
**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 52**
A293/16 and A295/16

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motions

in the causes

(FIRST) DAVID JOHN WHITEHOUSE; and (SECOND) PAUL JOHN CLARK

Pursuers and Reclaimers

against

(FIRST) THE CHIEF CONSTABLE, Police Scotland; and
(SECOND) THE LORD ADVOCATE

Defenders and Respondents

**First Pursuer: Dunlop QC, McKinlay; Urquharts (for Livingstone Brown, Glasgow)**
**Second Pursuer: Fairley QC, McNaughtan; Kennedys Scotland (for Beltrami & Co, Glasgow)**
**First Defender: no appearance**
**Second Defender: Moynihan QC, DB Ross QC, Charteris; Scottish Government Legal Directorate**

30 October 2019

**Introduction**

[1] These reclaiming motions (appeals) relate to two separate actions by the pursuers against the Chief Constable and the Lord Advocate. The pursuers each claim damages against both defenders arising out of their treatment by the police and the prosecution authorities in connection with their involvement in the winding up and sale of Rangers

Football Club. The reclaiming motions do not concern the Chief Constable, against whom claims, which are presented under Article 5 of the European Convention on Human Rights, are to proceed to a proof before answer. They concern only the Lord Advocate. It is accepted that he is responsible for the acts of the Advocates Depute and the Procurator Fiscal Deputes who were involved in the case.

[2] The Lord Advocate contends that he and the ADs and PFDs have immunity from suit in terms of *Hester* v *MacDonald* 1961 SC 370. The first issue, as developed at the Summar Roll hearing, is whether the law, as stated in *Hester*, was correctly decided or whether the Lord Advocate is liable in damages for acts which are malicious and without probable cause. The second is whether, if *Hester* was correctly decided, it should nevertheless by overruled on the basis that the policy considerations which existed in 1961 are not applicable in the modern era. The third is whether the pursuers' cases, in so far as they were based on the right to respect for private life in Article 8 of the Convention, is relevant for inquiry.

**Background**

[3] The written pleadings in the two cases run respectively to 300 and almost 175 pages. The following outline of events is a compilation of those averments, some of which have been admitted, but others not. The pursuers' cases, as set out below, should not be taken as established; the averments have yet to be proved. The pursuers aver that they were the subject of detentions, arrests and prosecutions of a broadly similar nature. In late 2010, a businessman, namely Craig Whyte, wanted to acquire Rangers. In March 2011, he engaged MCR, who were a corporate restructuring advisory firm in which the pursuers were partners, to assist in negotiations with the club's lenders, the Lloyds Banking Group. MCR were taken over by Duff & Phelps in October 2011. The pursuers became partners of that

firm. In May 2011, Mr Whyte, through an acquisition vehicle, namely Wavetower Ltd, agreed with Lloyds to buy a controlling shareholding in the club. Mr Whyte was appointed as a director. In February 2012 Rangers entered administration.

[4] The pursuers were appointed as joint administrators of Rangers. They informed Strathclyde Police that the acquisition of Rangers by Wavetower may have involved illegal financial assistance. They initiated proceedings in England for payment of sums due to Rangers which were being held by Collyer Bristow, who were Wavetower's solicitors. They also raised proceedings for damages based upon an "unlawful means conspiracy" whereby Mr Whyte and a partner at Collyer Bristow had: (i) made false representations about the availability of funds to finance the acquisition; and (ii) acquired the controlling shareholding by fraud. The police were told of these allegations. On 25 June 2012 the Crown Office issued a press statement stating that they had instructed the police to conduct an investigation into the acquisition and financial management of Rangers. In May 2012, another acquisition vehicle, namely Sevco (Scotland) Ltd, acquired the business and assets of Rangers on behalf of Charles Green and associates for £5.5 million. During 2012, Mr Whitehouse provided three statements to the police and Mr Clark provided four. In October 2012 the pursuers vacated office following the appointment of new joint liquidators.

[5] In August 2013, the police executed search warrants, which had been granted by a sheriff at Glasgow, at Duff & Phelps' London and Manchester offices. Duff & Phelps instructed their solicitor to liaise with the police in relation to documents, which they maintained were either not within the scope of the warrant or over which legal privilege was claimed. In February 2014, the Crown Office assured Duff & Phelps that the police had not reviewed the material which was subject to the privilege claim. This was not true.

[6] In November 2014, Duff & Phelps' solicitor and counsel had a meeting with the

AD and PFD involved in the case. The solicitor was told that the pursuers were to be treated as suspects and would be detained. The AD asked him whether that would change his position on privilege. At dawn on Friday, 14 November 2014, Mr Whitehouse and Mr Clark were detained at their respective homes in Cheshire and Surrey by officers from Police Scotland on suspicion of being involved in a "fraudulent scheme and attempt to pervert the course of justice". Both pursuers were taken to Glasgow, where they were separately interviewed, arrested and charged. Both were kept in police custody until Monday 17 November, when they each appeared on petition at Glasgow Sheriff Court and granted bail. They were provided with a summary of the evidence. The alleged false pretence was that Mr Whyte was a wealthy man who was investing his own capital, when in fact he was using money advanced to Rangers in anticipation of season ticket sales. The practical result was alleged to be that Mr Whyte had gained control of the club and forced it into administration, to the financial benefit of the pursuers.

[7] In June 2015 the pursuers' legal advisers were told that the focus of the inquiry had changed. Any subsequent indictment was likely to include charges relating to the conduct of the administration itself and the disposal of Rangers' assets. At dawn on Tuesday, 1 September 2015, Mr Whitehouse was again detained at his home in Cheshire and taken to Glasgow, where he was interviewed, re-arrested and charged. He appeared on petition on 2 September when he was bailed. Mr Whitehouse's committal had been opposed on the basis that the charges did not represent new allegations, but were reformulations of those in the earlier petition. The Procurator Fiscal Depute insisted that the charges were distinct and had arisen from a separate police investigation. There was a failed attempt to detain Mr Clark at his home in Surrey on

1 September 2015. He had been abroad on holiday. On 2 September, after he had heard of the failed attempt, Mr Clark returned to Glasgow and went to his solicitors' office, where he was detained. After detention, he was similarly interviewed, re-arrested and charged. He appeared on petition on 3 September and was admitted to bail.

[8] On 3 September 2015, and at a continued hearing on 7 September 2015, the sheriff considered an application for an extension of the statutory time limits within which to indict and commence a trial (Criminal Procedure (Scotland) Act 1995, s 65(11)). The pursuers aver that the second petition was brought in order to influence the outcome of that application. In order to justify an extension, the Procurator Fiscal Depute told the sheriff that Duff & Phelps had recently produced a large quantity of material, which ought to have been made available during the August 2013 searches. At the continued hearing, the PFD intimated that, having checked matters, there had been no such late production. Instead it was asserted that Clyde & Co, a firm of solicitors who had acted for Collyer Bristow, had recently produced 39 boxes of material that ought to have been produced in response to the warrant. On 7 September 2015, the sheriff granted an extension of time, restricted to three months. It was later explained that the reference to the 39 boxes had been an error. This had been caused by internal misunderstandings within Crown Office and its communications with the police. In an appeal against the extension, the High Court was provided with a fuller explanation. The appeal was refused.

[9] In terms of new averments, which were added after the Lord Ordinary's decision (*infra*), it is said that, on 10 September 2015, after a meeting at the Crown Office, an email was sent by one of the Procurator Fiscal Deputes, who was involved in the case, to her colleagues. This summarised the discussion at the meeting and continued:

> "Ok – here goes…
>
> Plan A and everyone's preferred choice was that we persuaded the LA to allow us to take advantage of the hard fought 3 month extension granted on Monday to allow us to serve an indictment against the 5 on the first petition. We are comfortable with the indictment against 3 [Mr Whyte and two others] but Whitehouse and Clark have been causing us concern although we are confident that a sufficiency will be established in the fullness of time…".

This appeared to recognise that there was an insufficiency against the pursuers at that time. The email acknowledged that, if an appeal against the extension were granted, an indictment would have to be served within the original time limit, which expired during the course of the following week. The plan to indict "the 5" included a need "to identify some kind of sufficiency" against the pursuers. Very rapidly, the PFDs came to the conclusion that 7 persons should be indicted (one of whom had not appeared on petition). They were "to libel as many charges as we can".

[10] On 16 September 2015, which was within the original time limit, the pursuers were indicted to a preliminary hearing on 16 October 2015. On this first indictment, the pursuers were charged with conspiracy to defraud and attempting to pervert the course of justice. The pursuers lodged a series of preliminary issue minutes, including an objection to the relevancy of the charges. The PH was continued to 11 January 2016 in order to address such matters. On 2 December 2015, which was the day before the appeal hearing on the extension of time, the pursuers were served with a second (superseding) indictment. It contained seven similar charges. Again the pursuers lodged a series of preliminary issue minutes, including an objection to relevancy. A diet of debate was fixed to hear parties on those pleas in the first week of February 2016. The first indictment was not called by the Crown on 11 January 2015 and thus fell. At a continued PH on 5 January 2016, five out of the seven charges on the second indictment were withdrawn; including all of those derived

from the November 2014 petition. The Advocate Depute renounced the Crown's right to prosecute the pursuers on those charges. On 22 February 2016 the court sustained the plea to the relevancy of the remaining charges. The AD informed the court that the Crown would consider whether to bring a further indictment. Later that day, the Crown Office issued a press statement that further proceedings would be brought against the pursuers. The pursuers aver that, on 3 June 2016, the Crown told them that all proceedings against them were at an end. No further indictments have ever been served.

[11] It is averred that at no point was there any justification for the detention, committal, prosecution or indictment of the pursuers. The Lord Advocate had never had sufficient evidence for any of the charges. Mr Whitehouse focuses on alleged failures by the Crown to make proper disclosure of both documents which had been recovered and recordings, which had been made by Mr Whyte of his conversations with Mr Green and which were said to exculpate the pursuers. The Crown had failed to pursue all reasonable lines of inquiry, including interviewing the pursuers' staff. They had failed to respond to requests for information. Statements had been made to the court which were misleading and lacked candour. The police had told Duff & Phelps that they would "shut down the Shard" (a reference to their headquarters in London) if they did not produce certain material. The sheriff had been invited to grant the search warrant on the basis of one-sided information. The execution of the warrant in London had involved police, who were wearing bulletproof vests and carrying tasers, interrupting a reception for clients. On February 2016, the High Court of Justiciary had suspended the warrant on grounds of oppression. On 6 October 2016 the High Court of Justice in London had ordered the defenders to pay Duff & Phelps' costs on an agent and client basis, noting that the actions of the defenders had been "an abuse of state power".

[12] It is averred that the police interfered with legitimate defence investigations. They had threatened witnesses with imprisonment if they did not change their accounts. They had amended draft witness statements. The Crown had instructed forensic accountants to prepare reports in the hope that they would provide an evidential basis for the charges against the pursuers. The experts had not been provided with all of the relevant material. They had been invited to reach conclusions on the basis of "one sided information".

[13] The pleadings make general averments about wrongful conduct, including that: the initial detentions were "outwith the competence of the officers" and accordingly unlawful; the detentions lacked probable cause; the instructions from the Crown were actuated by an ulterior motive, being the desire to allow evidence, over which privilege had been asserted, to be relied upon in the erroneous belief that detention of the pursuers would allow the criminal purpose exception to be invoked; and the absence of reasonable grounds for suspicion demonstrated a degree of recklessness on the part of the Crown amounting to malice.

**The Lord Ordinary's decision**

***Hester and* absolute immunity**

[14] The Lord Ordinary held that, while the decision of the First Division in *Hester* v *MacDonald* (*supra*), was now almost 60 years old, it remained authoritative. Unless there was something which clearly rendered it obsolete, its merits could only be reviewed by a Full Bench. Although *Hester* adjudicated only upon the position of a Procurator Fiscal Depute, the outcome had been heavily dependent upon the court's observations on the absolute immunity of the Lord Advocate. Those observations could not be categorised as

mere *obiter dicta*. They were at the heart of the case, crucial to the decision and rooted in institutional authority and earlier judicial statements.

[15] The Lord Ordinary was not persuaded that the temporal scope of the decision could be restricted to immunity following upon an indictment. The institutional writers (Hume: *Crimes* ii, v, 135; Alison: *Practice* 93) cited in *Hester* v *MacDonald* (*supra*) were not so limited. The Lord President (Clyde) had said that it was essential that the Lord Advocate enjoyed an absolute privilege in connexion with proceedings brought on indictment. This was habile to cover conduct before the indictment. The real contrast was with summary criminal procedure, in which the position had always been statutory (Criminal Procedure (Scotland) Act 1995, s 170). The Lord Advocate and those acting on his behalf, as opposed to upon their own authority, enjoyed the same protection as superior judges in any matter which properly fell within the scope of their official duties. It was not accurate to say that, prior to the indictment, the Lord Advocate was not acting as a prosecutor, but rather as an investigator (*McBain* v *Crichton* 1961 JC 25, LJG (Clyde) at 29, endorsed in *Stewart* v *Payne* 2017 JC 155, LJC (Dorrian) at para 86). The pursuers' real complaint was about the width of the immunity, rather than the circumstances in which it would apply.

[16] It was not difficult to conceive of cogent arguments against absolute immunity (Mitchell: *Constitutional Law* at 172 (fn 17)). As with superior court judges, the Lord Advocate was not a public official or servant, but answerable originally to the Queen in Parliament, and now to the Scottish Parliament. The absolute immunity of judges had been explained in *McCreadie* v *Thomson* 1907 SC 1176 (at 1182). An analogy could be drawn with the position of the Lord Advocate, in contrast to a procurator fiscal who was exercising an inferior and local jurisdiction in summary proceedings. A similar constitutional underpinning could be extended to the immunities enjoyed by the Lord Advocate and the

Solicitor General (Law Officers Act 1944, section 2). The independence of the Lord Advocate could be seen as deserving of the same protection as that of the judges (*Noon* v *HM Advocate* 1960 SLT (notes) 51). A reasoned justification for granting the widest immunity from civil suit could be found in *Imbler* v *Pachtman* (1976) 424 US 409. A different view was demonstrated in *Nelles* v *The Attorney General for Ontario* [1989] 2 SCR 170. There was no obviously right or wrong answer to the difficult balancing exercise involved in weighing the various factors. Any court seeking to review prosecutorial immunity in Scotland, even if it was starting with a blank canvas, would face a difficult and delicate task; all the more reason for a Lord Ordinary to be cautious before interfering with settled law.

[17] Although the legal landscape had been changed by the introduction of domestic remedies for breaches of European Convention rights by public authorities, it was not self-evident that this had implications for the nature and extent of prosecutorial immunity. The Human Rights Act 1998 had introduced a limited and separate regime. It had no direct relevance to whether an absolute, as opposed to a qualified, privilege should be regarded as reflecting the common law.

[18] Section 170 of the 1995 Act was the current manifestation of a long-standing, extensive, but not absolute, immunity in summary proceedings. The provision was not limited to prosecutors, but included judges and clerks of court. Although "judge" did not include a sheriff, this was without prejudice to the immunities possessed by sheriffs. These immunities had to be assumed to be no less than those set down in the statute. It was implicit, in the terms of section 170, that a sheriff, whether in solemn or summary proceedings, enjoyed absolute immunity. The same applied to High Court judges. It was a short step to extend this to the Lord Advocate, when discharging functions as public prosecutor. The pursuers' contention that the Lord Advocate should be liable for any

malicious and unfounded prosecution on indictment did not address the anomaly that would thereby be created, given the terms of section 170. If the pursuers were correct, there would be a wider immunity for Procurator Fiscal Deputes in summary proceedings than for the Lord Advocate and the Advocates Depute in solemn proceedings. The common law envisaged absolute immunity for matters in connection with the prosecution of serious crime and, in terms of the relevant statute, there was very wide, although not absolute, immunity in respect of summary proceedings.

***Article 8***

[19] The Lord Ordinary rejected the Lord Advocate's submission that Article 8 could not be engaged by a decision to prosecute, unless the criminalisation of the conduct concerned was itself a breach of article 8. The difficulty with the Lord Advocate's reliance on *SXH* v *Crown Prosecution Service* [2017] 1 WLR 1401 was that it did not acknowledge that the appellant in *SXH* had conceded that the CPS had been entitled to conclude, at the time of the decision to prosecute, that the relevant evidential test had been satisfied. No such concession had been made in the pursuers' cases.

