

SHERIFFDOM OF LoTHIAN AND BORDERS
IN THE ALL SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SC EDIN 28

PIC-PN1775-19

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

SH

Pursuer

against

CARE VISIONS GROUP LIMITED

Defender

Pursuer: Markie, Advocate; Digby Brown LLP
Defender: Thomson, Advocate; Clyde & Co (Scotland) LLP

Edinburgh, 8 February 2021

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

Finds in Fact

1. That the pursuer is SH. She is 47 years old. The defender is Care Visions Group Limited.
2. In 2016 the defender operated S. S is a residential house which accommodates a maximum of four children or young persons who are not, at that time, able to live at home. The children and young persons placed at S may be subject to a compulsory supervision order or permanence order or be placed there under a voluntary arrangement in terms of

section 25 of the Children (Scotland) Act 1995 (hereinafter referred to as a “voluntary arrangement”). Some of the children placed at S have behavioural issues and some have been placed there for their own safety.

3. That since at least 2015 each child at S would be allocated a key worker. The key worker would be the main worker for the child and the key point of contact for both the child and other professionals involved in the child’s care and development.

4. That in the summer of 2015 the pursuer commenced employment with the defender as residential care worker. At the commencement of her employment with the defender the pursuer received initial training of two weeks duration. The initial training included training in CALM techniques, de-escalation and trauma informed care.

5. That the CALM techniques including training in relation to appropriate ways to conduct physical interventions with children.

6. That the de-escalation training was based on a model known as “Sanctuary”. The aims of the de-escalation training included: (i) to develop an understanding of how to recognise the signs of escalating stress and anxiety in each young person and confidently intervene to de-escalate the situation; and (ii) to develop strategies and techniques that are known to be effective in preventing or de-escalating challenging behaviour. The defender’s policy entitled “Holding Safely & De-Escalation Policy Challenging Behaviour”, (hereinafter referred to as the “the challenging behaviour policy”), amongst other things, provided:

“Responsibilities

[...]

- Residential Carers will make sure that they have familiarised themselves with the risk assessment and that they use the strategies identified.

[...]

Definitions

Care Visions defines challenging behaviour as that which:

- Poses significant risk or danger either to self or others.
- Poses an implicit or explicit challenge to the safety, well-being or health to self or others.

[...]

Examples of challenging behaviours include:

- Verbal abuse or harassment
- Intimidation or bullying
- Threatening behaviour

[...]

Key points (Risk Assessment)

1/ Individual risk assessments will be carried out and updated regularly for each young person. Strategies for managing challenging behaviour will be based on assessed risk.

2/ the individual risk assessment will provide guidance to carers about the level of risk to the young person and others, and the action to be taken by the carers to reduce the risk level.

[...]

5/ the risk assessment should provide specific responses to risks, which should be identified in the individual safety plan.

[...]

Signs of Escalating behaviour

The use of individual negotiated, person-centred care plans, informed by the Sanctuary Model can be effective in minimising and preventing incidents of challenging behaviour.

Clarity between carers and young people about acceptable behaviour and the responses to unacceptable behaviour is useful in the prevention of challenging situations.

Certain observations may show that a young person is feeling overwhelmed and may resort to the use of challenging behaviour to express this. Awareness of

individual triggers or indicators as detailed in the young person's risk assessment or care plan is essential in the effective prevention of challenging behaviour through de-escalation techniques, focusing on creating safety for the young person,

Signs that a child may be feeling overwhelmed.

1/ Features of escalating are expressed through:

- Facial expressions (clenched teeth, wrinkled brow, flushed expression)
- Prolonged eye contact or lack of eye contact
- Distinct period of low mood
- Increased or prolonged restlessness, body tension and pacing
- Raised voice
- Erratic movements
- Reporting feelings of anger or frustration
- Threats or insults
- Verbal obscenity
- Young people isolating themselves

2/ When a carer identifies that a young person appears to be overwhelmed and is therefore unable to safely manage his emotions, the carer, whenever possible, should encourage the young person to make use of the Sanctuary Safety Plan. Where appropriate, de-escalation techniques identified in the care plan and risk assessment may be considered. Use of the young person's Safety Plan must always be encouraged at the earliest stage possible.

[...]

De-Escalation Techniques

The goal of de-escalation is to reduce anxiety and distress and minimise the risk of harm to anyone involved.

Effective strategies for de-escalating and managing challenging behaviour should be the least intrusive options available and be consistent with Sanctuary core values and the Safety Plan and Sanctuary Care Plan for each young person.

Key points (De-Escalation Techniques)

1/ Carers will use and develop a preventative approach to supporting individuals, based upon a needs led assessment...

2/ Effective strategies for reducing the risk and de-escalating the behaviour of young people should always include:

- Empowering the young person to implement their Sanctuary Safety Plan to divert them from their current frame of mind, when there are signs that they may feel overwhelmed and are not coping.
- Reflecting an entirely non-violent approach which is mindful of body language and physical proximity, facial expression and tone of voice
- Active listening to identify exactly what the young person is communicating

3/ During the management of challenging behaviour carers must always be proactive in de-escalating potentially challenging situations by using non-physical means wherever possible.

4/ Carers must always demonstrate readiness to intervene to assist colleagues.

[...]

9/ For the purpose of minimising risk it may be necessary to move the young person exhibiting the challenging behaviour to a different room.

[...]”

The staff at S, including the pursuer, JM and LR, were trained to comply with the said policy.

7. That the training provided to the pursuer by the defender made clear that if a threat was made to someone by a child, a member of staff would be expected to create space between the child and the target of the threat. If that technique failed, then the training made clear that a CALM physical intervention technique could be used to safely hold the child.

8. That after the pursuer had completed her initial training she was posted to S. The pursuer commenced working at S in the summer of 2015. When the pursuer commenced working at S, a female child, AB, was already a resident there. AB had been placed at S on a voluntary arrangement as a result of being beyond parental control and being unable to keep herself safe in the community. The pursuer became AB’s key worker a few months

after she started working at S. AB also had a second key worker, JMcD. Both the pursuer and JMcD worked closely with AB.

9. That between the summer of 2015 and August 2016, the pursuer built up a strong professional relationship with AB.

10. That the pursuer, as AB's key worker, had input into risk assessments prepared in respect of AB.

11. That on 10 January 2016 a risk assessment was prepared in respect of AB. That risk assessment: (i) identified, in the category of "violence, aggression, bullying", that AB was at high risk to both herself and others; and (ii) identified as one of the main concerns that:

"[AB] is struggling to deal with an ability to manage relationships with friends and family. [AB] will lash out [*sic*] verbally if she feels betrayed, hurt or angry. [AB] is feeling isolated and doesn't have many friends her own age".

12. That on 18 March 2016 the pursuer reported to her manager, AR, that her colleague and fellow residential care worker, JM, was: (i) not performing at the level required of a residential care worker; and (ii) was unable to effectively challenge the children at S.

13. That FM was a residential care worker at S. FM was assaulted by AB when she was performing her duties as a residential care worker at S. By 2 May 2016 AB had been charged by the police with assaulting FM. The staff at S, including JM and LR, both residential care workers, were aware that AB had assaulted FM.

14. That on 1 June 2016 a risk assessment was prepared in respect of AB. That risk assessment identified, in the category of "violence, aggression, bullying", that AB was now at medium risk to herself and others. AB's risk level had reduced from high (in the risk assessment dated 10 January 2016) to medium because she was making progress and her aggressive behaviour had reduced.

15. That in 2016 the staff at S were permitted to give 'direct feedback' to the children. 'Direct feedback' involved the child being given fairly blunt feedback (whether good or bad) immediately or shortly after an incident.

16. That AB's 16th birthday was in late August 2016. AB's 16th birthday was significant because it meant that the voluntary arrangement would come to an end and resulted in AB having to make a decision as regards whether to reside at S beyond her 16th birthday. AB wanted to go home and reside with her mother but her mother did not want her to return home. In the months leading up to her 16th birthday, AB had been anxious about it and, in particular, the decision she had to reach.

17. That in 2016 the staffing at S depended on the number of children being accommodated. If there were three or more children accommodated, there would usually be two residential care workers on a 24 hour shift between approximately 10am on day 1 and 10am on day 2, whereby the residential workers would sleep at S overnight (hereinafter referred to as a "sleep over shift"). In addition, there would normally be a residential care worker on a backshift between the hours of approximately 3pm and 10pm.

18. That as at 9 August 2016 S had two floors, namely a ground floor and a first floor. On the ground floor the front door led to a hallway. Four ground floor rooms could be entered from the hallway, namely a living room, a manager's office, a bedroom and a small lounge. The living room and manager's office were at the front of the house. The living room and small lounge were located on one side of the hall and the manager's office and the bedroom were located opposite these rooms at the other side of the hall. The door from the hall to the ground floor living room was a fire door that opened into the living room and closed if it was not held or propped open. At the end of the hallway, opposite the front

door, was a set of stairs, which led to the first floor. On the first floor, near to said stairs was a further office (hereinafter referred to as "the first floor office").

19. That on 8 August 2016 there was an incident at S which caused damage and mess to a number of rooms.

20. That on 9 August 2016 the pursuer was doing a sleep over shift at S. Also on shift at S that day were two further residential workers, namely, JM and LR. JM and LR were employed by the defenders.

21. That on 9 August 2016 AB had been having contact with her father out with S and returned to S about 16.00 hours. At that time AB's mood was ok. At some point after AB had had dinner she asked the pursuer if she could telephone her grandad regarding what he was going to get her for her birthday. At that time: (i) some of the rooms were still in mess as a result of incident on 8 August 2016; (ii) there was only one other female child at S; and (iii) this other female child was: (a) wary of AB, (b) kept her distance from AB, and (c) had been told to go to her room to allow the staff to tidy the messy rooms.

22. That the pursuer allowed AB to use a cordless telephone to contact her grandad. After speaking to her grandad AB telephoned her mother. When AB was speaking to her mother her tone changed. At this time she was sitting on the stairs leading to the first floor and the pursuer was at the door to the ground floor bedroom, next to the stairs, listening to AB speaking to her mother. AB was using a raised voice and was arguing with her mother. The pursuer gestured to AB to keep her voice down and gave her a thumbs up gesture to encourage her that she was doing well. AB's telephone call with her mother was difficult for AB. AB was saying to her mother words to the effect that the registered manager of S, AR, had said to her that she could return home when the voluntary arrangement came to an end on her 16th birthday. AB was saying that she was entitled to go home and demanding to go

home. AB was shouting and screaming and said something like “everyone else gets to go home” and said she was coming home. AB’s mother told AB that she could not move back home and that she would never change. AB’s telephone call with her mother lasted a few minutes. At the end of the call AB threw the cordless handset down the stairs. As a result, the handset came apart.

