SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF COURT

[2018] SC EDIN 7

PN641-17

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

LOUISE STARK

Pursuer

against

LOTHIAN NHS BOARD, Waverley Gate, 2-4 Waterloo Place, Edinburgh, EH1 3EG

Defender

Act: MacMillan
Alt: Lugton

Edinburgh, 14 February 2018

The sheriff, having resumed consideration of the cause, makes the following findings in fact:

1. The pursuer is Louise Stark. She resides in Edinburgh. She is 32 years of age. She was at the material time employed by the defender as a staff nurse based at the Marchhall Centre, 3 Marchhall Crescent, Edinburgh.

2. The defender is Lothian Health Board, Waverley Gate, 2-4 Waterloo Place, Edinburgh, EH1 3EG.

3. On 25 March 2014, the pursuer was working in the course of her employment with the defender at the Royal Edinburgh Hospital, within the Rum Unit of the Islay Centre there. She was providing a therapeutic art session to a patient, AB.

4. AB suffered from learning disabilities and autism. He was known to become violent towards staff and, in particular, to hit and bite. He was known at times to be opportunistic in terms of when he exhibited violence. He was also known at times to give verbal warnings to the effect "I am going to hit" [and/or bite], on which he carried

through. Often these episodes of physical aggression towards staff had no obvious antecedent.

5. The defender had identified and assessed the risk that AB would attack members of staff and other patients. It had produced an Environmental Risk Management Plan that placed AB on a support/observation level of "1:1 Constant at all times" (No 6/1/2/23 of process). This meant that one staff member "should be constantly aware of the precise whereabouts of [AB] through visual observation or hearing". There was a further plan (6/1/2/5 of process) which described how staff should deal with physical aggression on the part of AB.

6. The defender had also produced a set of Guidelines for offering sessions in-house to AB (no 6/1/1 of process). Such sessions included artwork. The guidelines were to "ensure safety of AB, staff and others in the vicinity" and included a guideline that two members of staff were to knock on AB's door and offer him the planned session for that day. The final guideline was in the following terms:

> "Should AB display any self injurious or physical aggression towards staff during process guidelines for management of these to be followed."

7. The said Guidelines adequately identified the risk of aggression by AB towards members of staff, and instructed staff how to deal with aggression which did erupt.

8. The defender had also produced a document entitled "Interactive Activity Session" (number 6/3/9[1] of process). This provided for a staffing ratio for sessions, including art sessions, of one Marchhall member of staff and one Rum Unit member of staff.

9. On 25 March 2014, the care plan was followed in that there was an initial discussion upon the pursuer's arrival at the Rum Unit between the pursuer and the nurse in charge of the unit on the day, Staff Nurse Milligan. It was decided during that discussion that

[1] The numbering of productions is illogical – technically this production, which is the only item in the defender's third inventory, should either be 6/3/1 or simply 6/9 but I have adopted the numbering used by the defender.

Nursing Assistant Duncan Morrison would be the second member of staff allocated to the art session with AB.

10. Again following the care plan, both the pursuer and Morrison went to AB's room and invited him to the art session which had been set up in the dining room of the Rum Unit. The pursuer and Morrison then went to the dining room to await AB's arrival, for the session to commence.

11. The dining room was situated at the end of a corridor, from which it was accessed through double doors. An office was adjacent to the dining room. The door to the office and the double doors into the dining room were at right angles to each other. From inside the office it was possible to see the corridor and the entrance to the dining room.

12. The table which the pursuer set up with art equipment for the session with AB was the first table on the right after entering the dining room through the double doors. It was a round table, having a diameter of about 45 inches. There were two or three seats at the table. The table was close to the double doors.

13. When the pursuer and Morrison returned to the dining room, both initially sat at the table.

14. When AB arrived at the dining room, he sat at the table. Looking from the entrance to the dining room and picturing the table as a clock-face, he sat at about 9 o'clock. The pursuer sat at about 5 or 6 o'clock. Morrison stood up and went to stand by the double doors.

15. The art sessions were of short duration, typically one or two minutes, and never longer than ten minutes. Two minutes duration was a long time for AB for an art session.

16. AB usually sat at a table on the left. The nurse leading the art session usually sat directly opposite him (that is, if he had been seated at 9 o'clock, the nurse would sit at 3 o'clock).

17. The pursuer had a personal alarm in her possession.

18. Morrison stood at the threshold of the doors throughout the art session. From there he was able to see and hear both the pursuer and AB.

19. Another nurse, Kristina Biggar, was standing either in the corridor or just inside the office.

20. Staff Nurse Natalie Milligan was in the office, sitting at a desk and talking to Kristina Biggar. They were discussing an incident which had taken place before the pursuer arrived, involving another patient, T. That incident was no longer ongoing at the time of AB's art session.

21. Both Milligan and Biggar were able to see Morrison standing at the dining room entrance.

22. Suddenly and without warning, AB stood up. He grabbed the pursuer's right arm and bit her on the upper right arm.

23. The pursuer was unable to get away from AB. She did not sound her personal alarm. She screamed.

24. Morrison and Biggar heard her scream. Morrison, Biggar and Milligan all ran to her aid. Morrison was first to reach the pursuer, followed by Biggar and then Milligan.

25. Morrison and Biggar placed AB in a figure of four hold.

26. The incident was recorded in the defender's Datix system by Milligan. Number 5/7 of process is a copy of the Datix event form which she completed. It makes no mention of inadequate staff ratio, nor of inadequate supervision.

27. There is no means of knowing what prompted AB to act in the way he did.

28. The pursuer was injured as a consequence of being bitten. In particular she sustained a physical bite injury which healed but left a scar, and a psychological injury in the form of an adjustment disorder.

29. The pursuer's loss is agreed by the parties to amount to £10,000 inclusive of interest to 21 November 2017, net of any liability the defender may have in terms of the Social Security (Recovery of Benefits) Act 1997.

Finds in law:

1. This court has jurisdiction.
2. The defender did not fail to provide the pursuer with a safe place of work and safe system of work at common law.
3. The pursuer's injury was not caused by any breach of duty on the part of Morrison.

