

Neutral Citation Number: [2018] EWHC 3286 (QB)

Case No: D90BM014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2018

Before :

MR JUSTICE MARTIN SPENCER

Between :

Mrs Sally Brayshaw
- and -
The Partners of Apsley Surgery
Mr Thomas O'Brien

Claimant
First Defendant
Second Defendant

Justin Levinson (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Paul Stagg (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Defendant**
Mr Thomas O'Brien did not attend and was unrepresented

Hearing dates: 12, 13 and 14 November 2018

Judgment Approved

Mr Justice Martin Spencer:

Introduction

1. Plato said:

“The greatest mistake in the treatment of diseases is that there are physicians for the body and physicians for the soul, although the two cannot be separated.”

Thankfully, medicine has moved on in the intervening 2,400 years and the separation of medicine and religion is well-established. A doctor who uses, or abuses, his position to inculcate his patients with his religious beliefs is acting unprofessionally and deserves to be struck off. The issue in this case is whether such a doctor is also tortiously liable to his patient where the patient is occasioned harm and whether, if he is, liability transfers to his employer or quasi-employer through the doctrine of vicarious liability.

2. The allegation in this case is that the Claimant suffered psychiatric harm as a result of religious practices and religious doctrines imposed on her through and at the behest of the Second Defendant, Dr O’Brien, after she had consulted him when he was a locum doctor, his services having been engaged by the GP practice of which the First Defendants were the proprietors. The fact that the Claimant has suffered psychiatric harm is not in dispute, although there is some dispute over the nature and extent of that harm. The Claimant alleges that the series of events which led to her sustaining that harm arose from and were instigated by a “treatment plan” which included an alternative “way of healing” (through finding God and faith) instigated by the Second Defendant at their very first consultation. It is alleged that the events which followed that initial consultation amounted to the intentional infliction of harm or harassment or, at least, negligent conduct giving rise to tortious liability for the harm which ensued. It is further alleged that the way in which these matters were instigated, through a normal GP consultation, and the fact that the Second Defendant intermittently remained one of the doctors treating the Claimant through the First Defendants’ surgery, meant that the events leading to the Claimant’s injury were “so closely connected” with the Second Defendant’s engagement as a locum GP as to give rise to vicarious liability on the part of the First Defendants.
3. For the First Defendants, however, it is asserted first that, however unprofessional the conduct of the Second Defendant may have been, and however deserving of the Second Defendant being struck off the register of medical practitioners, it did not amount to a tort for the purposes of civil liability. Even if that is wrong, it is alternatively asserted on behalf of the First Defendants that the conduct of which complaint is made is so far removed from what the Second Defendant was engaged to do as a locum doctor as not to engage the doctrine of vicarious liability and, furthermore, as a locum doctor, as opposed to an employee, the Second Defendant did not have the necessary integration into the business of the First Defendants.
4. The Second Defendant has played no part in these proceedings. The Claimant seeks judgment against him for what it is worth. If, on the evidence, I find that there has been tortious conduct on the part of the Second Defendant, the Claimant will clearly

be entitled to judgment against him for such damages as I assess that the Claimant is entitled to as a result of that conduct.

The facts

5. The Claimant was born on 30 April 1964 and in July 2012 became a patient of the Apsley Surgery, Stoke-on-Trent, a GP surgery owned, managed and operated by the First Defendants as partners. The First Defendants are not themselves doctors: one is a qualified nurse and the other a business manager. The Second Defendant was a General Practitioner whose services were engaged by the First Defendants from time to time as a locum.
6. The arrangement for the engagement of locum doctors was described to me by one of the First Defendants, Mrs Marilyn Marathe who has managed the Apsley Surgery for some 40 years. She described how they used locum GPs when their regular, employed GPs were off sick or on holiday and the locums were usually obtained through agencies. The Primary Care Trust (“PCT”) had a list of locum GPs and Mrs Marathe would call either the PCT or an agency to identify a potential locum. She said that the practice had retained Dr O’Brien as one of its locum GPs since 2008 having initially identified him through the PCT locum list. She says he was well known in the area and did a lot of locum work locally. He provided his services as an independent contractor on an “ad-hoc” basis as and when required, being paid for those services at a rate of £500 per day. The First Defendants were not aware that Dr O’Brien’s practice and behaviour was anything other than that of an orthodox GP. Nor were they aware of any complaints save for one in October 2012 to which I shall return later in this judgment (see paragraph 35 below).
7. The Claimant has had the misfortune to have suffered, over the years, from a multitude of health problems, both physical and mental. These have included, at various times:
 - Somatoform pain disorder since March 1996;
 - Addison’s disease (a form of adrenal insufficiency, treatable with hormones such as hydrocortisone) since July 1996;
 - Anxiety/depression necessitating psychiatric treatment;
 - Bulimia nervosa;
 - Opiate dependency;
 - Essential hypertension;
 - Chronic obstructive lung disease/asthma;
 - Chronic fatigue syndrome;
 - Epilepsy;
 - Osteoarthritis of the right knee;

- Perianal abscess;
 - Colorectal problems which led to a colostomy carried out in 2012 and the fashioning of a stoma with which the Claimant, with all her accompanying problems had to contend throughout the events in question.
8. In addition to the above medical problems, there seems no doubt that the Claimant also had to contend with familial problems. The Claimant's father was an alcoholic who had gambling problems and could be violent at times. The Claimant had been cared for in a children's home, part of a Roman Catholic convent run by nuns, where she was abused (the Claimant was brought up a Catholic). She also suffered abuse at the hands of her mother. The Claimant has two sisters and a half-sister. One of her sisters died as a result of a heroin overdose. The Claimant herself has five children, one of whom is a heroin addict and the youngest of whom had to have brain surgery. She was divorced from their father. The Claimant, despite everything, married her present husband, Mr Brayshaw, on 4 September 2012 but their relationship has not been wholly straightforward. For example, when the Claimant saw her consultant psychiatrist, Dr Jorsh, on 29 October 2012, she told him that she and her husband had not spoken for approximately a week. A letter from Dr Jorsh to the Claimant's GP, Dr Angmo, in November 2012 described the Claimant having taken an overdose in response to conflicts with her husband and his attitude to one of the Claimant's daughters, the situation at home being aggravated by the fact that one of the Claimant's sons had stolen from her and she was struggling with her stoma with pilonidal sinuses and with general distress.
9. So it was that this Claimant, with all her complicated medical, psychiatric and social problems, rang the surgery asking to speak to a doctor on 17 August 2012. The usual system would be for the telephone to be answered by a receptionist who, having "triaged" the call, would decide whether the patient needed to speak to a doctor. If the patient did, she would either be put through to a doctor at the surgery or arrangements would be made for a doctor to ring the patient back. The receptionist should make a note of the encounter. The GP records were computerised and the print-out shows that the Claimant had contacted the surgery at 13:27 on 17 August 2012 and the receptionist, Mrs Baker, had made an entry as also had one of the permanent GPs, Dr Angmo. The record also shows that, at 15:57, the Claimant had spoken to Dr O'Brien. Various encounters with patients are entered as codes on the computer and generate a particular form of words. Thus, for example, code 8B311 generates "medication given", code XaEFD generates "patient given telephone advice out of hours" and there are many other codes. On this occasion, Dr O'Brien entered "8CB" which generates "had a chat to a patient". In addition, Dr O'Brien entered:
- "Long chat with this lady over her various issues; could really do with visit next week."
10. It is clear, however, that this entry in the GP notes disguised more than it revealed. In relation to what was said, I have various strands of evidence including:
- The Claimant's statement to the General Medical Council ("GMC"); the GMC investigation led to a hearing before the Fitness to Practise

(FTP) Panel of the Medical Practitioners' Tribunal Service and which is referred to in this judgment as the "FTP Panel");

- The Claimant's witness statement for the purposes of the trial;
- The Claimant's evidence at trial;
- Dr O'Brien's documentary evidence to the GMC;
- A letter written by the Claimant, undated but clearly written within about two or three days of the encounter.

11. In her statement to the GMC, the Claimant said this:

"My first consultation was over the phone and Dr O'Brien was the on-call doctor. ... I told Dr O'Brien over the phone that I was desperate and low. During the telephone conversation, Dr O'Brien asked me if I have a faith and I said no and talked about my past. Dr O'Brien said that his wife knew a different way that could heal me that didn't involve any medication. He told me that he would ring me from his house. I didn't give him my number and he must have obtained it from the surgery. He also passed it on to his wife later without expressly asking my permission. When Dr O'Brien got home, he rang me and put me on the phone to his wife. They asked to see me the following day. It was agreed that Dr O'Brien would visit me at my home because I was ill and couldn't get out."

12. There is also a description of this encounter from Dr O'Brien in his statement to the GMC. To put that statement in context and explain its content, the Claimant's consultant psychiatrist Dr Jorsh (who was the person who made the initial referral and complaint to the GMC about Dr O'Brien), described an appointment he had with the Claimant on 21 January 2013 and stated:

"Mrs Brayshaw told me that she had been to see a locum General Practitioner at her local GP surgery ... Mrs Brayshaw said that she had gone to see Dr O'Brien in a distressed state and he had advised her that 'there was a better way' these were Mrs Brayshaw's words."

Dr O'Brien in his concluding statement to the GMC, said in response:

"I spoke to [Mrs Brayshaw] for the first time in August 2012 via a telephone consultation from the Norton surgery and not in person as Dr Jorsh stated. As she was in a state of extreme distress and in floods of tears I arranged a home visit, when, as stated previously, [Mrs Brayshaw] related all her childhood trauma and stresses, her suicidal thoughts and attempts, her Roman Catholic upbringing and abuse in the convent, her faith in God and her family life and divorce, much like in her witness statement ..."

