



SHERIFF APPEAL COURT

**[2026] SAC (Crim) 11
SAC/2026/71/AP
SAC/2026/72AP**

Temporary Sheriff Principal B Mohan
Appeal Sheriff C M Shead
Appeal Sheriff Ian Hay Cruickshank

OPINION OF THE COURT

delivered by TEMPORARY SHERIFF PRINCIPAL B MOHAN

in

CROWN APPEAL AGAINST ACQUITTAL

in the causes

PROCURATOR FISCAL, GLASGOW

Appellant

against

HANNAH TAYLOR AND CATRIONA ROBERTS

Respondents

Appellant: B J Gill KC, advocate depute; Crown Agent

Respondents: Party Appellants

3 September 2026

[1] The facts of this case are not in dispute. On the morning of 6 February 2025 the respondents staged a protest outside the James McCune Building at Glasgow University. They had decided to spray paint the glass on the building to protest at the university's involvement with companies associated with the Israeli government, in order to demonstrate their opposition to that government's military action in Gaza. The respondents

used a fire extinguisher to spray red water-based paint on the glass frontage of the James McCune Building. They then sat on the ground next to the building. Their actions were deliberate and they posted a video online to draw attention to their protest.

The incident was captured on CCTV.

[2] Following this, the respondents faced trial on a common law charge of malicious mischief. The charge read as follows:

“On 6 February 2025 outside James McCune Building, University Avenue, Glasgow you Hannah Taylor and Catriona Roberts did whilst acting together maliciously spread spray paint over the façade of the building including windows, walls and pavement causing damage to the same.”

[3] After hearing evidence the sheriff in Glasgow acquitted the respondents of the charge. She was satisfied that the building had been sprayed intentionally by the respondents. However, the sheriff was “not satisfied that the actions were intended to cause loss or damage to property” ... [and] “not satisfied that the actions did cause loss or damage to property.” (paras [53] and [54] of stated case).

[4] The Crown appealed both acquittals under section 175(3) of the Criminal Procedure (Scotland) Act 1995. Both respondents represented themselves and made joint submissions. The appeals were therefore heard together. In each appeal the only question posed for the opinion of this court is the following: “Did I err in law by acquitting the respondent and her co-accused by finding that the Crown had not proved that the actions caused loss or damage to the property?”

[5] There is, of course, a statutory charge of vandalism found in section 52 of the Criminal Law (Consolidation) (Scotland) Act 1995. The prosecution in this case, and consequently this appeal, is not concerned with the detail of that legislation. We were not

provided with any authorities relevant to the legislation which may have assisted the interpretation of the law in this case.

[6] The sheriff accurately defined the crime. Malicious mischief consists of intentionally or recklessly damaging or destroying another person's property without permission. It can take many forms. It can result in physical damage or economic loss (Gordon, *Criminal Law*, 4th Edition paragraph 29.01).

[7] A significant part of the submissions before us from both the Crown and the respondents concentrated on the relevant *mens rea* of the offence of malicious mischief (also commonly referred to as malicious damage in the authorities and text books). The *mens rea* of malicious mischief does not require proof of spite, ill will or wicked desire to harm the owner's property. It is sufficient that the accused acted wilfully in the sense of knowingly engaging in conduct which interferes with another person's property while showing a deliberate disregard of, or indifference to, the property or possessory rights of others (*Ward v Robertson* 1938 JC 32, at p 36).

[8] The sheriff went to some lengths to emphasise her conclusions about the intentions of the respondents. In finding in fact number 6 she noted "They specifically selected water-based paint to prevent damage to the property. It is removed by water." Finding in fact number 7 was "The red paint was not visible later that day." She also observed at para [47]:

"Having regard to *Ward v Robertson*, the evidence from the respondent and her co-accused was that they had demonstrated the opposite of deliberate disregard of, or even indifference to, the property or possessory rights of others. They considered and utilised paint designed to wash off."

The sheriff also cited the *Lord Advocate's Reference* (No 1 of 2000) 2001 JC 143. That case followed the acquittal of accused who had perpetrated a deliberate attack on a submarine at a naval base. The reference sought clarification on the *mens rea* of the crime; the accused in

that case had argued that their actions were justified because the deployment of Trident nuclear weapons was - they submitted before the jury - in breach of Scots law.

