SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 31
COS-A156-24

Lord Justice Clerk
Lord Malcolm
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in the reclaiming motion

in the cause

MARK HIRST

Pursuer and Respondent

against

THE CHIEF CONSTABLE

First Defender

and

THE LORD ADVOCATE

Second Defender and Reclaimer

Pursuer and Respondent: Smith KC, Dangerfield (sol adv); DAC Beachcroft Scotland LLP
First Defender: No Appearance
Second Defender and Reclaimer: Moynihan KC; Scottish Government Legal Directorate

18 June 2026

Introduction

[1] The pursuer, who is the respondent in this reclaiming motion (appeal), seeks damages of £200,000 from the Lord Advocate for malicious prosecution following his

acquittal of a charge alleging threatening behaviour on summary procedure at Jedburgh Sheriff Court. It arose from the pursuer posting online a recording of him making comments about witnesses who testified in the High Court trial of the former First Minister of Scotland, Alex Salmond, in March 2020. He appeals against the decision of 5 February 2026 by the Lord Ordinary (the judge hearing the argument at first instance on whether the pursuer had averred a relevant case) to halt proceedings by dismissing the action because of the terms of the Criminal Procedure (Scotland) Act 1995 section 170.

[2] The pursuer's claim was remitted from the Sheriff Court at Jedburgh to this court. Following a diet of debate on 9 May 2025, the Lord Ordinary held that, on the papers before him, there was a lack of objective reasonable probable cause for criminal proceedings to have been taken against the pursuer by the reclaimer. However, he dismissed the claim as irrelevant because the Lord Advocate has immunity from liability in summary proceedings under section 170 of the 1995 Act. He proceeded, under section 4 of the Human Rights Act 1998, to declare section 170 incompatible with the right of access to a court for determination of his civil rights as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

[3] The Lord Advocate (the second defender in the action and the reclaimer) argues that the Lord Ordinary erred in declaring section 170 of the 1995 Act incompatible with the Convention since it was within her gift to waive the protection afforded by the provision. She contends that the declaration of incompatibility was unnecessary since she had waived the protection and no plea-in-law associated with section 170 was insisted upon. She also maintains that the Lord Ordinary erred in not limiting the declaration to prosecutors when he heard no submissions from the perspective of clerks of court and justices of the peace who are also protected by section 170. She further argues that he erred in finding that there

was no objective reasonable probable cause for prosecutorial action against the respondent. She maintains that the pursuer had failed to plead a relevant case such that the claim ought to have been dismissed on that basis.

[4] The pursuer supports the reclaiming motion to some extent. He argues that the Lord Ordinary was correct to find that there was no objective reasonable probable cause to bring the prosecution against him, but that he erred in holding that section 170 could not be waived by the Lord Advocate. Proceeding on those assumptions, he invites the court to recall the interlocutor of dismissal and allow the case to proceed to proof before answer on subjective reasonable probable cause and malice.

[5] The case against the first defender, the Chief Constable of Police Service of Scotland, was dismissed on the ground that there was no relevant case pled against her. That decision is not challenged.

Certain provisions

[6] Article 6 of the Convention, so far as relevant, provides:

> "**Right to a fair trial**
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

[7] Section 170 of the 1995 Act provides:

> "**Damages in respect of summary proceedings**
> (1) No judge, clerk of court or prosecutor in the public interest shall be found liable by any court in damages for or in respect of any proceedings taken, act done, or judgment, decree or sentence pronounced in any summary proceedings under this Act, unless—
>
> (a) the person suing has suffered imprisonment in consequence thereof; and

(b) such proceedings, act, judgment, decree or sentence has been quashed; and

(c) the person suing specifically avers and proves that such proceeding, act, judgment, decree or sentence was taken, done or pronounced maliciously and without probable cause.

(2) No such liability as aforesaid shall be incurred or found where such judge, clerk of court or prosecutor establishes that the person suing was guilty of the offence in respect whereof he had been convicted, or on account of which he had been apprehended or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence.

(3) No action to enforce such liability as aforesaid shall lie unless it is commenced within two months after the proceeding, act, judgment, decree or sentence founded on, or in the case where the Act under which the action is brought fixes a shorter period, within that shorter period.

(4) In this section 'judge' shall not include 'sheriff', and the provisions of this section shall be without prejudice to the privileges and immunities possessed by sheriffs."

[8] Neither party referred to this provision in the proceedings at first instance until, while preparing his Opinion, the Lord Ordinary appreciated that section 170 of the 1995 Act may be relevant and invited written submissions. Parties were agreed that since the Lord Advocate had correctly waived the protection under section 170 because it was incompatible with Article 6, the Lord Ordinary could ignore it. If necessary, he could read it down under the Human Rights Act 1998, section 3.

[9] Sections 3 and 4 of the Human Rights Act provide:

"**3.— Interpretation of legislation.**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.…

4.— Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
> …"

The Court of Session is included in the definition of court in subsection (5).

Criminal prosecutions in Scotland

[10] As the Lord Justice General (Clyde) explained in *McBain* v *Crichton* 1961 JC 25, at 29:

> "The Lord Advocate … is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone."

[11] In practice, the Lord Advocate generally delegates the decision on whether to prosecute in the public interest. For High Court cases the delegation is to Advocates Depute, collectively known as Crown Counsel. For cases destined for summary prosecutions, those tried by a sheriff without a jury, the delegation is to area Procurators Fiscal and their deputes. In particularly complex, sensitive or high-profile summary cases, instructions may be sought from an Advocate Depute. All prosecutors apply the Prosecution Code publicly available on the Crown Office and Procurator Fiscal Service website.

[12] The Code, published in 2001, embodies what has been known to generations of lawyers in Scotland. If there is no legal impediment to a prosecution in domestic or international law, the considerations in determining whether to take criminal proceedings involve sequential assessments. First, whether there is sufficient evidence in law. Generally, this means there must a case for which there is corroboration of the essential facts of whether a crime was committed, and that the accused was the perpetrator. Secondly, if so, the prosecutor must consider what action is in the public interest. As the Lord Advocate (Lord Mackay of Drumadoon) stated: "in every case the procurator fiscal has to decide

whether a prosecution would be in the public interest", 1996 SLT News 51. Accordingly, a prosecutor must be satisfied that it is in the public interest to launch a prosecution against an accused person before doing so. The Code sets out 13 non-exhaustive examples of considerations that may be relevant in assessing the public interest. These include: the nature and gravity of an offence; the circumstances of victims and other witnesses and any impact on them; the circumstances of the accused; a victim's attitude; the accused's motive; the effect of prosecution on the accused; and public concern.

The prosecution of the respondent

[13] On 23 March 2020, the former First Minister of Scotland, Alex Salmond, was acquitted of various sexual offences at the High Court of Justiciary at Edinburgh. On 10 March 2020, the trial court had made an order preventing the publication of the names and identity, and any information likely to disclose the identity, of the complainers in the case at common law and under section 11 of the Contempt of Court Act 1981. The order was subsequently varied on 11 February 2021: *HM Advocate* v *Alexander Elliot Anderson Salmond* [2021] HCJ 1, 2021 SLT 271.

[14] The respondent provided commentary of Mr Salmond's acquittal on his YouTube channel. There he made the following statements on 29 March 2020 (the pleadings and the Lord Ordinary's Opinion clarify that the recording of the pursuer was posted six days after Mr Salmond was acquitted). We have divided the transcript of his remarks into three parts. The Lord Ordinary quoted only the second section in his Opinion:

> "So today in all the papers we have had this statement issued eh by the anonymous female accusers. I happen to know every single one of them and em they issued a statement via Rape Crisis which is a registered charity which receives most of its money from the Scottish Government basically saying how upset they were em that the criminal allegations that they made, the false allegations that they made had been

> thrown out by a Trial at the High Court in Edinburgh em which was made up of a female judge, eh nine majority of female jury, eh numerous female witnesses all contradicting what these accusers and conspirators had to say and em so they have they claim there was no collusion yet they have managed to sign together an anonymous open letter. I don't know how it can be anonymous when they are maintaining their anonymity but
>
> I suspect very strongly that as this rumbles on that that precious anonymity that they have sought will not be em continued because these women and not just these women. Some of the people involved in this eh are senior members of the Scottish Government and are senior members of the SNP and they have been involved in this act of collusion to try and em destroy Alex Salmond's reputation and there's not a cat's chance in hell that they are going to get away with that eh so they are going to reap a whirlwind no question about it and eh that's going to happen as soon as this virus emergency is out of the way then eh there is going to be a bit of reckoning taking takes place and will clear out the soft independent (*sic*) supporters which are currently leading the party, that's why we have seen no movement in nearly 6 years
>
> and em we are gonna claim the party back and get the country back on course for independence but eh to do that we are gonna have to wade through eh what's left of this leadership and get them out the way which I am confident we will do."

[15] Five of the women who had given evidence against Mr Salmond complained about these statements to the police and to prosecutors, and a complaint was made by Rape Crisis Scotland. Following discussion between police and procurators fiscal depute, and consideration by the office of the Deputy Crown Agent for Serious Casework, a search warrant was sought and ultimately granted at Edinburgh Sheriff Court on 14 April 2020. It was averred within the warrant that there were reasonable grounds for believing that evidence material to the investigation of a contravention of section 127(1) of the Communications Act 2003 could be found in the pursuer's property. Section 127(1) of the 2003 Act provides that it is an offence to send, or cause to be sent, by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.

[16] The warrant was executed on 20 April 2020. The resulting search led to the seizure of several mobile devices. The pursuer was interviewed by the police with a solicitor on 12 May 2020 after which he was cautioned and charged under section 127(1) of the 2003 Act.