23. That the pursuer picked up the cordless handset and put it back together. As soon as she did so, the cordless handset began to ring. The pursuer answered and it was AB’s mother on the line. The pursuer had spoken to AB’s mother on the telephone on numerous previous occasions and had also met her in person on numerous occasions. The pursuer moved into the ground floor living room in order to speak to AB’s mother. AB’s mother was furious in relation to having been told by AB that the registered manager had told her (AB) that she could go home on her 16th birthday. AB’s mother told the pursuer that she had told AB that she (AB) would never change. The pursuer tried to explain to AB’s mother how well AB had been doing recently. During the telephone call AB was in the hallway shouting and screaming. AB was saying that her mother had called her a junkie. AB then burst into the living room and was screaming at the pursuer that: (i) her mother had called her junkie; and (ii) the pursuer was believing her mother. AB’s scale of anger was the worst the pursuer had ever seen. The pursuer ended the telephone call with AB’s mother. The pursuer had ascertained that AB’s mother had said to AB something like “are you on drugs?” when AB had asked to go home. The pursuer tried to explain to AB that it was just a turn of phrase similar to “are you for real?”. AB’s anger did not abate and her anger was directed at both her mother and the pursuer because she was convinced that the pursuer was taking her mother’s side. AB said to the pursuer, words similar to: (i) she would kick her c**t in; (ii) she would knock her out; (iii) that she wanted a new key worker; and (iv) that she wanted

the pursuer out of the house (meaning out of S). At this point AB was standing within the living room next to the door to the hallway. The said door was being held open by JM, at an approximate 45 degree angle, with JM positioned behind the door on the hallway side. JM heard: (i) AB making threats to assault the pursuer; and (ii) AB shouting that her mother had called her a junkie.

24. That whilst still in the living room, the pursuer asked AB to stop shouting and screaming and encourage her to talk in a calm manner. AB was shouting that: (i) her mother didn't want her in the house; and (ii) that her sister didn't want her in the house. The pursuer said to AB something like "I wouldn't want you screaming and shouting like that in my house either" (hereinafter after referred to as "the remark"). AB left the living room in a rage, shouting that she would not want to go to the pursuer's house anyway, and slammed the living room door against a table in the living room that was adjacent to the door. The remark made by the pursuer was unfortunate and did not help the situation. However, the main source of AB's anger was: (i) being told by her mother that: (a) she was not welcome home, and (b) her belief that her mother had called her a junkie; and (ii) her belief that the pursuer was siding with her mother and believing her mother. The remark did not materially increase the level of AB's anger towards the pursuer.

25. That AB entered the hallway from the living room. The pursuer remained in the living room. In a period in the region of 5 to 10 minutes the following occurred in the hallway/stairs: (i) JM and LR were trying to calm AB down; (ii) AB continued to shout and scream and continued to make threats against the pursuer saying something like she was going kick the pursuer's c**t in; (iii) AB was demanding that the pursuer leave the house and said that if the pursuer did not leave, she would; (iv) AB was screaming: (a) that her mother had called her a junkie and was saying that the pursuer believed her mother, (b) that

she (AB) hated the pursuer and wanted her out; and (v) AB started ripping wood of the stair bannister whilst crying.

26. That at the point when AB was ripping wood of the stair banister, LR was in the first floor office. LR left that office and approached AB. At this point AB was angry and shouting. The banister was being destroyed by AB. LR asked AB what was going on and AB said something like her mother wanted nothing to do with her and that the pursuer had sided with her mother. LR gave AB a hug and tried to calm her down by getting her to slow down her breathing. LR said to AB that she maybe misheard or misunderstood what the pursuer had said. AB calmed down a little and indicated that she wanted to speak to the pursuer. LR let AB take the lead and AB walked down the stairs and into the hallway with purpose. AB was followed down the stairs by LR. At this point JM, AB and LR were in the hallway. AB remained very angry and upset with both her mother and the pursuer. AB's main source of anger towards the pursuer was due to AB's belief that the pursuer had sided with her mother. During the period that AB was in the hallway/stairs, both LR and JM heard AB make threats to assault the pursuer.

27. That at the point when AB was about to enter the living room: (i) both JM and LR were aware that AB's mother had told her she was not welcome in the family home; (ii) both JM and LR were aware that AB considered that she had been called a junkie by her mother; (iii) that both JM and LR were aware that AB considered that her key worker, the pursuer, had sided with her mother; (iv) that both JM and LR were aware that AB had been screaming and making threats to assault the pursuer; (v) that both JM and LR were aware that AB had been ripping wood of the stair banister in anger; (vi) that both AB and LR were aware that very shortly before AB re-entered the living room that AB had been exhibiting extreme anger due to points (i), (ii) and (iii) above; (vii) that both AB and LR were aware

there had only been a very short time period between: (a) AB exhibiting extreme anger, (b) making threats to assault the pursuer, and (c) ripping wood of the banister; to her being allowed to re-enter the living room; (viii) AB remained very angry and upset with both her mother and the pursuer; (ix) AB had not calmed down sufficiently to safely have a face to face conversation with the pursuer; and (x) both LR and JM knew or ought to have known that: (a) AB remained very angry and upset with both her mother and the pursuer, and (b) that AB had not calmed down sufficiently to safely have a face to face conversation with the pursuer.

28. That JM, AB and LR entered the living room from the hallway. JM entered first, then AB, then LR. AB remained very angry and upset with both her mother and the pursuer. AB's main source of anger towards the pursuer continued to be because of AB's belief that the pursuer had sided with her mother. JM stood in the middle of the living room. AB squatted down near to the living room door with her back leaning against either a radiator or the wall. LR stood near to AB. The pursuer stood near to the television in the living room, which meant there was a bit of distance between the pursuer and AB. AB was still shouting and swearing at the pursuer in relation to the phone call the pursuer had had with AB's mother and was threatening to kick the pursuer's head in. Suddenly, AB leaped up from her squatted position and attacked the pursuer. AB grabbed the pursuer's hair with one hand and used her other hand to punch the pursuer on her head and body. AB pulled the pursuer to the ground and repeatedly punched and kicked the pursuer. During the attack the pursuer, in an attempt to stop AB punching and kicking her, tried to push AB away and made contact with AB's neck/shoulder area. LR managed to get hold of AB in a type of bear hug and tried to pull her away from the pursuer. AB continued to have hold of

the pursuer's hair and continued to punch and kick the pursuer. Eventually LR managed to pull AB away from the pursuer.

29. That later in evening on 9 August 2017 the pursuer went to hospital for treatment to the injuries she sustained in the assault by AB. Prior to doing so the pursuer was instructed by the on-call manager to prepare an Incident Report. The Incident Report, amongst other things, provided:

"Events Leading to the Incident

What happened **before** the incident?

[AB] had an emotional telephone call with her Mum and she threw the house phone down the stairs. [JM] offered to support to [AB] to help calm her down. She was shouting and swearing that her mum had called her a junkie. Her Mum [AB's mother's name] then called the house and spoke with [the pursuer]. [AB's mother] said that [AB] had asked her if she could move back home when she was 16 because she was on a voluntary order and this would end when she turned 16. [AB's mother] had told [AB] that she couldn't move back home. [the pursuer] reassured [AB's mother] that [AB] had been flourishing recently and how proud she was of [AB] and that the care team have explored with [AB] her desire to move back home. [AB] understands that her relationship with her Mum is fragile and moving there would not be a healthy choice for her.

Report of the Incident

What happened **during** the incident? [AB] came to the living room while [the pursuer] was on the phone to her Mum and started shouting that [the pursuer] was believing her Mum and not her. [the pursuer] ended the call with [AB's mother] and reassured [AB] that she would never take sides and that she had been telling her Mum how proud she was of [AB]. [AB] became verbally aggressive shout [sic] that her Mum didn't want her. [the pursuer] asked [AB] to stop shouting at her and she wanted to talk this through with [AB] calmly and in a way that was mutually respectful. [AB] refused to listen and continued to shout and swear, she said that her Mum had told her she didn't want her to move home because she knew it wouldn't work and that [AB] would never change. [the pursuer] reminded [AB] that she was still screaming and shouting at [the pursuer] and she asked her to calm down. [AB] continued to shout at [the pursuer] about her Mum calling her a junkie, [the pursuer] tried to explore this with [AB] and said that her mum had used a phrase "are you on drugs" in a way which did not mean she was accusing her she was a junkie. [AB] refused to listen and continued to shout abuse at [the pursuer]. [the pursuer] said that she knew [AB] was hurting and angry but that [AB] needs to be mindful of the way she speaks to people. [the pursuer] asked [AB] to listen to herself and the way she

was shouting and screaming would not be accepted as she went through life by anyone. [AB] still continued to shout abuse about her mum not wanting her and that her mum said that her sister [AB's sister's name] didn't want her home either. [the pursuer] said that she wouldn't want [AB] in her house screaming and shouting like that either.

[AB] left the living room in a rage shouting that she wouldn't want to go to [the pursuer] house anyway and slammed the door against the computer table.

[AB] came back into the living room and directed her anger towards [the pursuer], threatening to knock her out and that she wanted [the pursuer] out of her house. She was screaming that she hated [the pursuer]. [AB] then grabbed [the pursuer] by the hair and began kicking her in the legs and body.

Writer [LR]: [AB] spoke with [JM] and [LR] on the stairs crying. [AB] was ripping the wood off of the banister while crying. [LR] took the wood from [AB's] hands and stood in front of the wooden banister to stop [AB] continuing the destruction of the house banister. [AB] explained that she had overheard [the pursuer] siding with her mum. Both staff members reassured [AB] that she had only heard one side of the conversation and that there was possibly a plausible explanation, [AB] needed to breath [sic] out her frustrations first before she could rationalize the situation. [AB] took slow deep breaths and appeared to have calmed down. [AB] began walking down the stairs and [JM] walked with [AB] as she strided [sic] towards the living room where [the pursuer] was. [JM] entered the living room first standing between [the pursuer] and [AB], [AB] was crouched in the fetal [sic] position by the door where Lisa was standing. [AB] challenged [the pursuer] verbally about her conversation on the phone with her mum and number of other various conversations. [the pursuer] attempted to explain the conversation with [AB's] mum. [AB] leapt from her seated position and grabbed [the pursuer's] hair with her right hand. [LR] moved behind [AB] removing her hand from [the pursuer's] hair while [JM] was in front of [AB] trying to separate [AB] and [the pursuer]. [LR] placed [AB] in a cross chest hold while [AB] was continuing to scream at [the pursuer], [JM] was stood between [the pursuer] and [AB]. As [LR] walked [AB] backwards away from [the pursuer], [LR] noticed that [AB] was kicking out at [the pursuer], [LR] continued to walk back with [AB] speaking to her during the hold and guiding her to breath [sic] out her anger rather than hurting people and place some distance between [AB] and [the pursuer]. [AB] broke free from the hold and attempted to assault [the pursuer] a few more times screaming that [the pursuer] had attempted to strangle [AB]. [the pursuer] explained that she had her hand at [AB's] shoulder/neck in self-defense [sic] to place some distance between [the pursuer] and [AB]. During [AB's] other attempts to reach [the pursuer] in further assaults [LR] and [JM] were able to intercept any contact between [AB] and [the pursuer].