[20] The potential consequences of a criminal prosecution, including the risk of detention and broader reputational damage, were not *per se* sufficient to engage Article 8. An investigation into the particular circumstances surrounding the decision might result in a determination that there had been an infringement. Article 8 could be engaged by a decision to prosecute, whatever the nature of the charge, where the charges had been "trumped up" (*SXH* (*supra*) at para 36). Although it was difficult to envisage an infringement of Article 8, where the person had been reasonably suspected of committing an offence, different considerations might arise if the conduct had been a deliberate abuse of process.

**Submissions**

***First Pursuer***

[21] The first pursuer had initially focused on whether *Hester* v *MacDonald* (*supra*) could be seen as still being authoritative, standing developments in society and the law since it had been decided. Under some prompting from the court, the question of whether *Hester* had been correctly decided was addressed. It was submitted that it had been wrongly decided. Any immunity had to be justified in terms of public policy and public interest (*Robertson* v *Keith* 1936 SC 29 at 60), yet there had been no analysis of this in *Hester*. The immunity in *Hester* had been created "out of the air" from two *obiter dicta* (*Henderson* v *Robertson* (1853) 15 D 292 at 294; *McMurchy* v *Campbell* (1887) 14 R 725 at 728). The *dicta* ran contrary to prior authority that the actings of a public official were protected only on a qualified basis (*Robertson* v *Keith* (*supra*) following *Beaton* v *Ivory* (1887) 14 R 1057). The contemporary textbook at the time of *Hester* (Glegg: *Reparation* (4th ed) at 185-186) pointed to "a procurator-fiscal, or other public prosecutor" being liable in damages on proof of malice and lack of probable cause. This echoed Bell: *Principles* (10th ed at para 2040). It was consistent with Mackenzie: *Matters Criminal* II.19.8 citing Justinian: *Code* 3.26.9 (see Lee: *Malicious Prosecution in Roman-Dutch Law* (1912) S African Law Journal 22 at 23-24, invoking the *actio injuriarum*). Although a witness had immunity in relation to what he or she said in connection with criminal proceedings, this did not extend to the complainer or informer (*B* v *A* 1993 SC 232 at 238-239, citing *Watson* v *McEwan* (1905) 7F (HL) 109 at 111). None of this was referred to in *Hester*, which was built on a foundation of sand.

[22] If *Hester* v *MacDonald* (*supra*) had been correct at the time, it ought now to be overruled on the basis that there was no good reason in modern practice to maintain

absolute immunity from civil suit. In *Hester*, it was said (at 377) that the Lord Advocate's responsibilities and privileges were unique and dependent upon public confidence in his "utter impartiality". The Lord Advocate had been selected from the "most eminent at the Bar" and it was not to be "supposed" that he could be actuated by unworthy motives in commencing or conducting a prosecution. Prosecutorial decisions were now routinely taken by the ADs or the PFDs. It could not be assumed that they would act with the same degree of propriety (see eg *KP* v *HM Advocate* 2018 JC 33 at para [21]; *Lundy* v *HM Advocate (No 1)* 2018 SCCR 269 at para [59]).

[23] There was no good reason for the Lord Advocate to enjoy absolute immunity. Immunities were rooted in public policy. Public policy was "a very unruly horse" which was "never argued at all but when other points fail" (*Richardson* v *Mellish* (1824) 2 Bing 229 at 252). It was not immutable. It must, and did, vary with the habits and *mores* of society. The fact that an immunity was long established was not a sufficient reason for blessing it with eternal life (*Jones* v *Kaney* [2011] 2 AC 398 at para 112). Society had moved on since Hume (*supra*) and *Hester* v *MacDonald* (*supra*) (eg the Human Rights Act 1998; vicarious liability (eg *Vaickuviene* v *J Sainsbury* 2014 SC 147); and the enlargement of the Crown Office and Procurator Fiscal Service). The law had cast aside multiple immunities or re-categorised them as situations in which no duty of care existed. That had been the evolution of claims against the police. In *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53, it was said (at 63, see also [1988] QB 60 at 76) that, as with barristers in *Rondel* v *Worsley* [1969] 1 AC 191, the police were immune from suit for reasons of public policy. It was "not to be doubted" that the police applied their best endeavours in the performance of their functions (*Hill* at 63). It had been recognised in *Brooks* v *Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 (at para 27) that the immunity for barristers no longer existed. Since *Z* v *United Kingdom* (2001)

34 EHRR 97 (at para 100), the principle in *Hill* required to be reformulated as an absence of a duty of care rather than a blanket immunity. A more sceptical approach, than that adopted in *Hill* in relation to the police performance, should be taken to the carrying out of all public obligations.

[24] Like any other public official, the Lord Advocate enjoyed qualified privilege. There was no public interest in him being given protection from civil liability for malicious acts. The public interest was adequately preserved by the absence of a duty of care and the need to show malice and want of probable cause. Immunities were an exception to the principle that every wrong should have a remedy (*Jones* v *Kaney* (*supra*) at paras 108 and 113). They required to be justified in the public interest (*ibid*; *Darker* v *Chief Constable of the West Midlands Police* [2001] 1 AC 435 at 446-448). That justification had to be kept under review (*Jones* v *Kaney* (*supra*) at para 114). The question was whether there was a compelling need for the immunity (*ibid* at para 115). The fact that public servants were made of sterner stuff rebutted any floodgates argument (*ibid* at 452, citing *Dorset Yacht Co* v *Home Office* [1970] AC 1004 at 1033, borrowing from Shakespeare (*Julius Caeser* III, II, 94)). Immunities should be given no wider application than was absolutely necessary (*Darker* v *Chief Constable of the West Midlands Police* (*supra*) at 453, citing *Rees* v *Sinclair* [1974] 1 NZLR 180 at 187; at 456, 461 and 468, citing *Mann* v *O'Neill* (1997) 71 ALJR 903 at 907 and *Lincoln* v *Daniels* [1962] 1 QB 237 at 263). There was no suggestion that *Darker* did not represent the law of Scotland.

[25] It was fundamental to a case of malicious prosecution that there was no extant conviction (*Friel* v *Brown* 2019 SLT 377 at para [35]; *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529). The civil courts could not look behind a criminal conviction. Collateral attacks were undesirable (*Darker* v *Chief Constable of the West Midlands Police* (*supra*) at 457, citing *Hunter*). This too would militate against the floodgates argument. An

immunity required to be justified by looking at the potential disadvantages to the public interest which might result from its abolition (*Jones* v *Kaney* (*supra*) at para 51, citing *Rondel* v *Worsley* (*supra*) at 228). There was no empirical evidence that liability to suit would cause the ADs any difficulty (*ibid* at paras 58-59).

[26] As the issue was about the use and misuse of judicial proceedings, it was for the courts and not Parliament to "sort it out" (*Crawford Adjusters* v *Sagicor Insurance* [2014] AC 366 at para 84). The immunity had not been enshrined in statute. The courts were accustomed to overruling past cases. It would be most disturbing if it were necessary to go to London to do so. The law had long since recognised a claim for wrongful civil suit (*Wolthekker* v *Northern Agricultural College* (1862) 1 M 211). A distinction between that and wrongful criminal proceedings did not make sense (*Crawford Adjusters* v *Sagicor Insurance* (*supra*) at paras 87 and 88, analysing *Jain* v *Trent Strategic Health Authority* [2009] AC 853).

[27] The various arguments against removing an immunity had been considered in *Willers* v *Joyce* [2018] AC 779 (at paras 46 *et seq*). The Lord Advocate advanced some of these, but none justified a blanket immunity. *Wright* v *Paton Farrell* 2006 SC 404 expressed *obiter* views (at para [14]) on the immunity of solicitor advocates in the conduct of trials and on the restriction of the ambit of the duty of care. Both required justification, whether or not the issue was addressed from a human rights angle. The *obiter* view was that immunity from suit was justified (para [32]) having regard to the due administration of criminal justice, notably the potential conflict between duties owed to the client and the court. *Wright* was immediately eroded by the Legal Profession and Legal Aid (Scotland) Act 2007, which introduced inadequate professional services as a concept together with awards to compensate for such services.

[28] In relation to other jurisdictions, there was no absolute immunity from suit in the other countries of the Commonwealth. In England & Wales, there were the torts of malicious prosecution and misfeasance in public office. These were both available against the Crown Prosecution Service where a prosecution had failed. Malice and want of probable cause required to be proved (*Elguzouli-Daf* v *Commissioner of Police for the Metropolis* [1995] QB 335 at 347). The proposition that there was a blanket immunity was not "respectable jurisprudence" (*Bennett* v *Commissioner of Police for the Metropolis* (1998) 10 Admin LR 245 at 254). The same approach was thought to be applicable in Ireland (Whatley: *Civil Liability of Prosecutors under Irish Law*, Office of the DPP 2010)

[29] In Canada, the existence of an absolute immunity was said (*Nelles* v *The Attorney General for Ontario* (*supra*) at 195) to "strike[s] at the very principle of equality under the law". A malicious prosecution suit was available, even if the plaintiff bore a "formidable burden of proof" (*ibid*) to demonstrate a "deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function." (*ibid* at 196-197). Such proof was not required where there had been a breach of the constitutional right of disclosure (*Henry* v *British Columbia (Attorney General)* [2015] 2 SCR 214; see also *Smith* v *Ontario (Attorney General)* [2018] OJ No. 914 at paras [26] and [28]).

[30] In Australia there was no immunity from suit where malice was proved (*A* v *New South Wales* [2007] 233 ALR 584; *Grimwade* v *State of Victoria* (1997) 90 A Crim R 526; see also Fleming: *Torts* (10th ed) at para 8.370). There was no general immunity in New Zealand (*Currie* v *Clayton* [2014] NZCA 511 at para 67). In South Africa, an official, including a prosecutor, who performed his duties with an ulterior motive, maliciously or dishonestly, acted unreasonably and outside the bounds of his authority. His actings would, in a case

involving the infringement of private interests, be regarded as wrongful (Loubser *et al*: *The Law of Delict in South Africa* (3rd ed) 224-226).

[31] The European Public Prosecutor's Office, which was expected to become functional in 2020 in order to tackle crimes against the EU budget and cross border VAT fraud, would be liable "in accordance with the general principles common to the laws of the Member States" to make good any damage caused by them (EU Regulation 2017/1939 Art. 113). The Consultative Council of European Prosecutors had stated (*The Rome Charter - European norms and principles concerning public prosecutors*, Art X, see also Explanatory Note paras 88-89) that prosecutors should not benefit from a general immunity, but from functional immunity for actions carried out in good faith in pursuance of their duties.

[32] The only exception to the qualified immunity principle was the United States of America, where public prosecutors had absolute immunity (*Imbler* v *Pachtman* (*supra*)) on the same basis as judges and grand jurors. None of the factors relied upon by the US court in *Imbler* justified absolute immunity. All manner of public officials required to exercise judgment. It was not judgment that was being questioned, but a "deliberate and malicious use of office for ends that are improper" (*Nelles* v *The Attorney General for Ontario* (*supra*) at 196-197 and 199). Sunlight was the best disinfectant when considering public trust. The floodgates argument was not borne out in countries where no absolute immunity existed. The prosecutors' energy would only be taken up if the floodgates argument were sustainable. There were "ample mechanisms… to ensure that frivolous claims are not brought" (*ibid*). There would be no satellite litigation because a civil suit would not be permitted where there was a conviction. The requirement to prove malice would prevent a multiplicity of claims. Standing the terms of section 170 of the 1995 Act, it would be anomalous if there were no liability in the case of the general (the Lord Advocate) but there

was for the actings of the foot-soldiers (the ADs or PFDs). *Imbler* was not the guiding light. The court should look to the common law position in *Bennett* v *Commissioner of Police for the Metropolis* (*supra*), the Commonwealth and Ireland.

[33] Alternatively, the immunity conferred was personal to the Lord Advocate. It did not shield the wrongdoing of his underlings. At the time of Hume (*supra*) and *Hester* v *MacDonald* (*supra*), there was little appetite for arguments based upon vicarious responsibility (*respondeat superior*, cf *culpa tenet suos auctores*). It was misreading the pleadings to say that the Lord Advocate's hand was on the tiller throughout the proceedings. There would require to be a proof on who had done what.

[34] Such immunity as existed was not a blanket one. Its precise boundaries would be best defined after hearing the evidence. It was doubtful whether the immunity extended to the pre-indictment proceedings, albeit that the Lord Ordinary had held that it did. The press statement (*supra*) had nothing to do with the prosecution. Equally, there were averments that the prosecution had provided damaging information to the Insolvency Practitioners Association, who were the pursuers' regulators. Such action was no different from the situation in which an AD had assaulted someone when leaving court.

[35] The first pursuer adopted the second pursuer's submissions upon Article 8 of the European Convention.

***Second Pursuer***

[36] The second pursuer adopted the first pursuer's submissions on immunity at common law. He focused on Article 8. The genesis of the prosecution was a dispute between the Crown and Duff & Phelps about the documents which had been seized and over which legal privilege had been asserted. There had been intensive discussions about this between the

Advocate Depute and Duff & Phelps' solicitor over many months. The problem had started when the Crown had placed the pursuers on petition in November 2014, for what was said to be an ulterior motive. The relevant time limits were thus triggered in a situation in which there was no evidence against the pursuers. The service of the second petition had been to secure a further period of time when there was still insufficient evidence. The first indictment, which was served within the original time limit, had been framed without a sufficient evidential base. These averments were the core elements in the case and permitted an inference of improper purpose and lack of probable cause.

[37] *Denisov* v *Ukraine*, (App No 76639/1), unreported, 25 September 2018 confirmed that Article 8 protected the right to personal development and to establish and develop relationships, including business relationships, with others. This encompassed reputation (see *Cemalettin* v *Turkey*, (App No 22427/04), unreported, 18 February 2009, at para 36, citing *Pfeifer* v *Austria* (2009) 48 EHRR 8 at para 35), including that formed in a business context. There were two different approaches to private life set out in *Denisov* (para 102). The first was reason-based, whereby the "impugned measure was based on reasons encroaching upon the individual's freedom of choice in the sphere of private life" (*ibid* para 103). This did not arise. The second was consequence-based, whereby the "impugned measure has or may have serious negative effects on the individual's private life" (*ibid* para 107). Where false and unfounded allegations were made, Article 8 was both engaged and breached, subject to the exceptions in Article 8.2, if the threshold of severity was reached (*ibid* paras 110 *et seq*).

[38] Mr Clark offered to prove that his reputation had been damaged as a result of the Lord Advocate's acts and this this had caused loss of £250,000 *per annum*. Article 8 "cannot be interpreted to require individuals to tolerate… being publicly accused of criminal acts by

Government officials who are expected by the public to possess verified information concerning those accusations, without such statements being supported by facts (*Jishkariana* v *Georgia* [2018] ECHR 740 at para 62 citing *Einarsson* v *Iceland* (2018) 67 EHRR 6). The pursuers had been the object of a media frenzy when they had appeared on petition. Article 8 made it clear that a prosecutor required to make sure that his claims had a factual basis before accusing someone of criminality.

[39] The remedy for a breach of Article 8 may be limited to non-pecuniary compensation (€1,500 in *Jishkariana* v *Georgia* (*supra*)). Article 8 may not dovetail with the common law, which had different remedies (*Van Colle* v *Chief Constable of the Hertfordshire Police* [2009] 1 AC 225). *R* v *G* [2009] 1 AC 92 was not authority for the proposition that Article 8 could not be engaged unless the criminalisation of the conduct was itself a breach. There was no majority view that prosecutorial policy was not engaged. A minority (see eg para 34) thought that it would be engaged, whether or not the prosecution had been well founded. That proposition need not be considered here, where malice and lack of probable cause were alleged. *SXH* v *Crown Prosecution Service* (*supra*) was distinguishable in that a concession, that the CPP had been entitled to prosecute, had been made. No such concession was made by the pursuers. It was accepted in *SXH* (at para 36; see also [2014] 1 WLR 3238 at para 71) that Article 8 could be engaged where, for example, false charges were "trumped up". False allegations were capable of both engaging and breaching Article 8.

***The Lord Advocate***

*Hester* v *MacDonald* (*supra*)

[40] The Lord Advocate accepted that he was responsible for the acts of the Advocates Depute and the Procurator Fiscal Deputes. The question was not whether the Lord

Advocate was above the law (*Bennett* v *Commissioner of Police for the Metropolis* (*supra* at 254), but whether he was liable in damages in a civil court to a person who had suffered *injuria* and damages as a consequence of the Lord Advocate's acts, or those for whom he was responsible, as a prosecutor (*Hester* v *MacDonald* (*supra*) at 386).

