OUTER HOUSE, COURT OF SESSION

[2023] CSOH 11

PD216/21
PD219/21

OPINION OF LORD BRAILSFORD

In the cause

C & S

Pursuers

against

(FIRST) NORMAN SHAW
(SECOND) LIVE ACTIVE LEISURE LIMITED

Defenders

Pursuer: Middleton KC et Bergin; Slater & Gordon Scotland Limited
Second Defender: Shand KC et Pugh; BLM Law

14 February 2023

[1] In terms of an interlocutor dated 13 May 2022 proof in this cause was limited to the issue of liability. In terms of the same interlocutor proof in the action at the instance of S (PD219/21) was permitted "to run in tandem" with the related action at the instance of C (PD216/21).

[2] C and S are brothers. S was born in January 1974. C was born in August 1976. The first defender ("Shaw") never entered appearance. The pursuers moved for decree in absence against him in terms of RCS 19.1(2), (3) and (4), finding Shaw liable to make reparation to the pursuer (in each action) in respect of his abusive acts.

[3] There was no dispute that the second defenders were a company responsible for the operation of a leisure centre in Perth and that the company was previously registered under the names of Bell's Sports Centre (Perth) Limited and subsequently Perth and Kinross Recreational Facilities Limited. There is, further no dispute that Shaw was employed by these companies between sometime during the 1983/84 tax year until sometime in mid-to late-1987. It is clear from both the evidence adduced and the conduct of the proof that there was no material dispute that sexual abuse of both pursuers by Shaw occurred in some form. That abuse is the subject of criminal convictions of Shaw which he accepted in his evidence. As a matter of admission criminal abuse by Shaw was perpetrated against both pursuers in the home in which they resided with their mother and siblings and in the caretaker's house occupied by Shaw within the curtilage of the second defenders leisure centre premises in Perth. Having regard to the nature of this diet of proof and because of the manner in which parties have focused the issue for this proof, there is no need to make findings about the nature and extent of that abuse.

[4] I was informed that the compearing parties had agreed that, in order to determine the issue of liability, the following questions arose for the courts consideration: Whether any sexual abuse was carried out by Shaw on C in his own home at an address in Perthshire; and, in the caretaker's house at Bell's Sports Centre, Perth. Whether any sexual abuse was carried out by the first defender on S in his own home at an address in Perthshire; in the caretaker's house at Bell's Sports Centre, Perth; and, within Bell's Sports Centre? Whether Shaw is liable to make reparation for any such abusive acts? Whether the second defenders are vicariously liable for any abuse carried out by Shaw on either S or C in the caretaker's house at Bell's Sports Centre? Whether the second defender is vicariously liable for any abuse carried out by Shaw on S within Bell's Sports Centre?

Evidence

[5] There were only three witnesses, all adduced by the pursuers. Both pursuers gave evidence. The other witness was Shaw, the first defender.

(i) C

[6] The foundation of C's evidence-in-chief was the terms of his statements to Police Scotland, dated 7 December 2016 [1] and 4 May 2018[2]. He spoke to abuse within his own home, where he lived with his mother, who raised him and his siblings as a single parent, and where he lived throughout the periods with which this action is concerned, in Perthshire and within the caretaker's house. He said that period of abuse was when he was between about the ages of 3 and 9 years, which would mean between about 1979 and 1986.

[7] Insofar as abuse within the caretaker's house is concerned C stated that he could remember the premises and was able to identify it from photographs lodged.[3] His recollection was that he first went to the house when he was 5. He said he regularly accompanied Shaw into the sports centre both during normal working hours when the sports centre was open to the public and out with those times. He accompanied Shaw "all round the property"; around the perimeter; the front/main entrance; the reception; the sports hall; around a perimeter corridor near the changing rooms; the equipment stores and the cafeteria, where Shaw sometimes bought him food and drink. He also recalled accompanying Shaw on his security rounds, checking fire escapes and using doors not

[1] No 6/47 of Process.
[2] No 6/46 of Process.
[3] No 6/15 in Process PD219/21

available to the public. His view was that he and Shaw would have been seen by other employees within the centre. He recalled Shaw having conversations with people in the centre when he was with him. He said Shaw wore clothing he described as a "janitorial outfit". On occasion when C accompanied Shaw when he was at work he would help him albeit he conceded that by virtue of his age such assistance was of questionable value, in such tasks as getting equipment from store; setting up badminton nets and stands; fetching bags of footballs; putting up or rolling out bits of kit and taking it down and putting it away. This took place in three large sports courts and in a hall.

