EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 28
PD489/20

Lady Wise
Lord Clark
Lady Carmichael

OPINION OF THE COURT

delivered by LADY CARMICHAEL

in the Reclaiming Motion

in the cause

X

Pursuer and respondent

against

Y

Defender and reclaimer

Pursuer and Respondent : Brodie KC, E Smith; Digby Brown LLP
Defender and Reclaimer: Party

10 June 2026

Introduction

[1] The reclaimer (Y) and respondent (X) were formerly husband and wife, and are now divorced, having separated in 2018. They were married from 1995 to 2020. X raised an action seeking damages against Y alleging that during the marriage he pursued a course of conduct against her contrary to section 8 of the Protection from Harassment Act 1997 (the 1997 Act), by abusing her physically, sexually and emotionally. She alleged that he did so

between 16 June 1997, which is the date the 1997 Act came into force, and 2019. The action was served on him on 2 December 2020.

[2] In 2022 Y was convicted on indictment of two charges of assault and two charges of threatening and abusive behaviour. He received a community-based sentence and the sheriff imposed a non-harassment order.

[3] Given the nature of the allegations in the action, and the existence of the non-harassment order, the Lord Ordinary appointed a curator *ad litem* to conduct the cross-examination of X.

[4] The Lord Ordinary was satisfied that Y had engaged in a course of conduct involving physical assaults between 17 September 1997 and August 2018 which was directed at causing physical and psychological harm to X. He also found proved a number of allegations of abusive language and conduct. He was satisfied that specified aspects of Y's language and conduct towards X were aimed at hurting or humiliating her, and undermining her confidence so that he could assert control over her. They formed part of his course of harassment of her.

[5] Y now reclaims (appeals) against various aspects of the Lord Ordinary's decision.

Y's submissions

[6] The Lord Ordinary erred in founding on the content of general practitioner records on which X had not founded. It was the content of those records that had permitted him to conclude that Y assaulted X on 17 September 1997. There was no averment that an assault took place on that date, and X did not give evidence of such an incident. The date on which the course of conduct was said to have started was the date of commencement of the

1997 Act. There was no fair notice of any incident on 17 September 1997. The records did not identify the perpetrator of the alleged assault.

[7] The Lord Ordinary had made findings of fact for which there was no record. X had averred that over the course of a week in Gloucestershire in 2017, Y assaulted her on a number of occasions, and specified particular conduct in which he had engaged during those assaults. X gave evidence only of a single assault during that week, in the course of which Y grabbed her throat. The Lord Ordinary should not have found that assault proved. Her evidence was not properly foreshadowed in the pleadings.

[8] A similar error of approach had occurred in relation to X's case about Y's conduct during a holiday that she took in Mexico. The Lord Ordinary found that Y had reneged on an agreement to look after the children while X was away, but there was no basis in the written pleadings for that allegation. The Lord Ordinary had not been entitled to conclude that Y's conduct was deliberately designed to cause anxiety and exert control.

[9] Y had sought to lodge contemporaneous correspondence from shortly after the Mexico trip, bearing on the state of the relationship and X's credibility. The Lord Ordinary had wrongly refused to allow it to be lodged.

[10] The Lord Ordinary had misapprehended a police incident report dated 2 September 2006. He had erred in treating it as supportive of X's account. She had not wished to make a complaint of assault at the time.

[11] The Lord Ordinary should not have found the assault in August 2018 proved. X's account was undermined by an email from her to the police, sent in September 2019, in which she said the last incident took place in November or December 2017. The error was significant, because, without this incident marking the end of the course of conduct, the action would have been barred by limitation. The Lord Ordinary had referred to the

availability of formal corroboration. As there was no requirement for corroboration in civil proceedings, it was unclear why that matter was relevant.