[9] However, having regard to the single question posed in the stated case, it will be noted that the issue of *mens rea* is not the focus of this appeal. Likewise, the Crown's prosecution policy, and arguments about whether bringing these proceedings against the respondents interfered with their convention rights to freedom of expression (Article 10 ECHR) or freedom of assembly and association (Article 11) are not the subject of any question raised in this appeal. The respondents concentrated on this latter point and produced an extract from an English authority which they submitted was in support of these rights (*Attorney General's Reference No 1 of 2002*). In my view, given the question in the stated case and given that neither party sought to add any matter relating to *mens rea* or convention rights by adjustment, the focus of this appeal remains only whether the sheriff was entitled to find that the admitted actions of the respondents had not caused loss or damage.

[10] What qualifies as "loss or damage" under the common law crime of malicious mischief? Does interference with property require to reach a certain threshold to be considered loss or damage? The Crown referred to a number of authorities and argued that the defacement of the glass building - in this case with paint - amounted to damage. The Crown also argued that, even though they had not produced evidence of cost or effort attached to its removal, and even though the damage was temporary, the sheriff had erred in acquitting the respondents. The respondents argued that the sheriff was correct in finding that, because they took care to only use "water-based paint" which could be removed easily, no damage had occurred.

[11] In *Ward v Robertson* 1938 JC 32 the appellant took a short cut across a field to walk home instead of using a footpath. He and his companions trampled over growing grass. The appeal was successful on the issue of *mens rea* because the appellant maintained throughout that he did not believe he was doing any harm. According to the finding of the magistrate the field was “rendered useless or unsuitable for grazing purposes,” albeit that the Lord Justice Clerk described that as “an astounding finding” (at p 35).

[12] The question of loss or damage was more specifically analysed in the decision of the High Court of Justiciary in *HMA v Wilson* 1984 SLT 117. The appellant was accused of maliciously activating an emergency stop button in the turbine hall of a power station, thereby preventing the generation of electricity into the national grid and causing substantial financial loss for the company. By a majority the court held that the economic loss thereby incurred satisfied the requirements of the crime of malicious mischief. The court in that case concluded that it was appropriate to update the definitions of the crime found in the works of Hume and Alison. At page 119 the Lord Justice Clerk (Wheatley) noted Hume’s observation in 1829 that malicious mischief consisted of “every act of great and wilful damage done to the property of another”. He also observed Alison’s description that:

“At common law, every act of serious and wilful damage done to the property of another, whether from malice or gross misapprehension of legal rights, is an indictable offence”.

The court then went on to quote the definition of “damage” in the Shorter Oxford English Dictionary as including “loss or detriment caused by hurt or injury affecting estate, condition or circumstance” [that remains the definition in the online edition of the Shorter Oxford English Dictionary today].

[13] However, in analysing the institutional writers and reviewing the authorities the court in *Wilson* concluded that “there is a wider cover to be given to the earlier view of the nature of the offence” (page 120). In the same case Lord McDonald noted from Hume that, in addition to the description of “great and wilful damage” something less could qualify: “the panel shall equally be convicted, whether he interferes with the property of another, or with his state only of peaceable and lawful possession” (page 120). The judgments of both Lord Wheatley and Lord McDonald referred to an older case of *Miller* (1848) Arkley 525 where a stone was placed on a railway line but removed by a third party before a train arrived at the spot and no damage was incurred. The relevancy of that charge was not challenged although there was clearly no suggestion of actual physical damage to the property of another.

[14] The other relevant case cited by the Crown was *Bett v Hamilton* 1998 JC 1. The allegation there was that the appellant maliciously moved a video surveillance camera on a bank building using a pole to prevent it recording a specific area. Although the Crown intended to lead evidence that there were costs associated with the re-fixing of the camera, the charge was held to be irrelevant.

[15] In my view it is apparent from these authorities that damage no longer requires to be considered as “great” (as noted by Hume) or “serious” (by Alison). Nevertheless there is a limit to the extent to which interference with property will qualify as damage, as seen in *Bett v Hamilton* (*supra*).

[16] Returning to the question before this court, was the sheriff entitled to find that the Crown had not proved that the actions of the respondents caused loss or damage to the property? It is clear that the sheriff’s findings in that regard were based on the deliberate selection by the respondents of water-based paint, together with the lack of evidence led by

the Crown about what effort or cost (if any) it took to remove this from the glass frontage of the building. In my view the sheriff erred in deciding that proof of “damage” in the charge of malicious mischief required evidence that this was permanent, and that defacement or damage which was temporary did not fall within the definition.

