**OUTER HOUSE, COURT OF SESSION**

**[2026] CSOH 8**

A156/24

OPINION OF LORD LAKE

In the cause

MARK HIRST

Pursuer

against

THE CHIEF CONSTABLE, POLICE SERVICE OF SCOTLAND AND OTHERS

Defender

**Pursuer: Dangerfield, (sol-adv); DAC Beachcroft Scotland LLP**
**First Defender: Byrne; Ledingham Chalmers LLP**
**Second Defender: Moynihan; Scottish Government Legal Directorate**

5 February 2026

[1] In March 2020, Alex Salmond, the former First Minister of Scotland, was acquitted in the High Court at Edinburgh of various sexual offences including two counts of attempted rape. Six days later, on 29 March, the pursuer posted a video on YouTube titled "Salmond Trial Observations". A transcript of the video is incorporated into the summons. It says the following:

> "I suspect very strongly that as this rumbles on, that precious anonymity that they've [ie the complainers have] sought will not be continued. Because these women, and not just these women, some of the people involved in this, are senior members of the Scottish Government, senior members of the SNP. And they've been involved in this active collusion to try and destroy Alex Salmond's reputation 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, no question about it. As soon as this virus emergency is out the way, then there's going to be a bit of a reckoning takes place. We'll clear out the soft independence supporters which are currently leading the party, that's why we've seen no movement in nearly 6 years."

[2] Complaints were made about the contents of the video to the police and to prosecutors. On 2 April 2020, the pursuer made contact with Police Scotland in a response to an Article in a national newspaper which said that he was the subject of a complaint to the police. On 14 April 2020, a warrant to search the pursuer's home was granted by the sheriff at Jedburgh on the basis of an alleged contravention of the Communications Act 2003, section 127. The warrant was executed on 20 April 2020. On 12 May 2020, in response to a request from the police, the pursuer attended a police station in Edinburgh for interview. He gave a pre-prepared statement in which he acknowledged that it was him in the video and that he had posted it. At the conclusion of the interview, he was cautioned and charged with an offence under section 127 of the 2003 Act. The pursuer was subject to summary prosecution in respect of the contents of the video. The complaint alleged an offence under the Criminal Justice and Licensing (Scotland) Act 2010, section 38(1), rather than the one with which he was charged at the end of the interview. The trial started on 7 January 2021. There was agreement that the pursuer had posted the video and of the transcript of its contents. At the end of the Crown case, a submission of no case to answer was made. It was upheld and the pursuer was acquitted.

[3] In this action, the pursuer seeks damages in respect of these events. His first plea in law is in the following terms:

> "The pursuer having been prosecuted as a consequence of the malicious acts of the defenders' employees as condescended upon, he is entitled to reparation from them therefor."

The employees of the first defender referred to are police officers. The pursuer avers the following acts carried out by the police:

- Preparing a first draft of an application for a search warrant and discussing the terms of the application with procurator fiscal deputes. It should be noted, however, that the pursuer also avers that two further procurator fiscal deputes drafted the application for the warrant and presented the application and admits an averment from the first defender that the warrant was drafted, prepared and presented to the Court by the second defender.
- Executing the search warrant to carry out a search of the pursuer's home.
- Interviewing and then charging the pursuer with a contravention of the Communications Act 2003.
- Preparation of a standard prosecution report in respect of his actions.

His pleadings state that there was no reasonable or probable cause for police officers bringing charges against the pursuer. He avers that the actions were carried out for a number of improper motives that appear to overlap and included; (1) "doing the bidding" of the complainers in the trial of Alex Salmond and the Chief Executive Officer of Rape Crisis Scotland, (2) a "political" motive, to silence him and to prevent him from criticising the complainers, (3) to deter others from criticising the complainers, (4) to punish him for speaking out about the prosecution of Mr Salmond, and (5) to deprive him of the electronic devices he required for his work as a journalist. It was averred that these actions were "instrumental in the procurator fiscal bringing and maintaining the prosecution" and that they "caused or materially contributed to the commencement and continuation of the prosecution, for which the first defender is liable in law".

[4] The employees of the second defender to whom the pursuer refers are employees of the Crown Office and Procurator Fiscal Service (COPFS). The principal action they undertook was to prosecute him for an alleged contravention of section 38 of the 2010 Act. In addition to the commencement and conduct of this prosecution, the pursuer makes averments of the role of these employees in drafting the application for the search warrant and presenting it to the sheriff. He pleads that "the actions of COPFS were also objectively and subjectively lacking in reasonable and probable cause for the same reasons". He offers to prove that the actions were malicious, again, for all reasons averred in relation to the police.

**Relevancy of the averments concerning actions of the defenders' employees**

[5] Before setting out the submissions of parties on the issues that were disputed, it is useful to summarise matters that were not in dispute:

- For an action alleging malicious prosecution to succeed, four elements must be averred and proved. They are (a) the proceedings must have been initiated by the defender; (b) the proceedings must have terminated in favour of the pursuer; (c) the absence of reasonable and probable cause; and (d) malice, or a primary purpose other than that of carrying the law into effect (*Whitehouse* v *Lord Advocate* 2020 SC 133, [2019] CSIH 52, paragraph [106]).
- The pursuer was prosecuted and acquitted.
- The absence of reasonable and probable cause has an objective element and a subjective element. In *McGregor* v *Chief Constable* [2024] CSOH 109, the following passage from *Stuart* v *Attorney General of Trinidad and Tobago* [2023] 4 WLR 21, [2022] UKPC 53 was quoted with approval:

> "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. However, the prosecutor does not have to believe that the proceedings will succeed. It is enough that, on the material on which the prosecutor acted, there was a proper case to lay before the court".

