cases **on the facts** the present case did not fall within established principles. On one view,

the only authority required for the pursuer to illustrate the point was *Donoghue* v *Stevenson* [1932] SC (HL) 31. On the facts that NM offers to prove, the Service had a duty to take care to avoid exposing her to harm as she would be closely and directly affected by their acts or omissions.

[10] Even if the analysis on behalf of NM was wrong and this is a novel case where the tripartite test in *Caparo* has to be applied, it would be fair, just and reasonable. The Lord Ordinary had failed to give sufficient reasons for the contrary conclusion. If the Service was unaware of the risk posed by Mr Henderson as a result of their own negligence, they should not benefit from that. A benevolent approach should be taken to NM's averments about what would have occurred but for that negligence (*Keefe* v *Isle of Man Steam Packet* [2010] EWCA Civ 683).

(ii) Vicarious liability

[11] On the cross-appeal, the Lord Ordinary was correct in concluding that the vicarious liability case should go to proof. There was no dispute that stage 1 of the stage 2 test on vicarious liability set out by Lord Burrows in *Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB* [2023] 2 WLR 953 at paragraphs 48-58 was met. Whether the stage 2 "close connection" test is also met will require evidence of all the relevant facts and circumstances.

[12] NM avers a course of conduct on the part of Mr Henderson which she states commenced at the point when he had professional contact with her through the auspices of his work for the Service. The Lord Ordinary had been correct to consider the entirety of the conduct. In addition to averring the necessary close connection, NM specifically avers that Mr Henderson himself maintained to her that his relationship with her was in furtherance of his employment and that the Service, in dismissing Mr Henderson, effectively impliedly

accepted that there was a close connection between his behaviour and the workplace. Evidence was required before such essentially subjective views could be said to point in favour of the necessary close connection. It was only after proof that the significance or otherwise of the views taken at the time could be properly analysed.

[13] NM's case as pled went beyond suggesting only that Mr Henderson's employment offered him the opportunity to meet her. She offers to prove that throughout his employment Mr Henderson was put in a position of trust, interacting with vulnerable patients when they were at their most vulnerable. He had been put in a position of caring for NM when she was at her lowest. The access he had to personal information about her medical history, her living arrangements and her lifestyle all arose under the auspices of his employment. It was for NM to prove that the circumstances went beyond Mr Henderson simply meeting her through his employment. Much depended on whether it could be concluded that there was an increased risk of exploitation arising from the very nature of the type of trust and authority bestowed in the context of someone's employment - *Lister* v *Hesley Hall Limited* [2002] 1 AC 215, correctly relied upon by the Lord Ordinary at paragraph 42 of his opinion. The vicarious liability case was not bound to fail.

Submissions for the second respondent

(i) The direct negligence case against the second respondent

[14] The Lord Ordinary had been correct to identify the relevant question as being whether a duty of care exists and if so to consider its resultant scope. The question was one of law, to be answered without evidence. It had been correct to pose the question of whether the claimed duty is novel or whether it can be answered by the application of existing principles of negligence under reference to *Robinson* v *Chief Constable of West*

Yorkshire Police. The Lord Ordinary had stated in terms at paragraph 54 that the case was novel and so he had applied the tripartite test set out in *Caparo*. He concluded correctly that there was no relationship of proximity between NM and the Service such as to give rise to a relevant duty of care.

[15] There is no authoritative determination on whether a duty of care arises in the present case. Accordingly, the closest analogies in existing law required to be considered together with reasons for and against imposing liability in order to decide whether the existence of a duty of care would be just and reasonable (*Robinson*, per Lord Reed at paragraph 29). A conclusion that there were no authorities analogous to a contention that a "vulnerable individual who might at some later stage be dealt with in an ambulance is owed a duty of care by the Ambulance Service" (paragraph 54 of the Lord Ordinary's opinion) was one which the Lord Ordinary was entitled to make. Although in the amended pleadings prior contact between NM and the Service before February 2015 is now averred, that did not fundamentally alter the conclusion reached at first instance.