[8] In relation to frequency of his visits to the sports centre he thought this would be two or three times a week during school holidays; Easter, summer, October and Christmas, and once a week or so during term time. He was clear that he was always there with his mother's agreement. His recollection was that abuse would start "immediately" and happened every time he went to the caretaker's house.

[9] In relation to other details he stated that sometimes he would be in the caretaker's house when other children were present, for example members of a youth football team Shaw coached. He said no abuse took place when other children were present but once they were "shipped out", he was abused. He also said that abuse occurring at the sports centre was at a "much higher level" than the "low level touching" he experienced in the family home. It was "much more serious…he had much more opportunity and time". In addition to direct physical abuse C said he was shown pornographic films. His memory was that the "vast majority of the more serious abuse" happened in the caretaker's house.

[10] His memory was that abuse ceased when he was 8 or 9 years old (1984 or 1985), when he realised that this should not be happening and he said "No" and went into the

garden. He reported the matter to the police in 2016, after seeing a report on BBC news concerning a football coach who, it transpired, was a paedophile.

(ii) S

[11] S also spoke to abuse in the house he resided with his mother and siblings and within the caretaker's house. As with C, the foundation of his evidence-in-chief was the terms of his statements to Police Scotland, dated 13 February 2017[4] and 9 May 2018[5]. He gave the time of abuse within his home as when he was between about the ages of 6 and 10 years, which date the behaviour between about 1980 and 1985. Shaw pled guilty to a charge of lewd, indecent and libidinous practices and behaviour in respect of S at the family home on various occasions between 14 January 1980 and 13 January 1985.

[12] In relation to abuse in the caretakers house S was able to give his recollection of the building, its location within the sports centre and the internal layout of the premises. He stated that he "regularly" accompanied Shaw into the sports centre while he was working and that this could occur during working hours or after hours. His position was that they entered the centre through the main entrance reception area. His memory was that most days he visited Shaw, they would be [in] what he described as the "public areas" together and in his own words he was "in tow with him". He helped Shaw to set up sports equipment, again in his words, "during the working day". He gave as examples setting out football pitches in the "big hall", using curtains or "put out markers" for areas that "would need to be broken down for other activities". Cones were used for sprints or "close control" of footballs. He helped set up for soft tennis, badminton, hockey and gymnastics, with blue

[4] No 6/60 of Process
[5] No 6/9 of Process

mats. Shaw pled guilty to a charge of lewd, indecent and libidinous practices and behaviour, including abuse within the caretaker's house. There is no criminal conviction in relation to behaviour within the sports centre.

(iii) Shaw

[13] This evidence can be dealt with briefly. Shaw accepted that he had abused both pursuers on a number of occasions all as detailed in the charges of which he was convicted. He denied any abuse beyond that detailed in the charges of which he was convicted. In particular he denied that he sexually abused either pursuer within the sports centre premises of the second defenders during the course of his employment with the second defenders. He was cross-examined on these denials. During the course of cross-examination he on a number of occasions claimed that as a result of his age he had no memory of events which senior counsel for the pursuers put to him. I note that Shaw's memory appeared to be selective in that he appeared to have reasonable recall of events which were supported by independent corroborative evidence, for example by way of an extract conviction, but could not, in his language "recall" events such as alleged abuse of the pursuers in the sports centre which rested only on the word of the person giving evidence which he may have perceived as adverse to his interests. Beyond matters pertaining to his abuse of the pursuers Shaw accepted that he was employed by the second defenders as the head caretaker at the sports centre for a period of about 4 to 5 years and that such employment terminated between July and November 1987.

Submissions

[14] In submission the pursuers moved for decree in absence to be granted against the first defender in terms of RCS 19.1 and to find him liable to make reparation for abuse perpetrated upon them in the family home, the caretaker's house and the sports centre.

