OUTER HOUSE, COURT OF SESSION

A3254/00

OPINION OF LORD EMSLIE

in the cause

SHIRLEY JANE McKIE

Pursuer;

against

JOHN ORR

Defender:

Pursuer: A Smith; Digby Brown, S.S.C.

Defender: Maguire; Simpson & Marwick, W.S.

14 February 2002

[1] The pursuer is a former serving police officer with Strathclyde Police who retired on ill-health grounds at about the end of 1999. The defender is the Chief Constable of Strathclyde Police, and as such is liable under statute for civil wrongs committed by subordinate officers in the performance of their duties. In this action, the pursuer seeks damages from the defender in respect of the events surrounding her arrest on a

charge of perjury in March 1998. The arrest itself proceeded upon a Petition Warrant obtained by the Procurator Fiscal, and is acknowledged to have been lawful. The pursuer's complaint, put shortly, is that in a variety of respects the manner in which the arresting officers behaved towards her in the course of executing the warrant was unjustifiable and amounted in law to a series of assaults.

[2] The pleadings in this action are somewhat unusual, in respect that it is only in Condescendences 7 and 8 that the alleged assaults in 1998 constituting the pursuer's ground of action are addressed. The averments in Condescendences 2 to 6 largely concern events in 1997 which preceded any decision to charge the pursuer with perjury, and which involved individuals, all but one of whom played no part in the pursuer's arrest in the following year. In broad terms, these Condescendences narrate how, during a murder inquiry, a fingerprint stated by the Scottish Criminal Records Office to belong to the pursuer was found on a doorframe in the victim's house in Kilmarnock. The pursuer, who was among the officers deployed on the murder inquiry, but who had no authority to enter the house, denied that the fingerprint was hers and went off work suffering from stress. Shortly thereafter, her superiors instituted disciplinary proceedings against her, on the view that she must have entered the house in disobedience to her orders. Subsequently, at the trial of the man accused of the murder, the pursuer gave evidence and continued to deny, under questioning, that the fingerprint could be hers. Thereafter, the decision was taken to prosecute the pursuer for perjury at that trial, and the Procurator Fiscal proceeded to obtain the Petition Warrant to which I have already referred. At this point, it is convenient to record that in Condescendence 7 it is narrated that the pursuer eventually stood trial on the perjury charge, that defence evidence was led to the effect that the fingerprint at the *locus* was obviously not that of the pursuer, and that she was found not guilty by the unanimous verdict of the jury.

[3] More particularly, the averments in Condescendence 3 concern a lengthy visit to the pursuer's house in February 1997 by a named police officer, in the course of which the latter allegedly sought to persuade the pursuer to reconsider her denial that she could possibly have entered the house and left the fingerprint. Condescendence 4 details an interview of the pursuer by Detective Superintendent Malcolm in March 1997, in which she was persistently questioned on the fingerprint issue, as if suspected of the murder, and repeatedly warned of the risk of perjury if she maintained her position at the forthcoming trial. Condescendence 5 describes apparently reassuring conversations with two further named police officers in May 1997, to the effect that disciplinary papers were not to be served on the pursuer and that she was not to be suspended. These conversations were followed immediately by the commencement of disciplinary proceedings against the pursuer, and she believes and avers that the reassurances given were knowingly false. Condescendence 6 narrates how, at the murder trial in late May 1997, the pursuer maintained her denial that the fingerprint could be hers; and how she thereafter returned to work and was assigned to a post within the mounted branch, attending to stables. It is then averred that:

> "During that period, the pursuer was attending her GP and receiving treatment for depression and anxiety as a result of the allegations made against her and the aggressive manner in which they were being investigated by her superiors".

The Condescendence ends with averments of an "essentially unannounced" visit by the Chief Medical Officer of Strathclyde Police to the pursuer's place of work on 5 March 1998, ostensibly to ascertain her state of health, but during which the doctor is alleged to have behaved in a strange and evasive manner. This was on the day before the arrest which forms the subject-matter of the pursuer's claim.

[4] When the case called before me on the procedure roll, counsel for the defender invited me to sustain her first plea-in-law and dismiss the action as irrelevant. In particular, she directed a powerful attack on the relevancy of the pursuer's primary averments alleging actionable assaults in Condescendences 7 and 8. In addition, she challenged the relevancy of Condescendences 3 to 6 inclusive which, in her submission, concerned matters wholly extraneous to the pursuer's ground of action. Failing wholesale dismissal, counsel submitted that I should exclude material parts of the pursuer's pleadings from probation, and (by reference to her second plea) that any inquiry should be by way of a proof before answer. In response, counsel for the pursuer maintained that his client's claim on Record was relevantly stated, and that I should allow issues for a jury trial. He submitted no argument in support of his own first plea-in-law, and at the end of the debate intimated that he would be content if that plea were now to be repelled. Both parties agreed that if I held the action relevant and suitable for jury trial, the defender should then have an opportunity, if so advised, of contending that such a jury trial would infringe the human rights of the various police officers against whom potentially serious allegations were directed. The reason for deferring consideration of this argument was that the human rights issue was currently under consideration by the Inner House, and that in any event, depending on my decision, the point might become academic.