Therefore grants decree of absolvitor in favour of the defender; reserves meantime all questions of expenses and appoints parties to be heard thereon at 9.30 am on 23 March 2018 within the Sheriff Courthouse, Chambers Street, Edinburgh.

Note

Introduction

[1] This is a personal injuries action in which the pursuer, a staff nurse employed by the defender, sues for damages in respect of injuries she sustained when she was bitten by a patient, AB, at the Royal Edinburgh Hospital in the course of an art session which she was delivering to AB on 25 March 2014. The action proceeded to proof before me on 21, 22 and 24 November 2017. The grounds of action are discussed more fully below, but at this stage it is sufficient to note that the pursuer does not allege that the defender had not properly

assessed the risk of AB assaulting her. Rather she claims, first, that the defender is directly liable to her because the ward was understaffed on the day in question; and, second, that the defender is vicariously liable for the acts and omissions of a nursing assistant, Duncan Morrison, who, it is alleged, failed to follow the care plans which the defender had in place for dealing with AB's aggression.

The defender's minute of amendment

[2] Before the commencement of the proof, an issue arose as to the extent to which the pleadings should be amended in terms of the defender's minute of amendment and the pursuer's answers thereto. The entire amendment and answers process was somewhat unusual. Both parties fundamentally changed the position that they had hitherto adopted on record until shortly before the proof. A major issue between the parties was the degree of supervision which there ought to have been of AB while the session was taking place. The pursuer's original case was that there ought to have been 2:1 supervision but that no second staff member was available for the session. The defender's response to that was that 1:1 supervision was sufficient. However, a document (number 6/3/9 of process) came to light of which the defender (or at least, those conducting the litigation) had been unaware which did require 2:1 supervision, hence the need for the defender to amend its pleadings. In its minute of amendment, the defender now averred that there had after all been such supervision. There was no opposition by the pursuer to the amendment, but the pursuer in her answers sought to expand her own pleadings, not only by answering the defender's amendment (which she did by accepting that a second staff member had after all been supervising, but had left her on her own with AB, which was a significant deviation from her previous position that there had never been a second member of staff) but by

introducing new averments unrelated to the minute of amendment. Counsel for the defender objected to three passages in the answers, submitting that the pleadings should not be allowed to be amended in terms thereof. In the event, two of the offending passages were not insisted in by counsel for the pursuer, and it is unnecessary to comment further thereon. As regards the third passage, which introduced averments directed towards an attack on the defender's risk assessment documents, while the significance and relevancy of the averments was unclear, I did allow the pleadings to be amended in terms thereof, in the interests of overall fairness, given that the defender had itself introduced its complete documentation only at a very late stage and it seemed to me that the pursuer should be afforded some latitude in being allowed to respond to, and criticise, same. I also allowed a supplementary report by the pursuer's expert, Mr Bradley, commenting on the documentation, to be lodged as number 5/9 of process.

Joint Minute/issue for proof

[3] A joint minute of admissions was also tendered at the start of the proof. At that time, quantum had not been agreed. However, parties did manage to agree quantum (at £10,000 inclusive of interest to the date of the proof) by lunchtime on the first day of the proof, which meant that, to all intents and purposes, the proof proceeded solely on the issue of liability (and contributory negligence).

[4] Evidence was given by the pursuer and, on her behalf, by Patricia Anderson, a nursing assistant, and by Patrick Bradley, an expert. For the defender, evidence was given by Duncan Morrison, a nursing assistant, Kristina Biggar, also a nursing assistant and Natalie Milligan, a staff nurse.

The pleadings

[5] Before going on to consider the evidence (much of which was given under reservation of its relevancy), it is convenient at this stage, so as to put the evidence in context, to say something about the pleadings, and to consider the case made by the pursuer against the defender which the defender had to meet at proof.

[6] The pursuer's averments about the incident, and fault, are contained within stat. 4(i) of the record as amended. They are somewhat confused, intermingling averments of how the incident happened with averments of fault. It is convenient to re-order them as follows. Insofar as material, the averments about the incident itself are as follows[2]:

> "On or about 25 March 2014 the pursuer was working in the course of her employment with the defender at its Royal Edinburgh Hospital. She was working within the Rum Unit of the Islay Centre. The pursuer was required to attend to a patient, AB. She was to conduct an art session with him on said date. Whilst she was working with AB in the dining room, he stood up and said, 'I'm going to hit'. He grabbed the pursuer's right arm. She screamed for help, but no-one was nearby to help. She was unable to reach her alarm by reason of AB's grip on her arm. The pursuer is 5'4" tall and of light build. AB is 5'11" tall and weighs over 15 stones. AB then grabbed the pursuer by the right elbow and then bit her on the arm… When the pursuer arrived in the Unit on said date she was given a briefing on AB by Nurse Natalie Milligan. Nurse Milligan advised the pursuer that there was no indication from AB's behaviour that day so far that his art session should not go ahead. Conform to the defender's Guidelines For Offering Session In House, the pursuer went to AB's room, knocked on his door and offered him an art session. Conform to said Guidelines, she was accompanied by another nurse, Duncan Morrison. Having offered AB an art session the pursuer and Duncan Morrison retreated to a table in the dining room at which said art sessions are habitually carried out with 2:1 supervision…They were joined at said table by AB who had followed them out from his room. He sat in his customary seat. There were four patients on the ward. When AB's art session commenced two patients were in their rooms. A third patient was in the corridor outside the dining room. The said patient frequently exhibited challenging behaviour. His propensity to do so was well known to the defender. He frequently became aggressive and required to be restrained. Apart from the pursuer, there were only three other members of staff on the ward. Without warning or consulting with the pursuer, Duncan Morrison left the table…The pursuer was left on her own with AB. AB could hear the sounds of the said other patient being restrained.

[2] For consistency, I have changed "defenders" to "defender" throughout.

Further the presence of the pursuer on her own with him was a break from the routine he was used to."