[15] C's evidence was contained in two police statements from 2016 and 2018, supplemented by what he said in court. He spoke to abuse within the family home and the caretaker's house between 1979 and 1986. It was submitted that given his age at the time, being aged between 3 and 9 years, latitude should be allowed when assessing the detail he provided. There is clear evidence of abuse in both locations. He was clear about the approximate date of commencement of the abuse in the family home and separately in the caretaker's house. The more serious abuse occurred in the latter and was said to have happened every time he visited. The first defender did not dispute the abuse in the family home. On 12 December 2018 he pled guilty to the charge of lewd, indecent and libidinous practices and behaviour towards C in the family home at the relevant period.

[16] S's evidence was contained in two police statements from 2017 and 2018. He also spoke to abuse within the family home and caretaker's house between 1979/80 and 1985. It was submitted that given he was aged between 6 and 10 years at that time, he should be afforded the same latitude as C. The first defender also pled guilty to a charge of lewd, indecent and libidinous practices and behaviour towards S between January 1980 and January 1985. There is no criminal conviction in relation to the abuse S claims to have suffered within the sports centre. The submission on his behalf was that his failure to mention this to police is understandable given the context of him as a complainer providing a statement about traumatic sexual abuse committed around 40 years previously. There was said to be clear evidence of abuse in all three settings. Insofar as the second defender might

suggest S's presence at the sports centre and in the caretaker's house related to the Perth Rovers under 14s football team, some of the allegations relate to a period when the football team was not present.

[17] The submission was developed to the effect that both pursuers' accounts had a "ring of truth" about them. They largely corroborate each other's accounts. The first defender's *modus operandi* was consistent. He groomed both of them in the same way. The first defender's evidence regarding the pursuers' presence at the caretaker's house was said to be "very unsatisfactory". His position was inconsistent with his having tendered a guilty plea to a charge which included abuse within the caretaker's house. C and S's evidence should be preferred in every respect.

[18] On the basis of the evidence it was submitted that the second defenders should be held vicariously liable for the abuse which occurred within the caretaker's house, as well as that perpetrated on S in the sports centre. A two-stage test required to be to be applied as set out in *Lister & Ors* v *Hesley Hall Ltd*[6]. First, was the first defender in an employment relationship with the second defender or something akin to that? Second, if so, was there a sufficient connection between the nature of the first defender's employment and the abusive acts to render it fair, just and reasonable to find the second defender vicariously liable? The first stage was said to be clearly met. The second defender employed the first defender at the time the abuse in the caretaker's house and sports centre occurred. This was a matter of agreement and spoken to by various productions. On the first defender's own evidence, he was employed as head caretaker for 4 or 5 years. His employment came to an end somewhere between July and November 1987.

[6] [2002] 1 AC 215

[19] In terms of the second stage, the submission was that there was a sufficient connection between the nature of Shaw's employment and the abuse perpetrated in the caretaker's house. While the abuse started in the family home, it escalated in scale and nature upon the first defender becoming head caretaker. The abuse which occurred in the caretaker's house, and in the sports centre related to S, is a separate question from that occurring in the family home. In any event, that the abuse of the pursuers arose from a friendship between Shaw and the pursuers' mother did not negative the second defender's vicarious liability[7]. Shaw did not recall their mother having entrusted their care to him. His job description from 1987 set out the various duties he required to perform as head caretaker. These included *inter alia* setting up and dismantling equipment, ensuring the general security of the building by carrying out "security rounds" and ensuring compliance with the sports centre's rules to ensure the safety of adults and children. He was in a position of authority, though he need not have been for the second defender to be held vicariously liable[8]. The first defender's took the pursuers on his security rounds and had them assist with setting up sports equipment. This was all part of a "seamless episode" of abuse within the caretaker's house and sports centre as a whole[9]. In failing to ensure the safety of young children using the building, he breached the terms of his employment[10].

[20] It was submitted that the second defender created more than an opportunity for abuse to occur, they created an inherent risk of abuse by bringing Shaw into close contact with and proximity to children. He was required to reside in the caretaker's house as a condition of his employment. He abused his work responsibilities regarding access to and