Management of the Incident

What strategies were used to establish safety?

[*the pursuer*] left the living room and went up to the office. [LR] and [JM] spent a short time in the front living room with [AB] listening to [AB's] perceptions of the situation and offering reassurance that staff recognised [AB] is hurting from the phone call with mum. [LR] and [JM] reassured [AB] that once [AB] has emotionally settled then I am sure that there will be things that make sense once she has the whole picture. [AB] was still heightened explaining that if [*the pursuer*] doesn't leave then she will. [AB] persisted with her statement that she felt that [*the pursuer*] had tried to Strangle her."

The pursuer completed: (i) the section entitled "Events Leading to the Incident"; and (ii) the first three paragraphs of the section entitled "Report of the Incident". LR completed the final paragraph of the section entitled "Report of the Incident", which commenced with the heading "Writer [LR]".

30. That the pursuer was investigated by the defenders in respect of both AB's allegation that the pursuer had assaulted AB by grabbing her neck and in relation to the remark. The investigation concluded that the pursuer had not assaulted AB. No disciplinary action was taken against the pursuer in relation to the remark.

31. That on 30 June 2017 AB pled guilty to an amended charge on a summary complaint which was in the following terms:

On 9th August 2016 at [S], [address], you [AB] did assault [*the pursuer*], c/o the Police Service of Scotland and did seize her by the hair, pull her by the hair and repeatedly strike her on the head and body; all to her injury"

32. That JM and LR had received similar induction training to that received by the pursuer. The induction training received by the pursuer, JM and LR, in relation to CALM techniques and de-escalation was sufficient, if followed, to allow them to perform their duties at S.

Finds in Fact and Law

1. That the defender had a common law duty to take reasonable care for the pursuer's safety and health, and to provide and maintain for her a safe system of working.
2. That it would have been apparent to an ordinary reasonable person in the position of JM and LR that a reasonable and probable consequence of their combined failure to prevent AB from re-entering the living room, would be harm to the pursuer.
3. That the applicable standard of care is that of a reasonably competent residential worker in the position of JM and LR (hereinafter referred to as "the applicable standard of care").
4. That the combined failure of JM and LR to prevent AB re-entering the living room fell below the applicable standard of care.
5. That but for the combined failure of JM and LR to prevent AB re-entering the living room, the harm to the pursuer would not have occurred.
6. That the combined failure of JM and LR to prevent AB re-entering the living room was so closely connected with acts that JM and LR were authorised to do that, for the purposes of the liability of the defender, it may be fairly and properly regarded as done by JM and LR while acting in the ordinary course of their employment with the defender. Accordingly, the defender is vicariously liable for the conduct of JM and LR.
7. That the remark made by the pursuer did not result in her falling below the standard of a reasonable person in the pursuer's position. Accordingly, the pursuer was not contributorily negligent by making the remark and the damages recoverable by her should not be reduced in terms of section 1(1) of the Law Reform (Contributory Negligence) Act 1945.

8. That the pursuer is entitled to damages of £12,000 (inclusive of interest to 19 January 2021).

Finds in Law

1. That the defender is liable to make reparation to the pursuer at common law in the sum of £12,000 (inclusive of interest to 19 January 2021).

NOTE

Introduction

[1] This is an action for reparation. The pursuer was formerly employed by the defender as residential care worker at S. S is a residential house which accommodates a maximum of four children or young persons who are not, at that time, able to live at home. On 9 August 2016 a female resident of S, AB, who was approaching her 16th birthday, assaulted the pursuer. There is no dispute that the pursuer was assaulted by AB. In this action the pursuer claims that the defender is vicariously liable for the negligent actions of two colleagues (JM and LR) who were working with her when she was assaulted and seeks damages for the harm caused to her.

[2] The proof was heard over 3 days, between 19 and 21 January 2021. The parties had agreed quantum at £12,000 (inclusive of interest to 19 January 2021). The pursuer called the following three witnesses to give evidence:

1. The pursuer;
2. AR, former registered manager at S; and
3. Amanda Trimble, Health and Safety consultant.

The defender called the following witness to give evidence:

1. LR, former residential care worker at S.

The Evidence

The pursuer's evidence

[3] The pursuer explained that she had formerly been a police officer and that she had also worked in the Scottish Prison Service. The pursuer spoke to the background facts set out findings in fact 1 to 20, the subsequent investigation of her (finding in fact 30), the charge that AB ultimately pled guilty to (finding in fact 31) and that JM and LR had received similar training from the defenders to what she had received (finding in fact 32). As regards the events on 9 August 2016 the pursuer gave the following evidence. On 9 August 2016 the pursuer was doing a sleep over shift at S. Also on shift at S that day were two further residential workers, namely, JM and LR. AB had been having contact with her father out with S and returned to S about 16.00 hours on 9 August 2016. At that time AB's mood was ok. At some point after AB had had dinner she asked the pursuer if she could telephone her grandad regarding what he was going to get her for her birthday. At that time: (i) some of the rooms were still in mess as a result of incident on 8 August 2016; (ii) there was only one other female child at S; and (iii) this other female child was: (a) wary of AB, (b) kept her distance from AB, and (c) had been told to go to her room to allow the staff to tidy the messy rooms. The pursuer allowed AB to use a cordless telephone to contact her grandad. After speaking to her grandad AB telephoned her mother. The pursuer was not aware that AB was going to telephone her mother. When AB was speaking to her mother her tone changed. At this time she was sitting on the stairs leading to the first floor and the pursuer was at the door to the ground floor bedroom, next to the stairs, listening to AB speaking to her mother. AB was using a raised voice and was arguing with her mother. The pursuer

gestured to AB to keep her voice down and gave her a thumbs up gesture to encourage her that she was doing well. AB's telephone call with her mother was difficult for AB. AB was saying to her mother words to the effect that the registered manager of S, AR, had said to her that she could return home when the voluntary arrangement came to an end on her 16th birthday. AB was saying that she was entitled to go home and demanding to go home. AB was shouting and screaming and said something like "everyone else gets to go home" and said she was coming home. AB's telephone call with her mother lasted a few minutes. At the end of the call AB threw the cordless handset down the stairs. As a result, the handset came apart.

[4] The pursuer picked up the cordless handset and put it back together. As soon as she did so, the cordless handset began to ring. The pursuer answered and it was AB's mother on the line. The pursuer had spoken to AB's mother on the telephone on numerous previous occasions and had also met her in person on numerous occasions. The pursuer moved into the ground floor living room in order to speak to AB's mother. AB's mother was furious in relation to having been told by AB that the registered manager had told her (AB) that she could go home on her 16th birthday (the pursuer did not think the registered manager had told AB she could go home on her 16th birthday). AB's mother told the pursuer that she had told AB that she (AB) would never change. The pursuer tried to explain to AB's mother how well AB had been doing recently. During the telephone call AB was in the hallway shouting and screaming. AB was saying that her mother had called her a junkie. AB then burst into the living room and was screaming at the pursuer that: (i) her mother had called her junkie; and (ii) the pursuer was believing her mother. AB's anger was "off the scale". The pursuer ended the telephone call with AB's mother. The pursuer had ascertained that AB's mother had said to AB something like "are you on drugs?" when

AB had asked to go home. The pursuer tried to explain to AB that it was just a turn of phrase similar to "are you for real?". AB's anger did not abate and her anger was directed at both her mother and the pursuer because she was convinced that the pursuer was taking her mother's side. AB said to the pursuer, words similar to: (i) she would kick her c**t in; (ii) she would knock her out; (iii) that she wanted a new key worker; and (iv) that she wanted the pursuer out of the house (meaning out of S). At this point AB was standing within the living room next to the door to the hallway.

[5] The pursuer initially said that JM and LR were in the doorway of the living room when the matters set out in paragraph [4] above were occurring. However, in cross examination she accepted that she could not see who was in the doorway but was clear that the door was being held open at about a 45 degree angle by either JM or LR or both of them. The pursuer explained that the living room door was a fire door and, as a result, closed automatically and therefore it must have been held open by one or both of JM or LR. When it was put to the pursuer that LR was in fact in the first floor office, the pursuer, did not suggest that was incorrect. The pursuer considered that whoever was at the door would have heard AB threatening to assault her.

[6] The pursuer explained that whilst she was in the living room with AB, she asked AB to stop shouting and screaming and encouraged her to talk in a calm manner. AB was shouting that: (i) her mother didn't want her in the house; and (ii) that her sister didn't want her in the house. The pursuer said to AB something like "I wouldn't want you screaming and shouting like that in my house either". AB left the living room in a rage, shouting that she would not want to go to the pursuer's house anyway, and slammed the living room door against a table in the living room that was adjacent to the door. The pursuer accepted, with the benefit of hindsight, that her remark was "not the best" but she

advised that she did have a relationship with AB whereby she could give her that type of direct feedback. The pursuer did not consider that her remark inflamed the situation but accepted that it did not de-escalate the situation. The pursuer denied that she had made the remark because she had lost her temper. The pursuer explained that the source of AB's anger, at both her mother and the pursuer, was because of the terms of the conversation that she (AB) had had with her mother and because she felt that the pursuer had sided with her mother.

[7] The pursuer explained that AB entered the hallway from the living room. The pursuer remained in the living room, tidying up the mess from the incident the night before. The pursuer said that she could hear AB in the hallway or stairs with JM and LR making threats to kick the pursuer's c**t in, demanding that the pursuer's leave the house and saying that if the pursuer's didn't leave, then she would. The pursuer could also hear the pursuer again screaming about her mother calling her a junkie and stating: (i) that the pursuer believed her mother; (ii) that she hated the pursuer; and (iii) that she wanted the pursuer out of the house. The pursuer said that she could hear three voices in total (namely AB, JM and LR) and could hear JM and LR trying to calm AB down.

[8] The pursuer explained that JM, AB and LR then re-entered the living room from the hallway. She described the living room door "bursting open". JM entered first, then AB, then LR. JM stood in the middle of the living room. AB squatted down near to the living room door with her back leaning against a radiator. LR stood near to AB. The pursuer was stood near to the television in the living room, which meant there was a bit of distance between the pursuer and AB. There had not been any discussion with LR about LR bringing AB back into the living room. AB was still raging. AB was shouting and swearing at the pursuer in relation to the phone call the pursuer had had with AB's mother and was

threatening to kick the pursuer's head in. Suddenly, AB leaped up from her squatted position and attacked the pursuer. AB grabbed the pursuer's hair with one hand and used her other hand to punch the pursuer on her head and body. AB pulled the pursuer to ground and repeatedly punched and kicked the pursuer. During the attack the pursuer, in an attempt to stop AB punching and kicking her, tried to push AB away and made contact with AB's neck/shoulder area. LR managed to get hold of AB in a type of bear hug and tried to pull her away from the pursuer. AB continued to have hold of the pursuer's hair and continued to punch and kick the pursuer. Eventually LR managed to pull AB away from the pursuer.