[41] Only two jurisdictions had questioned the degree of liability for damages; the USA in *Imbler* v *Pachtman* (*supra*) and Canada in *Nelles* v *The Attorney General for Ontario* (*supra*). *Nelles* had not been the last word in Canada. In *Miazga* v *Kvello (Succession)* [2009] 3 RCS 339 it was held (at para [79]) that, in order to prove malice, an improper purpose which was inconsistent with the office of Crown prosecutor had to be proved. If the prosecutor initiated or continued the prosecution on the basis of an honest, albeit mistaken, professional belief that probable cause existed, the action would fail. Even if the pursuer did not believe that there was probable cause, this was not sufficient to prove malice. The failure might be due to "inexperience, incompetence, negligence or even gross negligence, none of which is actionable" (*ibid* at para [80] citing *Nelles* v *The Attorney General for Ontario* (*supra*) at 199). Need for malice ensured that liability would not be imposed where a prosecutor proceeded in the absence of probable cause, "by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence" (*ibid* at para [81]). Care had to be taken not to infer malice from the absence of probable cause, as was done with private prosecutions (*ibid* at [86]). *Miazga* represented a realisation that, having removed absolute immunity in *Nelles*, there was a potential for interference with the constitutional position of the prosecutor (see Hume (*supra*) ii.135). Like judges, the prosecutor required to be independent.

[42] Both Clerk & Lindsell: *Torts* (22nd ed at para 16-04) and Fleming: *The Law of Torts* (10th ed) at 698) had questioned whether the common law ought to translate to a public

prosecutor. The Australian cases had proceeded upon the common law relative to private prosecutions (*A* v *New South Wales* (*supra*)) but, once public prosecution had been introduced, limitations on liability followed. Queensland prosecutors had absolute immunity (Director of Public Prosecutions Act 1984 s 25; *Richardson* v *State of Queensland* [2015] QDC 30). In Victoria there was immunity for acts in good faith. The prosecutor had personal immunity, but there was state liability for his acts (Public Prosecutions Act 1994 s 46). In South Australia, there was no immunity (ie in the Director of Public Prosecutions Act 1991). It was a subject for legitimate choice.

[43] A variety of different approaches were taken throughout the world. In some European countries there was a liability on the prosecutor to pay damages if he or she had been grossly negligent or worse (eg Finland, Greece, Norway, Sweden). The norm was that the state would pay damages in respect of the acts of a prosecutor (eg Denmark, Finland, Germany, Italy, Netherlands, Romania). There may be no need to prove malice as distinct from fault (eg Denmark, Germany, Italy, Netherlands) or gross negligence (eg Norway, Romania, Sweden). This may only be where the person suing has not been convicted (eg Denmark). Where the person has been acquitted, it may not be necessary to prove fault (eg Denmark).

[44] As a generality, an official who has acted maliciously ought not to escape liability for damage caused. "Malice and without probable or reasonable cause" involved deliberate wrongdoing. It could be inferred from recklessness (*Robertson* v *Keith* (*supra*) at 63), but recklessness was not malice (*Juman* v *Attorney General* [2017] 2 LRC 610 at para [18], citing *Willers* v *Joyce* [2018] AC 779 at para [55]). The justification for the immunity was that it was impossible to decide if a claim was well founded until a case was tried and the official, whether innocent or guilty, had been subjected to that trial. This would "dampen the

ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" (*Gregoire* v *Biddle* (1949) 177 F.2d 579 at 581). Immunity was afforded in the wider public interest, as with judges.

[45] The Human Rights Act 1998 (s 9) provided for liability on the state for judicial acts when the judge had acted in good faith (see *Mazhar* v *Lord Chancellor* [2018] 2 WLR 1304). There was no mention of the common law or the immunity of prosecutors. Sections 6 to 8 would apply. The 1998 Act had introduced a limited regime which was separate from the common law. It was not necessary to assimilate the common law with the Convention.

[46] The absolute immunity of the Lord Advocate, and those acting on his behalf, had been a feature of the criminal justice system for centuries (*McMurchy* v *Campbell* (*supra*) at 728; Hume (*supra*) ii, 134-135; *Henderson* v *Robertson* (*supra*) at 295). The constitutional basis for this had not changed (*Stewart* v *Payne* (*supra*) at para [96]). The 1579 Act (c 78) had referred to the frequency of malicious private prosecutions, or public prosecutions proceeding on information from private individuals. It had introduced financial penalties, which were to be divided between the King and the accused when accused were acquitted, on "said unjust pursuers". Where the Lord Advocate was the prosecutor, the informer was to pay. Caution had been introduced for persons seeking to raise criminal letters. In the system of public prosecution, as it developed, the Lord Advocate had to be absolutely independent in determining whether to prosecute (*Stewart* v *Payne* (*supra*)). *Hester* v *MacDonald* (*supra*), which had been based upon the dicta in *Henderson* v *Robertson* (*supra*) and *McMurchy* v *Campbell* (*supra*), was what it was. No civil suit against the Lord Advocate had been taken since then. The second edition of Renton & Brown: *Criminal Procedure* (1928) had stated (at 297) that the Lord Advocate and his deputes enjoyed an "absolute privilege", which may not have been shared by inferior prosecutors. This had not been mentioned in

the first edition (1909). The third edition (1956) referred (at 450) to the Lord Advocate "apparently" enjoying "absolute privilege" (see also Oswald Dykes: *Defamation* in Greens Encyclopaedia Vol V para 1138). As with other immunities from civil suit, including judicial immunity, the structure of the law reflected a policy judgment which was based on the relative weights given to the objective of providing a remedy for a wrong and the potential for such provision to have adverse systematic effects on the administration of justice (see *Wright* v *Paton Farrell* (*supra*) at paras [32] and [178-179]).

[47] It would be wrong to assume that the principles of the Scots system shared a common base with the cases from England & Wales. Scotland had had public prosecution by the Lord Advocate for centuries (see Normand: *The Public Prosecutor in Scotland* (1938) 54 LQR 345). Private prosecution was rigorously controlled and had been virtually unknown in recent times. The situation in England & Wales was very different (*R (Gujra)* v *Crown Prosecution Service* [2013] 1 AC 484 at paras 10-22, 31, 33, 81 and 95). The differences were illustrated by the right in England & Wales, but not in Scotland, to review a prosecutorial decision in the civil courts. The law in England & Wales had its origins in the specific tort of malicious prosecution in the context of private prosecutions. This tort had almost vanished with the relatively recent advent of public prosecution (*Willers* v *Joyce* (*supra*) at para 131; *Crawford Adjusters* v *Sagicor Insurance* (*supra*) at para 121). There was an absolute privilege attaching to witnesses (*B* v *A* (*supra*)), albeit that it had been abolished in relation to experts (*Jones* v *Kaney* (*supra*) at 68). The common law had addressed the liability of procurator fiscals in relation to summary proceedings, but there was no need to discuss this as it had been regulated by statute since the Summary Procedure Act 1864, s 30. The current provision in the 1995 Act (s 170) could be traced back to the Summary Jurisdiction (Scotland) Act 1908.

[48] The Lord Advocate's concerns were to ensure that prosecutors continued to act independently and robustly. This was his unwavering expectation. He had no empirical evidence about the consequences of removing the immunity, but it could cause resources to be diverted. It could have a chilling effect on prosecutorial decision-making in difficult cases. If the test for immunity was to be that in *Miazga* v *Kvello (Succession)* (*supra*), it may be that very few cases would succeed, but the question was how many cases would be brought. There were six concerns raised in *Van Colle* v *Chief Constable of the Hertforshire Police* (*supra*): (i) defensive decision making (at paras 81,108, 132); (ii) diversion of resources (at paras 81, 133); (iii) the stopping of good claims in the wider public interest (at paras 106, 139); (iv) the erosion of the law of negligence by the Human Rights Act 1998 (at paras 82, 137-9); (v) the deterrence afforded by disciplinary measures and criminal liability (at para 139); and (vi) the need to defer to Parliament (at para 102). The same factors, as were used in *Van Colle* to prevent a negligence claim, could be used to justify the immunity.

[49] If *Hester* v *MacDonald* (*supra*) was correct, but no longer in accord with today's *mores*, any reform ought to be a matter for Parliament. It would be anomalous to have a rule which differed between solemn and summary proceedings, although the distinction was recognised in relation to judicial immunity (*McCreadie* v *Thomson* (*supra*) at 1182-3). There were three possibilities: (i) the immunity could be excluded in the event of malice and a lack of probable cause on the *Miazga* v *Kvello (Succession)* (*supra*) standard; (ii) there could be immunity for acts in good faith, such as applied in Australia; and (iii) the chilling effect could be removed by abandoning the personal immunity and imposing liability on the state.

[50] The *de quo* of *Hester* v *MacDonald* (*supra*) was that the immunity applied to the Procurator Fiscal Depute and not just to the Lord Advocate. In the eyes of the court, an Advocate Depute was the Lord Advocate (see generally Normand (*supra*)). The remit of the

Lord Advocate extended back to the investigation stage. The immunity applied to all matters "in connection with his administration of crime" (*Hester*, LP (Clyde) at 378, Lord Carmont at 383, Lord Guthrie at 387). There was no force in the contention that any immunity was personal to the Lord Advocate (see Hume (*supra*)) ii, 132, 134-135 fn 1; Alison (*supra*) 86). The Lord Advocate accepted that he was responsible for the acts of the ADs and PFDs. The Lord Advocate's prosecutorial functions were usually carried out by the ADs, who held a personal commission. Procurator Fiscals were required to act upon the directions of the Lord Advocate (or an AD). The Lord Advocate took his decisions independently (Scotland Act 1988, s 48(5)). Although there was now a right to have his decisions not to prosecute reviewed, the Lord Advocate would carry out that review (Victims and Witnesses (Scotland) Act 2014, s 4; see also Human Trafficking and Exploitation (Scotland) Act 2015, s 8).

*Article 8*

[51] *Denisov* v *Ukraine* (*supra*) had been issued after the Lord Ordinary's opinion. It put a different cast on the case. *Denisov* was in the context of employment disciplinary proceedings, where Article 8 could be engaged in relation to reputational damage. *Denisov* did not translate to criminal prosecutions. There was no case in any jurisdiction in which Article 8 had been used in relation to a prosecution (R *(E)* v *Director of Public Prosecutions* (2012) 1 Cr App R 6 (p 68) at para 75 citing the exception, *Ulke* v *Turkey* (2009) 48 EHRR 48). Article 8 was not engaged in relation to the consequences, including reputational harm which followed a conviction, of prosecutorial acts (*Gillberg* v *Sweden* [2012] 34 BHRC 247). *Cemalettin* v *Turkey* (*supra*) concerned the storage of data which did engage Article 8. *SXH* v *Crown Prosecution Service* (*supra*) was not authority that Article 8 applied to prosecutions (see

para 36). The Lord Ordinary erred in holding that it did. In England & Wales, there was already scope to review prosecutorial decisions and to sue for malicious prosecution, so an Article 8 case did not add much to the equation (cf the *obiter* remarks at [2014] 1 WLR 3238 at para 71; and [2013] EWHC 71 at para 75; *Rudall* v *Crown Prosecution Service* [2018] EWHC 3287 (QB) at para 176). If Article 8 were engaged, it would be in relation to deliberately trumped up charges which amounted to harassment (cf for illegal searches: *Keegan* v *United Kingdom* (2007) 44 EHRR 33 at para 34, where no malice was required).

**Decision**

***General***

[52] The length and detail of the averments of fact on record may have served to obscure the legal bases upon which the pursuers are seeking damages. In Mr Whitehouse's case, the articles of condescendence are divided by headings *viz*.: The Sale of Rangers…to Craig Whyte; The Administration; The sale by the Administrators; The Police enquiry2012-2014; Detention of the pursuer on 14 November; The pursuer's first appearance on petition – 17 November, 2014; Detention of the pursuer on 1 September 2015; The pursuer's second appearance on petition – 2 September, 2015; [The First indictment]; The second indictment; Preliminary Hearing – 5 January, 2016; The Court's Ruling 22 February, 2016; The Crown's overall conduct of the prosecution – *Disclosure…Crown's obligation to pursue all reasonable lines of enquiry*; Infringement of the pursuer's rights under Article V; Wrongful Detention and Arrest; Wrongful Prosecution – Petition & Committal; Petition and Committal – November 2014; Petition and Committal –September 2015; Wrongful Prosecution – Indictment; Infringement of the pursuer's rights under Article VIII; The pursuer's loss, injury and damage.

[53] There is little difficulty in understanding Mr Whitehouse's fundamental contention that the Lord Advocate did not have sufficient evidence to take any of the steps which were taken in relation to his detention, arrest and charge and his subsequent prosecution, which is intermittently described as wrongful and/or malicious. It is slightly more difficult to see the relevance of the detailed averments in relation to the conduct of the prosecution, including matters such as disclosure and proper investigation, outwith that simple context.

Mr Whitehouse's pleas-in-law are as follows:

> "1. The [Lord Advocate] having infringed [the pursuer's] rights under Article 5… through directing unlawful detentions and arrests, thereby causing [him] to suffer loss, injury and damage …, the pursuer is entitled to damages therefor.
>
> 4. The defenders having infringed the pursuer's rights under Article 8… thereby causing the pursuer to suffer loss, injury and damage …, the pursuer is entitled to damages therefor.
>
> 6. The pursuer, having suffered loss, injury and damage through the fault of the [Lord Advocate], is entitled to reparation from him therefor."

[54] In Mr Clark's case, the articles of condescendence are also divided by headings *viz*.: The Sale of Rangers…to Craig Whyte; The Administration; The sale by the Administrators; The Police enquiry2012-2014; Detention of the pursuer on 14 November and first petition; Detention of the pursuer on 2 September 2015 and second petition; Indictment of the pursuer; Exculpatory material withheld; Infringement of the pursuer's rights under Article 5; Infringement of the pursuer's rights under statute; Infringement of the pursuer's rights under Article 8; Wrongful prosecution – common law; Time bar –Human Rights Act 1998; Loss. The reference to the statute is to section 20 of the Police and Fire Reform (Scotland) Act 2012 (duties of police constables) and the first article (XXVI) under the heading "Loss" concerns only the Chief Constable. Neither feature in the reclaiming motion. The second article (XXVII) refers to the infringement of the pursuer's Article 8

rights by the Lord Advocate. The averments include reference to "unfounded accusations of criminality… [causing] loss, injury and damage to his reputation". The acts are described as "wrongful and unjustified".

[55] Mr Clark's pleas-in-law are as follows:

> "1. The defenders having unlawfully infringed his rights under Article 5… and at common law, and having caused the pursuer loss injury and damage thereby, the pursuer is entitled to damages therefor.
>
> 4. The defenders having unlawfully infringed his rights under Article 8… and at common law, and having caused the pursuer loss injury and damage thereby, the pursuer is entitled to damages therefor."

[56] Mr Whitehouse's pleas in relation to the Article 5 and 8 cases are clear. His case is said otherwise to be based on some form of unspecified "fault of the [Lord Advocate]". Mr Clark's pleas, in so far as they relate to the "common law" lack meaningful content. They seek "damages" (not reparation) for infringing unspecified common law rights. In neither pursuer's case is there a legal case specifically based on malicious prosecution, despite averments of fact to that effect. There is no legal case based on wrongful arrest or detention. There is none based upon illegal search. There is no reference to defamation or other verbal injury. Malicious prosecution and/or defamation/verbal injury appear to be at the heart of the pursuers' claims. Each is separate in nature from damages for wrongful search, arrest or detention and will attract different measures of loss. The conclusions, however, are directed at both the Chief Constable and the Lord Advocate on a joint and several basis for different acts. It is essential that the factual averments are radically pruned, the legal bases relied upon for classifying particular acts to be unlawful clearly stated and the damages attributed to the specific acts so identified are fitted into specific, recognised delictual categories. If the common law cases are based on malicious prosecution, the pleas-

in-law should state that unequivocally. If there is any other basis upon which a common law case is being pursued, there ought to be a clear plea-in-law which specifies what it is.