[17] A Standard Prosecution Report was sent by the police to COPFS on 20 May 2020. The procurator fiscal reported to Crown Office on 21 May 2020 as follows:

> **"ANALYSIS**
> Identification & Actus Reus
>
> [Two police officers] can identify the accused as the individual shown in the video. They can also identify his voice from the telephone recording and will speak to the contents of both recordings.
>
> Proof that the accused posted the video to YouTube and Twitter comes firstly from the admissions made at interview (and may be enhanced by the call he made to police). That may be corroborated by the examination of the devices which showed that the accused's iPad was logged into the YouTube profile to which the video was uploaded and the mobile telephone was logged into the Twitter profile on which the link was posted. Given the accused is the subject of the recording, which he has clearly filmed himself, it is submitted that this is circumstantial evidence which is sufficient to corroborate his admission.
>
> Nature of the recording & *mens rea*
> The nature and content of the recording, it is submitted, amounts to threatening behaviour which would cause fear or alarm to the reasonable person. The following comments in particular are acknowledged:
>
> *"That precious anonymity that they've sought will not be continued"*
>
> *"…they've been involved in this active collusion…and there's not a cat's chance in hell that they're going to get away with that. So they're going to reap a whirlwind."*
>
> *"As soon as this virus emergency is out the way, then there's going to be a bit of a reckoning takes place."*
>
> Set in the context of the significant public interest in the trial and verdict, and in particular calls from various individuals (some of whom are high profile) for the complainers to be named (and by some individuals, calls for them to be prosecuted), these comments are objectively threatening.
>
> Evidence that the various complainers contacted police, and of the comments made by Rape Crisis would certainly assist with proving that the conduct was threatening. However, it is not recommended that any of those individuals be included as

potential witnesses in this case. Thus, the matter would require to proceed on the basis of the reasonable person test, and in the absence of any evidence of actual fear or alarm.

It is respectfully submitted that whilst the content of the video is directly threatening towards the particular complainers in the Salmond case, it also has the potential to be indirectly threatening to complainers in other sexual offences cases past, present and future insofar as it may diminish their confidence in the justice system's ability to properly protect their anonymity. Whilst this was clearly not the accused's intention, he has been reckless as to the impact his recording may have had on others outwith the Salmond case.

Insofar as the accused's mens rea, it is respectfully submitted that this may be inferred from the recording itself. Whilst his position at interview was that he did not intend to offend the complainers, at the very least it could be argued that he was reckless as to whether he caused them fear or alarm, and a reasonable person ought to have known that they would feel threatened by the content of the recording.

Recommendation

It is respectfully submitted that there is sufficient evidence to prosecute the accused for a contravention of s.38(1) of the Criminal Justice & Licensing (Scotland) Act 2010, in terms of the following draft charge

[In the terms of the charge proceeded with, set out at para [19] below.]

It is respectfully submitted that there is a public interest in action being taken, not solely due to the profile of the Salmond case which was the catalyst for the accused's conduct, but also because the comments made by the accused have potential to impact upon complainers in other sexual offences cases and their faith in the criminal justice system in Scotland.

That said, the accused has no previous convictions. The video has now been removed and at interview he appeared to be genuinely contrite and remorseful (albeit that may well be offset by the more recent YouTube video). A trial is likely to become the focus of significant media attention and online commentary, particularly from Salmond supporters. As with the Salmond trial, it is likely that any trial would become the subject of significant political commentary. It is submitted that this would be likely to have a further detrimental impact on the complainers in Operation Diem.

Careful consideration has been given to whether the issue of a warning letter would sufficiently meet the public interest in the circumstances. This conduct must be considered in the context of the very high-profile nature of the Salmond trial, and the fact that the complainers were the subject of vile abuse and threats – predominantly through social media – from a variety of individuals at the time the video was posted. COPFS will be under scrutiny in the aftermath of the trial, and may risk

> contributing to the undermining of confidence in a robust system for securing the anonymity of complainers in the prosecution of sexual offending if we are considered not to be taking a robust approach to conduct of this nature.
>
> Whilst a trial would inevitably have an impact upon the complainers, it is respectfully submitted that it may be inferred that they nevertheless have a desire to see robust action given they reported the matter to Police Scotland. Any impact would be minimised by the fact that it is recommended that they are not witnesses for the purposes of this case.
> On balance, having carefully considered matters and with particular consideration being given to the public interest and the need for justice to be seen to be done, it is respectfully recommended that the accused be prosecuted in the Sheriff Court at summary level in respect of the draft charge above."

[18] Crown Counsel provided instructions on the same day, noting:

> "[Crown Counsel] agrees that there is sufficient evidence to justify proceedings as recommended. There is a strong public interest in bringing proceedings. CC agrees that it is not necessary to call any of the complainers as witnesses. There was actual harm here but that, of course, is not necessary for proving the crime.
>
> CC notes the expressed contrition by the accused which appears different to his public pronouncements. Summary proceedings are appropriate. I do not think a warning letter would suffice. Doubtless he will run a "free speech" defence."

[19] On 7 January 2021 the respondent appeared for trial on the following charge.

> "On 29 March 2020 at Jedfoot Cottage, Jedburgh or elsewhere in Scotland, you MARK JOHN HIRST did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did create a video recording in which you uttered threatening remarks, directed at the complainers in the High Court prosecution of Alexander Elliot Anderson Salmond, and did thereafter upload the said video to the internet; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

[20] The pleadings disclose that a joint minute of agreement was lodged at trial establishing that the pursuer had posted a video together with what the video depicted, and a transcription of what the pursuer said. The recording was played to the sheriff at trial.

[21] The summary of evidence provided with the complaint (the document on which a charge is brought in summary proceedings,), and provided to us by parties, states that the pursuer delivered his remarks to the camera forcefully and directly. It also explained that

following the video being uploaded on YouTube and Twitter it was open for general viewing purposes that prompted comments from several people supporting the pursuer's comments. Examination of the pursuer's Twitter account on 3 April 2020 revealed a brief attached to a thumbnail picture of the pursuer stating:

> "Scottish independence, nothing less. Spending isolation sharpening my pitchfork. Defence witness for #Alex Salmond- Former TV and broadcast journalist" (the last phrase being a reference to the pursuer)."
> [Emphasis added]

The sentence underlined was deleted by the user of the account, the pursuer, on 8 April 2020.

[22] At the end of the prosecution case, the sheriff upheld a no case to answer submission in terms of section 160 of the 1995 Act and acquitted the pursuer. The implication of acquittal under section 160 is that the sheriff considered that the evidence led by the prosecution was insufficient in law to justify the pursuer being convicted of the offence charged (or any other offence of which he could have been convicted on the complaint). Since there was plainly sufficient evidence of identification and the pursuer's conduct, it can be inferred that the sheriff did not consider that the material before him constituted the crime charged.

The pursuer's averments

[23] The YouTube video constituted proper comment on a matter of public interest and was obviously a matter of fair publication on issues of public interest. Sandy Brindley, at that time the Chief Executive of Rape Crisis Scotland, had a special relationship with the Scottish Government and with COPFS. She had direct access to its personnel at the highest levels. Ms Brindley and some of the complainers in the Alex Salmond trial made complaints

to Police Scotland/COPFS against the pursuer. COPFS was involved in the case at a high level from an early stage. This was an extraordinary response to what was alleged. The resulting SPR sought to form a false impression of a "standard" police investigation being newly reported for consideration by COPFS.

[24] Ms Brindley and the complainers had direct access to the "Salmond team" at COPFS. They used this direct access throughout the case against the pursuer. Their access to, and influence over, the staff at COPFS and Police Scotland substantially exceeded that afforded to the ordinary citizen enabling Ms Brindley and the complainers to have COPFS do their bidding that the pursuer be investigated and prosecuted despite there being no reasonable and probable cause.

[25] The use of the term "obscene" within the application for a search warrant (incorporated and adopted into the pursuer's condescendence 6) constituted a statement which the police and COPFS staff knew to be false. There was no evidence of a crime justifying application for a warrant. Further, the application for and exercise of the warrant was wholly unnecessary, disproportionate and an abuse of process.

[26] What was said in the recording did not amount to any offence. It followed that there was no objective reasonable or probable cause to justify the pursuer being arrested, interviewed or charged. Further, there was no basis for subjective (honestly or genuinely held) belief that there was reasonable or probable cause for a prosecution because the content of the video was clearly not threatening and could not possibly be construed as being a criminal offence. The motive of the complainers was political, namely, to prevent the pursuer from further criticism of them, and to deter others from criticising them. It was to silence a political opponent and to punish the pursuer for speaking out as he did. The ulterior and improper motive of COPFS [required for malice] was "doing the bidding" of the

complainers, thus adopting their political agenda. The suggestion that there was a strong public interest to prosecute revealed that to be the true motive behind the prosecution.

The Lord Ordinary's decision on relevancy and section 170

[27] The question of objective reasonable and probable cause was one for the judge to determine: *Glinski* v *McIver* [1962] AC 726, *Grier* v *Lord Advocate* [2021] CSOH 18, 2021 SLT 371. It was clearly highly significant that the sheriff sustained a submission of no case to answer. For a charge under section 38 to succeed, the behaviour in question must have been threatening or abusive such that it would be likely to cause a reasonable person fear and alarm. It was not enough for it only to be annoying or offensive: *R* v *Murphy* [2015] HCJAC 34, *Angus* v *Nisbet* [2010] HCJAC 76 and *Smith* v *Donnelly* 2002 JC 65.

[28] The sheriff sustaining a submission of no case to answer indicated that there was no objective reasonable and probable cause. The Lord Ordinary did not consider that there was a case fit to try. He did not consider that what was said in the video could be seen as behaviour that was threatening or abusive. It did not contain a threat to disclose the names of the complainers. The statement made was passive. It may have been offensive, but that did not mean it was abusive. The post could be seen as a comment on a matter of some public interest which could be protected by the right to freedom of expression in Article 10, even if it was ill-informed and ill-judged. There was a lack of objective reasonable and probable cause.