[12] The errors already mentioned, particularly those informing the conclusion that the course of conduct started in September 1997, had an impact on the quantification of damages, and the calculation of interest. Y re-stated his complaints about lack of fair notice in the pleadings by reference to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[13] The curator *ad litem* had been appointed only shortly before the proof. That limited the scope for preparation, and altered the manner in which Y's case could be presented. There was no issue as to the competence or diligence of the curator. There was a question whether, in circumstances of late appointment and limited preparation, the substitution of cross-examination by court-appointed counsel satisfied the requirements of Article 6 ECHR and equality of arms.

X's submissions

[14] The circumstances in which an appellate court could interfere with findings of credibility and reliability on the part of a judge at proof were limited: *McGraddie* v *McGraddie* [2013] UKSC 58; 2014 SC (UKSC) 12; *CD* v *ND* [2025] CSIH 12; 2025 SC 333. In considering whether fair notice had been given to the defender, account must be taken of the nature of the case and the extent to which he was familiar with the circumstances: *Richards* v *Pharmacia Ltd, c/o Pfizer Ltd* [2018] CSIH 31 2018 SLT 492.

[15] A course of conduct, for the purposes of the 1997 Act, must involve conduct on at least two occasions. A course of conduct might include patterns of behaviour and be averred in that way, and not simply by pleading a series of individual incidents by reference

to time, place and each individual act. In determining whether there was a course of conduct and whether that amounted to harassment, the proper test was to consider whether the course of conduct amounted to harassment, as opposed to the individual incidents: *Marinello* v *City of Edinburgh Council* [2011] CSIH 33; 2011 SC 736.

[16] The Lord Ordinary had been entitled to found on the general practitioner record dated 17 September 1997. X had offered to prove a course of conduct including the period when the parties lived in London, to which the general practitioner record referred. Y's position was to deny ever having assaulted X. It was unrealistic to expect every individual act in a course of conduct over a lengthy marriage to be the subject of separate averment.

[17] As to the incident during the Mexico trip, X had given notice of her position in averments at stat 4.6 of the summons. Y's attempt to lodge contemporaneous correspondence had come too late. It had come on the second day of the proof, after X's examination in chief, but before her cross-examination. It would have caused prejudice to X. Counsel could not have sought her instructions on it, as she was in the course of giving evidence. It did not contradict any specific fact to which X had spoken. The Lord Ordinary had exercised his discretion correctly in refusing to admit it.

[18] The curator *ad litem* had confirmed at the start of the proof that she was in a position to proceed. The proof had started 18 days after her appointment, which was a reasonable period for preparation. Y had not specified any way in which the timing of the appointment of the curator had affected adversely the fairness of the proceedings. Cross-examination had been consistent with Y's position, which was to deny any abusive conduct.

[19] The Lord Ordinary had not misapprehended the significance of the police report dated 2 September 2006. He had been entitled to treat it as supportive of X's evidence about an assault on that date.

[20] In relation to the assault in August 2018, the Lord Ordinary was aware of X's account that the last assault was in November or December 2017. He accepted, for reasons that he explained fully in his opinion, her evidence that it occurred in August 2018.

Applicable law

[21] Appellate courts should be slow to interfere with findings of fact made on the evidence by first instance judges: *Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36, at 54 - 55; *McGraddie* v *McGraddie* cited above, paragraphs 2, 3, 27 - 29, 33; *CD* v *ND* cited above, paragraph [30]. We would require to be satisfied that the Lord Ordinary had gone plainly wrong before interfering with his findings. An appellate court will not generally interfere if the Lord Ordinary's findings were ones reasonably open to him.

[22] In actions for damages for personal injuries to which the provisions of Chapter 43 of the Rules of Court apply, there is no need for parties to engage in elaborate pleading, but a party must give fair notice of a case which he or she proposes to make: *McGowan* v *W & JR Watson* [2006] CSIH 62; 2007 SC 272, paragraph [13]. When specification is in issue what is required will depend on the nature of the case, but regard must also be had to the identity of the party to whom the pleadings are addressed and what they are aware of. What is not permissible is that a defender be taken by surprise at proof because he does not know the case to be made against him: *Richards* v *Pharmacia Ltd c/o Pfizer Ltd*, cited above, paragraph [47].