It is sufficient for the pursuer to aver and prove absence of *either* objective *or* subjective belief that there is reasonable and probable cause.

**Submissions for the Lord Advocate**

[6] Assessing whether there was reasonable and probable cause requires an examination of the material available at the date of the decision to prosecute. However, in carrying out this examination it was necessary to have regard to the comment in *Beaton* v *Ivory* (1887) 14 R 1057 that, "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". This statement had been approved recently by the Inner House in *Grier* v *Lord Advocate* 2023 SC 116, [2022] CSIH 57, paragraph [108]. Displacing this presumption would require the pursuer to lead evidence which would in turn require that there were averments in the pleadings.

[7] As to what was meant in practical terms by reasonable and probable cause, counsel referred to *Glinski* v *McIver* [1962] AC 726, where the test for reasonable and probable cause was described by Lord Denning as being whether there was a proper case to lay before the Court (p. 758). In *Rae* v *Strathern* 1924 SC 147, Lord Cullen said that there would be no reasonable and probable cause where the view taken by the prosecutor was "so obviously wrong that the prosecutor was destitute of a basis for his actings" (page 154). In *Craig* v *Peebles* (1876) 3 R 441, although the report related to a reclaiming motion, at first instance

Lord Young had considered reasonable and probable cause in relation to a question of law which was said to be novel. He said it would exist where the view that had been taken of the disputed matter in starting the prosecution "was not irrational, and was such as reasonable men in their position (or indeed in any position) might excusably entertain and act upon" (p.444). It was submitted that a similar approach had been taken by Lord Tyre when hearing debates in the cases of *Grier* v *Lord Advocate* [2021] CSOH 18, 2021 SLT 371 and [2021] CSOH 28, 2021 SLT 833. In the first, as the charges were dismissed as irrelevant, Lord Tyre considered that it would be difficult to argue that there had been reasonable and probable cause at the outset (paragraph [42]-[43]). In considering this, it was submitted that it was important to note that no Scottish Authority on the matter had been cited to him in the course of the debate (paragraph [31]). In the second debate, the attention of Lord Tyre had been drawn to the cases of *Craig* and *Lightbody* v *Gordon* (1882) 9R 934. Lord Tyre considered that they were of assistance in answering the question of whether there had been reasonable and probable cause. In light of them he said that a finding the case was irrelevant did not necessarily amount to a finding that there was an absence of reasonable and probable cause (paragraph [9]).

[8] In relation to lack of subjective belief in reasonable and probable cause, it was submitted that the pursuer made no averments that this was the position and that, having regard to the presumption in *Craig*, such averments were necessary.

[9] As to the process by which the absence of objective belief as to reasonable and probable cause would be established, it was submitted that it was a legal question and that, as the facts are not in dispute as to what material was available to the prosecutor, I could consider the content of the video uploaded and decide whether objective reasonable and probable cause existed. In *Glinski*, Lord Denning had said, in a context where the disposal of

the case would ultimately be for a jury, where the facts are not in dispute it was for the judge to determine whether there was a lack of reasonable and probable cause. A similar approach had been taken by Lord Tyre when hearing debates in *Grier*. In the first, he had said that the issue was a question of law and had determined the issue.

[10] It was submitted that in this case the issue of whether the test for objective reasonable and probable cause was met was one in which there was scope for different views to be taken. This was particularly so where issues of free expression and Article 10 arose. Recent examples of this could be seen in the decisions in *R* v *Casserly* [2024] EWCA Crim 25 and *R* v *Watson and Manchester Chief Constable of Manchester Police* [2025] EWHC 954 (Admin). It was submitted that in considering whether there has been reasonable and probable cause, regard must be had to the context in which the decision was taken. It was of note that the pursuer's video had within it a threat of disclosure of the identity of the complainers in the Salmond trial shortly after the trial had ended and threats of repercussion to those women for having been complainers. The comments from the pursuer came in the immediate aftermath of a trial at a time the complainers felt vulnerable. It was submitted that the question as to whether there was reasonable and probable cause raised difficult issues and it was an evaluative judgment as to where the line should be drawn. This meant that a prosecutor with a duty to protect the public could reasonably reach the conclusion that it was fit to be put before a court. Accordingly, there was reasonable and probable cause both in relation to obtaining the warrant and commencing the prosecution.

[11] It was noted that in the present case the court has the benefit of the Report from the procurator fiscal setting out the thinking behind the decision to proceed and comment from Crown Counsel. The recommendation in the Report was that there was sufficient evidence to prosecute the pursuer for a contravention of section 38. It also said,

> "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 the potential to impact upon complainers in other sexual offences cases and their faith in the criminal justice system in Scotland."

It noted that the complainers in the earlier trial had been subject to vile abuse and threats at the hands of various individuals following the trial. It also noted,

> "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."

It said that it could be "inferred" that the complainers had a desire to see robust action taken given that they had reported the matter to Police Scotland.