[7] BXB v Watchtower & Bible Tract Society of Pennsylvania & anr [2021] 4 WLR 42
[8] Maga v The Archbishop of Birmingham & anr [2010] 1 WLR 1441 at paragraphs 79-80 per Longmore LJ
[9] Mohamud v Wm Morrison Supermarkets plc [2016] AC 677 at paragraph 47 per Lord Toulson
[10] Lister (supra) at paragraph 60 per Lord Hobhouse of Woodborough

use of the sports centre and the caretaker's house. Shaw actively engaged the pursuers in his work around the sports centre. He was brought closer to them by virtue of his role and by provision of the house in which he was required to reside. The second defender placed Shaw in a special position to enable them to discharge their own responsibilities. He abused that position. The caretaker's house was akin to the "approved" house in *BXB (supra)* where a Jehovah's Witness congregational member was raped by an elder in the elder's own house, but which had been approved by the church as a venue for bible study. Even where the acts of grooming occurred outside the Shaw's normal working hours, he was effectively never off duty[11] . His responsibilities, for example as the key-holder and in the case of emergencies, meant he worked far in excess of his normal working hours. Where the abuse occurred in the context of Shaw's performance of his duties, it was more likely that the second stage of the test would be satisfied[12] . Shaw groomed the pursuers with gifts, by granting them access to the sports centre and letting them play video games. These were the "progressive stages of intimacy"[13] . It is irrelevant whether the Shaw carried out the abuse for his own purposes. It suffices that it occurred within the second defender's field of activities[14] . The submission was that it is fair that the second defender bears liability for the abuse carried out by Shaw, which was "inextricably interwoven with the carrying out…of his duties"[15].

[21] In response senior counsel for the second defender did not dispute that the first stage of the test is met. Nor was it disputed that sexual abuse occurred in some form. The key

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[11] Maga (supra) at paragraph 42 per Lord Neuberger of Abbotsbury MR
[12] Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1 at paragraph 62 per Lord Phillips of Worth Matravers
[13] Maga (supra) at paragraph 84 per Longmore LJ
[14] Cox v Ministry of Justice [2016] at paragraphs 15 and 19 per Lord Reed
[15] Lister (supra) at paragraph 28 per Lord Steyn

issue was whether the abuse perpetrated at the caretaker's house and within the sports centre was sufficiently connected to Shaw's employment for the second defender to be vicariously liable. The submission was that it was not. The abuse resulted from Shaw's connection with the pursuers' family. It was a matter of admission that the abuse resulted from Shaw "ingratiating himself with the [pursuers' mother], with a view to gaining access to and sexually abusing the [pursuers]"[16]. This predated Shaw's employment with the second defender. The provenance of the abuse was explained entirely by the family situation, including Shaw's previous employment in a garage where the pursuers' two older brothers worked and his involvement with the Perth Rovers football team. The only connection to the employment is that some of the abuse occurred in the caretaker's house, which he resided at as a condition thereof. On no view did Shaw's head caretaker duties involve him working with children. He was not responsible for organising activities, running classes or supervision. The pursuers were only ever at the caretaker's house with their mother's knowledge. She had entrusted the first defender with their care while she worked. The grooming of the pursuers began long before they "tagged along" with Shaw while he performed his duties. The only abuse said to have occurred during this time was S's allegation regarding the abuse in the sports centre's showers, but his evidence on this was said to be unclear. S did not give a satisfactory reason why Shaw would be in the showers in connection with the activities in the sports centre. That the Perth Rovers football team sometimes used the changing facilities might explain this, but in any event, there was no evidential basis for linking these incidents with the first defender's employment.

[16] Statement of Claim for Pursuer, Stat. IV, p. 6 of Record.

[22] In carrying out the second stage assessment, account should be taken of the Canadian Supreme Court judgments in *Bazley* v *Curry* [17] and *Jacobi* v *Griffiths*[18] , upon which the guidance in *Lister (supra)* is based. A real and meaningful connection to the employment is required; a superficial one will not suffice. Trial judges must investigate the employee's specific duties to determine whether they gave rise to special opportunities for wrong doing and special attention should be paid to the existence of a power or dependency relationship. In *Jacob (supra)*, notwithstanding the wrongdoer met the victims of his abuse at the boys' and girls' club where he worked, other than an isolated incident, the abuse had not taken place on club premises or in connection with club activities. A specific aspect of the abuser's job was to build rapport with the children in the club, however the sexual abuse only became possible when he managed to subvert the public nature of the activities (paragraph 80). There was an even lesser connection between the employment and abuse in the instant case. The mother in *Jacobi (supra)* also gave permission for the victims to go the abuser's house. The creation of a "mere opportunity" is not sufficient (*Lister (supra)* at paragraph 25 per Lord Steyn). It is greater than a test of "but for" causation. It connotes circumstances where the employment relationship has put the abuser in a position to carry on its business or further its own interests, in a manner that has "created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse" (*Catholic Child Welfare (supra)* at paragraph 86 per Lord Phillips). In *Lister (supra)* the warden's employer entrusted him with the care of the boys. That was not the case here. Contact was created through Shaw's relationship with the pursuers' family. Similarly, that relationship created "the progressive