[29] Malice covered not only spite and ill-will but also any motive other than a desire to bring a criminal to justice and circumstances in which the prosecutor is attempting to obtain some extraneous benefit: *Whitehouse* v *Lord Advocate* [2019] CSIH52, 2020 SC 133 at [32]. On a fair reading, the pleadings indicated what was meant by "do the bidding" of the

complainers. If the motive for bringing the prosecution was that it was in the public interest to reassure potential complainers in other cases, that could amount to an ulterior motive when there was no reasonable and probable cause.

[30] Since the pursuer had pled a relevant case on malice, he had also pled a sufficient case on the related subjective reasonable and probable cause if it be a separate requirement. It could not be said that the pursuer would necessarily fail to establish an absence of subjective reasonable and probable cause if he proved all his averments. Accordingly, it could not be said that the pleadings were irrelevant. There were sufficient averments to allow proof before answer. Since the contents of the recording were not "grossly offensive or of an indecent, obscene or menacing character", the application for a warrant meant there was no reasonable and probable cause for the prosecutor to instruct the police to seek a warrant.

[31] When the Lord Ordinary drew section 170 of the 1995 Act to the attention of parties, the pursuer submitted that the Lord Advocate had provided an assurance that she would not plead section 170 as a secondary defence. If necessary, the proper course of action would be to determine if the pursuer's case was otherwise relevant and, if so, to invite the pursuer to amend to raise a compatibility issue as required by Rule of Court 25A. The Lord Advocate confirmed in her written submissions that she would not plead "the section 170 defence". The proper course was to read down the provision under section 3 of the 1998 Act as conferring a defence that a defender was entitled to waive. Since the Lord Advocate did not invoke the defence, the Lord Ordinary should ignore section 170.

[32] The Lord Ordinary narrates that parties did not explain on what basis section 170 was incompatible with Convention rights in their submissions. He researched the matter for himself and considered *Osman* v *United Kingdom* (2000) 29 EHRR 245 to justify his

determining that the immunity in section 170 is incompatible with Article 6. He considered that section 170 provided an absolute immunity and, as such, infringed the Article 6 rights of the pursuer and other prospective claimants. It was not possible to read down the provision under section 3 of the 1998 Act without going against the grain of the provision: *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557. It would be inconsistent with the provision to change a blanket immunity to a right to claim an immunity, creating a very different statutory scheme. There was no way to make section 170 Convention compatible. He also noted that since the 1995 Act is an Act of the United Kingdom Parliament, there is no devolution issue.

[33] The Lord Ordinary explained that intimation had been given to the Advocate General and she had not sought to join the proceedings. There was no basis on which he could deprive it of effect. He had no option but to declare under section 4 of the 1998 Act that section 170 was inconsistent with ECHR Article 6(1) as an unjustifiable restriction on the pursuer's right to have a determination of the merits of his claim that he was the subject of a malicious prosecution. He was not attracted by the suggestion of dealing with relevancy first as he considered immunity to be the key issue in determining relevancy as, given his acquittal, the pursuer could not succeed because of section 170. The action fell to be dismissed.

The status of section 170: *Osman* and subsequent developments

[34] In *Osman*, the wife and son of a man murdered by a stalker raised an action in negligence against the police. The domestic courts dismissed the claim as irrelevant standing the House of Lords' judgement in *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 which had the effect of excluding liability of the police for negligent acts in the context of the investigation and suppression of crime. The claimant had no substantive right

recognised under domestic law to claim damages from the police in these circumstances. The European Court of Human Rights held that Article 6 was applicable and had been violated. The right to institute proceedings before courts in civil matters was one aspect of the right guaranteed by Article 6. The ECtHR noted the general law in England in negligence claims and considered that Article 6 applied. There was a margin of appreciation accorded to contracting states and limitations were legitimate so long as they did not impair the very essence of the right. A limitation would not be Convention compatible if it did not pursue a legitimate aim and if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. All such matters should have been considered on their merits and not automatically excluded by a rule granting automatic immunity to the police. In this case there was a disproportionate restriction on the applicants' right of access to a court in breach of Article 6(1).

[35] The ECtHR's decision in *Osman* was doubted in *Matthews* v *Ministry of Defence* by both the Court of Appeal, [2002] EWCA Civ 773, 2002 1 WLR 2621, and the Judicial Committee of the House of Lords, [2003] UKHL 4, [2003] 1 AC 1163. The claimant had served in the Royal Navy from 1955 to 1968 and was diagnosed with asbestos related conditions in 1999. He sued the Ministry of Defence for negligence and breach of statutory duty by exposing him to asbestos fibres and dust. The Ministry claimed immunity under section 10 of the Crown Proceedings Act 1947 exempting the Crown from liability in tort in specified circumstances for injuries suffered by members of the armed forces for events occurring before 1987.

[36] In delivering the judgment of the Court of Appeal, at [34], Lord Phillips MR identified that Article 6 is essentially concerned with judicial process. Whether a civil right exists is a matter of the substantive law of the contracting states. If a preliminary issue is

resolved against a complainant, there is a procedural bar to exploring facts before the court but this procedure does not infringe Article 6. He went on to identify examples of procedural rules subject to the requirements of Article 6 and rules of substantive law that delimit rights and liabilities that arise under the civil law. Article 6 did not guarantee the content of civil rights and obligations of the contracting states: *James* v *United Kingdom* (1986) 8 EHRR 123. Lord Phillips, at [47], considered immunity from liability as substantive and immunity from suit as procedural, whilst acknowledging that it was not always easy to distinguish between the two.

[37] In the House of Lords, Lord Bingham noted that at common law any claim in tort against the Crown was precluded. We note Lord Hope's explanation at [53] following his consideration of Lord Walker's analysis of the ECtHR caselaw and his own:

> "53. The detailed reasoning of the European Court in these cases does not provide us with much by way of guidance as to how the dividing line between these two concepts is to be identified. It is not possible to find a clear *ratio* in these decisions which will lead to the right result in every case. So it is better to have regard instead to the underlying principles. On this matter I have reached the same conclusion as my noble and learned friend Lord Hoffmann. One can at least say that there is a plain and obvious difference in principle between a procedural bar which impairs or restricts the enjoyment or enforcement of a right on the one hand and a substantive bar which prevents an alleged right from ever coming into existence at all. What article 6(1) seeks to do is to protect the individual against anything which restricts or impairs his access to the courts for the determination of a civil right whose existence is at least arguable. But the precise scope and content of the individual's civil rights is a matter for each state party to determine. These are the broad Convention principles. They are likely to provide the best guide as to the side of the line on which any given case lies."

[38] Lord Walker, at [128], explained that bars arising from a defendant's right to invoke state or diplomatic immunity were procedural in the sense that the immunity may be waived. He explained, at [142], that "…article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content

of its national law." At [143] he concluded that section 10 of the 1947 Act was a matter of substantive law. The appeal was refused.

[39] In *Roche* v *United Kingdom* (2006) 42 EHRR 30, another case concerning section 10 of the 1947 Act, the majority of the Grand Chamber supported the House of Lords' decision and reasoning in *Matthews*. The applicant maintained that section 10 breached Article 6 by depriving him and other servicemen of suing the Crown for injuries in tort law. At [116] – [121] the ECtHR restated that while Article 6 secures to everyone the right to have a claim relating to civil rights and obligations before a court, it does not guarantee any particular content for civil rights in the substantive law of contracting states. It extends only to a right which can be said, at least on arguable grounds, to be recognised under domestic law. The court noted the necessity of maintaining the procedural/substantive distinction as the court had explained in *Z* v *United Kingdom* (2002) 34 EHRR 3 and reiterated that it was a fundamental principle. No indication to the contrary could be taken from *Al-Fayed* v *United Kingdom* (1994) 18 EHRR 393, where the particular circumstances had made it unnecessary for the court to distinguish substantive limitations and procedural bars. Article 6 could, in principle, have no application to substantive limitations on a right existing under domestic law. At para [121] the court explained that:

> "The Court must not be unduly influenced by, for example, the legislative techniques used or by the labels put on the relevant restriction in domestic law: as the Government noted, the oft-used word "immunity" can mean an "immunity from liability" (in principle, a substantive limitation) or an "immunity from suit" (suggestive of a procedural limitation)."

[40] On the case before it, the court concluded at [124] that it found:

> "…no reason to differ from the unanimous conclusion of the Court of Appeal and the House of Lords [in *Matthews*] as to the effect of s.10 in domestic law. It considers that the impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law. In such circumstances, the applicant had

> no (civil) "right" recognised under domestic law which would attract the application of Art.6(1) of the Convention."

[41] Returning to the pursuer's case, the court drew this general line of authority to parties in advance of the hearing, inviting them to make submissions on the question of whether Article 6 was engaged. Senior counsel for the Lord Advocate explained that the Lord Advocate did not wish to change her stance that section 170 was incompatible with Article 6. He proposed that one view the court may take was that there were two lines of authority in Strasbourg and that it was at large for us to choose between them. He helpfully drew our attention certain other cases, founding particularly on *Bakoyanni* v *Greece*, Application no. 31012/19, explaining that it was this decision that prompted him not to argue that section 170(1) was a substantive provision such that Article 6 was not engaged.

[42] In *Bakoyanni*, the first section of the ECtHR sitting as a chamber of seven judges, resolved the complaint without reference to any of the cases on the importance of the substantive/procedural distinction. The applicant, a Greek MP, claimed that she had been defamed by the Greek Minister of Defence, also an MP, in a tweet which was said to offend against the applicant's dignity and honour. She filed a criminal complaint before the Athens prosecutor of first instance, requesting that, in the event of any conviction, the judgement be published in two Athenian newspapers. MPs had immunity under Greek domestic law for statements made by them and the prosecutor required authorisation to bring a prosecution from the Committee on Parliamentary Ethics. The Committee held that only Parliament could initiate criminal proceedings in respect of the MP and, in the event, there was no prosecution. The applicant brought a subsequent civil claim for compensation for libel. She was awarded EUR 5,000, although by the time the chamber considered the application, that

decision had been successfully appealed. Her motion for the civil judgement to be published was refused.