***The Common Law and Hester* v *MacDonald 1961 SC 370***

[57] The first question for the court is to determine whether *Hester* v *MacDonald* (*supra*) was correctly decided. The answer to that will depend initially upon an analysis of its underpinnings. The starting point is the principal submission for the Lord Advocate in *Hester* (at 373-4). According to the Justiciary Cases reporter, the submission was based upon Renton & Brown: *Criminal Procedure* (3rd ed) 450, Alison: *Practice* 92; *Henderson* v *Robertson* (1853) 15 D 292, LJC (Hope) at 294 and *McMurchy* v *Campbell* (1887) 14 R 725, Lord Young at 728. Hume: *Crimes* (4th ed) was not relied on. The submission was that, in the conduct of prosecutions upon indictment, the Lord Advocate had "absolute privilege" (*nb* not immunity). In order to counter that, the pursuer (at 374-5) advanced a simple proposition, *viz*:

> "…nor was there any authority for the view that [the Lord Advocate] possessed the absolute privilege which attached, for example, to a Judge. Compelling authority would be required before a contrary view were taken. The opinions of even the most learned writers and judicial opinions expressed *obiter* were not enough".

[58] The Lord President (Clyde), who had been Lord Advocate from 1951 to 1954, referred (at 377) to the "constitutional trust" which was placed upon the Lord Advocate. Coupled with a passage from Alison (*supra* at 93) on the Lord Advocate being "absolutely exempt from penalties and expenses", the Lord President concluded:

> "It is, therefore, an essential element in the very structure of our criminal administration… that the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings … by way of indictment ([cf Renton & Brown (*supra*) (3rd ed) 450])."

Lord Guthrie was of a similar view (at 387), again founding on statements in Hume and Alison, about the trust placed in the Lord Advocate. He concluded that Hume's references to this trust:

> "infers ... that the Lord Advocate cannot be made liable in damages in respect of a prosecution in his name".

In order to determine whether this is correct, the context in which Hume was writing must be examined.

[59] The critical point to note, in relation to Hume, is that the passages relied on by the Lord President and Lord Guthrie are in the context of a discussion upon criminal procedure. They are not about civil liability. The chapter in Hume is headed "Prosecutors and their Title". The confidence which was placed in the office of Lord Advocate meant that, in contrast to a private prosecutor, he did not have to find caution or pay the penalties required from unsuccessful private prosecutors under the Act of 1579 (c 78). In the event of an acquittal in a matter pursued, not privately but by the Lord Advocate, it was the informer "of mere malice and envy" that would have to pay.

[60] Hume noted (ii, v, 134 fn 1) that there had never been an award of expenses against the Lord Advocate in the event of an acquittal because:

> "it will not be supposed of him, that he can be actuated by unworthy motives in commencing a prosecution, or fall into such irregularities or blunders in conducting his process, as ought properly to make him liable in that sort of amends".

The same did not apply to a procurator fiscal. According to Hume (at 136), the Lord Advocate would have to name the informer (*Steven* v [*Lord Advocate*] *Dundas* 1727 M 7905).

[61] The court in *Hester* v *MacDonald* (*supra*) was referring to the 4th (Bell) edition of Hume, which was published in 1844, after Hume's death in 1838. Had the Lord President and Lord Guthrie resorted to Hume's writings in relation to civil liability, they may have

formed a different view. In volume III of his published *Lectures* (Stair Society Vol 15), when writing about verbal injuries in the general context of obligations *ex delicto* (ch XIV), Hume is clear (at 134) that accusing a person of a crime "wantonly and maliciously" is actionable. No doubt that is not controversial as a generality. Hume goes on (at 143) to consider "words uttered or things done in the course of [a person's] official duties". There could be no action if these were "done at the proper season, and in the proper manner, and that the due measure is not exceeded". Parties to a lawsuit "must be allowed the due freedom and latitude in stating the allegations which are anywise material to their cause" (at 144). The same applied to witnesses. Malice was not readily to be imputed, but it is clear that Hume is saying that such acts would be actionable if done maliciously and without probable cause.

[62] Most interesting, specifically in relation to the acts of a judge, Hume said (at 145) that:

> "It shall not *prima facie* be imputed to malice in him, but to sense of official duty, what he throws out on the Bench, touching the character of parties or their witnesses, or the conduct even of agent or counsel in the cause. To be relevant as a ground of charge against him, the thing said must not only be in itself unjust – ill founded – something which he has not a right to say – and which can be shown, from circumstances on the part of the complainer, to have been said maliciously. On that ground absolvitor passed in…*Haggart's Trustees* v *Lord President* (*Hope)* (1824) 2 Sh App 125 affirming (1821) 1 S 46 …
>
> …
>
> Thus in these several descriptions of cases the pursuer's ground of action fails, because the admitted situation of the party and circumstances of the face, are truly exclusive, *prima facie* at least, of the notion of any *malus animus*, or improper disposition on his side."

[63] Hume later (at 148-149) returns to the same subject in connection with a judge's remarks from the bench:

> "…And I have already said that *prima facie* his conduct shall be imputed to these proper and to no malicious motive, and that the pursuer must aver and charge circumstances in the case, that show the contrary. But such circumstances there may

> be in a case, and they will be relevant if shown. Put the case, that, at deciding some cause, the Judge drags some character into a suit, where it has nothing to do, to pull it to pieces, and that afterwards, extrajudicially, he indulges in invectives against this person and makes a common conversation of his faults – certainly he is answerable for such an excess. For these things indicate malice on his part".

If then, Hume was of the view that malicious acts of a judge in the course of his duties were actionable, it is difficult to see why he would have differed if considering the position of a prosecutor, including the Lord Advocate.

[64] The case, which is cited in the 4th edition of Hume, is nevertheless authority for the proposition that a judge's privilege, in relation to what he says in court, is absolute. In *Haggart's Trs* v *Lord President (Hope)* (*supra*), the late Mr Haggart, an advocate, contended that he had been injured by remarks made by the then Lord Justice Clerk (Hope) (afterwards Lord President) at an advising in a case in which he had been counsel. The remarks in the opinion were that:

> "Mr Haggart has here, as is his usual practice, stated facts and circumstances of which there is no evidence on the record, and which live in the memory and recollection of that gentleman alone. Mr Haggart had conducted this cause, as he does all the others he is concerned in, differently from all the other counsel at the Bar".

Mr Haggart had averred malice, but the Lord Ordinary (Pitmilly), rejected the claim as incompetent, although he also thought that the averments of malice were insufficient.

[65] In the Second Division, Lord Craigie, whilst agreeing with the result at first instance, considered (at 133) that "Judges or lawyers may be sued for damages for malversations creating an injury ...". Malice may be inferred from the act itself. Lord Robertson thought (at 135) that any remedy had lay with the King or Parliament. Lord Glenlee agreed (at 135) with Lord Craigie, adding that an action against a judge would be competent if it could be proved that he had been "... bribed to pronounce an erroneous judgment ...". If the judge had done something *ultra vires*, he would be responsible for it even if it looked like a judicial

act. The Lord Justice Clerk (Boyle) considered (at 138) that, if the action were allowed, it would be "... a total end to the independence, dignity, and security of Courts of Justice ". He did not entirely exclude (at 139) an action based on an act which was "palpably *ultra vires*".

[66] In the House of Lords, it was contended (at 142) that:

> "... although Judges were protected in general against claims for what they may have done in the due exercise of their judicial functions, yet there was no authority which declared that they should be exempt from responsibility for the malicious abuse of their powers ...".

Lord Gifford, who delivered the speech having had express regard to the good sense of the law of England (at 145), confined himself (at 143) to the narrow question of whether a suit was competent at the instance of "any private party who may feel himself aggrieved by the judicial acts of [a] Judge?". He answered that in the negative; on the basis that it would subvert the independence of judges.

[67] Turning to Mackenzie: *Matters Criminal* (1678), it is of passing note to recognise that Mackenzie was Lord Advocate from 1677 to 1689 (with a short interval) and had a reputation for displaying what some might regard as extreme malice towards the Covenanters. Unlike Hume, whose work on criminal law was expressly not focused on the Roman law principles which form the basis of the Scots law of reparation, Mackenzie did revert to Roman law for certain purposes. In relation to "Accusations and Accusers" (ch 19) he wrote (at para 8):

> "To the end that persons may not be unjustly pursued, the civil [Roman] law did appoint two remedies. First, that the pursuer should find caution to insist. Second, that he should be pursued as a calumniator if his pursuit was found to be malicious…".

Mackenzie noted that caution was originally prescribed by an Act of 1535 (c 51). The Lord Advocate was not obliged to find caution, as he was not presumed to be calumnious, but he did normally ask his informer to do so. In the event that the accuser was found to be

calumnious, a penalty was payable in terms of the 1579 Act, even in the absence of malice and want of probable cause. In the event of malice being proved:

> "it is arbitrary for the Justices to inflict what punishment they please, either in that same sentence wherein the defender is absolved, or upon a separate bill or pursuit; as also, he [the calumniator] is by the Justice constantly ordained to pay what damage and interest, or expense, the Justice pleases, both to the parties and to the assizers. And albeit, according to the civil law, '*procurator fisci non praesumebatur calumniousus* [the fisc's (treasury's) procurator is not to be presumed as a calumniator] yet '*si procurator fiscalis culumniose instigat judicem ad inquirendum, tenetur in damna actione injuriarum, et concremari debet*' [if the procurator calumniously incites the governor into an investigation, he is liable in an action for the losses incurred from the outrages, and should be burned] (Code of Justinian 3.26.9 (AD 365)) … And according to the opinion of the doctors…[nowadays both the judge and the procurator fiscal are to be punished arbitrarily for feignedly pursuing a crime]."

[68] The passage cited from Justinian's Code is not strictly about damages. It is in a chapter headed (as translated by Justice Blume of the Wyoming Supreme Court) "Where fiscal causes… may be conducted" and reads:

> "3.26.9 Emperors Valentinian and Valens to Philippus, Vicar.
>
> Everybody may rely on this: that if anyone has been wronged at the hands of an agent (actore) of our Crown Domain, or a procurator (of the imperial patrimony), he need not hesitate to complain of his insults or depredations to Your Sincerity or to the rector of the province, and he may fearlessly ask for a decision involving public punishment. We ordain and proclaim that if it is clearly proven that (such agent or procurator) has dared to use such insolence towards a provincial, he shall be publicly burned alive.
>
> Given at Heracles July 5 (365)."

The Code had earlier recorded, in a chapter headed "Where senators or those holding the title of clarissimi (honourable) may be sued civilly or criminally", the following exchange:

> "3.24.3 Emperor Zeno Augustus to Arcadius, Praetorian Prefect
>
> ...
>
> 1a. The measure of punishment to be meted out to persons of dignity rests solely in the discretion of the Emperor. But if the prosecution was malicious, the accused forsooth being immediately absolved, the accuser must be punished as the law provides even without consulting Our Sincerity, unless, perchance, the latter also is not of a rank inferior to that of the defendant; for it is proper that in such case the

> emperor should be consulted concerning the punishment for malicious prosecution of such an accuser
>
> Given at Constantinople (485-486?)".

[69] Whether the sources relied upon by Mackenzie have been correctly identified, scholars in the modern, or relatively modern, era have expressed the view that, by the time of Justinian, an action would lie for malicious prosecution. Thus Lee: *Malicious Prosecution in Roman-Dutch law* (1912) S African LJ 22 expresses the view (at 24) that, although the law expressed at the time of Gaius had fallen into desuetude, following Ulpian and Paulus:

> "the *action injuriarum* lay at the suit of any person who had been acquitted of a criminal charge vexatiously preferred against him by the defendant. But no action would lie if the accusation were not vexatious or if the accused person had been found guilty" (see also Justinian: *Institutes* IV.4.16 *De Poena temere litigantium*).

This is the law which would have been understood as applicable at the time of Mackenzie; the *action injuriarum* forming the foundations of the law of defamation (see generally Stair Encyclopaedia: *Obligations* Vol 15 para 214, distinguishing the *actio injuriarum* from the *actio legis aquiliae*). Certainly, Mackenzie understood that there was a remedy of damages in the event of a malicious prosecution. That understanding is consistent with the 18th century lectures by Hume (*supra*).

[70] The citation by the Lord President and Lord Guthrie of Alison (*supra*) is, like the reference to Hume (*supra*), one to a treatise on criminal procedure. Alison (at 92) is repeating what Hume had said about the Lord Advocate not having to find caution or to take the oath of calumny and his exemption from "expenses or penalties". This did not apply to procurator fiscals:

> "who are selected in general from a subordinate class of men, and are not to be presumed to be either so thoroughly exempt from improper motives, or so completely under the observation of the King in Council, as those functionaries whose appointment flows directly from the Crown itself" (at 93).

Alison does refer (at 96) to the civil remedy of damages against the informer where there have been unsuccessful or abortive criminal proceedings. He mentions the need for there to be both malice and lack of probable cause (*Arbuckle* v *Taylor* (1815) 3 Dow 160).

[71] Returning the focus to writers on the remedies available in civil law, Chapter I of Book IV in Bell: *Principles* (10th ed (1899)) concerns the "Protection of Person and Character". Under a heading "Wrongous Imprisonment at Common Law" (para 2036) Bell states (at 2040) that:

> "The mere failure of an accusation will not infer damages against the accuser, if the circumstances justify his suspicion. 'And a procurator-fiscal or public prosecutor cannot be made liable in damages without averment and proof of malice and want of probable cause, the facts being averred from which malice is to be inferred, or at least of gross and culpable irregularity in procedure' (*Bell* v *Black & Morrison* (1865) 3 M 1026)."

Bell then immediately goes on to consider "Protection of Character".

> In the first edition of Bell (1829) the following appears:
>
> "830. 3. In a court of justice there is a privilege to state what is necessarily called for in the course of the inquiry, either on the part of the Judge, or by the parties or their advisers. …In order to overcome that privilege which protects a Judge, and the dignity and independence of his place, malice must be proved. This must be by other evidence than the mere construction of the words used, when the Judge adheres to the matter in judgment before him; but wherever he goes out of the case, he is unprotected, and the words spoken may infer malice and damages…
>
> 831. 4. Counsel are protected in the statement of whatever is relevant to the cause, and within their instructions; and the same protection is given to the party…".

There is no mention of a prosecutor being in a different position.

[72] By the time of the 10th edition, Bell had been cautioned by the courts. His editors wrote as follows:

> "2048. (3) *Courts of Justice* – In Courts there is, on the part of the judge, of the parties, and of their advisers, an 'absolute' privilege to state whatever is pertinent to the inquiry.

> 2049. This privilege protects a judge, and the dignity and independence of his place. It 'was erroneously stated by Mr Bell that it' is forfeited by malice. In an action against a judge, therefore, malice 'he says', must be libelled and proved. And the proof must be by other evidence than the mere construction of the words used… 'It is more correct to say that the privilege of a judge absolutely excludes an action of damages for words said in his judicial capacity, even though it be averred that they were malicious and irrelevant, provided only they relate in some way to the matter before the Court [citing *Haggart's Tr* v *Lord President (Hope)* (*supra*) ...]
>
> …
>
> 2051. Parties 'litigants' are privileged in the statement of whatever they believe to be true, and which is relevant to the cause, unless malice be proved; and counsel have the same privilege, provided their statement be within their instructions. 'But the latter statement is too narrow, for the general rule has been fixed, that whatever is said or written in the course of judicial proceedings by those engaged in them, whether as judges, counsel, witnesses, or jurors, is absolutely privileged, however false, malicious, or irrelevant it may be, provided only it be said or done relative to the matter in question [citing *Forteath* v *The Earl of Fife* (1821) 2 Mur 1463)."

This is all in connection with defamatory statements made in court proceedings.

[73] At the time of *Hester* v *MacDonald* (*supra*) the commonly used and respected text-books on civil liability in delict were, first, Glegg: *Reparation* (4th ed) and Walker: *Damages*, both from 1955. Glegg has a separate chapter (10) on "malicious prosecution". He defines this (at 185) as consisting of the institution of criminal proceedings "maliciously and without probable cause, for an offence which he has not committed". The prosecution must have been abandoned or failed. Specifically on the "Position of Public Prosecutor", Glegg writes (at 186):

> "A procurator-fiscal, or other public prosecutor, cannot be found liable in damages to one whom he has prosecuted, although it turns out that the offence charged was not committed, unless he is shown to have acted maliciously and without probable cause… It is in the public interest that liability in damages is thus limited, in order that the prosecutor may have a free hand in dealing with crime, knowing that while he acts in the discharge of his duty, and not from an improper motive, he is not responsible. The privilege of criminal officials is simply an application of the principle which gives protection to all public bodies and officers in the discharge of their duty…".

