OUTER HOUSE, COURT OF SESSION

[2024] CSOH 109

A256/19

OPINION OF LORD CLARK

In the cause

BRIAN MacGREGOR

Pursuer

against

IAIN LIVINGSTONE QPM, CHIEF CONSTABLE

Defender

Pursuer: MacGregor KC, Byrne KC; Campbell Smith LLP
Defender: Moynihan KC, Arnott; Clyde and Co

13 December 2024

Introduction

[1] In 2014, the pursuer was charged with the crime of stalking and police officers submitted a Standard Prosecution Report ("SPR") to the procurator fiscal. In due course, the charge was not insisted upon and no trial took place. The pursuer seeks damages from the defender, claiming that the SPR was deliberately false and misleading. The defender denies this allegation.

[2] The case called for a diet of debate, with two main contentions raised on behalf of the defender: firstly, the pursuer's case is irrelevant and lacking in specification and should be dismissed; secondly, the expert report for the pursuer (from Mr Christopher), incorporated

in the pursuer's pleadings, contains substantial amounts of inadmissible evidence and should not be remitted to probation. The pursuer's position is that the case is relevant, that Mr Christopher's report is not inadmissible and that there should be a proof before answer.

Background

[3] Based on the pursuer's pleadings (taken *pro veritate*) the background is as follows. There was a relationship between the pursuer and a woman. They became acquainted in 2013. She received a loan from the pursuer and he let her use a laptop. The relationship was amicable until 11 September 2014, when he challenged her over advertising her services as a prostitute. He sought return of his money and the laptop. She first contacted the police on 12 September 2014. The initial police investigation commenced on that day.

[4] As the money and laptop had not been returned, the pursuer reported this to the police on 18 September 2014. At the conclusion of an interview on 10 October 2014, the pursuer was arrested and charged with the crime of stalking. The police submitted the SPR to the procurator fiscal on 17 October 2014. It was prepared by Constable Leach under the supervision of Sergeant Coleman and Inspector Chisholm, with Detective Constable MacDonald also involved in the investigations.

[5] The pursuer appeared on petition on 23 October 2014. The indictment was served in September 2015 and the first diet took place on 22 September 2015. There was sundry procedure from September 2015 to 2017. The case against him was due to call on 25 August 2017 but the indictment was deserted *pro loco et tempore*. The case time-barred on 8 December 2017.

Pursuer's averments

[6] The Closed Record is very lengthy (78 pages) and contains various repetitions. In addition, the pursuer's pleadings incorporate the SPR (37 pages) and the report by Mr Christopher (126 pages). Consequently, it is not practicable to set out the full details of the averments that are challenged. The pursuer's main averments are that the police officers who compiled the SPR acted deliberately and failed to properly investigate matters, failed to have proper regard to his defence to the complainer's allegation, suppressed exculpatory evidence and acted with malice. The pursuer avers that no SPR should have been submitted to the procurator fiscal, meaning that no prosecution would have commenced. These unlawful actions by the police are said to have resulted in the procurator fiscal and the Crown being unable to exercise independent judgment and properly discharge their duties.

[7] It is averred by the pursuer that, having had an amicable relationship with the woman named in the charge ("the complainer"), the pursuer became concerned about certain matters, including that she had lied about her marital status, advertised her services as a prostitute and used aliases for her name. These points are said to have been made clear by the pursuer to the police in his interview on 10 October 2024. The pursuer explained that these concerns caused him to seek return of the laptop and the £6,500 he had loaned to her, which then prompted a change in attitude by the complainer towards him, giving rise to her making up malicious allegations that he was stalking and harassing her.

[8] The number and nature of the challenges by the defender to the pursuer's case make it necessary to discuss the averments in some detail in due course, when dealing with my decision and reasons.

Submissions

[9] As a consequence of the lengthy pleadings and the points raised, detailed written and oral submissions were made, with reference to a large number of authorities. The key matters submitted are analysed later. At this stage, the main points for each side are briefly summarised.

Submissions for the defender

Relevancy and specification

[10] The police will be liable if they submit a malicious report containing false or tainted information or evidence. However, the extent to which the police will be liable for the ensuing prosecution is a question relating to the causation of loss having regard to the role of the procurator fiscal and Crown counsel in reaching independent decisions on the sufficiency of evidence and the public interest in a prosecution. This gives rise to four distinct phases: the initial police investigation, arrest and charge; the commencement of a prosecution by the decision of the procurator fiscal to place the pursuer on petition; indictment following a decision of Crown counsel; and the pursuit of the prosecution by the procurator fiscal.

[11] The pursuer's averments proceed on a fundamentally mistaken approach to the relationship between the police and the Crown as prosecutor and the progression of a criminal investigation. In addition, his pleadings are riddled with contradictions because he has not properly addressed the four distinct phases. The SPR will form at least part of the material that the fiscal will consider in taking the decision to place an accused on petition (phase 2) but it is not evident or averred that it plays any part in phases 3 and 4. Criticisms of the SPR are, accordingly, not relevant to decisions by the Crown in phases 3 and 4.

[12] In relation to phase 2, the SPR does in fact contain the information and the evidence that the pursuer says was omitted. The SPR complies with the legal requirements in *Grier* v *Lord Advocate* [2023] SC 116. Any evidence secured later is irrelevant to the SPR. There was no suppression of potentially exculpatory evidence. Indeed, the sequence of events and the evidence set out in the SPR show that it would have been a dereliction of duty for the police not to have submitted the report to the procurator fiscal.

[13] Malice requires to be established by the pursuer and that is a matter of fact, for proof. However, the pursuer also requires to establish a lack of reasonable and probable cause, which includes a question of law. To have a relevant case of a lack of such cause the pursuer must identify specific evidence (not general sources) that was omitted by the police in the SPR and that, put in the balance, would have led to the conclusion that there was no *prima facie* case.

[14] On phases 3 and 4, making its own decision, the Crown decided to maintain the prosecution. This was based on the totality of evidence available to the Crown. The pursuer would need to show (and not just assert) that the police misled the Crown and the Crown was deprived of the opportunity to form an independent judgment. There are several areas where there is a lack of specification as to reasons why the Crown was so deprived.

[15] The offence of stalking has a core component and also has defences. On the pursuer's pleadings, there is no relevant case that the core elements were absent. The pursuer's contention that there was other evidence (such as emails) and a more amicable general context is irrelevant because the Crown case is taken at its highest. It would be a question for the jury whether the other evidence undermined the core case. As to the defence, there is an absence of averments about the factual content of the defence. But in any event the SPR specifically highlighted the pursuer's defence and the basis for it. The

pursuer cannot have been seeking, as he now argues, to "prevent or detect a crime", because the course of conduct continued after the crime of theft had allegedly been committed and reported to the police. There is also no averment that his conduct was reasonable.

[16] The pursuer's averments are irrelevant because he pleads only vague generalisations and points only to general sources of evidence but does not identify any specific evidence that affects the assessment of probable cause. Nor does the pursuer specify any evidential basis on which Crown counsel instructed a prosecution, so it cannot be determined whether the absence of any evidence deprived the Crown of a reasonable opportunity properly to assess the case.

Mr Christopher's report

[17] Opining on probable cause is the expression of an opinion on a question of law. Expert evidence cannot be led on that matter. Moreover, malice is an evaluative judgment on which the court requires no assistance. The four admissibility threshold questions in *Kennedy* v *Cordia* [2016] SC (UKSC) 59 require to be met. Mr Christopher fails on the first three. He gives evidence on the law, which is irrelevant and he does not address the correct test for malice. He does not have the necessary knowledge and experience. He has not worked in the police service in Scotland. He is not impartial and engages in prejudicial speculation. Mr Christopher's report is incorporated in full in the pleadings and there is no basis upon which it can be filleted down to admissible evidence about police procedure. It should be excluded from probation in its entirety.