[43] The Greek Government did not argue the substantive/procedural distinction but contended that since the applicant had received compensation for a breach of her "right to personality" her civil rights had not been affected by the immunity. They had been satisfied by compensation. The applicant insisted that publication of a judgment of the criminal court was the only way to restore her reputation. She argued that parliamentary privilege did not apply to the particular statement by the MP, the Government had not explained the legitimate aim justifying the restriction and the damage to her reputation was not linked to the MP's parliamentary functions.

[44] It followed that the court in *Bakoyanni* did not consider the case-law on the substantive/procedural distinction. While it noticed *Grzeda* v *Poland* [GC], (2022) 53 BHRC 631 at [343] (which was dealing with matters that do fall within the ambit of the Convention) it did not notice the fundamental points made in that case at [257] and [258] quoted at para [53] below. The court in *Bakoyanni*, at [64], appeared to propose that it must be satisfied that the limitation imposed on the applicant's access to a court was proportionate to the legitimate aim to be pursued. The court noted that the law had since changed in Greece, allowing a person in the applicant's position to assert civil claims before the Special Court. The court considered that the crucial point was that publication of a judgement in newspapers was only possible in the context of criminal proceedings following a request of the victim. The impossibility of the applicant initiating criminal proceedings against the MP meant that she could not achieve her aim of restoring her reputation in the eyes of the public. The offending tweet was not linked to the exercise of the MP's parliamentary or ministerial functions. In these circumstances, with particular emphasis on the last two

factors, the refusal to lift the MP's immunity impaired the very essence of the applicant's right of access to a court. Accordingly, there was a violation of Article 6 (1).

[45] Finally, the Lord Advocate proposed that observations by the ECtHR in *Z* v *United Kingdom*, supported the view that it may sometimes be appropriate for the court to examine whether a limitation impaired the very essence of the right and whether it pursued a legitimate aim and proportionality between the means employed and the aim sought to be achieved.

[46] Senior counsel for the respondent associated himself with the submissions on this point for the Lord Advocate in so far as they suggested that Article 6 was engaged.

Assessment of Article 6

[47] So far as reliance is placed on *Z* v *United Kingdom*, it is important to note that at [92] the court presupposed that there was an unlawful interference with a civil right. That right was not absolute. The court noted that no procedural rules or limitation periods were invoked. The House of Lords' decision that there was no duty of care in the applicants' case was neither an exclusionary role nor an immunity depriving the applicants of access to a court. The court explained at [96] that:

> "It is not enough to bring Article 6(1) into play that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm."

[48] At [100], the court further concluded:

> "In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law."

[49] The gap in domestic law did not give rise to an issue under Article 6 but it did under Article 13 (effective remedy for a breach of convention rights) where the court had found that the Article 3 rights of children were violated while in local authority care. There was no violation of Article 6.

[50] So far as *Bakoyanni* is concerned, we note the very particular circumstances of the case and how those circumstances informed the decision. That decision of seven judges in which no consideration was given to judgments of the Grand Chamber by 17 judges (excepting *Grzeda* without referring to paras [257] and [258]) where the importance of the substantive/procedural distinction was reiterated, does not convince us that there remains two competing and contradictory lines of authority.

[51] Senior counsel for the Lord Advocate did refer to *Grzeda*. The applicant judge complained that he had been denied access to a court in order to challenge the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary (NCJ). The NCJ's purpose was to safeguard the independence of courts and judges in Poland. One of its functions was to nominate candidates for appointment to judicial office. The Polish Constitution laid down rules concerning the NCJ's composition, specifying the members' terms of office and the manner of their appointment. In January 2016, the applicant was elected as a judicial member of the NCJ for a four-year term as provided for by the Constitution. Under Polish legislation, the NCJ's judicial members were elected by assemblies of judges of the ordinary and administrative courts. In January 2017, the Polish government announced plans for judicial reform regarding the NCJ and the courts. In June, the Constitutional Court held that the provisions governing the procedure for electing NCJ members from among judges were unconstitutional. In December 2017, a legislative amendment was adopted transferring the competence to elect

judicial members of the NCJ to Parliament. In March 2018, 15 judges were elected as NCJ members. The applicant's term of office, along with 14 others, was terminated with effect from the day the new members were appointed, pursuant to the amending Act. Relying on Article 6(1), the applicant claimed that the premature termination of his term of office had violated the Constitution and the rule of law. The Polish government claimed that Article 6(1) was inapplicable because there was no right under Polish law to exercise public authority, and that there was in any event no genuine and serious dispute concerning the existence of the applicant's alleged civil right to remain a member of the NCJ.

[52] In the event, the Grand Chamber found that there was a breach of Article 6 because of the special position of public servants employed by the civil service, (*Eskelinen and others* v *Finland* (2007) 45 EHRR 43) now accepted to apply also to judges, meaning that the state cannot exclude Article 6 protections unless the state has expressly excluded access to a court for the post or category of staff in question and, secondly, the exclusion was based on objective grounds in the state's interest. The state must also show that the subject of the dispute relates to the exercise of state power or has called into question the special bond between the state and public servants; *Grzeda* at [104], [261] and [262]. There was a breach of Article 6 because the second criterion in *Eskelinen* was not met.

[53] Of particular relevance to the case before us is the Grand Chamber's clear restatement of general principles at [257] and [258]:

> "257. For Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" ("contestation" in French) over a right which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, lastly, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play ... Lastly, the right must be a "civil" right …

> 258. Article 6 § 1 does not guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Roche* v *the United Kingdom* [GC], […]; *Boulois* v *Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012; and *Károly Nagy* [v *Hungary* (App no 56665/09) [2017] ECHR 56665/09]."

[54] *Nait-Liman* v *Switzerland*, Application no 51357/07, does not assist the Lord Advocate and the respondent on this point because in that action, seeking redress for torture carried out abroad, it was at least arguable that Swiss law recognised the right claimed by the applicant. The effect of section 170 is different as it expressly prohibits the Lord Advocate being found liable for damages in any summary prosecution save in the circumstances prescribed in subsections 1(a), (b) and (c).

[55] The law appears to rest as it did after *Roche*. We are fortified in that view by the analysis in Reed and Murdoch, Human Rights Law in Scotland (5th ed Murdoch) at 5.20 where such exceptions as there may be relate to parliamentary privilege and state immunity which can be waived.

[56] We note also that in *Attorney General of the Cayman Islands* v *Bush* [2025] UKPC 39, in giving the judgment in a case before the Board of the Privy Council concerning the Cayman Islands Constitution Order 2009, Bill of Rights, Lord Lloyd-Jones noted and applied the general statements at paras [257] and [258] in *Grzeda*. Section 7(1) of the Bill of Rights is similar to Article 6 ECHR, being a procedural right providing for access to courts. Whilst it is concerned with the means of vindication of substantive rights, it does not confer them and is not concerned with their content: *Matthews* (HL), *supra*. The Labour Act (Revision 2021) provided a statutory scheme for compensation for unfair dismissal providing remedies not available at common law for wrongful dismissal. Section 3, in effect, excluded those working for public service, charitable organisations (as the claimant did) and churches. The

Board of the JCPC noted that whilst the Labour Act provided a right, it expressly provided in section 3(b) that it did not apply to charitable organisation workers such as the claimant. Accordingly, the rights accorded by the Labour Act did not apply. It was not arguable that section 3(b) was a procedural bar:

> "[41]… It is not concerned with how a substantive right may procedurally be vindicated but prevents a substantive right from arising in the first place."

Decision on section 170

[57] In Scotland, the protection of justices of the peace was codified in the Justices Protection Act 1803. A provision similar to the current section 170 extended immunity to prosecutors by the Summary Procedure Act 1864 section 30. We remind ourselves of the current terms of section 170(1):

> "(1) No judge, clerk of court or prosecutor in the public interest shall be found liable by any court in damages for or in respect of any proceedings taken, act done, or judgment, decree or sentence pronounced in any summary proceedings under this Act, unless…."

[58] The language of section 170(1) excludes there being liability unless the cumulative conditions in sub-paragraphs (a), (b) and (c) are met. It is a substantive provision excluding liability. It offers immunity from liability as opposed to immunity from suit. Where it applies, it prevents a substantive right from arising. Accordingly, domestic law expressly restricts the scope of the substantive law on malicious prosecution. Subsection (2) offers a defence and subsection (3) is a procedural provision requiring any action to "enforce such liability" generally to be commenced within two months.

[59] Since section 170(1) excludes liability, Article 6 is not engaged. There is no proper basis for the court to fail to apply this provision of substantive law. Accordingly, there was

no justification for declaring the provision incompatible with Article 6. The Lord Ordinary erred in doing so and we shall recall his declarator.

[60] The section provides that the court shall not find the Lord Advocate liable in damages arising from any summary proceedings. That being so, the respondent's action is incompetent unless it can be waived.

[61] Parties jointly submitted that it remained open to the Lord Advocate to waive the advantage afforded by section 170 since the waiver would not infringe on the public interest or be contrary to public policy: *Bennion on Statutory Interpretation* (8th ed) at 9.6; *Cabot Financial UK* v *MacGregor* [2018] SAC (Civ) 12, 2018 SC (SAC) 47, *MacPhail on Sheriff Court Practice* (4th ed) at 2.12.

[62] We are not satisfied that it is open to the Lord Advocate to waive the protection in section 170 for two principal reasons. First, the wording of the provision lays bare Parliament's intention: "No judge, clerk of court or prosecutor in the public interest shall be found liable by any court…" (emphasis added.) As the authors of *Bennion* observe at 9.6:

> "the question of whether it is legally possible to contract out, or waive performance of a statutory requirement, depends on the legislative intention".