13. Mrs Brayshaw gave evidence about the first encounter with Dr O'Brien and attested to the truth of her witness statement. In cross-examination, she said that she had initially spoken to triage and that Dr O'Brien had called her back. She said that the initial call was for about 40 minutes and then he went home and rang her from home and the call carried on for another 1½ hours. She said that after Dr O'Brien went home and rang her, it was then his wife who was talking to her. She said that in the first call she had explained she was struggling with the colostomy and was depressed about it. She also confirmed that she had spoken about her history and the abuse she had suffered when she was young. She said this was because Dr O'Brien asked her if she had faith. She said she told him everything including the abuse suffered at the hands of her mother. She denied that she had wanted to be reconciled with her faith at that time. She said that where, in her statement, she had written that Dr O'Brien said that "his wife knew a different way that could heal me that didn't involve any medication" those were his very words. He hadn't said anything about the method his wife used. She said that, at that stage, she thought he was talking about alternative medicine rather than religion. When Dr O'Brien rang back, she said that he and Dr O'Brien's wife, Tina, were on the loudspeaker, and that both were talking to her all the time. Mrs O'Brien had said that they would meet up tomorrow when "Tom" would come round and talk to her some more. Mrs O'Brien had also said that her husband would examine Mrs Brayshaw's knee.
14. There is also a hand-written letter from the Claimant to Dr and Mrs O'Brien which, although undated, appears to have been written very soon after the first encounter. This is because, in that letter, the Claimant writes:

"... but if I am to meet Tina which I am keen to do at some point ..."

indicating that this letter was written before the Claimant had met Mrs O'Brien. As the Claimant said she met Mrs O'Brien within about three days of 17 August 2012, it would follow that the letter must have been written within that period. In that letter the Claimant referred to enclosing a solicitor's witness statement which she had made in relation to previous proceedings arising out of the abuse that she had received. At paragraph 4 of her witness statement, the Claimant says that she received £38,000 in compensation for the abuse and so it follows that she would have made a witness statement in support of that claim. The letter goes on to say:

"I've chosen to reveal this to you as I believe you have been sent to me. I've never met anyone let alone a Christian doctor who understood. I have had some wonderful GPs in my time but felt that somehow you both empathise rather than sympathise with me as the other GPs and many other professionals I have encountered over the years. What I've given is not pleasant to read, I think it will or maybe easier for you to read Tom as a GP but if I am to meet Tina which I'm keen to do at some point it may be important and I won't have to discuss it yet again. I feel you came to me and if I am to regain my faith with yours' and others guidance then upfront and confront is the route to take. I thank you for the time you have taken. I'm aware it is your own time as a Christian and not as my GP. If you find that either of you do not wish to read the enclosed I shall understand. I know I do not have to prove to

anybody what happened to me but if you are to work together to help me get on the right path to regain my faith. I've wanted to reconcile with God and my faith for a long time now. This is the right time. Thank you and God bless to you both. Sally”

Clearly this is an important document for the purposes of the present proceedings. Given the circumstances in which, and the time at which, it was written it seems to me that it is likely to represent the truth and accurately to express the Claimant's feelings and thought processes at the time. Importantly, it confirms that Dr O'Brien had stated, and the Claimant understood, that what was to happen was to be a religious process and that Dr O'Brien would be giving of his own time “as a Christian and not as my GP”. It confirmed that the Claimant had wanted to reconcile with God and her faith for some time and that Dr O'Brien and his wife would be working together to help Mrs O'Brien “to get on the right path to regain her faith”. I have no doubt that the Claimant was aware that the course which was being suggested to her and which she, at that time, was willing to embrace was not a course of medical treatment but a form of “religious treatment”, perhaps “healing through faith”. I am further sure that the Claimant was able to distinguish in her mind between Dr O'Brien's role as a doctor and his role as a Christian proselytiser. This accords with a paragraph of Dr Jorsh's statement to the FTP Panel:

“6. Mrs Brayshaw further stated that Dr O'Brien told her that she should start going to a Pentecostal church. I believe from information given to me by Mrs Brayshaw and her husband, that Dr O'Brien is a minister, lay preacher or something to that effect at the church.”

15. Thereafter, it appears clear that the Claimant spent many hours with Dr O'Brien and his wife as they inculcated her into their faith, their church and their Christian practices. Furthermore, I have no doubt that the Claimant embraced all this with enthusiasm. In addition, they befriended her and she said in her evidence that she felt flattered that she should be befriended by two professional people, given her situation and background. The Claimant got married to her husband, Mr Brayshaw, on 4 September 2012 and was offered the use of Dr and Mrs O'Brien's log cabin for their honeymoon.
16. In her statement and again in her oral evidence, the Claimant describes how Dr O'Brien set her television onto a “series link” to the Gospel Channel and this was on when she woke in the morning. However, she also told me that she cancelled the series link after a few days. She described being invited to lunch by Dr and Mrs O'Brien to a family restaurant in Newcastle-under-Lyme. There appear to have been many prayer meetings and the Claimant was also taken by Dr and Mrs O'Brien to their church and to events known as “testimonies” where a particular person would give testimony about his or her faith and the importance of God in their lives.
17. It would appear that, over the next few months, it was probably Mrs O'Brien who took the major part in guiding the Claimant in spiritual matters. Not only is this consistent with the Claimant's evidence that she had been told on 17 August 2012 that Dr O'Brien said that it was his wife who knew a different way that could heal her but also the documentary evidence in the form of texts and emails appears predominantly to have been between the Claimant and Mrs O'Brien. One example is a very long

email sent by the Claimant to Mrs O'Brien at 23:16 hours on 10 November 2012 with the subject "GOD is my best friend God is love" and which made reference to the daughter of Dr and Mrs O'Brien, Emily. One extract reads:

"I'm understanding through you and Emily has a way with me too. She can sometimes explain through young eyes the way God has been in her from birth, because she has had the Lord always in her life through you and Tom. I feel so much younger than her like an infant learning to read the little cardboard books I used to read to my children, that's how young I feel in this journey. I can read, hear and speak fairly articulately and understand what you are teaching me yet I have this horrible block which stops me doing what I want most of all want and need to do, to be able to read that gorgeous bible you all kindly brought for me. Such beautiful words and direction for myself because I can only have what we do when we are together. I'm praying to the LORD to end me it really makes sense as I really do believe I have GOD inside me.

GOD has become so much part of my life that when I swear or get angry or do something that is not right I speak to the LORD automatically to get rid of the sin (and many more) that I have committed. ...

It has made me feel so ignorant and a fool to have been suckered by Lucifer and others. I can't understand why they did it because I could have had all that I have now and life would have turned out so differently with the LORD guiding me. I didn't understand that I needed to repent ALL my sins and forgive ALL those who have harmed in my life even taking what I thought was the GOD away from me. To me that is the worst thing of all is to have your faith robbed from you. That is why you all, with the LORD'S guidance have given me a priceless gift for life. The LORD through you has made sure I shall never feel alone."

18. The religious inculcation occurred through the rest of 2012 and into January 2013. At the same time, though, it is clear that the Claimant continued to seek medical help and consult on a very regular basis with the surgery and other health care professionals. Thus, there are many encounters throughout September, October, November and December 2012 with the surgery. On 26 September 2012, the Claimant attended the University Hospital of North Staffordshire complaining of low back pain. In December 2012, Dr O'Brien referred the Claimant to a colorectal surgeon, Mrs Hall, for further assessment arising out of hernia formation in the stomal area of the abdomen.
19. On 5 October 2012 Dr Jorsh wrote to Dr Angmo (the Claimant's GP) describing how he had seen the Claimant on 1 October 2012 and again on 4 October 2012. In that letter he wrote:

“[Sally] felt physically much better after stopping the Nortriptyline. We spent some time discussing her cannabis use and she had plans to go back to ADSIS.”

Of particular significance is the fact that, throughout this period, the Claimant continued to engage with the psychiatric services based at Harplands Hospital. On 15 October 2012 there is a note:

“Sally phoned saying she was not well enough mentally to attend CPA.”

This was followed by a call from the Claimant’s husband, Mr Brayshaw, on 16 October where he said that he was struggling with Sally, that she had locked him out of the house, she had a large supply of medication and had sent him some disturbing text messages. Then on 18 October 2012 the Claimant phoned the psychiatric services saying:

“I’m in trouble”

and explaining that she had taken a large overdose of Nitrazepam and Zopiclone, had written on her bedroom wall “do not resuscitate” and had locked her husband out. He telephoned the police who attended with him. On 29 October 2012 there was an appointment with the consultant, Dr Jorsh, when the Claimant told Dr Jorsh that she and her husband had not spoken for a week. There was a further telephone encounter on 22 November 2012 with a Registered Mental Nurse, Melanie Carr, when the Claimant described she had been arguing with her husband “+++” about her children. Nurse Carr also noted:

“Still having trouble with the stoma and unbearable pain. She says she’s eating very little because it hurts so much. She’s been seen by the Stoma nurse and is awaiting further surgery at Macclesfield.”

The Claimant was due to see Dr Jorsh again on 29 November 2012 but there is a note:

“Could not attend appointment with Dr Jorsh today as not physically well enough.”

The “Testimony” of 12 January 2013

20. Things appear to have gone wrong between the Claimant and Dr and Mrs O’Brien as a result of the events surrounding a “testimony” on 12 January 2013. This took place at 7pm at Hanley Baptist Church, Stoke-on-Trent and was advertised as follows:

“Want to meet with other Christians on a Saturday evening?
Want to hear how Jesus is changing people’s lives today?
Need prayer support?
Meet: PJ a remarkable man whom God took from witchcraft to follow Jesus and to see miracles.
Come taste and see that God is good.”

21. In her witness statement, the Claimant describes a 50-year-old man called “Persistent Percy” (to whom I shall refer in this judgment as “Percy” not having been supplied

with his full name) who told a story of how a witch doctor had tried to induce Percy to offer up his son and blood as a sacrifice. She said:

“The witch doctor said to [Percy] that if he offered his son up, his son would get a headache and die and the only way to stop it was to take an owl and set fire to it near someone who had died. Then, Percy said that, at a grave, an owl came. Within two nights, Jesus came down and Percy knew that he had to get away because they were in danger and so was their son. He said that once he was back in England he was relaxed with God now he and his wife were successful, it shows what can be done.”