[9] The pursuer explained that later in evening on 9 August 2017 the pursuer went to hospital for treatment to the injuries she sustained in assault by AB. Prior to doing so the pursuer was instructed by the on-call manager to prepare an Incident Report (the relevant parts of the Incident Report are narrated at finding in fact 29). The pursuer explained that she completed: (i) the section entitled "Events Leading to the Incident"; and (ii) the first three paragraphs of the section entitled "Report of the Incident". LR completed the final paragraph of the section entitled "Report of the Incident", which commenced with the heading "Writer [LR]". The pursuer noted that she may have been concussed when completing the Incident Report and that she was completing it as fast as possible before she went to hospital. The pursuer explained that the Incident Report was a summary of events and that the references that she made in her summary regarding AB shouting "abuse" encompassed the threats AB had made to assault her in both the living room (on the first occasion) and in the hallway (after AB had left the living room). The pursuer was adamant that AB had made threats to assault her in both the living room (on the first occasion) and in the hall (after AB had left the living room). The pursuer noted that she would not include

every comment made by AB in the Incident Report because: (i) she would normally spend time going over an Incident Report with AB after the incident; (ii) that the contents of the Incident Report, as written, would have been traumatic enough for AB to see; and (iii) that she did not want to be too hard on AB in the Incident Report. The pursuer considered that LR's part of the Incident Report was wishy washy and focused on AB rather than the violence and aggression shown. She did, however, accept in cross examination that saying there might be a plausible explanation and asking AB to breathe slowly, were attempts to de-escalate the situation. The pursuer considered that she would not have been assaulted by AB if JM and LR had prevented AB from re-entering the living room. The pursuer considered that JM was a weak member of staff who struggled to say "no" to children residing at S.

AR's evidence

[10] AR gave the following evidence. AR was 44 years of age and had a number of qualifications relating to residential child care. Between approximately 2007/2008 and 1 January 2017 AR had been the registered manager at S. AR explained: (i) the background information set out finding in fact 2; (ii) the staffing levels at S (see finding in fact 17); (iii) that AB was at S as a result of a voluntary order and that the pursuer and JMcD were her key workers (see finding in fact 8); (iv) the role of a key worker (see finding in fact 3); (v) that the pursuer had been AB's key worker for about a year; (vi) that the staff were permitted to give direct feedback (see finding in fact 15); and (vii) that all staff received training in CALMS techniques and de-escalation. AR was taken through the challenging behaviour policy (see finding in fact 6). AR confirmed: (i) that when a young person was unable to manage his emotions, the carer, should encourage the young person to use the

young person's safety plan and, where appropriate, use the de-escalation techniques identified in the care plan and risk assessment; and (ii) that the staff were trained in the de-escalation techniques set out at points 2, 3, 4 and 9 of the said policy. AR explained that if a child made threats of violence to a member of staff it would usually be for the member of staff to remove themselves. If there were threats made to a member of staff, the other staff members ought not to allow the child to return the room where the target member of staff was. What the other members of staff ought to do, in that scenario, is to keep the child away from the target member of staff for a period of time and then address the issue in a safe way.

[11] AR agreed that the pursuer had raised concerns about the performance of JM and agreed that she was not able challenge the children at S effectively. AR confirmed that he was aware that AB had previously assaulted FM and, as a result, had been charged by the police (see finding in fact 13). AR agreed that AB's propensity to assault staff was well known to the staff and explained that she had the ability to assault staff when in crisis. AR was referred to the risk assessments of 10 January 2016 and 1 June 2016. AR agreed that the "Main Concerns at this time" section was used to identify triggers and accepted that AB being betrayed was a trigger identified in the risk assessment of 10 January 2016. AR explained that all staff would need to have a working knowledge of the risk assessment and care plan for each child.

[12] AR advised that he was not physically at S when the pursuer was assaulted by AB. AR confirmed that he completed the manager's section of the Incident Report. He confirmed that he wrote the following comments:

"Managers Comments on the Completion of the IR and/or the Incident

I have a few reflections from this incident.

Over the last week [AB] has been having big conversations with the care team about what turning 16 means for her and what her voluntary order means for her. She is confused and anxious about her future despite assurances that she can continue to

stay at [S] under the continuum of care legislation. [AB] had been adamant that she was going to call her mum to ask if she can return home despite advice that this was unlikely to be a positive answer due to the challenging relationship between them. Following this phone call and the rejection that followed [AB] was incredibly upset and the power of this emotion manifested in her being much less emotionally contained and ultimately her physical response to the staff member.

Having reflected on it I feel that the comments from the staff member about not accepting the behavior [*sic*] being displayed in her own home were poorly chosen given the circumstances and emotional condition of [AB] at that time. The staff member has had a good relationship with [AB] for a year and can give [AB] direct feedback usually however on this occasion the rejection from mum meant that this was too much to tolerate and she reacted to this.

I cannot and will not condone an assault on any member of the care team within [S] and [AB] will have to take responsibility for her actions and work to repair the relationship with her key worker. [AB] has been charged with assault at the assaulted staff members request and I recognize [*sic*] her right to do this. I will also be reflecting on this incident with the team involved for future learning. [AB] has suggested to me that she feels she was assaulted during the course of assaulting the staff member, I have reflected with her that she is free to contact the police in this regard or make a complaint to myself or her social work department.”

[13] AR made clear that the pursuer had a very good relationship with AB and explained that the pursuer had been hugely committed to AB. AR accepted that the closeness of that relationship was a factor in giving direct feedback and that a staff member with a close relationship with a child would be in good position to know how to pitch direct feedback. As regards the remark made by the pursuer, AR explained that he considered it to be “poorly chosen” not because of the words used but because of the timing of the remark. AR highlighted that AB had just experienced the most painful thing that a child could hear (that you are categorically not welcome in your family home) and given that fact, it was the timing of the remark that was “poorly chosen”. AR explained that what he meant by reflecting on the incident for future learning, was exploring why JM and LR had allowed AB to re-enter the living room and considering how that impacted on safety.

[14] In cross examination AR was asked if LR formed a judgement that a child had calmed down would he have any concerns. AR said it would depend on the circumstances

and explained that LR was not strong on managing physical disputes but was good at emotionally containing a young person to bring them down. AR was asked whether LR was an accurate reader of a young person's emotion. AR said she sometimes was and sometimes she was not. AR accepted that it was good thing for LR to attempt to calm AB down by saying that she had only heard one side of the storey and getting her to breathe slowly.

Amanda Trimble's evidence

[15] Amanda Trimble was called as an expert for the pursuer. She gave the following evidence. She had a post graduate diploma in occupational health and safety for HM Inspectors of Health and Safety. Her relevant employment history was as follows:

- (1) 2017 to present – Associate Consultant with Finch Consulting in Leicestershire;
- (2) 2005 to present – Freelance Health and Safety Consultant;
- (3) 2001 to 2005 – Health and Safety Officer at Bridgend County Borough Council; and
- (4) 1997 to 2001 – HM Inspector of Health and Safety at the Health and Safety Executive (hereinafter referred to as “HSE”)

As an HM Inspector of Health and Safety Ms Trimble was in the service group that dealt with NHS Trusts, nursing homes, local authority run children's homes and special needs establishments. She would conduct management audits every 6 weeks and investigate incidents. Her key area of expertise was the risk management of violent and aggressive behaviour and she had audited and investigated children's home and other establishments (where challenging behaviour was exhibited) in that regard. Since leaving the HSE she had provided advice and guidance, on the risk management of violent and aggressive

behaviour, to a number of organisations and had last provided advice to a residential home for young persons, in that regard, about 5 years ago. She currently had two roles, firstly as a free-lance health and safety consultant and, secondly, acting as an expert witness in her role with Finch Consulting.

[16] Ms Trimble adopted her two reports and confirmed that she had considered, amongst other documents, a precognition from the pursuer, the risk assessments dated 10 January 2016 and 1 June 2016, a personal action plan in respect of AB and training information including the challenging behaviour policy. Ms Trimble considered that the level of training provided to the staff was sufficient to meet HSE and industry benchmark standards for managing generic challenging behaviour. However, she considered that the said risk assessments were not sufficient. Ms Trimble explained that risk assessment was a five stage process:

- (1) Stage 1 – identify the hazard;
- (2) Stage 2 – decide who may be harmed and how;
- (3) Stage 3 – evaluate the risk and decide on precautions;
- (4) Stage 4 – document findings; and
- (5) Stage 5 – review.

[17] Ms Trimble explained that the risk assessments were deficient because they did not: (i) address how a person could be harmed; and (ii) identify control measures. Ms Trimble considered that the risk assessments should have identified the known triggers for AB and then identified specific techniques to de-escalate AB's behaviour (including what to do when the situation became critical). Ms Trimble accepted that de-escalation techniques could be found in the challenging behaviour policy but explained that it was a generic policy and

what should have happened is that the control measures should have been tailored to AB.

Indeed the said policy made this clear where it stated:

“Key points (Risk Assessment)

1/ Individual risk assessments will be carried out and updated regularly for each young person. Strategies for managing challenging behaviour will be based on assessed risk.

2/ the individual risk assessment will provide guidance to carers about the level of risk to the young person and others, and the action to be taken by the carers to reduce the risk level.

[...]

5/ the risk assessment should provide specific responses to risk, which should be identified in the individual safety plan.”

Ms Trimble noted in her report that it was not clear, from the documentation that she had considered, whether she had received the safety plan for AB. She did, however, observe that if the safety plan was contained within the said risk assessments, under the headings “things that you think will keep you safe” (which was not completed in respect of the 1 June 2016 risk assessment) and “our agreed action”, the comments in each risk assessment were aimed at keeping AB safe and did not address the safety of staff. The lack of detail in the risk assessments meant that it was not immediately clear why AB became aggressive, what form this would take and what actions the staff could take to calm the situation.

[18] As regards the assault on the pursuer, Ms Trimble was under the impression that AB had made threats to kill the pursuer. Ms Trimble was of the view that if the other staff members had heard AB making threats of violence against the pursuer, they should not have allowed AB back into the same room as the pursuer until AB had calmed down and the threat of aggression had diminished. Ms Trimble considered that the level of aggression shown by AB towards the pursuer, taken together with known previous assault (on FM),

resulted in a foreseeable risk that things could escalate if AB was allowed to re-enter the room that the pursuer was in. She considered it would have been reasonable for the other staff members to de-escalate the situation and create space between the pursuer and AB. However, the risk assessments did not give the staff any guidance as regards how they should de-escalate the situation or what to do when the situation became more critical.