[5] Turning now to the averments in Condescendences 7 and 8, which were the subject of the defender's principal attack, these may be said to identify five main aspects of the pursuer's arrest which are alleged to have amounted to assaults and to have been actuated by malice. First, it is alleged that on the morning in question the pursuer was physically apprehended at her own house, as opposed to being informally invited to attend at a named Court or police station with her solicitor. According to the pursuer, the latter would have been the normal and appropriate course in the circumstances, and physical apprehension was unnecessary and unjustifiable. Secondly, it is said that on the morning in question, after announcing that they had a warrant for her arrest on a charge of perjury, Detective Superintendent Malcolm and two other officers pushed their way into the pursuer's house when she tried to shut the door against them. When the pursuer then said that she wanted to get dressed, Detective Sergeant Malcolm instructed one of the other officers "to accompany her whilst she was doing so". That other officer is then said to have insisted on watching the pursuer as she urinated, undressed, took a shower, and dressed again.

[6] Thirdly, the averments concern events at Ayr Police Station where the pursuer was taken following her arrest. The allegations here are that she was taken into the police office ".... by the most public route"; that Detective Superintendent Malcolm ordered other officers who knew the pursuer not to communicate with her; and that he also ordered the pursuer to be held by the arms for around ten minutes at the charge bar, referring to her loudly as "the prisoner". A notice above the charge bar stated "Officers, ensure you hold your prisoners". It is said that the doors on either side of the charge bar were jammed open throughout, allegedly with a view to maximising

the pursuer's humiliation. Fourthly, the pursuer complains about the way in which she was searched while at Ayr Police Office. According to her averments, Detective Superintendent Malcolm instructed the other two arresting officers to search her. What is then said to have happened, in an adjacent detention room which could have been observed by others through an eye-level window, is that the pursuer was subjected to an intimate search which involved her stripping down to her underwear, and then being touched around her breasts, beneath her brassiere, and around her buttocks and private parts. Fifthly, it is averred that the pursuer was then transferred to Glasgow Sheriff Court, where she was processed again and placed in a cell before being judicially examined and released on bail.

[7] In addition to the foregoing narrative of events, Condescendences 7 and 8 contain a number of important averments on the pursuer's behalf. In Condescendence 7, at p. 14E, it is averred:-

> "The pursuer is unaware of the extent to which the female officers... were acting under direct orders of Malcolm and the extent to which they were acting on their own initiative. The actions of Malcolm were motivated by malice, on account of the unnecessary and aggressive manner in which they were carried out."

At p. 15A, with reference to the defender's averments in answer, it is admitted that the decision to proceed with the Petition Warrant was at the instance of the Crown Office, and that the pursuer made no complaint about the manner of the search at the time. At p. 15B, the precise communications among senior officers regarding the manner in which the Petition Warrant was to be executed are stated to be not known and not admitted. From p. 15C the averments continue *inter alia* as follows:-

> "It is further explained and averred that it is standard and almost invariable practice, when a Police Officer is to be charged with an offence, that they are asked to attend a Police Office or Court for that purpose. Arrest of a suspect can be effected without actual apprehension of that suspect. In the event that it is unlikely that a suspect may try to abscond....(such) a practice is competent, proper and reasonable. A suspect should not be apprehended, even in exercise of a warrant, unless there is good reason to do so. Reference is made to the terms of Section 17 of the Police (Scotland) Act 1967. There was no possibility of the pursuer destroying evidence, the charge being one of perjury. There was no reason to assume that she would fail to or refuse to attend. Had she been given such notice she would have attended and would have been able to obtain legal representation. The method of arresting and charging her was wholly unnecessary and humiliating."

At p. 16C it is averred that if there had been concern that the pursuer might inflict harm upon herself, that could have been obviated by supervision as opposed to a wholly unnecessary search. To treat the pursuer as "any other member of the public" by subjecting her to the (treatment complained of) is said to have been wholly unnecessary.

[8] Condescendence 8 spells out the legal basis of the pursuer's claim at some length, beginning with the sentence:-

> "The manner of arrest and detention and search of the pursuer was wholly unnecessary in the circumstances and amounted to an invasion of her privacy and liberty and an assault upon the pursuer by all three officers responsible therefor."

It is then averred:-

> "At all material times, Malcolm was acting in the course of his duties and the defender is therefore liable to the pursuer to make reparation to her. To the extent that those other officers were not acting under direct orders of Malcolm (the extent of which is now known to the pursuer) the defender is liable for their actions in the course of their duties."

These averments are repeated and amplified at p. 26B/C. The only attempt to specify malice in this Condescendence is against Detective Superintendent Malcolm, although all of the officers' actings are described as "wholly unnecessary" or in similar terms.