[23] The 1997 Act prohibits a course of conduct by one person which amounts to harassment of another and which is intended to amount to harassment of that person or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person: section 1. In cases brought under the 1997 Act, the question

for the court is whether the course of conduct amounts to harassment, rather than the individual incidents comprising that course of conduct: *Marinello*, paragraphs [10], [11].

[24] Although Y referred to Article 6 EHCR he, correctly in our view, did not submit that there was any difference in the context of this case between the requirements imposed by Article 6, and what the common law requires. He founded on a passage in *Al Rawi* v *Security Service* [2011] UKSC 34, [2012] 1 AC 531, paragraph 14, citing *Kanda* v *Government of Malaya* [1962] AC 322, at 337. The statement of principle there is uncontroversial. A defender must know the case that is made against him. He must know what evidence has been given and what statements have been made affecting him, and he must be given a fair opportunity to correct or contradict them.

Decision

General practitioner record - 17 September 1997

[25] The parties entered into a joint minute, which included the following agreement about X's medical records:

> "The records lodged at [process numbers] constitute a set of medical records held by [X's] GP practice at [address] and can be admitted into evidence without being spoken to by the various authors referred to therein."

[26] A handwritten entry dated "17/09/97" reads: "… assaulted last night thrown around room – (1) bruising and swelling surrounding R eye. (2) small bruise lower part L thigh (3) aching tender neck and lumbar muscles." The address given for X on the page containing that entry is one with a London postcode.

[27] X gave notice in her pleadings of her intention to lead evidence of a course of conduct starting on the date of commencement of the Protection from Harassment Act 1997. The Lord Ordinary records that it was uncontroversial that the parties purchased a house

in London where they lived until making a permanent move to Edinburgh in 2001. X's evidence was of cycles of aggression while the parties lived in London. In her own evidence she described an incident at Christmas 1998. X's school friend, H spoke to observing bruises on X's arms on a warm day in London, during a visit early in X's marriage. She was not able to give a date for that visit. X told H that Y had caused the bruises; she appeared upset.

[28] The entry in the general practitioner records did not feature in the pursuer's oral evidence. The Lord Ordinary asked Y about that entry, and another, dating from 2001, in the course of Y's evidence. Y's position in relation to both entries was that he was mystified and could not explain them.

[29] The Lord Ordinary found X to be a credible and generally reliable witness. There were some parts of her evidence where he was not satisfied that her memory was accurate. He accepted her evidence that Y was physically abusive towards her when the parties were living together in London. H's evidence supported her testimony. X's affidavit suggested that H was speaking about an incident after 1999. The Lord Ordinary noted that the entries in the general practitioner records spoke for themselves.

[30] We consider that the Lord Ordinary was entitled to found on the entry dated 17 September 1997. It fell within the period during which X averred that Y had subjected her to physical abuse. Although it did not name a perpetrator, it was a hearsay account of an assault on X. The parties had agreed that it could be admitted into evidence without being spoken to by its author. It was a piece of evidence that the Lord Ordinary was entitled to take into account, which was generally consistent with X's account of assaults on her by Y in London. The Lord Ordinary gave Y an opportunity to comment on the entry in the course of his evidence.

[31] Over the course of a long relationship, and in the context of a case founding on an alleged course of conduct, there may be many incidents in respect of which it will be impossible to specify dates. As the Lord Ordinary observed, criminal indictments frequently libel conduct "on various occasions" between two specified dates. While it may be desirable, where the dates of incidents are capable of being ascertained from contemporaneous records, for reference to be made to those dates on record, there was no want of fair notice to Y in the circumstances of this case. The entry dated 17 September 1997 was in 7/1 of process, a production lodged by Y himself.