[17] The paint was applied from a fire extinguisher across the entire elevation of the curved glass frontage of the building, extending to about 20 metres, in red continuous wavy lines (as described in paras [4] and [5] of the stated case). Despite the absence of direct evidence it is a logical inference that the application of such paint to the glass required human or mechanical input to remove it. Paint does not remove itself.

[18] The finding that “water-based paint” had been used as opposed to other forms of paint (presumably oil-based) is relevant to how easy or difficult it may be to clean off. It is relevant to the extent of the damage, not to its existence. The discussion by their Lordships in *HMA v Wilson* about updating the descriptions of damage by Hume and Alison represents the current law. Their Lordships’ reference to the case of *Miller* where a stone was removed from a train track - thereby averting damage of any sort - demonstrates the wide application of the crime.

[19] The damage caused in this case may seem less real and less harmful because it was caused by two student activists who sprayed paint on a university building. But to hold that only permanent damage constitutes the crime of malicious mischief would be going too far. Temporary damage is still damage. To acquit an accused merely because water-based paint is more easily removed than other types could set an unwarranted and undesirable precedent. It might encourage anyone who engages in anti-social behaviour as part of any protest or demonstration - whether organised or spontaneous - to think that they could deface property with impunity simply by using a particular type of paint.

[20] I have had the benefit of reading the opinions of Appeal Sheriff Shead and Appeal Sheriff Cruickshank. For the reasons I have explained above I dissent from their conclusion as to the outcome of this appeal.

[21] I consider that the sheriff misdirected herself in this case by focusing on the respondents' explanation that this was water-based paint. They may have sought to minimise the impact of the damage which their protest caused, but it was still damage. Accordingly, in my view the case should be remitted to the sheriff with a direction to convict. The sheriff should thereafter decide the appropriate sentence or disposal based on her assessment of the full facts and submissions about the respondents' individual circumstances.



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**Appellant: B J Gill KC, advocate depute; Crown Agent
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3 September 2026

Introduction

[22] On 7 November 2025 both respondents were acquitted by the sheriff of a charge of malicious mischief. The terms of the charge and the question posed for the opinion of this

court are set out in the opinion of your Lordship in the chair. Since, in my view, the appeals should be refused I should explain my reasons for reaching that conclusion. In doing so I emphasise that the court is concerned only with the crime of malicious mischief and not the offence in section 52(1) of the Criminal Law (Consolidation) Act 1995.

[23] As can be seen from the charge the allegation was that the respondents, by their actions, caused damage to the façade of the building mentioned. There is no averment that they caused patrimonial loss.

[24] The sheriff made a number of findings in fact which are set out in [37] of the stated case. None of those findings have been challenged by an appropriate question in the stated case. It is clear from those findings that the actions complained of took place as a part of a political protest. Findings in fact 3 and 6 are in the following terms:

“(3) They [the respondents] had decided to spray paint on the glass on the building...using water based paint. They used this as it was easily removable without causing damage.

(6) They [the respondents] specifically selected water-based paint to prevent damage to the property. It is removed by water.”

[25] In the stated case the sheriff refers to the definition of the crime which she supplied to the respondents to assist them. She explains that she was not referred to any authority during the trial. I pause to observe that it was the duty of the Crown to draw any relevant authorities to the sheriff's attention. It was all the more important to comply with that duty where, as here, the respondents were representing themselves.

The trial

[26] The evidence led by the Crown was not disputed. None of the Crown witnesses were cross-examined. Each of the respondents gave evidence and were briefly

cross-examined. In summary the sheriff explains that the Crown led evidence to establish that the respondents had sprayed water-based paint on the glass façade of one of the university's buildings. However no evidence was led to show whether anyone removed the paint, how it was removed or if there were any costs associated with its removal.

[27] In summarising her conclusions the sheriff explains that she was satisfied that the respondents had sprayed paint on the windows, that they did so intentionally and that the property belonged to another. However she was not satisfied that their actions were intended to cause loss or damage to property nor was she satisfied that the actions did in fact cause loss or damage to property.