Submissions for the pursuer

Relevancy and specification

[18] The pursuer's case is that the police acted with malice, and without probable cause, when they made a report to the Crown. The legal basis is the intentional delict clarified by the Inner House in *Grier* v *Lord Advocate*. The pursuer's case is straightforward. It is not about the Crown. Rather, it is that the alleged crime should not have been reported by the police in the first place. But for the actions of the police officers, there would have been no SPR. He offers to prove that the defender's officers illegitimately set out to ensure that he was prosecuted. They had no probable cause to consider that a crime had been committed when they arrested him and subsequently submitted the SPR to the Crown. They did not act in discharge of their public functions when they investigated the complaint against him. Instead, motived by antipathy and ill-will against him, they presented a false and misleading position in the SPR.

[19] The actions of the officers deprived the Crown of the ability to exercise independent judgment. The defender's officers deliberately suppressed exculpatory material that came into their possession after the SPR was submitted to the Crown and thereby continued to deprive the Crown of its ability to exercise its independent functions. The defender's officers caused the pursuer to be prosecuted in circumstances where no report should have been submitted to the Crown. The antipathy of the officers who made the SPR is clear from the language used to describe the pursuer, including that he was "obsessive", "vindictive", "pig-headed" and "downright despicable". Malice can be inferred from this intemperate language.

[20] On the test for relevancy, the court must be satisfied the pleaded case must "necessarily" fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44). The Inner House has warned there

is to be no "trial by pleading"; the parties are not to be engaged in an iterative process to resolve the litigation through those pleadings (*Heather Capital Ltd (in liquidation)* v *Levy & McRae* 2017 SLT 376, para [100]). Issues of credibility and reliability arise in the present case.

[21] The separate roles of the police and the prosecutor are well-established. The SPR must be a fair and balanced document. The pursuer's complaint is not that the defender's officers, with the benefit of hindsight, should have realised that certain information could have been relevant to the decision the Crown required to make. The pursuer's complaint is more serious and fundamental. He offers to prove that the defender's officers deliberately submitted a selective and misleading position in the SPR. The complaint is not of incompetence or oversight. It is that the SPR was deliberately produced to be misleading to the Crown.

[22] It is also well-established that the police must supply all relevant material to the Crown (*Smith* v *HMA* 1952 JC 66 at p 71-72). The pursuer offers to prove that the defender's officers failed to do so. They deliberately failed to provide exculpatory evidence and did not investigate the statutory defence. The pursuer's position is that precisely what material required to be included in the SPR is a judgment that should properly only be made by the court after proof.

[23] Antecedent relations are relevant to whether malice can be inferred (e.g. *Shaw* v *Burns* 1911 SC 537). The pursuer has set out on record details of his past dealings with the police. This includes averments of a prosecution of the pursuer's son for not wearing a seat belt where the Justice of the Peace was the father of one of the officers responsible for the report to the Crown. The pursuer sought to ridicule the prosecution including publishing a poem in the local press. The SPR states that the pursuer was "bragging" about having "put the police…of Inverness in their place again and again". The pursuer offers to prove that the

officers had a grudge against him and made an unfounded report to the Crown. The prior relations are relevant to whether any inference of malice can be drawn. That is particularly so when considered in light of the intemperate language used to describe the pursuer in the SPR.

Mr Christopher's report

[24] The defender's complaints concerning Mr Christopher's report are unfounded. The report by Mr Christopher has been produced to assist the court and to provide fair notice to the defender of the serious criticisms that are made of the police investigation and the report made to the Crown. It is incorporated into the pleadings to seek to avoid unnecessary duplication. The report does not seek to usurp the function of the court. The weight to be accorded to Mr Christopher's views can only fairly be determined after proof.

[25] The four considerations identified in *Kennedy* v *Cordia* are met. The evidence will be of assistance to the court. Mr Christopher has very considerable relevant experience in addressing what constitutes improper police conduct in the process of investigating crime. That experience is practical and academic. He patently has the necessary knowledge and experience. He has acted impartially, with no conflict of interest. The real issue is about the weight to be given to his evidence, not the admissibility of it.

Decision and reasons

Issue 1: Relevancy and specification

Legal principles

[26] To succeed in this allegation of an intentional delict, claiming that the police SPR was deliberately false and misleading, the pursuer must prove that the police acted with malice

and had no reasonable and probable cause for submitting this report. This test applies in a case based on malicious prosecution but also to a delictual claim of this kind: see e.g. *Whitehouse* v *Lord Advocate* 2020 SC 133, Lord President (Carloway), at paras [89]-[90]. A number of malicious prosecution cases are of assistance in relation to the test and how it is to be applied, albeit many of them refer, of course, to the prosecutor rather than the police.

[27] In this action, the defender accepts that the position on malice is one that can only be determined after the evidence is led and that there are relevant averments on the allegations of malice. Accordingly, the central issue at this stage is whether the pursuer has pled a relevant case, with sufficient specification, that there was no reasonable and probable cause for this SPR to be prepared and submitted to the prosecutor. In addition, the question of relevancy on causation also arises.

Reasonable and probable cause

[28] Reasonable and probable cause means an honest belief based on reasonable grounds that there is a proper case to lay before the court: *Stuart* v *Attorney General of Trinidad and Tobago* [2023] 4 WLR 21, at para [26]. Older authorities, including *Glinski* v *McIver* [1962] AC 726, explain the elements of the test (Lord Devlin at p 768, Lord Denning at p 760-762). Lord Radcliffe said (at p 754):

> "If there really is some evidence founded on speech, letters or conduct that supports the case that the prosecutor did not believe in his own charge, the plaintiff is, in my view, entitled as of right to have the jury's finding upon it."

The approach in *Glinski* has been applied in several other cases (eg *Rees* v *Commissioner of Police for Metropolis* [2018] EWCA Civ 1587).

[29] It is also the position in Scots law that reasonable and probable cause has both subjective and objective aspects: *Grier* v *Lord Advocate* 2022 SLT 199, at first instance, Lord Tyre, at para [66]; *Whitehouse* v *Lord Advocate*, Lord President (Carloway), at para [108]. The Lord President also referred to *A* v *New South Wales* {2007] HCA 10, at para [38], part of which is that:

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

[30] Lord Tyre made the valid point in *Grier* that it may not, at that time, have been established whether in Scots law it will suffice for the pursuer, even if he fails on the objective element, to prove that the prosecutor had no subjective belief. Reference was made to *Miazga* v *Kvello Estate*, 2009 SCC 51 (CanLII), [2009] 3 SCR 339, in which it was said (at para [70]) that *Glinski* and *A* v *State of New South Wales* support the proposition that a plaintiff would succeed by showing "*either* an absence of subjective belief *or* an absence of objective reasonable grounds". But the Canadian court in *Miazga* reached a different view, holding (at para [73]) that where objective reasonable grounds did in fact exist at the relevant time, it could not be said that the criminal process was wrongfully invoked. The court held that the presence or absence of the prosecutor's subjective belief in sufficient cause is a relevant factor on the other element of the test, the inquiry into malice.

[31] The need for both elements was, more recently, affirmed by the Privy Council in *Stuart* v *Attorney General of Trinidad and Tobago*, at para [13]:

> "Taking first the 'lack of reasonable and probable cause' element, there is an objective aspect to this (whether PC Phillips had reasonable grounds for bringing the case to court) and a subjective aspect (whether PC Phillips had the honest belief that this was a proper case to bring to court). The claimant would succeed on this element if he could prove that PC Phillips did not have the required reasonable grounds *or* lacked the required honest belief [emphasis added]."

[32] The means of assessing the subjective and objective aspects have recently been explained further by the Privy Council in *Attorney General of Trinidad and Tobago* v *Maharaj* [2024] UKPC 1, at para [10]:

> "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: see *Willers v Joyce* [2016] UKSC 43, [2018] AC 779 at para 54 per Lord Toulson; *Stuart v Attorney General of Trinidad and Tobago* [2022] UKPC 53; [2023] 4 WLR 21, at paras 26–28, per Lord Burrows."

