

# **SCOTLAND**

Martin Hogg

*Alleged wrongful detention of a football club's administrator*

***Whitehouse v Gormley [2018] CSOH 93 – alleged wrongful detention of an insolvency administrator of Glasgow Rangers Football Club***

Facts:

- Following financial problems, Glasgow Rangers F.C. went into insolvent administration.
- Alleged financial improprieties of the administrators led to a criminal investigation.
- In November 2014, the police detained one of the administrators, David Whitehouse, on a Friday at his home on the basis of a 'fraudulent scheme and attempt to pervert the course of justice'.
- He was driven to Glasgow, arrested, and kept in custody until the Monday. Following an appearance in court he was released on bail.

## The facts

- He was again arrested and held overnight in September 2015, appearing at Glasgow Sheriff Court when he was committed for further examination and again bailed.
- Other suspects in the investigation were permitted to attend the police station by arrangement, without being detained.
- In June 2016, following further investigations, the Crown announced that no further action would be taken against him.
- He raised an action against (i) the Chief Constable of Police Scotland (Mr Gormley), (ii) the Procurator Fiscal (the local prosecutor), and (iii) the Lord Advocate (Scotland's chief prosecutor), seeking payment by them, jointly and severally or severally, of £ 9 million damages for alleged wrongful detention, arrest and prosecution based on common law fault and breaches of arts 5 and 8 of the European Convention on Human Rights (ECHR).

## Judgment

- In relation to the common law delictual claims, the judge (Lord Malcolm) held that:
  1. the Lord Advocate enjoyed a common law immunity against civil suits, hence the common law claims against him were dismissed. (This immunity had been settled in the 1961 case of *Hester v MacDonald*);
  2. a proof before answer (a trial of the facts, before a determination of the law) would be allowed in relation to the claim against the Chief Constable. In relation to that claim, the pursuer would be required to demonstrate “malice and a want of probable cause” on the part of the arresting police officers in order for his claim to succeed.

## **Comment**

- The specific alleged common law delict here was unlawful deprivation of an individual's liberty.
- In relation to the commission of that delict, public officials enjoy an immunity against suit. Why? Lord Malcolm—

*‘Our law aims to provide appropriate protection to public officials who, when exercising their public duties, do something which, in terms of the constraints on their powers, they are not entitled to do. In particular they will not be liable in civil damages unless they acted without probable cause and were actuated by malice or some other improper motive. If matters are explained by an honest mistake, overzealousness, or the like, the necessary bad faith or deliberate abuse of power is absent. The policy is that public officials should be able to act in the public interest free of a concern that if they err, or overstep the mark, they will be subject to a civil suit from anyone harmed by their conduct. Claimants have attempted to exclude the protection, or privilege as it is sometimes called, by a submission that the official acted outwith or beyond his powers, and thus is in the same position as a private wrongdoer.’*

## Comment

- That rationale is clear, but the case law is not clear on some elements of the exception to the immunity, including—
- *The element of malice*: specifically, whether malice can be inferred from the mere occurrence of the wrongful act, or whether it is necessary to aver specific facts and circumstances from which actual malice can be inferred.
- One view: *McKinney v Chief Constable of Strathclyde* - if an arrest is alleged to be 'unlawful' (which might be the case if the officer had simply made a mistake about the power to arrest), it must be justified by the officer as having been made for probable cause. Malice is, on this approach, *not* a required element of a claim.
- Opposite view: *Woodward v Chief Constable, Fife Constabulary* - the mere fact that an officer acted wrongfully to interfere with the liberty of an individual did not deprive the officer of immunity against civil suit (on this view, actual malice *is* a required element of a claim).

## Comment

- Lord Malcolm prefers the *Woodward view*:

‘the police should be able to discharge the duties of their office without being exposed to civil damages claims unless want of probable cause and malice are proved. Anything less, such as error, incompetence, or overzealousness, is not enough to set aside the privilege. And this remains so even if the error renders the conduct unlawful. It may be that sometimes judges have conflated malice and a lack of probable cause with conduct beyond the competence of the officer ... but logically something more or different is required if the conduct is to be removed from the plea of privilege, perhaps conduct of a type which the law could never recognise as part of the officer’s authorised duties, even if the officer honestly thought otherwise. If one is not in that territory, the law does not impose civil liability upon a public officer who is carelessly but honestly pursuing his public duties.’

## Comment

- Contrast the English law approach: in England, the tort of 'false imprisonment' is a tort of strict liability (see *R ex parte Lumba v Secretary of State for the Home Department* [2011]). Once an absence of lawful authority to imprison someone is proven, it does not matter whether the imprisonment was imposed in an honest but mistaken belief that it had a lawful basis. Notably, malice is not required.
- This might be said to suggest that English law places a higher value on the right to liberty than does Scot law. But, to look at it from the other side, it could alternatively be said that Scots law has a higher regard for the protection of police officers who act honestly and in good faith in the discharge of their duties. *Which is the better approach ... ?*
- *Whitehouse v Gormley* is only a 1<sup>st</sup> instance decision, so it will be interesting to see what the court makes of both the facts and the relevant legal rule if the decision is appealed.