The submissions summarised

[28] The advocate depute adopted his written submissions. By way of disposal he invited the court to set aside the verdict of acquittal, to substitute an amended verdict of guilty and thereafter to sentence the respondents.

[29] Notwithstanding the terms of the question in the stated case he argued that the sheriff had misdirected herself in three respects: (a) as to the required *mens rea* in considering that it involved an intention to cause permanent or irreparable loss or damage, (b) in relation to the actus reus by concluding that the crime involves an act that causes permanent or irreparable loss or damage and (c) in relation to the significance of the absence of evidence as to the economic loss to the complainer, by treating proof of quantified economic loss as necessary element, where there was physical defacement of the property.

[30] As regards the actus reus of the crime it was submitted that "damage" encompasses not only destruction or permanent harm but also injury to the condition or state of the property which would include defacement or physical alteration even where such alteration

is capable of being reversed. In respect of the last point the advocate depute submitted that physical defacement could be equated to damage. In other words chalking a protest slogan on a wall or pavement would be sufficient to constitute the damage required for the commission of the crime.

[31] It was further submitted that it was an error to require proof of economic loss in cases where physical damage or defacement is established.

[32] The first respondent made oral submissions based on a written document which was provided to the court. Those submissions were adopted by the second respondent.

[33] It was submitted, *inter alia*, that “defacement” does not always cause damage. The evidence supported the conclusion only that the appearance of the building had been altered superficially not that it had been damaged. Referring to the decision in *HMA v Wilson* to the effect that “damage” is the “loss or detriment caused by hurt or injury affecting estate, condition or circumstances” it was submitted that the Crown had failed to lead any evidence which justified a conclusion that damage had been caused. It was also contended that the case law did not provide any examples of the use of the word “defacement” as constituting the physical damage required for the crime of malicious mischief. Were defacement sufficient that would significantly broaden the definition of malicious mischief and may conflict with convention rights including the right to protest.

[34] In that connection reference was made to the *AG’s Reference* (No 1 of 2022) [2022] EWCA Crim 1259; [2023] KB 37 and the observation at [121] that a prosecution for causing minor damage arising out of peaceful protest might constitute a disproportionate interference with the convention rights of those who caused the damage.

[35] It was submitted that the Crown’s argument in relation to *mens rea* represented a misunderstanding of the law. Reference was made to *Ward v Robertson* and the opinion of

Lord Pitman who said: “A person who thinks he is doing no harm cannot rightly be convicted of doing something maliciously.”

[36] In respect of the issue of physical damage and patrimonial loss as alternative bases for establishing the crime it was clear from the sheriff’s note at [43] that she had not misunderstood the position as the Crown had contended.

The scope of the appeal and the submissions considered

[37] The first question is whether the Crown submissions went beyond the scope of the appeal delineated as it was by the sole question posed. This is important because, as noted, there were two matters which the sheriff did not find proved to the necessary standard only one of which is challenged in that question.

[38] Assuming that the court answered the question in the stated case in the affirmative that would still leave the acquittal undisturbed. That is because the sheriff was not satisfied that the actions of the respondents were intended to cause loss or damage to the property of another. In other words her conclusion as regards *mens rea* is not challenged in the stated case. In the application for the stated case the focus was on the sheriff’s approach to the causing of damage it being asserted that there was clear evidence of damage in the form of the defacing of the building. The question which was posed reflects the single issue which was raised in the application. In any event there are no questions directed to challenging the relevant findings in fact.

[39] It would have been open to the Crown to seek to expand the scope of the appeal once the draft stated case was available but it did not do so. No new questions were suggested by way of adjustment.

[40] The first indication of a challenge to the sheriff's approach to the vital issue of *mens rea* came in the Crown's written submissions lodged in support of the appeals.

[41] As both the High Court and this court have emphasised it is necessary to formulate the relevant questions with care.

[42] In deciding whether to engage with the wider arguments presented to us the context is important. The starting point is that this was an acquittal in a summary prosecution which arose from a peaceful protest conducted by the respondents. The Crown failed to advance the arguments put before us to the sheriff and to cite the relevant authorities. Accordingly in my view this court should not seek to determine the issues raised by the Crown submissions which go beyond the scope of the appeal. In any event those submissions were not advanced to the sheriff and therefore we do not have the benefit of her view on the matters raised. Having reflected on the question in the stated case I consider that it is unnecessary and unhelpful to answer it since even an affirmative answer would not affect the acquittal. In coming to that decision I do not consider it necessary to analyse the sheriff's approach to *mens rea* nor to express a view on her conclusion on that critical issue. For the reasons given I would refuse the appeals.