[9] In developing her submission that the action was bound to fail and should therefore be dismissed, counsel for the defender maintained (i) that Condescendences 7 and 8 contained no relevant averments of assault on the part of any of the police officers concerned, and (ii) that in any event there were no relevant averments of malice. By reference to a number of well-known authorities, she maintained that the law conferred very wide protection upon police officers and others acting in the discharge of official duties. They were, in short, strongly presumed to act *bona fide* within the legitimate bounds of their authority, and their conduct in that context could only be made actionable by specific averment and proof of malice. In *Robertson* v *Keith* 1936 SC 29, a seven-judge case, Lord Justice Clerk Aitchison explained the rule in this way at pp. 45-7:-

> "The question of law in the case is whether, assuming the act to have been within the competence of the defender as Chief-Constable, it is essential that the act should have been done maliciously and without probable cause before liability can attach to the defender as for a legal wrong.
>
> I think that this question requires an affirmative answer, and indeed that it is concluded against the pursuer on the authority of *Beaton* v *Ivory* (1887) 14R 1057. In that case the Sheriff of Inverness had directed the arrest of all the inhabitants of the township of Herbista, Skye, ... there having been a deforcement and a riot. *Prima facie* that was an act of great extravagance, even though the facts disclosed that the disturbance had been widespread and that the township was relatively small. But the importance of the case lies in the law that was laid down. It was clearly and explicitly affirmed that civil liability will not attach to a public official for an act done on the pursuance of his official duty, unless the act was done maliciously - that is from a dishonest motive - so as to amount to an abuse of official power. Lord

> President Inglis made plain the ratio of the rule in these words (at p. 1062): "It is for the benefit of the public, and for the interests of justice and good government that public officers acting in the exercise of their duty should be surrounded by a very considerable protection".....
>
> In *Hill* v *Campbell* (1905 8F 220)... Lord President Dunedin said this (at p.223): "The case was simply one of an arrest and a charge made by ordinary police-constables acting admittedly in the scope of their duty, and in a place where they had a right to make arrests and charges. Doubtless, if they did that without probable cause and in order to gratify their own spite, they would be liable to an action of damages, but unless malice and want of probable cause were proved against them the action could not succeed".....
>
> Without entering upon further detailed examination of authority, the law, as I understand it, may be summarised in these propositions:
>
> (1) An act is *prima facie* within the competence of the public official doing or authorising it when it is the kind of act that is within his ordinary duty to discharge.
>
> (2) When a public official does an act that is *prima facie* within his ordinary duty, there is a presumption that he has acted within his authority.
>
> (3) This presumption is not absolute, but may be rebutted by showing that the act was unrelated to any duty arising on the particular occasion, in which case the act ceases to be within the authority of competence of the public official and becomes unlawful.
>
> (4) Where an act is within the competence, no civil liability arises from the doing of the act, unless it can be shown that the act was done maliciously and without probable cause..."

Similar observations were made by Lord President Clyde in *Hester* v *MacDonald & Others* 1961 SLT 414, at p. 420, and the need for malice to overcome a wide presumption of legitimacy was further confirmed by the First Division in *Ward* v *Chief Constable, Strathclyde Police* 1991 SLT 292. More recently, these authorities were followed by Lord Kingarth in *Woodward* v *Chief Constable, Fife Constabulary* 1998 SLT 1342 after an extensive review of the case-law in this area. In the course of that review, his Lordship *inter alia* doubted the validity of certain decisions in which the fundamental principles laid down in *Beaton* and *Robertson* did not appear to have been drawn to the Court's attention, and in which the requirement to aver and prove malice had not been addressed.

[10] Against that background, counsel maintained that the apprehension of the pursuer (as opposed to an informal invitation to attend a police office or court) could not be actionable because the decision as to how a Petition Warrant was to be executed was for the Procurator Fiscal, and not for any police officer, to take. In this context, she relied on certain general observations at paragraph 7-15 of *Renton & Brown's*

Criminal Procedure, 6th ed., and on the case of *Young* v *Smith* 1981 SLT notes 101, in which it was held that proceeding by informal means, although competent, did not amount to execution of a formal warrant. As regards the manner in which the apprehension was carried out, counsel maintained that it could not be actionable either because all of the actings complained of were *prima facie* within the scope of the officers' ordinary duty, in the sense that these were the sorts of acts that were within their ordinary duty to discharge. Keeping the pursuer under observation at the time of her arrest, holding her by the arms during formal charging procedures at Ayr Police Office, and searching her thereafter were all normal and legitimate steps which could not be said to fall outwith the proper performance of the officers' duty. Moreover, in counsel's submission, the actings alleged by the pursuer could not in law qualify as assaults. An assault was a deliberate or intentional attack by one person on another, generally involving the use of threats or violence to the alarm or injury of the victim. The pursuer's averments fell well short of meeting these requirements, particularly in circumstances where the actings in question attracted the presumption of legitimacy discussed in the authorities cited.