Gloucestershire

[32] X averred that over the course of a week in Gloucestershire in 2017, Y assaulted her on a number of occasions, and that in the course of those assaults he slapped her, pinned her down and shouted at her. She averred also that she suffered bruising and that he raped her.

[33] The Lord Ordinary noted that X gave evidence only of a single assault during that week. He went on to say:

> "Although there is no other supportive evidence for [X's] allegation that [Y] grabbed her throat in bed one night, I found [X's] evidence to be credible on this allegation. It fits the mode of assault described on other occasions. I have hesitated over this particular finding given [the evidence of another witness, P] that [Y] was physically weak during that holiday. However, I observe that the proposition that [Y] was in a weak condition over the course of this holiday was not put to [X] or [another witness, B] in cross-examination; it was not advanced by [Y] in his own affidavit or evidence to the court; and it was not contained in P's own affidavit lodged in advance of the proof."

[34] Y's submissions appeared to proceed on a misapprehension that because X did not prove all of her averments about his alleged conduct during the week in Gloucestershire, it was not open to the Lord Ordinary to accept the evidence she did give about that period. Her description of the assault was not at odds with her record. It was consistent with other

assaults that she described. The credibility and reliability of her evidence were pre-eminently matters for the Lord Ordinary who, as we have noted, found her to be a credible and generally reliable witness. He accepted X's evidence about the assault on her, and gave cogent reasons for having done so. There is nothing in his approach that would entitle this court to interfere with his conclusion.

Mexico

Lack of record

[35] Y's complaint is that X's written case did not provide sufficient notice of an allegation that he had agreed to look after the children during her trip, and then reneged on that. X averred:

> "In or about March 2008, and knowing [X] to be on holiday in Mexico, [Y] hired a van and emptied [the family home] of most of its contents. [Y's] behaviour caused [X] much distress and she had a nervous breakdown."

[36] X's affidavit relates:

> "In March 2009, I visited a friend on my own in Mexico. [Y] agreed that he would stay in Edinburgh to look after the children with the help of a nanny. While I was away, [Y] hired a van and took most of our furniture to London. When I returned home, there were items missing from each room. [Y] had not even left a forwarding address. At that point I had a complete breakdown."

[37] The Lord Ordinary accepted the evidence of X and her friend, J, in relation to a trip that X took to Mexico in 2008. X's evidence was that it was agreed that Y and an au pair would look after the children at that time. When she was in Mexico, she received a message from the au pair to say that Y had arrived with a van and had removed items of furniture from the family home. He had moved without leaving a forwarding address. The children were left in the care of the *au pair* until X returned from Mexico.

[38] J recalled X's holiday in 2008, and that X was on the phone during a stop at a petrol station. She learned from X that Y had removed items from the house and left the children in the care of the *au pair*. X was very upset, and could not believe that the defender had abandoned the children when she was so far from them.

[39] Y accepted in evidence that he did move out of the family home while the pursuer was on holiday in Mexico. In response to the suggestion that he had undertaken to look after the children, he said, "it wasn't prescriptive, it was understood". He said, variously, that he was not sure whether he had told X that he was going to move out, and that she was mistaken in saying that he had not alerted her in advance.

[40] X's case on record referred to the holiday having taken place in or about March 2008, and her affidavit referred to March 2009. The Lord Ordinary's narration of the evidence that he accepted does not place the holiday in any particular month during the year 2008. Y's complaint is not about any lack of notice arising from confusion between 2008 and 2009. He was plainly aware that the allegation related to his conduct during a single trip that X took to Mexico. His complaints were that there was no notice of any allegation that he had reneged on a promise to look after the children, and that the Lord Ordinary was not entitled to view the incident as an example of behaviour calculated to cause anxiety and exert control.

[41] X's affidavit provided detail about her allegation as to what Y had done. The notion that he had agreed to look after the children with the nanny did not come as a surprise to him. His own evidence did not seriously dispute the proposition that there was at least an understanding between the parties that he would look after the children, albeit he said it was not "prescriptive". There was no want of fair notice to Y, and nothing to suggest that he had any difficulty in responding to X's evidence about the trip.