The pursuer's averments about fault are as follows:

"AB is 40 years of age and had been resident within the Islay Centre for the previous 15 years. He has learning disabilities, challenging behaviour, depression, anxiety, and autism. His behaviour is such that a buzzer sounds if he leaves his room alone to alert staff. He is very regularly aggressive, and is often secluded in a seclusion room as he attacks staff and other patients. AB's art sessions are always conducted with two members of staff present. He is used to routine and can become aggressive if his routine is broken. Other patients are diverted away from the dining room when AB is taking an art session. The pursuer and her colleague, Patricia Anderson, were assigned as a team to provide AB with care, including art sessions. They came to the Rum Unit from March Hall Unit for the specific purpose of providing AB with his art session. The rationale for having 2:1 staffing during any intensive session, where staff are required to engage in a more direct manner with the patient, is that this is known to be anxiety provoking at times and can lead to sudden episodes of physical violence from the patient. This, therefore, is to safeguard staff and ensure staff are able to manage episodes quickly and effectively. The defender knew that AB was a very difficult patient to manage. He was known to be at risk of assault by hitting and biting staff, particularly when anxious or when with unfamiliar staff or when there was an insufficient number of staff. Art therapy sessions were specifically indicated as a risk increasing factor. At the time of that assault Patricia Anderson was on sick leave… Mr Morrison was expected in terms of the care plans for AB for the interactive activity session to be carrying out constant observations of AB on a sight and sound basis. In all previous art sessions, the staff member supervising AB had been standing nearby. Policies detailing observation should be clear and unambiguous in terms of role, responsibilities, reaction and reporting. In the Wallace House care plan documents for AB neither role responsibility nor reaction are clearly articulated for peripatetic staff such as the pursuer… Duncan Morrison knew, or ought to have known, that AB was unpredictable and prone to violence and aggression towards staff members. His departure from the table was in breach of the defender's Care Plan for Interactivity Activity Sessions with AB. Duncan Morrison knew, or ought to have known, that the pursuer should not have been left on her own with AB. He knew or ought to have known that in so doing he was leaving the pursuer in a vulnerable position with a patient whom he knew to be unpredictable and aggressive… In such circumstances, it was reasonably foreseeable that AB would become unsettled and aggressive. It was reasonably foreseeable that if she was left on her own in said circumstances the pursuer would be assaulted by AB. The defender and said Duncan Morrison failed to follow the care plan for AB, and in doing so, caused the pursuer's injury. The defender failed to see to it that there were adequate numbers of staff in the ward."

[7] Various observations fall to be made about these averments. First, the pursuer clearly and unambiguously avers that the incident occurred at a time when no-one was

"nearby" to help, such a state of affairs having come about because Duncan Morrison, without warning, left the table at which he had been seated with the pursuer and AB, thus leaving the pursuer on her own with AB. Although it is not expressly averred that Morrison had left the room that is the clear and only inference to be drawn from the averments that no-one was nearby and that the pursuer was left on her own with AB. The pursuer also avers that this all happened while another patient was being restrained in the corridor outside, which, she avers, AB was able to hear. As regards fault, the pursuer avers that AB was a known risk (which, although not formally admitted on record, was not disputed by the defender); that Duncan Morrison was expected to carry out constant observation of AB on a sight and sound basis; that in all previous art sessions, the staff member supervising had been standing nearby (the implication being that Morrison, likewise, ought to have been standing nearby), that Morrison's departure from the table was in breach of the Care Plan for Interactivity Activity Sessions with AB and that he ought not to have left the pursuer on her own. It is further averred that leaving the pursuer on her own and the sounds of the patient being restrained were factors which made it reasonably foreseeable that AB would become unsettled and aggressive. In short, Morrison is averred to have failed to follow the care plan for AB. Finally, although the precise significance of this is unclear, it is averred that the care plan documents for AB did not clearly articulate role responsibility nor reaction for peripatetic staff such as the pursuer. Drawing these together, the pursuer's case is, in essence, that she was left on her own with AB, in breach of his care plan, which she ought not to have been.

[8] It is unnecessary to rehearse the defences at length, but the defender's position, as set out in answer 4, is to admit that 2:1 supervision was required for the art session, but to aver that Duncan Morrison was in the room throughout the session. The defender further avers

that Morrison did not require to be in touching distance at all times and that previous art sessions had been conducted with one member of staff at the table and a second member of staff in the room but not at the table. Although not expressly admitted, these further averments are not inconsistent with the pursuer's own averments.

[9] Those were the battle lines drawn up before the proof commenced. The main factual issue for the court to resolve was whether or not the pursuer was left alone with AB. Against this background, I will now proceed to discuss the evidence.

The evidence

[10] The pursuer gave evidence that she had done many art sessions with AB. He was a known risk of attacking staff, and was very unpredictable. On the day in question, she arrived at the Rum Unit and she was allocated Duncan Morrison as the second nurse. Together they went to AB's room to offer him an art session before returning together to the dining room to await his arrival. They sat at the first table on the right as one entered through the doors from the corridor. That was his usual table. He sat at 9 o'clock (as one looked at the table from the doors) and she sat at 5 or 6 o'clock. Duncan Morrison had been seated at 2 o'clock but then got up and stood at that position. AB had been settled at the start of the session. Suddenly and without warning, he stood up and said, either, that he was going to bite, or that he was going to bite and hit, whereupon he lunged at the pursuer, got hold of her arm and bit her. She screamed and other staff – Duncan Morrison, Natalie Milligan and Christina Biggar – came to her aid. She didn't know where Morrison had been at the time of the incident. She believed he had left the room. There was an incident going on in the corridor outside at the time, which she could hear, and she believed that Morrison had gone to intervene, to assist Milligan and Biggar. A datix entry had been completed

shortly after the incident. It was very minimal, making no mention of the absence of 2:1 supervision. She did not think the accident would have occurred, or at least not to the same severity, if Duncan Morrison had remained, because he would have intervened at an earlier stage. She did not know what had been the trigger for AB's behaviour. It might have been Morrison leaving which made AB agitated, or it might have simply been that she was vulnerable. AB could be opportunistic. In cross-examination, the pursuer said that the second nurse could be either seated or standing. Sometimes the second nurse would take part in the session, for example by gluing with AB, and sometimes not. On this particular day, Duncan Morrison was seated initially, then he stood up, which was fine. She said that she did not initially see him leave the room, then she saw him move but she did not realise he had left the room and that she didn't see him leave the room. She then said in almost the same passage of evidence that she did see him leave the room. She didn't see where he'd gone. She couldn't shout on him to come back because that would have meant disengaging with AB and anyway, she couldn't upset him by shouting. She was then referred to a passage in the record prior to amendment, where it was averred on her behalf that when she arrived on her own that day, she was told that the unit was short-staffed but that there would be someone floating about. She agreed that there was no mention in that record of Duncan Morrison leaving the table or the room, or of another incident going on at the same time in the corridor outside. She could not give any explanation as to how those averments came to be made on her behalf. Her position was that she would not have done the session had the second member of staff simply been floating about. She conceded that it was possible that at the time she was attacked, no incident was taking place in the corridor outside.