[16] In the absence of analogous cases, the Lord Ordinary was in the territory of a novel duty of care and so the question of whether there was a sufficient relationship of proximity had to be considered. The key recent authority on that in this jurisdiction is *Thomson* v *Scottish Ministers* 2013 SC 628. There the Lord President (Carloway) confirmed that in the context of deliberate wrongdoing, proximity depended on there being "a special relationship which exposed [the deceased or here NM] to a particular risk of damage as a result of negligence by the defenders in the context of that relationship". The Lord Ordinary had been correct in holding (at paragraph 57) that NM was not "in any defined class of persons under special contemplation of the second defenders". Even with the additional averments that NM had been a regular user of the Ambulance Service since 4 January 2015

and that she was a vulnerable female, the issue remained one of proximity. Any duty of care arising between a patient and the Ambulance Service so arises when the call for an ambulance is accepted (*Kent* v *Griffiths*). The duty persists for the duration that the user is a patient of or in the care of the Service. The proposition that once someone comes into contact with the Service any duty owed to them at that point persists indefinitely has no foundation in authority.

[17] The purpose of proximity was to allow consideration of who ought to have been in the contemplation of an alleged wrongdoer at the time they committed a negligent act. Previous and prospective relationships with the alleged wrongdoer were not relevant to that core question.

[18] In any event, an abstract duty of care would not be sufficient. The question was always to identify the sort of harm that ought to have been prevented (*Meadows* v *Khan* [2022] AC 852 at paragraphs 33 and 34). Accordingly, the Lord Ordinary had been correct to state that it went too far to contend that every patient calling for or being in an ambulance was owed a duty of care, the scope of which included the consequences of not having properly investigated the ambulance technician's previous conduct.

(ii) Vicarious liability

[19] In analysing NM's case insofar as it was based on vicarious liability, the Lord Ordinary had fallen into error in two material respects: (i) he had failed to properly direct himself on the question of connection between Mr Henderson's actions and the duties he was employed to undertake and (ii) in failing to recognise that NM's averments, even taken at their highest, would establish only that Mr Henderson's employment with the service afforded him no more than mere opportunity to meet the pursuer. The two stage

test for the imposition of vicarious liability had been established in *Various Claimants* v *Barclays Bank Plc* [2020] AC 973. This case was concerned with the second limb of the test, namely the connection between the employer-employee relationship and the wrongdoer's conduct.

[20] As Lord Burrows had put it in *Trustees of the Barry Congregation of Jehovah's Witnesses*, a causal connection between the wrongful conduct and the tortfeasor's authorised activities was not sufficient to satisfy the second limb of the test.

[21] NM's pleadings disclose the first allegedly inappropriate interaction involving Mr Henderson occurred on 17 April 2017. It is said that he started chatting with her and reminded her of their previous meeting (in November 2016 when she had called an ambulance although no inappropriate conduct is averred). It is said that Mr Henderson showed an interest in NM and advised her that he would make sure she was seen by a "good doctor". It is claimed that he then asked NM for her telephone number on arrival at hospital and she provided that. He sent messages to her while she was in hospital and arranged to collect her on discharge. Thereafter it is alleged that various instances of rape, sexual assault and other abusive behaviour occurred, all constituting a course of conduct amounting to harassment. None of those instances of wrongful conduct are said to have taken place while Mr Henderson was on duty as an ambulance technician. The only averment purporting to connect any conduct with his employment was in relation to his access to NM and her medical history through his position and employment. It is averred that through that he established contact with her, gained knowledge of her vulnerabilities and her trust and that this provided an opportunity for him to take advantage of her.

[22] Against that background, the Lord Ordinary had been wrong to conclude that the hearing of evidence was necessary to determine the second limb of the close connection test.

NM's pleadings were insufficient to allow her to establish the necessary close connection. On her own pleadings, the events that post-dated 17 April 2017 were removed in time and place from Mr Henderson's employment. None of the averred facts and circumstances demonstrated how Mr Henderson's conduct could be said to be in furtherance of the activities of the Scottish Ambulance Service.