[12] Applying the test suggested by Lord Young in *Craig*, it was contended that when presented with the report from the police, a reasonable person might well say "prosecute". Lord Young's test was therefore met. The advice given by Crown counsel agreed that there was sufficient evidence to justify proceedings and that there was a strong public interest in bringing proceedings. The advice notes that there had been "actual alarm here" but that was not necessary for proving the crime. It was submitted that the Crown has a public duty to prosecute for the protection of the public and not simply the individual complainers.

[13] In relation to the need for averments of malice, counsel submitted that, while arguments might be made about the lack of specification in the arguments that the prosecutors were "doing the bidding" of the complainers in the previous trial, no such arguments were in fact to be advanced. This was because the identity of the complainers was protected. However, he noted there are no averments of any contact between those complainers and the prosecutors who made decisions in relation to pursuer.

[14] In relation to the grounds of action other than malicious prosecution, it was accepted that conspiracy to injure could be a separate delict, but there were no averments of any conspiracy to which COPFS employees were a party. There were averments that the prosecution had done the complainers' bidding, and these might be relevant to malice, but nothing was said of any conspiracy to injure the pursuer by individuals for whom the Lord Advocate was responsible.

[15] Although the Lord Advocate did not require to make submissions in relation to the case so far as directed against the Chief Constable, I was referred to the delineation of the responsibilities of the police and the prosecution set out in the case of *Smith* v *HMA* 1952 JC 66 and their recent reiteration in the context of a civil case in the Opinion of the Inner House in *Grier* at paragraph [135]. The role of the police was to investigate and then to report to the procurator fiscal. The decision as to whether there would be a prosecution would then be taken by the procurator fiscal. It was submitted that the break between the two roles arose at the stage of the standard police report submitted to the procurator fiscal. The only way that the police could be liable for a prosecution was if they had misreported the case by stating false evidence or omitting critical evidence. That was the nature of the claim in *McGregor*. There was nothing in the pursuer's averments here to bring this case within the scope of the remedy identified there.

**Submissions for the Chief Constable**

[16] For the Chief Constable, the principal submission was that it was necessary to characterise the action accurately. It was an action seeking damages in respect of malicious prosecution. Once this was understood, it was apparent that the case ought not to continue against the Chief Constable. Reference was again made to the passages in *Grier* in the Inner

House which emphasised the different constitutional roles of the Crown on the one hand and the police on the other. The latter do not have responsibility for prosecution and therefore cannot be liable for malicious prosecution. There could be liability on the part of the police only if they acted in such a way when submitting their report as to rob the Crown of its ability to exercise independent judgement. If that was the case that was to be made, that matter would have to be averred and there would have to be averments of a clear causal link between the actions of the police which amounted to the breach of duty and the decision to initiate a prosecution.

[17] The second point for the Chief Constable was that there was inadequate specification of what the pursuer was seeking to prove by saying that the police were "doing the bidding" of the complainers in the Salmond trial. It was submitted that the Chief Constable could not properly investigate the case being made against her as she had no real notice of what was being alleged. It would be necessary to know what the complainers' bidding was, who said that it was their bidding, when they had said it, where they said it and to whom they had said it.

[18] It was submitted that the pursuer's averments were not sufficient to amount to a relevant case against the Chief Constable on the alternative basis of liability considered in *Grier* and *McGregor*. Such a case would require clear and cogent averments as to what the police had said in their report that was inaccurate or incomplete and in what respects it caused the prosecution to be brought (*Grier*, paragraph [136]). Instead, the pleadings consider both defenders together without considering for what actions each bears responsibility. There is nothing to say that the decision as to whether to prosecute the petitioner was prejudiced in any way by the actions of the police or the terms of the police report.

**Submissions for pursuer**

[19] The solicitor advocate for the pursuer said that the only delict for which it is claimed that the defenders are liable is malicious prosecution. The pursuer offers to prove that there were malicious acts by employees of the first defender which continued up to the point that the prosecution was commenced and, thereafter, there were malicious acts of the employees of the second defender until the conclusion of the trial. Acts which took place after those two points might be relevant for making inferences of malice or ulterior purpose at the time the acts were undertaken. Although the pursuer's submissions acknowledged that the Lord Advocate was only to be responsible for harm that happened following the complaint, it was contended that, as a matter of logic, the actions of the police prior to service of the complaint must also be actionable. As the Lord Advocate is not responsible for them, any action in respect of actings in that period must be against the first defender. It was submitted that the law should find a way to afford the pursuer a remedy in respect of these actions. Reference was made to *Micosta* v *Shetland Islands Council* 1986 SLT 193 where Lord Ross said that Scots law will always provide a remedy for conduct which appears to be wrongful. It ought not to be the case that the police can escape liability if they acted maliciously together with prosecutors.

[20] It was submitted that there was no belief as to reasonable and probable cause and that the presumption that public officials perform their function properly was clearly rebutted in this case. It was submitted that the averments as to the ulterior purpose in commencing prosecution were relevant to whether or not there was a subjective belief as to reasonable and probable cause as well as to the issue of malice. It was accepted that subjective reasonable and probable cause could not be determined without proof but it was

submitted that the averments of an ulterior motive for the prosecution for the purposes of malice were relevant here also and that there were averments for proof to be allowed. The pursuer pleads that the motive of the complainers in the Salmond trial in complaining of his video was to silence him, a political opponent, and punish him for speaking out after the trial. The reference to the police and prosecutors doing the complainers' bidding was a reference to his prosecution for an ulterior motive and prosecuting in the absence of reasonable and probable cause. It was pointed out that the pursuer also pleads that the comment of Crown counsel that there was "a strong public interest in bringing proceedings" indicates the ulterior motive to punish the pursuer for criticising the complainers and to deter others from doing so.