Glegg does not confine his remarks to procurator fiscals, but includes other public prosecutors. There is no particular reason to restrict the generality to those practising in the summary courts, especially as Glegg deals (at 190) with the legislation (then the Summary Jurisdiction (Scotland) Act 1954 s 75), which covered these courts separately.

[74] Glegg deals (ch 9) with privilege in the context of "slander" as a separate topic. He describes the principle whereby a person, who has a duty to speak, is not presumed to be actuated by malice. Proof of malice is required if damages are to be available. If not an absolute privilege, privilege of a "very high degree" is available (at 163, citing *Beaton* v *Ivory* (1887) 14 R 1057 and *Robertson* v *Keith* 1936 SC 29; see *infra*). As Glegg puts it generally (at 164) "a person may not act as he pleases under pretence of official duty without having to answer for his doings". Although it is said that a judge acting in his official capacity is "absolutely privileged", this is qualified by a statement that a judge does not have "a right to use the bench to utter slanders unconnected with the matters or parties before him". Absolute privilege was also said to attach to an advocate who is pleading in court and to a witness (but not a litigant) who is called to give evidence. In all of this, there is no mention of the Lord Advocate or his deputies being in a different position.

[75] Walker: *Damages* has a chapter (25) on "Wrongs to Reputation". It contains an interesting statement (p 643) that the actionable wrong "may be done principally by defamation or indirectly by wrongfully using legal process or diligence". Malicious prosecution is treated (at 656) separately from defamation in a general statement that:

> "*Malicious Prosecution*. – It is a wrong justifying damages to institute criminal proceedings, maliciously and without probable cause, against a person for a crime which he has not committed.
>
> *Privileged Persons.* – In an action against a public prosecutor or a person similarly placed specific averment and proof of malice and want of probable cause is essential…".

There is no mention of any immunity from suit afforded to anyone. The protections available under what was then the 1954 Act are noticed, as are the limitations on damages for acts in the summary courts (the "Twopenny Acts"; Justices Protection Act 1803; Circuit Courts (Scotland) Act 1828 and the Criminal Law (Scotland) Act 1830).

[76] So far as the analyses in the textbooks, institutional or otherwise, are concerned, prior to *Hester* v *MacDonald* (*supra*), there was no "immunity" afforded to the Lord Advocate in the event of a malicious prosecution. He would be liable, vicariously or otherwise, for a solemn prosecution carried out maliciously and without probable case. An exception to these analyses is Guthrie Smith: *Reparation* (1864) which, somewhat tentatively, suggests, specifically in relation to malicious prosecution, that:

> "The Lord Advocate and his deputes appear, like her Majesty's judges, not to be answerable in any private action for acts done by them in an official character".

Guthrie Smith explains (at 271, see also 210) that this stems from the terms of the 1579 Act. If the obligation, in a failed prosecution by the Lord Advocate, is on his informer to pay the penalties :

> "This implies that the Lord Advocate cannot be convened in any private action [citing Hume (*supra*) ii, c 5; and LJC (Hope) in *Henderson* v *Robertson* (*supra*)]".

[77] *Henderson* is the exemplar, which the Lord President in *Hester* v *MacDonald* (*supra*) used (at 377; see also Lord Guthrie at 387) in stating that "our Courts have consistently affirmed the existence of such *immunity*" (emphasis added), referring back to what he described as "absolute privilege" in solemn proceedings. *Henderson* was an action for malicious prosecution against a banker who had informed the procurator fiscal that he (the pursuer), who was a "share-broker", had committed perjury. The pursuer sought a commission and diligence to recover the original documents making the allegation. The

banker unsuccessfully opposed the application. The Lord Advocate had not objected and did not appear in the reclaiming motion. The pursuer was not called upon to reply. Nevertheless, the Lord Justice Clerk (Hope), who coincidentally was the son of the Lord President in *Haggart's Trs* v *Lord President (Hope)* (*supra*), opened his opinion as follows:

> "It is impossible to disguise the great importance of this question, - one of the most important that can be raised in reference to the office of public prosecutor. The public prosecutor has by law great and most important protection. As against the Lord-Advocate, I do not think that a case of liability to damages could be even stated. The inferior officers of the Crown – the Procurators-fiscal – are also entitled to the most large and comprehensive protection; and setting aside the case of irregularity, I do not know in what circumstances a Procurator-fiscal could be made liable, unless when, after having received a regular information, he has conspired with others to carry on a false prosecution".

[78] Neither the purpose nor the meaning of this introduction is immediately clear. The application under consideration was for the recovery of the formal written information provided by the banker to the procurator fiscal about the sharebroker. The issue was whether the banker had to provide the information if, as the Lord Advocate had maintained before the Lord Ordinary, he (the Lord Advocate) could not be compelled to do so. It was not about the Lord Advocate's liability in damages for a malicious prosecution or any other delictual act. The Lord Justice Clerk's introductory remarks are not expressly reflected in the opinions of the other members of the Division. They are not supported by any authority or preceded by any submission by the defender or the content of the Lord Ordinary's report. They are indeed a flimsy base upon which to draw any conclusion about the "immunity" or "privilege" of the Lord Advocate.

[79] The Lord President in *Hester* v *MacDonald* (*supra*) included a passing reference to Lord Young's opinion in *McMurchy* v *Campbell* (*supra* at 728). Lord Guthrie relied upon it more directly (at 387). It is important to note that *McMurchy* was a defamation, not a

malicious prosecution, case. It proceeded at the instance of a police officer against a police inspector and a procurator fiscal. It was based upon a report which the defenders had sent to the chief constable about rumours concerning the pursuer's immorality. The report recommended an investigation. It was said that the contents of the report were "unfounded and malicious" and that the report had been made "maliciously, and without any just or probable cause", with the intention of causing the pursuer to lose his employment. The pursuer had subsequently been cleared of any immorality by the local police committee. In assoilzing the defenders, the Lord Ordinary held that the general averment was not sufficient. It had not been said that the rumours had been invented. The pursuers did have probable cause to make the report and thus the matter was not actionable. The Lord Justice Clerk (Moncreiff) agreed (at 728) with the Lord Ordinary, holding that, in the absence of "any intelligible allegation of malice", the action could not succeed.

[80] Lord Young commented that the law on defamation by public officials in the discharge of their duty was not "fully matured". For reasons which remain obscure, he referred specifically to *Haggart's Trs* v *Lord President (Hope)* (*supra*) in relation to statements from the Bench. He continued (at 728):

> "Again, with respect to public prosecutors, I do not know that the law stands on any discussion, but rather on generally received opinion. For example, no action will lie against the Lord Advocate for averments made by him in the discharge of his duty, even though they are said to be malicious. The public interest will not allow such actions. …it is only within the last ten years that it has been decided in England that an action will not lie against witnesses for slander contained in statements made in the witness-box on the allegation that they are false and malicious. There again it is on the grounds of public interest and high expediency…
>
> Though it is not, for the purposes of this action, necessary to decide the point, …it is not in the public interest that an action for libel should lie against a public officer for a report made in discharge of his duty to his superior officer. It may cost great suffering to the person who is affected by these statements that they should be made, and that he should be without redress, but it is in the interest of the public that the police should make investigation into such charges, and it would require a very

> exceptional statement indeed, a statement very different from what we have here, to induce me to allow such an action to proceed…".

Lord Young acknowledges the absence of authority for his assertion on "received opinion". He does not refer to *Henderson* v *Robertson* (*supra*). He appears to accept that there might be exceptions to that opinion. He does refer to "absolute privilege" being mentioned by Oswald Dykes: *Defamation* (in Greens Encyclopaedia vol 5 at para 1138), but there the author is talking in the context of communications between government ministers. His statement is qualified by the word "probably". It is from this article on defamation that a reference to the *obiter dicta* of both Lord Justice Clerk (Hope) and Lord Young can be found.

[81] In *McMurchy* v *Campbell* (*supra*) Lord Rutherford Clark, in concurring, left open the possibility of an exception in "a remarkable case", which it was possible to conceive and might involve "special grounds for inferring malice". Looking at the opinions as a whole, they do not support the proposition that the Lord Advocate has absolute immunity from suit, especially where the ground of action is not defamation.

[82] Finally on the reasoning in *Hester* v *MacDonald* (*supra*), there is reference by both the Lord President and Lord Guthrie to the chapter on the "Liability of Judges, Clerks of Court and Prosecutors" in Renton & Brown: *Criminal Procedure* (3rd ed, 1956) 450. As with Oswald Dykes, the relevant statement is tentative. It is as follows:

> "The common law recognises that a public prosecutor, while discharging his public duties, occupies a position of high privilege. The Lord Advocate *apparently* (emphasis added) enjoys an absolute privilege [citing Lord Justice Clerk (Hope) and Lord Young in respectively *Henderson* v *Robertson* (*supra*) and *McMurchy* v *Campbell* (*supra*)]. A Procurator-Fiscal or other inferior public prosecutor is not liable in damages to anyone whom he has prosecuted unless he can be shown to have acted maliciously and without probable cause [*ibid*]…. A private prosecutor taking proceedings in the interest for which they were intended to be used enjoys a similar protection [*Glegg* (*supra*) (3rd ed) at 183]. He loses this when he uses his powers in an improper interest [*Cook* v *Spence* (1897) 4 SLT 295]".

[83] The use of the word "apparently" does not appear in the earlier edition (2nd, 1928) in which Alison (*supra*) 92 *et seq*, *Urquhart v Dick* (1865) 3 M 932 and *Beaton* v *Ivory* (*supra*) are cited as authority in relation to the liability of the procurator fiscal. In the first edition (1909), there is no mention of the Lord Advocate having immunity, although that of sheriffs and "judges of the Supreme Court" is covered (at 278, citing *Harvey* v *Dyce* (1876) 4 R 265). In *Harvey* the Lord President (Inglis) had referred to the privilege of judges in their judicial capacity being absolute; that having been settled by a series of judgments of the Court of Session (ie *Haggart's Trs* v *Lord President (Hope)* (*supra*); and *Hamilton v Anderson* (1858) 3 M 363) and "in England" (*Scott* v *Stansfeld* (1868) LR 3 Ex 220).

[84] Pulling these various threads together, *Hester* v *MacDonald* (*supra*) was wrongly decided and should be overruled. The submission of counsel for the pursuer (Stott QC), that there was no authority for the view that the Lord Advocate possessed the absolute "privilege", which attached to a judge, ought to have been sustained in the context of a case which was based on malicious prosecution and not defamation. The court ought to have adhered to the reasoning of the sheriff principal (Sherwood Calver QC).

[85] It is relatively clear that, both at the time of Mackenzie (*supra*) and Hume (Lectures *supra*), an action could be pursued against the public prosecutor for: wrongful arrest, detention or search; malicious prosecution; and/or defamation. This was understood to be the law by the majority of the textbook writers in the 19th and the first half of the 20th centuries and by the judges (see *infra*) who, in *Beaton* v *Ivory* (*supra*) and *Robertson* v *Keith* (*supra*), explained the scope of the liability in wrongful arrest and defamation cases involving public officials. Separate proof of malice is not required where an arrest, detention or search is carried out without warrant and is deemed to have been illegal (*Bell* v *Black and Morrison* (*supra*), LJC (Inglis) at 1029). As regards malicious prosecution, obviously

malice has to be proved. That is contained in the very description of the wrong. Since it is not wrongful to prosecute someone who has committed a crime with a degree of malice, want of probable cause also requires to be shown. There is no immunity from suit.

[86] Privilege is not a defence to malicious prosecution. It is a defence to an action of defamation. In relation to what is said in court, whether written or oral, by a party's legal representative, whether counsel or solicitor, for the prosecution or the defence, there is absolute privilege in an action for defamation (see *Forteath* v *Earl of Fife* (*supra*) involving Francis Jeffrey as counsel). In terms of *Haggart's Trs* v *Lord President (Hope)* (*supra*), as confirmed in *Harvey* v *Dyce* (*supra*) a judge enjoys absolute privilege too, as a matter of public policy. This may not have been quite the view of several of the judges of the Second Division (*supra*). Whether it is something which requires to be reviewed in the future may be a moot point, but at present there is authority from Lord Gifford (whose background was in English law, cf the Scots judge of the same name) in the House of Lords confirming that it is so.

[87] In essence, in relation to his acts, the Lord Advocate, and those for whom he is responsible, are generally subject to the same rights and duties as other public officials in the conduct of their public duties. In order to define those, it is convenient to revert to the extraordinary circumstances of *Beaton* v *Ivory* (*supra*), which was a wrongful arrest and detention case. It was averred that the sheriff of the county of Inverness had instructed the police to "search for, apprehend, and convey to prison every person whom they could find in the locality" of Herbista, near Uig on Skye, where deforcement of a messenger-at-arms had taken place two days previously. The Lord Ordinary (Fraser) describes the "proceedings" which were going on in Skye as "tumultuary". They centred on the reluctance of the crofters to pay rents which are now widely regarded to have been

exorbitant. The pursuer, who was from a neighbouring township, had been arrested while tending his cattle, taken to Herbista, placed in the custody of marines, marched three miles in order to board the gunship "Seahorse" and taken to Portree. He appeared before the sheriff-substitute and was questioned for more than an hour by the procurator fiscal before being detained until the following day when, three days after his arrest, he was liberated without explanation. It was averred that the act of the sheriff had been malicious and without probable cause.

[88] The Lord Ordinary held that the action was irrelevant. He said this (at 1059):

> "It seems to be forgotten that the freedom from responsibility for damages – the absolute privilege that is given to the chief magistrate endeavouring to do his duty – is given to him not for his own sake, but for the sake of the public, whose servant he is, and for the advancement of justice."

The Lord President (Inglis) was more expansive (at 1061) as follows:

> "If it had not been that the pursuer is under an obligation to aver and prove malice as the condition of his succeeding…, … we could not have disregarded that averment made as it is, and must have sent the case to trial. But… there is a very special protection surrounding the defender in the execution of his duty as the Sheriff of the county, and so responsible for the peace of the county. That protection extends to this, that he will not be liable for anything that he does in the performance of that duty unless it can be shewn that he was actuated by a malicious motive of some kind. The mere use of the word 'malice' in a case of this description is… quite insufficient to fulfil the condition upon which alone such an action can be entertained. The presumption in favour of a public officer that he is doing no more than his duty, and doing it honestly and *bona fide*, is a very strong one, and certainly ought not to be overcome by the simple use of the word 'malice'. …[T]he duty of the pursuer in a case of this kind is to aver facts and circumstances, from which the Court or jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive. …It is for the benefit of the public, and for the interests of justice and good government that public officers acting in the execution of their duty should be surrounded by very considerable protection."

[89] Almost a half century later, the issue of wrongful acts of a public official came to be debated once again, albeit in markedly different circumstances, this time by the Full Bench

in *Robertson* v *Keith* (*supra*). A detective inspector had taken leave during the week of the Hamilton Park Races, at which he was supposed to have been supervising the detectives. He could not be traced, but it was suspected that he was in the house of a woman, who was not his wife. This was the pursuer, who was a well-respected pharmacist in Rutherglen. She did not co-operate with police enquires. The defender, who was the chief constable, therefore instructed a watch on her house over a period of three days and nights. The pursuer averred that the defender's actions had given rise to rumours adverse to her character and had created the impression that she was suspected to be a criminal. The pursuer's first plea-in-law was, as in the pursuers' cases, remarkably vague in its reference to the "wrongful and illegal actings of the defender", but the second was straightforward defamation.

[90] The Lord President (Normand) adopted (at 43) the reasoning of his predecessor in *Beaton* v *Ivory* (*supra*). The Lord Justice Clerk (Aitchison) produced (at 47) a succinct summary of the law, albeit that it should be remembered that this was at least in part a defamation case:

> "1. An act is *prima facie* within the competence of the public official doing or authorising it when it is the kind of act that is within his ordinary duty to discharge.
>
> 2. When a public official does an act that is *prima facie* within his ordinary duty, there is a presumption that he has acted within his authority.
>
> 3. This presumption is not absolute, but may be rebutted by showing that the act was unrelated to any duty arising on the particular occasion, in which case the act ceases to be within the authority or competence of the public official and becomes unlawful.
>
> 4. When an act is within the competence, no civil liability arises from the doing of the act, unless it can be shown that the act was done maliciously and without probable cause.
>
> 5. Want of probable cause and malice are not necessarily unrelated and independent. The absence of just cause may go to prove malice, and similarly the presence of oblique or dishonest motive may go to show the absence of probable cause.