[19] In cross examination, Ms Trimble ultimately agreed that talking to AB could be a de-escalation technique. When asked whether AB being told that she may have misinterpreted the telephone call that the pursuer had had with AB's mother was an attempt at de-escalation, Ms Trimble said she was not qualified to comment. Ms Trimble said that she could not recall identifying any de-escalation techniques being utilised in the Incident Report. She explained that in an incident report you would expect to see examples of what the staff said and did and then be able compare that with the identified control measures in the risk assessment/care plan. When Ms Trimble was asked if AB could have re-entered the room if she had calmed down and the threat diminished, Ms Trimble said she wasn't qualified to comment and that her comments were restricted to risk management. Finally, she said that if you have a situation where someone could get hurt, you take them out of that situation.

LR's evidence

[20] LR gave the following evidence. LR was 48 years of age. She had a teaching qualification which allowed her to teach dance. She was currently studying a diploma in social care. LR was employed by defenders between 2013 and 2016. Prior to that LR had operated her own dance school. LR explained that she had, on commencing employment with the defenders, undergone two weeks of induction training. That training included

CALM safe hold techniques, trauma informed care and de-escalation techniques. The de-escalation techniques were to try and prevent the child from losing control emotionally. LR explained that she would try and get the child to co-regulate with her. In order to do so she would slow down her voice and give the child a chance to think and breathe. If that did not work a safe hold could be used if required.

[21] LR confirmed that AB normally had a good relationship with the pursuer and that the pursuer had achieved good outcomes for AB.

[22] LR explained that she was working at S on 9 August 2016 with the pursuer, JM and perhaps another person. By that time LR had been working with AB for around 2 years.

The first she became aware of incident was when she was in the first floor office near to the stairs. She heard banging and screaming outside the first floor office. She went out of the first floor office to investigate and saw AB in an extremely distressed state ripping wood from the stair banister. The banister was being destroyed. AB was shouting and angry. LR asked her what was wrong. AB gave LR a massive hug and sobbed. AB explained to LR what had happened. AB said her mother wanted nothing to do with her and that the pursuer had said something similar. LR said to AB that she might have misheard or misunderstood what the pursuer had said. AB said she maybe did misunderstand and said she would quite like to understand what happened. AB then walked down the stairs. LR explained that AB was taking the lead. It had been around 5 to 10 minutes (but probably closer to 5 minutes) between LR first seeing AB ripping the bannister and her walking down the stairs. By this time LR considered that AB had de-escalated from anger and was at the point of reasoning. Around this time JM came out of the bathroom and AB said she wanted to have a chat with the pursuer. LR asked JM if she would mind supporting AB chatting to the pursuer and JM said that would be fine.

[23] They all went to the living room where the pursuer was. JM went into the living room first, followed by AB, with LR being last into the living room. LR asked the pursuer if it was ok for a quick catch up and the pursuer said "sure". LR stood by the living room door, AB was next to the living room door crouched down in a foetal position, with her back resting against the wall. LR considered that AB was not distressed but in a contained place. LR considered that AB had found a safe space but was open to conversation. AB was talking to the pursuer and asking her about what happened with her mother. LR thought the conversation went on for about 10 minutes. LR had no concerns about how the conversation was going. LR considered it to be a sincere conversation. Then the pursuer moved towards AB and raised her voice, however, LR explained that she did not perceive the pursuer's actions as aggressive but suggested that AB may have. AB then flew through the air and grabbed the pursuer by the hair. AB had her right hand on the pursuer's hair. LR put AB in a safe hold. LR said that she heard JM say to the pursuer to take her hand of AB's neck and saw the pursuer's hand on AB's throat. LR and JM managed to separate the pursuer. Later that evening LR completed the "Writer [LR]" part of the Incident Form.

[24] In cross examination LR said that she did not know where JM was when AB was shouting at the pursuer in the living room (on the first occasion). LR was asked whether AB shouted that she was going to kick the pursuer's c**t in. LR said that that was the type of thing that AB would say but she could not say what she heard that day. LR confirmed that she was aware that AB had been charged with assaulting FM. LR rejected a suggestion that AR would not be confident in LR dealing with a physical situation, explaining that she had supported the staff team by using safe holds on 4 or 5 occasions. LR explained that certain aspects of the day (meaning 9 August 2016) were clear, but there were certain aspects, due to the passage of time, she could not recall. LR accepted the reference to "[JM] walked with

[AB] as she strided towards the living room” in the Incident Report perhaps indicated that AB was walking with purpose. It was suggested to LR that AB was striding to confront the pursuer. LR noted that “strided” could be perceived in different ways and suggested it could have been walking with a purpose to understand. LR explained that the reference to “[AB] challenged [*the pursuer*] verbally” could be that AB was speaking directly and did not necessarily mean it came with aggression. LR explained that throughout the incident she could not recall whether AB made threats of violence to the pursuer. LR explained such threats were part of AB’s behaviour and that it was possible she did threaten the pursuer with violence during the incident but she could not be sure. LR did not think that JM had told her that AB had threatened to kick the pursuer’s c**t in or threatened to kill the pursuer, but noted it was the way that some of the children at S spoke. LR was asked that if AB had threatened violence to the pursuer, did she accept it was no idle threat because AB had used violence on staff before. LR agreed, but noted that AB had threatened more staff than she had actually assaulted. LR was asked whether AB should have been allowed to re-enter the living room if she had threatened the pursuer with violence which had been overheard by another member of staff. LR said that it was part of the work of reconciliation. LR accepted that AB’s anger on the stairs was directed at the pursuer and explained that she (LR) considered that there had potentially been a misunderstanding. When it was suggested to LR that it would be courting danger to put AB in front of the target of her aggression, LR stated it would not be smart, but that there were three members of staff in the living room and that the pursuer had sound relationship with AB. When AB re-entered the living room LR did not think she was furious, but she did think she may have been hurting.

Submissions

[25] Counsel for both the pursuer and defender had helpfully prepared succinct written submissions and both made additional oral submissions.

Submissions for the Pursuer

[26] Counsel for the pursuer narrated the evidence and made the following submissions.

The pursuer was a credible and reliable witness. It was accepted that the pursuer had conceded in cross examination that she could not see who was at door when AB was in the living room with her on the first occasion, but when the pursuer's evidence was taken with the parts of LR's evidence that could be accepted, a reasonable conclusion was that it was JM holding the living door open and therefore JM heard the threats made by AB to assault the pursuer. LR was not an impressive witness and was in many respects unreliable. LR's evidence could shed no light on the event in the living room which led to AB being in the hallway in distressed state. LR appeared to be filtering her evidence through the prospective of AB, rather than providing her own memory of events. Her account in oral evidence was contradicted by what she had written in the Incident Report. Her account in oral evidence of what occurred in the living room when AB re-entered that room was irreconcilable with the pursuer's account of that part of the events. It was more likely that the pursuer's version of events was correct. Her account was supported by the fact that AR considered that the incident was extremely distressing for AB. LR seemed to fail, even after the event, to grasp the risk that AB presented and seemed to suggest that the threat could be disregarded because she had threatened violence to members of staff on more occasions that she acted on those threats. Where the evidence of the pursuer and LR differed, the pursuer's evidence should be preferred.

[27] Counsel for the pursuer accepted that a HSE guideline on violence and aggression, referred to in Ms Trimble's report, had not been lodged and, in the circumstances, conceded that her evidence in respect of the said HSE guideline should not be admitted. However, the remainder of her evidence ought to be admitted under the tests set out in the recent Supreme Court case of *Kennedy v Cordia (Services) LLP* [2016] UKSC 6. Ms Trimble's evidence established that the risk assessments and care plans lacked the essential information on the nature and type of risk faced by staff and failed to identify the control measures that they ought to have used to de-escalate an aggressive situation. That resulted in the staff not being provided with instruction as to what to do when AB became overwhelmed. Ms Trimble's evidence also made clear that, from a risk management perspective, it would have assisted matters for AB and the pursuer to be separated to allow the situation to de-escalate. Counsel for the pursuer noted, as a fall-back position, that Ms Trimble's evidence was not essential to the pursuer's case and that liability could be established on the basis of the other evidence before the court.

[28] Counsel for the pursuer submitted that in the exercise of the duty of care owed to provide a safe system of working, the defender ought to have: (i) provided risk assessments that identified specific risks presented by AB; (ii) provided techniques to de-escalate AB; and (iii) in circumstances where: (a) a threat of violence had been made; or (b) the child was becoming emotionally overwhelmed; the child and the target of that violence of aggression should be separated, until such times as the risk had subsided. On the evidence of the pursuer: (i) there were direct threats of violence issued by AB to the pursuer; (ii) these threats were heard by at least JM when she was stood at the door of the living room; (iii) that AB was highly agitated and angry; and (iv) that her anger was directed at the pursuer. In the circumstances, the combined failure of JM and LR to prevent AB, by physical restraint

or diversion, from re-entering the living room was negligent. The failure by JM to act, in that regard, was consistent with the observation of the pursuer (which was fully supported by AR) that JM had an inability to effectively challenge the children at S and say “no” to them. It was reasonably foreseeable, that in the event of the combined failure to prevent AB from entering the living room, that AB would commit an act of violence. In such circumstances liability had been established. Finally, Counsel for the pursuer submitted, under reference to *Gloag and Henderson, The Law of Scotland*, 14th Ed at paragraph 25.37 that the pursuer had not been contributorily negligent in making the remark. The test was whether the actions of the pursuer were jointly causative of the accident along with the negligence of JM and LR. The pursuer required to take reasonable care for her own safety, as was reasonable in the circumstances. The evidence showed that the reason why AB was angry was because of AB’s perception that the pursuer had taken her mother’s side of the argument. In such circumstances, the remark was poorly chosen, for the reasons given by AR, but it was not negligent and there should, therefore, not be a finding of contributory negligence.

Submissions for the Defender

[29] Counsel for the defender accepted that the key question was whether AB should have been prevented from re-entering the living room. He noted under reference to *Walker and Walker, The Law of Evidence in Scotland, 4th Edition*, at paragraphs 2.2.3 to 2.2.4 and 2.4.1, that while the question of onus usually ceased to be important once evidence is led, the burden of proof remained on the pursuer, who will fail if no evidence was led. The present case was brought at common law. The common law duty to take reasonable care was not absolute. It was relative and circumstantial. The nature and extent of the duty was

informed by the necessary judgements and actions made by skilled and trained staff working in a challenging environment.