Letter dated 9 March 2008

[42] Y sought to introduce a letter dated 9 March 2008 after X's evidence in chief, with a view to challenging her credibility during cross-examination. Counsel objected to its production on the basis that it came very late.

[43] The rules as to the lodging of productions for proof do not apply to a document used merely to test the credibility of that witness, as opposed to documents going to proof of a party's averments on record: *Paterson & Sons (Camp Coffee)* v *Kit Coffee Co Ltd* (1908) 16 SLT 180; *Robertson* v *Anderson* 2014 SLT 709. The document that Y wished to introduce for the purposes of cross-examination is not, therefore, one that he required to lodge timeously before the proof, or, if late, only with the permission of the court. Y was, in principle, entitled to produce it at the point he did, and to seek to use it in cross-examination.

[44] We have considered whether he has suffered any material prejudice because the curator was not able to use it when cross-examining X, and have concluded, for the following reasons, that he has not. The non-availability of the document for use in cross-examination has not resulted in unfairness to Y.

[45] The content of the letter is, at best for Y, double-edged. It is in some respects supportive of X's account. It was obviously written after X's holiday in Mexico, as it refers to it. It relates that X had learned from a third party that Y was, at the time she was writing, living with another woman. It records that Y had moved out, and that the children did not fully understand that he had done so. The letter indicates a willingness to reconcile and a belief that Y had a number of qualities that X valued. It also records X's view that a number of matters would require to change in order for there to be a successful reconciliation. It

records several matters arising from the behaviour of Y that X said had made her very unhappy indeed. There is nothing in it that would obviously have undermined the credibility of X as regards her case about events connected to the holiday in Mexico. There is nothing in it that would necessarily have undermined more generally her account of a relationship in which domestic abuse occurred over a protracted period.

[46] It is within judicial knowledge that people who are in abusive relationships may have conflicting emotions towards their abuser. That is reflected in the standard directions given to juries in criminal cases where there are allegations of domestic abuse:

> "People who are in an abusive relationship may struggle to extricate themselves from it for a whole range of reasons including fear, lack of resources, family responsibilities, cultural or societal concerns or their own conflicting emotions towards their abuser. Further, their ability to react to events may be compromised or blunted by their experience."

[47] The document demonstrates that X had feelings towards Y which were ambivalent, that the parties were apart at the time it was written, and that there were difficulties in the relationship. None of that is particularly surprising in the context of a relationship which, it was common ground, did not end for more than 10 years after the letter was written.

Police report - 2 September 2006

[48] Y produced (7/24 of process) a letter dated 12 November 2018 from Police Scotland to his former solicitors. It relates that the solicitors had requested information, and that Police Scotland had searched its historical incident recording system. It contains a summary of an incident, in the following terms:

> "Incident No. 0985 – 02 September 2006
>
> Police contacted after [X] reported she had been assaulted by her husband, [Y]. On Police arrival [X] advised she had become involved in a heated argument with her husband regarding an affair he had apparently been having for the last two years.

> She advised this had resulted in a disturbance within the property. [Y] had been spoke (*sic*) with who confirmed there had been a heated argument between both parties. No complaints of assault forthcoming from either party at this time. No apparently (*sic*) injuries to either party to substantiate any physical violence. [X] agreed to leave the property and was conveyed by Police."