> 6. Malice may be inferred from recklessness, and the facts and circumstances from which it may be inferred need not be extrinsic to the circumstances in which the act is done or to the manner of doing it.
>
> 7. Circumstances may show that an act was done with malice, or without probable cause, or that it was an act outwith the competence of the person doing or authorising it. In some cases, according to the angle from which the question is approached, the same facts may be habile to infer each of these conclusions.
>
> 8. The *onus probandi* is on the pursuer to show that the act complained of is outwith the competence of the person doing or authorising it, or, if within the competence, that it was done maliciously and without probable cause."

Where there is proof of malice and lack of probable cause in relation to the general acts of a public official, including the Lord Advocate and those for whom he is responsible, the matter is actionable. In defamation claims, however, there is an exception, whereby, as with all legal representatives and the judge, there is absolute privilege for things said or done in court.

[91] For completeness, it is noted that section 170 of the Criminal Procedure (Scotland) Act 1995 prescribes the regime in summary cases whereby a prosecutor cannot be found liable in damages "... for or in respect of any proceedings taken, [or] act done ..." unless the pursuer has suffered imprisonment as a result, the proceedings or act has been quashed and malice and without probable cause has been averred and proved. The prosecutor escapes liability if the guilt of the pursuer is proved. There is a two month limitation period. These provisions apply to Justices of the Peace and clerks of court. Their origins go back at least to the Justices Protection Act 1803, which applied throughout the United Kingdom to JPs. The pursuer could not obtain damages greater than two pence unless malice and the absence of reasonable probable cause was proved. The procurator fiscal was added to the list of officials by the Summary Procedure Act 1864 (s 30) when the limit was £5. The existence of this regime is of no material relevance to the question of immunity in solemn cases. It exists as a matter of policy applicable only in the prosecution of what will inevitably be relatively

minor offences. Whether parts of it might be challenged on Convention grounds, may be for another day.

***Should Hester v MacDonald (supra) be overruled on public policy/interest grounds***

[92] This does not now arise, but, in deference to the submissions made, it is appropriate to make certain observation on whether, if *Hester* had not been overruled as wrongly decided, there were reasons to do so on the basis that its *ratio* is no longer sustainable.

[93] Some myths should be dispelled *in limine*. There is no substance in the argument that there has been a change in the duties performed by the Lord Advocate in modern times. At the time of the decision in *Hester* v *MacDonald* (*supra*), the Lord Advocate was William Grant (later Lord Justice Clerk). As such, he was not only the law officer in charge of criminal prosecution in Scotland, he was also the Unionist Member of Parliament for Glasgow Woodside. He was responsible for providing the UK Government with advice on, *inter alia*, matters of Scots law and practice. He would have had to have divided his time between Edinburgh, London and his constituency. The proposition that the Lord Advocate of the early sixties had more of a "hands on" role in relation to the direction of prosecutions does not have any evidential basis. It is inherently improbable. Indeed, from the averments in these actions, the Lord Advocate of today, whose responsibilities are largely Edinburgh based, would have more of a direct role to play.

[94] The Lord Advocate in the Macmillan Government would delegate responsibility for individual cases to the Advocates Depute, just as the Lord Advocate of today will do. Equally, he may decide to take a personal interest in a particular case, as the circumstances dictate. Although there was no doubt a minimum required standard, and the ADs had to be selected from members of the Faculty of Advocates, the ADs of that era were generally

appointed at least partly on the basis of political allegiance rather than legal excellence. A glance through the justiciary reports of the time does not reveal the names of ADs whose skills and experience obviously trump those in the modern Crown Office. Mistakes are made today, as they were in the late 1950s and 1960s.

[95] There is little substance in the view that modern society requires a more sceptical view of the performance of public functions. The idea that those who perform official duties now are in some way less able than those who did so in the past is, again, hardly borne out by history. The judges of yesteryear, or at least many of them, had lived through experiences which would have, in all probability, induced at least a moderate degree of scepticism in relation to those in official positions. When Lord Keith said, in *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 (at 63), that, although the police sometimes made mistakes, it was "... not to be doubted that they apply their best endeavours to the performance of it ...", he was not saying that all police officers always use their best endeavours at all times. His six years of experience in the High Court would have provided him with a broad view of the capabilities of police officers. Rather, he was expressing what the law presumed, not what a judge would ultimately find as fact. Lord Steyn, in *Brooks* v *Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 (at para 27) was explaining developments in the law, in the light of *Z* v *United Kingdom* (2001) 34 EHRR 97, which had stressed the duty on the state (including the police) to take positive action to prevent harm being caused to the individual. In his reference to scepticism, Lord Steyn is not to be taken as being critical of Lord Keith, but providing a narrative of why and how the law required to move on.

[96] On the assumption that *Hester* v *MacDonald* (*supra*) was correctly decided, the law, since 1961 at least, has been that the Lord Advocate has immunity from suit in relation to the

conduct of all solemn prosecutions. That immunity would extend to all acts from the investigative to the trial phases. It would include those for whom the Lord Advocate was responsible; the ADs and PFDs in solemn procedure. That law has been extant for over half a century, during which Parliament has not sought to change it. The question then becomes one of whether the courts (ie the judges) ought to step in and determine that the law is outmoded, or whether the change proposed ought to be one for the Scottish Parliament, after due consultation and democratic debate, to enact.

[97] In his dissenting opinion in *Shaw* v *Director of Public Prosecutions* ("the Ladies Directory") [1962] AC 220, Lord Reid borrowed from Pope's *Essay on Criticism* when he cautioned: "Where Parliament fears to tread it is not for the courts to rush in". Three years later, in *Myers* v *Director of Public Prosecutions* [1965] AC 1001 he said (at 1021):

> "The common law must be developed to meet changing economic conditions and habits of thought… But there are limits to what [the courts] can or should do. If we are to extend the law it must be by the development and application of fundamental principles… And if we do in effect change the law, we ought… only to do that in cases where our decision will produce some finality or certainty."

Both passages were cited by Toulson LJ in the Court of Appeal in *R (Nicklinson)* v *Ministry of Justice* [2015] AC 657 (at 683). Toulson LJ also quoted from *C (A Minor)* v *Director of Public Prosecutions* [1996] AC 1, in which Lord Lowry had set out (at 28) some useful ground rules:

> "It is hard, when discussing the propriety of judicial law-making, to reason conclusively from one situation to another … I believe… that one can find in the authorities some aids to navigation across an uncertainly charted sea. (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."

The reluctance of courts to legislate in areas of social policy was stressed in the UK Supreme Court in the subsequent appeal in *R (Nicklinson)* (eg Lord Sumption at paras 230 – 232, Lord Reed at para 267).

[98] Using Lord Lowry's check list, there are arguments for and against intervening in this area. The issue is one which concerns the scope of the law of reparation. This is an area in which the law has, since *Donoghue* v *Stevenson* 1932 SC (HL) 31, undoubtedly been moved forward by the courts rather than Parliament (see *Thomson* v *Scottish Ministers* 2013 SC 628, LJC (Carloway), delivering the opinion of the court, at paras [45] *et seq*) . Parliament has not tended to intervene in this general area and it has not done so in this particular sphere. It may be reluctant to do so in the absence of political pressure. Change in the scope of reparation is not usually thought of as creating social policy, but as developing the law to meet modern expectations. Whether that is correct or not (cf *Micosta* v *Shetland Islands Council* 1986 SLT 193, Lord Ross approving Walker: *Delict* (2nd ed) at 9), finding a fundamental principle to be developed and applied is the appropriate way forward from the perspective of Scots law (cf the incremental approach in *Custom & Excise Commissioners* v *Barclays Bank* [2007] 1 AC 181, Lord Bingham at para 4).

[99] The fundamental principle is that, for every right, there must be a remedy (Bankton: *Institute* iv, xxiii, 18; cited recently in *Wightman* v *Secretary of State for Exiting the European Union* 2019 SC 111, LP (Carloway) at para 21). As a broad generalisation, everyone has a right at common law to his or her liberty, property and reputation. There ought to be a remedy if these rights are wrongfully interfered with. Malicious prosecution and defamation are examples of such interference. There must be a mechanism whereby the interference is remedied by an award of damages for any resultant loss, injury and damage. If there is to be some limitation on that remedy, it must be justified on public policy/interest

grounds (*Darker* v *Chief Constable of West Midlands* [2001] 1 AC 435, Lord Hope at 446). That is not to say that the limitation requires to be justified in every individual case. Normally, reliance can be placed on the original, or a subsequent, justification as endorsed by the superior courts in previous cases. There will nevertheless occasionally be circumstances in which the courts will be satisfied that the time has come for a review (*Jones* v *Kaney* [2011] 2 AC 398, Lord Dyson at paras 112-114).

[100] In this case, the justification for what has been described as an immunity from suit is the proper administration of justice. The concerns of the Lord Advocate mirror, to a large extent, those proffered in *Van Colle* v *Chief Constable of Hertfordshire Police* [2009] 1 AC 225. The first is to avoid defensive decision making; to ensure that prosecutors continue to act independently and robustly. The Lord Advocate accepted that there was no material which showed that a prohibition on malicious conduct would have any "chilling effect" on the manner in which those delegated with the Lord Advocate's powers carried out their prosecutorial functions. It is not normally conducive to careful decision making for there to be a complete immunity from suit in relation to malicious acts which have been taken without probable cause (see *Nelles* v *The Attorney General of Ontario* [1989] 2 SCR 170, Lamer J at 195). The existence of a right of action is highly unlikely to deter robust and independent decision making. Neither requires malice or the lack of a proper basis.

[101] The second ground is that there may be a diversion of resources. There could be some increase in malicious prosecution cases following upon failed prosecutions. There are probably almost no such cases now, other than those relating to the Rangers' winding up. Given the strictness of the test to aver and prove malice and want of probable cause, such actions ought to remain very few and far between (*Nelles* v *The Attorney General for Ontario* (*supra*) at 197). The sanction of an award of expenses and the availability of the requirement

to provide caution for expenses during a civil process is likely to deter the raising and pursuit of unmeritorious cases. The fact that a flood of actions is unlikely to occur appears to be the lesson learned from the many jurisdictions, both in Europe and in the Commonwealth, in which no, or a very limited, immunity exists. The resource implications ought to be minimal relative to the overall COPFS budget.

[102] The third area of concern relates to whether it is necessary for the better performance of the prosecution of crime that the immunity should be retained. This is a value judgment, but there is little reason to suppose that a prohibition on malicious acts would diminish prosecutorial endeavour. The fourth relates to the impact of the Human Rights Act 1998 (ie the incorporation of the European Convention into domestic law) on the common law of reparation. For reasons which will be explored in part in relation to Article 8 (*infra*) that impact is likely to be relatively minimal. The class of civil cases involving the Convention is a small one. As was pointed out in *Van Colle* v *Chief Constable of the Hertfortshire Police* (*supra*, Lord Brown at para 138):

> "Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights."

In short, the common law of reparation ought to remain relatively unscathed, although it may, no doubt, be influenced by the strengthening of individual human rights under the Convention. In the modern era, the pursuer in *Beaton* v *Ivory* (*supra*) might at least have expected to have had some form of redress under Article 5, if not 8 (*infra*).

[103] On the fifth ground, that of deterrence, it is reasonable to suppose that an individual AD or PFD would be more likely to be concerned about the soundness of his acts in terms of his or her susceptibility to disciplinary measures, notably the loss of employment, rather

than the remote and distant prospect of an action of reparation against the Lord Advocate, which would be unlikely to have any direct consequences on him or her outwith that disciplinary context. Finally, the sixth point, relative to need to defer to the democratic process of Parliament, has already been covered in the comparison (*supra*) of the appropriateness of Parliamentary legislation with that of court innovation in the area of the development of reparation in contemporary society.

[104] As is said in Fleming: *The Law of Torts* (10th ed at para 27.10), albeit in the context of the English common law:

> "The tort of malicious prosecution is dominated by the problem of balancing two countervailing interests of high social importance: safeguarding the individual from being harassed by unjustifiable litigation and encouraging citizens to aid in law enforcement."

The balance in Europe has fallen in favour of a right of action tempered, in some countries, by a need to prove gross negligence. This is not entirely inconsistent with the approach taken by Roman law, adjusted to meet modern societal problems and expectations. The availability of the remedy in South African law is consistent with the continental approach.

[105] Coming from different origins, the law in England & Wales allows claims for malicious prosecution, even if the principles which are now applied stem from the era of private prosecution. The idea that blanket immunity is not "respectable jurisprudence" (*Bennet* v *Commissioner of Police for the Metropolis* (1998) 10 Admin LR 245 at 254) is an attractive one.

[106] Canada and Australia, in large part, demonstrate how matters should be analysed in modern society. Although stemming from English law roots, it is difficult to fault the truncated "necessary elements" (cf LJC (Aitchison) in *Robertson* v *Keith* (*supra*)) identified by

Lamer J in *Nelles* v *The Attorney General for Ontario* (*supra*, at 193, citing Fleming (*supra*, 5th ed 1977 at 598), *viz*. that:

> "a) the proceedings must have been initiated by the defendant;
> b) the proceedings must have terminated in favour of the plaintiff;
> c) the absence of reasonable and probable cause;
> d) malice, or a primary purpose other than that of carrying the law into effect."

On a practical level, as Lamer J describes matters (at 194),:

> "…a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof …".

[107] The formidable, but by no means unsurmountable, problems facing a pursuer were highlighted in *Miazga* v *Kvello (Succession)* [2009] 3 RCS 339 in which Charron J was at pains to express (at 378) the narrow scope of the liability in explaining that:

> "…[E]ven if the plaintiff should succeed in proving that the prosecutor did *not* have a subjective belief in the existence of reasonable and probable cause, this does not suffice to prove malice, as the prosecutor's failure to fulfil his or her proper role may be the result of inexperience, incompetence, negligence or even gross negligence, none of which is actionable… Malice requires a plaintiff to prove that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice…
>
> … the malice element of the tort… ensures that liability will not be imposed in cases where a prosecutor proceeds, [in the absence of] reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence ".

[108] Similar views were expressed by the majority (Gleeson CJ *et al*) in *A* v *NSW* [2007] 233 ALR 584 in relation to the difficulties in proving the absence of probable cause, *viz*. (at para [38]):

> "…[J]ustice requires that the prosecutor, the person who effectively sets criminal proceedings in motion, accept the form of responsibility, or accountability, imposed by the tort of malicious prosecution. In so far as one element of the tort concerns reasonable and probable cause, the question is not abstract or purely objective. The

> question is whether the prosecutor had reasonable and probable cause to do what he did; not whether, regardless of the prosecutor's knowledge or belief, there was reasonable and probable cause for a charge to be laid. The question involves both an objective and a subjective aspect".

[109] The position in the United States of America differs from that in the rest of the western world. The following *dictum* of Learned Hand CJ in *Gregoire* v *Biddle* (1949) 177 F.2d 579 has been influential and is in tune with the thinking in *MacDonald* v *Hester* (*supra*):

> "... [I]t does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties ... There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judges as *res nova*, we should not hesitate to follow the path laid down in the books."

[110] Although there is force in these observations, the regimes in England, Europe and the Commonwealth have demonstrated that it is possible at least to confine the outcomes of any action to "the guilty"; that is those who are proved to have acted malicious and without probable cause and to limit actions to those in which there are specific averments from which it can be inferred that both of those criteria can be established. The balance, especially in regimes in which expenses may be awarded and caution required, favours redressing the wrongs of dishonest officials, even if there may be rare cases in which unfounded actions are sought to be pursued.

[111] *Gregoire* v *Biddle* (*supra*) was in turn highly influential in *Imbler* v *Pachtman* (1976) 424 US 409. The plaintiff had sought damages for the loss of his liberty caused by unlawful prosecution. The specific issue under consideration was the import of section 1983 of Title 42 of the United States Code (originally the Civil Rights Act 1871, s 1) which provided, in very broad terms, that everyone who caused anyone to be subjected to the deprivation of Constitutional rights would "be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress". No immunities were prescribed. The US Supreme Court determined that the same considerations of public policy, which underlay the common law rule of prosecutorial immunity from a malicious prosecution suit applied equally to a claim brought under section 1983. The reasoning was explained by Powell J, delivering the judgment of the court (at 424):

> "If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate ... Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.
>
> Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and – ultimately in every case – the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials.
>
> ...