[21] In relation to objective lack of reasonable and probable cause, it was submitted that the situation here was the same as was before Lord Tyre in *Grier*. It was said that it could be determined now on the basis of undisputed facts that there was no objective reasonable and probable cause. I was invited to take the same approach as Lord Tyre in *Grier* and conclude that the finding that the charge was irrelevant amounted to a finding that there was "no case fit to put into court". It was said that nothing that the prosecution had claimed the pursuer had said – and which he admitted – was capable of amounting to a breach of section 38 of the 2010 Act. There was nothing criminal in the pursuer saying that he thought the complainers would lose anonymity. It was an opinion he was entitled to express and no-one could think it was a crime. Expressions such as "reap the whirlwind" are common in political parlance and merely meant that where bad things had been done, they would rebound badly. It was a statement of political opinion. The fact it was political meant that it should have been less likely to be seen as criminal.

[22] In relation to malice it was submitted that the purpose of a prosecution should be to carry the law into effect. The statement in the police report and Crown counsel's advice that they wish to avoid a situation that might prevent people coming forward in relation to offences committed against them by other people is itself an ulterior motive for prosecution. Once someone is convicted, it may be appropriate for a sentence to be imposed with an intent to "send a message" but it is not a reason to prosecute. It was submitted that the absence of an apology was also indicative of malice.

[23] In relation to the application for a search warrant, it was contended that the statements made in support of it, and in particular that it met the test for a breach of section 127, were "a lie" told for the ulterior purpose of misleading the sheriff and obtaining a warrant despite there being no reasonable and probable cause. It was contended that the police and Crown colluded to obtain a warrant by presenting false information to mislead the sheriff without reasonable and proper cause and with ulterior motive and in which the consequence was a malicious prosecution by the Crown.

**Analysis**

***Case against the Chief Constable***

[24] It was made clear in submissions that the case against the Chief Constable was not brought on the basis identified in *Grier* or *McGregor* of having deprived the Crown of the ability to form a decision on whether or not to prosecute but was concerned with the prosecution itself. The decisions in *Smith* and *Grier* make it clear that that in Scotland the police do not make the decision whether to prosecute and are not responsible for the decisions that are taken by the procurator fiscal and/or Crown Office in that regard. As a result, the Chief Constable cannot be liable for malicious prosecution. The question then is

what basis is there for the liability asserted? For the pursuer, reference was made to the statement by Lord Ross in *Micosta* that Scots law will always provide a remedy for conduct which appears to be wrongful. However, a party bringing a claim on this basis would have to identify the conduct in question, why it is wrongful, what consequences it had and what loss was suffered as a result. The pursuer does not make averments in relation to these matters.

[25] I refer in paragraph [3] above to the actions of the police that are founded on. Although there were various references in the submissions for the pursuer to there having been collusion between the police and prosecutors, there are no averments to that effect so I leave those allegations to one side. Looking at what is averred in relation to obtaining the warrant, in view of the admission that the application for the search warrant was drafted, prepared and presented to the court by employees of the second defender (Article 2), it is not apparent what conduct of the police identified in the pleadings could be said to be "wrongful" in this regard or even that it could be said that it was the police that obtained it. Although the execution of the warrant and the interview were clearly actions on the part of the police, no reason is averred why it would be wrongful of the police to execute a warrant granted by a sheriff or to invite the pursuer to attend for interview and then conduct that interview. The pursuer avers that the view that he should be interviewed originated within COPFS rather than the police but that does not infer any wrongfulness on the part of the police in what they did. In relation to the standard prosecution report prepared by the police, it is averred that it "sought to present a false impression of a standard Police investigation being newly reported for consideration by COPFS" and there are averments that Crown Office had already been involved prior to the report. Taking that *pro veritatae*, that factor must have been known about within Crown Office. It is therefore not apparent in

what respect preparing the report the police sought to convey a "false impression". In addition, unsurprisingly, there are no averments that anyone in Crown Office was misled and there are no averments of any practical consequence arising from the report. It is not said that anyone was in fact misled or that it led to the prosecution being commenced when otherwise it would not have been. In relation to the issue of the consequences of the acts which are referred to, there are no averments as to how the actions of the police as opposed to COPFS caused the warrant to be obtained or the prosecution to be brought. More generally, the pursuer's averments of loss all flow from his having been prosecuted or from not having access to electronic devices seized in the course of the search. Neither the obtaining of the warrant nor the initiation of the prosecution are decisions of the police. In this situation, the pursuer is not offering to prove that he had suffered any loss caused by the wrongful acts of the police. These factors means that the decision in *Micosta* is of no assistance to the pursuer. The pursuer submitted that the actions of the police "ought" to have a remedy. Despite this, no basis has been identified on which they would be actionable and the pursuer has not averred any consequences which flow from the acts. In summary, no relevant case is plead against the Chief Constable.