[43] On the other hand I recognise that the arguments advanced by the appellant and the respondents are of some importance to the prosecution of offences of malicious mischief particularly those arising out of peaceful protest. In response I propose to make some observations about the common law and how it might require to be interpreted in the context of cases involving peaceful protest. In doing so I would stress that the court did not have the benefit of full argument on each of these issues.

The concept of damage in malicious mischief

[44] The first issue which arises concerns the meaning of “damage”. In this context there is some value in considering the decision in *HMA v Wilson* 1984 SLT 117.

[45] The question in that case was whether an action which caused no physical damage to machinery but did cause economic loss could nevertheless constitute the crime. The sheriff sustained a plea to the relevancy of the indictment against which decision the Crown appealed. By majority the court allowed the appeal. The Lord Justice Clerk considered first what constituted the crime by reference to both Hume and Alison. For present purposes it is of note that both writers qualified the word “damage” by the use of the adjectives “great” and “serious” respectively. In considering whether the alleged actions caused “damage” or “patrimonial injury” the Lord Justice Clerk said:

“To interfere deliberately with the plant so as to sterilise its functioning with resultant financial loss such as is libelled here is in my view a clear case of interference with another’s property which falls within Hume’s classification of malicious mischief and consists with the words in the phrase.”

He did not suggest that there was any error in Hume’s statement of the law nor in Alison’s. Given the issue before the court there was no need to focus on the issue of how serious the loss or damage required to be given the scale of the alleged loss but it would have been open to the Lord Justice Clerk to express disapproval of those statements had he considered they disclosed any obvious error. Lord McDonald does not refer expressly to either Hume or Alison in his opinion and rests his decision on the ground that interference with the property of another so long as it is an interference with his state of peaceable and lawful possession of the property is sufficient. In his dissenting opinion Lord Stewart refers to Gordon’s *Criminal Law* and, having set out the definition of the crime contained therein, he

says that it is in line with the statement of the law formulated by earlier text book writers including Alison.

[46] The advocate depute submitted that the Lord Justice Clerk had not used a qualifying adjective when describing the crime but in my view that is not determinative of the point given the structure of his opinion. It would have been an obvious observation to make had the Lord Justice Clerk thought there had been a misstatement of the law.

[47] Although we were not referred to the case, the crime of malicious mischief was considered by the High Court in the *Lord Advocate's Reference* (No 1 of 2000) 2001 JC 143.

However here too, when regard is had to the questions which had been posed for the opinion of the court, there was no need for the court to analyse whether the damage in the crime required to be serious. What had been done was clearly serious.

[48] Hume dealt with the crimes of wilful fireraising and malicious mischief together in chapter IV of volume 1. He said this of malicious mischief:

“It may be affirmed generally, with respect to every act of great and wilful damage done to the property of another, and whether done from malice, or misapprehension of right, that is cognisable with us a crime at common law; if it is done, as ordinarily happens, with circumstances of tumult and disorder and of contempt and indignity to the owner.”

It is not without significance that Hume chose to deal with both crimes in the same chapter describing wilful fireraising as “a crime of a very high degree.” Alison said: “At common law every act of serious and wilful damage done to the property of another ... is an indictable offence.”

[49] In my opinion there is at least a question to be considered in future cases as to whether the definition of the crime ought to be understood as reflecting the statements of the law made by Hume and Alison. In other words is there some minimum threshold to be met before an interference with another's property can be characterized as “damage” or is it

sufficient to prove a transitory alteration in the appearance of the property such as defacement?

Convention rights: Articles 9, 10 and 11

[50] Before the sheriff there was no discussion of whether the convention rights of the respondents were engaged. During the appeal, as noted, the respondents drew attention to the decision in the *Attorney General's Reference* (No 1 of 2022).

[51] In this context the issue of proportionality has been considered both by the Supreme Court and the Court of Appeal. In *re Abortion Services (Safe Access Zones) Northern Ireland Bill* [2022] UKSC 32; [2023] AC 505 the Supreme Court gave guidance on the approach to be followed. If Articles 9, 10 and 11 are engaged the question which arises is:

“whether the offence is one where the ingredients of the offence themselves strike the proportionality balance so that if the ingredients are made out and the defendant is convicted, there can be no breach of his or her Convention rights.” [55].