[11] More importantly, counsel submitted that even if, in any of the respects complained of, the officers had gone further than was objectively necessary and appropriate in the circumstances of this case, the complete absence of relevant averments of malice precluded the actionability of any part of the pursuer's complaints. Other than the words "and malicious" inserted by amendment at pp. 16C/D and 24A during the debate, there were no averments to suggest ill-will or improper motive on the part of the junior officer who allegedly observed the pursuer intimately as she urinated, showered and dressed, or on the part of the officers who allegedly carried out an intimate personal search on the pursuer at Ayr Police Office. Bearing in mind the necessity for clear and specific averments going beyond a bare allegation of malice, as laid down by Lord President Clyde in *Hester* at p. 420, the pursuer's pleadings contained nothing to displace the presumption that both officers were simply doing, in good faith, what they conceived to be their duty. Here it was relevant to note that the charge of perjury was based on scientific evidence which none of the officers concerned would have had any reason to question, and that in executing the warrant for the pursuer's arrest the officers would no doubt have been concerned to ensure that the Force was not exposed to any allegation of favouritism or special treatment towards one of its members.

[12] With regard to the allegations against Detective Superintendent Malcolm, counsel contended that they fell far short of the requirements for actionability laid down in *Robertson* and the other authorities cited. In the first place, there was no relevant basis averred for the pursuer's belief that Malcolm was responsible for the phone call immediately prior to his arrival at the pursuer's house, or for Dr McLay's visit on the previous day. In either case, any connection was pure speculation on the pursuer's part. As regards what happened in the house, it was significant that on the pursuer's own averment the order given was simply that she should be accompanied. There was nothing to suggest that Malcolm knew or intended that the pursuer would be watched while urinating, showering or dressing. At the police station, Malcolm was merely following normal practice, which on the pursuer's own averment was the subject of a notice above the charge bar. And in relation to the search, the instruction allegedly given was simply that the pursuer should be searched, and there was nothing to suggest that Malcolm knew or intended that the search should take an intimate

form. The pursuer's lack of knowledge on these matters was confirmed by her own averments at p. 24B/C and 25B, which left wide open the possibility that the other arresting officers were acting on their own initiative, and by her averment at 24C/D that Malcolm "either ordered or permitted" the other officers to act as they did. Finally, according to counsel for the defender, the averment at 24C/D, which impliedly suggested that Malcolm was motivated by ill-will towards the pursuer because he had been the officer responsible for interviewing her on the fingerprint issue in May 1997, was wholly speculative and completely failed to meet the requirements for a relevant case of malice.

[13] In the whole circumstances, counsel argued that the pursuer had no relevant averments on any of the constituent parts of her claim, and that accordingly the averments in Condescendences 7 and 8 were not relevant to go to inquiry.

[14] Counsel went on to argue that, in any event, the averments in Condescendences 3 to 6, especially those directed against other named officers and Dr McLay, should be excluded from probation as wholly irrelevant to the pursuer's sole ground of action. This was not a case which concerned the substantive merits of the fingerprint issue, and the pursuer offered no relevant explanation as to why actings in 1997 unconnected with her arrest in 1998, or the actings of Dr McLay just before the arrest, should be thought relevant for inquiry in the context of the present action. Malice at the material time was not alleged against any of the individuals concerned. Even the averments regarding Detective Superintendent Malcolm in Condescendence 4 were irrelevant, partly because they could not legitimately be used to infer malice on his part in 1998, and partly because they did not in themselves represent anything out of the ordinary or beyond the legitimate scope of his duty at the time. In addition, counsel for the defender invited me to exclude from probation a number of sentences in Condescendences 7 and 8, notably those relating to the telephone call and to Dr McLay's visit (13A/B), entry to the police office "by the most public route" (13E), the subsequent trial (14E/15A), and the question of apprehension (15C/E and 25C/E). Counsel also suggested that I should exclude from probation the two allegedly competing accounts of the search at pp. 14 and 16 of the Record.

[15] Finally, counsel submitted that if there were to be any question of an inquiry here it should be by way of proof before answer, the case being wholly unsuitable for trial by jury. At the very least, the pursuer's averments on assaults and malice were of doubtful relevancy, and the defender's first plea-in-law could therefore not be repelled at this time. Moreover, since the critical issues for resolution were primarily difficult and complex matters of mixed fact and law, allowance of a jury trial would simply open the door to confusion and to the risk of a perverse and unjust outcome. In addition, the existence of a second action at the instance of the pursuer, in which she was claiming substantial damages from third parties on *inter alia* averments identical to those at pp. 6D, 11F and 27A/B, was a further reason why allowance of a jury trial was inappropriate. In short, counsel contended, the legal and factual difficulties inherent in this action constituted special cause for withholding it from jury trial under section 9 of the Court of Session Act 1988.

[16] In response, counsel for the pursuer invited me to hold his averments relevant, not just for inquiry but for jury trial. In his submission, the criticisms which had been advanced on behalf of the defender were misplaced, and in certain respects wrong in

law. The pursuer had, he said, made averments relevant to render the events of March 1998 civilly actionable, and she now insisted on her statutory right to have the disputed issues determined by a jury. Moreover, the averments in Condescendences 2 to 6 inclusive set out the essential background to the events complained of in Condescendences 7 and 8, and accordingly should be admitted to probation along with the remainder.