> We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."

[112] It may well be that these are sound arguments in the context of the legal system of the United States, where the expenses regime and the nature of damages litigation are markedly different from those in the United Kingdom, Europe and the Commonwealth. For the reasons already given, there is no substantial reason to suppose that the existence of a qualified immunity would undermine prosecutorial performance. Public trust in the prosecutorial system is likely to be strengthened by the availability of a malicious prosecution suit, even one of the limited nature under contemplation. It is not anticipated that there would be a "frequency" of suits. The court in *Imbler* v *Pachtman* (*supra*) had in mind the effect of liability on the conduct of the trial itself. That is not something which is focused in the pursuers' cases; no doubt because of the absence of any trial. The absolute privilege from defamation suit in these circumstances would continue to provide the appropriate protection.

[113] If *Hester* v *MacDonald* (*supra*) had been determined to have been correctly decided, it would have been overruled on the basis that public policy no longer supported its continued application. In short, the court would have decided that it would do what it could "to sort ... out" the undesirable consequences of *Hester* (see *Crawford Adjusters* v *Sagicor Insurance* [2014] AC 366, Lady Hale at para 84).

**Article 8**

[114] In the context of the sums sued for in these actions, it is difficult to see what practical value is added by the Article 8 cases. The damages which might be available purely for a breach of Article 8 will pale into insignificance when compared with those available in the event of a successful action for malicious prosecution.

[115] Article 8 provides for a right to respect for, *inter alia*, a person's private life. Even without having regard to the specific exceptions in Article 8.2, it does not create an absolute prohibition on the state from interfering with a person's private life. The prosecution of a person for a crime, which he or she is reasonably suspected of having committed, does not show any disrespect for his or her private life. A malicious prosecution which is conducted without probable cause undoubtedly does.

[116] These general propositions are consistent with the jurisprudence of the European Court of Human Rights as explained recently in *Denisov* v *Ukraine*, (App No 76639/11), unreported, 25 September 2018. Mr Denisov had been removed from his office as president of the Kiev Administrative Court of Appeal by the High Council of Justice. The European Court made some preliminary observations on how Article 8 dovetailed with disciplinary proceedings of this nature as follows:

> "92. ... In the assessment of whether or not a private-life issue under Article 8 of the Convention is raised in such a case, there is a strong tie between the questions of applicability and the merits. Once a measure is found to have seriously affected the applicant's private life, that conclusion means that the complaint is compatible *ratione materiae* [according to the nature of the matter] with the Convention and, at the same time, that the measure constituted an 'interference' with the 'right to respect for private life' for the purpose of the three-limb merits test under Article 8 (assessment of the lawfulness, the legitimate aim and the necessity of such 'interference'). Therefore, the questions of applicability and the existence of 'interference' are inextricably linked in these categories of complaints."

Whether there is an interference will thus depend on the nature of the proceedings which are complained of; in particular whether they were objectively justifiable.

[117] In *Denisov* v *Ukraine* (*supra*), the European Court explained (at para 97) that "private life" encompassed a person's reputation, before continuing:

> "98. However, it is important to stress that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequences of one's own actions, such as, for example, the commission of a criminal offence ... In *Gillberg* [v *Sweden* (2012) BHRC 247] the Grand Chamber did not limit this rule to reputational damage and expanded it to a wider principle that any personal, social, psychological and economic suffering could be foreseeable consequences of the commission of a criminal offence and could not therefore be relied on in order to complain that a criminal conviction in itself amounted to an interference with the right of respect for 'private life' (*ibid*, § 68)."

This means that, if a person has committed a criminal offence, he or she cannot complain about being prosecuted and convicted; at least while that conviction remains extant.

[118] *Denisov* v *Ukraine* (*supra*) continued (at para 102) by narrating that the concept of private life could be approached on two different bases. The first is the "reason-based" approach, in which the state measure is itself based on reasons which encroach upon an individual's freedom of choice in his or her private life (*ibid* para 103). The prosecution of the pursuers for what is a Convention compliant criminal offence is not engaged on this approach. The second is the "consequence-based" approach, in which the reasons for the measure are not linked to the individual's private life, but the measure has "serious negative effects" on his or her reputation (*ibid* para 107). It is relatively clear that the prosecution of the pursuers did have such effects. On that basis, Article 8 is potentially engaged. Although the matter may be regarded as somewhat circular, whether it is engaged depends upon whether the Lord Advocate's acts were, using loose terminology for the present, justified.

[119] In *Jishkariani* v *Georgia*, (2018) ECHR 740, the applicant was a psychiatrist. She was a director of a rehabilitation centre for the victims of torture. The centre had carried out some work for the Ministry of Justice at a Tbilisi prison. On a private television channel, the Minister of Justice had made a defamatory statement of criminal corruption on the part of the applicant within the ministry and its medical department. The applicant's domestic defamation case had failed on the basis that the Minister had been exercising his right of freedom of expression in a matter of public interest. The applicant complained of a breach of Article 8 on the ground that the Minister had made the statements without any factual basis.

[120] The European Court reasoned (at para 43) that the main issue was whether the state had achieved a fair balance between an individual's right to protection of his or her reputation and the other party's right to freedom of expression. In judging that matter, the question of whether there was a factual basis to support the allegation fell to be considered. In finding that Article 8 had been breached, the European Court reiterated:

> "62. ... that the Convention cannot be interpreted to require individuals to tolerate, in the context of their rights under Article 8 of the Convention, being publicly accused of criminal acts by Government officials who are expected by the public to possess verified information concerning those accusations, without such statements being supported by facts (see ... [*Einarsson* v *Iceland* (2018) 67 EHRR 6] § 52)."

This supports the circularity whereby Article 8 may be breached if the reputational damage has been caused by a statement which has no factual basis, but not if there was "probable cause" to make it. This is essentially what was determined in *Cemalettin* v *Turkey* (App No 22427/04), unreported, 18 February 2009, in which a forwarded inaccurate police report had constituted the interference.

[121] Prior to *SXH* v *Crown Prosecution Service* [2017] 1 WLR 1401, there was some debate about where the mounting of a prosecution could, of itself, engage Article 8 and thus,

subject to the exceptions in Article 8.2, interfere with it. In *R* v *G* [2009] 1 AC 92 it had been contended that a decision to charge an offence which involved rape, as distinct from one of unlawful intercourse, was disproportionate and *per se* an interference. Views differed; with Lord Hoffman and Lady Hale holding that Article 8 was not engaged, whereas Lords Hope, Carswell and Mance reached the opposite view. The claim failed because Lady Hale and Lord Mance considered that the exception in Article 8.2 applied. *R* v *G* (*supra*) was followed by *R (E)* v *Director of Public Prosecutions* [2012] 1 Cr App R 6 in which there was a challenge to a decision to prosecute a person who had been 12 years old at the time of serious sexual offences against her very young sisters. Munby LJ did not consider that Article 8 was engaged by a prosecutorial decision.

[122] In *SXH* v *Crown Prosecution Service* (*supra*), the question asked by the court (Lord Toulson at para 1) was whether a decision to prosecute infringed Article 8 in circumstances in which it had been conceded that the prosecutor had reasonable cause to believe that the individual had been guilty of the offence. Lord Toulson observed:

> "32. By commencing a criminal prosecution the CPS places the matter before a court. ... There is a striking absence of any reported case in which it has been held that the institution of criminal proceedings for a matter which is properly the subject of the criminal law may be open to challenge on article 8 grounds (as Munby LJ observed in *R (E)* v *Director of Public Prosecutions* [2012] 1 Cr App R 6, paras 72-75). It would be illogical; for if the matter is properly the subject of the criminal law, it is a matter for the processes of the criminal law. ... If the criminalisation does not amount to an unjustifiable interference with respect for an activity protected by article 8, no more does a decision to prosecute for that conduct. The consequences will be matters for the determination of the court ...".

This is consistent with the idea that, at least if there is a sound reason to prosecute, Article 8 can neither be engaged nor infringed.

[123] Lord Toulson continued:

> "36. However, if article 8 was applicable, I agree also that there was no breach. ...Indeed, even if the original decision to prosecute was an error of judgment by the

> CPS, it would not ... have involved a breach of article 8. It would be a different thing if the state deliberately trumped up false charges against someone as a form of harassment. In terms of domestic law, that would involve the torts of malicious prosecution or misfeasance in public office or both, to which article 8 would add nothing; ..."

Although the matter may not be entirely clear, given the qualification that what was being said was on the basis, which he had rejected, of Article 8 being applicable, Lord Toulson appears to be contemplating that Article 8 could be engaged and infringed in the event that the state had prosecuted the individual on "trumped up false charges". That would be consistent with the European jurisprudence (*supra*). It is what the pursuers are, at least in part, alleging. On that basis, although, as Lord Toulson suggested, Article 8 may add nothing to a malicious prosecution suit, the claim is nevertheless relevant to proceed to enquiry.

**Conclusion**

[124] Since *Hester* v *MacDonald* (*supra*) is overruled, the interlocutors of the Lord Ordinary dated 16 November 2018 must be recalled in so far as they reject the common law cases. In Mr Clark's action, the pursuer's first and fourth pleas-in-law require to remain standing in their entirety. The Lord Advocate's third and fourth pleas-in-law fall to be repelled; the Lord Ordinary having correctly repelled the Lord Advocate's fifth and sixth pleas-in-law. In Mr Whitehouse's action, the pursuer's (vague) sixth plea-in-law requires to remain standing as does his tenth plea. The Lord Advocate's third and fourth pleas-in-law fall to be repelled; the Lord Ordinary having correctly repelled his fifth and sixth pleas. *Quoad ultra* in relation to these parties there will be a proof before answer.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 52**
A293/16 and A295/16

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motions

in the causes

(FIRST) DAVID JOHN WHITEHOUSE; and (SECOND) PAUL JOHN CLARK

Pursuers and Reclaimers

against

(FIRST) THE CHIEF CONSTABLE, Police Scotland; and
(SECOND) THE LORD ADVOCATE

Defenders and Respondents

**First Pursuer: Dunlop QC, McKinlay; Urquharts (for Livingstone Brown, Glasgow)**
**Second Pursuer: Fairley QC, McNaughtan; Kennedys Scotland (for Beltrami & Co, Glasgow)**
**First Defender: no appearance**
**Second Defender: Moynihan QC, DB Ross QC, Charteris; Scottish Government Legal Directorate**

30 October 2019

**Introduction**

[125] It is not disputed that the wrong of malicious prosecution is recognised by the law of Scotland. It is attested by numerous authorities examined below. The key issue is whether the Lord Advocate, by virtue of his constitutional role in the suppression and prosecution of

crime, is immune from a suit based on such grounds of action. To answer that question we require to examine the historical basis upon which the argument is advanced.

[126] Sir George Mackenzie (The Laws and Customs of Scotland in Matters Criminal, Title 19, "Of accusations and accusers", cap 8) notes that the civil law appointed two remedies to the end that persons may not be unjustly pursued in criminal matters. These were that the pursuer in the criminal libel should find caution for proceeding and could himself be pursued as calumniator if his pursuit were found to be malicious. The King's advocate was not required to find caution, "for in him there is no presumption of calumny" (although it appears that it became usual for the King's Advocate to require caution of his informant). This does not appear to be a basis for asserting that should the Lord Advocate have been found to have acted calumniously he could not be pursued in damages for malicious prosecution. In fact, Mackenzie goes on to state that according to the civil law whilst the procurator was not to be presumed calumnious, yet if he calumniously did incite proceedings he was liable for the losses so caused, as well as for the penalty of burning alive. The authority which he gives for this is the Code of Justinian, Book 3, Title 26, cap 9. Examination of the Code in translation, in several examples, does not in fact provide a basis for the former, so the root of Mackenzie's understanding must have lain elsewhere. In an article in the South African Law Journal "Malicious Prosecution in Roman Dutch Law" (29 S African LJ 22 (1912)) Robert W Lee, later Professor of Roman Law at McGill University, writer on the topic. At the time of the article he held the part time chair in Roman Dutch law at the University of London. In 1921 he became the Rhodes Professor of Roman Dutch law at the University of Oxford. In the article in question he concludes that, at the time of Ulpian at least, the civil law provided that the *actio iniuriarum* lay at the instance of one acquitted of a criminal charge maliciously preferred against him, although no action would lie if the

action had not been vexatious or if the individual had been found guilty. The latter would of course imply probable cause. It may be presumed that Mackenzie's conclusion rested on a similar basis.

[127] Examination of subsequent writings equally does not seem to present a basis for the assertion that the Lord Advocate is immune from a suit for malicious prosecution.

[128] Hume (*Commentaries on Crimes*, Volume ii, 134) repeats that the Lord Advocate finds no caution for reporting or insisting on criminal letters; nor is called upon to take the oath of calumny; nor, in the case of a verdict of acquittal, is he liable in the statutory penalties as a rash or calumnious accuser. The latter is, presumably, a reference to the Act of 1579 which applied where criminal proceedings had been pursued out of malice; and where the individual was acquitted. (The combination of malice and acquittal, with the reference to slander, may together be taken to indicate that the prosecution lacked probable cause.) The Act provided for payment of a penalty, to be divided between the King and the accused. It is perhaps noteworthy that prosecutions at the hand of the Lord Advocate were not excluded entirely from the scope of the 1579 Act. Where the claim was that such a prosecution had a malicious basis, and was without probable cause, the informant was liable for the penalties which may be extracted under the Act, and it seems clear from the authorities as a whole, (see, for example, Hume, ii, 135; Burnett, 313) that in the public interest, the Lord Advocate was bound to provide the details of the informant if called upon to do so. It is not surprising that the Lord Advocate should not be held liable for a criminal penalty in these circumstances but that the responsibility for this should be placed upon his informant. However, that provision of this kind was made in respect of criminal penalty does not logically lead to the conclusion that the Lord Advocate is immune from suit for a prosecution instigated by him maliciously and without probable cause.

[129] The real source for the assertion that this is so appears to come from Hume's footnote (ii, 134, footnote 1) that "as far as I have observed, there is no instance of an award of expenses to a pannel, on his acquittal, in a prosecution at the Lord Advocate's instance". The conclusion drawn from this is that the constitutional trust reposed in the high office in question, vouched by the calibre of men from whom the office is appointed, meant that "it will not be supposed of him that he will be actuated by unworthy motives such as ought properly to make him liable in that sort of amends". This is clearly a sound basis for refraining from asking the Lord Advocate to take an oath of calumny, but it does not appear to be a sound basis for saying that, if found in fact to have acted from impure motives and without foundation he cannot be held answerable for the same. The general heading under which Hume discusses the issue is "Of prosecutors and their title" and it would seem a considerable stretch to infer from this footnote that the Lord Advocate has complete immunity from suit, even when acting maliciously and without probable cause.

[130] Burnett in "*A treatise on the Various Branches of the Criminal Law of Scotland*", p 313 states that:

> "It necessarily follows from the powers entrusted to his Majesty's advocate, that he must be exempted from those restraints which are wisely imposed on private prosecutors"

Hence he is not obliged to find caution, give the oath of calumny, or pay expenses or penalties on failing in the prosecution. Even on the question of expenses, "failing in the prosecution" does not imply either malice or want of probable cause. This again does not appear to provide a basis for asserting complete immunity from suit.

[131] Alison, "*Principles and Practice of the Criminal Law of Scotland*", vol ii, p84, draws heavily on Hume in treating of this matter. He cites the "high confidence" reposed in the Lord Advocate as requiring that neither he nor his deputes can be called upon to give an

oath of calumny or to find caution or be subjected to expenses or penalties in the event of an acquittal. He describes this as "an absolute exemption from penalties and expenses", applicable only to the Lord Advocate and his deputies and not to the procurators-fiscal, being "selected in general from a subordinate class of men" who are "not to be presumed in every case to be … exempt from improper motives". To adopt as a starting point the assumption that the Lord Advocate will not be motivated by base motives seems unexceptional: to conclude however that where proof of malice and want of probable cause may be established he is exempt from suit does not seem justified, nor can it truly be said to be necessary for the discharge of the office of Lord Advocate, a point which I will address subsequently.

[132] Alison notes (p84) that in the case of private individuals, prosecutions are sometimes begun in anger, are frequently abandoned for inconstancy, caprice, or the load of expenses attendant upon the prosecution. As he explains (p113)

> "Such is the force of private interest, both in blinding the understanding and exciting the passions, that if private persons, who either have been, or conceive themselves to have been injured, were allowed to prosecute without any restriction or responsibility, trials or commitments would become the means of wreaking individual vengeance, and the tribunals of public justice be converted into the instruments of private malignity."