[11] The next witness for the pursuer was Patricia Anderson. She said that the pursuer had a lot of experience of dealing with AB, since the pursuer had often shadowed her and seen how sessions were led. She was not present on the day of the incident. She expressed surprise that the pursuer had sat at a table on the right, because according to her, AB was accustomed to doing sessions at a table on the left. She also expressed surprise at the seating arrangements described by the pursuer. In her view, if AB had been seated at 9 o'clock, the pursuer should have been at 3 o'clock. She also said that the pursuer should have sat with her back to the exit, with AB away from the exit. As it was, she had blocked her exit route. There should have been a second member of staff, whom she would have positioned behind her, to her left or right. The second member of staff should never stand behind AB, because they would want to know what he was looking at. AB was very perceptive. She had personally experienced him become aggressive on two occasions. Sometimes he gave a warning and sometimes not. If she had become aware of her "shadow" leaving, she would have got up and left. She would not have continued doing a session on her own.

[12] The next eye witness was Duncan Morrison, who gave evidence for the defender. He confirmed that AB was subject to 2:1 supervision. The second person was to be there in case anything happened. His initial description of the incident was as follows. He was standing at the door when the incident happened. AB and the pursuer were seated at the table on the right. Usually AB and the nurse leading the session would be at the table on the left. In that event, he would sit at the other table on the left, but on this occasion he was at the door. He denied that he had left the room at any point. AB was sitting with his back to him. He was three or four feet away from the table. He could not remember AB saying that he was going to hit or bite the pursuer. He heard the pursuer scream. By the time he reached the pursuer, AB had his teeth in her. He thought it was her left arm which was

bitten. Christina Biggar and Natalie Milligan also came to the pursuer's aid. The former had been standing at the door, between the dining room and the office, to his right as he was standing at the door. She was closer to the office door than to the dining room door. He said that she too was there in case anything happened, and also, contradicting that evidence, that she just happened to be there. He could not remember any other incident taking place at the same time, nor could he remember any incident that day involving another patient. In cross-examination he confirmed that the observation of AB during the session was to be sight and sound, in other words that he had to be able to see and to hear AB at all times. If AB had stood up and threatened to hit or bite the pursuer, his role was to get there. He didn't know if he could have stopped AB from biting the pursuer if he had got there more quickly because AB was quite strong. If he had seen AB stand up he would have run over straight away. On further questioning, he said first that the pursuer "must have" screamed, and then that he was unable to remember if she screamed or not. He insisted throughout his cross-examination that he had not left the room. He agreed that AB could be opportunistic, but said that he had been known to attack someone even if other people were present. When asked how AB would have been aware of his presence if he was standing behind AB, he said that AB would have seen him when he came into the room, although he also said that he didn't know where he had been when AB came in. He was unable to remember going to AB's room with the pursuer before the session. He didn't think the plan required two people to go. Before AB arrived he and the pursuer would be in the dining room sitting at the table. The pursuer had sat at the wrong table, but he couldn't remember whether he had said anything to her about that. There had not been anywhere else for him to stand, when they were seated at the table on the right. He had been seated at the table but got up and stood at the door. The pursuer would have been able to see him. He never left the

room. AB must have stood up. He, the witness, couldn't remember whether AB had said that he was going to hit, or that he was going to bite. Sometimes he did say that, sometimes he did not. The event was more than three and a half years ago. The pursuer would have been at 6 o'clock, and AB at 12 o'clock, looking at the table from the door. The table was three feet in diameter. In response to questioning by me, Mr Morrison said he couldn't remember whether he had been at the table or in the office when AB arrived.

[13] Christina Biggar was the next witness. She was present in the unit at the time of the incident. She didn't see the pursuer being bitten, but had been standing at the office door, a few steps from the dining room door, and she had been able to see Duncan Morrison standing at the dining room door. From where she was standing she could see into the dining room but had not been able to see the table where the pursuer and AB were seated. She had been speaking to Staff Nurse Milligan. There was no-one else in the corridor at the time. There had been an incident involving another patient, T, earlier that day, but it was over. She had not seen Duncan Morrison leave the room at any stage. If he had left the room she would have seen that. She heard the pursuer make a sound – a bit of a scream – and she then saw Morrison running into the dining room. She too went in and saw the pursuer at the table, next to AB who was standing. They were at a table to the right, as you went in the door. He was attached to her arm – she was positive it was the left arm. She had hold of him to stop him from hitting her. Natalie Milligan also came into the room. The witness and Morrison took hold of AB by his arms and took him to his room. In cross-examination, Ms Biggar said that AB could become aggressive with or without giving any warning. Morrison was close enough to AB that he would have been able to hear anything he said. She herself had not heard AB say anything. She didn't know the respective seated positions of AB and the pursuer. She was then asked a series of questions directed towards

establishing where the second nurse should be positioned, to which objection was taken by counsel for the defender, and which I allowed under reservation. In response to further questioning about the incident itself, although there was much of the surrounding detail she could not remember, such as whether she had seen the pursuer enter the dining room, she would not be shaken from her testimony that she had seen Morrison standing at the dining room doors.