[33] The Privy Council went on to say, at para [63]:

> "In a case of malicious prosecution, both the subjective motives of the prosecutor and the reasonableness of the prosecutor's decision to bring charges are in issue. The trial judge is therefore required to make findings of fact on the first issue on the basis of the evidence before the court and to make an evaluative assessment of whether the prosecutor had reasonable and probable cause to bring the charges on the basis of the information known to the prosecutor when the charges were brought and of information which would have been known if the prosecutor had undertaken such further inquiries (if any) as, in the circumstances, it was appropriate to pursue."

[34] From these authorities, the approach taken is as follows: (i) there is a subjective element (actual belief) and an objective element (reasonable belief) for reasonable and probable cause, and failure to have either of them will suffice to establish that there was no such cause; (ii) if there is no basis for alleging that there was no actual belief, and it is accepted that there has been sufficient inquiry, and the facts known are undisputed, the matter can be determined without further evidence; (iii) if there is an allegation of no actual belief, or it is contended that there has not been a sufficient inquiry, or the facts known are disputed, it will require to be determined on the evidence; (iv) however, the onus is on the person suing to aver reasons for there being no actual belief, or why a further inquiry would have resulted in no objective basis, or which other facts exist to support these positions.

[35] On the subjective aspect, malice may in some circumstances imply that there was no honest or actual belief. In *Grier* v *Lord Advocate* the Lord President (Carloway) said, at para [136]:

> "If the police provide the procurator fiscal with information or evidence which is either false or tainted, that in itself may be actionable. The wrong is not characterised as malicious prosecution, since it occurs in advance of any prosecution, but the information may cause that prosecution and hence result in loss. It will be actionable if what the police put in those reports is done maliciously. If that malicious reporting directly causes the Crown to prosecute a person, the police will be liable in damages. Proof of causation will remain difficult, given the role of the procurators fiscal and/or Crown counsel in reaching an independent decision on sufficiency and, in the event of a sufficiency, on whether a prosecution is in the public interest."

This indicates that where there is false or tainted evidence deliberately and maliciously provided (which can point towards there being no honest belief) that will suffice. It would therefore support the proposition that it is enough for the pursuer to succeed on the subjective aspect. That was accepted by senior counsel for the defender. However, as will become clear from the conclusions I reach below, in this case the same position is reached on both aspects.

Malice

[36] It is not necessary to set out the legal principles in relation to malice in Scots law in any detail, as it is accepted by the defender that in this action there is a relevant case pled on malice. It suffices to note these further comments made by the Lord President (Carloway) in *Grier*:

> "[118] There is no indication in the Lord Ordinary's opinion that he erred in his understanding of the test for malice. That test requires that a prosecutor initiate or continue a case not with a bona fide purpose of bringing a criminal to justice but for some other, and thus necessarily improper, motive. The analysis in *Glinski v McIver* (Lord Devlin, p 766) accurately reflects how malice ought to be seen in Scots law. 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. In relation to the latter, *Willers v Joyce (No 1) (*Lord Toulson, para 55) offers a useful critique. The Lord Ordinary synthesised the foreign and domestic jurisprudence and arrived at a correct view of what is required. That is encapsulated succinctly in four words: improper purpose or motive. The court adopts, in that regard, the dictum in *Henry v British Colombia* (Moldaver J, delivering the opinion of the majority of the Supreme Court of Canada, para 51)."

[37] As indicated above, if it does come to be proved that the person acted with an improper purpose or motive that can have an impact on at least the subjective element. Links, or potential links, between malice and reasonable and probable cause are mentioned, in similar terms, in some of the authorities. Malice can be inferred from a lack of reasonable and probable cause, but a finding of malice is always dependent on the facts of the individual case; it is for the tribunal of fact to make the finding according to its assessment of the evidence: *Trevor Williamson* v *Attorney General of Trinidad and Tobago,* at para [13]. Want of probable cause and malice are not necessarily unrelated and independent; the absence of just cause may go to prove malice, and similarly the presence of oblique or dishonest motive may go to show the absence of probable cause *Robertson* v *Keith* 1936 SC 29, at p 47. Circumstances may show that an act was done with malice, or without probable cause, or that it was an act outwith the competence of the person doing or authorising it; in some cases, according to the angle from which the question is approached, the same facts may be habile to infer each of these conclusions: *ibid*. The two elements of malice and want of probable cause may run into each other, and the one may be proof of the existence of the other: *McDonald* v *Ferguson,* Lord Fullerton at p 548. Accordingly, these issues are not unrelated, although as was said in *Glinski* (at p 759) malice does not necessarily equate to, or show, lack of probable cause.

[38] As to how malice is to be determined, in *Rogers* v *Orr* 1939 SC 121, p 134, Lord Moncrieff explained:

> "But—while facts and circumstances inferring malice must now be averred in all cases and these must pass the test of relevancy and while the relevancy of the averments is for separate determination in each separate case—the plausibility or probability of the oblique motive thus relevantly indicated having acted, rather than the innocent motive evidenced by the privileged occasion, is never a question for the Court but is always a question for the jury, and, moreover, only arises for determination by the jury after the hearing of evidence."

The expression "oblique motive" can be taken as meaning a hidden or ulterior purpose behind what was done.

The test for relevancy

[39] The test for relevancy in Scots law is well-established and an action will not be dismissed as irrelevant unless it must necessarily fail, even if all the pursuer's averments are proved: *Jamieson* v *Jamieson.* Senior counsel for the pursuer placed quite substantial reliance on what was said by Lord Glennie in *Heather Capital Ltd (in liquidation)* v *Levy & McRae*. His Lordship observed that the purpose of the pleadings is to give notice of the essential elements of the case and set out the bare bones of the case, with no need to set out in full the evidence intended to be adduced. Lord Glennie also said:

> "The judgments which the court is being asked to make are essentially value judgments, assessments of the reasonableness or otherwise of a party's conduct. Such judgments should seldom if ever be made on the basis of the pleadings without hearing evidence…It is not the function of pleadings to set out every reason why each relevant individual took or did not take any particular step."

These comments assist but do not demur from the established principles and indeed are to be construed in the context of *Jamieson,* along with the need for fair notice and sufficient specification.

[40] In *JD* v *Lothian Health Board* 2018 SCLR 1, Lord Brodie (on behalf of the majority) said:

> "[47] …here the pursuer avers that he 'suffered almost a two year wait for urgent hormone treatment as a direct consequence of the misdiagnosis'. Of course what that averment lacks is any indication of what facts the pursuer proposes to prove with a view to inviting the conclusion that the wait was the 'direct consequence' of the misdiagnosis."

This is a useful reminder that if the consequences are not the obvious or natural result, there is a need for the pursuer to indicate the basis or reason for, or the link between, the alleged wrong and its consequences.

[41] Specifically in relation to malice, in *Rogers* v *Orr*, after the passage quoted above, Lord Moncrieff went on to say:

> "A pursuer's condescendence is a narrative of circumstances, but does not profess to detail the evidence by which these circumstances may be established. If a pursuer has averred facts and circumstances which may reasonably be regarded as allowing an inference of malice on the part of a defender, he is always entitled to have an opportunity of asking any particular defender himself whether or not the averments are true, and whether or not the inference is a proper one."

Duties of the police

[42] The requirements to be met by the police in preparing the SPR are covered by common law. In making a report to the Crown:

> "…it is their duty to put before the procurator-fiscal everything which may be relevant and material to the issue of whether the suspected party is innocent or guilty…it is not for the police to decide what is relevant and material but to give all the information which may be relevant and material" (*Smith* v *HMA* 1952 JC 66, at p 71).

[43] However, in assessing what was done there has to be a realistic and pragmatic approach. In *Grier* v *Lord Advocate*, the Lord President (Carloway) noted, at para [107] that not every document may have appeared relevant at the time of reporting and important

further inquiries may still be merited, even at the stage of indictment. He then observed, at para [108]:

> "A police report, by its very nature, is bound to be a summary in order to make it reasonably digestible to the prosecuting authority. It cannot, and should not, cover all the minutiae of months of investigation. It must to a degree, be selective, even though the law of disclosure must ultimately be complied with. Even then, what is readily seen in hindsight to have been of relevance may not have assumed such a significance at an earlier stage. This is the real world in which prosecutions are commenced."