In the following paragraph the court made clear that where that question is answered in the negative another question may arise to ensure that the court does not act incompatibly with convention rights: whether there is a means by which the proportionality of a conviction can be ensured? At [61] the court said in relation to a common law offence:

“the question arises whether the court can develop the common law so as to render the offence compatible with Convention rights either on ordinary principles or by virtue of the duty imposed by section 6(1) of the Human Rights Act.”

[52] The respondents referred to the observations of the Court of Appeal at [121] of its judgment in the *Attorney General's Reference* (No 1 of 2022) concerning minor or trivial damage. Thus if the crime of malicious mischief extended to minor damage including defacement, as the Crown now submits, a question might arise as to whether the act of bringing a prosecution was an act which was incompatible with an accused's convention

rights assuming that the damage was related to an act of peaceful protest. If, on the other hand, there was a threshold of the kind described by Hume and Alison no such question is likely to arise.

[53] For the reasons given I am not confident that the qualification articulated by both Hume and Alison no longer forms part of the common law. Indeed, at least in the context of the application of convention rights, I can see the value of that qualification. However, as has been noted, none of these arguments were presented to the sheriff and given the narrow focus of the question before this court I do not consider that I should express a concluded view on the issues to which I have drawn attention.

[54] I have had the advantage of reading the opinions of your Lordship in the chair and Appeal Sheriff Cruickshank. In response I would make the following points. First we are all agreed that the question before the court concerns the *actus reus* of the offence and not the *mens rea* of the respondents. My Lord in the chair has emphasised that the focus of the appeal should be on the sole question raised in the stated case. For the reasons given I am in respectful agreement with that approach. I accept that neither the Crown nor the respondents raised the question of convention rights before the sheriff. However that does not elide the duty of the court under section 6(1) of the Human Rights Act 1998. Given the disposal of these appeals the matter is now academic although the issue may arise in future similar cases.

[55] Secondly it is important to emphasise that the Crown sought to prove that there had been “damage” and not patrimonial loss. Unsurprisingly therefore there was no evidence of the latter. Notwithstanding the basis on which the trial had been conducted the question in the stated case refers to both damage and “loss”. It is not immediately obvious on what basis the latter concept was introduced into the question. Even if there had been evidence

from which to infer “loss” it would not have been open to the sheriff to convict the respondents on that basis standing the terms of the charge.

The disposal of the appeals

[56] In the event that I had been prepared to allow the appeals, I do not consider that it would have been appropriate to proceed by reference to section 183(1)(c) of the Criminal (Procedure)(Scotland) Act 1995. The Crown did not specify what the amended verdict of guilty should be and in any event this provision is more obviously applicable to appeals by those have been convicted.

[57] In the past this court, when allowing the Crown appeal, has remitted the case to the sheriff with a direction to convict. However in my view that step would not have been appropriate in these cases not least because it cannot be said that a finding of guilt would have been inevitable once the relevant authorities had been cited and analysed for the sheriff’s benefit.

[58] Rather, in light of the observations I have made, I would have exercised the power under section 183(1)(a) to remit the matter to the sheriff to hear further submissions.



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[59] The issue for this court is whether the sheriff was entitled to acquit the respondents on the undisputed facts as presented by the Crown. The respondents also gave evidence at trial. As had been outlined in your Lordships' respective opinions the question as framed for this court does not focus on the issue of *mens rea* although the sheriff's conclusion was

that this had not been established and could not be inferred from the respondents' actions.

The matter for the consideration of this court relates to whether there is in this case "loss or damage" to the building sufficient to constitute the crime libelled.

[60] Equally, as has also been noted in the respective opinions of your Lordships, the Crown elected to prosecute this matter under the common law crime of malicious mischief as opposed to the statutory offence of vandalism under section 52 of the Criminal Law (Consolidation) (Scotland) Act 1995. This appeal draws into sharp focus the nature and extent of the common law crime as it has developed and been interpreted in more modern times.

[61] I will not repeat the terms of the charge. Unlike the cases of *HMA v Wilson* 1984 SLT 117 and *Bett v Hamilton* 1998 JC 1, where the matter to be determined was whether the respective libels in each case relevantly disclosed the crime of malicious mischief, on the face of it, what we have here is a relevant charge for the said crime. The Crown specifically set out to prove that damage was caused to the building. What did the Crown mean by "damage"? Was that damage sufficient in law to constitute this crime?