[14] The final eye witness was Natalie Milligan, the staff nurse in charge on the day of the incident. She knew AB. He was autistic, and could be unpredictable and aggressive. When participating in an art session, he had to be on a constant 2:1 supervision. That did not mean that the second nurse had to be within touching distance, which would have been special observation. She said that she had been working in her office at the time of the incident. Christina Biggar had been with her. She was able to see Duncan Morrison standing at the dining room door. She was aware of the art session going on. She was sure that AB had arrived, and gone into the dining room, alone. She heard the pursuer's raised voice then Morrison shouted something then Christina started running into the dining room, and she followed. She saw AB biting the pursuer on her left arm. AB didn't respond to verbal commands to desist, so Morrison and Biggar had to put their hands on him to restrain him. She did not hear AB say that he was going to hit or bite, but was unsure if she would have been able to hear that if it had been said. She did not see Duncan Morrison leave the dining room. There was no other incident going on at that time. There had been a previous incident that morning but it was over. She had completed the datix entry in relation to the incident involving the pursuer. If it had been suggested that the pursuer had been left alone with AB, she would have had to put that in the datix entry as it would have been a breach of protocol. In response to cross-examination, Ms Milligan confirmed that she had said that it

was the pursuer's left arm which was bitten, and that the datix entry referred to her right arm, and said she couldn't really remember which arm it was. She was then asked questions about whether the supervising nurse should be able to see the face of the patient, which again was objected to and again I allowed this evidence under reservation. She said that AB should be observed from the front. It was very difficult to see signs that he was about to become aggressive. Although he could say that he was going to bite or hit, he could equally just pick someone. If he did say he was going to attack, the person to whom that was directed should either retreat, or step in if there was another person beside them, and they could then step in together. She was not sure where else Morrison could have stood. AB didn't like people too close to him. She was not shaken from her assertion that Morrison had not left the room.

Expert Evidence

[15] Evidence was given for the pursuer by a skilled witness, Patrick Bradley, who had prepared the reports numbers 5/8 and 5/9 of process. It was not disputed by the defender that Mr Bradley was a skilled witness; rather the defender's position was that his evidence did not assist in resolving the issues in the case. The task of assessing his evidence is not made any easier by the fact that he was not asked in terms to speak to, or to explain, the conclusions in his report number 5/8 of process, although he did confirm at the outset of his evidence that number 5/8 of process was a report which he had prepared. In those circumstances, while the report may technically be in evidence before me, it is difficult to attach a great deal of weight to the conclusions in it where they have not been explained or justified in evidence. In any event, to the extent that the main thrust of that report was that AB constituted a risk, it is uncontroversial. However, I do not accept Mr Bradley's

conclusion at page 7 if that is to be read as meaning that it was foreseeable that AB would attack on that particular day. That conclusion was not explained, or even spoken to, in his evidence. It appears to be based upon the premise that normal working practices were not being used on the day of the incident, which in turn appears to be based on an assumption that there was no 2:1 supervision from the outset. However, the evidence did not support that premise or assumption. There was 2:1 supervision from the outset, and there was no evidence that normal working practices were not being used, and in any event Mr Bradley did not explain precisely what he meant by that phrase. So, all I take from Mr Bradley's report number 5/8 of process is that there was a foreseeable risk that AB might attack at any given time, which as I say, is not disputed by the defenders. Beyond that, the report is of limited value since Mr Bradley's main conclusion was that there should have been a staff to patient ration of 2:1, which is no longer in dispute. The second report, number 5/9 of process, was spoken to in more detail in evidence, some of which was objected to and allowed under reservation. One such passage allowed under reservation was evidence given in relation to page 2 of the report, where Mr Bradley expressed the opinion that the second member of staff should either have direct visual contact with the interactions of the client and staff member or be positioned close enough to hear. He also said that there was a balance to be drawn between ensuring that the session was safe on the one hand, and therapeutic on the other. Beyond that, I do not propose to discuss Mr Bradley's evidence in detail because the value of it was significantly diluted by his concession in cross-examination that he had been unaware that the pursuer had previously conducted sessions with AB, and was unaware that she had trained in the Islay Centre. He was not in a position to dispute that the pursuer had not given evidence that she did not know what to do in the event of AB becoming aggressive and he had not seen the defender's production, number

6/3/9 of process, until the morning of the proof. He conceded that that did make clear who was to be involved in the supervision and that the process was clearly set out. These concessions fundamentally dilute his criticisms of the defender's documentation to the extent that I attach no weight to those criticisms. Mr Bradley was also asked a series of questions, objected to by counsel for the defender, and allowed under reservation, about the stage at which intervention should have occurred. He said that there should be initially be a verbal response of "No"; and if the behaviour by the patient persisted then physical intervention should be allowed. He was also asked about where the second person should have stood, again objected to and again allowed under reservation. His response was that there was a balance between not intruding on the art session and staff safety, but that relevant factors included that there was a new member of staff in an unfamiliar environment who was female. It is not clear where that answer would take the pursuer in any event, but even if that evidence is relevant it is completely undermined by Mr Bradley's erroneous assumption that the pursuer was a new member of staff in an unfamiliar environment, and by the fact that there was no evidence before me (nor was it part of the pursuer's case) that AB posed more of a threat to females than males. In the event, while I make no criticism whatsoever of Mr Bradley's expertise or experience, and I acknowledge that he was doing his best to assist the court, nonetheless, the majority of the building blocks on which his report was based turned out to be constructed of no more than quicksand meaning that the conclusions which he based on those building blocks simply fall away.