[44] The Lord President added, at para [139]:

> "As already observed, a police report to the Crown is inevitably a summary which will contain primarily what the police regard as important, even if, in an ideal world, that ought to include any material factors in favour of the suspect's innocence. It is not intended to be a comprehensive account of everything that the police did, or of what everyone said, and when, during the investigation. Like the Lord Ordinary, the court is unable to detect anything sinister in the fact that certain matters did not find their way into the SPR."

[45] There must be a *prima facie* case to place an individual on petition, but that does not require corroboration: *Lauchlan* v *HMA* 2010 SCCR 347, at para [23] (Lord Carloway). There must be a sufficiency of evidence to indict, but that is of course a matter for the Crown and takes place at a later stage. The duty of the police is to report the results of their investigation but the police investigation is itself conducted under the supervision of the Crown*: Smith* v *HM Advocate,* at p 71-72. In that case, a failure by the police to disclose the finding of a separate knife at an early stage, although done later by the Crown when a special defence was lodged, did not give rise to a miscarriage of justice.

Information received after the SPR

[46] There is a statutory duty on the police to provide information to the prosecutor in solemn cases. The statutory duty begins after the accused has appeared on petition

(section 117 of the Criminal Justice & Licensing (Scotland) Act 2010) and is a continuing obligation from that point (section 118).

[47] In *Grier*, as noted above, the Inner House confirmed that the law will provide a remedy when the police provide false and misleading information to the Crown which prevents the Crown exercising its independent function and results in a wrongful prosecution. In *Smith* v *HM Advocate*, Lord Justice Clerk Thomson put the matter thus (p 71):

> "...(T)he duty of the police is simply one of investigation under the supervision of the procurator-fiscal and the results of the investigation are communicated to the procurator-fiscal as the inquiries progress. It is for the Crown Office and not for the police to decide whether the results of the investigation justify prosecution. The two functions are quite distinct."

Application of the legal principles

[48] As noted above the basis for the pursuer's case is primarily that there was, deliberately, a lack of investigation, a failure to properly consider his defence and the suppression of exculpatory evidence. These are said to support a lack of reasonable and probable cause on both the subjective and objective elements. The police officers are also said to have acted maliciously. For the defender, it is argued that the SPR sufficiently covers a large number, if not all, of the points relied on by the pursuer, but of course does not require to cover everything. Further submissions were made for the defender about lack of specification in the pursuer's averments and the pursuer's case on causation being irrelevant.

[49] In relation to malice, the police are accused of deliberately provided a misleading SPR with the malicious purpose of persuading the prosecutor to pursue a prosecution by (i) failure to portray a comprehensive and accurate narrative of the facts, (ii) the inclusion of

selective email evidence which created a misleading picture of the evidence because exculpatory material was excluded, (iii) the inclusion of uncorroborated allegations made by the complainer, (iv) the failure to comprehensively describe the counter-narrative of the pursuer as the supportive material, and (v) the failure to address the details of the counter-narrative of the pursuer which had not been thoroughly investigated. The officers are said to have maliciously failed to investigate and maliciously withheld relevant and material evidence from the prosecutor. The failures are claimed to have been so obvious and fundamental to the readily understood practice of police officers that they each acted maliciously and without probable cause.

[50] The pursuer refers *inter alia* to the terms of the SPR, said to reveal that one of the police officers involved was driven by his perception of the pursuer as disparaging and arrogant and his comments about the pursuer (including "obsessive", "vindictive", "pig headedness" and "downright despicable") reveal malice towards him. Such comments are said to demonstrate that the police officers who compiled the report were not acting in discharge of their public duty but from an illegitimate motive, namely antipathy towards the pursuer. The antecedent involvement of the pursuer with officers of the Northern Constabulary and how that could readily have caused a deliberate and non-subjective decision are set out in some detail. The pursuer believes and avers that the malice arose from antecedent ill-will towards the pursuer arising from his criticism of his local police force.

[51] The defender accepts that the averments on malice are relevant and suffice to go to proof. Thus, the defender must have accepted, as the cases above explain, that there are relevant averments of improper purpose or motive, such as false or tainted evidence or a

motive that is oblique. Nonetheless, I have considered the defender's position challenging similar averments in relation to reasonable and probable cause and causation.

[52] Applying the law to the averments of the pursuer in the present case raises some challenges. The pursuer's pleadings do not take the chronological approach, with no real differentiation in the phases or stages in the prosecution process. In addition, in several parts of the pursuer's pleadings only general assertions or propositions are made, causing the need to then check the remaining pleadings to see if any more detailed averments supporting those general points exist. However, there are also passages in the averments, particularly in Article 4 and its sub-parts, and in Mr Christopher's report, which provide more detail. Setting out in full the averments from the lengthy and at times repetitive pleadings is not desirable, and so the forthcoming references to the pursuer's pleadings pick out the main points for present purposes, in the terms stated by the pursuer.

Failure to investigate

(i) Pleadings

[53] The SPR demonstrates that the police deliberately failed to investigate: (a) the pursuer's claims that the complainer had stolen his property and money and thereby failed to link and investigate this conduct on the part of the complainer to the allegations she made against the pursuer; (b) the pursuer's defence under section 39(5) of the 2010 Act, and (c) matters which, if investigated, would have shown her to have lied and would have heavily impacted on her credibility and reliability in general (the complainer's use of a number of different aliases, her differing accounts of her marital status to witnesses, her involvement in prostitution and the false allegation she made that the pursuer was responsible for placing an advert in which she offered her sexual services).

[54] The complainer had, by email dated 16 September 2014 and in her police statement of 29 September 2014, denied that she placed the advert and suggested that this had been done by the pursuer. The police could have checked her bank statement, showing that the advertisement of the complainer's services was placed by her on 5 September 2014, at a cost of £49.50, and again this should have been done before the SPR was issued. Detailed averments are also made about a series of emails sent by the pursuer to the police in late September and early October 2014 and that there were a number of lines of enquiry raised by the emails, which the police did not pursue.

[55] The police deliberately also failed to consider, as well as the "Play" SIM card, other productions seized during the enquiry and in particular the USB stick, a camera SD memory Card, Nokia mobile telephone, a Lyca mobile SIM card and request an evidential report on these.

[56] The complainer had lied when she denied being given a laptop by the pursuer. The pursuer reported his stolen laptop and money to Police Scotland on 18 September 2014 and his report was recorded. He followed up these reports with a series of emails to one of the officers on 27, 28, 30 September 2014 and 3 October 2014. The emails of 27 and 28 September 2014 provided the police with a number of lines of enquiry, that ought to have been pursued, and these lines are stated. The four-page document produced by the pursuer on 27 September 2014 set out in detail the pursuer's position and outlined clear and obvious lines of enquiry to vouch the existence of the statutory defence.

[57] On 27 September 2014 the pursuer also provided a statement to the police about the circumstances of the theft, confirming payment of monies into her bank accounts and relevant details. The police carried out a separate enquiry into the theft of the pursuer's laptop. The evidence engathered by the police clearly demonstrated that the pursuer was

truthful in his account of his purchase of his laptop and his allegation that the complainer had stolen it. This is evidenced by the obviously contradictory accounts provided to the police by the complainer in the form of an email she sent dated 25 September 2014, the police statement she provided on 27 September 2014, the interview she gave under caution on 29 September 2014 and the police statement she later provided on 25 March 2015.

[58] The pursuer's account was also supported by the evidence available from PC Katarzyna Wyslouch who visited the complainer at her home on 27 September 2014 and by the statements of Mr Janick and Mr McKendrick. An officer refused to read the pursuer's statement of 27 September 2014 when it was presented to him and responded in a threatening and intimidating manner. Despite the pursuer's allegations being directly relevant to the allegations made by the complainer, the officers involved in the investigations failed to link these investigations together. One enquiry ought to have taken place with one investigating police officer. Police Sergeant Coleman was aware of both allegations from the outset and ought to have established an investigation to examine both allegations. The investigations would also have revealed that the complainer deliberately sought to withhold email communications and text messages that demonstrated she had an amicable relationship with the pursuer, up to 11 September 2014.