The Claimant says that this story has left her terrified of owls, and the expert psychiatrists have in fact agreed that she now suffers from an owl phobia. She also said that, at the testimony,

“Dr O’Brien asked me to come to the front of the room to heal me and Percy asked me to hold my hands out, as I could pass out. Percy blew on me and was commanding demons to leave my body. I let out a roar. There were nearly 100 people there at the testimony and it was played on the TV screen in the building. I thought ‘Oh no, I did that in front of everyone’. Emily told me that when I roared I scared her and her friend, I’m now worried that there is a film of what happened on a DVD and that makes me feel ashamed. At that last meeting, I recall that Tina held me to her breast in a hug, which no woman has done before. On that night whilst I was driving home alone I couldn’t stop crying and I had to stop three times as I was physically sick.”

22. This event which appears to have been the start of the breakdown in the relationship between the Claimant and Dr and Mrs O’Brien was the subject matter of the hearing before the FTP Panel and there were conflicting accounts. Thus, Dr O’Brien, who did not attend the FTP Panel hearing itself, had obtained and submitted to the GMC statements from others who attended the “testimony”, including a retired police sergeant, the pastor of St John’s Community Church Burslem and the pastor at Hanley Baptist Church who said that at no point throughout the evening did any exorcism take place and no one received any prayer ministry against their will. There is clearly a significant dispute of fact about what exactly happened at the meeting, which I am unable to resolve on the evidence which I have seen and heard. In her statement the Claimant said that she felt suicidal two days after the meeting on 12 January 2013 and then she thought her home was riddled with demons so that she drove to an industrial site and sat there for three hours in the freezing cold. She then became suicidal. She said she had been over-medicating. On a date which must have been between 12 January and 21 January 2013, the Claimant sent a text to Mrs O’Brien as follows:

“Hi Tina sorry couldn’t answer my mobile. In hospital. Had bad fall on ice late Monday afternoon landed straight on shoulder I broke before. They’re not sure what I’ve done but I cannot move shoulder at all very painful. I need to tell you Tina didn’t want to do by text but I’ve been really affected by

last testimony. Tony obviously knows was unable to hide it being so distressed have spoken to Tony I think I need a break. Not turning away from God he knows how much I've prayed and repented."

The Medical Appointment of 21 January 2013 and its consequences

23. On 21 January 2013, the Claimant had an appointment with Dr Jorsh which she attended with her husband. It was at this appointment that the Claimant revealed to Dr Jorsh what had been going on with Dr and Mrs O'Brien. In his statement to the GMC, Dr Jorsh said:

"7. Mrs Brayshaw told me that Dr O'Brien had advised her to stop taking all her medication, including hypertensive medication, and told her 'God is her surgeon' she stated that Dr O'Brien also advised her that she did not need to see a psychiatrist and that Dr O'Brien made her feel that everything that was wrong with her was due to the Devil and if she stopped doing what the church told her, she would be punished.

8. Mrs Brayshaw's husband attended the appointment and was in the room during the consultation between Mrs Brayshaw and I. He made his disapproval of the situation quite assertively known. Mrs Brayshaw stated that Dr O'Brien's wife had advised her to stop seeing Mr Brayshaw, as he did not approve of the church. I can confirm that Mrs Brayshaw's husband did not contribute to the facts of the situation they were given by Mrs Brayshaw; however, he did express concern about what Dr O'Brien and his wife had been saying to Mrs Brayshaw.

9. Mrs Brayshaw was very distressed during the appointment as she had been told she would be punished for coming to see me. As she was so distressed it was difficult to get the exact dates of how long this had been going on for. I believe that it was approximately a few months but she has hidden it from me. I can see from my notes that Mrs Brayshaw's mental state had been deteriorating for six weeks. Also, she had been experiencing more pain since 6 December 2012 and up to this point her pain levels had been bearable. On 6 December 2012, I made a comment to her that her pain was worse than it had been and I suspect that she may have started to see Dr O'Brien and his wife around this time.

10. I suggested to Mrs Brayshaw that she start taking her medication and she agreed. The medication was therefore reinstated on 21 January 2013 and the effect of this was quite quick."

Clearly, some of this was materially inaccurate. For example, the Claimant had not started to see Dr and Mrs O'Brien on or around 6 December 2012 but much earlier.

Furthermore, the suggestion that Mrs Brayshaw had stopped taking all medication was clearly wrong and I return to this in paragraph 48 below.

24. As a consequence of this consultation, Dr Jorsh contacted the GMC and later made a formal complaint to the GMC about Dr O'Brien.

The proceedings before the FTP Panel

25. Following Dr Jorsh's complaint, the GMC instigated disciplinary proceedings against Dr O'Brien which culminated in the hearing before the FTP Panel in January 2015. Although Dr O'Brien engaged with the process in the form of responding to the complaint and giving his version of the events, he did not attend or participate in the hearing itself. In those circumstances, there was no cross-examination of the Claimant as such, although she was questioned by members of the Panel.

26. The allegations against Dr O'Brien were as follows:

"That being registered under the Medical Act 1983, as amended:

- 1. Between August 2012 and February 2013 you were employed as a General Practitioner at Apsley Surgery, Cobridge Health Centre, Stoke-on-Trent.*
- 2. In August and September 2012, in the course of your work you undertook consultations with Patient A.*
- 3. You knew that Patient A was vulnerable to your influence by reason of her mental and physical health and/or your status as a doctor.*
- 4. You used your professional position to influence Patient A to adopt your religious beliefs and engage in religious practices in that;*
 - (a) In the course of your initial consultation with Patient A in August 2012 you*
 - (i) Initiated discussion about her faith;*
 - (ii) Spoke about your wife's knowledge of a way of healing without medication;*
 - (iii) Said you would ring her from your house.*
 - (b) Following your initial consultation with Patient A you:*
 - (i) Visited Patient A's home with your wife;*
 - (ii) Engaged Patient A in discussion about God;*

- (iii) *Set Patient A's television control to the Gospel Channel;*
 - (iv) *Prayed with Patient A;*
 - (v) *Entertained Patient A at a restaurant where you introduced her to a pastor;*
 - (vi) *Presented religious gifts and other gifts to Patient A;*
 - (vii) *Offered Patient A the use of a log-cabin for her honeymoon;*
 - (viii) *Provided Patient A with religious materials;*
 - (ix) *Suggested to Patient A that she had been possessed by demons;*
 - (x) *Said to Patient A words to the effect that the Devil was having a real go at her;*
 - (xi) *Conveyed Patient A to religious meetings;*
 - (xii) *Made frequent telephone calls to Patient A;*
 - (xiii) *Caused or permitted your wife to present an "Occult List" to Patient A for her signature;*
 - (xiv) *Said to Patient A words to the effect that there were Devil items in her house;*
 - (xv) *Entertained Patient A at your home.*
5. *Without Patient A's consent you disclosed her confidential notes to your wife.*
6. *You said to Patient A she should stop taking her*
- (a) her anti-depressant medication*
 - (b) blood medications.*
7. *You said to Patient A words to the effect that psychiatrists are very dangerous and she should not go to see them.*
8. *Your actions as set out in 4 and/or 5:*
- (a) exploited Patient A's vulnerability;*
 - (b) caused Patient A distress;*
 - (c) were detrimental to Patient A's health;*

(d) demonstrate a failure to maintain a professional boundary with Patient A.

9. *Your actions at paragraph 6 and/or 7 carried significant risks to Patient A's health.*

And that by reason of the matters set out above your fitness to practice is impaired by your misconduct."

All the above allegations were found proved except for those at paragraphs 4 (b) (ix), 4 (b) (xii), 6 (a) and 6 (b). So far as the allegation at 4 (b) (xi) was concerned, this was found proved in relation to one meeting only.

27. In its determination, the FTP Panel found that Dr O'Brien was in breach of a fundamental tenet of good medical practice and that the breach was serious. It stated:

"17. ... the Panel has concerns for the safety of the general public, and it notes Dr O'Brien's written statement, in which he states:

'If I had my time all over again, I would still help Patient A (or anyone else in the same situation) if I was asked to do so, I would still offer the person spiritual care, if I felt, as in this case, that a terrible malaise in that area was the underlying route of their presenting disease.'

18. On the basis of the facts proved, the Panel has found that Dr O'Brien has a continuing attitudinal problem in relation to a number of aspects in this case in general, and specifically in relation to psychiatrists. The Panel notes there is no evidence before it to suggest that Dr O'Brien has repeated his behaviour. However, it is in no doubt that he would repeat his behaviour as he has expressly said so and he has not acknowledged his failings, remediated or shown any insight into his conduct.

19. The Panel has concluded, having weighed all the matters set out above, that Dr O'Brien's actions are a serious breach of good medical practice, which are fundamentally incompatible with continued registration. ...

22. The Panel has found that Dr O'Brien abused his position of trust as a doctor by imposing his religious beliefs upon Patient A who was and remains a vulnerable patient. It has had regard to all the documents submitted by Dr O'Brien and found that he has no insight into the seriousness of his actions, nor has he apologised."

On that basis the FTP Panel determined to erase Dr O'Brien's name from the medical registrar.