Submissions

Pursuer's submissions

[16] Counsel for the pursuer submitted that I should accept the pursuer as credible and reliable and reject the evidence of the defence witnesses so far as inconsistent therewith. He placed much emphasis on Morrison's evidence that he had heard the pursuer scream, not that he had seen AB stand up. There were inconsistencies in the detail of evidence of the three defence witnesses – but no inconsistencies in relation to which of the pursuer's arms had been bitten, which they all got wrong, indicative of collusion. The only logical explanation for Morrison not having seen AB stand up was that either he was not in a position to see it happening or else he was not looking or listening to events in the dining room. Counsel referred to *McCarthy* v *Highland Council* 2012 SLT 95, which was an appeal to the Inner House from the Sheriff Court (there reported at 2010 SLT Sh Ct 74) and to *Buck & Ors* v *Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576. In *McCarthy* the Inner House held that the sheriff in that case had erred, and substituted their own findings in fact, including one that had a male support worker been present, the pursuer, a female teacher, would not have been injured in attacks by a pupil. *Buck* was relied upon for a passage at paragraph 36 of the judgment of Waller LJ where he said, in relation to a dangerous patient, that the duty owed by a health board to its employees should be tested by reference to the principles applicable as between employer and employee, rather than those as between doctor and patient, and that a health board may be liable to employees if it failed to take precautions so as not to expose them to needless risks. Turning to the facts of this case, counsel submitted that the defender was vicariously liable for Morrison's breach of duty, for failing to carry out the constant sight observations incumbent on him. He had been fulfilling that function whilst seated at the table but ceased doing so when he moved away. It may be

difficult to say precisely where he should have been but he had moved outwith the area where he could see AB's face and could be seen by AB. Four points could be taken from the care plan, as spoken to by the pursuer and Patricia Anderson, namely that the second nurse should be: (i) present; (ii) not behind the patient; (iii) within the patient's range of vision; and (iv) able to see and hear the patient. Even if at the doorway, Morrison had breached the second and third of these, and possibly the fourth. When pressed by me as to whether there was any record for such a case, counsel submitted that there did not have to be a record for every detail of a pursuer's case. The thrust of the pursuer's case was that Morrison didn't do what he was supposed to do. He submitted that this gained support from Mr Bradley's reports numbers 5/8 and 5/9 of process. I have already discussed these reports at paragraph [15] above. Turning to causation, counsel submitted that the stage when AB stood up was the stage at which Morrison should have intervened. It was clearly the case that intervention was necessary when the threat was made. Morrison would have been able to intervene timeously had he been performing his duties properly.

Defender's submissions

[17] Counsel for the defender submitted that the pursuer had failed to establish either a case of vicarious liability for the actions of Duncan Morrison or a case of direct negligence against the defender. In addition, the pursuer had failed to establish any causal link between any alleged breach of duty and the pursuer's injuries. The defender had identified and assessed the risk that AB would attack members of staff and other patients. It had produced a set of guidelines for offering sessions in-house to AB (number 6/1 of process) and also a document entitled "Interactive Activity Session" (number 6/2 of process). This provided a staffing ratio of one Marchhall member of staff and one Wallace Unit member of

staff. The pursuer's case was predicated upon the narrow factual issue as to whether Duncan Morrison had moved beyond sight and sound of the pursuer and AB. Assuming that Morrison's evidence was accepted, as it should be, the pursuer had failed to prove her case. Even if she had proved that Morrison moved out of sight and sound, she had failed to prove that but for his departure, she would not have suffered injury. She could have done that in one of two ways: by proving that the departure was the trigger for the attack; or by proving that had Morrison been within sight and sound, he could have prevented AB from injuring the pursuer. There was no sound evidential basis for finding that there was any particular trigger for the attack. A litany of possible triggers had been canvassed in evidence. There was no evidence as to how quickly a figure of four hold could have been put in place, nor to the effect that more often than not an attack could be prevented if two people were present. AB was not on special observations, which would have required the second staff member to stand within reach. There had been no detailed exploration of: the relative positions of the persons involved; the time that Duncan Morrison would have had to react; the dimensions of the table; or the speed with which a preventative restraint could have been implemented. These were matters which might have been explored with a suitably qualified expert on restraining techniques, but there had been no such evidence. As regards the pursuer's case on record of understaffing, there had been no evidence in support of it. The pursuer had also failed to establish any case of fault that might be covered by the averments that the defender had failed to clearly articulate the role, responsibility and reaction for peripatetic staff. Mr Barclay had criticised the defender's policies on the basis that peripatetic staff such as the pursuer might not know what to do when faced with aggression by a patient. However, such a case was not underpinned by factual evidence from the pursuer that she did not know what to do. Her evidence was that she was aware of

AB's many acts of aggression over the years. Finally, counsel renewed his objection to evidence directed towards showing at what point intervention should have taken place, and as to where Morrison should have been standing, for which he submitted there was no record.

Discussion

Admissibility of evidence led under reservation

[18] My first task is to rule on the admissibility of the considerable body of evidence led in the case under reservation. Broadly speaking, there were two lines which the pursuer sought to take in evidence to which objection was taken. One was to lead evidence about where Morrison ought to have been standing within the room assuming he had not left it, and the other, related to the first, was to lead evidence about when he ought to have intervened. The defender's position, stated briefly, was that there was no record for either line. The pursuer's position was that having regard to the abbreviated form of pleading in chapter 36 cases, adequate and fair notice had been given of each line. Reference was made in the course of submissions on the defender's objection to *Lamb* v *Wray* 2014 SLT (Sh Ct) 2. In that case, Sheriff Mackie, after considering certain Court of Session authorities in which a similar approach was taken, stated (at paragraph 13) that the function of written pleadings, even in a chapter 36 case, was to give fair notice to the opponent, and to the court, of the issues, and that a party was not entitled to establish a case of which the other party has not received fair notice. Sheriff Mackie went on to draw attention to OCR 36B.1 which requires the pursuer to make averments relating only to those facts necessary to establish the claim. Although not binding on me, I respectfully agree with that approach to abbreviated chapter 36 pleadings in its entirety, subject to the minor quibble that the court does not require fair

notice of a case in the same way as the parties do. It is a pre-requisite of any litigation that fair notice be given to an opponent of the case which a party is offering to prove. Sheriff Mackie went on to observe that it was not appropriate to expect a defender to "guddle about" to find out the case which it had to meet. I agree with that observation also, and would add that where a defender is faced with a specific factual case with concomitant specific duties of breach of duty, it would be equally inappropriate, and indeed unfair, to expect it to meet an entirely different factual case, based upon different breaches of duty. Putting that another way, OCR 36B.1 requires only the facts necessary to establish the claim to be briefly stated. Form PI 1 makes clear that as regards duty, all a pursuer requires to state is whether a claim is based on fault at common law or breach of statutory duty (and, in the case of the latter, the provision of enactment also requires to be stated). However, the more detailed a pursuer chooses to make his or her averments of fault, the more likely it is that he or she will not be allowed to found a case based upon a different ground of fault, not just because to do so would breach basic principles of fairness but because of the requirement that evidence must be relevant. Sheriff Mackie's reference to "guddling about" is, it seems to me, directed at the situation where only vague averments are made, and the defender is uncertain as to what the case is that has to be met. That is to be distinguished from the situation where a pursuer avers state of affairs, X, and then seeks to lead evidence about an entirely different state of affairs, Y. In such cases, evidence of Y is inadmissible not so much because fair notice has not been given, but because it is irrelevant, it never having been suggested that the provisions of chapter 36 detract from the requirement that only relevant evidence is admissible as a matter of law.