[17] So far as the law was concerned, counsel expressly accepted that in this case it was essential for the pursuer to aver and prove malice on the part of the police officers against whom criticism was directed. He acknowledged that the general rule to be applied was that laid down by the Inner House in *Beaton, Robertson, Hester* and *Ward*, and that only limited assistance could perhaps be gained from other decisions where the courts did not appear to have had a full citation of authority and the issue of malice had not been specifically addressed. He did not, however, concede that these other decisions should be left out of account altogether. They were still of some value, he said, in showing how liability might attach to police officers for acts going beyond the scope of their duty, especially where these were manifestly unnecessary or excessive in the circumstances. In particular, *Henderson* v *Chief Constable, Fife Constabulary* 1988 SLT 361 was a case in which Lord Jauncey awarded damages to the pursuer in respect of the unjustifiable removal of her brassiere during the course of standard processing after her arrest.

[18] Counsel for the pursuer also accepted, during the course of the hearing, that there was some force in the defender's criticism of certain of his averments. He therefore sought and obtained leave to amend his pleadings to delete the last two sentences of Condescendence 8 relative to the alleged actings of two senior police officers. In addition, immediately prior to the debate, counsel deleted the sentence beginning "It is believed and averred" at p. 15A regarding the basis on which the jury at the pursuer's trial reached its verdict, and also the third, fourth and fifth sentences of Condescendence 9 alleging psychological and psychiatric harm to the pursuer.

[19] On the issue of assault, counsel for the pursuer submitted that all of the pursuer's complaints about the manner of her arrest were relevant in law. An assault, he maintained, could involve any form of affront, as was most clearly illustrated by the learned author of *Walker on Delict*, *2nd ed.*, at pp. 488-492. This would include an indecent approach or gesture towards a woman, and any unlawful interference with a person's liberty or privacy. Such interference could legitimately be deemed unlawful where, as discussed in cases such as *Henderson,* it went beyond the bounds of what could be regarded as necessary and appropriate in the circumstances. What might be legitimate in relation to the arrest of a violent criminal, liable to try to escape or to do harm to himself or others, would be entirely out of place in relation to the arrest of a responsible and peaceful individual such as the pursuer who could be expected to co-operate voluntarily with any informal invitation or instruction. In counsel's submission he had averred ample facts and circumstances which, if proved, would entitle a judge or jury to conclude that assaults had been committed against the pursuer. There was in particular no justification for the decision to apprehend the pursuer at her own home rather than institute more informal procedures appropriate to the circumstances. Counsel for the defender was wrong in law to suggest that the discretion in such matters rested with the Procurator Fiscal alone, and this was (*quantum valeat)* confirmed by the defender's own averments at pp. 18 and 19 as to

what was actually decided by police officers in the instant case. In addition, there could be no justification for degrading the pursuer by watching her as she urinated, showered and dressed on the morning of her arrest; there could be no justification for Detective Superintendent Malcolm's high-handed conduct at Ayr Police Office, especially his order that the pursuer be held by the arms for ten minutes at the charge bar where her distress could be seen by others; and there could be no justification for the intimate search of the pursuer which later ensued. As averred in Condescendence 8, all of these aspects of the pursuer's arrest and subsequent processing were unnecessary and unwarranted invasions of her privacy and liberty and accordingly amounted to assaults. The officers concerned were responsible for those aspects in which they had personally participated, and in addition Detective Superintendent Malcolm was liable, art and part, for the actings of the junior officers under his direction and control. In the latter context, he submitted, the case of *Bonar & Hogg* v *McLeod* 1983 SCCR 161, showed how a senior officer could be guilty of assault, on an art and part basis, where the actual assault was committed by someone else.

[20] Counsel for the pursuers went on to submit that his averments of malice were equally relevant to go to inquiry. The pursuer's position was that she did not know, and therefore could not say with precision, who was *de facto* the instigator of each of the assaults. This was why the complaints against Detective Superintendent Malcolm and the other two arresting officers were pled in the alternative, and the pursuer could not be criticised for that. Counsel accepted, however that malice required to be averred against all three officers, and submitted that this had been done. So far as the junior officers were concerned, malice on their part was put in issue by the insertion of the words "and malicious" by amendment at pp. 16C/D and 24A, and could in his submission be inferred from the nature of the actings complained of and the extent to which these could be seen to exceed the normal and appropriate performance of the officers' duty. The fact that such an inference could properly be drawn from the nature of the actings in question was vouched by *Walker on Delict* at pp. 689-90, and by the case of *Young* v *Glasgow Magistrates* 1891 8R 825, where the Lord President at p. 828 observed that abuse, or personal restraint uncalled for in the circumstances, were facts and circumstances from which malice could be inferred. It was self-evident, according to counsel, that if a police officer deliberately punched a suspect before arresting him it would not be necessary to go further and aver additional facts and circumstances to establish the necessary element of malice. Here, it was sufficient that the pursuer was subjected to humiliating treatment at the time of her arrest, and it was immaterial that she was unable to say that any of the officers acted in a malicious state of mind at any given moment.