The present proceedings

28. Following the FTP Panel's determination, a Letter of Claim was sent to the First Defendants by solicitors on behalf of the Claimant in July 2015 and a Claim Form was issued on 26 August 2015. On 20 May 2016 Particulars of Claim were served. In paragraph 1 these alleged that, at the material time, "The Second Defendant was a medical doctor practising from the surgery and employed or used as such by the First Defendants." In my judgment, contrary to the finding of the FTP Panel and the allegation in the Particulars of Claim, there is no evidence that Dr O'Brien was ever employed by the surgery. Indeed, the evidence is clear that he was occasionally engaged to provide his services as a locum on a daily basis (see paragraph 6 above) and it is this which I shall take to be connoted by the word "used" in paragraph 1 of the Particulars of Claim.
29. At paragraph 4 of the Particulars of Claim, the initial conversation between the Claimant and Dr O'Brien on 17 August 2012 was referred to, it being pleaded that the Claimant "discussed her health concerns with the Second Defendant and told him that she was feeling desperate and her mood was low. The Second Defendant asked the Claimant about her faith." Then a series of factual allegations is set out for the period August 2012 to January 2013, namely that the Second Defendant:
- a) Purported to treat the Claimant
 - b) Initiated a discussion about the Claimant's faith
 - c) Recommended a way of healing without medication – in particular, that God could heal her
 - d) Telephoned the Claimant from his house
 - e) Visited the Claimant at home with his wife
 - f) Engaged the Claimant in discussion with God
 - g) Set the Claimant's television to the Gospel Channel to "soak" the Claimant with religious content
 - h) Prayed with the Claimant
 - i) Presented religious and other gifts to the Claimant
 - j) Provided the Claimant with religious materials
 - k) Suggested to the Claimant that she was possessed by demons
 - l) Told the Claimant that the Devil was having a real go at her
 - m) Conveyed the Claimant to religious meetings
 - n) Made frequent telephone calls to the Claimant (including up to 33 in one day)

- o) Caused or permitted his wife to present an Occult List to the Claimant for her signature
- p) Told the Claimant that there were Devil items in her house
- q) Entertained the Claimant at his home
- r) Advised the Claimant that she should stop taking her anti-depressant medication and blood pressure medication
- s) Advised the Claimant that psychiatrists are very dangerous and she should not go to see them

It is then alleged as follows:

“5. The Second Defendant in acting as aforesaid intentionally exposed the Claimant to a foreseeable risk of injury or severe distress, which resulted in injury.

6. Further or alternatively the Second Defendant in acting as aforesaid, carelessly exposed the Claimant to a foreseeable risk of injury and deterioration in her pre-existing mental health problems, which materialised.

7. Yet further or alternatively, the Second Defendant’s conduct towards the Claimant constituted harassment contrary to Sections 1 and 3 of the Protection from Harassment Act 1997.”

30. It seems to me this is what may be termed a somewhat “scattergun” approach to pleading. It is clear that some, indeed many, of the allegations of the Second Defendant’s conduct between August 2012 and January 2013 would not, of themselves, be said to be negligent or constitute intentional exposure to the risk of injury or severe distress. Thus, for example, it takes the matter no further to allege that the Second Defendant “telephoned the Claimant from his house”: it would depend what was said. Nor was it obviously negligent or the intentional infliction of harm to visit the Claimant at home with his wife. These allegations are effectively lifted from the allegations before the FTP Panel and have been pasted, somewhat inappropriately, into the Particulars of Claim when, whilst I am sure they were relevant and pertinent for the purposes of an allegation of professional misconduct, their relevance to an allegation of tortious conduct is questionable. In the present context, the most important allegations are probably those at (r) and (s).

31. The Particulars of Claim then allege vicarious liability on the following basis:

“8. The tortious conduct of the Second Defendant set out above arose in circumstances where the First Defendant entrusted the safekeeping and care of the Claimant to the Second Defendant, delegated those tasks to the Second Defendant and undertook its care and safekeeping of the Claimant through the services of the Second Defendant. Further, the Second Defendant’s torts were committed in the

course of his employment/work for the First Defendant or were closely conducted therewith.”

32. It is then alleged in the Particulars of Claim that, “By reason of the matters complained of” the Claimant suffered pain, injury, humiliation and hurt to her feelings and had sustained loss and damage. Reference is made to the medical report of Dr Papanastassiou, a consultant psychiatrist whose report of 8 February 2016 was served with the Particulars of Claim. Again, I consider this to be a less than optimal approach to the pleading of causation in a case in which, on any view, causation is difficult and complicated.
33. In their Defence, the First Defendants assert that the only clinical interactions between the Claimant and the Second Defendant at the surgery were the telephone consultation on 17 August 2012 and a face-to-face consultation 14 December 2012. This appears to be correct and is accepted as so by the Claimant. No admissions are made as to whether the alleged conduct of the Second Defendant was tortious as alleged but in any event it is denied that any tortious conduct of the Second Defendant was committed in the course of his work at the surgery or was closely connected thereto and vicarious liability is denied. In the course of the trial, the First Defendants’ position firmed up in that it was positively argued by Mr Stagg that the court should find that the Second Defendant’s conduct was not tortious.
34. The parties instructed consultant psychiatrists as experts, Dr Papanastassiou for the Claimant and Dr Tom Carnwath for the Defendant. They agreed that:
 - Prior to the index events the Claimant suffered from Emotionally Unstable Personality Disorder and Recurrent Depressive Disorder, both of moderate severity. They also agreed that she suffered from iatrogenic opiate dependence due to prolonged treatment for pain and bulimia nervosa.
 - As a result of the index events the Claimant experienced a recurrence of her depression; she went through an episode of opiate withdrawal; towards the end of her contact with Dr O’Brien she became agitated with upsetting dreams and memories relating particularly to a religious meeting she attended with him. Dr Papanastassiou considered that the Claimant developed Post-Traumatic Stress Disorder but Dr Carnwath considered that she experienced an exacerbation of her Emotional Unstable Personality Disorder. They also agreed that she had developed a specific phobia relating to owls.
 - Prior to the meeting on 12 January 2013, the Claimant had already become depressed and anxious in the context of the events in relation to the Defendants’ [by which I take it that they meant involvement of the Second Defendant and his wife] involvement with Mrs Brayshaw prior to this

meeting and this heightened her perception of the upsetting significance of that event;

- The Claimant became depressed and anxious with poor sleep and concentration towards the end of 2012, she felt estranged from her family, she went through a period of opiate and tranquilliser withdrawal over some two to three weeks when she stopped her medication, thereby increasing her restlessness and anxiety; after contacting the mental health team in January 2013 she felt relieved to have escaped the influence of Dr O'Brien and his wife but continued to feel depressed and lacking in confidence. She felt guilty about turning away from her family and the effect this had on her relationship with her husband and her self-esteem was reduced by her perception that she had allowed herself to be emotionally mistreated by the O'Briens;
- The phobia about owls has not been particularly disruptive, only causing anxiety when she is confronted with images of owls rather than inducing generalised avoidance behaviour, but it is another significant area causing distress;
- There were many other events which negatively affected the Claimant's mental condition, but their relative impact cannot be accurately quantified;
- Dr Carnwath considered that the prominent negative factor in the Claimant's life before and after the index events had been her physical condition and it was his opinion that the Claimant suffered an exacerbation of her mental condition as a result of the 'index events; for a period of about two years.
- Dr Papanastassiou considered that the PTSD, the owl phobia and the depressive episode following the index events would not have occurred if those index events had not taken place but she agreed that the Claimant would have continued to suffer intermittent relapses in the context of her personality disorder and her physical health conditions, but less so over time as personality disorder presentation normally becomes less intense and matures with the passage of time as the patient learns to live with her emotional dysregulation and learns to manage her crises better;

- The Claimant would benefit from cognitive behaviour therapy for her depressive symptoms, her phobia and her traumatic memories and other treatment but they disagreed as to the extent of the treatment.

The October 2012 Complaint

35. Before turning to the evidence at trial, a further matter should be mentioned if only to exclude it as relevant to the determination in this case. On 23 October 2012 the Apsley Surgery received a letter from a person (MD) regarding a patient (BE). As a side note to the main concern about BE, MD wrote that she did not think it appropriate that Dr O'Brien should have lent BE a DVD that was religious in nature. The letter said:

“I also feel that part of the conversation that took place was inappropriate, BE talked about seeing the doctor before at Christ Church and having a coffee with him, the doctor then went on to discuss about God and how he felt that BE had not yet made his mind up and was ‘sitting on the fence’, he then issued BE with a DVD to watch about religion, this concerned me because I do not believe that conversation had a valid place at his appointment to discuss his medication.”

This was raised on the basis that the surgery might have been alerted to Dr O'Brien's unprofessional conduct at the time when damage to the Claimant in this case could have been prevented.

36. However, Mrs Marathe said in her statement that she spoke to Dr O'Brien about this the next time she saw him and Dr O'Brien told her that he had known BE for a number of years through the church and that, at the previous Sunday's service, BE had asked to borrow the DVD. Dr O'Brien explained that, as he had not had the DVD with him, he had told BE that he would carry it in his car for when they next saw each other. He had then given the DVD to BE in the car park at the rear of Christ Church. Mrs Marathe explained that the Cobridge Practice is located near a church, the church has no car park of its own and therefore parishioners use the Practice's car park. She said that many of the patients registered with the Practice worship at that church. Mrs Marathe said that, as many of the patients worship at the church, many of them also knew Dr O'Brien from the local community and through the church, outside the Practice. In short, Mrs Marathe said that she had satisfied herself that there had been no improper contamination of a clinical appointment with conversation or activity of a religious nature and she was “unaware that he may have promoted his religious beliefs to any patient in the context of a doctor-patient relationship.” Had she or her partner in the practice, Mrs Rushton, been made aware of any such behaviour, she said she would have raised it with Dr O'Brien and if not satisfied that he would refrain from such promotion of religious beliefs in his discussions with patients, he would have been told that the Practice would no longer use his services.
37. I was quite satisfied with Mrs Marathe's explanation in relation to the complaint about Patient BE and that it has no bearing on the liability of the First Defendant in this case.

The trial and the Claimant's evidence

38. At the trial, evidence was given by the Claimant, Mrs Brayshaw, the expert psychiatrists and the Partners of the Surgery, Mrs Marathe and Mrs Rushton. The only one of these witnesses relevant to the assessment of the facts and the court's findings in relation to them was Mrs Brayshaw.
39. It should be mentioned at the outset that Mrs Brayshaw was emotionally labile throughout the trial and I observed her weeping on many occasions. This also occurred during her evidence and two breaks were required for her to compose herself. Also, as Mr Levinson submitted, she is a lady who has many medical and other problems (as set out in paragraph 7 and following above) and it is therefore appropriate to make due allowance for that. In examination-in-chief, Mrs Brayshaw simply affirmed the truth of the two statements she had made, and in particular that made for the purposes of the FTP Panel on 16 July 2013. My assessment of her as a witness therefore arises principally from cross-examination.
40. I regret that I found her a deeply unsatisfactory witness and in that regard I find myself at odds with the FTP Panel who stated:

“In general, the Panel was impressed with the clear, fluent and emotional [I wonder if this is a misprint for unemotional] manner in which she gave some of her evidence, which was consistent with her written statement. It noted that [Mrs Brayshaw] was clearly distressed whilst giving her evidence. She appeared to clearly recollect events with Dr O'Brien and his wife and provided some details to the Panel which were convincing and unlikely to have been made up.