[17] 174 DLR (4th) 45
[18] 174 DLR (4th) 71

stages of intimacy". The Supreme Court has granted permission to appeal in *BXB (supra)* on the closeness test. In any event the connection there is much greater than the instant case.

[23] The non-sexual cases on vicarious liability remain relevant in this context. While the accepted test has been applied in a particular way in sexual abuse cases (*Various Claimants* v *Wm Morrison Supermarkets* (supra) at paragraph 36 per Lord Reed PSC), the court in *Lister (supra)* rejected that that there was any explicit difference between the tests to be applied (paragraph 48 per Lord Clyde). This is also not a classic sexual abuse case. Even on the pursuers' case, the employment is not the cause of the abuse. The question remains the need for a close connection between the field of activities the wrongdoer is authorised to do and the circumstances of the abuse. It is not to be answered on grounds of individual social justice. It is a principled one to be answered in accordance with previous authority. The facts of the instant case do not come close to satisfying the second stage of the test. The abuse at the family home has no connection in time, place or circumstance to the employment. The abuse at the caretaker's house has no connection other than that it was where Shaw lived. It resulted from Shaw's pre-existing relationship with the pursuers' family. There is no causal link between the abuse alleged to have occurred in the showers and Shaw's employment duties. *Esto* there is, this can be regarded as no more than "mere opportunity".

Analysis and conclusion

[24] Having found Shaw liable to the pursuers for the sexual abuse he perpetrated upon them, I turn to consider whether the second defender should be held vicariously liable for those acts. The law on vicarious liability has developed considerably in recent years, particularly in terms of its operation in sexual abuse cases. It is not necessary to narrate that

development in full. However, under the previous test that applied, known as "the Salmond test", it was almost inconceivable that a court would find vicarious liability established in sexual abuse cases[19]. A "close connection" test is now applied. It has its origins in judgments of the Canadian Supreme Court in *Bazley* v *Curr (supra)* and *Jacobi* v *Griffiths (supra)*. In *Lister (supra)*, Lord Steyn summarised the key question in the following terms:

> "whether [the employee's] torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable" (paragraph 28).

[25] The parties agree that I must carry out a two-stage assessment, as enunciated by Lord Phillips in *Catholic Child Welfare Society (supra)*. First, I must assess whether the relationship between the first and second defender is one that is capable of giving rise to vicarious liability. Generally, there will be an employment relationship between the parties or something akin to that. It is plain that the second defender employed Shaw as head caretaker for a period of approximately 5 years, albeit the precise dates are not ascertainable. The second defender has conceded as much. I have found it established that Shaw sexually abused the pursuers as specified in the claim. It follows that I am satisfied that the first stage of the test is satisfied and the relationship between the first and second defender is one which is capable of giving rise to vicarious liability.

[26] Secondly, I must consider the connection between that relationship and the wrongful act. This case turns on whether there is a sufficiently close connection between the abusive acts and the employment relationship between the first and second defender. In *Dubai*

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[19] See Salmond, Law of Torts (1907) at page 83; Trotman v North Yorkshire County Council [1999] LGR 584 at paragraph 18 per Butler-Sloss LJ

Aluminium Co Ltd v *Salaam*[20] Lord Nicholls of Birkenhead elaborated on the close connection test adopted by the House of Lords in *Lister*:

> "23. …the wrongful conduct must be so closely connected with the acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment…"

At paragraphs 25-26, his Lordship continued by observing the lack of guidance as to the degree of connection required. He described this imprecision in the test as inevitable, given the infinite circumstances in which it might arise. The crucial features will vary considerably depending on the facts of the case. The court's task is to make an evaluative judgment having regard to all the circumstances, as well as the previous decided cases.