[62] In this case the libel did not set out to prove that as a consequence of the spraying of water-based paint, the effect of which the evidence established was temporary and short lived, that the act of spraying the paint led to any financial or patrimonial loss to the owner or possessor of the property (as was the case in both *Wilson* and *Bett*). There was no evidence of any cost or monetary loss to the owner/possessor of the building as a result of this act which was carried out as part of a peaceful protest.

[63] The Crown say the damage, being the spraying of the paint itself on the building was sufficient to bring the actions of the respondents into the territory of malicious mischief. The respondents dispute that what they did can properly be categorised as damage for the

purposes of this crime. Both the Crown, and the respondents, have referred to what occurred as “defacement” of the property. The Crown submits that temporary interference would constitute the offence. No-one can gainsay that what was done was rectified in quick order, by means unknown and at no established cost if indeed there was any cost at all attached to a clean-up operation. There appears to be no dispute that following cleaning, if that indeed occurred and at whose hand, no marks or damage of any kind remained.

[64] The Crown submission largely rested upon the fact that the CCTV footage showed the spraying of the building – therefore it was plainly damaged. It was an intentional act on the part of the respondents. Is that sufficient, in the particular circumstances of this case, measured against the definitions as provided for by the institutional writers, textbooks and the legal authorities to constitute the crime libelled?

[65] Of the crime of malicious mischief Hume said this:

“It may be affirmed generally, with respect to every act of great and wilful damage done to the property of another, and whether done from malice, or misapprehension of right, that is cognisable with us as a crime at common law; if it is done, as ordinarily happens, with circumstances of tumult and disorder, and of contempt and indignity to the owner” (from *The Law Society of Scotland* 1986 reprint, Volume I, chapter IV at I)

[66] Hume defined the crime in the language of his day. He associated the crime of malicious mischief with “riotous behaviour”. Such associated behaviour is no longer necessary. An updated definition can be found in Gordon who describes it thus:

“The modern crime, therefore, consists in the intentional or reckless destruction of or damage to the property of another.... or the causing of economic loss in the absence of damage to any corporeal property (provided, it seems) that the loss is caused by unauthorisedly interfering with, in the sense of doing something positive to, another’s property ...” (*The Criminal Law of Scotland*, Volume 2, 4th Edition at paragraph 29.01)

[67] In *Wilson*, the charge was held to be relevant albeit there was no damage but there was a loss, as a result of a positive act on the part of the accused. That was the activating of

an emergency stop button at a power station which led to a loss of 12 million kilowatt hours of electricity at a cost of £147,000. In his opinion, Lord Justice Clerk Wheatley looked to the dictionary definition of “mischief” (which per the Shorter Oxford English Dictionary he quoted from the variety of meanings as the appropriate one “in the present context” as being “Harm or evil as wrought by a person”). From the same dictionary he pointed to “Damage” being defined as (1) “loss or detriment caused by hurt or injury affecting estate, condition or circumstances” and (2) “injury or harm”. In analysing whether the act in that case amounted to loss or patrimonial injury, he concluded that the stopping of the turbine fell within Hume’s classification of the crime.

[68] In *Bett* the court did not have to consider the concept of “damage” as there was none. The relevancy of the charge hinged on whether turning a camera away from the area it was set to record resulted in the “detriment to the benefit which the bank had attempted to secure” by using the camera and whether, as a result of that act, the bank suffered financial loss. In finding the charge to be irrelevant the Appeal Court said that what was required was “a wilful intent to cause injury to the owner or possessor of the property ... either in the form of physical damage or in the form of patrimonial loss”.

[69] As the determination of this appeal is neither concerned with the concept or *mens rea* nor the application of convention rights, the decision in *Lord Advocate’s Reference* (No 1 of 2000) 2001 JC 143 is of little assistance. That said, the charge in that case libelled that there had been damage to computers and other pieces of equipment having deposited “said items in the waters of Loch Goil, whereby said items became waterlogged, useless and inoperable”. It would be hard to argue that the libel in that case offered to prove anything other than damage to property items in the true sense.