[23] Further, it had been wrong for the Lord Ordinary to place significance on Mr Henderson's own subjective view that his conduct was connected to his employment. Such a subjective view was not sufficient to establish the necessary close connection. It would in any event run contrary to the test as set out in *Trustees of the Barry Congregation of Jehovah's Witnesses* if the subjective view of those involved was allowed to be determinative of the issues. It was well-established that opportunity arising through employment was not sufficient of itself to impose vicarious liability even when it arises in the context of a relationship of trust (*Lister* v *Hesley Hall Limited*, per Lord Clyde at paragraph 45 and *Trustees of the Barry Congregation of Jehovah's Witnesses*, per Lord Burrows at paragraph 70).

Analysis and decision

[24] Dealing first with the question of whether the reclaiming motion is competent, it is indisputable that the interlocutor reclaimed against is not on its face one that disposes of part of the merits of the cause. The requirements of RCS 38.2(5)(a) are not met. Further, the rules of court do not permit a reclaiming motion against an opinion of a judge but only against an interlocutor. The difficulty that has arisen here is resonant of that which arose in *McCluskey* v *Scott Wilson Scotland Limited* 2024 SLT 863. That case was one of a group of personal injuries actions in which a debate had taken place. The argument related to *res judicata*. Having issued an opinion, the Lord Ordinary decided to put the case out By Order

to be addressed on a specific issue and whether it had been dealt with in a previous action. A reclaiming motion against the decision to refuse the plea of *res judicata* was successful but the First Division commented about the difficulties that had arisen because of the procedure chosen in the Outer House. The court commented:

> "By Orders following a debate or proof ought to be relatively rare events; they have the potential to add further unnecessary procedure and expense. Parties ought to have addressed all reasonably likely outcomes following the evidence and/or submissions. The Lord Ordinary ought to have dealt with all the issues arising; if necessary having sought further submissions, preferably in writing, in the event of an issue unexpectedly arising at *avizandum*" (paragraph 41, per Lord President (Carloway)).

[25] The origin of the difficulty that has arisen in this case was also the issue of an Opinion, which determined that one of NM's two cases on liability would not advance to proof but without that being reflected in the court's order. The problem has been partially resolved by a joint minute before this court agreeing most of the amendments to the pleadings that would logically follow from the Lord Ordinary's opinion. In light of the decision we have reached, explained below, we have found it unnecessary to comment in any detail on those. Having heard full argument on the issues of duty of care and vicarious liability, we have no hesitation in invoking our inherent power to decide those matters of substance. It would be wholly inimical to the administration of justice to determine the matter on the basis of its unfortunate procedural history. We reiterate that no such procedural difficulties will arise if the comments in *McCluskey* v *Scott Wilson Scotland Limited* are heeded and judges take care to ensure that their opinions, taken together with the accompanying interlocutor, determine all issues in dispute before them at a hearing of any kind.

[26] Turning to the arguments about the case averring a direct duty of care by the Scottish Ambulance Service to NM, this turns on whether or not it can be characterised as one raising

a novel duty of care or whether it can fit into existing principles of the law of negligence. The applicable general principle was articulated by Lord Atkin in *Donoghue* v *Stevenson* (at page 44) by posing and answering the question of who, in law, constitutes one's neighbour for the purpose of ascertaining whether a duty of reasonable care is owed. He described such a duty as being applicable to all *"persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*." Lord Macmillan (at page 70) spoke of the circumstances having to establish a relationship between the parties, without any suggestion that the relationship with an individual claimant required to exist at the time of the alleged negligence. Self-evidently, the manufacturer of the aerated water in that case could not have had Mrs Donoghue as an individual in contemplation. She was, however, in a class of person with whom the necessary relationship existed, as the manufacturer ought to have had customers such as her in contemplation when they omitted to take adequate precautions in storing the empty bottles. It is accordingly long established that the concept of a breach of duty of care is sufficiently flexible such as to permit the court to decide that new and/or prospective relationships are sufficiently proximate to fall within the ambit of a duty of care.