[49] The Lord Ordinary recorded X's evidence about this incident at paragraphs [18] and [19] of his Opinion:

> "[18] In September 2006, the pursuer realised that she was pregnant again. She was surprised by this as the defender had told her he had had some form of contraceptive medical device implanted. There is an entry in her GP records for 19 September 2006 which, after noting the positive pregnancy test, includes an entry made by the GP of 'Husband on the male pill through GP plus'. When she told the defender of her pregnancy on 2 September 2006, his initial reaction was positive, but he then 'flipped'. He called her a bitch and told her to obtain an abortion. He then attacked her by pushing her down onto a sofa. He snapped the necklace which she was wearing. He grabbed her arm which resulted in her dislocating her shoulder. He hit her on the face. He kicked or punched her on the stomach and said 'let's see if you can hold on to your precious baby'. She called the police. The police came but left after a few minutes. A summary of the incident was provided by a Police Scotland letter dated 12 November 2018 in the following terms:
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> […]
>
> [19] Three days after this incident, the au pair employed by the pursuer advised her to take photographs of the injuries which she sustained in this incident. The pursuer then took a series of date stamped digital photographs of her face which were produced in court. These photographs appear to show bruising below the right eye and bruising on both eye lids, especially the right. There is a mark on the left temple and some marks behind the left ear."

[50] Two other witnesses, R and J, gave evidence that they been told about both the incident and the photographs before the parties separated.

[51] Y's position at proof was that there had been an argument, and X had called the police. He said there was no proper audit trail for the photographs, and that he had not seen meta data to confirm that the date stamp was accurate. He suspected that the photographs had been manufactured, and pointed out that the incident report did not note allegations of assault or findings of injuries.

[52] The Lord Ordinary noted that this allegation had featured in the criminal trial, and had resulted in a not proven verdict. He took the view that the police summary, which referred to her report of having been assaulted, and the photographs, supported X's account. In relation to the police summary, he noted:

> "I agree with senior counsel for the pursuer that by calling the police, the pursuer was escalating matters which indicates that this was likely to involve more than an argument. The police incident report states that the pursuer 'reported she had been assaulted by her husband.' The defender correctly points out that the report goes on to note that 'no complaints of assault forthcoming from either party at this time' but I consider this probably reflects the fact that matters had calmed down with the presence of the police and neither party wished the police to take matters further."

[53] The Lord Ordinary went on to find that the photographs were taken on 5 September 2006 and that they showed bruising on X's face and neck caused by Y's assault on her. He deprecated the allegation that the photographs had been manufactured for the purposes of litigation as one that should not have been advanced without evidence capable of supporting the allegation. He accepted the evidence of R and J that they had been told about the photographs before the parties separated. The Lord Ordinary was entitled to regard the police summary as supportive of X's position. He explained his reasoning in some detail. Y's complaint here amounts to nothing more than disagreement with a conclusion that was one properly open to the Lord Ordinary on the evidence before him.

Incident in August 2018

[54] The Lord Ordinary was aware, and records, that X wrote an email to Police Scotland on 29 September 2019 in which she said that the last assault she could remember took place in late November or early December 2017. The question of whether that communication undermined her evidence about an assault in August 2018 was squarely before him. It was

a matter for him to determine whether or not he considered that it did. He gave reasons for accepting X's evidence:

> "The terms of this email do not cause me to doubt the pursuer's evidence of being assaulted in August 2018. I do not find it particularly surprising that the pursuer on 29 September 2019 has omitted to recall that there was a more recent assault. An entry in the GP records for 1 October 2019 describes the pursuer suffering from acute anxiety and poor sleep, and an entry on 22 October 2019 describes her as at 'breaking point'. At the time of the email sent to the police, the pursuer was at a low ebb. The pursuer was also dealing with a significant issue which had arisen with one of her children which would have taken much of her focus and attention. I am unable to accept, as the defender asks me to do, that her failure to refer to the August 2018 incident in the 29 September 2019 email points to the incident being fabricated. I considered that the pursuer's account of being assaulted in the kitchen in August 2018 was credible. It is consistent with how the defender reacted in similar situations in the past. Formal corroboration, had it been necessary, can be found utilising the single complainer mutual corroboration principle from *HMA v Taylor* 2019 JC 71 with reference to the other assault found proved in paras [86]-[87] of this Opinion. In addition, the pursuer's evidence is consistent with LP's evidence that she was told by the pursuer that the defender assaulted her by pinning her by the throat against the wall in July or August 2018. I find this assault established."