[70] Accordingly, none of the authorities cited to this court give any consideration as to what the necessary level or degree of damage is required to constitute the crime in the absence of their being patrimonial loss. In the present case, there was no wilful intent on the respondent's part to cause either loss or damage, and, in fact, on one view there was no damage, dependent on how damage is to be defined. To that end I consider that the sheriff's decision here was in line with the reasoning in *Bett*.

[71] The crime of malicious mischief must be fact specific. It will depend on the facts and circumstances of each case whether there has been loss or damage sufficient to constitute the crime. Whether or not an accused committed the crime of malicious mischief would have to be viewed objectively. In the facts and circumstances of this case, viewed objectively, my view is that the sheriff was entitled to conclude the respondents did not commit the crime.

[72] The Crown set out to prove there had been damage to the building as a result of spraying paint. The sheriff heard from a number of Crown witnesses. Provenance of CCTV footage showing the respondents spraying the paint was agreed. The respondents both gave evidence. The respondents readily admitted they had been responsible for spraying the paint. The sheriff made findings in fact which included (as numbered in the stated case):

- 2 The respondents were staging a protest for youth justice.
- 3 They had decided to spray paint the glass using water-based paint. They used this as it was easily removable without causing damage.
- 6 They specifically selected water-based paint to prevent damage to the property. It is removed by water.
- 7 The red paint was not visible later that day.

[73] The sheriff was satisfied that there had been a positive act on the part of the respondents. It was intentional, and the property belonged to another. What the sheriff was

not satisfied about was that the actions were intended to cause loss or damage and that the actions did, in fact, cause loss or damage.

[74] The sheriff recognised that the act could be either intentional or reckless as to whether there was loss or damage. The Crown submitted that the sheriff misdirected herself as to the required *mens rea* on the basis that it involved an intention to cause permanent or irreparable loss or damage. I do not read the sheriff as going that far. She simply found, on the evidence adduced, that what had been done did not constitute “damage”. Significantly, there was no evidence of any patrimonial loss. Had that been part of the charge, and evidence led in support, then the sheriff may well have concluded that notwithstanding there was no damage in a real or lasting sense there was financial or other loss to the possessor of the property that was sufficient to render the respondents’ actions criminal.

[75] Patrimonial loss in this case could have covered a number of matters. It could have resulted from the costs associated from an otherwise unnecessary clean-up operation. It could have resulted from cost associated by the university being deprived of the use of the building whilst the paint was removed (although in fairness to the respondents, the sheriff noted from their evidence that they had intentionally chosen the time of their protest to ensure that no student education would be impacted). But whether there was in fact patrimonial loss is speculative as no evidence on that was led.

[76] I accept the point made by your Lordship in the chair that paint does not remove itself but there was no evidence led as to how it was removed or by whom. Was it by human intervention or merely a heavy shower of rain? It would have taken little effort on the Crown’s part to find out and consider whether it was necessary to lead evidence on that.

[77] I also agree with your Lordship that to hold only permanent damage as being a necessary constituent of the crime goes too far. But in this case the defacement of the

building was transient and, according to the evidence, left no perceptible mark of any kind.

In the majority of cases where damage is founded upon to establish the crime of malicious mischief that damage will either lead to a permanent spoiling of the property in question or lead to restorative action being necessary. Furthermore, in most cases, it will be plainly obvious that some form of repair would either be necessary or had been carried out.

[78] On the above basis I respectfully disagree with the conclusion that an acquittal in these circumstances would set an unwarranted and undesirable precedent. In this case the Crown knew, or ought to have known, that the effect of the spraying water-based paint on the building was very short lived. It does not lead to the conclusion that anyone can spray paint on a building, water-based or otherwise, and safely conclude that there will be immunity from prosecution. It simply means that in prosecuting unusual cases such as the present then the Crown, if it founds on malicious mischief, requires to consider both the terms of the libel it proceeds upon and what evidence it considers it requires to lead to establish the crime.

[79] I stress again that, based on the evidence here, neither the sheriff, nor this court can say whether the possessor of this property had to do anything to remove the paint.

Accordingly, in the particular circumstances of this case, absent any evidence of financial or patrimonial loss, I do not consider that the sheriff misdirected herself that loss or damage, sufficient in the context of the crime of malicious mischief, had been caused to the building by the respondents.

[80] For the reasons above stated I consider it is appropriate to answer the question posed in the negative and refuse this appeal.