***Case against the Lord Advocate***

[26] Turning to the case against the Lord Advocate, as two of the four requirements for a case of malicious prosecution identified in *Whitehouse* are agreed, the issues are focussed on whether it can be said that there was no reasonable and probable cause for the actions taken and whether there was malice. If the issue concerning objective reasonable and probable cause was to be determined by the judge hearing the proof, the pursuer's averments would meet the test of relevancy. However, on the basis of the decision in *Glinski* and the decision

of Lord Tyre in *Grier* (paragraph [42]), this is an issue of law. As has been pointed out in submissions, there is no dispute as to the material which was available at trial and therefore, rather than simply allow the case to go to proof before answer on the basis that there are relevant averments and that this matter should be decided later, I am in a position to determine the issue of objective reasonable and probable cause and will do so. I should add, however, that although the parties adopted opposing positions on this issue which lies at the heart of this case, little analysis was provided as to the basis on which their positions might be supported.

[27] That the sheriff who conducted the trial sustained a submission of no case to answer is clearly highly significant. In his second decision in *Grier,* Lord Tyre pulled back slightly from the view he expressed in his earlier opinion that when charges were dismissed as irrelevant it would normally be difficult to argue that there was objective reasonable and probable cause. What he said in this regard was,

> "the circumstances in which dismissal of a charge as irrelevant will not imply an absence of reasonable and probable cause are not quite as exceptional as I suggested at (p.382), para.44 of my earlier opinion. They would appear in particular to support the defender's proposition that dismissal of a charge giving rise to a complex or controversial point of law would not necessarily amount to absence of probable cause: that appears to have been exactly how the court saw the matter in *Craig* v *Peebles*."

[28] The underlying issue in *Craig* was whether a liquor licence for a public house remained in existence after the premises were destroyed by fire so that it remained lawful to sell spirits on the solum. On the view that it did not, the pursuer who had continued business from premises which had partially been destroyed by fire was prosecuted. He was found guilty but the conviction was overturned on appeal on the basis the licence continued to have effect. The pursuer then commenced proceedings for malicious prosecution. In the Outer House, Lord Young granted decree of absolvitor. He said that the prosecution had

raised a novel issue of law and the outcome of the appeal against conviction was not free from doubt. He considered that "probable cause" would exist if the view of the fiscal was not irrational and was one that reasonable men might act on (p.441). His decision was upheld in the Inner House where the Lord Justice Clerk said that he was "far from thinking the question free from doubt" (page 446). Lord Neaves said that there was doubt as to a matter of law and that it was not unreasonable for the prosecutor to try the question (page 447). The basis of the decision is that precisely because this legal issue existed on which a range of views were open, it was appropriate for the prosecutor to proceed and that there was therefore reasonable and probable cause. It is apparent that the test identified by Lord Young was formulated in a situation of uncertainty and it must be seen in that light. In the present case there are no averments in the pleadings and were no submissions for the Lord Advocate suggesting that there was any uncertainly as to the law concerning section 38 and it was accepted before me that there was no dispute as to the facts at the trial. Nothing has been brought to my attention to indicate why, notwithstanding the submission of no case to answer being upheld, it could be said that there was a case fit to try. It therefore appears that in the circumstances, the decision of the sheriff to sustain a submission of no case to answer indicates that there was no objective reasonable and probable cause. It should be stressed that this does not lead automatically to liability. If that was the position it would impose an unreasonable burden on the Crown and could impede the proper functioning of the prosecution. Even in the absence of reasonable and proper cause, there will be no liability unless malice is also proved. As Lady Dorrian puts it in *Whitehouse*,

> "it is in the interests of justice that prosecutors should be protected against the consequences of mistake, negligence, error of judgement and similar matters. However this does not require an immunity from suit which protects the prosecutor who acts maliciously and without probable cause." (paragraph 147)

Nonetheless, as the finding that there was no reasonable and probable cause is a significant one, rather than solely rely on the decision of the sheriff, I have considered the issue myself.

[29] Section 38(1) states;

> "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."

The behaviour in question must be threatening or abusive such that it would be likely to cause a reasonable person fear and alarm. It was determined in R v *Murphy* [2015] HCJAC 34 that it is not enough for it to be only annoying or offensive. This is consistent with earlier decisions in relation to the common law offences (*Angus* v *Nisbet* [2010] HCJAC 76, 2011 JC 69 and *Smith* v *Donnelly* 2002 JC 65). The test in the Act is objective, so whether or not the crime is committed is not affected if the person to whom the behaviour was directed is particularly stoic (*Paterson* v *Harvie* [2014] HCJAC 87) and it must follow that it is also not affected by particular sensitivity of that person. In *Orr* v *Mundell* [2018] SAC Crim 11, however, the Sheriff Appeal Court determined that it is relevant to consider the context of the behaviour. In that case the behaviour consisted of standing outside a church on a Sunday in the period before Mass was due to begin holding up a placard which bore the words, "God Hates Catholics". The geographical proximity to the church and the fact that the timing was such that it would be seen by people going into Mass were what rendered the conduct abusive (paragraph [9]).