In our view, Parliament's intention was to direct the court that it may find no party listed in the provision liable in damages in certain prescribed circumstances, not to provide an advantage to the Lord Advocate in civil proceedings. Secondly, we have been unable to find any authority that a substantive rule of law can be waived by a party who is advantaged by it. The position would be otherwise if we had found the provision to be procedural: *Burns* v *The Corporation of Glasgow* 1917 1 SLT 301.

Observations on section 170

[63] It is open to Parliament to remove prosecutors from the protection in section 170, but the court cannot do so. In *Whitehouse*, a Full Bench was entitled to correct the common law of malicious prosecution in solemn cases. In summary procedure section 170 applies. It is important to note that the protection does not apply if the pursuer was imprisoned. Parliament plainly struck a balance in 1864, maintained in subsequent Acts up to and including the 1995 Act. That summary cases are less serious than solemn cases, where the action of malicious prosecution rests exclusively on the common law, was noticed in *Whitehouse* at [91]. Successive Parliaments have retained what is a policy choice which appears to have been made on grounds including proportionality in pursuit of aims that were then considered legitimate.

[64] We have hardly been addressed on policy considerations and make no criticism of parties given their respective stances. Nevertheless, even if it was in our power to change a statutory provision on policy grounds, we would need full, detailed and preferably competing submissions, including information on the number and nature of summary prosecutions in Scotland each year. The introduction of numerous statutory offences since 1864, not least motoring offences, for which there may be tens of thousands of summary prosecutions in Scotland each year, is a significant change of circumstances that may strengthen rather than weaken justification for the qualified immunities enjoyed by prosecutors under section 170. The extraordinary contemporary development of serious and organised crime, largely funded by drug-dealing and human trafficking generating extraordinary profits, was not a feature of life in Scotland in 1864. It is now.

[65] We note the court's analysis in *Whitehouse* of the strength of policy arguments in this field, albeit in the context of solemn procedure, at paras [100] to [103], and recognise that

they may call into question immunity for prosecutors to the extent provided for in section 170. On the other hand, the court in *Whitehouse* recognised, at [109]-[111], that the United States of America has found policy reasons to justify prosecutorial immunity from malicious prosecution. It may be that in some Australian states there are exclusions of, or statutory limitations on, the liability of public prosecutors: [42]. Senior counsel for the Lord Advocate identified other policy considerations at [48].

[66] In *Graham* v *Strathern* 1924 SC 699, in giving the leading opinion of a Full Bench, the Lord Justice Clerk (Alness), at page 718, viewed it as undesirable that a procurator fiscal may be inhibited in making the instant and difficult decisions he must make and in taking the prompt and drastic action he may have to authorise and initiate. In the context of the Summary Jurisdiction (Scotland) Act 1908 section 59, a predecessor of section 170 of the 1995 Act, he considered there was an obvious justification for it, noting that it would not prevent officials being punished if they abused their position by prosecuting maliciously. We note that both the criminal law and disciplinary procedures are contemporary constraints on a miscreant prosecutor.

[67] Unless Article 6 is in play, and we have determined that it is not, this court cannot read down section 170 or declare it incompatible. It would be a matter for Parliament to remove or amend the protection afforded to prosecutors in summary proceedings if so advised. Cases brought in summary proceedings are less serious than those prosecuted on indictment. Whether the policy considerations identified in *Whitehouse*, that permit a right to claim damages for malicious prosecution in the limited number of solemn prosecutions in Scotland, justify widening the scope for such claims in the very large number of summary prosecutions would be a matter for Parliament to resolve.

Relevancy

[68] Having determined that the claim is rendered incompetent by section 170, it may appear unnecessary to resolve the dispute over relevancy. Senior counsel for the pursuer submitted to the Lord Ordinary that should he fail on his arguments about Article 6 and waiver, the pursuer would seek to renew his claim if Parliament should amend section 170 and render it competent. The question of relevancy was the principal issue between parties before the Lord Ordinary and before us. Accordingly, we shall address the detailed arguments presented and determine the relevancy of the claim.

Did the respondent plead a relevant case of malicious prosecution?

Law

[69] Parties were agreed before the Lord Ordinary, and in the reclaiming motion, that for an action of malicious prosecution to succeed, four elements must be averred and proved:

- that the proceedings were initiated by the defender;
- the proceedings terminated in favour of the pursuer;
- the absence of reasonable and probable cause to prosecute; and
- malice, or a primary purpose other than that of carrying the law into effect: *Whitehouse* at [106].

[70] This is an accurate statement of the law from a Full Bench. The court referred to *Beaton* v *W Ivory* (1887) 14 R 1057 where the Lord President (Inglis) gave the leading opinion of a Full Bench on 19 July 1887, at page 1061:

> "There is a very special protection surrounding the defender in the execution of his duty as 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 shown 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, I think, 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.' I think the duty of the pursuer in a case of this kind is to aver facts and circumstances from which the Court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive."

In *Grier* v *Lord Advocate* [2022] CSIH 57, 2023 SC 116 the Lord President (Carloway), again referring to this passage, stated that there is a presumption that a public office-holder is doing no more than his duty and doing it honestly and *bona fide*.

[71] The pursuer's case does not relate to a sheriff, but we note also what was stated about the presumption in favour of a public officer, and its adoption by a Full Bench of seven judges in *Robertson* v *Keith* 1936 SC 29. It concerned an action against the Chief Constable of Lanarkshire to recover damages for injury to the pursuer's reputation and business resulting from the defender's alleged illegal actings. Since the police actings were carried out in the exercise of their duties, the pursuer required to prove that the defender had acted maliciously and without probable cause. The Lord Justice Clerk (Aitchison) explained, at page 47, that 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. An act is *prima facie* within competence when it is the kind of act ordinarily performed in the execution of the official's duties. 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. These are related, may overlap and:

> "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."

[72] *Craig* v *Peebles* (1876) 3 R 441 concerned an action for malicious prosecution against the background of a criminal appeal, reported as *Craig* v *Peebles* (1875) 2 R (J) 30. The

prosecutor brought a case that was held proved at first instance but quashed on appeal. The allegation related to a statutory offence of trading as a public house and selling alcohol without a licence when the accused retained an unexpired licence to do so in premises partly destroyed by fire. The police considered the premises dangerous and, when the accused refused to stop selling alcohol a week after the fire, served a summary complaint on him. On appeal the complaint was considered irrelevant and the conviction and fine suspended.

[73] At first instance in the Court of Session, the judge found that the decision to prosecute a statutory offence in a novel situation was not irrational and was such that a reasonable person in that position might excusably entertain and act upon. Accordingly, there was probable cause, and he dismissed the action as irrelevant where there was no disputed matter of fact to resolve. As a consequence, the court would not hear evidence.

[74] On appeal, the Lord Justice Clerk (Moncrieff) stated, at 445, that whilst it was for the pursuer to prove want of probable cause… it would be "the worst example to allow mere words to become the foundation for a trial where there is manifestly no substance in the allegation." He concluded, at 446:

> "I do not think it necessary to go into the other matters argued, how far want of probable cause is for the Judge to decide, and how far for the jury. I go upon the broad ground that, although the pursuer avers in words that the defender acted " without probable cause," it is manifest from the pursuer's whole statements that there is no substance in these averments."

Lord Neaves agreed, adding:

> "There being, then, no dispute as to the facts, or, at least, there being sufficient undisputed facts to enable us to arrive at a conclusion, we are in a position to negative want of probable cause. The alteration on the state of the building made it not unnatural and not unreasonable for the public prosecutor in the dis charge of his duty to try the question, which he did, before a competent tribunal and in competent form, though he did not ultimately succeed. It would be a strong and a harsh thing to say to a procurator-fiscal in such circumstances, that there was not a probable cause where the Justices found there was a good cause. The superior Court having found it insufficient does not infer

> that it was not probable.
>
> With regard to malice, I do not much differ from the Lord Ordinary's view that if that had been all which it was necessary for the pursuer to aver the allegation is sufficient to allow him to go to trial. But want of probable cause is also essential."

Lord Ormidale noted the absence of any material allegation of fact requiring investigation and concluded that the question of want of probable cause should be determined by the court "at once" i.e., without hearing evidence. Lord Gifford considered want of probable cause a pure question of law to be resolved by the court where there was no dispute on the material facts.

[75] In *Glinski* v *McIver* [1962] AC 726, in his speech to the House of Lords, Lord Denning explained, at 758, that the proper rule of law is that the claimant must satisfy the judge that at the time when the charge was made there was an absence of reasonable and probable cause for the prosecution. It was not necessary for a prosecutor to believe in the guilt of the person accused. What was required for reasonable and proper cause was only that the prosecutor was satisfied there was a proper case to lay before the court. The prosecutor could not know if witnesses were telling the truth, what evidence there may be to support a defence and the question of guilt or innocence was a matter for the trial court.

[76] He proposed that want of reasonable cause for a prosecution is a question of law for the judge, at 760, stating:

> "It is better to go back to the question which the law itself propounds: Was there a want of reasonable and probable cause for the prosecution? This is a question for the judge and not for the jury: and in order to enable him to answer it, the authorities give him this guidance:
>
> First, there are many cases where the facts and information known to the prosecutor are not in doubt. The plaintiff has himself to put them before the court because the burden is on him to show there was no reasonable and probable cause. The mere fact of acquittal gets him nowhere. He will therefore refer to the depositions which were taken before the magistrate: or he may refer, as here, to the statements taken by

> the police from the witnesses: and he will argue from thence that there was no reasonable or probable cause. In such cases the judge should leave no question to the jury. He should take the undoubted facts and information and decide upon them himself. If, on considering them, he finds that there was no want of reasonable and probable cause, he should dismiss the claim without more ado .... If he finds there was an absence of reasonable and probable cause, likewise he should say so and leave only malice to the jury… In cases of this kind, where the facts are not disputed, it is for the judge to say whether they show a want of reasonable and probable cause."