[21] As regards Detective Superintendent Malcolm, similar considerations applied, although in his case malice could inferred, not only from the actings alleged against him personally and/or on an art and part basis at each stage of the arrest and processing of the pursuer in 1998, but also from his prior involvement averred in Condescendence 4.

[22] Turning to Condescendences 2 to 6, counsel maintained that these comprised essential background to the pursuer's claim, and in particular showed the atmosphere of suspicion and aggression which had persisted since the fingerprint issue arose in early 1997. It could not be said that these articles were irrelevant, especially

Condescendence 4 which alleged actings by Detective Superintendent Malcolm which arguably had a bearing on his later conduct towards the pursuer.

[23] In the whole circumstances, according to counsel for the pursuer, this was a case eminently suited for jury trial; his client's statutory right to jury trial could not lightly be overcome; and it was clear on the authorities that "special cause" for avoiding a jury trial had to be some real and substantial reason going beyond a mere want of specification and applying to the particular case in question. In this connection he referred to *Graham* v *Paterson* 1938 SC 119, per the Lord Justice Clerk at p. 127; *Currie* v *Strathclyde Fire Brigade* 1999 SLT 62; and the *Annotated Rules of the Court of Session* at p.C272.

[24] In a brief third speech, counsel for the defender re-affirmed her reliance on the line of authority from *Beaton* to *Woodward*, and stressed the need for specific averments of malice by reference to the opinion of the Lord President in *Hester* at p.420. In counsel's submission the pursuer had failed to meet the necessary tests. Regarding the junior officers, nothing was averred that could be thought inconsistent with a desire, in good faith, to do what they conceived to be their duty. Regarding Detective Superintendent Malcolm, there was nothing in the averments to show malice on his part either. Serious allegations of assault had thus been made without any proper foundation, and the defenders were entitled to invoke the protection of the court and have the action dismissed.

[25] In my judgment, the starting point here is the parties' agreement that in an action such as the present the principles laid down in the leading authorities fall to be applied, with the result that the pursuer must aver and prove malice in order to displace the strong presumption of good faith and legality attaching to police officers in the performance of their public duty. I respectfully accept and adopt the reasoning in these authorities, and consider that there are sound and substantial reasons why the law must necessarily protect police officers against civil liability on grounds such as excessive zeal, insensitivity or an error of judgment in exercising what may often be a difficult discretion. Averment and proof of malice, in the sense of ill-will or some improper motive, is an essential component of a successful claim because, in its absence, there is nothing to displace the presumed justification for actings which are *prima facie* of a kind within the authority or competence of the officer concerned. That being so, it is not in my view appropriate to enquire, in the first instance, whether actings alleged by the pursuer relevantly constitute assaults, and then proceed to consider the issue of malice. On a true analysis, it seems to me that the alleged actings cannot in law amount to assaults at all unless and until their presumed justification is displaced by relevant averments of malice in terms of the authorities. Malice is, in other words, logically the first question to be addressed rather than the last, on the basis that if no relevant case of malice is made out, actings protected by the presumption of legality must remain immune from civil action.

[26] I am inclined to agree with counsel for the pursuer that, on the authorities, there may be circumstances in which malice is capable of being inferred from the extreme nature of the actings complained of - for instance from a violent, unprovoked physical attack on a suspect. However, I think that it would be dangerous to take this doctrine too far. In my opinion, unless the relevant actings could properly be regarded as extreme, the pursuer must aver and prove independent facts and circumstances

capable of supporting the desired inference of ill-will or improper motive. For that purpose, insensitivity would not be sufficient, nor would an error of judgment, nor even perhaps an element of recklessness, in discharging what the officer concerned genuinely and in good faith believed to be his or her public duty. The law must in my opinion be astute to ensure that police officers are not exposed to civil claims alleging, as a mere matter of degree, that the force used at the time of an arrest was greater than necessary, or that things could have been done in a different way or at a different time, or that in some other respect the procedures followed showed less sensitivity or indulgence towards the arrested individual than might have been the case. Putting the matter another way, the wide discretion entrusted to a police officer in the performance of a lawful duty should not be capable of being cut down except on the basis that what was done was in fact an abuse of official power by reason of malice.