[30] I do not consider that what is said in the video could be seen as behaviour that is threatening or abusive. Despite what was said in submissions, 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 statement made in this regard is passive – that the anonymity "will not be continued". No basis is stated for this opinion. For wholly justifiable and obvious reasons, the courts in Scotland act robustly when required in order to maintain the anonymity of complainers in charges of sexual offences. The implicit suggestion that a court might remove the complainers' anonymity was therefore without any foundation whatsoever. Although not threatening, it might be seen as an offensive suggestion as described in *R* v *Murphy*, but that does not mean that it is abusive. I do not consider that this is changed by the particular circumstances which preceded the video being posted. In *Orr* the context was that the behaviour was directed at a particular religion and occurred at a time and place which mean that it would inevitably be experienced by persons going to Mass. To use a colloquial expression, it was 'in their faces'. It is easy to see why that might be considered abusive. Here, by contrast, the context was a post on a website which viewers had to choose to visit. Although it was said that the complainers felt "vulnerable", the test to be applied is objective and the issue is not how it would affect the particular complainers but how it would affect a reasonable person in this situation. Although the video was posted online shortly after the trial, I do not consider that the fact that persons could read it in that timeframe meant that it was abusive. It is necessary also to have in mind the countervailing consideration that the trial had been prominent in news reports for many days beforehand. The post can therefore 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 of the

ECHR even if it is ill-informed and ill-judged. As Lord Brodie said when giving the Opinion of the court in *Angus* in relation to the common law offence of breach of the peace,

> "not everything said and done in public amounts to a breach of the peace, even if it might be said to be indecorous, inappropriate or irritating in nature."
> (paragraph [14])

[31] Moving on to the other parts of the video, the allegation that there had been collusion and that it would not succeed is an expression of opinion and carries with it no element of threat. The references to "reaping the whirlwind" and "reckoning" are expressed in passive terms as to an expectation of what will transpire. Again, they are expressions of opinion. There is no statement that the pursuer himself will seek retribution or revenge. I do not consider that they amount to a threat of repercussions as was submitted. A reasonable person would not find them threatening. As with the comments in relation to anonymity, it is necessary to have in mind that they existed on a website and related to an issue which had been of public interest. The comments may be "indecorous, inappropriate or irritating" but they are not abusive. In conclusion, whether on the basis of the view taken by the sheriff at the trial or an examination of the evidence available in relation to the requirements of section 38, viewed objectively there was no reasonable and probable cause to commence the prosecution – no case fit to be put before a court.

[32] Although it is sufficient for a relevant case for the pursuer to establish objective reasonable and probable cause, for completeness I have also considered whether there was an absence of subjective belief that it existed. However, before turning to that it is convenient to consider the final requirement - malice. The issue here is only whether the pursuer has made averments which meet the test of relevancy from *Jamieson* v *Jamieson* 1952 SC (HL) 44. As to what must be averred and proved to establish malice, in *Grier*, Lord President Carloway adopted the approach from *Glinski* in saying:

> "It 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."

[33] The pursuer makes a number of averments which, if proved, could establish a motive for commencing the prosecution against him other than a desire to bring a criminal to justice. He avers that the prosecutors wished to "do the bidding" of the complainers. Although a point of specification is taken in relation to this, I consider that on a fair reading the pleadings indicate what is meant and that adequate notice is given of the case that must be met. In Article 6 of Condescendence, the pursuer avers that the bidding of the complainers was that he be investigated and prosecuted despite the absence of reasonable and probable cause. In Article 9, the motives of the complainers are said to be to prevent further criticism of them from the pursuer and to deter others from criticising them. Other motives are said to be to silence a political opponent and to punish the pursuer. These are said to be objectives of the complainers which the prosecution was intended to achieve. Although there are, as was pointed out for the Lord Advocate, no averments of any meetings with the complainers when these views were expressed, that is not an intrinsic part of what must be proved and where the pursuer is indicating what the complainers' views were, I do not consider that any prejudice to the defenders flows from the lack of these averments. In addition, the contents of the report to Crown Office dated 21 May 2020 are relevant. The pursuer admits the terms of the report in the pleadings and it was founded on for the purposes of the debate. It contains the following passage:

> "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."

If this means that the motive for bringing the prosecution was to reassure potential complainers in other cases, that is capable of amounting to an ulterior motive. Such considerations can be legitimate matters to take into account when deciding on a sentence following a conviction but not whether to commence a prosecution where there is no reasonable and probable cause.

[34] I have considered malice before subjective reasonable and probable cause as the two are related. It is clear that they are not the same thing and it is necessary that both malice and some form of absence of reasonable and probable cause must be established if a case of malicious prosecution can succeed. However, in *Grier* Lord Tyre referred to the strong argument for treating the subjective element of reasonable and probable cause as being part of the requirement to demonstrate malice (paragraph [37]). The pursuer has made averments that there was no basis for subjective belief as to reasonable and probable cause (Article 9 of Condescendence). When that is taken with the relevant case in relation to malice, I do not consider that it can be said that the pursuer would necessarily fail to establish an absence of subjective belief as to reasonable and probable cause if he proved all his averments. It cannot therefore be said that the pleadings are irrelevant in this regard.

[35] In addition to considering the issue of reasonable and probable cause in relation to section 38(1) of the 2010 Act, it is necessary to consider it in relation to section 127 of the Communications Act 2003 – the basis on which the search warrant was sought. It prohibits the sending by means of a public electronic communications network of a message that is "grossly offensive or of an indecent, obscene or menacing character". The contents of the video are clearly not indecent, obscene or menacing. They might be considered to be offensive but that is not sufficient for section 127. They do not meet the requirements of being "grossly offensive" as that term was considered in *DPP* v *Collins* [2006] 1 WLR 2223,

[2006] UKHL 40. There was therefore no objective reasonable or probable cause for action to be taken against the pursuer in relation to that matter.