[30] Counsel for the defender, while accepting that the pursuer was a credible witness, contended that she was an unreliable witness. In particular, she was unreliable as regards who was at the door of the living room when she was in that room with AB on the first occasion. In examination in chief the pursuer said that both JM and LR were visible at the door of the living room and could hear what was going on. However, when the pursuer became aware, in cross examination, that LR had been upstairs, the pursuer back-tracked and said she couldn't see who was at the door. The pursuer seemed to wish to put LR and JR together and seemed to be tailoring her evidence to the case she wanted to make. Given the unreliability of the pursuer's evidence regarding who was at the living room door, the court, it was contended, should not make a finding in fact that anyone was at the living room door. Further, the pursuer said that when AB re-entered the living room the door burst open. But there was no dispute that it was JM who entered the living room first and it may be that the pursuer was seeking to upgrade the drama of the event. The pursuer also did not concede that the remark she made to AB inflamed the situation. In circumstances where, as AR put it, AB had heard the most painful news a child could hear (that she was not welcome at home) the remark was like throwing petrol on the fire. The pursuer should have conceded that point instead of maintaining the remark did not make things worse and her failure to do so adversely affected her reliability. Given that the pursuer did not leave the living room, she could not really help with what happened in the hallway/stairs after AB left the living room. However, the pursuer did say that she heard JM and LR attempting to calm AB down in the hallway and that evidence supported LR's version of events.

[31] Counsel for the defender submitted that the evidence in this case demonstrated that AB's anger had sufficiently dissipated such that it was safe and proper for AB to re-enter the living room accompanied by LR and JM. The court could and should make such a finding on the basis of the evidence of LR, who was a credible witness. The first intimation that LR had of any problem was when she was in the first floor office and heard AB ripping wood off the banister. LR was clear and unchallenged on this point. LR spoke clearly about her conversation with AB. LR counselled AB that there may have been a misunderstanding. AB listened to this and calmed down. AB then expressed a wish to reconcile with the pursuer, which was an indicator that she had calmed down. LR, by physical contact (in the form of a hug), listening, encouraging breath control and observation, whilst using her skills, experience and knowledge of AB, reached the view that it was safe to begin the reconciliation process between the pursuer and AB (with such reconciliation being part of the underlying *raison d'être* of child care). LR asked JM to support the reconciliation, thereby keeping the risk to a minimum and the pursuer did not object to a conversation taking place (the pursuer was asked if a conversation could proceed and she said "yeah sure"). That was against a background of AB having been doing well recently and having been downgraded in the 10 June 2016 risk assessment to being of medium risk of violence and aggression. In the circumstances LR made a judgment call to allow AB to re-enter the living room that she was both entitled and correct to make. LR's decision in this regard should not be second guessed with the benefit of hindsight. LR's conduct fell within the scope of reasonable care and she took proper precautions. AR's evidence that LR would not have been first choice in a physical confrontation situation added little to the consideration of the judgement made by LR. In any event, AR did not say LR was incapable of assessing and dealing with a physical

confrontation. The Incident Report completed by LR supported the fact that AB had calmed down by the time she re-entered the living room.

[32] Counsel for the defender had not objected to the evidence of Ms Trimble as whole (he had objected to any reference to HSE guidance in her report, on the basis that that HSE guidance had not been lodged - Counsel for the pursuer ultimately conceded this point), however, he submitted, on the basis of the tests set out in the case of *Kennedy*, that Ms Trimble was not qualified to give expert evidence to assist the court. She had no significant background in childcare nor were her qualifications apposite. Expert evidence must have sufficient content to qualify it for recognition. That content was lacking in this case. His fall-back position was that if Ms Trimble's evidence was to be admitted she was correct to say that if AB had calmed down and the threat diminished then there was not a barrier to AB re-entering the living room. Nevertheless, her evidence should be disregarded. Her evidence was clearly designed to supplant the role of the court. In any event, her evidence was of little value and generic. Her evidence was also contradictory, on one hand she was saying that the risk assessment didn't tell staff what to do, but on the other hand she accepted that the training was sufficient and told staff what they needed to manage violent and aggressive behaviour.

[33] In all the circumstances Counsel for the defender submitted that liability had not been established and that decree of absolvitor should be granted. In the event that the court considered that liability was established, Counsel for the defender submitted, for the reason given at paragraph [30] above, that a finding of contributory negligence should be made in relation to the remark made by the pursuer. The remark was made shortly before AB assaulted the pursuer in what was a continuing event. Given the inflammatory nature of the remark, it was contended that contributory negligence should be assessed at 50 percent.

Discussion

Conclusions on the evidence

[34] It is first convenient to consider the expert evidence given by Ms Trimble. In considering whether to admit her evidence I sought to apply the tests identified at paragraphs 38 to 61 of the case of *Kennedy*. In the present case Ms Trimble was not, unlike in *Kennedy*, giving any factual evidence. She gave opinion evidence in relation to the adequacy of the training provided to the pursuer and other staff and the adequacy of the risk assessments. She also offered an opinion in her report and in examination in chief as regards whether AB should have been allowed to re-enter the living room. However, in cross examination when asked if AB could have re-entered the living room if she had calmed down and the threat diminished, Ms Trimble said she wasn't qualified to comment and that her comments were restricted to risk management. I have set out Ms Trimble's experience at paragraph [15]. I accepted that Ms Trimble had considerable experience in relation to the risk management of violent and aggressive behaviour. As an HM Inspector of Health and Safety she had audited and investigated children's homes in that regard. Since leaving the HSE she had provided advice and guidance on the risk management of violent and aggressive behaviour to a number of organisations and had last provided advice to a residential home for young persons, in that regard, about 5 years ago. In the circumstances I considered that she had the requisite knowledge and experience to give opinion evidence on the adequacy of: (i) training provided to staff to equip them to deal with violent and aggressive behaviour; and (ii) risk assessments prepared to assess the risk of a person behaving violently or aggressively. I considered that Ms Trimble explained the reason behind the conclusions she had reached in respect of both the training and risk assessment

and I considered that her evidence in relation to them assisted me to determine the adequacy of both. I did not consider that I could give any weight to Ms Trimble's evidence as regard whether JM and LR ought to have prevented AB from re-entering the living room because she did not have a full grasp of the facts leading up to that point and ultimately it was a matter for the court to determine whether JM and LR had fallen below the standard of care required (on which see paragraphs [53] to [59] below). I did, however, accept the general proposition that for the purposes of minimising risk it may be necessary to separate the child from the target of their aggression (and indeed the challenging behaviour policy makes that clear at point 9 of the de-escalation techniques -see finding in fact 6) and that both threats made by AB and the prior assault perpetrated by AB, would be relevant factors. In the circumstances I admitted Ms Trimble's opinion evidence and had regard to it to the extent I have set out above.

[35] None of the witnesses made any criticism of the training the staff had received at S as regards the management of violent and aggressive behaviour. I considered that the pursuer and LR demonstrated that they had a good understanding of the de-escalation techniques that they had been trained to use. Ms Trimble considered that the training provided by the defender was sufficient to meet HSE and industry benchmark standards for managing generic challenging behaviour. In the circumstances I had no difficulty in finding that the training provided by the defender to the pursuer, JM and LR, in relation to the management of violent and aggressive behaviour (which took the form of CALM techniques and de-escalation techniques), was sufficient to allow them to perform their duties as a residential care workers at S.

[36] As regards the risk assessments of 10 January and 1 June 2016, I accepted, on the basis of Ms Trimble's evidence, that the risk assessments, when looked at in isolation, were

lacking because they did not identify: (i) how a person could be harmed; and (ii) any control measures to minimise the risk of AB using violent and aggressive behaviour.

Ms Trimble considered that the risk assessments should have identified the known triggers for AB and then identified specific techniques to de-escalate AB's behaviour (including what to do when the situation became critical). The risk assessment of 10 January 2016 did identify that being betrayed was a potential trigger for AB but, other than that, there was no evidence before the court to say whether AB had any known triggers or whether there were specific de-escalation techniques that she responded to. The pursuer did not aver what the control measures ought to have been. The challenging behaviour policy made extensive reference to both a safety plan and a care plan (where specific triggers and de-escalation techniques could be identified – see finding in fact 6) and it was clear that that said policy intended that these two documents should be read alongside the risk assessment.

Ms Trimble had not seen the safety plan and it was not clear whether the personal action plan, that she had seen, was in fact the care plan. In any event, neither the safety plan nor the care plan was referred to in evidence and therefore it was not known whether either of those documents did, in fact, identify whether AB had any known triggers or specific de-escalation techniques that she responded to.

[37] I considered that the risk assessments ought to have considered whether such triggers and techniques could be identified, but it was unclear whether these had in fact already been identified and set out in either or both of the safety plan or care plan. In the event that they had not been identified in the safety plan or care plan, there was, in any event, no evidence before the court to suggest: (i) that any such triggers and techniques would, in fact, have been identified; and (ii) if they had been, whether they would have assisted the staff on 9 August 2016. If it was not possible to identify such triggers and

techniques, then I considered that it was difficult to see what further control measures could have been included in the risk assessment, other than the staff falling back on their training to assess a given situation and use their training in de-escalation techniques and physical intervention to de-escalate the situation. In all circumstances I considered that the court did not have a full picture of the documentation that was in place at the relevant time and that, in such circumstances, it would be not be appropriate to make any findings as regards the suitability and sufficiency of the risk assessments without having considered the safety plan and care plan.

[38] In the circumstances there was certainly no basis for making a finding that a suitable and sufficient risk assessment would probably have resulted in a precaution being taken which would probably have avoided injury to the pursuer (I was not referred to the English Court of Appeal case of *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66, but I simply note the foregoing test is identified at paragraph 39 of that case by Smith LJ). That being so, I considered that this case turned on whether JM and LR, in combination, were in breach of duty in allowing AB to re-enter the living room and I now turn the relevant facts in that regard.

[39] There was no dispute in relation to: (i) the background facts set out findings in fact 1 to 20; (ii) the subsequent investigation of pursuer (finding in fact 30); (iii) the charge that AB ultimately pled guilty to (finding in fact 31); and (iv) that the pursuer, JM and LR had all received similar training from the defenders (finding in fact 32). I had no difficulty in accepting the pursuer's evidence (which was in many respects supported by the evidence of both AR and LR) in relation to these matters.

[40] The events of 9 August 2016 had essentially four parts, namely: (i) AB's telephone call with her mother on the stairs; (ii) AB's confrontation with the pursuer in the living

room on the first occasion; (iii) AB's actions in the hallway stairs after leaving the living room; and (iv) AB re-entering the living room with JM and LR and assaulting the pursuer.