Here, again, Y's submissions express disagreement with the Lord Ordinary's conclusions. There is no basis for finding that the Lord Ordinary has erred in any way, or that his conclusion is plainly wrong.

[55] In support of his reclaiming motion Y submitted that the Lord Ordinary's reference to the availability of formal corroboration indicated an error of approach. That complaint is without substance. The Lord Ordinary understood that formal corroboration was not necessary. Corroboration, where it is available, can, however, still provide support for evidence in civil proceedings. A witness, B, gave evidence, described more fully at paragraph [36] of the Lord Ordinary's opinion, about coming into the immediate aftermath of the assault found proved in paragraphs [86] – [87]. It was an incident for which independent corroboration was available. That is the context for the Lord Ordinary's reference to the doctrine in *Taylor*.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

[56] Y raised two issues by reference to the fair trial rights protected by Article 6 ECHR. The first was in relation to what he characterised as lack of fair notice in the written pleadings for some of the evidence on which the Lord Ordinary relied. The reference to Article 6 adds nothing to Y's submissions based on fairness at common law, which we have already considered and rejected.

[57] The second was in relation to the timing of the appointment of a curator *ad litem*. Y questioned whether, in circumstances of late appointment, and limited preparation, the substitution of court-appointed counsel satisfied the requirements of Article 6.

[58] X made a vulnerable witness application. By interlocutor (court order) of 8 May 2025 a Lord Ordinary (not the Lord Ordinary who presided over the proof) granted the application and determined that the most appropriate special measures were that X should give evidence using screens, which failing live link, and that a curator *ad litem* should be appointed for the limited purpose of undertaking the cross-examination of X. In doing so, she adopted the same course as had the Lord Ordinary in *PW (AP)* v *KM* [2024] CSOH 85. The interlocutor is silent as to who should in the first instance pay the fees of the curator. The proof started on 27 May 2025.

[59] Y did not submit that it was in principle inappropriate to appoint a curator *ad litem*. He was unable to specify any respect in which the curator's conduct of the cross-examination of X was inadequate, or in which her ability to prepare was compromised by the timing of her appointment. Y's position was that he had not engaged in conduct which was abusive of X, physically, sexually or verbally. Y acknowledged that the curator

had consulted with him, and that she had had access to the papers. A period of 18 days in which to prepare is not obviously inadequate given the nature of the allegations, and Y's position in relation to them. There was no indication from the curator herself that she was unable responsibly to represent Y's interests having regard to the time available for preparation. The curator was senior counsel with experience in both the prosecution and defence of serious sexual and domestic abuse offences in criminal practice.

[60] With all that in mind, we are satisfied that Y has not made out a case that the timing of the appointment of the curator adversely affected the fairness of the proceedings.

[61] When the amendments to Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 by virtue of the Children (Scotland) 2020 and the Victims, Witnesses, and Justice Reform (Scotland) Act 2025 currently pending are brought into force, the court will have power in civil actions for damages involving allegations such as those made by X to order special measures. There will be a presumption in favour of prohibiting the personal conduct of the case by the party said to be responsible for sexual or domestic abuse, or on whom a non-harassment order has been imposed: see particularly sections 11B(3), (3A), 12(6A), 18(1)(da), 22D(1), (2), (5).

[62] When those provisions are in force, there will be no need for a curator *ad litem* to be appointed for the reasons that arose in this case. In the meantime, we observe that in other areas of practice interlocutors appointing a curator *ad litem* specify which party will be liable in the first instance for payment of the curator's fees. It is desirable that liability explicitly be assigned in that way, in order to avoid any delay or uncertainty regarding the remuneration of curators for what is a significant professional commitment.

Disposal

[63] We therefore refuse the reclaiming motion, adhere to the Lord Ordinary's interlocutor of 24 September 2025 and reserve all questions of expenses for the time being.