However, the Panel found that during her oral evidence there were some discrepancies with her written statement. On the whole, however, her oral evidence, much of which was detailed and remarkably consistent to what she stated to Dr [Jorsh] in January 2013 and subsequently in her written statement dated 7 July 2013. Furthermore, on occasions as set out below, we have found support for Mrs Brayshaw from Dr O'Brien's own documents.”

As to her general demeanour at this trial, Mrs Brayshaw found it difficult to answer the question that she was being asked. Her answers tended to ramble on, giving information which was not prompted by the question which she was asked and she seldom gave a direct answer to a single question. To a certain extent, this was due to her personality but it was also, in my judgment, because the questions which she was being asked were awkward for her and she chose not to answer them. I have no doubt that she understood the questions that she was being asked and, indeed, foresaw their significance. With all her difficulties and clear emotional lability, I nevertheless formed the impression that she is an intelligent woman.

41. Time and again Mrs Brayshaw contradicted herself and gave answers which were inconsistent with what she had said in her statements and then, when taken to the statements, gave further answers which were in turn inconsistent with the answers she

had just given. Furthermore, many of her assertions in her evidence were not only unsupported by documentary evidence, but, in many cases, contradicted by the contemporaneous documents.

42. Mrs Brayshaw confirmed that she had had difficulties long before she first encountered Dr O'Brien and this is clearly borne out by the medical records. From page 364 in divider 32, her medication record is set out from July 2012 until February 2013. From page 376 her active ongoing medical problems are set out and these include:

- Somatoform pain disorder
- Mixed anxiety and depressive disorder
- Essential hypertension
- Asthma
- Chronic fatigue syndrome
- Colostomy and creation of a stoma
- Epilepsy
- Arthritis of her right knee
- Perianal abscess.

These were all problems which were ongoing throughout the relevant period. In addition, there was a history of drug abuse (cannabis) and familial problems with one son having a heroin addiction and a sister having died from a heroin overdose. There were also marital difficulties so that, at one stage, Mrs Brayshaw told her psychiatrist, Dr Jorsh, that she had not spoken to her husband for a week.

43. Mrs Brayshaw confirmed that she had called the out-of-hours service at the surgery on 17 August 2012 and was rung back by the Second Defendant, Dr O'Brien. In her written evidence, she said that Dr O'Brien asked her if she had a faith and she replied: "No", and talked about her past. She then said:

"Dr O'Brien said that his wife knew a different way that could heal me that didn't involve any medication. He told me that he would ring me from his house."

She said that when Dr O'Brien got home, he rang her again and put her on the phone to his wife. In evidence, she said that in fact the phone was put on loudspeaker so that she was speaking to Dr O'Brien and his wife, Tina, at the same time. In evidence, Mrs Brayshaw expanded upon what she had said in her statement, stating that she had told them about the abuse she had suffered when she was young, particularly from her mother. Mr Stagg put to Mrs Brayshaw, that at that time, she wanted to be reconciled with her faith, having been brought up a Roman Catholic. Mrs Brayshaw denied this saying that she had horrendous memories from the convent where she had been cared for and educated. Mr Stagg then took the Claimant to her handwritten letter in which she had said "I've wanted to reconcile with God and my faith for a long time now": see paragraph 14 above. It was put to Mrs Brayshaw that she understood that the alternative healing would be done by Mrs O'Brien which she denied. However, she

modified this saying that she agreed that Dr O'Brien said that it was his wife, Tina, who could help her on that occasion.

44. This initial conversation between the Claimant and Dr O'Brien - firstly Dr O'Brien ringing from the surgery and then ringing from home - is clearly critical to my assessment of the true relationship between them and how that relationship developed. In my judgment, it must have been clear, and was clear, to the Claimant that when Dr O'Brien rang her from home, he was no longer doing so in his capacity as her GP. I say this for the following reasons:

- (i) The mere fact that he was ringing her from home rather than from the surgery will have indicated to her a change in status. She said in evidence that Dr O'Brien said that he was doing this because he had to get home for childcare reasons but I do not accept this.
- (ii) Secondly, as Mrs Brayshaw said in her statement, she was told by Dr O'Brien that it was Dr O'Brien's wife, Tina, who:
"Knew a different way that could heal me that didn't involve any medication".

This indicated that it was Tina who would principally be providing the spiritual guidance.

- (iii) The telephone call from Dr O'Brien's house was either conducted with Tina alone or was conducted on the speakerphone with Tina participating. In her statement, Mrs Brayshaw said:
"When Dr O'Brien got home, he rang me and put me on the phone to his wife."

This would imply that Mrs Brayshaw was speaking exclusively to Tina. However, in evidence she said that this was a call conducted using the speakerphone with them both. However, it may not matter: the fact is that Tina appears to have been an important contributor to the conversation.

- (iv) By involving Tina in the conversation, it is quite clear that Dr O'Brien had moved away from the doctor patient relationship, underpinned as it is by the duty of confidentiality. With her medical history, Mrs Brayshaw must have known – and she in fact confirmed in evidence that she did know – of the duty of confidentiality on a doctor and either she thought that the involvement of Tina was a gross breach of confidentiality or she realised that they were talking in a different capacity. In my judgment, it is the latter which is the case.

45. In her evidence, Mrs Brayshaw suggested that, during the relevant period between August 2012 and January 2013, it was exclusively Dr O'Brien who was providing for her medical needs. Whilst it seems undoubtedly true that Dr O'Brien continued, on occasions, to provide advice or treatment as a GP, the records show beyond peradventure that Mrs Brayshaw's medical needs were principally provided for through the surgery and through other doctors. She continued to consult the surgery, as shown by the records, sometimes on a daily basis and she was given treatment for each of the ongoing medical problems listed in paragraph 5. above, with referrals as appropriate, for example for surgery for the perianal abscess. In addition, Mrs Brayshaw continued to consult the psychiatric service including Dr Jorsh and attend

review meetings of her treatment on the Care Programme Approach (“CPA”). Whilst I have no doubt that Dr O’Brien compromised his position as a GP by introducing Mrs Brayshaw to his family and involving Mrs Brayshaw in their spiritual activities through the local Pentecostal Church, I also have no doubt that Mrs Brayshaw was quite aware that this was separate to the medical treatment which she had had and was continuing to have at the surgery, for which the First Defendants were responsible.

46. In relation to the overall unreliability of the Claimant’s evidence, I agree with, and adopt, the submissions made to me in closing by Mr Stagg. These were:

- i) Mrs Brayshaw’s two statements were not consistent with each other in certain important respects, for example in relation to whether she had religious faith before she met Dr O’Brien. In her statement dated 12 January 2017 she said:

“I was a follower of the Roman Catholic faith before the abuse began and now I have been left sceptical and no longer believe in some of the faith’s teachings.”

In her previous statement for the FTP Panel, Mrs Brayshaw said that when Dr O’Brien asked her if she had a faith she replied “No”.

- ii) When asked about her attendance at the Beacon House Prayer Group, Mrs Brayshaw initially said that she was always taken there by Dr O’Brien and his wife; then, moments later, she said she had driven there on her own and arrived after they had left.
- iii) In evidence, Mrs Brayshaw asserted that, when Dr O’Brien first visited her house, he examined her knee and wrote a prescription for cortisol (a cortisone injection). This was a totally new allegation, not mentioned in the proceedings before the FTP Panel. It is not reflected in the records. What is reflected is that, on 5 September 2012, another doctor, Dr Sharif Zulfiker saw the Claimant because of a complaint of osteoarthritis in her right knee, he gave her a tubigrip (an elasticated tubular bandage) and arranged for her to come in for an injection. Then, on 12 September Dr Zulfiker noted that he injected steroid into the Claimant’s right knee joint, Dr Zulfiker noting:

“Rhs (right hand side) knee injected many years ago and helped a lot ... Patient would like another. Informed consent, patient knows what to expect as recalls from last time and went to seek medical advice.”

Thus, it seems clear that the injection of the right knee was arranged solely by Dr Zulfiker and not Dr O’Brien.

- iv) In her evidence, Mrs Brayshaw claimed that Dr O’Brien had taken volume 1 of her medical notes home to show his wife.

This would, of course, have been a gross breach of confidentiality which would have been of interest to the GMC but it formed no part of the complaint of serious professional misconduct.

- v) Mrs Brayshaw was also inconsistent in relation to what exactly happened on 12 January 2013 and the testimony of “Persistent Percy”. At one stage she said that this took place when only she, Percy, Dr O’Brien and Dr O’Brien’s family were present. However, in her statement she said she did it in front of everyone.
- vi) There was a further significant matter which the Claimant alleged against Dr O’Brien and which I found wholly unbelievable. In paragraph 35 of her statement to the GMC, Mrs Brayshaw said:

“Dr O’Brien told me that I had a tumour in my stomach and Tina kept saying that time was running out. I texted my friend to say I had a tumour because I thought Dr O’Brien meant a cancerous tumour, but I texted the message to Dr O’Brien by mistake. He texted me back, saying he didn’t mean tumour as in cancer he meant as a swelling. By then, I was convinced I was dying.”

In her evidence, Mrs Brayshaw said:

“Tom told me I had a tumour. He said only the Lord could help me.”

Mrs Brayshaw was taken by Mr Stagg to the GP records for 14 December 2012 which was the only time recorded in the records that she saw Dr O’Brien at the surgery. He recorded as follows:

“Had a fall in her bathroom last week and has hurt her shoulder, back and knees. Feels right knee is distorted has some irregularity of right kneecap. Get x-ray. Is having a lot of hernia formation in the stomal area of her abdomen and is very worried about cancer. I will do referral to Mrs Hall, for further assessment.”