[41] The pursuer spoke to parts 1 to 4, but she remained in the living room for the duration of part 3 and therefore could only say what she heard occurring in the hallway/stairs. The pursuer was the only witness to parts 1 and 2. The only other witness to events on 9 August 2016 was LR, but she could only speak to parts 3 and 4. The pursuer gave her evidence in a dispassionate, straightforward and calm manner. I considered her evidence was internally consistent and consistent with the Incident Report that she had completed later in the evening of 9 August 2016. I considered the pursuer to be a credible and reliable witness. I considered that LR came across as a caring person who was doing her best to tell the truth. However, I did consider that she was trying to focus on the positive aspects of AB's behaviour and that, as a result of that and the passage of time, she had filtered out much of the aggressive aspects of AB's behaviour. Indeed, LR accepted that AB may have been making threats to assault the pursuer but simply could not recall any such threats being made. I considered that LR had been hampered by the passage of time and that her recall of events, whilst internally consistent, was quite limited. Her evidence was also, at times, at odds with what she had written in the Incident Report. LR's account of part 4, was significantly at odds with that of the pursuer. I considered that was because LR's focus was on AB and, in particular, the rehabilitation between the pursuer and AB, and that LR had, again, filtered out AB's aggressive behaviour prior to the assault. The above points did not militate against the credibility of LR, but they did, in my view, adversely affect her reliability. Where there was a conflict between the pursuer's evidence and that of LR, I preferred the evidence of the pursuer.

Part 1 - AB's telephone call with her mother on the stairs

[42] The pursuer was the only person who witnessed part 1. However, both AR and LR accepted that AB had had a distressing call with her mother who had told her that she could not move back home. The pursuer's account was in line with what she had written in the Incident report under the heading "What happened before the incident?". In the circumstances I had no difficulty in accepting the pursuer's evidence in relation to Part 1.

Part 2 - AB's confrontation with the pursuer in the living room on the first occasion

[43] The pursuer was again the only person, who gave evidence, who witnessed part 2. Counsel for the defender contended that the pursuer's evidence as regards who was at the door of the living room should be disregarded due to the pursuer being unreliable in relation to that part of her evidence. I did not agree with that contention. In examination in chief the pursuer did say that both JM and LR were at the door of the living room but it became clear in cross examination that that had been an assumption on the part of the pursuer. Ultimately, the pursuer made clear that she was aware of someone at the living room door. She knew that because the living room door was a fire door that closed automatically and someone was holding the door open. She did not consider that it could have been the other child at S because, she was wary of AB, kept her distance from AB and had been told to go to her room to allow the staff to tidy up from the incident the night before. The pursuer did not know whether it was JM or LR at the door and explained that she did not know that LR was up the stairs. She also heard both JM and LR speaking to AB in the hallway after AB left the living room (ie during Part 3). Whilst there was no mention of someone being at the living room door in the Incident Report I did not consider that that was the type of information which would have been included in such a report. It was not to

the pursuer's advantage for her not to have seen who was at the door but she readily accepted that she could not. The pursuer did not take issue with the suggestion that LR was upstairs. I considered that the pursuer was telling the truth on this point. I had no reason to doubt that LR was not in the first floor office and therefore considered that it must have been JM at the living room. I drew support for that finding from the "Events Leading to the Incident" section of the Incident Report where it is stated that JM was "offering [AB] support to help her calm down" prior to the pursuer speaking to AB's mother on the telephone (i.e. after Part 1 and before Part 2) because I considered it would be common sense for her to have remained on hand to assist the pursuer given how AB was presenting. I also considered that that finding was consistent with the opening sentence of the "Writer [LR]" section of the Incident Report which, contrary to LR's evidence, stated "[AB] spoke with [JM] and [LR] on the stairs crying" and suggests that JM was immediately on hand when AB left the living room (i.e. immediately after Part 2).

[44] I accepted the pursuer's evidence that AB's anger was "off the scale". I considered that the pursuer's assessment of the level of AB's anger was supported by the unchallenged evidence that she was, immediately after Part 2, ripping wood off the stair banister. I accepted that, in that state, AB was making the threats detailed in finding in fact 23. I considered that the pursuer's account was consistent with what she had written in the Incident Report. I accepted that the pursuer had tempered the Incident Report so as not to be too hard on AB and that the references to AB shouting "abuse" in the Incident Report included AB making threats to assault the pursuer. I considered, for the reasons given at paragraph [43], that JM was at the door of the living room and would have heard AB both making threats to assault the pursuer and shouting about her belief that her mother had called her a junkie.

[45] As regards the remark made by the pursuer to AB, I have considered that issue at paragraphs [63] to [64] below.

Part 3 - AB's action in the hallway/stairs after leaving the living room

[46] The pursuer remained in the living room when AB left that room. The pursuer could not see what was going on but she was clear that she could hear AB in the hallway with JM and LR making the threats and comments detailed in finding in fact 25, whilst JM and LR were trying to calm AB down. LR said that the first thing that she saw was AB ripping wood off the banister but made no mention of JM being present. That was inconsistent with the opening sentence she wrote in the Incident Report (which I have quoted above at paragraph [43]) and the fifth sentence where it is stated that "Both staff members reassured [AB]...". These were, however, consistent with both JM and LR speaking to AB as the pursuer had in fact asserted. The pursuer said that AB left the living room in a rage. That was again supported by the unchallenged evidence regarding AB ripping wood off the banister moments later. LR accepted that it was possible that AB had been making threats to assault the pursuer but she could not recall her doing so. In the circumstances I considered that it was highly likely that AB continued to make threats to assault the pursuer whilst in the hallway/stairs and that these threats were made in the presence and hearing of both JM and LR.

[47] It was clear from LR's evidence and from what she had written in the Incident Report that LR was aware that AB was angry and upset because: (i) her mother had said that she was not welcome home; and (ii) because AB considered that the pursuer had sided with her mother. I considered that JM, given that she had been trying to comfort AB after the phone call with her mother, had been at the door of the living room while Part 2 was

occurring, and was trying to calm AB down in the hallway (with LR) after she left the living room, that JM would also have been aware why AB was angry with both her mother and the pursuer. I also considered, on the balance of probabilities, that both JM and LR would have heard AB screaming in the hallway/stairs about her belief that her mother had called her a junkie and that both would have been in no doubt that AB was exhibiting extreme anger at that time.

[48] I accepted that both JM and LR were trying calm AB down. From LR's evidence I accepted that AB had calmed down a little and indicated she wanted to speak to the pursuer. I do not, however, accept that she had calmed down sufficiently to have a face to face conversation with the pursuer when she went to re-enter the living room. I based that on the following factors:

- (1) That AB had been told one of the most painful things that a child could hear (that she was not welcome in her family home);
- (2) That AB considered that she had been called a junkie by her own mother;
- (3) That AB considered that her own key worker (and the person most important to her in the care system), the pursuer, had sided with her mother and believed her mother;
- (4) That, as a result of points (1) to (3), AB's anger was "off the scale";
- (5) That AB was screaming and making numerous threats to assault the pursuer;
- (6) That AB was screaming that her mother had called her a junkie;
- (7) That AB was ripping wood off the stair banister in anger;
- (8) That AB "strided" towards the living room immediately before re-entering the living room;

- (9) That there was only a very short time period between: (i) AB's anger being "off the scale"; (ii) making threats to assault the pursuer; and (iii) ripping wood of the banister; to her being allowed to re-enter the living room (LR estimated that it was between 5 to 10 minutes (but probably closer to 5 minutes) from her seeing AB ripping wood off the banister to her re-entering the living room);
- (10) That AB, after re-entering the living room, was still very angry and upset with the pursuer, was shouting and swearing regarding the phone call with her mother, was making further threats to assault the pursuer and then violently assaulted the pursuer.

[49] I have found that Points (1) to (9) were known to both JM and LR prior to AB re-entering the living room. LR made clear that she was letting AB take the lead and accepted that AB had, as she recorded in the Incident Report, "strided" towards the living room. LR said that there may have been a number of reasons why AB may have "strided" towards the living room, but, in my view, the most straight forward and common sense explanation was because she was still angry and upset with the pursuer (and her mother) and wanted to confront the pursuer. When I viewed points (1) to (8) against both the very short time scale between the pursuer leaving and then re-entering the living room (Counsel for the defender, in his submission in relation to contributory negligence, characterised it as a continuing event) and the pursuer's description (which I accepted) of how the AB was presenting when she re-entered the living room (point 10), I considered that, on the balance of probabilities, at the point when AB was about to re-enter the living room: (i) that AB remained very angry and upset with both her mother and the pursuer; (ii) that AB had not calmed down

sufficiently to safely have a face to face conversation with the pursuer; and (iii) that both LR and JM knew or ought to have known points (i) and (ii).

Part 4 AB re-entering the living room with JM and LR and assaulting the pursuer.

[50] As explained at paragraph [41] above, LR's account was significantly at odds with that of the pursuer. For the reasons given in that paragraph I preferred the pursuer's evidence where it conflicted with LR's evidence. I did not, however, consider it likely that JM would have 'burst' into the living room, however, the pursuer was not asked what she meant by this turn of phrase and I considered that the use of it, whilst maybe inaccurate, did not undermine the pursuer's credibility or reliability. I did not think it probable that LR asked the pursuer if she could have a quick catch up and the pursuer said "sure". The pursuer denied this occurred and I think it unlikely given what had occurred between AB and the pursuer minutes before (i.e. Part 2). In any event, there was no dispute that LR entered the living room last which meant, if the question was asked about a quick chat, AB was already in the living room. I did not think it was probable, in a very short space of time, that AB would have gone from, off the scale anger involving threats to assault the pursuer and ripping wood off the banister, to having a sincere conversation. I also did not think that it was likely that conversation went on for 10 minutes. The pursuer's evidence demonstrated that when AB re-entered the living room, she was still very angry with the pursuer and was still making threats to assault to the pursuer. There was no dispute that AB ultimately assaulted the pursuer and I inferred from the pursuer's evidence that the assault occurred shortly after AB re-entered the living room.

The Common Law case

[51] In order to succeed in a reparation action a pursuer generally has to prove:

1. That the defender owed the pursuer a duty of care;
2. That the harm sustained by pursuer arose as a result of a breach by the defender of the duty of care they owed to the pursuer;
3. That the defender's breach of duty of care was the cause of the harm sustained by the pursuer; and
4. That the losses claimed were not too remote.

[52] In the present case there was no dispute that the defender, in their capacity as the pursuer's then employer, owed the pursuer a duty of care to prevent her from suffering physical or psychiatric harm as a result of the defender's negligent conduct. There was also no dispute that the defenders were vicariously liable for any wrongs committed by JR and/or LR who were employed by the defender and working with the pursuer at the time when she was assaulted by AB. The issues in this case were breach of duty and contributory negligence (no submission were made in respect of causation but I have briefly dealt with that issue at paragraph [60] below).