(ii) The SPR

[59] Before dealing with what is said in the SPR, it is convenient to note what is required for the offence of stalking. It is defined in section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. There are three requirements for the offence to be committed, specified in section 39(2) and explained in *Miller* v *HM Advocate* 2022 JC 33, at paras [44]-[46]: (a) the suspect must engage in a course of conduct; (b) he must do so with intent to cause the

complainer to suffer fear or alarm; or he must have known or ought to have known that engaging in the course of conduct would be likely to cause the complainer to suffer fear and alarm; (c) the suspect's course of conduct must cause the complainer to suffer fear or alarm.

[60] Defence evidence might rebut or neutralise inferences that might be drawn from other evidence, but until it is led the sufficiency of evidence is judged by taking the Crown case at its highest, when considering whether there is no case to answer: *Behan* v *Procurator Fiscal, Hamilton* [2013] HCJAC 118, at para [8]. In terms of section 39(5)(b) it is a defence to show that the conduct of the accused was engaged in for the purpose of preventing or detecting crime, or, under section 39(5)(c), that it was, in the particular circumstances, reasonable.

[61] The SPR was reported to the procurator fiscal on 17 October 2014. It states that between 1 June 2014 (said to be the date of the first offence) and 9 October 2014 at various places the pursuer engaged in a course of conduct which caused the complainer fear or alarm, in that he did repeatedly contact her, to her fear and alarm, in spite of being told not to do so by the complainer, her solicitor and the police. The means of contact were predominantly emails and text messages.

[62] Multiple references are made in the SPR to the dispute over property and money given by the pursuer to the complainer, and his comments on the allegation of stalking and the pursuer's allegation of theft. It references the evidence of both the pursuer and the complainer on these matters, recording that the complainer said when interviewed that the laptop was returned and that a search of her address found no trace of it. The SPR refers to the separate investigation into these allegations and gives the police reference code for it. It notes that a subject report could be submitted on this matter but that the reporting officer was on annual leave at the date of the SPR.

[63] The SPR records the pursuer's evidence that he was justified in behaving in the way that he did because of his belief that the complainer had stolen his property and money. It refers to his complaint of theft, his allegation that the police had not properly investigated it and that he said he had to do his own investigation. It also informs the procurator fiscal that the pursuer's and the complainer's phones had been seized and that they could be interrogated if required. The SPR further explains that several other emails existed beyond those referenced in the SPR.

(iii) Relevancy and specification

[64] The questions of whether there was adequate investigation justifying the SPR, and whether the SPR properly set out what should have been contained in it, are therefore substantially in issue in this case. There was plainly some degree of investigation by the police officers. The SPR is intended to be a summary and even if it is selective that can be consistent with the nature of such a report. However, it is clear that the pursuer avers that certain matters were not investigated or properly followed up in the SPR and specific additional points which should have been covered, but were not, are identified.

[65] In relation to the six digital devices, the defender submits that there is a lack of specification as to what the contents actually were. But the pursuer avers that the content of the "Play" SIM card contained material that was highly relevant to the pursuer's defence and exposed a series of lies advanced by the complainer to the police. Other digital devices are said, at least by implication from the averments, to have contained messages between the pursuer and the complainer which affect reasonable and probable cause. These devices have been interrogated and messages they contain are available to the defender. It is also averred by the pursuer that when these devices were disclosed to the procurator fiscal they

contributed to the Crown decision to desert the indictment and allow the case to go to time-bar. Relevant averments are therefore made about the devices.

[66] While the SPR notes that there was a separate investigation to take place regarding the alleged theft, the pursuer's averred contention is this was inappropriate and a balanced approach should have to be taken. It is submitted that the police cannot simply state that there are two separate alleged crimes, when the pursuer's allegation of the crime against him can, on his account, be inextricably linked to his conduct and hence should be dealt with as part of the same investigation at the time. The pursuer submitted that there is no proper reference in the SPR to any of the emails of 27, 28, 30 September and 3 October sent by him. The way it is expressed in the SPR is that:

> "From 27/09/14 and over the next couple of days, the [pursuer] was in contact through emails and phone calls with the police witness Coleman. The sole purpose of this as far as the police witness Coleman was concerned was over a complaint made against the police."

This is again a disputed issue with sufficiently relevant averments.

[67] The question of whether investigation into the telephone number used on the advert was that of the complainer, analysis of the "Play" SIM card, checking her bank statement, and the lines of enquiry put by the pursuer in relation to his laptop, should have been done and what results they would actually have given are matters for evidence. Whether the particular content of the emails, and indeed the other points said by the pursuer not to be investigated or suppressed, when viewed in the context of the totality of the information before the police, do or do not add enough to show a want of reasonable and probable cause are also matters to be determined on the evidence at proof. A past amicable relationship between the pursuer and the complainer, and the exchanges of messages showing that, may well be of no relevance to the charge of stalking. However, the SPR notes that the crime

relates to the pursuer stalking the complainer by repeatedly contacting her predominately through emails and text messages "mainly from the summer months to October 2014". The crime is alleged as commencing on 1 June 2014 and the effect, if any, of the emails from at least that time must also be a matter for evidence.

[68] In relation to the pursuer's claim about a lack of balance in the SPR, the defender argues that Mr Christopher lists the evidence showing the commission of a crime and the evidence bearing on the defence, and that this material is in the SPR. However, Mr Christopher's statements on the point are not themselves conclusive. The key question is whether further investigation into the defence should have been carried out and what results that would have had. Indeed Mr Christopher repeatedly refers to things that were not investigated.

[69] The defender makes the point that it is self-evident from the terms of the SPR that there were significant factual differences between the pursuer and the complainer and contends that the veracity of statements is not an issue at that stage. The pursuer's averments however say that there is material which substantially undermines the complainer's credibility, showing her to be a liar, and that should be have been taken into account. The full nature and extent of that material and any impact it has on the credibility and reliability of the complainer is also a matter for proof. If there were the obvious and serious consequences on credibility and reliability averred by the pursuer, from the information available to the police, it could affect reasonable and probable cause.

Defence under section 39(5) of the 2010 Act

(i) Pleadings

[70] Key averments on the defence not having been properly investigated are noted above. Information about that defence is also said to have been omitted or suppressed, as is noted below. However, as to some extent this can perhaps be seen as a discrete part of the pursuer's case, it is convenient to consider it separately. Further averments on the defences include that the pursuer had a defence under section 39(5)(b) and (c).

(ii) The SPR

[71] The SPR mentions the defence and the basis for it, the alleged theft. However, as noted, the pursuer avers that further investigation into that potential defence should have taken place. The SPR references the information received from the pursuer raising questions about the complainer's identity. It records the pursuer's evidence that she operated as an escort and advertised her services and includes the opinion of officers that the complainer was likely engaged in some form of prostitution. But certain further issues about the credibility and reliability of the complainer's account are averred by the pursuer, as noted above.

(iii) Relevancy and specification

[72] If there is a sufficiency of evidence for the charge, then the defence is a matter for the procurator fiscal to consider and, if indicted, for the accused to put forward at the trial. Where, as here, there is conflicting evidence, the existence of some evidence pointing to innocence does not therefore necessarily exclude probable cause because the Crown case must be taken at its highest (see *Behan* v *Procurator Fiscal, Hamilton*). However, it is averred

that there was information, currently available to the police or that should have been found in an investigation, that substantially undermined or contradicted the complainer's position and could also contribute materially to a defence to the allegation. The averments go on to say that the police should have taken that into account in deciding whether an SPR was necessary and, if so, should have recorded that information in the SPR. To determine what impact, if any, the points averred would have had on the SPR requires evidence.

[73] The particular grounds of defence relied upon by the pursuer involve either preventing or detecting crime or having acted reasonably. While it is no doubt correct that some of the pursuer's conduct took place after the alleged crime of theft was already committed and indeed reported, and hence at that stage prevention is impossible, other conduct by him occurred before it was reported and, for aught yet seen, might have some relevance to seeking to prevent the crime. It may well also be correct that recovery of property, which is part of what he was trying to achieve, does not negate commission of the crime, but it is not possible at this juncture to rule that it could have no bearing whatsoever on detecting the crime. It will be necessary to hear evidence about the emails and messages in order to reach a final view on what, if anything, was prevented or detected.