At 762, he stated: "It must always be remembered that, if a charge is genuine, the mere fact that the prosecutor has made an unfair use of it will not take away his protection. It may show malice, but it does not raise any inference of a belief that there was no reasonable or probable cause."

[77] Viscount Simonds, at 742, considered that the law had been for centuries that whether there was reasonable and probable cause was for the judge. Some facts would be for determination by a jury but, at 744, generally a judge should not leave want of honest belief to the jury unless there was "affirmative evidence of the want of it." Lord Radcliffe, at 753, proposed that if a prosecution was instigated without an honest belief in the truth of the charge it could not be said to have proceeded on reasonable and probable cause. If there was evidence in speech, letters or conduct supporting the case that the prosecutor did not believe in the charge it should go to the jury (i.e. there was a question of fact). If it is a matter of inference from the feebleness of the case, that should be left to the judge. He concluded:

> "In my opinion, it does not arise unless there is some contested evidence bearing directly upon the defendant's belief at the relevant date, apart from anything that could merely be inferred as to his belief from the strength or weakness of the case before him."

[78] Lord Devlin stated at 768:

> "Six points are settled about the question of reasonable and probable cause. First, the question is a double one: did the prosecutor actually believe and did he reasonably

> believe that he had cause for prosecution? Secondly, provided that the defendant has made sufficient inquiry, the facts on the basis of which the question has to be answered are those, and only those, known to the defendant at the material time. Thirdly, though a question of fact, it is one that in the end has to be determined by the judge and so is to be treated in the same way as if it were a question of law. Fourthly, if, in the course of the judge's inquiry, he finds that it is necessary to resolve some disputed question of incidental fact, that question is a jury question. But fifthly, like any other jury question, it is to be left to the jury only if there is some evidence put forward by the party on whom the onus lies; and that, in the case of malicious prosecution, means the plaintiff, since it is he who has to show want of cause. Sixthly, a question whether the defendant in fact believed that there was cause for prosecution is, if in dispute and if there is some evidence to support a conclusion that he did not, a question to be left to the jury."

At 779 to 780 he summarised the position:

> "…there emerge two questions of fact to be determined by the judge on which the result of this case turns. First, has the plaintiff shown that objectively there was no reasonable and probable cause for the 1962 prosecution? Secondly, was there some extraneous evidence, fit to go to the jury, tending to show that the defendant disbelieved in his case?"

[79] Accordingly, in the pursuer's case, against a background of public prosecutors carrying out their normal function of determining whether to prosecute in the public interest, there is a presumption they were acting properly. The onus is on the pursuer to show otherwise. Whether there was reasonable and probable cause to prosecute is a question of law. If there is no material dispute on the facts, the relevance of averments of malice can be determined on parties' averments as, if it arises as a separate question in Scots law, can the related question of lack of honest belief.

[80] We note that in *Grier* v *Lord Advocate* the Inner House, at [69], recorded that the position presented by parties was that malice required proof of some improper purpose, that the prosecutor deliberately perverted or abused the process of criminal justice, and it was accepted by all parties that subjective belief was relevant only to malice and not whether there was reasonable and probable cause. In Canada, it is not enough to show that the prosecutor had no subjective belief in a reasonable and probable cause 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..."

Miazga v *Kello Estate* 2009 SCC 51, [2009] 3 SCR 339, cited in Whitehouse at [107].

[81] The Lord President examined the meaning of malice (*Grier*, [IH] at [118]), suggesting that a prosecutor, "… initiate or continue a case not with a *bona fide* purpose of bringing a criminal to justice but for some other, and thus necessarily improper, motive." He approved Lord Devlin's analysis in *Glinski* to the effect that malice covers "not only spite and ill-will but also any motive other than a desire to bring a criminal to justice and circumstances in which the prosecutor is attempting to obtain some extraneous benefit."

[82] The phrase "bringing a criminal to justice" can be contrasted with Lord Denning's view that what amounted to reasonable and proper cause was only that the prosecutor be satisfied there was a proper case to bring before the court. More recently, in *Stuart* v *Attorney-General of Trinidad and Tobago* [2022] UKPC 53, [2023] 4 WLR 21, in delivering the judgment of the Privy Council, Lord Burrows, at [26], rejected a requirement for belief in guilt. His Lordship approved Lord Denning's statement that a prosecutor "has only to be satisfied that there is a proper case to lay before the court." The same conclusion was reached in *Willers* v *Joyce* [2016] UKSC 43, [2018] AC 779 at [54] and [55] (Lord Toulson) and also noticed in *Grier* [IH] at [118], where the court approved a judge's encapsulation of the meaning of malice as "improper purpose or motive," and in *Attorney-General of Trinidad and Tobago* v *Maharaj* [2024] UKPC 1 at [10] (Lord Richards).

[83] The formulation "bringing a criminal to justice" has difficulties alluded to by Lord Denning in *Glinski* and has been departed from in English law. It presupposes that the prosecutor knows the person accused to be guilty which a prosecutor is generally unable to

do. Lord Denning focussed on the presumption of innocence, the prosecutor's role and the unpredictability of what can happen in a trial. The prosecutor's role is to bring a proper case before the court. It is the court, starting from a presumption of innocence, that will decide on consideration of all the admissible evidence before it if there is sufficient evidence in quantity and quality such that guilt has been proved beyond reasonable doubt. That is not the only problem with the "bringing a criminal to justice" formulation. In Scotland, there have been test-case prosecutions such as *Khaliq* v *HM Advocate* 1984 JC 23 where the prosecutor could not have known that the court would find, as it did, that selling glue-sniffing kits was criminal in Scotland as falling within the scope of culpable and reckless conduct causing injury. It would be contrary to public policy to inhibit a prosecutor from properly bringing a case for such reasons as the "bringing a criminal to justice" test might do. The formulation of "a proper case to lay before the court" avoids such difficulties.

[84] It has not been authoritatively resolved in Scots law whether the requirement to show a lack of reasonable probable cause will be sufficiently met if the pursuer can show *either* a lack of objective probable cause *or* a subjective lack of honest belief on the part of the prosecutor that there was objective probable cause as senior counsel for the pursuer proposed.

[85] Lord Denning suggested otherwise in *Glinski*, but Lord Devlin favoured the view that these were both aspects of reasonable and probable cause. In his sixth point in the quote at para [78] above, he deemed the question of want of actual belief on the part of a prosecutor to be a question for the judge (i.e. a question of law) unless there was a dispute on the facts and some evidence to support a conclusion that he lacked honest belief. In his second point in the second passage we have quoted, he appeared to conflate subjective probable cause and malice.

[86] Lord Richards in *Maharaj,* at [10], said that when assessing whether a claimant has established that a prosecutor acted without reasonable and probable cause, the consideration has both subjective and objective aspects:

> "…The subjective aspect is that the prosecutor must believe that there is a proper case to bring. The objective aspect requires that there existed proper grounds to bring the case, to be judged by reference to the evidence known to the prosecutor and such other evidence as would have been known as a result of any enquiries that should have been, but were not, made…"

His Lordship explained, at [11], that for the separate and additional requirement of malice a claimant had to prove:

> "… that the proceedings initiated by the defendant were not a *bona fide* use of the court's process. While proceedings brought in the knowledge that they were without foundation may be the most obvious case, it will be sufficient if, for example, the defendant was indifferent whether the charge was supportable and brought the proceedings for an illegitimate collateral purpose: see *Willers v Joyce* at para 55 per Lord Toulson."

He acknowledged, as Lord Toulson had in *Willers* at [54], that the requirements of absence of reasonable and probable cause and malice can become entwined and will frequently overlap substantially. We note that Lord Clark came to similar conclusions at first instance in *MacGregor* v *Chief Constable of Scotland* [2024] CSOH 109, 2025 SC 169 at [30]-[38].

[87] In Scotland, if the prosecutor believes there to be sufficient evidence and judges, in the exercise of a discretion, that it is in the public interest to prosecute there could be no want of subjective probable cause if it is a separate consideration. A question may remain as to whether proof of the absence of a genuine belief held by the prosecutor in the sufficiency of the evidence and/or that proceedings are in the public interest, allied to an illegitimate collateral purpose, such as personal retribution, could found a claim of malicious prosecution against a prosecutor, notwithstanding that, objectively, the court considers that there was a proper case to bring. We are unaware of any case in which this was a real issue,

and it may be more theoretical than one which is ever likely to arise. The alternative view would be that both the subjective and objective aspects of lack of reasonable and probable cause must be established before the question of malice arises. In any event, it is unnecessary for us to attempt to resolve any uncertainty given our view of the pursuer's averments, to which we now turn.

Procedure and pleadings

[88] The pursuer raised his action in the Sheriff Court before it was remitted to the Court of Session. He averred, and maintained before the Lord Ordinary as he did before us, that there was never sufficient evidence to raise a prosecution and that accordingly there was no probable cause for instigating proceedings. From this the pursuer maintains that it can reasonably, and should, be inferred that those responsible for deciding to prosecute did not believe there to be sufficient evidence and were motivated by improper considerations such that this was a malicious prosecution.

[89] At the pursuer's condescendence 3, he incorporates the terms of the transcript of the video recording that formed the basis of the prosecution. At condescendence 9 he states:

> "The terms of the Standard Prosecution Report and other documents produced by the second defenders are admitted, as are the statutory provisions cited."

It is apparent from the Lord Advocate's answer 9 that the other documents, the terms of which were admitted, included the Standard Prosecution Report submitted by Police Scotland to COPFS, a report prepared by a Procurator Fiscal Depute on 21 May 2020 seeking Crown Counsel's instructions on whether to prosecute (above at [17]), and Crown Counsel's written instruction in response: (above at [18]).