The utility of placing prosecutions in the hands of the Lord Advocate as the public prosecutor acted as a guard against these dangers, and prevented individuals being detained without the existence of such evidence as affords a reasonable prospect of conviction. Notwithstanding that in the inferior courts prosecution was usually in the hands of a procurator fiscal, the Lord Advocate was entitled to proceed there in his own person or at the hand of one of his deputies.

[133] An important purpose of the vesting of such extensive powers in the Lord Advocate, and of restricting private prosecutions, appears thus to have been to provide protection against capricious, unfounded or unjust prosecutions. It is not obvious that the presumption that the Lord Advocate acts without malignity should be an irrefutable one, given the purpose of guarding against capricious prosecutions. Of itself, it is not obvious that it should rule out an action against him if he could be shown to have acted maliciously and without probable cause. In fact, one might consider that the opposite should be the case.

[134] Remaining, for the moment, with writings concerning the criminal law, the first edition of Renton & Brown "Criminal Procedure According to the Law of Scotland" (1909) addresses only the statutory provisions regarding summary prosecution and does not deal at all with the position of the Lord Advocate. The assertion in the 2nd edition, 1928, p297, is that the Lord Advocate enjoys "an absolute privilege", by which it appears is meant immunity from suit, since the comparison is made with inferior prosecutors "who may incur liability if they act from malice and without probable cause". The assertion here made rests on Alison, ii, 92 and adds nothing to the debate. The 3rd edition, making the same assertions, p450, cites *Henderson* v *Robertson* and *McMurchy* v *Campbell.*

[135] *Henderson* v *Robertson* was a case in which the only issue was whether a document in the form of any information provided to the Lord Advocate by one asserting perjury of another could be made the subject of an order for recovery of documents. The court had little difficulty in concluding that it could, there being sufficient authority to justify that conclusion. Accordingly, any observations as to the immunity or privilege of the Lord Advocate against suit were not relevant and were *obiter*. The Lord Justice Clerk states that the "public prosecutor has by law great and utmost protection", adding "As against the Lord Advocate, I do not think that a case of liability to damages could even be stated. The

inferior officers of the Crown—the Procurators-fiscal—are also entitled to the most large and comprehensive protection;". No authority was cited for these *obiter* pronouncements, and the other judges made no comment on the issue, confining themselves to the point in question.

[136] *McMurchy* v *Campbell* concerned an allegation that a defamatory statement had been made in a report by a police Inspector to a superior officer in respect of a matter about which the Inspector had a duty to communicate. The fiscal was called as a second defender, seemingly on the basis that he had been a party to submitting the report. This being a defamation case, the issue of privilege was a live and relevant one, and indeed the court considered the report to be a privileged document requiring detailed averments of malice before any action could proceed. Again, the liability or otherwise of the Lord Advocate in damages for malicious prosecution was not an issue in the case, and that of the fiscal only peripherally relevant. The Lord Justice Clerk therefore did not touch on that issue. Lord Young however, having alluded to a case in which the absolute privilege of judges in court proceedings had been determined, went on to refer to the role of public prosecutors, saying:

> "Again, with respect to public prosecutors, I do not know that the law stands on any decision, but rather on generally received opinion. For example, no action will lie against the Lord Advocate for averments made by him in the discharge of his duty, even though they are said to be malicious. The public interest will not allow such actions."

These observations were obiter and were not based on any authority. Furthermore, they appear more apposite to address the question of the privilege which may attach to statements or observations made in court by the Lord Advocate rather than to the question of immunity from suit for malicious prosecution. I am strengthened in that opinion from reading the opinion of your Lordship in the chair, with which I am in agreement. Your Lordship's observations illustrate that in many cases there has been a confusion between

these two issues. As your Lordship notes the wrongs of defamation and malicious prosecution are different, and have been given separate treatment in both Glegg and Walker, a separation which is not really acknowledged in the criminal treatises touching on the matter. The fact that it may be necessary in the public interest that the Lord Advocate, and others, should have absolute privilege against a suit for defamation does not lead to a concomitant conclusion that there must also exist an absolute immunity from suit for malicious prosecution.

[137] Before turning to examine *Hester* v *McDonald* it may be helpful to consider how the matter stood in civil text books or writings up to the time of that decision. These appear to be consistent with the passages in Hume's *Lectures* to which your Lordship has made reference. Green's *Encyclopaedia of the Laws of Scotland*, 1898 edition, vol 10 contains a chapter on malicious prosecution, the author of which was A T Glegg. This confirms that the crime of malicious prosecution lies in instituting maliciously and without probable cause criminal proceedings against a person for a crime he has not committed. The article states that "the person sought to be held liable may either be a private individual who gives information to a person in authority, or the person in authority who takes the proceedings complained of". In the case of a public prosecutor, malice and want of probable cause must be specifically averred and put in issue. The article does not suggest that the Lord Advocate is not answerable in damages in such a case.

[138] The 1931 edition of the Encyclopaedia (Vol X11) article on malicious prosecution is largely in similar terms, being an edited version of Glegg's original.

[139] Glegg on Reparation, 4th edition 1955, and thus the edition which would have been current at the time of *Hester* does not appear to vouch the proposition which was stated in that case. The requirements of the wrong of malicious prosecution are identified as bringing

proceedings maliciously and without probable cause against a person for a crime which he has not committed, it generally being a condition precedent that the prosecution has failed or the conviction been reduced. The fact of conviction would of course be seen as negating want of probable cause.

[140] An action against the procurator fiscal or other public prosecutor required specific averments of malice and want of probable cause to put these points in issue. It is noted that:

> "It is in the public interest that liability in damages is thus limited in order that the prosecutor may have a free hand in dealing with crime, knowing that while he acts in the discharge of his duty and not from improper motive, he is not responsible. The privilege of criminal officials is simply the application of the principle which gives protection to all public bodies and officers in the discharge of their duty."

[141] There does not seem to be a proper basis in principle for exempting the Lord Advocate from this general principle. This point is also made by your Lordship in the chair [paras 86 -89] under reference to *Beaton* v *Ivory* and *Robertson* v *Keith*. As senior counsel for the second pursuer noted, the passage in Glegg echoes the passage in Bell's Principles, 10th edition, 1899, 20-40, dealing with wrongous imprisonment at common law, that:

> "The mere failure of an accusation will not infer damages against the accuser, if the circumstances justify his suspicion. 'And a procurator-fiscal or public prosecutor cannot be made liable in damages without averment and proof of malice and want of probable cause, the facts being averred from which malice is to be inferred, or at least of gross and culpable irregularity in procedure'".

[142] The more recent primary text book available at the time of *Hester* would have been Walker: Damages (1955) which defines the wrong of malicious prosecution in the same way as Glegg. The author states that in an action against "a public prosecutor or a person similarly placed" there must also be averments of malice and want of probable cause, which points must be put in issue, but there is again no exemption suggested for the Lord Advocate.

***Hester* v *McDonald***

[143] The opinion of the Lord President in *Hester* commences by considering the role of the Lord Advocate in the prosecution of crime, where he has a universal and exclusive title to prosecute on indictment, these being matters exclusively for him and exclusively within his province. He relies on the passages from Hume and Alison quoted above, based on Hume's footnote, and the passage from the 3rd edition of Renton & Brown, to state that "the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings brought before a Scottish Criminal Court by way of indictment". This is then expressed as creating an immunity from suit: "Never in our history has a Lord Advocate been sued for damages in connexion with such proceedings. On the contrary, our Courts have consistently affirmed the existence of such immunity on his part." The authority cited for these assertions are *Henderson* v *Robertson* and *McMurchy* v *Campbell* neither of which, as noted, appear to be authorities for such a proposition. The Lord President then compares the position of the procurator fiscal, where there are statutory provisions as to the extent of liability with that of the Lord Advocate where no such provisions have ever been enacted on the basis that "in connexion with proceedings by indictment, our law does not recognise any right to damages against the Lord Advocate or against those acting on his instructions". It is difficult, in light of the authorities examined, to see this as other than assertion.

[144] Lord Carmont's opinion was based entirely on the assertion that "the Lord Advocate and his subordinates are absolutely immune from attack in our Courts in actions of reparation by parties alleging injury done them through the exercise of the Lord Advocate's functions as prosecutor in respect of alleged crimes", citing no authority for this proposition.

[145] Lord Guthrie appears to rely almost entirely on Hume's note commenting that:

> "This statement by an institutional writer infers, in my opinion, that the Lord Advocate cannot be made liable in damages in respect of a prosecution in his name. It has been understood by Judges and by text writers since then, that that is the law."

For the latter statement he relies on Alison vol. ii, p. 92, *Henderson* v *Robertson*, and *McMurchy* v *Campbell*. The "generally received opinion" referred to by Lord Young in *McMurchy* is said to be reflected in legal texts in recent times, namely Green *Encyclopaedia of the Laws of Scotland*, vol. v, section 1138 (which refers to a passage which asserts, under reference to *Henderson* and *McMurchy*, that it is probable that the Lord Advocate has absolute privilege in defamation); and Renton and Brown, (3rd ed.) p. 450 (which in turn had relied on *Henderson* and *McMurchy)* to justify his conclusion that "it is a rule of the law of Scotland, founded on the public interest, that the Lord Advocate cannot be sued for damages in a civil action for any act done by him or on his behalf as public prosecutor."

[146] There appears to be a complete circularity of approach in which the only real basis for the immunity asserted rests on the passage in Hume's footnote. In my view the weight of authority is against the proposition that the Lord Advocate has an immunity from suit for malicious prosecution and the case of *Hester* v *McDonald* must be viewed as wrongly decided.

[147] As I indicated above [para 131], I do not consider that immunity from suit for malicious prosecution is necessary for the discharge of the Lord Advocate's duties. The arguments that such an immunity was necessary in the interests of the proper administration of justice are not sound. I accept that it is in the interests of justice that prosecutors should be protected against the consequences of mistake, negligence, error of judgement and similar matters. However this does not require an immunity from suit which protects the prosecutor who acts maliciously and without probable cause. The Canadian cases to which we were referred in particular explain the high threshold which is

necessary to succeed in such an action, and in my view this presents a clear protection for the honest but mistaken prosecutor.

[148] I agree with your Lordship that the existence of a right of action is highly unlikely to deter the robust and independent prosecutorial decision making which lies at the core of our system. The requirements of averring and proving both malice and want of probable cause, for which the test is very high, are unlikely to have an inhibiting effect on prosecutorial decision making. The exacting nature of the test is clearly expressed in *Nelles* v *Ontario* and *Miazga* v *Kvello*. The demanding character of what has to be proved, and the fact that liability will not be imposed where the prosecutor mistakenly proceeds "by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence" (*Miazga,* p378) seems to be substantially destructive of the "floodgates" and "chilling effect" arguments considered in *Gregoire* v *Biddle* and *Imbler* v *Pachtman*, particularly when taken with the continued existence of absolute privilege in defamation.

[149] I do not intend separately to address the subsidiary question of whether, had *Hester* v *McDonald* been correctly decided, is should nevertheless be overruled as a matter of public policy. It is enough to state that I am in complete agreement on this matter with your Lordship in the chair.

[150] In relation to article 8, in my view the key to this is to be found in para 114 of the opinion of your Lordship in the chair. The decision in *SXH* related to a situation where probable cause was conceded: thus prosecution in these circumstances could not imply a lack of respect for the right to private life. On the other hand, I cannot see that a prosecution mounted without probable cause and from malicious motives could do otherwise. The pursuers have averred that prosecution in this case was both malicious and embarked upon

without probable cause: whilst agreeing with your Lordship that Article 8 really adds nothing to the common law claim, the averments made are sufficiently relevant to merit inquiry.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 52**
A293/16 and A295/16

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LADY PATON

in the Reclaiming Motions

in the causes

(FIRST) DAVID JOHN WHITEHOUSE; and (SECOND) PAUL JOHN CLARK

Pursuers and Reclaimers

against

(FIRST) THE CHIEF CONSTABLE, Police Scotland; and
(SECOND) THE LORD ADVOCATE

Defenders and Respondents

**First Pursuer: Dunlop QC, McKinlay; Urquharts (for Livingstone Brown, Glasgow)**
**Second Pursuer: Fairley QC, McNaughtan; Kennedys Scotland (for Beltrami & Co, Glasgow)**
**First Defender: no appearance**
**Second Defender: Moynihan QC, DB Ross QC, Charteris; Scottish Government Legal Directorate**

30 October 2019

[151] I am grateful to the Lord President and to the Lord Justice Clerk for their opinions. I agree with their reasoning and conclusions. In relation to Article 8 of the European Convention on Human Rights, it seems to me that charging a person, remanding him in custody, putting him on petition, and serving him with an indictment, will inevitably interfere with his private and family life, including his reputation. In most cases such

interference, based (as it usually is) on sufficient evidence that an offence has allegedly been committed by him, would be justifiable as "necessary in a democratic society in the interests of … public safety … for the prevention of … crime, for the protection of … morals … for the protection of the rights and freedoms of others" (Article 8.2 of the Convention). Thus whether or not Article 8 was engaged (and there may be differences of view on that matter: cf *R* v *G* [2009] 1 AC 92), the authorities' actions would be deemed justified in terms of Article 8.2. There would accordingly be no disrespect for private and family life, and no breach of Article 8. The individual suspected of the crime would face pre-trial, trial, and post-trial proceedings, protected throughout by the procedures laid down by domestic Scots law and Article 6 of the Convention.

[152] However the circumstances involving Mr Whitehouse and Mr Clark were exceptional, and (it is to be hoped) rare. If the pursuers prove their averments, it would appear that the authorities had no evidence of any alleged crime having been committed by either pursuer. The pursuers were nevertheless taken from England, driven to a police station in Scotland, charged, kept in custody for several days, placed on petition, and ultimately served with indictments. On the basis that the pursuers succeed in proving those averments, together with their averments about the lack of any evidence against them, I consider that there is a stateable case that Article 8 was, in their case, engaged. The pursuers' private and family lives, including their reputations, were, on those averments, not respected, and the justification contained in Article 8.2 could not be prayed in aid. This would be an unjustifiable interference with the exercise of the pursuers' rights to private and family life: cf the observations of Lord Phillips in *Norris* v *Government of the USA (No 2)* [2010] 2 AC 487 at paragraph 52; Lord Kerr in *SXH* v *CPS* [2017] 1 WLR 1401 at

paragraph 45, and Pitchford LJ in the Appeal Court in *SXH* v *CPS* [2014] 1 WLR 3238 at paragraphs 70-71.

[153] It might be suggested that an Article 8 case adds little to the common law case. But proof of malice is not necessary for a breach of Article 8: cf *Keegan* v *UK* (2007) 44 EHRR 33 at paragraphs 29 to 36 and paragraph 54; *Cemalettin* v *Turkey* (App No. 22427/04), unreported, 18 February 2009. It is possible therefore that a pursuer who failed to prove the elements necessary for a common law claim might nevertheless succeed in terms of Article 8.

[154] In the result I agree that both the common law case and the Article 8 case should proceed to a proof before answer in each case.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 52**
A293/16 and A295/16

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LORD MENZIES

in the Reclaiming Motions

in the causes

(FIRST) DAVID JOHN WHITEHOUSE; and (SECOND) PAUL JOHN CLARK

Pursuers and Reclaimers

against

(FIRST) THE CHIEF CONSTABLE, Police Scotland; and
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**Second Pursuer: Fairley QC, McNaughtan; Kennedys Scotland (for Beltrami & Co, Glasgow)**
**First Defender: no appearance**
**Second Defender: Moynihan QC, DB Ross QC, Charteris; Scottish Government Legal Directorate**

30 October 2019

[155] I am in complete agreement with the views expressed by your Lordship in the chair and by the Lord Justice Clerk, and I have nothing further to add.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2019] CSIH 52**
A293/16 and A295/16

Lord President
Lord Justice Clerk
Lady Paton
Lord Menzies
Lord Brodie

OPINION OF LORD BRODIE

in the Reclaiming Motions

in the causes

(FIRST) DAVID JOHN WHITEHOUSE; and (SECOND) PAUL JOHN CLARK

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against

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30 October 2019

[156] I am in complete agreement with the views expressed by your Lordship in the chair and by the Lord Justice Clerk, and I have nothing further to add.