[27] The modern authorities have focused on what is pled in considering whether an alleged wrongdoer should have had the victim in their contemplation when considering proximity. In *Thomson* v *Scottish Ministers* 2013 SC 628 the Lord Justice Clerk (Carloway) opined that there must be *"a special relationship which exposed [in that case the deceased] to a particular risk of damage as a result of negligence by the defenders in the context of that relationship (ie Dorset Yacht Co,* Lord Diplock, p 1070)…*"* (paragraph 56). That case was decided exclusively on the basis of established principles. The claim had been brought by the mother

of someone murdered by a prisoner on "short leave". As there was nothing averred in that case which, if proved, would establish that any class of person would be a particular target of the released prisoner's violence, there was no person or group of people that the prison service ought to have had in contemplation. *Thomson* was decided before the UK Supreme Court decision in *Robinson,* but Lord Carloway emphasised (at paragraph 56) that, as "fairness justice and reasonableness" were already ingrained into the existing defining principles, there was no need for a court to revisit those separately in a case that fell within a recognised category. Lord Reed's subsequent reference in *Robinson* (at paragraph 29) to those considerations only requiring scrutiny in a novel type of case, clarifies that the primary task must be to examine the case against established principles and decide whether they provide an answer.

[28] In the present case, the Lord Ordinary held that the pursuer was not "in any defined class of persons under special contemplation of the second defenders" (paragraph 57). However, in our view NM's case as pled is at least capable of bringing her within that ambit. Even prior to the amendment of the pleadings, she had averred that she was in a particular class, namely a vulnerable young woman who had used and could be anticipated to continue using the Ambulance Service. The amendment has clarified that she had been a regular user of the Ambulance Service since before the allegedly inept investigation by the service into Mr Henderson's conduct towards LM. However, the necessary "special relationship" would not in our view require a pursuer such as NM to have previously used the service. There are clear averments that, if proved, may establish that she was one of an identifiable class of people likely to use the Service such that they should have had her in their contemplation when placing Mr Henderson on front line duties.

[29] Further, on the basis of NM's pleadings, she could establish that there was a special risk of harm to her due to the actions of the Service in failing to investigate through to an appropriate conclusion the allegations made by LM. That failure may have led to his continued work as an ambulance technician in the course of which he posed a risk to vulnerable women such as NM. If she is able to prove the key averments about the complaint by LM, a failure properly to investigate and reach a conclusion that avoided a continuing danger to vulnerable women such as her could show that the Service knew (or ought to have known) that continuing to deploy Mr Henderson on frontline duties created such a risk. We conclude that if the essential elements of the pursuer's case are proved, this case could be decided on the application of existing principles.

[30] For these reasons, we do not consider that NM's direct case against the Scottish Ambulance Service is bound to fail. It should not be dismissed at this stage. The application of the law to the facts will require to be determined after factual inquiry.

[31] Had we been persuaded that NM's case did not fit into the established ambit of duties of care, we would have been attracted by the argument that it would in any event be fair, just and reasonable to allow NM's claim to proceed in the particular circumstances averred. However, as we consider that the circumstances of this case do not require a determination on that point, we express no concluded view.

[32] On the cross-appeal the Ambulance Service maintains that the close connection test is not met on the face of NM's pleadings. The difficulty with that argument is that the connection between the employer-employee relationship and the alleged wrongdoer's conduct is particularly fact sensitive. This was emphasised in *Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB* when Lord Burrows emphasised (at paragraph 58) that the task of the court was to consider carefully "on its facts" that link. In the present case

much may depend on the exploration of those facts at a level of detail only available after hearing evidence.

[33] The Lord Ordinary applied his mind to the relevant authorities in relation to vicarious liability. He acknowledged that there was some force in the submissions that possibly none of the alleged wrongful conduct occurred while Mr Henderson was actually at work as an ambulance technician (paragraph 41 of his opinion). However, in the context of a chapter 43 case with abbreviated pleadings we consider that there is a sufficient basis for inquiry. The connection between Mr Henderson's employment and his access to NM's medical records and details about her personal circumstances, requires to be explored in evidence before deciding whether the circumstances go beyond the mere holding of a position of trust. Mr Henderson's subjective view that he was carrying out employment functions during the course of his "relationship" with NM also requires examination. It is an unusual feature of the factual matrix in this case.

[34] The evidence in relation to vicarious liability has a very significant overlap with that on the direct case that we have determined is habile for proof. We consider that the two aspects of NM's claim should be heard together.

[35] For the reasons given, we will allow the reclaiming motion and recall the Lord Ordinary's interlocutor of 23 August 2024. We will refuse the cross-appeal and allow a proof on the pleadings as now amended, reserving meantime all questions of expenses.