[74] There is no specific reference in the pursuer's pleadings to him having acted reasonably and hence having a defence under section 39(5)(c). However, as noted, it is expressly averred that there is a defence under section 39(5)(b) and (c). The pursuer is, by necessary implication, averring that he was acting reasonably. While the defender argues that the defence was treated, and accepted by the pursuer, as some form of civil right, that is not the pursuer's pleaded position. The defender also makes the point that Mr Christopher, in his report, says that the pursuer claimed that he was pursuing his civil right to recover his

property and this was the reason for contacting her. That is said in the report, but making that contact could arguably also contribute to the statutory defence of acting reasonably.

[75] It would need to have been absolutely and irrevocably clear that the defence would have succeeded for the police to have decided, for that reason alone, that no SPR was required. That is a very high test to meet, but the remaining averments are that, *esto* the SPR was required, more information relevant to the defence should have been recorded in the SPR. The pursuer's case on the defence and whether more should have been said, and whether there was a basis for either ground to have been relied upon, is a matter to be determined at a proof.

Suppression of evidence

(i) Pleadings

[76] The terms of the SPR reveal that the reporting officer produced a selective account of the email communications between the pursuer and the complainer and failed to make reference to amicable email and text exchanges prior to September 2014. In so doing he produced an unbalanced and misleading report, not in conformity with the ACPOS Disclosure in Criminal Proceedings Manual of Guidelines. The totality of the emails, which were available to the police at the time the report was compiled, substantiated the pursuer's defence.

[77] The large number of amicable text messages and emails between the pursuer and the complainer were not referenced in the SPR and were not provided to the procurator fiscal in the period that followed submission of the report despite the material being in the possession of the defender's officers. The mobile phones, USB stick and SIM cards in the possession of the defender's officers contained exculpatory material that was not disclosed

to the procurator fiscal. The four-page document submitted by the pursuer to the defender's officers on 27 September 2014 was not provided to the procurator fiscal. The defender's officers failed to provide the statements of Mr Janick and Mr McKendrick to the procurator fiscal in the period after the SPR was submitted.

(ii) The SPR

[78] The SPR refers to a prior amicable relationship between the pursuer and the complainer. It mentions that the pursuer's phone and the complainer's phone had been seized and could be interrogated if required. It notes that, in addition to the emails to which it refers, other emails existed and it mentions the separate theft inquiry. However, it is plain from the pursuer's averments that aspects relating to these points, and additional matters, are alleged to have been suppressed.

(iii) Relevancy and specification

[79] The suppressed evidence is said to include the witness statement of Mr McKendrick but what the evidence was in that statement is not set out. However, the pursuer does aver that the evidence of Mr McKendrick corroborated the pursuer's statutory defence that he was contacting the complainer to seek to recover his property and prevent a crime (namely theft). That is sufficient specification. There are said to be no averments of what was in the emails that are not mentioned in the SPR, which could have negated reasonable and probable cause, and moreover the broad reference to an amicable relationship is said to be of no relevance. However, the pursuer's position is that the contents of the emails are exculpatory and that they substantiated his defence and again that is sufficient for fair notice, with the individual emails available to the defender. Other documents, such as the

four-page statement referred to by the pursuer, said to contain the information referred to above, are also available to the defender. On the issue of suppression, it cannot be said that the pursuer's case must necessarily fail.

Conclusions on relevancy and specification in relation to reasonable and probable cause

[80] Clearly, when assessing the objective part of the test for reasonable and probable cause, it is necessary to have regard to the totality of the information which the police ought to have considered. While the police have to provide all relevant evidence, it is equally plain from the authorities that there is no requirement that the police produce absolutely everything, as not every document may have appeared relevant at the time of reporting and important further inquiries may still be merited. Even if the court was to conclude that a charge was irrelevant there can still have been a reasonable and probable cause (see eg *Rae* v *Strathern*, 1924 SC 147, Lord Skerrington at p 152-3).

[81] As was observed by Lord Denning in *Glinski* and in the authorities quoted above, it is where the facts and information known to the prosecutor are not in doubt, not disputed, that the court can determine at this point whether there was a reasonable and probable cause. It is sufficiently clear, from the pursuer's averments, that this is not the case. Whether the police officers were truthful or lying and whether the conduct of the police might reasonably allow the inference that they were conscious there was no reasonable or probable cause for the prosecution, are evidential matters.

[82] As is also clear from the authorities, there are potentially connections that can be drawn between malice and lack of a reasonable and probable cause and the case on malice is accepted here as being relevantly averred and a matter for proof. There are a number of interactions between the individual points alleged by the pursuer. If, for example, there was

a deliberate failure to investigate a matter which should have been investigated, that can be potentially relevant to both the subjective and objective element. As an illustration, if the investigation should have been done and would have found information that materially affected the complainer's credibility, that could impact on the objective element of reasonable and probable cause. Deliberate suppression of exculpatory evidence could also be relevant to both elements. Points made in the pleadings about things found out after the SPR was submitted could also have affected reasonable and probable cause for the SPR, if it is established that they should have been known at the time as a result of a necessary investigation.

[83] The pursuer has made averments that may have a bearing on the subjective element and if it were to be established at proof that the police officers each acted maliciously that could, depending entirely on all of the evidence, potentially point towards a lack of an honest belief. I therefore conclude that the pursuer's case that the police officers had no honest belief that there was a proper case to put to the procurator fiscal will not necessarily fail. In short, from the averments made, it is not possible to look into the minds of the police at the debate stage.

[84] In relation to the objective aspect, whether there exist proper grounds to bring the case is, as the case law above explains, to be judged by reference to the evidence known to the police and such other evidence as would have been known as a result of any enquiries that should have been, but were not, made. The pursuer makes averments about both of these lines of evidence. The question of whether what is averred should have been investigated and what the result of the further investigations or enquiries would have been, and how, if at all, they would have affected the existence of reasonable and probable cause when being objectively assessed, also requires to be dealt with after the evidence has been

heard. It is not appropriate for the court to make those value judgments in the abstract, shorn of the context and detail that may emerge at the proof.

[85] I conclude that there are averments in relation to both aspects of reasonable and probable cause which indicate the basis or reason for, or link between, the alleged wrong and its consequences.

Causation

[86] The pursuer avers that officers knew that the report made to the procurator fiscal contained false and misleading information and that no attempt was made to correct it in the period following the submission of the report. It is then pled that, given the misleading nature of the report, and the failure to provide further exculpatory evidence when it became available, the procurator fiscal could not independently discharge their duties. It is said that the information which exposed a series of lies advanced by the complainer to the police, when disclosed to the procurator fiscal, contributed to the Crown decision to desert the indictment and allow the case to go outwith the time-bar.

[87] It is true that the SPR drew attention to the fact that mobile phones had been seized and left it to the fiscal to decide whether they should be interrogated. In addition, as noted, it mentioned the theft inquiry. Also, the witness statements given by Mr McKendrick and Mr Janick, after the SPR was tendered, are not relevant to the SPR. Nonetheless, the pursuer avers how the SPR is said to have influenced the procurator fiscal and indeed deprived him of the ability to exercise independent judgement by the presentation of information the police officers knew to be false and the suppression of evidence. The pursuer also argues that the witness statements were, at least for a period of time, suppressed.

[88] The defender says that criticisms of the SPR are not relevant to decisions by the Crown in phases 3 and 4. It is plainly correct that while the police will carry out the initial investigations (relevant to phases 1 and 2), what happens next is under the control of the Crown. However, the pursuer avers that the SPR should not have been prepared and submitted in the first place and but for the actions of the police officers there should have been no SPR and no prosecution.