[27] Applying these considerations to the facts and circumstances relied on by the pursuer in the present action, I am not persuaded that a relevant case of malice has been pled against any of the three police officers who were involved at the time of her apprehension and subsequent processing. In respect of the two junior officers, the pursuer makes no averments at all beyond the bare assertion that their actings were "malicious", and in my opinion the nature and extent of their alleged actings towards the pursuer, both in the house and at Ayr Police Office, fall far short of what would be required to justify an automatic inference of malice without anything more being pled. It is noteworthy, in this context, that all three officers are expressly averred to have been acting in the course of their duties at the material time. Equally, I am not persuaded that a relevant case of malice has been averred against Detective Superintendent Malcolm. The actings alleged against him seem to me to fall within the scope of the discretion entrusted to an arresting officer in the circumstances, and to fall well short of what would be required to warrant an automatic inference of malice by itself. It is therefore necessary to look carefully at the pursuer's other averments to see whether any of them might relevantly entitle a judge or jury to draw the inference of malice which the pursuer accepts is essential to her case. In my judgment Condescendences 7 and 8 contain no such averments. Bare assertions of malice are admittedly not enough, however frequently repeated, and on a fair analysis I do not consider that anything more is relevantly pled. To begin with, no basis is averred for the pursuer's averred belief that Detective Sergeant Malcolm was responsible for either the early phone call, or for Dr McLay's attendance on the previous day. Secondly, even if it would have been open to the police to execute the arrest warrant informally by inviting the pursuer to attend at a court or police office rather than by physically apprehending her, there is nothing to suggest that Detective Superintendent Malcolm took the relevant decision, nor that the decision was actuated by ill-will or by any improper motive. I am not prepared to hold that the police were bound to proceed informally, as the pursuer appears to suggest, and in that context note (a) that on the pursuer's averment in Condescendence 6 she was in 1997/8 receiving treatment for depression and anxiety; (b) that when the three officers arrived at her house and explained the purpose of their visit, her reaction was to try to shut the door in their face; and (c) that the officers would no doubt have been conscious of the need to avoid any suggestion of favoured treatment in the arrest and processing of one of their own number on a serious charge.

[28] Thirdly, I do not think that any relevant case has been made out against Detective Superintendent Malcolm regarding the way in which the pursuer was watched by one of the junior officers as she prepared herself to leave the house. Malcolm's instruction, averred at p. 13C/D, was simply that the junior officer should "accompany" the pursuer as she dressed. It is not alleged that he knew or intended that the pursuer would be watched as she urinated, showered or dressed. Even if such knowledge or intention had been alleged, I would not have been prepared to hold, without further specific reason, that Detective Sergeant Malcolm was actuated by malice in giving his instruction. Fourthly, I can find no relevant averments of malice in respect of the manner in which the pursuer was brought into Ayr Police Office or treated at the charge bar area, however heavy-handed or insensitive the actings of Detective Superintendent Malcolm might have been. Fifthly, I can find no relevant averments of malice in relation to the search of the pursuer which then took place. At p. 14B it is averred that Detective Superintendent Malcolm instructed that the pursuer should be searched. It is not said that he knew or intended that this should involve the removal of clothing or being "frisked" in intimate places, and even if such knowledge or intention had been alleged I would not have been prepared to hold, without further specific reason, that Detective Superintendent Malcolm was actuated by malice at that time.

[29] Sixthly, I am not impressed with the pursuer's attempt to link what happened in March 1998 with the fact that Detective Superintendent Malcolm was the officer who interviewed the pursuer on the fingerprint issue some ten months earlier. It is not said that the interview itself was carried out in a malicious or inappropriate way; it is not alleged that there was any contact between the pursuer and Detective Superintendent Malcolm in the intervening period; and I am unable to identify anything in Condescendence 4, or in the averment at p. 24C/D, which would relevantly permit an inference of malice in March 1998 to be drawn from the fact of the interview in 1997.

[30] On the whole matter, counsel for the defender was in my opinion well-founded in submitting that the pursuer's case was fundamentally irrelevant by reason of the absence of any relevant averment of malice on the part of any of the three officers involved in the arrest and subsequent procedures. That is sufficient to warrant dismissal of the action, but in case I am wrong in the approach which I have taken on this issue, it is appropriate that I should indicate my view on the other matters canvassed before me at the debate.

[31] If I had held that a relevant case of malice had been pled against one or more of the officers in question, I would not have felt able, at this stage, to dismiss as irrelevant the pursuer's characterisation of at least some of the events of 6 March 1998 as assaults, bearing in mind that any unwarranted affront or invasion of privacy is capable of being classified in that way. I would not have upheld the relevancy of the allegation that the apprehension of the pursuer in execution of an admittedly lawful arrest warrant was *per se* an assault. On the pursuer's own averment at p. 25D, "Any police officer carrying out an arrest has considerable discretion as to how to carry out the arrest", and I consider that the pursuer would require to aver much more than she does in order to make a relevant case of assault with regard to the decision not to proceed here by informal means. However, if *ex hypothesi* actuated by malice, it seems to me that the intimate watching of the pursuer as she prepared herself to leave the house, the holding of the pursuer for ten minutes at the charge bar at Ayr Police

Office, and the intimate nature of the search carried out there, could all conceivably be held, depending on how the evidence came out, to have gone well beyond what was necessary in the circumstances and to have amounted to assaults on the pursuer for the purposes of a civil claim. I would therefore have felt unable, as a matter of relevancy, to hold that the pursuer's action was, to borrow Lord Normand's well-known phrase in *Jamieson* v *Jamieson* 1958 SC HL 44, at p. 50, "bound to fail". At best, however, I would have regarded the case pled by the pursuer as of doubtful relevancy on the issues of (i) malice, (ii) assaults and (iii) the alleged responsibility of Detective Superintendent Malcolm, on an art and part basis or by reason of mere permission, for the actings of junior officers outwith his presence. In the latter context, the case of *Bonar* seems to me to have involved quite special facts, notably the presence, knowledge and participation of the senior officer concerned, and thus to provide scant support for the pursuer's much more tenuous allegations in the present case.