[90] As we noted above at paras [20] and [21], the pleadings disclose that the evidence adduced at trial consisted of a joint minute of agreement establishing that the pursuer had posted a video, what it depicted, a transcription of what the pursuer said and that the recording was played to the sheriff. The prosecutors knew that the pursuer delivered his remarks to the camera forcefully and directly. The pursuer's online statement of 3 April 2020 within his Twitter account that he was "spending isolation sharpening his pitchfork" was deleted by him on 8 April 2020.

[91] We have reproduced the whole terms of the transcript of the pursuer's recording at para [14] above, but the Lord Ordinary only quoted the second part of the passage.

[92] He was not obliged to reproduce the whole passage in his Opinion. It does not, of itself, demonstrate that he did not consider its whole terms, but we note his observation at para [30]: "I do not consider that the video contains a threat to disclose the names of the complainers (if indeed the pursuer was even aware of them)." The terms of the pursuer's second sentence in the video, including his assertion that he knew who the complainers were, rather suggest that the Lord Ordinary had not fully absorbed the whole terms and potential implications of the recording.

Section 38 of the 2010 Act

[93] The section provides:

> "**38 Threatening or abusive behaviour**
>
> (1) A person ("A") commits an offence if—
>
> (a) A behaves in a threatening or abusive manner,
> (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
> (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and
(b) behaviour consisting of—

(i) a single act, or
(ii) a course of conduct.

(4) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both."

[94] Section 38 was examined and its meaning and effect clarified by a Full Bench in *Paterson* v *Harvie* [2014] HCJAC 87, 2015 JC 118 dealing with several appellants. One of them, Mr Love, had posted abusive statements on Facebook and was properly convicted under the section. More generally, the court noted the objective nature of the test under subsection (1) and confirmed that there did not require to be evidence that any person was in fact afraid or alarmed.

[95] The court specifically approved the following passage delivered by Lady Dorrian in *Rooney* v *Brown* [2013] HCJAC 57, 2013 SCCR 334. That appellant had faced a charge of breach of the peace relating to his behaviour before he was arrested and placed in a police van. A second charge was brought under section 38(1) alleging shouting, swearing and uttering sectarian and racial threats of violence. It was argued on appeal that it had to be likely that people would hear the appellant. It was not objectively likely that a person

would be place in a state of fear and alarm by a person secured as the appellant was. Her Ladyship, at [6], explained:

> "…the matter is not to be decided by the reaction of individual police officers but on an objective basis. The court has to consider matters from the standpoint of the reasonable man placed in the shoes of these police officers. We have to assume that the behaviour occurs in the presence of such a person, we do not require to consider the likelihood of the remarks actually reaching such a person. We agree that context is relevant to that consideration. However in the present case the context in which this behaviour took place was one in which the appellant had immediately previously been abusive and threatening to the police officers and causing a disturbance. They had difficulty handcuffing him. They had not succeeded in calming him down completely and he was continuing to be offensive, although his remarks now were largely not directed to them personally. A reasonable person in the shoes of the police officers during the appellant's abusive behaviour in the van would have been aware of this, and also aware of the fact that when they arrived at their destination they would be faced with the task of removing him from the van into the police office. In that context we consider that the sheriff was fully entitled to conclude that this was behaviour which was likely to cause a reasonable person to suffer fear and alarm."
>
> [Emphasis added]

[96] Accordingly, it did not matter that there was no evidence of actual fear and alarm being caused to police officers who had arrested Mr Rooney and driven him, secured in a cage in the rear of a police van, or that he made his abusive remarks whilst confined separately in the vehicle from the police officers.

The circumstances in which the charge was brought against the pursuer

[97] Context is always likely to be important in considering a section 38 offence and in the pursuer's case, his behaviour occurred six days after the conclusion of the exceptionally high-profile trial of a former First Minister of Scotland who had campaigned vociferously for independence, not least in the lead up to the 2014 referendum. Several women, apparently working in and around government, had made complaints and testified in the High Court that Mr Salmond had behaved in an inappropriate and unwelcome sexual manner towards

them, supporting charges including attempted rape. A jury acquitted Mr Salmond of all charges. There was significant media interest and comment and significant reaction to the outcome of the trial on social media platforms. The names of the women were not in the public domain. Their names and identity in connection with the trial proceedings were and are protected by a contempt of court order in the criminal proceedings. A contempt of court order was made in these proceedings on 24 August 2024.

[98] On 10 March 2020, the trial court made an order at common law and under section 11 of the Contempt of Court Act 1981, "preventing the publication of the names and identity, and any information likely to disclose the identity, of the complainers in the case [against Alex Salmond]." It applied when the pursuer published his video and remains in effect, albeit it was varied on 11 February 2021 by the addition of the words, "as such complainers in these proceedings," to clarify that the proceedings referenced were the High Court trial.

[99] The Crown did not appeal against the sheriff's decision to acquit the pursuer under section 97, as they could have done, and this court is not presiding over a criminal appeal. Nevertheless, it is necessary to assess the legal effect of the information available to the Lord Advocate's representatives when the decisions were made to recommend and instruct proceedings against the pursuer on summary complaint. Given the importance the Lord Ordinary attached, and the pursuer attaches, to the decision that there was insufficient evidence, we shall consider the material before the sheriff, but the outcome of the trial is not determinative of all issues in an action for malicious prosecution. As Lord Denning put it in *Glinski,* rather more emphatically, in examining how a claimant may establish the necessary absence of reasonable and probable cause, "[t]he mere fact of acquittal gets him nowhere". The proper focus in this case is, and ought to have been for the Lord Ordinary, on the information available and considered by COPFS personnel when deciding to prosecute.

[100] In a report of 21 May 2020 seeking instructions from Crown Counsel, a Procurator Fiscal Depute summarised the circumstances. The PFD referred to the pursuer being listed as a defence witness but was not called to testify. The pursuer was known as an "ally" of Mr Salmond. The PFD recorded that Rape Crisis Scotland had publicly expressed concern at the "sinister and threatening" manner of the recording and that five of the complainers from the trial had contacted the police to express concern for their safety because of the video. The PFD noted that the pursuer had told the police that whilst he had created and posted the video, he maintained that he had not intended to threaten the complainers. The PFD then offered a conventional analysis of sufficiency of evidence of the two essential facts: the identification of the pursuer as the person responsible and his conduct constituting the crime.

[101] The PFD highlighted certain comments in the pursuer's recording:

> "that precious anonymity that they have sought will not be em continued"
>
> "they have been involved in this act of collusion [to try and em destroy Alex Salmond's reputation] and
>
> "there's not a cat's chance in hell that they are going to get away with that eh so they are going to reap a whirlwind" and "as soon as this virus emergency is out of the way then eh there is going to be a bit of reckoning taking takes place."

[102] The PFD noted calls from various individuals, some of high profile, for the complainers to be named and prosecuted.

[103] Against that background, the PFD considered that the pursuer's remarks were objectively threatening. That the complainers had contacted the police could assist to prove that the remarks were indeed threatening but it was not recommended that they be called as witnesses. The prosecution would proceed on the reasonable person test in the absence of evidence of actual fear and alarm. The recording was directly threatening to the

complainers and had an indirect potential to threaten complainers in other sexual offence cases and diminish their confidence in their anonymity being protected. On this analysis, it was at the very least arguable that the pursuer was reckless as to whether he had caused fear and alarm to the complainers and accordingly there was sufficient evidence for a charge under section 38. A reasonable person ought to have known that those complainers would feel threatened by the content of his recording.

[104] The PFD went on to consider whether it was in the public interest to prosecute the pursuer, identifying factors both for and against prosecution. The PFD suggested that the potentially adverse effect of the conduct on the Salmond case complainers, and the potential effect on complainers in other sexual offence cases, had potential to undermine such persons' faith in the criminal justice system. The PFD noted that the pursuer had no previous convictions and had expressed remorse. It was recognised that any trial could generate political commentary and have an adverse effect on the Salmond trial complainers. Consideration was given to a warning letter as an alternative to prosecution. Noting a background of the complainers being subject to abuse and threats through social media at the time the video was posted, and the importance of COPFS being seen to take action to protect complainers in sexual offence cases in order to maintain confidence in the system's ability to maintain confidentiality, it would be wrong not to take, and be seen to take, robust action in response to such conduct. In the whole circumstances, it was in the public interest to prosecute the pursuer under summary procedure.

[105] On 21 May 2020, Crown Counsel recorded agreement with the recommendation that there was sufficient evidence to proceed and a strong public interest in taking proceedings. Whilst the complainers were alarmed, that was not necessary to prove the offence, and they did not need to be called as witnesses. Noting the pursuer's apparent contrition, summary

proceedings would suffice but a warning letter would not. Crown Counsel anticipated that the pursuer would argue "free speech" in his defence. It should be noted that anticipating a defence case provides further inferential support for COPFS personnel considering there was sufficient evidence such that there could be a defence case.

Assessment of the decision to prosecute

[106] It is apparent from documents incorporated by reference into the pleadings that the recommendation to proceed was made on a proper analysis of the requirements of section 38 as they were authoritatively determined in both *Rooney* and *Paterson*. There was intense public and political interest in the outcome of the Salmond trial. It ended and the pursuer's video was posted six days later at a time when people were largely confined and isolated by the first COVID19 lockdown. It is significant that the pursuer's address commenced with him saying that he knew each of the complainers. It was an obvious implication that he could disclose their identity if he chose. His reference to their making a statement via Rape Crisis Scotland, and his observation that it is substantially funded by the Scottish Government was conjoined with his assertion that they had made false allegations. He repeatedly accused the complainers of collusion. He suggested that their "precious anonymity" would not continue. He stated that some of them were senior members of the Scottish Government and senior members of the SNP who had colluded to destroy Mr Salmon's reputation. They would "not get away with it" and "would reap a whirlwind". Once the COVID emergency had passed, there would be "a reckoning" to clear out "soft independent supporters" who were leading the party. He said that to get the party back and set the country back on course for independence, "we're gonna have to wade through eh what's left of this leadership and get them out of the way which I am confident we will do."