[19] Applying that approach to the evidence to which objection was taken in this case, it is quite clearly irrelevant in my view. As is evident from paras [6] to [9] above the pursuer's

case, pled in some detail, was clearly and indisputably that she ought not to have been left alone with AB. The duties which she pleads are quite clearly directed towards that factual situation. As such, evidence that Morrison remained in the room but was standing in the wrong place, or that he ought to have intervened sooner than he did is plainly irrelevant. The closest the pursuer gets to averring a case which might refer to Morrison's remaining in the room is the averment that he "was expected in terms of the care plans for AB for the interactive activity session to be carrying out constant observations of AB on a sight and sound basis". However, viewed in the context of the pleadings as a whole, even that is predicated upon Morrison not being within the room. In my view, the pleadings contain no suggestion of any case based upon Morrison remaining in the room but not standing in the correct place, or not intervening soon enough whether due to inattention or otherwise. If the defender had had notice of such a case, then the evidence led may well have been different. Accordingly, I have concluded that all of the evidence led under reservation which was directed towards blaming Morrison for his position within the room (such as standing behind AB) or not intervening sooner, is inadmissible. Having made that ruling, the status of the evidence in question is not entirely straightforward, since at least part of it is arguably relevant to the issue of causation, in particular to the question of whether, had Morrison been in the room (assuming he had left), his presence would probably have prevented the attack on the pursuer. It was also legitimate to put questions about his position in the room, and when he would have intervened, to Morrison for the purpose of testing the credibility and reliability of his evidence that he was standing at the door. Accordingly, I have taken the evidence to which objection was taken into account for those purposes but otherwise have had no regard to it.

Assessment of the witnesses

[20] Insofar as my assessment of the witnesses is concerned, although I found the pursuer to be a credible and pleasant witness, who was doing her best to tell the truth, I have also concluded that she is not a reliable historian. I have reached that view for a number of reasons. First, she gave evidence that the table on the right, where they sat, was AB's usual table. However, that was at odds with Patricia Anderson's evidence, supported by Duncan Morrison, that usually AB sat at a table on the left. On this issue, I prefer their evidence to the pursuer's. Neither of them had any reason to lie on the point and Patricia Anderson was an impressive and uncomplicated witness who appeared assured in her recollection of standard practice. It follows that the pursuer's evidence about this was simply wrong. She had no reason to lie, which means that her memory about this is simply poor. Second, the pursuer tied the incident into another incident which she said was going on in the corridor at the time, and which was the reason she proffered as to why she thought that Duncan Morrison got up and left. However, I am satisfied that no such incident was going on at the time. All of Duncan Morrison, Christina Biggar and Natalie Milligan gave evidence to that effect, and Natalie Milligan and Christina Biggar both said that while there had been an earlier incident, it was over by the time of AB's art session. Again, on this issue, I prefer their evidence. Apart from anything else, there could not have been an incident going on requiring the attention of Morrison, Biggar and Milligan because if there had been, none of them would have been able to have rushed to the pursuer's aid when they did. So, again, the pursuer is simply wrong in relation to a point of detail about events of that day. Again, the fact that she is wrong about this indicates that her memory is unreliable. Third, the pursuer's evidence about whether Duncan Morrison had left the room or not was not entirely consistent. At one point she said that she wasn't sure where he had gone. That

evidence is therefore not inconsistent with the evidence given by Morrison, Biggar and Milligan that Morrison was standing at the door. Last but by no means least, the pursuer was unable to give any explanation as to why her position on record until shortly before the proof had been that there was no second member of staff specifically allocated to her and that she had been told that someone would be floating about. On one view this might be said not to matter, given that her position at proof that there were two members of staff present at least initially was accepted by the defender to be correct. However, the fact that the pursuer's position fluctuated on what was the most important factual issue in the case is a further indicator of the unreliability of her recall. For all these reasons, I am unable to accept the pursuer's account of events where it is at odds with other evidence. In this category I include her evidence that AB said he was going to hit or bite, before he did so, which was not heard by any of the other witnesses, and hence I have made no finding of fact that such a statement was made by AB. (I have not specifically found that no such statement was made; rather, I have not been able to find on a balance of probabilities that it was made).

[21] As far as the other eye witnesses were concerned, it is fair to say that I was not particularly impressed by Duncan Morrison, whose recollection of events was manifestly poor, and who fluctuated at various points in his evidence such as where he had been when AB entered the dining room, and whether he and the pursuer had first gone to AB's door. Nonetheless he consistently adhered to the position that he had been standing at the door throughout, and his evidence that he had not left the room to go into the corridor was supported by Christina Biggar and Natalie Milligan, and is consistent with the fact (as I have found) that no other incident was going on in the corridor at that time. Christina Biggar and Natalie Milligan I found, on the whole to be credible and reliable. I cannot say that the evidence of all three defence witnesses was entirely without its difficulties. It was slightly

surprising that all three thought that the pursuer had been bitten on her left arm whereas she was bitten on her right. However, in my view that is indicative of a collective hazy recollection, rather than of collusive evidence as counsel for the pursuer submitted: there is no dispute that all three came into the room and saw the pursuer being bitten. There would be no reason for them to collude to make up evidence about which arm was bitten, given that was something which all three admittedly saw. Given that the pursuer has only two arms, the fact that three witnesses each said that it was the wrong arm which had been bitten is unfortunate, but not statistically so remarkable that I am prepared to draw any inference of collusion. If the witnesses had been colluding and unable to remember which arm had been bitten, each of them (or at least Milligan and Morrison) would have been able to access the datix system to refresh their memory. Morrison went so far as to say that he had checked the datix system to see if there was any mention of an incident involving another patient going on at the same time. Further, to some extent Morrison's evidence was supported by Patricia Anderson (for example in relation to which table was usually used) whom I found to be the most impressive of all the witnesses.