[32] Turning now to Condescendences 2 to 6 inclusive, I would have found it difficult to exclude from probation the bare narrative of the events which preceded and explained the arrest of the pursuer. Much of that narrative is in any event admitted by the defender. However, I would have excluded from probation, as extraneous and wholly irrelevant to the pursuer's ground of action, (i) the averments in Condescendence 3 touching upon the substantial merits of the fingerprint issue; (ii) the averments in Condescendence 3 regarding the visit to the pursuer by a fellow officer in February 1997; (iii) the whole of Condescendence 4 regarding the formal interview by Detective Superintendent Malcolm in March 1997; (iv) the whole of Condescendence 5, regarding statements allegedly made by fellow officers to the pursuer immediately before disciplinary proceedings were instigated against her; (v) the allegation of aggression against the pursuer's "superiors" in Condescendence 6; and (vi) the allegations in Condescendence 6 regarding the visit to the pursuer in March 1998 by the Chief Medical Officer of Strathclyde Police.

[33] As regards Condescendences 7 and 8, even if I had upheld the relevancy of certain aspects of the pursuer's complaints regarding the manner in which she was arrested and processed, I would have excluded from probation (i) the averments at p.13A regarding the early telephone call, and the pursuer's averred belief as to who was responsible for that; (ii) the averments at p.13B regarding Dr McLay's visit, and the pursuer's averred belief as to who was responsible for that; (iii) the averments at p.14D relating to the pursuer's processing at, and release from, Glasgow Sheriff Court (on the basis that these appear to have no discernible connection with the pursuer's ground of action); (iv) the averments at pp. 14-15 relating to the pursuer's subsequent trial and the merits of the fingerprint issue, none of which can in my view relevantly affect the legality or otherwise of her arrest; (v) all of the averments (at pp. 15C/E, 24E-25A. 25B and 25C/D) suggesting that the apprehension and detention of the pursuer, as opposed to proceeding by informal means, amounted to an assault for which any of the three arresting officers was responsible; and (vi) the sentence at p.24C regarding the interview of the pursuer by Detective Superintendent Malcolm in 1997. I would not, however, have been prepared to exclude from probation the two slightly different accounts of the way in which the pursuer was searched at Ayr Police Office. In my view, counsel for the pursuer was well-founded in submitting that no real difficulty arose if these two passages were simply read together.

[34] Finally, as regards the averments which would have been remitted to probation had I not been dismissing the action as irrelevant, I would have had no hesitation in holding them unsuitable for jury trial. In my view, special cause for withholding the case from jury trial would have arisen on several grounds. In the first place, as already indicated, I would have regarded the pursuer's averments on both malice and assaults as, at best, of doubtful relevancy and thus requiring reservation of the defender's first plea-in-law until after inquiry into the facts. I would have taken the same view of the averments by which, according to the pursuer's counsel at the debate, it was sought to hold Detective Superintendent Malcolm responsible, on an art and part basis, for acts committed by others outwith his presence. Secondly, in my opinion, since the issues arising in this case are largely issues of mixed fact and law in an area of significant difficulty and complexity, I would have regarded the allowance of jury trial in this case as wholly inappropriate and as a recipe for confusion and potential injustice. Drawing a fair and reasonable dividing line, as a matter of degree, between legitimate and illegitimate actings on the part of the three arresting officers, would be a difficult enough task for an experienced judge, and it seems to me that to charge a jury properly would in the circumstances be an exceedingly difficult task. Thirdly, the fact that the pursuer is prosecuting a parallel action for damages against third parties, founding on *inter alia* the humiliation of her arrest and subsequent trial, would in my view be bound to confuse and complicate any jury's assessment of *quantum* in the instant case. Here again, I am persuaded that jury trial would be an unsuitable mode of inquiry.

[35] In summary, therefore, I consider that the case would be undesirably difficult for the parties to present before a jury; that it would create undue difficulties for the presiding judge; and that it would confront the jury with complex and difficult issues that they would be ill-equipped to resolve on a proper basis. A jury verdict would, moreover, make it almost impossible to review any of the significant issues of law, or of mixed fact and law, on appeal, and in this particular case I would regard that as a grave disadvantage. Accordingly, whatever view may be taken of the requirements for "special cause" under section 9 of the 1988 Act, I am satisfied that they are amply met in this case.

[36] On the whole matter, for the reasons which I have given, I shall sustain the defender's first plea-in-law and dismiss the action.