[27] In considering the latter, the court must identify what factors or principles point towards or away from vicarious liability. This is necessary to ensure consistency in decision-making (*Various Claimants* v *Wm Morrison Supermarkets (supra)* at paragraph 24 per Lord Reed). The courts have applied the close connection test differently to sexual abuse cases. It has been tailored to emphasise factors which are particularly important in that context (*Catholic Child Welfare Society (supra)* at paragraph 83). Such factors have included the conferral of authority on the employee by the employer over the victims he abused (*Various Claimants* v *Wm Morrison Supermarkets (supra)* at paragraph 23). While in *Dubai Aluminium (supra)* Lord Nicholls noted that authority is not the touchstone of vicarious liability (paragraph 23), that was not a sexual abuse case. In all the sexual abuse cases cited, it has been treated as significant. I acknowledge that such authority has not always been conferred in the form of an undertaking by the abuser to care for the victims he abused, but

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[20] [2003] 2 AC 366

that is not to say that the employee was not exercising some degree of authority over them. For example, in *Maga (supra)*, Longmore LJ observed that there was no undertaking of responsibility by the priest in respect of the non-Catholic boy he abused and that such an undertaking was not essential for vicarious liability to arise (paragraphs 79-80). However, as Lord Neuberger noted, his status as a priest conferred a degree of general moral authority notwithstanding there was no specific undertaking (paragraph 45). In certain circumstances, in particular religious cases, that authority might arise from the status of the abuser's role alone.

[28] In order to determine whether the abuse perpetrated by Shaw was closely connected with the acts he was authorised to do, it is necessary to consider the duties and responsibilities incumbent on him during the course of his employment as head caretaker. The pursuers rely on three duties identified in Shaw's job description. I am not persuaded that there is any connection between the duties relied on by the pursuers and the sexual abuse. It is not alleged that he sexually abused the pursuers while they assisted him setting up the equipment or accompanied him on security rounds. For vicarious liability to arise, there must be "a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm" (*Maga (supra)* at paragraph 53 per Lord Neuberger, following *Jacobi (supra)* at paragraph 79). Merely giving the first defender an opportunity to commit the abuse is not sufficient (*Lister (supra)* at paragraph 65 per Lord Millet). The duties founded on by the pursuers did not create the risk or significantly enhance it. Neither of the first two duties founded on placed Shaw within proximity of the children, either in the caretaker's house or in the sports centre itself. Moreover, in respect of the former, the risk of abuse was created by Shaw's relationship with the pursuers' mother. The abuse had commenced in 1979 before Shaw became employed as

head caretaker. I do not understand this to be a matter of dispute. Whereas the pursuers contend that Shaw was grooming them when they accompanied him in the sports centre that had already occurred in the actions that preceded the abuse in the family home. To borrow Longmore LJ's language in *Maga (supra)*, the "progressive stages of intimacy" had already taken place before the second defender employed the first defender. While a "but for" test does not apply, if that test is not met, *a fortiori* the close connection test cannot be met either. Nor can any authority which Shaw exercised over the pursuers in this capacity be said to have arisen from what he was authorised to do by the second defender. It appears that the pursuers accompanied Shaw with the full knowledge and consent of their mother. The job description did not entitle or encourage him to have the pursuers accompany him while he was performing such tasks.

[29] The third duty relied upon is slightly different, though I am still not of the view that it is sufficiently connected to the abuse to give rise to vicarious liability. The pursuers rely on Shaw's duty to ensure that adults and children adhere to the rules of the sports centre, thereby ensuring the safety of the building. Such a duty appears to me as too remote to give rise to vicarious liability. As head caretaker, Shaw would inevitably have come into contact with the users of the sports centre. However, it is not apparent that this would have placed him in isolated contact with the children that would have provided him with a sufficient level of opportunity for him to abuse the pursuers. While the pursuers seek to draw a parallel between the instant case and *Lister (supra)*, in my view, the present circumstances are more closely analogous to those in *Jacobi (supra)*. In *Jacobi (supra)* the abuser was employed by a non-profit organisation to run a boys' and girls' club. He was responsible for *inter alia* supervising volunteer staff and organising recreational activities. He was also encouraged to form friendships and a positive rapport with the children at the club. He

abused two children whom he had met in the club, but the abuse did not take place on the club's premises or in connection with club-activities. The Canadian Supreme Court held there was not a sufficiently strong connection between the employment and the acts of abuse. The opportunity for the abuser to abuse whatever power he may have had was slight. The club activities did not require the abuser to be alone with a child off club premises and outside club hours. The opportunity to perpetrate the abuse only became possible when he managed to "subvert the public nature of [his] activities" (paragraph 80).