[107] We consider that it was properly open to prosecutors to conclude that the pursuer's actions in publishing his denunciation of the Salmond prosecution, and those whose complaints underpinned it, his linking all of this to the cause of independence, his assertion that he knew the complainers' identities and that they would not remain anonymous, could be construed as a threat that he would disclose their identities publicly. He also suggested people who could be taken to include at least some of the complainers would reap a whirlwind and, in due course, face a reckoning.

[108] While these remarks may be open to various interpretations, it was open to the sheriff to conclude that a reasonable person in the shoes of the Salmond trial complainers would have feared potential consequences including to their personal safety or at the very least be alarmed. In the whole circumstances, there was a sufficient basis to allow the court to conclude that the pursuer behaved in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm by uttering threatening remarks, directed at the complainers, in a video he then uploaded to the internet.

[109] At the stage of a no case to answer submission in a trial, in evaluating the potential of the evidence adduced for the prosecution, a judge must take:

> "the evidence relied on by the Crown …'at its highest', that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown":

Mitchell v *HM Advocate* [2008] HCJAC 28, 2008 SCCR 469, the Lord Justice General (Hamilton) delivering the opinion of the court at [106].

[110] There was no issue of credibility and reliability in the case before the sheriff and at the stage of considering if there was a case to answer, the interpretation of the recording should have been considered in the most favourable way for the Crown. In *McPherson* v *HM Advocate* [2019] HCJAC 21, 2019 JC 171, the issue was identification of the appellant from

circumstantial evidence. The Lord Justice General (Carloway), in delivering the Opinion of the court at [10], explained that where a number of inferences may be open on the evidence, if one of them is that the pursuer committed the crime, the submission of no case to answer ought to have been rejected.

[111] It was open to the sheriff to find that the pursuer's conduct recording was threatening behaviour likely to cause a reasonable person in the shoes of the complainers to suffer fear or alarm and that the pursuer intended that result or was reckless in that regard. Had the sheriff adopted the guidance in *Mitchell* and *McPherson*, as he ought to have done, he would have repelled the submission of no case to answer. The pursuer may or may not then have adduced evidence. It would then have been for the sheriff to carry out his fact-finding and evaluative function in determining what he was prepared to take from the evidence and whether he was satisfied beyond reasonable doubt that a crime had been committed. It would have been open to the sheriff to find that the pursuer, a journalist, chose his words carefully to make remarks which would be threatening to the complainers but which he could argue were metaphorical and not literal. It would have been the sheriff's prerogative as the fact finder to determine if any such inferences ought to be drawn. These were all matters for the sheriff to determine in light of any evidence adduced by the defence and we cannot anticipate what the outcome would have been.

[112] Accordingly, the Lord Ordinary misdirected himself in his acceptance that there was insufficient evidence at the trial. He then used that conclusion as the foundation for his further conclusion that there was no objective reasonable and probable cause when the prosecution was instructed. He erred in doing so because there was undoubtedly sufficient evidence at the outset of the prosecution, as there was when the prosecution closed its case in the summary prosecution.

[113] We would add that it was known to those deciding to prosecute that it could be inferred that the appellant had written electronically that he was, "spending isolation sharpening my pitchfork." That statement was metaphorical and not literal. Nevertheless, one implication of it is contemplation of violence. Whilst that did not feature in the trial, at the stage of deciding to prosecute it further substantiated the view that the pursuer was implicitly threatening that the complainers and others may suffer consequences that could include violence. The PFD and Crown Counsel knew that five of the complainers had reported the matter to the police. Adducing such evidence or serving a statement of uncontroversial evidence under section 258 of the 1995 Act establishing the fact of five anonymised complainers from the trial reporting what they had come across to the police, or agreeing those facts by joint minute, would have provided evidence of actual alarm. It was legally unnecessary but may have nevertheless strengthened the case in the eyes of the sheriff.

Conclusion on relevancy

[114] As we have noted above, there is a presumption that a public official such as the prosecutors who determined to take proceedings against the pursuer acted in good faith. The pursuer pled (and argued) his case on the proposition that it was plain that there was no basis for the prosecution as there was always insufficient evidence. From this, the inference was said to be available that there must have been some extraneous and improper motive capable of demonstrating that the prosecutors did not honestly believe they had a sufficient case and were motivated by some extraneous and improper purpose such that the pursuer can demonstrate malice.

[115] Whether there was reasonable and probable cause is a matter of law. We have found that there was objective reasonable and probable cause on the pleadings including the documents incorporated. If the absence of prosecutors holding a genuine belief in probable cause could itself found an action of malicious prosecution in Scotland, it could not do so in this case. There was sufficient evidence to prosecute the charge proceeded with and it is clear from the terms of the recommendation and instruction that the prosecutors so believed. The pursuer has incorporated into his pleadings documents that demonstrate that there was a conventional and proper consideration of relevant factors by both the PFD and Crown Counsel who respectively recommended and instructed summary proceedings being convinced of a sufficiency of evidence and that it was in the public interest to prosecute. There is no foundation for the inference of malice proposed by the pursuer.

[116] The Lord Ordinary erred in his analysis of the law on section 38 generally, in considering that it would not readily apply to an internet communication, his incomplete focus on the whole terms of what the pursuer said in the recording posted and his undue focus on the sheriff's decision on the evidence adduced at trial.

[117] In considering want of subjective belief in reasonable and probable case and malice, he started from an erroneous assessment of the position objectively. He compounded that error by considering that a prosecutor was taking account of an improper consideration, as he put it, "an ulterior motive," in considering the public interest in deciding to prosecute.

[118] The presumption that the prosecutors acted properly is supported by our analysis that there was sufficient evidence in law and that it was correct prosecutorial practice to consider the public interest. Accordingly, averments that in prosecuting the pursuer prosecutors were doing the bidding of witnesses who were seeking to deter the pursuer from further criticising them and silence him as a political opponent, and adopting their

alleged political motives, take the pursuer nowhere. That persons alleging that they were the subject of sexual offending should be in contact with Rape Crisis Scotland and its Chief Executive is hardly surprising. Neither is it surprising that the Chief Executive of that organisation might be alarmed by an implied threat that the pursuer may breach the anonymity of such complainers. That the witnesses would have had contact with COPFS staff is again entirely to be expected. None of these averments, if established, would permit the inference that there was an improper motive in bringing the prosecution.

[119] Prosecutors in receipt of a report from the police, following five people in an exposed position bringing this matter to the attention of the police, were doing their job in considering whether to prosecute. Accordingly, the PFD and Crown Counsel in this case were acting within scope of the protection of section 170(1). Like the Lord Justice Clerk (Alness) in *Graham* v *Strathern*, we need not consider hypothetical situations where officials might put themselves beyond the protections of the provision.

[120] The pursuer's argument based on the warrant being sought with reference to one provision and the prosecution proceeding on another does not assist him. The Communications Act section 127(1) provides:

> "(1) A person is guilty of an offence if he—
>
> (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be so sent."

[121] In considering that there could be some malign significance in seeking a search warrant under the Communications Act 2003 and then prosecuting under section 38 of the 2010 Act, the Lord Ordinary erred in failing to appreciate that, viewed as a whole, the pursuer's conduct in its context was capable of being seen as menacing just as it was capable of being seen as threatening and liable to cause fear and alarm. The wording in the warrant

application quoted the words of the provision, omitting only "indecent" which is generally a synonym for "obscene." It is an entirely conventional warrant application. The inclusion of the word "obscene" from the statutory definition carries no malign significance and permits no such inference. Nor does seeking and instructing the execution of a warrant in the first place. In concluding otherwise the judge also erred by failing to consider the information before him in the summary of evidence attached to the complaint demonstrating that it was only after YouTube and Twitter declined to provide any information to Police Scotland that, "as a result of this," officers asked COPFS to obtain a general evidential search warrant for the pursuer's home address.

[122] Part of the role of the professional lawyers in COPFS is to determine which charge to prefer if there is more than one option. The prosecutors plainly considered the principle in *Paterson* and other cases concerning the objective nature of the section 38 offence. It was a perfectly reasonable conclusion that section 38 was a more appropriate charge in the circumstances, not least given the relevance of the decision and reasoning in the case of the appellant Love, in *Paterson*, who posted messages on the internet. It would also be perfectly reasonable for a prosecutor to note that the maximum penalty is imprisonment for 6 months under section 127 of the 2003 Act but 12 months under section 38 of the 2010 Act and prefer the latter offence accordingly. The more serious offence would signal the gravity of the pursuer's conduct against the background of a contempt of court order prohibiting what, on one tenable view, the pursuer was threatening to do.

[123] The basis on which the pursuer maintains that he has pled a relevant case of malicious prosecution proceeds on the drawing of inferences from there being insufficient evidence from the outset and the contention that there was no objective reasonable and probable cause. For the reasons explained above, the pleadings, and incorporated

documents, disclose that there was sufficient evidence and there was accordingly objective reasonable and probable cause. It was for the prosecutors to determine the public interest question and there is nothing in their analysis from which an improper motive could be inferred. There is nothing in the pursuer's averments of facts and circumstances to permit a reasonable inference that the prosecutors lacked genuine belief in the validity of the prosecution or acted with malice. His case is irrelevant and is dismissed on that basis.

[124] Since that is our conclusion it is unnecessary to determine what the position would have been if we considered that the prosecutors had erred in concluding there was sufficient evidence. We note that in *Whitehouse*, the Lord Justice Clerk (Dorrian) at [147] contrasted malice with "mistake, negligence, error of judgement and similar matters." That is consistent with the decision in *Craig* v *Peebles*.

Decision

[125] For the reasons given we shall recall the Lord Ordinary's declaration under section 4 of the 1998 Act and dismiss the pursuer's claim on the basis that it is incompetent because of the effect of section 170. It is also irrelevant in failing to aver a basis on which the court could uphold the plea of a malicious prosecution.