Then, three days later, there was a referral to Mrs Hall, a colorectal surgeon. Mr Stagg pointed out to Mrs Brayshaw that

this note was effectively saying that she had convinced herself that she had cancer but she said that was wrong, it was Dr O'Brien who had mentioned a tumour. She said:

“I can't explain why he would have made the referral to Mrs Hall if he had said that only the Lord could help me.”

She confirmed she went to see Mrs Hall. The fact is that if Dr O'Brien had really told Mrs Brayshaw not just that she had a tumour but that the only person who could help her was God, he would surely not have referred Mrs Brayshaw to a colorectal surgeon for investigation and by far the more likely explanation is that, as Dr O'Brien recorded, the idea this was a tumour had come from Mrs Brayshaw and that Dr O'Brien had reassured her and referred her to a surgeon.

47. For the above reasons, combined with what I say below in relation to the issue of medication, I came to the conclusion that there was very little of Mrs Brayshaw's evidence that I could rely on. It seemed to me that, with his cross-examination, Mr Stagg effectively destroyed the Claimant's credibility and she was not a witness upon whom any reliability could be placed. This distinguished her evidence at trial from the evidence she had given before the FTP Panel where she had not been subjected to the same cross-examination by reference to a careful forensic comparison with the documents. Thus, I do not find myself persuaded by the findings of the FTP Panel as to what was proved or not proved and I make up my own mind as to what conduct by Dr O'Brien has been proved.

Medication

48. A further important issue relates to whether, as alleged in the Particulars of Claim, Dr O'Brien “advised the Claimant that she should stop taking her anti-depressant medication and blood pressure medication”. Again, I agree with and accept Mr Stagg's submissions in relation to the hopeless inconsistency and contradictions in the Claimant's evidence about this.
49. In relation to giving up medication, her previous accounts and answers given in oral evidence vacillated between having given them all up, having given up only some of them up and for how long she had given up her medication. Thus:
- i) In his statement to the GMC, Dr Jorsh said that Mrs Brayshaw told him that Dr O'Brien had advised her to stop taking all her medication, including her hypertensive medication. He said:

“I suggested to Mrs Brayshaw that she start taking her medication and she agreed. Her medication was therefore reinstated on 21 January 2013 and the effect of this was quite quick.”

The clear implication is that Dr Jorsh was led to believe by Mrs Brayshaw that she had stopped all her medication on the advice of Dr O'Brien and that she was still not taking it when she went to see Dr Jorsh 21 January 2013.

- ii) Equally, Dr Papanastassiou in her report reported being told by Mrs Brayshaw:

“Dr O'Brien told her to stop all medication and not to see her psychiatrist. Mrs Brayshaw listened to Dr O'Brien and stopped all medication including morphine and her anti-depressant medication.”

- iii) At paragraph 26 of her statement to the GMC, however, Mrs Brayshaw said:

“I had already started to decrease my medications when I was seeing my previous GP, but Dr O'Brien said I should stop taking my anti-depressants and blood pressure medication because God was going to look after me. Dr O'Brien said I should keep taking the morphine, however, and he gave me extra morphine which were in 10 mg and would give instant relief as the others were a slower release. These were prescribed when I was at the surgery.”

- iv) In her oral evidence, there were yet further versions. She was referred to paragraph 12 of her statement dated 12 January 2017 where she said “Dr O'Brien abused his position as my doctor and advised me to come off my medication.” She said:

“Not all my medication, just some of it. He said it was impairing my concentration. I did tell Dr Papanastassiou that Dr O'Brien had told me to come off all my medication but in fact it was only the morphine and the mind-changing drugs.”

She said that she stopped all medication for just a few days. Mr Stagg asked:

“What were you advised to do?”

She replied:

“To come off the most potent ones – morphine and anti-depressants. But I decided to try coming off all medications”

However, she then said that she was told to come off all medications, that was the “long-term plan”. She said:

“I did stop taking them all for two to three days but then felt very ill.”

One of the drugs she was on was Lamotrigine for seizures (epilepsy) she said:

“I stopped it for a few days. I had a seizure and I resumed taking it.”

Mrs Brayshaw was then taken by Mr Stagg to an entry in the GP notes of an appointment on 27 November 2012 at the Surgery with Dr Hadeel Mattar. The entry reads:

“Was unhappy with locum earlier today, would like Ondansetron for intermittent nausea again as other Rx (treatment) caused problems, she has stopped anti-depressant and BP meds, explained this is not safe but she will discuss with PSYCH (psychiatrist) and see me for double appointment for pelvic exam and swabs.”

Dr Mattar then prescribed Ondansetron. She was asked whether she had told Mr Mattar that Dr O’Brien had advised her to stop medications and she said:

“No – he told me not to tell her. She told me it was unsafe.”

She said she then told Dr O’Brien and he said it would be better to taper it down.

It was then pointed out that Dr O’Brien had written a prescription for her for morphine on 5 October 2012 to which she responded:

“I can’t remember”.

50. Mrs Brayshaw was then asked questions about who it was who had told her to give up medications. First, she said that it was Dr O’Brien not Mrs O’Brien who said she didn’t know anything about it and she would leave that to her and Dr O’Brien. Mr Stagg asked:

“Did you tell the Fitness to Practise Panel that Tina told you give up the medications?”

to which she then responded: “Yes that was true.” This reflected paragraph 92 of the FTP Panel’s determination where they stated:

“The Panel noted the oral evidence of [Mrs Brayshaw]. She told the Panel that **Dr O’Brien’s wife** [emphasis added] had said that she should reduce her medication, and that she should

‘harken’ and be ‘still’ and that this would be the ‘warmest and happiest feeling ever’.

93. During Patient A’s oral evidence she told the Panel that she self-medicates and often over- or under-uses the drugs prescribed for her. In relation to [Mrs Brayshaw] and how she takes the drugs prescribed for her, the Panel found her to be a less reliable witness, Dr Jorsh confirmed to the Panel in oral evidence that [Mrs Brayshaw] is unreliable with her medication and often self-medicates.

94. Also the Panel noted the emails sent by Mrs Brayshaw to Dr O’Brien’s wife dated 1 November 2012 where she states:

‘I’ve been asking for 2 years for someone to try [to] sort out the medication now I know why nobody did it. They could not make time to do what Tom is doing now and that’s go back to the beginning and seeing what I have been given’

95. The Panel is of the view that this email is not consistent with an abrupt instruction from Dr O’Brien to [Mrs Brayshaw] to stop her medication.”

In the light of that consideration of the evidence the FTP Panel, not surprisingly found the allegation that Dr O’Brien told Mrs Brayshaw that she should stop taking her anti-depressant medication and blood pressure medications not proved. The evidence before me was equally inconsistent, incoherent and unreliable. This was of concern because it related to one of the most important of the allegations against Dr O’Brien both before the FTP Panel and in the present proceedings, relating as it did to a medical matter, the giving of medication.

Findings of fact

51. My findings of fact based on the documents I have seen and the evidence I have heard and read are as follows:
- i) On 17 August 2012 at about 15:37 hours, the Claimant rang Apsley Surgery asking to speak to a doctor and she was rung back a short time later by Dr O’Brien.
 - ii) In the course of that conversation, which lasted about 40 minutes, the question of the Claimant’s faith was raised and Dr O’Brien said that his wife knew a different way that could heal the Claimant that didn’t involve medication and that he would ring her back from his house.

- iii) Later that day, Dr O'Brien rang the Claimant from his house and there was then a long further conversation which primarily took place between the Claimant and Dr O'Brien's wife, Tina. Much of this conversation probably centred on the Claimant's difficult background and upbringing, the abuse she had suffered, the faith that she had lost and the help that Tina O'Brien principally, but also Dr O'Brien, could give the Claimant in becoming reconciled with God and resuming her active Christianity. It was made clear to the Claimant, and she understood, that the time being given her by Dr O'Brien was his own time as a Christian and not as a GP.
- iv) The Claimant wrote to Dr and Mrs O'Brien enclosing a copy of the witness statement she had made in relation to the proceedings arising out of the abuse she had suffered and which the Claimant felt that Dr and Mrs O'Brien needed to read in order to understand some of the background. In that letter, she wrote:
- “I feel you came to me and if I'm to regain my faith with yours' and others guidance then upfront and confront is the route to take. I thank you for the time you have taken. I'm aware it is your own time as a Christian and not as my GP. If you find that either of you do not wish to read the enclosed I shall understand. I know I do not have to prove to anybody what happened to me but if you to work together to help me get on the right path to regain my faith. I wanted to reconcile with God and my faith for a long time now.”
- v) Thereafter, the Claimant spent a lot of time with Dr and Mrs O'Brien and also their daughter, Emily, praying with them, attending prayer meetings, attending their church and attending special “testimonies”. Dr and Mrs O'Brien befriended the Claimant, invited her to their own home, took her out to meals and generally encouraged her to become involved more and more deeply with their Christian faith.
- vi) It was hoped that, with a degree of spiritual renewal, some of the Claimant's physical and mental ailments would be alleviated. Mrs O'Brien probably mentioned that she was herself seldom ill, which she attributed to her faith, but when she was ill, she found healing in God rather than in, for example, medication.
- vii) The Claimant was flattered to be befriended by people such as Dr and Mrs O'Brien and she embraced the renewal of her faith enthusiastically and willingly. However, it caused problems

with her husband who was probably somewhat suspicious of the motives of Dr and Mrs O'Brien. There were also tensions between the Claimant and her husband in relation to the Claimant's children.