Breach of duty by the defender?

[22] I accept that the law is as stated in *Buck & Ors* v *Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576, namely that the defender's duty of care to the pursuer must be assessed by reference to the principles applicable as between employer and employee, rather than those as between doctor and patient, which I do not consider to be controversial. No direct breach of duty on the part of the defender has been established. It did properly assess the risk of assault posed to the pursuer by AB and had appropriate policies in place, including the need for 2:1 sight and sound observation at all times during art sessions. It

was not contended by the pursuer that the defender had failed properly to assess the risk. The only criticism of the plans in place was that advanced by Mr Bradley to the effect that the plans did not clearly articulate who was to do what in the event of aggression, but I have discounted that criticism for the reason given above at paragraph [15]. As regards the alleged under-staffing, that has not been made out. On the evidence, there were sufficient members of staff to provide 2:1 supervision. I find, therefore, that the defender did not breach any duty of care which it owed to the pursuer. The pursuer can, therefore, succeed only if she succeeds in establishing that Morrison breached his duty of care towards her, to which I now turn.

Breach of duty by Morrison?

[23] As I have already identified, the only breach of duty pled is that Morrison left the room, thus failing to maintain sight and sound observation of AB. The crucial factual issue on the pleadings is therefore whether or not he left the room, leaving the pursuer on her own. The evidence in summary was that the pursuer said that he had left her alone, but ultimately that came to be that she couldn't see him, which she may well not have been able to do, given her position at the table, if he was standing at the door as he said. The reason she gave for his leaving – an ongoing incident – has been shown to be wrong. By contrast, we have Duncan Morrison, Natalie Milligan and Christina Biggar all saying that Morrison had not left the room, and I am unable to hold that they are all lying. The one piece of evidence which perhaps goes in the opposite direction was Morrison's somewhat unsatisfactory evidence that he heard the pursuer scream. Had he been looking at the incident, one would have expected him to describe what he saw, in the first instance, rather than what he heard. However, I have come to the view that this is insufficient for me to

hold that Morrison had left the room, standing the evidence of Milligan and Biggar that he did not, when there are other explanations for Morrison giving the evidence that he did. Although it was unusual, the fact that he mentioned the scream first does not necessarily mean that he did not see AB stand up; that may simply be the aspect of the incident which Morrison remembered most three years after the event: if it was a particularly blood-curdling scream, say. Even if Morrison did not see AB stand up, it does not follow that he was not in the room. He might have been in the room and he may momentarily have looked away. In the event, I am unable to find, on a balance of probabilities, that Duncan Morrison left the pursuer on her own with AB and consequently the pursuer has failed to prove the case on record and her claim based upon Morrison's alleged breach of duty by having left the room must fail.

[24] That is sufficient to dispose of the action in the defender's favour. However, for completeness I will deal with two additional matters, the first of which is whether I would have found in favour of the pursuer on the question of liability had I not ruled the objected-to evidence as inadmissible. I would not. As to where in the room Morrison should have stood, it was clear on the evidence that there was no requirement for him to remain at the table, provided that he was able to maintain sight and sound supervision from where he was situated. Mr Bradley's evidence was that a balance had to be struck between the therapeutic aspects of the session, and the need for safety. In other words, the benefits to AB of the art session would be diminished had Morrison been too close to him. Natalie Milligan also gave evidence that the second nurse did not require to be within touching distance. There was also evidence that the table where the pursuer and AB were seated was close to the door, and that there was nowhere else for Morrison to stand when they were at the table on the right. It was not obvious that Morrison was completely behind AB, since at least on

the pursuer's evidence, he would have been viewing AB from the side. For all of these reasons, I would have been unable to find that Morrison breached any duty of care to the pursuer by standing in the wrong place within the room. Similarly, there was no reliable evidence on which I could have found that he ought to have intervened sooner than he did, wherever he had been standing.

Causation

[25] The second matter on which I wish to comment is causation. Even had I found that Morrison was not within the room I would have found that the pursuer had failed to prove that such breach of duty had caused her injuries. There is very little to add on this point to the submissions made by counsel for the defender, who identified two problems, these being (i) that the pursuer failed to prove that Morrison's leaving the room was the trigger for the assault by AB; as she conceded herself, there were many triggers for his aggression and it is not possible to know what prompted it on this occasion; and (ii) that there was no evidential basis for finding that, if Morrison had been within the room able to see and hear AB, the attack would probably have been prevented. Again, there is simply no evidence to show that that would have been sufficient to prevent the accident (and we know for a fact that standing at the door did not prevent it). There was evidence that AB could move very quickly. It is also worth making the point that on this occasion he must have moved so quickly that the pursuer herself had no time to react, either by moving away from the table herself or by sounding her alarm. AB's aggressive tendencies were known to her, as much as to the other nurses on the ward. I therefore could not have held, on the evidence which was led, that the failure to be in the room caused the pursuer's injuries. *McCarthy* does not assist the pursuer, since each case must turn on its own facts. Finally, and for completeness,

the pursuer would have faced the same difficulties even had she established that Morrison should have been standing at a different position within the room. If he had been standing in a position where he was directly facing AB, for example, he may even have been further away than he was, meaning that he would have taken longer to reach AB and the pursuer. There was also insufficient evidence before me to allow me to conclude that had Morrison been standing in that position, AB would not have attacked the pursuer.

Decision

[26] For all these reasons, I have found that the pursuer has failed to establish her case on a balance of probabilities, and have granted decree of absolvitor in favour of the defender. I have assigned a hearing on expenses. If these can be agreed, the appropriate motion and joint minute should be lodged.