**Criminal Procedure (Scotland) Act 1995, section 170**

[36] On the basis of the foregoing, it would be possible to conclude that the requirements for a case of malicious prosecution against the Lord Advocate set out in *Whitehouse* are admitted, established, or the subject of relevant averments. However, that is not an end to the issue of whether there is a relevant case. In the course of preparing this Opinion, I noted that in paragraph [91] of the decision of the Inner House in *Whitehouse*, Lord Carloway refers to the Criminal Procedure (Scotland) Act 1995, section 170. It is in the following terms:

> "(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."

This is clearly relevant to the case made against the Lord Advocate. The pursuer was not imprisoned, and it is apparent that this action was not raised within two months of his acquittal. Despite this, no party cited either the relevant passage in *Whitehouse* or the section itself to me. I therefore asked that section 170 be drawn to the attention of the parties and invited them to make further submissions. All three did so.

[37] The pursuer's submission provided details of pre-action correspondence between his solicitors and the Crown Office concerning section 170 and in which an assurance was sought that it would not be relied on in the defence to the action. This culminated in a statement on behalf of the second defender that "in this particular case, the Lord Advocate would not intend to plead section 170 of the Criminal Procedure (Scotland) Act 1995 as a secondary defence". In relation to the issue of the court considering matters not cited to it, the submission referred to *Sheridan* v *News Group Newspapers Limited* 2019 SC 203, [2018] CSIH 76 in which it was said that "superior courts in the modern era can be expected to carry out some research of their own". It noted that Rule of Court 25A.4(3) states that a "compatibility issue" must be raised in a party's pleadings. It submitted that section 170 only comes into play if the pursuer's case against the second defender is otherwise relevant. I was therefore invited to consider the relevancy issues first without reference to section 170 and, if the case is relevant, to invite the pursuer to amend its pleadings to raise the issue as required by RCS 25A.

[38] The submission for the Chief Constable notes – correctly – that the section has no direct bearing on the case against her. On that basis, no substantive submissions are made. The submission for the Lord Advocate notes that section 170(1) confers immunity on her in

relation to the pursuer's case as he was not imprisoned. It states that while the Inner House in *Whitehouse* lifted the immunity of the Lord Advocate in solemn proceedings, no opinion was expressed on the role of section 170 other than noting in paragraph [91] that "whether parts of it might be challenged on Convention grounds may be for another day". The submission records that the second defender had reached the conclusion that "it would not be appropriate to plead the section 170 defence in these proceedings". It was accepted that an immunity from civil liability can engage Article 6(1) of the European Convention on Human Rights and that the second defender, as a public authority, must act compatibly with Convention rights by giving effect to legislation in a way that, so far as possible, is compatible with the Convention. Reference was made to the speech of Lord Rodger in *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557, [2004] UKHL 30 at paragraph [106]. It was noted that section 170 was the present manifestation of a very old rule that dated back at least to the Summary Jurisdiction (Scotland) Act 1908, section 59. That section had been considered in *Graham* v *Strathern* 1924 SC 699 where Lord Justice Clerk Alness had considered that it was a "condition of competency of the action". I was invited to take a different interpretation of section 170 in exercise of the power contained in the Human Rights Act 1998, section 3. I was invited to construe section 170 so as to confer a defence on each of the specified office-holders which they could invoke or not as they chose. The Lord Advocate had chosen not to invoke it, and I was invited to ignore it.

[39] The only argument advanced to me to restrict the effect of section 170 is that based on section 3 of the 1998 Act. In considering this argument, it is necessary first to determine whether section 170 is incompatible with the Convention when read on the basis of its plain terms so as to engage section 3 and, if so, to determine whether it can be read and given effect to in a way which is compatible with the Convention rights.

[40] No party made submissions as to the basis on which section 170 might be incompatible with Convention rights. The most obvious line of attack is that the immunity is inconsistent with the right to a hearing in Article 6. In *Osman* v *United Kingdom* (2000) 29 EHRR 245, the European Court of Human Rights concluded that the rule introduced 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 infringed Article 6. The Court concluded that before *Hill*, it could be said that the applicants had had a right to seek an adjudication on the merits of their claim. This meant that Article 6 applied (paragraph 139). The Court considered that the *Hill* immunity was applied by the English courts on the basis that it provided a "watertight defence" (paragraph 150). Such application without the possibility of having countervailing considerations taken into account by the court amounted to a blanket immunity and was an unjustifiable restriction on the applicant's right to have a determination of the merits of their claim (paragraph 151-152). There are clearly parallels between the situation in *Osman* and the situation here. But for section 170, there would be an entitlement to seek a decision on the merits of the pursuer's claim that there had been malicious prosecution. However, the section confers an absolute immunity that does not permit the court to undertake any weighing or evaluation of factors that might suggest that it should not apply. On this basis, it can be concluded that section 170 does infringe the rights of prospective claimants under Article 6. I therefore go on to consider the application of section 3 of the 1998 Act.

[41] In *Ghaidan*, Lord Rodger of Earlsferry considered the limits upon the use of the section. He noted that the obligation to read and give effect to legislation so as to be compatible with Convention rights is not unfettered and is subject to the qualification in the opening words, "So far as it is possible to do so". In relation to what was 'possible', he

noted that application of the section might involve a considerable departure from the actual words (paragraphs 118 to 120). Words could be read in by implication or words substituted for those used in the legislation. He then said,

> "For present purposes, it is sufficient to notice that cases such as *Pickstone* v *Freemans plc* [1989] AC 66 and *Litster* v *Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is 'amending' the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

The key elements from this passage are that to fall within the scope of the power conferred in section 3, the interpretation to be adopted must be consistent with the scheme of the legislation or goes "with the grain" and it must produce a result which is consistent with Convention rights.