Breach of Duty

[53] In the recent case of *Anderson v Imrie* 2018 SC 328 an Extra Division had to consider whether a breach of duty had been established against the owner of a farm who had agreed to look after 8 year old boy. The boy had been told to remain within certain specified areas of the farm and told not to go into other areas, including a race. Unfortunately the boy, when unsupervised for a few minutes, was seriously injured when a heavy gate, situated within the race, fell on him. In finding that the owner of farm had breached her common

law duty of care, Lord Brodie approved Lord MacMillan's approach in *Muir v Glasgow*

Corporation 1943 SC (HL) 3 and stated:

"Thus, it is for the judge to determine what the reasonable person would have had in contemplation, otherwise what was reasonably foreseeable. The formulation of the duty is to 'take reasonable care' (*Donoghue v Stevenson*, Lord Atkin, p 44) but once the risks that the reasonable person would have had in contemplation have been determined, in principle due exercise of a duty of care requires the avoiding of doing or omitting to do anything which may have as its reasonable and probable consequence injury to other persons to whom the duty of care is owed. I say 'in principle' because in a given case there may be room for adjustment having regard to the remoteness or otherwise of the foreseeable risk, the extent of the likely harm, the burden of the necessary precautions and any particular considerations of public policy which may come into play. However, fundamentally, taking reasonable care means taking effective precautions against reasonably foreseeable risks of material physical harm."

[54] In the same case Lord Malcom considered the Lord Ordinary required to address two issues:

"[82] The Lord Ordinary required to address the following issues. Would it have been apparent to an ordinary reasonable person in the position of the claimer [*the owner of the farm*] that a reasonable and probable consequence of non-supervision of the pursuer would be harm to him? If the answer is yes, the precise way in which the harm occurred need not have been foreseeable, so long as it was caused by the kind of occurrence which could be anticipated (*Hughes v Lord Advocate; Jolley v Sutton London Borough Council*).

[83] The next question was whether the claimer's conduct amounted to culpa; in other words, did she meet the standard of care required of her? What would a reasonable person have done or not done? If her conduct fell within the scope of a reasonable standard of care, there is no liability. Thus, for example, it might be reasonable to leave a child alone for a short period, but not for an extended length of time. Much depends upon the whole circumstances. Sometimes reference is made to a 'calculus of risk', which might include the seriousness of any injury within contemplation."

[55] In my view the same two issues required to be addressed in this case. Both parties agreed that the first issue was as follows:

Issue 1 - whether it would have been apparent to an ordinary reasonable person in the position of JR and LM that a reasonable and probable consequence of their failure to prevent AB from re-entering the living room would be harm to the pursuer?

I have set out at paragraph [48] the factors which led me to conclude that JM and LR knew or ought to have known at the point when AB was about re-enter the living room: (i) that AB remained very angry and upset with both her mother and the pursuer; (ii) that AB had not calmed down sufficiently to safely have a face to face conversation with the pursuer; and (iii) that both LR and JM knew or ought to have known points (i) and (ii). In addition, LR accepted that she was aware that AB had previously assaulted FM and AR confirmed that it was well known amongst the staff that AB had assaulted staff members. I considered that the assault on FM would have been a significant event at S and that both JM and LR would have been aware of it. When I considered factors 1 to 9 of paragraph [48], together with the conclusion I reached above (that JM and LR knew or ought to have known that AB was still very angry and upset and had not had sufficient time to calm down) and JM and LR's knowledge of the previous assault on FM, I considered that the answer to the first issue was "yes".

[56] I considered the second issue to be whether JM and LR fell below the standard of care required of them. In *French v Strathclyde Fire Board* 2013 SLT 247, at paragraph 41, Lord Drummond-Young considered the standard of care required of a Watch Commander fighting a fire at a garage:

"[41] The applicable standard of care is in my opinion that of a skilled firefighter exercising reasonable care. In counsel's submissions there was some discussion as to whether the appropriate standard was that of an ordinary employer or a version of the test for professional negligence laid down in *Hunter v Hanley*. In my opinion there is no sharp dividing line between these tests; there is rather a spectrum of situations ranging from a case where the person responsible for safety has clear professional or technical qualifications to cases where he has no particular

qualifications but is under an ordinary common law duty of care. The extent to which specialist expertise must be brought to bear will vary according to the circumstances of the particular case. In the present case I am of the opinion that Watch Commander Clark was required to demonstrate the standard of care to be expected of a skilled and trained firefighter. That is not a professional qualification, and accordingly the *Hunter v Hanley* test does not apply in its ordinary form. Nevertheless this standard does require the officer in charge to exhibit a special level of skill and care, which differs from that of an ordinary employer...”

[57] Lord Drummond-Young then explained why the standard of care in that particular case was not met and then went on to say at paragraph 43.

“[43] ... In the recent case of *MacIntyre v Ministry of Defence*, it is pointed out (by Spencer J at paras 69–71) that the likelihood of injury, the seriousness of the injury which might occur, and the social value of the activity giving rise to the risk and cost of preventative measures must all be balanced. I think that that is clear; the balancing exercise is crucial. Finally, in *ICL Tech Ltd v Johnston* it is pointed out (by Lord Hodge at 2012 SLT, p.671, paras 21 and 23) that the law must recognise that difficult decisions may have to be made, and that the principle *spondet peritiam artis* is not confined to recognised professions. I agree entirely with both of those propositions. The difficulty of the situation confronting the officer in charge in the present case is clearly material. The statement that even those who do not belong to a recognised profession must display a standard of care and skill appropriate to their training and responsibilities is in my view clearly correct; it involves recognition of the fact that there is a spectrum of possibilities running from the classic *Hunter v Hanley* situation on one hand to ordinary employer's liability on the other.”

[58] I agree with the approach taken by Lord Drummond-Young in *French* and considered that in the present case the applicable standard of care was that of a reasonably competent residential worker. Both parties agreed that that was the appropriate standard.

[59] LR and JR had received similar training to that of the pursuer and I considered that their training had been sufficient to allow them to assess how AB was presenting, apply appropriate de-escalation techniques and, if necessary, use appropriate physical intervention techniques. LR's evidence made clear that her intervention with AB resulted in her stopping ripping the wood off the banister. No attempt was made to stop AB re-entering the living room, rather she was allowed to take the lead and was assisted in re-entering the living room by JM entering first. JM and LR's training in de-escalation

techniques included creating space between a child and another person if the child was making threats to that person. In my opinion, in the whole circumstances of the case, any reasonably competent resident residential worker in the position of JM and LR (and having their knowledge of the ongoing situation with AB) would have taken the simple step of preventing AB from re-entering the living room. The combined failure of JM and LR to do so resulted in them falling below the standard of care that was required of them. I therefore find that a breach of duty has been established.

Causation

[60] As I have already pointed out, at paragraph [52], neither party addressed me on the issue of causation. Having established a breach of duty the pursuer must go on to prove that the breach of duty was the cause of the harm sustained by the pursuer. The pursuer must prove, on the balance of probabilities that 'but for' the defender's breach of duty the harm to the pursuer would not have occurred. In my opinion, the prevention of AB re-entering the living room would have prevented the pursuer from being assaulted. I therefore consider that the failure to prevent AB re-entering the living room caused or materially contributed to the pursuer's injury.

Contributory Negligence

[61] Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (hereinafter referred to as "the 1945 Act) provides:

"1. — Apportionment of liability in case of contributory negligence.

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person

suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: ...”

Fault on the part of the pursuer includes negligent actions (see section 5(a) of the 1945 Act).

Therefore, a pursuer will only be contributorily negligent if their act falls below the standard of a reasonable person in the position of the pursuer. The onus lies with the defender to prove that matter. The defender must also prove that the pursuer’s fault was a factual cause of the harm she sustained.

[62] In the present case, towards the end of Part 2, it is recorded in the Incident Report that after AB had continued to shout abuse at the pursuer about “her mum not wanting her and that her mum said that her sister [*sister’s name*] didn’t want her home either”. In response the pursuer said to AB something like “I wouldn’t want you screaming and shouting like that in my house either”. The pursuer whilst accepting that the comment was “not the best” did not think it inflamed the situation. AR considered that the pursuer’s words were poorly chosen, but that was due to the timing of the words rather than the content of the words. LR said in evidence when she approached AB, (when AB was ripping wood off the banister) and asked her what was wrong AB said that her mum wanted nothing to do with her and that the pursuer had said something similar. LR then explained that she attempted to reason with AB by saying that she may have misunderstood what the pursuer had been saying in the telephone call. In the Incident Report LR recorded that

“[AB] explained that she had overheard [*the pursuer*] siding with her mother. LR then went on to record: (i) ‘Both staff members reassured [AB] that she had only heard one side of the conversation and there was possibly a plausible explanation, ...’; and (ii) [AB] challenged [*the pursuer*] verbally about her conversation with [AB’s] mum...”

At no stage in evidence or in the Incident Report did LR mention that AB had said anything about the remark made by the pursuer. I considered that the pursuer, as AB’s key worker,

having worked with her for about a year, was in a good position to read what was fuelling AB's anger. The pursuer thought that AB's anger came from: (i) the terms of the conversation she had had with her mother; and (ii) AB's belief that the pursuer had sided with her mother. I considered that the evidence I have highlighted demonstrated that AB's focus was on those two factors, rather than the remark, and provided support for the pursuer's reading of AB's anger.

[63] I also considered that the remark by the pursuer was directed at how AB was behaving in that moment (namely shouting and screaming) and was not a more general comment. I drew support for that analysis from both the words used by the pursuer and the earlier parts of the Incident Report, which I considered made clear that the pursuer was trying to focus on how AB was acting in that moment (the pursuer recorded in the Incident Report that "[the pursuer] asked [AB] to listen to herself and the way she was shouting and swearing would not be accepted as she went through life by anyone"). I accepted, given the closeness of the pursuer's relationship with AB, that she could, in the right circumstances and atmosphere, give the pursuer blunt direct feedback. I did, however, agree with AR that the words were poorly chosen, in that moment, given the nature of AB's conversation with her mother and her emotional state. I considered that at the time the remark was made the pursuer was facing a very challenging situation with AB who was extremely angry and making threats to assault the pursuer. I considered that the remark was unfortunate and did not help the situation. However, I accepted, for the reason given above, that the main source of AB's anger was: (i) being told by her mother that: (a) she was not welcome home, and (b) her belief that her mother had called her a junkie; and (ii) her belief that the pursuer was siding with her mother and believing her mother. AB's anger was already "off the scale"

before the remark was made and I did not, having regard to all the circumstances, consider that the remark materially increased her level of anger towards the pursuer.

[64] In all the circumstances I considered that the remark made by the pursuer was merely an error of judgement by the pursuer in a heated and difficult situation and that it could be fairly described as momentary inadvertence on the pursuer's part. In the circumstances I did not consider that it had been proved that the pursuer had fallen below the standard of a reasonable person in her position. Accordingly, I did not consider that the pursuer was contributorily negligent.

Disposal

[65] For the reasons given above, I find that the defender is vicariously liable for the conduct of JM and LR and that the defender is liable to make reparation to the pursuer at common law. Quantum was agreed at the sum of £12,000 (inclusive of interest of 19 January 2021). A hearing will be fixed to determine the question of expenses and certification of skilled persons.