[30] Similar considerations apply here. The facts of *Jacobi (supra)* were on stronger ground. Shaw was not encouraged to form relationships with the children at the sports centre. On the pursuers' analysis, his responsibilities were limited to ensuring all users of the sports centre adhered to safety rules. Nothing in the job description required Shaw to associate with users privately, nor to any significant extent publicly for that matter. He was only able to continue the abuse of the pursuers at the caretaker's house and the sports centre when he was able to subvert the public nature of his duties. It has been averred that the pursuers' mother entrusted their care to the first defender whenever they visited the caretaker's house. The pursuers have disputed that averment. Whatever the case may be, their attendance at Shaw's house was not closely connected with anything he was authorised to do. It did not result from duties or responsibilities incumbent on him as head caretaker. Insofar as the pursuers analogise between the instant case and *Maga (supra)* in contending the first defender was essentially "never off duty", Lord Neuberger made those remarks in respect of the first meeting between the priest and the boy. The former was dressed in his clerical garb, as he would normally be notwithstanding he was not carrying out priestly duties. His special role, which was identifiable from his "uniform", conferred him with a degree of general moral authority that few others possess (paragraph 45).

Neither the first defender's role generally, nor any of the specific responsibilities incumbent on him, conferred the requisite degree of authority to render it fair and just to find the second defender vicariously liable.

[31] It is a significant distinguishing feature in the instant case that the abuse commenced prior to the abuser undertaking the employment which the pursuers seek to found on for the purposes of vicarious liability. In all the other sexual abuse cases cited, the abuse had at least *prima facie* commenced as a direct result of the abuser's employment. In *Lister (supra)* the warden of a boarding house perpetrated the abuse. His introduction to the boys he abused was in his capacity as warden. In *Catholic Child Welfare Society (supra)* brother teachers of a Roman Catholic boys' residential school, who lived on school grounds, abused the boys living there. In *BXB (supra)* an elder raped a member of a congregation of Jehovah's Witnesses. The pursuers' rely on this case in contending that the fact the first defender's abuse of the pursuers commenced as a result of his friendship with their mother does not negate vicarious liability for the later abuse. The victim and her husband in *BXB (supra)* had struck up a friendship with the elder and his wife prior to the rape occurring. Nicola Davies LJ, who delivered the lead judgment, observed that the elder's role was an important part of the reason why the victim and her husband had begun associating with him. Mance LJ regarded their friendship prior to the rape as no more than part of the background to the relationship. However, his Lordship also noted that the victim would have ceased associating with the elder had it not been for his role and status (paragraphs 104-105). I acknowledge that, in principle, it may be possible for vicarious liability to attach even where abuse has commenced at an earlier stage unrelated to the employment but then continues in the context of the abuser's employment. Such circumstances, however, are hypothetical and do not arise here. The circumstances of *BXB*

(supra) were very different. It concerned a single episode of rape, not abuse perpetrated over a prolonged period as in the instant case. Whereas Mance LJ took the view that the victim would not have continued to associate with her abuser had he not been an elder, and thus the rape would not have occurred had it not been for his status, the same is not necessarily true for the pursuers in this case given it has already occurred prior to his employment.

[32] The fundamental difficulty with the pursuers' case is that, even if they are correct in submitting that conferral of authority, or the absence thereof, is not determinative, they fail to identify any other connecting factors such that it would be fair and just to impose vicarious liability on the second defender. The nature of the first defender's job, assessed broadly, did not require him to be in close, private proximity with the pursuers (*Mohamud (supra)* at paragraph 44 per Lord Toulson). The risk created was thus insufficient to amount to a connecting factor. The abuse itself was not perpetrated within the second defenders' field of activities. It was done in a private capacity once the public nature of his role, at least insofar as it relates to engaging with users of the sports centre, had been subverted. It has, quite properly, not been suggested that the first defender acted to further the employer's business interests. Similarly, there is no doubt that the first defender's motive for the conduct is purely personal. In the absence of any connecting factors, any alleged vicarious liability falls to be negated.

[33] Having regard to all the foregoing I will pronounce decree of absolvitor in favour of the second defenders.