- viii) The Claimant continued to consult at the Apsley Surgery, she continued to take her medication and she continued to engage with the psychiatric services and to see Dr Jorsh.
- ix) Dr O'Brien did not tell or encourage the Claimant to stop taking her medication. As indicated in paragraph 48 above the evidence on this from the Claimant was hopelessly confused and self-contradictory and is contradicted by the fact that Dr O'Brien himself prescribed additional morphine for the Claimant. The Claimant was in any event erratic in relation to her compliance with her prescribed medication, and sometimes under-medicated or over-medicated herself of her own accord.
- x) In December 2012/January 2013, the Claimant began to become disillusioned with Dr and Mrs O'Brien and probably wanted to cut back on her involvement with them or even break off altogether but found this difficult.
- xi) At the testimony of "Persistent Percy" on 12 January 2013, the Claimant had an adverse psychological reaction to her experiences at that event, not because there was an attempt at exorcism or anything like that but because of her mental fragility combined with her burgeoning disillusion and disappointment/sense of let-down which that will have given her. Hence her physical reaction (vomiting on the way home from the meeting) and psychological reaction (deterioration in her mental state and phobia of owls).
- xii) The Claimant unburdened herself to Dr Jorsh when she and her husband saw him on 21 January 2013 and he took the matter up with the FTP PANEL immediately. Thereafter the Claimant severed her ties with Dr and Mrs O'Brien.

52. In relation to the allegations contained in paragraph 4 of the Particulars of Claim (see paragraph 29 above) I find as follows:

- a) It is not clear what this allegation is intended to impart, but I find that Dr O'Brien did not, on 17 August 2012, purport to treat the Claimant medically but introduced the Claimant to his wife for an alternative way of healing, through faith and Christianity;
- b) Proved
- c) Proved
- d) Proved

- e) Proved
- f) Proved
- g) Dr O'Brien set a series link to the Gospel Channel which the Claimant cancelled after about 3 days: I make no finding as to his motive in so doing
- h) Proved
- i) Proved
- j) Proved
- k) Not proved
- l) Not proved
- m) Proved
- n) Not proved. I make no finding as to the frequency of telephone calls, and, in any event, most were probably made by Mrs O'Brien
- o) Not proved: although the Claimant did sign a document called the Occult List, this was probably at the behest of Mrs O'Brien and was, in any event, a patently absurd document which would have had little or no impact on the Claimant
- p) Not proved
- q) Proved
- r) Not proved: see above
- s) Not proved: quite clearly, the Claimant did continue to see Dr Jorsh and to engage with the psychiatric service.

53. In the course of his closing submissions, Mr Levinson for the Claimant modified the list of matters set out in paragraph 4 of the Particulars of Claim in an attempt to make the allegations more pertinent to the tortious conduct alleged. He submitted that Dr O'Brien caused the Claimant to be immersed in his religious ideology by exposing her to relentless prayer sessions, relentless discussions about God, relentless contact and the other matters already alleged. New allegations are that the Claimant was made to feel "suckered in by Lucifer and others", causing division between the Claimant and her family particularly her husband, telling her that she was hearing the Devil's voice, humiliating her, telling her that because she was born a Catholic she was a sinner and telling her that her children were the Lord's not hers.
54. I assume that the purpose of the use of the adjective "relentless" is to suggest that the Claimant was given no peace, and that the attentions of Dr and Mrs O'Brien were unwelcome or more than the Claimant wished to have. If so, I reject that suggestion. As stated, I find that the Claimant willingly and enthusiastically embraced what was

being offered to her, to start with at least, and she never lost her free will or ability to say no if she wished. I do not find that the Claimant was humiliated by Dr and Mrs O'Brien but, on the contrary, they tried to treat her with kindness. I do not accept that they deliberately fostered division between the Claimant and her family: although there were difficulties between the Claimant and her family including her husband, I do not find that it was ever the intention or purpose of Dr and Mrs O'Brien for this to happen.

The allegations of Tort

55. In the light of the above findings of fact, I turn to the allegations made on behalf of the Claimant which are said to give rise to the right to damages.

Intentional infliction of harm

56. The first allegation is that Dr O'Brien intentionally exposed the Claimant to a foreseeable risk of injury or severe distress, which resulted in injury. In order to succeed in such a claim, the Claimant must show:

- i) Words or conduct directed at the Claimant for which there is no justification or excuse;
- ii) An intention to cause severe distress or illness (recklessness is insufficient);
- iii) That psychiatric illness has resulted from the words or conduct.

57. For the Claimant, it is argued that the court should focus on what the Second Defendant must be taken to have intended rather than on his personal primary motive. Reference is made to *Wilkinson v Downton* [1897] 2 QB 57 where the defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. This statement was made with intent that it should be believed to be true, the plaintiff did believe it to be true and in consequence suffered a violent nervous shock which rendered her ill. Wright J said:

“One question is whether the defendant’s act was so plainly calculated to produce some effect of the kind that was produced that an intention to produce it ought to have been imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, may suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.”

The defendant was not saved from liability by reference to the fact that he himself seemed to have regarded what he told the plaintiff as a “practical joke”. Reference is

also made to *ABC v WH Limited* [2015] EWHC 2687 (QB) where a teacher who caused a pupil to send him indecent images of herself did not wish her any harm but was motivated by sexual gratification. However, the tort was made out because distress/injury to the pupil was a likely collateral consequence. It is argued that, in the present case, Dr O'Brien can only be taken to have intended that the Claimant would be distressed by being told things such as that there were devil items in her house, that the Devil was having a field day with her and that the Devil was having a real go at her.

58. In my judgment, the tort of inflicting intentional harm is not made out in this case. It seems to me that it is very unlikely that Dr O'Brien had the requisite intention to cause harm. Whatever may have been said to the Claimant about the Devil being at work, whether in her or her house or otherwise, which I have in any event found not proved (see paragraphs 29 and 52 above), this would surely have been in the context of reassurance that the forces of evil in her life could be, and were, being dealt with by her return to faith and reconnection with Christianity. All the evidence suggests that the intention of the Second Defendant, misguided as it may have been, was the Claimant's well-being and the improvement of her spiritual (and therefore mental) health. In my judgment, this case is a long way from the type of conduct which this tort is intended to catch. Accordingly, the claim under this alleged cause of action fails.

Harassment

59. Next, I deal with the allegation that the tort of harassment is made out. This derives from Sections 1 and 3 of the Protection from Harassment Act 1997. Section 1 provides:

“(1) A person must not pursue a course of conduct –

- (a) Which amounts to harassment of another,
- (b) Which he knows or ought to know amounts to harassment of the other.”

By Section 7 of the 1997 Act, “references to harassing a person include alarming the person or causing the person distress.” A course of conduct must involve conduct on at least two occasions in the case of conduct relating to a single person. By Section 3, an actual or apprehended breach of Section 1 (1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question and damages may be awarded for (among other things), any anxiety caused by the harassment and any financial loss resulting from that harassment.

60. For the Claimant, it is argued that, by virtue of Dr O'Brien's knowledge of the Claimant's health and circumstances, and in particular her “feelings of guilt, the feeling that she could never be good enough and her extreme anxiety” it would have been obvious to Dr O'Brien that the Claimant would be alarmed or distressed at being told such matters as she was hearing the Devil's voice and the other matters relating to the Devil.

61. In my judgment, the allegation of harassment also fails. It seems to me that the offence (and, thus, the civil remedy) connotes the concept that the conduct by the Defendant is unwelcome. However, as I have stated, the Claimant was enthusiastic about, and embraced, the attentions of Dr and Mrs O'Brien and their introduction to her of their particular brand of Christianity. As I understand that brand of Christianity, it focuses on redemption from the forces of evil so that the one, redemption, is seen in the context of the other, the forces of evil. Furthermore, there is no evidence that the Claimant specifically sustained damage as a result of being told that the Devil was at work and the like. The deterioration in her mental health appears to me more to have been the result of her disillusion with her religious revival, her movement away from the influence of Dr and Mrs O'Brien together with the effect of the testimony meeting on 12 January 2013. There is no evidence that the Second Defendant or his wife engaged in any kind of course of conduct amounting to harassment because of their perception that the Claimant was turning away from the "true path" and was losing her commitment and enthusiasm. Again, it seems to me that the matters relied on are a long way from the kind of conduct that this offence was intended to cover and, in my judgment, the offence is not made out and therefore nor is there a civil remedy.

Negligence

62. Finally, it is alleged that the Second Defendant was negligent because, by his overall conduct, he carelessly exposed the Claimant to a foreseeable risk of injury and deterioration in her pre-existing mental health problems which in fact materialised.
63. Before considering this allegation, it is necessary to consider the evidence of the psychiatrists as to the damage sustained by the Claimant. In their joint statement, they agree that, "as a result of the index events", the Claimant experienced a recurrence of her depression and towards the end of her contact with Dr O'Brien she became agitated with upsetting dreams and memories relating particularly to the testimony meeting which took place on 12 January 2013. However, the psychiatrists differ as to the effect. Dr Papanastassiou considered that the Claimant has developed Post-Traumatic Stress Disorder as a result of her interactions with the Defendants (meaning Dr O'Brien and his wife). Dr Carnwath considered that the Claimant suffered an exacerbation of her Emotionally Unstable Personality Disorder. They also agreed that the Claimant had developed a specific phobia relating to owls.
64. The difficulty with the evidence of both psychiatrists is that they refer to the index events as a whole without defining precisely which index events they consider to have been responsible for the deterioration in the Claimant's psychiatric condition. It is the Claimant's case that the conduct needs to be looked at as a whole. Even if the actual harm was done towards the end, and in particular as a result of the Claimant's experiences at the testimony on 12 January 2013, it is suggested that all the activity before that was a kind of "grooming", whereby an already vulnerable and suggestible person, known to be such by the Second Defendant, was put in a position whereby she would foreseeably suffer the damage which she has suffered. In this regard, Mr Levinson reminded me that Dr Carnwath had agreed in cross-examination that the following features of the Claimant's Emotional Unstable Personality Disorder rendered her particularly vulnerable to the matters complained of:

- a) She had a tendency to act impulsively without consideration of the consequences
 - b) She had a strong desire to be loved and to attach to charismatic or authority figures, whom she would overvalue and then have a strong desire to avoid real or imagined abandonment by them
 - c) She had an unstable sense of self/identity
 - d) She had low self-esteem
 - e) She was searching for solutions to her physical and emotional pain
 - f) She had a tendency easily to trust people and follow their advice making her especially vulnerable to exploitation
 - g) She particularly had a need for clear boundaries.
65. It is in relation to the above aspects that Mr Levinson submits that Dr O'Brien's status as a GP assumes such importance. He was certainly an authority figure; he was someone whom the Claimant would naturally have trusted and whose advice she would have followed; it is suggested that she would not have understood clearly or properly the boundaries between Dr O'Brien *qua* doctor and his proselytising mission as a Christian.
66. I agree with Mr Levinson that Dr O'Brien was negligent in relation to the Claimant's mental health. Given his knowledge of her, he owed her a duty of care not to subject her to the unreasonable and avoidable risk of harm, and that duty of care should have included and encompassed the risk that the Claimant would fail to follow through her commitment to the doctrine of Christianity which he and his wife were espousing, with the consequences of the potential breakdown of their relationship. Effectively, the Claimant was left without a safety net in circumstances where the doctors at the Surgery and, in particular, Dr Jorsh, were not aware of what was going on and therefore how the Claimant could be supported medically, and particularly psychiatrically. In my judgment it was negligent of Dr O'Brien to expose the Claimant to the meeting of 12 January 2013 when, given the Claimant's psychological and psychiatric make-up, together with all her physical problems, it was foreseeable that she might react adversely in the way that she did. By reason of his zealous promotion of the religious aspects, he became blind to the medical aspects and thereby caused or contributed to the deterioration in the Claimant's mental health. Accordingly, in my judgment, the Second Defendant is liable to the Claimant for the psychiatric damage which she has sustained and its consequences.

Vicarious liability

67. In *Cox v Ministry of Justice* [2016] AC 660 the Supreme Court held that vicarious liability in tort is imposed upon the defendant in respect of the act or omission of another "because of his relationship with the tortfeasor and the connection between that relationship and the act or omission in question". The Supreme Court confirmed that a relationship could give rise to vicarious liability even in the absence of a contract of employment. In that particular case the essential factors were that the tort

had been committed as a result of activity being undertaken by the tortfeasor on behalf of the defendant, that that activity was integral to the defendant's business activities and that the defendant, by employing [perhaps engaging would be better] the tortfeasor to carry out the activity had created the risk of the tort being committed by the tortfeasor. Those criteria had been designed to ensure that liability was imposed where it was "fair, just and reasonable" to do so. In the course of his judgment, Lord Reed, with whom the other members of the Supreme Court agreed, said:

"The scope of vicarious liability depends on the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?"

I would add that the answer to these questions must always involve looking carefully at the particular activity which has been the cause of the damage in question and examine that activity in the context of the relationship between the tortfeasor and the defendant.

68. Further helpful guidance arises from the decision of the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 where, at paragraph 35, five reasons were set out as to why it is usually fair, just and reasonable to impose vicarious liability:

- i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
- ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
- iii) The employee's activities are likely to be part of the business activity of the employer;
- iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort being committed by the employee;
- v) The employee will, to a greater or lesser degree, have been under the control of the employer."

In my judgment, examination of each of these five reasons points strongly and clearly away from the imposition of vicarious liability on the part of the First Defendants in this case. I say that for these reasons:

- i) Dr O'Brien was not an employee of the First Defendants but merely a locum whose services were engaged at certain times for certain defined purposes. The evidence is that Dr O'Brien also provided his

services as a locum to other GP practices and it is almost certain that he did so during the period in question.

- ii) Thus, the only difference between the First Defendants and the other GP practices for whom Dr O'Brien worked is that Dr O'Brien was introduced to the Claimant by virtue of the Claimant being registered as a patient with the First Defendants' practice. It was through his work for the First Defendants that the Second Defendant had the occasion to encounter the Claimant but that was as far as it went and this is insufficient.
 - iii) After the initial encounter, all the activity of the Second Defendant which together constituted the negligence which I have found, occurred elsewhere than at the Surgery. Of course, it is possible for activity carried on away from the place of employment to carry with it vicarious liability as shown by such cases as *Lister v Hesley Hall Ltd* [2002] 1 AC 215 where the warden of a boarding school sexually abused the claimants, including off the premises, but the connection with the business of the party whom the Claimant seeks to make vicariously liable is inevitably weaker and more tenuous where the activity is off-site;
 - iv) If the activity which caused harm to the Claimant can be seen to be promotion of a particular brand of Christianity, then it is difficult to see how that can be said to have been activity undertaken by Dr O'Brien on behalf of the First Defendants;
 - v) Equally, and more significantly, Dr O'Brien's activity was no part of the business activity of the Surgery: the Surgery was in the business of providing medical assistance, the activities of Dr O'Brien and his wife were religious rather than medical;
 - vi) In my judgment it cannot be said that, by engaging Dr O'Brien as a locum GP, the First Defendants thereby created or enhanced the risk of this particular tort being committed by Dr O'Brien. This is the distinction between the present case and for example, the activities of errant priests in sexually abusing children or the activity of the warden in *Lister's* case who was endowed with particular pastoral duties and care towards those whom he abused.
69. Thus I find myself in complete agreement with the submissions of Mr Stagg on behalf of the First Defendants in relation to the issue of vicarious liability. As he submitted, there is no direct authority dealing with the issue of vicarious liability in circumstances such as these involving a locum GP. Thus, it is necessary to stand back and look at the overall fairness and reasonableness of imposing vicarious liability. In this regard, there is an analogy with the law on liability for agents. In *Dubai Aluminium v Salaam* [2003] 2 AC 366 Lord Nichols explained why liability for agents should not be strictly confined to acts done with the employer's authority and went on to say:

“23. If, then, authority is not the touchstone, what is? ... Perhaps the best general answer is that the wrongful conduct must be so closely connected with 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. ...

To the same effect is Professor Atiyah's monograph *Vicarious Liability in the Law of Torts*, [1967] p 171:

'The master ought to be liable for all those torts which *can fairly be regarded* as reasonably incidental risks to the type of business he carried on.'

I cannot see that religious proselytization can fairly be regarded as a reasonably incidental risk to the business of carrying on a doctors' surgery. I am fortified in this view by the fact that, as I have found, the Claimant herself knew that Dr O'Brien was not acting in his capacity as a GP but as a friend and Christian: she said so herself in her letter written soon after they met.

70. I should, in deference to Mr Levinson, deal with the essence of his argument in relation to vicarious liability which is that the embracing of religion was “sold” to the Claimant by Dr O'Brien as his treatment plan, a plan which was devised for her during that initial consultation as “a way of healing”. He referred me to a letter to the GMC written by Dr O'Brien on 21 September 2013 where he said:

“I believe I've made the correct initial diagnosis; offered the patient the opportunity, if she so wished, which she did at the time, to avail herself of the therapeutic option which I believe held out the best hope for a permanent cure, and later facilitated her recovery by the input of our own private time and resources, something the NHS does not and cannot offer, as it involved many hours of coming alongside the person, whom in our case became a good friend as a family. I would call this a very good example of 'working in partnership with the patient' (see GMC guidelines).”

Mr Levinson submitted that Dr O'Brien clearly regarded what he was doing as treatment as shown by his use of the word “therapeutic” for example, and everything that followed after 17 August 2012 was part of his “way of healing”. Thus, the recommendation for this “therapeutic” plan was made at the Surgery; the implementation came later but that does not matter.

71. Mr Stagg responded, submitting that in no way was this a course of treatment. Whilst Dr O'Brien may have sought to justify it in those terms, it was not intended to replace medical treatment which continued alongside the religious activity. He submitted that the Claimant's case is founded upon a fallacy, namely that this was a treatment plan for Mrs Brayshaw from Dr O'Brien as a doctor when in fact it was nothing of the kind. In fact it was an attempt to help her with something which she regarded as

missing in her life (and so did Dr O'Brien), namely her faith. The fact that this was not a substitute for medical treatment is shown by the fact that she continued to engage with the GP and with the psychiatric services at the same time. The Second Defendant, Dr O'Brien, was not writing a medical treatment plan but a spiritual one, whereby he hoped that he and his family could give a spiritual fulfilment which would benefit Mrs Brayshaw's mental health incidentally. I agree with those submissions. It seems to me that what is happening here is a play of words in relation to the word "healing". Healing is widely used as a concept in religious teaching, but what it usually refers to is spiritual healing, not medical healing. This is the "way of healing" to which Dr O'Brien was referring.

72. For these reasons, I reject the claim that the First Defendants are vicariously liable for Dr O'Brien's negligence and there shall be judgment accordingly for the First Defendants so far as the claim against them is concerned.

Quantum

73. Given that I have found the Second Defendant liable in negligence to the Claimant, it remains for me to assess the damages. In so far as there was a difference of opinion between the psychiatrists, I prefer the evidence of Dr Carnwath to that of Dr Papanastassiou. Dr Papanastassiou seemed to struggle with the distinction between Dr O'Brien's professional duty towards Mrs Brayshaw and his tortious duty, with its emphasis on harm. Dr Carnwath was a thoughtful and measured witness who made appropriate concessions and who impressed me with both what he said, and the way he said it.
74. The records show that the obsession with Dr O'Brien and what he had done to the Claimant fell away from her perception after about two years, only being resurrected when prompted by other events such as the proceedings before the FTP Panel and these present proceedings. Thus, general damages fall to be assessed for an exacerbation in the Claimant's pre-existing psychiatric condition for a period of about two years. This, combined with the phobia in relation to owls should be assessed, in my judgment, at £7,500. In addition, there are the treatment costs claimed and I allow 12 sessions of cognitive behaviour therapy at £150 per session and 10 sessions of exposure therapy also at £150 per session together with three consultations with a psychiatrist at £325 per session. I assess the travel costs at £500. This amounts to a total of £4,775 in relation to future treatment/therapy. Interest at 2% on the general damages runs from 15 December 2015 to 15 November 2018, a period of 2 years 11 months coming to £437.50. I therefore calculate that the total of damages including interest amounts to £12,712.50 and there will be judgment for the Claimant against the Second Defendant in that sum, but the claim against the First Defendants is dismissed.