[89] I accept that from the averments it is not entirely clear what the Crown relied upon to reach its own independent decision and whether, for example, items said previously to have been suppressed deprived the Crown of a reasonable opportunity properly to assess the case. It is evident that a number of items, now referred in the pursuer's averments as Crown productions, were available to the Crown at the time of the indictment. However, the Crown's decision to desert the indictment and allow the case to time-bar is averred to have reflected the fact that the complainer no longer wanted to give evidence in the case and also because it was clear that she had repeatedly lied to the police. In short, her credibility and reliability is alleged to have been so compromised by the evidence which the police should have identified in the SPR that, when it did become known to the Crown, this contributed to the decision not to pursue the prosecution. The conduct of the police is therefore averred to have played some part in phases 3 and 4 and been relevant to the decision by the Crown not to proceed. Of course, whether that can be established is a matter for evidence.

[90] The pursuer has a secondary approach, which is that there was a loss of chance, the point being that the SPR and other alleged failures by the police caused him to lose the chance of avoiding a criminal prosecution and the losses incurred as a result of the prosecution. The pursuer also accepts that if the Crown took all material said not to have

been investigated or suppressed into account when deciding to prosecute that would affect the claim for damages. However, at this point in time, on the averments made by the pursuer, the court is not able to presume or conclude that the Crown could not have been in any way influenced or misled by the conduct of the police.

[91] It is abundantly clear in a case of this kind, as is observed by the Lord President in *Grier*, that there will be difficulties in relation to causation, given the phases of the process and the independent decisions made by the procurator fiscal and the Crown. But, for the reasons explained, I am not persuaded that the pursuer's case on causation, as averred, must necessarily fail. As a result, the case is not dismissed on that ground and the averments relating to events from the date of the indictment (September 2015) are not excluded from probation.

Issue 2: Mr Christopher's report

Legal principles

[92] The defender submits that the expert evidence of Mr Christopher does not meet three of the four aspects of the test set out in *Kennedy* v *Cordia* (at para [44]): (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence.

[93] The Supreme Court observed, at para [45], under reference to other authorities, that it is for the court to decide whether expert evidence is needed when the admissibility of that evidence is challenged. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. Where, on its own or in addition to an opinion, skilled evidence of fact would be likely to assist the efficient

determination of the case, the judge should admit it (para [47]). Reference is made to *Davie* v *Magistrates of Edinburgh* 1953 SC 34, p 40, where the Lord President observed that expert witnesses cannot usurp the functions of the jury or the judge. The court also referred to *Pora* v *R* [2015] UKPC 9, at para [24], in which the Privy Council stated that it is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues and that the expert witness should be careful to recognise the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case.

[94] In *Kennedy* it is then added (at para [49]) that

> "Thus, while on occasion in order to avoid elusive language the skilled witness may have to express his or her views in a way that addresses the ultimate issue before the court, expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert."

[95] Applying the law to the facts in the case, the court held that:

> "[70] …his expressions of opinion as to what Cordia should have done were capable of being interpreted as legal opinions that Cordia had breached statutory regulations and thus objectionable. But the Lord Ordinary applied his own mind to the legal questions which he had to decide (see our discussion, paras 21–25, of this part of his opinion)."

[96] There are, in *Pora* some other points made that are of assistance in the present case. It was said (at para [24]) that the expert:

> "trenchantly asserts that Pora's confessions *are* unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity…it is not open to him to assert that the confession is in fact unreliable."

The court later states:

> "[27] The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter which is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to give an opinion on such a matter but this is not one of them. It appears to the Board that, in general, an expert should only be called on to express an opinion on the 'ultimate issue' where that is necessary in order that his evidence provide[s] substantial help to the trier of fact. As observed above, Professor Gudjonsson could have expressed an opinion as to how the difficulties that Pora faced might have led him to make false confessions. This would have allowed the fact finder to make its own determination as to whether the admissions could be relied upon as a basis for a finding of guilt, unencumbered by a forthright assertion from the expert that the confessions were unreliable. In this way it would be possible to keep faith with and preserve the essential independence of the jury's role, which is to evaluate all the relevant evidence, including both expert evidence and other evidence which the expert may have no special qualification to evaluate."

The report

[97] Mr Christopher's report contains an Executive Summary in which he repeatedly expresses his opinion on whether there was a reasonable and probable cause, states that the police were determined to follow a pre-determined decision to detain, interview and charge the pursuer, and that the conduct of the police was deliberate and malicious. In the body of his report he explains his expertise and states that he has been asked to provide an expert opinion as to the conduct of the criminal investigation into the allegation of stalking by the pursuer, with regard to inferred malice.

[98] He states that not only do the omissions demonstrate a lack of investigative and interviewing professionalism but, in his opinion, any officer acting ethically, fairly and honestly in the discharge of their public duties would have included the points to prove and the statutory defences in the interview plan, to ensure that they were covered. He identifies things which the police officers should have done but did not do. He also identifies matters that were not taken into account. He gives his opinion on what should have been

investigated. He makes the comment that the police had no probable cause that an offence of stalking had actually been committed until the statutory defences were eliminated. He gives his opinion that there was a statutory defence. He explains what he "interpreted" to reach his views on malice and he gives his opinion on that on many occasions. Examples can be illustrated as follows:

> "120. In my opinion, the failure to expeditiously manage information and exhibits on the part of the police in this case was not accidental, human error, simple omission or incompetence. The failure by the police was deliberate, wilful and malicious…
>
> 122. In my opinion, the police intentionally and maliciously suppressed evidence available from the forensic analysis of exhibits so that the PF received an incomplete, inaccurate and misleading picture of the circumstances…
>
> 124. In my opinion, the police suppressed the evidence arising from the forensic analysis of exhibits because they knew it would have demonstrated that Mr MacGregor had a statutory defence to the allegation of stalking...
>
> 126. In my opinion, the information provided initially to the PF was biased, incomplete and inaccurate.
>
> 127. In my opinion, the police acted in a prejudicial and discriminatory fashion towards Mr MacGregor."

[99] He goes on to give his own opinion on the application of the law as set out in *Grier* on reasonable and probable cause. Further comments are made by him on the subjective element. There are many illustrations and again by way of example they include the following:

> "244. In my opinion, the police pre-determined on 30th September 2014 that Mr MacGregor was going to be charged with the offence of stalking...
>
> 257. In my opinion, the purpose of the police in furnishing a selective and biased SPR was to influence the PF to prosecute Mr MacGregor.
>
> 258. In my opinion, the PF was prevented from exercising his independent judgement by the police submitting a selective and biased SPR…

> 260. In my opinion, the reason the police suppressed exculpatory evidence from the PF was to ensure the prosecution was not undermined or jeopardised and would proceed against Mr MacGregor.
>
> 261. In my opinion, the police deliberately tried to mislead or dupe the Crown into mounting a prosecution of Mr MacGregor on the basis of inaccurate or tainted evidence…
>
> 263. In my opinion, the foregoing catalogue of actions conducted by the police during this investigation could not have been accidental, simple omission or human error.
>
> 264. In my opinion, the conduct of the police was deliberate and malicious towards Mr MacGregor…
>
> 266. In my opinion, the conduct of the police demonstrated prejudice and discrimination towards Mr MacGregor with a wilful and malicious intent that he was prosecuted for the offence of stalking."

Application of the law

[100] It is convenient to deal with the second and third elements of the test in *Kennedy* v *Cordia* and then to assess the admissibility issues on the opinions expressed by Mr Christopher, referred to above.

Knowledge and experience

[101] The defender argues that Mr Christopher does not have the necessary knowledge and experience, in part because he has not worked in the police service in Scotland. I do not accept that proposition. Mr Christopher's qualifications and experience, albeit in England, give him the ability to deal with the relevant matters. He has suitable experience in addressing what constitutes improper police conduct in the process of investigating crime. His experience is both practical and academic. He spent 29 years in the police service and achieved the rank of Detective Chief Inspector. He has extensive experience of working in a Professional Standards Unit. His academic experience includes lecturing in policing at De

Montfort University and as a senior lecturer in criminal investigation. He plainly had regard to the legal position and guidelines in Scotland, which he repeatedly mentions. The court may benefit from skilled evidence regarding the ordinary practice of the police in conducting a criminal investigation. Policies, practices and procedures of the police are, at least to some extent, outwith the knowledge and experience of the court. He has sufficient knowledge and experience.