[42] In my view, what the Lord Advocate suggests falls foul of both requirements. I have not been provided with any suggested form of wording that would have to be implied to achieve the result sought. It would be straightforward although inelegant to insert wording after "unless" so that subsection (1) reads:

> "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 *that person has waived the application of this section or unless* —
>
> (a) the person suing has suffered imprisonment in consequence thereof". (Words in italics being read in).

Similar wording would have to be inserted into subsection (3) to address the limitation period. If it was necessary to achieve a position where the officeholder in question had to opt in to the protection rather than opt out, the changes would have to be more significant. However, in *Ghaidan* Lord Rodger explained that the extent of changes required is not the factor which dictates whether the section can be applied so this is not a bar to the argument. The problem with what is proposed is that it does not "go with the grain". It changes the section from being one which confers a blanket immunity to one which confers a right to claim immunity. It creates a scheme that is different from what is in section 170 at present. The whole scheme or intention of section 170 is to confer blanket immunity and this is what is incompatible with Article 6. It is inevitable that any attempt to interpret the section in a way that removes the incompatibility will change the essential principle of the section.

[43] The second difficulty with the Lord Advocate's approach is more fundamental. It is that the reading proposed would not render the section compatible with Article 6. As noted in *Osman*, the factor that led to the immunity identified in *Hill* being inconsistent with Article 6 was that it did not permit a court to take into account other considerations and to disapply it. Moving from a situation in which there is a blanket immunity to one where the party who is the defender in an action has an unqualified right to invoke immunity does not address the restriction on the right of access to the courts. There remains no adequate control by the court of the immunity. It might be said in response that the defender in question would be subject to duties under the 1998 Act as a public authority such that it would be unlawful for them to invoke the defence. But if that assumption is made in carrying out the section 3 exercise, the court is, in effect, saying that *any* invocation of the "read down" section will lead to infringement of Article 6. If that is the position, it should be recognised by the court now rather than hidden in an interpretation that could never

lawfully be implemented. More importantly, as the terms of section 170 as so read down would still be incompatible with Article 6, that reading is not permitted by section 3. It requires a court, where possible, to read legislation in a way that is compatible with Convention rights. It does not entitle the court to read legislation which is incompatible with Convention rights so as to make it incompatible with those rights in a slightly different way. No other possible reading of section 170 has been suggested to me that would make it compatible with Article 6. Section 3 does not therefore assist.

[44] In the supplementary submissions the pursuer refers to Rule of Court 25A and making amendments and taking other steps required by that Rule to raise a compatibility issue. I take this as being an error and that the intention was to refer to a devolution issue. However, even if that was the case, the situation here does not meet the definition of a devolution issue. The 1995 Act is an Act of the United Kingdom Parliament rather than the Scottish Parliament so there is no question of it not being within legislative competence. As section 170 applies without it having to be invoked and the Lord Advocate is not the party that brings the action before the Court, there is no exercise of a function or act or failure to act. As this is not a devolution issue, no purpose would be served in doing as was suggested for the pursuer in putting the case out By Order to assess whether the pursuer wished at this stage to amend his pleadings as required by Rule of Court 25A to raise a devolution issue and bring it to the attention of the appropriate parties.

[45] This leaves the issue of whether to make a declaration of incompatibility in terms of section 4 of the 1998 Act. Intimation of this issue has been given to the Advocate General in terms Rule of Court 82.3. The Office of the Advocate General replied indicating that no application was to be made to become a party to the proceedings. I had regard to the contents of the judgments in *R* v *A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45 that such a

declaration is a measure of last resort (Lord Steyn, paragraph 44). However, the nature of the incompatibility with Article 6 is such that it will apply in any case in which section 170 is invoked. In that situation, I consider that it is appropriate to make the declaration.

**Conclusion and disposal**

[46] The way in which the issue concerning section 170 has arisen is unfortunate. The 1995 Act is binding on me and is material to the decision I am required to take. There was an obligation on parties to bring it to my attention. Instead, the way that it has emerged has meant that I have not been addressed on it in detail by the parties. The submission for the pursuer was that I should deal with relevancy leaving aside section 170 and only then turn to consider the effect of the section. I do not consider that that course of action is properly available. The immunity is a key issue in determining whether the claim is relevant. In addition, for the reasons I have set out, as the 1995 Act is an Act of the United Kingdom Parliament, there is no basis on which I can deny it effect. Accordingly, section 170 must be applied as it stands. As the pursuer was acquitted at his trial, the result is that the pursuer cannot succeed in his action against the Lord Advocate and the action against is accordingly irrelevant. For the reasons stated in paragraphs 24 and 25, the case against the first defender is also irrelevant.

[47] In these circumstances I sustain the second plea in law for the first defender and first plea in law for the second defender and dismiss the action. In addition, I make a declaration under the Human Rights Act 1998, section 4, that the Criminal Procedure (Scotland) Act 1995, section 170, is inconsistent with the European Convention on Human Rights and Fundamental Freedoms, Article 6, as it is an unjustifiable restriction on a pursuer's right to

have a determination of the merits of his claim that he was the subject of a malicious prosecution.