Impartiality

[102] I also do not accept the defender's position that Mr Christopher is not impartial and engages in prejudicial speculation. It is simply not possible to glean any such conclusion from the terms of his report alone. There is no basis in the report for there being any conflict of interest on his part. Any question of impartiality, if still live, can no doubt be addressed at the proof.

Opinion evidence

[103] It is clear from the authorities that for the expert to give his opinion on what is an ultimate issue before the court it requires to be necessary (or, to use the other expression, essential), to help the judge or jury. In professional negligence cases it is common to have an expert opining on the ultimate question of negligence, giving their view on whether no practitioner of ordinary skill in that discipline would have acted as the defender did. That conclusion will be drawn by the expert from his reasoning. In those cases, it is necessary to give that opinion to assist the court.

[104] In the circumstances of this case, a skilled witness is entitled to explain the practice and process of the police in considering an alleged crime. This allows him to assess what, in

his view, they should have done, by way of investigation and disclosure, and what he considers they did not do, identifying the matters they did not take into account. These observations can take him on to whether the SPR properly covers the relevant matters.

[105] While his opinion on whether there is a reasonable and probable cause may be viewed as a corollary to his analysis and an obvious outcome, it is clear that opining on the objective element of probable cause is the expression of an opinion on a question of law, which is one of the ultimate matters for the court to determine. That is the case even though his reasoning will inextricably lead to that conclusion. As a consequence, the multiple parts of Mr Christopher's report in which he expresses his own views on the objective element of reasonable and probable cause are not admissible.

[106] This is an intentional delict case, hence involving malice. The decision on malice is also an evaluative judgment and is another example of an ultimate issue to be determined by the court. The opinions Mr Christopher gives on whether there was malice are inadmissible because on that ultimate issue the court needs no assistance and can readily decide on its assessment of the evidence as a whole. A similar approach was taken in relation to a police witness in *Galletly* v *Laird* 1952 JC 16, who was asked if the publication was "obscene" (Lord Justice General (Cooper) at p 27). The decision on the subjective element, involving assessing what was in the mind of the police officers at the time and their honesty, is also something that can readily be determined by the court based on all of the evidence and again it is not assisted by expert evidence.

[107] As a result, on malice and honesty, Mr Christopher oversteps the mark (although instructed to do so) when he interprets or draws inferences from the facts and gives his opinions on whether the officers had pre-determined that they would have the pursuer charged and that they acted with bias, wilfully, deliberately and maliciously and

intentionally suppressed evidence. His evidence on the legal conclusion of there being malice and dishonesty is therefore irrelevant. The defender submits that he does not address the correct test for malice. I need not consider that further because his opinions on whether there was malice are inadmissible. The judge dealing with the proof will apply the appropriate tests and, on the evidence, reach a decision on malice and reasonable and probable cause.

[108] On a separate point, Mr Christopher also makes these comments:

> "69. In my experience, statutory defences or a straightforward defence to offences must always be considered when conducting an investigation and planning an interview. That applies from the most minor to the most serious crime. Where a suspect puts forward a defence to an allegation, it is essential that the account is investigated until it is confirmed or dismissed. A simple example of this is where a suspect submits a defence of alibi when interviewed. That account of alibi has to be investigated before any consideration is given to charging the suspect because, if the defence is corroborated, there is no probable cause that the individual committed the crime."

On a number of other occasions he states that the defence had to be "eliminated" before the pursuer could be charged.

[109] In the absence of Mr Christopher providing any proper basis for that approach, serious concerns arise from the suggestions that a defence of alibi would have to be dismissed or eliminated before a reasonable and probable cause can exist, and that the defence must be taken as confirmed if it is corroborated. If it is absolutely clear that there was an alibi (for example shown categorically by CCTV footage) it may be that the police can go no further. But absent such information, when a defence is put forward, the commonplace situation in criminal trials is that a special defence is lodged, evidence about it is led and the jury determines the matter. While I have concluded that there is a relevant case pled by the pursuer in relation to a potential defence, the police do not need to completely dismiss the defence before they can issue an SPR. This part of Mr Christopher's

report is therefore irrelevant, as is the averment for the pursuer that he should only have been charged if, after the investigations, it was demonstrated that the statutory defence did not apply.

[110] Mr Christopher goes on to give his opinion, expressed on several occasions, that there was in fact a statutory defence. This is another example of a decision on a matter of law that is to be left to the court. That opinion evidence is inadmissible.

[111] It is argued for the pursuer that there is no specific plea-in-law for the defender seeking exclusion of Mr Christopher's evidence. That is correct and there is also no standard plea-in-law seeking exclusion of averments from probation (except one in relation to malice, which was not, of course, relied upon). However, practically speaking the broad terms of the defender's second plea-in-law, seeking dismissal based on averments being irrelevant, allow me to exclude any particular irrelevant averments. Significant portions of Mr Christopher's report are inadmissible and require to be excluded.

[112] Mr Christopher's report is incorporated in full in the pleadings. As I have indicated, some of the points he makes do not fall foul of the requirements set out in *Kennedy* v *Cordia*. That said, there is a degree of difficulty in filleting the report down to admissible evidence, when problems arise from particular paragraphs, parts of a sentence or sentences. I shall therefore identify only the full, or almost full, numbered paragraphs in the report that are admissible and able to remain. These are: 12-18; 21-31; 33-45; 47-57; 58 (apart from the last two sentences); 60; 63-64; 66; 67 (apart from the last sentence); 68 (apart from the last sentence); 72; 75-79; 80 (apart from the second-last sentence); 81; 83-85; 86 (apart from the second-last sentence); 89-90; 91 (apart from the fourth-last and last sentence); 92 (apart from the last three sentences); 95-96; 99; 102-103; 105-111; 116; 118-119; 128-134; 136; 139; 146; 148; 149; 155-156; 159-161; 163-167; 169-171; 173; 176; 178-200; 238-239; 241;

245-247; 248 (apart from the last seven words); 249; 252; and 254 (apart from the last seven words). The rest of the paragraphs in the report, and the sentences and words just mentioned, are excluded from probation.

[113] On behalf of the defender, it was argued that if parts of the report are inadmissible the whole report should be excluded from probation, with reference made to *Eadie Cairns* v *Programmed Maintenance Painting Ltd* 1987 SLT 777. However, that case did not involve incorporation of an expert report into the pleadings. In the present case, the pursuer relies upon the whole report, including on relevancy, and it is not appropriate to exclude the parts of it that are admissible.

[114] While I have not excluded the report from probation in its entirety, a redacted version leaving only the passages which can remain would not be as easy to follow. It would plainly be much more sensible and appropriate for a revised report to be prepared, which can seek to include any parts of the current report that do not go beyond the limits of expert evidence.

Conclusions

[115] There are substantial obstacles and challenges for a pursuer in an action of this kind and on several aspects of the case the test he will require to meet is a high one. But, where sufficient averments are made the pursuer must have the opportunity to seek to meet the tests. It is accepted for the defender that malice is a matter for proof and it is clear from the authorities that, on relevant averments, the subjective and objective elements of reasonable and probable cause will also require evidence. Indeed, as is made clear, the evidence on malice may have a bearing on those elements. For the reasons stated, I do not conclude that the pursuer's case is bound to fail.

[116] Mr Christopher's report, while it contains some information that is admissible and provides details relied upon by the pursuer, in numerous respects strays beyond what an expert is entitled to say. Substantial parts of it are therefore excluded from probation and it would be prudent for a revised version to be prepared.

Disposal

[117] I shall therefore sustain the second plea-in-law for the defender to the extent of excluding from probation (i) the contents of the report by Mr Christopher other than the passages referred to above, and (ii) the pursuer's averment in Article 4.4 "and it was demonstrated the statutory defence did not apply". I shall repel the defender's third plea-in-law and *quoad ultra* allow a proof before answer. All questions of expenses are reserved.