



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Kirkwood

A3254/00

Lord Marnoch

OPINION OF THE COURT

Lord Caplan

delivered by **LORD KIRKWOOD**

in

RECLAIMING MOTION

in the cause

SHIRLEY JANE McKIE

Pursuer and Reclaimer:

against

JOHN ORR

Defender and Respondent:

Act: Smith, Q.C.; Digby Brown, S.S.C. (for Cassels, Glasgow)

Alt: Maguire, Q.C.; Simpson & Marwick, W.S.

28 February 2003

[1] This is a reclaiming motion at the instance of the pursuer against an interlocutor of the Lord Ordinary dated 14 February 2002 dismissing her action of damages against the defender.

[2] Until 18 December 1999 the pursuer was a serving police officer with Strathclyde Police and from about 1993 she was a Detective Constable based in Kilmarnock. The defender is the Chief Constable of Strathclyde Police. The pursuer is suing in respect of events which took place on 6 March 1998 when she was arrested and charged with perjury. The circumstances leading up to the incident on 6 March 1998 are set out in the pursuer's pleadings in condescendences 2 to 6 inclusive. Put shortly, on 8 January 1997 Marion Ross was found murdered in her house in Kilmarnock and the pursuer was appointed as one of the investigative team. In the course of the investigations into the murder the police found fingerprints on the frame of the bathroom door in the house of the deceased. It was alleged by the Scottish Criminal Records Office that one of the fingerprints on the door frame was that of the pursuer. The pursuer, in the course of the investigations, had been instructed not to enter the house. She denied that she had entered the house, and she stated that it was therefore impossible that she had left a fingerprint on the door frame. A man was accused of the murder and his trial took place in May 1997 in the High Court in Glasgow. The pursuer gave evidence at the trial and maintained that the fingerprint found on the door frame was not her fingerprint. In the event, the accused was convicted of the murder. The pursuer was subsequently indicted on a charge of perjury in relation to the evidence which she had given at the trial in relation to the fingerprint found on the door frame. She was arrested and charged on 6 March 1998, and it is the events which took place on that day which form the basis of her action.

[3] She avers that on 6 March she was on leave, and when her door-bell rang at about 9 a.m. she answered it. Superintendent Malcolm was there with two female police officers, one of whom was Detective Sergeant Morris. Superintendent Malcolm advised the pursuer that he had a warrant for her arrest for perjury. It is common ground that the Crown Office had taken the decision to proceed with the petition warrant. The pursuer was in her night-clothes, having just got out of bed. She said that she wanted to get dressed, and tried to close the door but Superintendent Malcolm forcibly prevented her from doing so. He pushed the door open and went in, followed by the other two police officers. He told the pursuer that she was under arrest and to get dressed, and he instructed D.S. Morris to accompany her while she was doing so. The pursuer told D.S. Morris that she required to go to the toilet and D.S. Morris stated that she would follow her into the toilet, and she watched the pursuer as she urinated. The pursuer then stated that she needed to take a shower, and D.S. Morris watched the pursuer undress and take a shower, emerge from the shower, get dried and put on a dressing gown. The pursuer then dressed, being observed the whole time by D.S. Morris. She was then taken by the police officers to Ayr Police Station. She was escorted by them to the charge bar by the most public route. She knew many of the officers on duty there. Officers who asked how she was were ordered by Superintendent Malcolm to desist communicating with her. At the charge bar there was a notice stating "Officers, ensure that you hold your prisoners". Superintendent Malcolm directed the other two officers to "hold the prisoner", which they did. The direction by Superintendent Malcolm to hold the pursuer's arms was given in a loud voice to ensure that those in the vicinity would hear the reference to the pursuer as a "prisoner". She was held for approximately ten minutes while she gave details to the

Duty Officer. During this whole period the doors at the side of the charge bar were jammed open, and the pursuer believes and avers that that was done to maximise her humiliation. Once again, other officers who attempted to converse with her were reprimanded by Superintendent Malcolm. After the pursuer's details had been taken, he instructed the other two officers to search her. She was taken to a detention room adjacent to the charge bar which had a window at eye level to enable officers outside the room to observe what was happening inside. The pursuer was told by the two female officers to strip off, and she undressed to her underwear. One of the officers checked and removed clothing and the other felt around the pursuer's breasts, beneath her bra, and around her buttocks and vaginal area over her pants. The pursuer was crying and distressed. The search was an intimate one, and one where what was taking place could easily have been observed by Superintendent Malcolm or other officers, male or female. She was then driven to Glasgow Sheriff Court. She subsequently stood trial for perjury but was found not guilty by a unanimous verdict, the defence having led evidence that the fingerprint found on the door frame was not that of the pursuer. The pursuer also makes averments to the effect that she should not have been arrested at her home, but should have been asked to attend voluntarily at the police station.

[4] The pursuer avers that the actings of Superintendent Malcolm were motivated by malice on account of "the unnecessary and aggressive manner in which they were carried out", and that the actings of the female police officers were malicious, although she also states that she is unaware of the extent to which the female officers were acting under the direct orders of Superintendent Malcolm and the extent to which they were acting on their own initiative.

[5] At the procedure roll debate counsel for the pursuer had sought a jury trial, failing which a proof before answer. Counsel for the defender had asked for dismissal of the action. In the event the Lord Ordinary, in a lengthy and detailed judgment, decided to dismiss the action. He held that the pursuer's case was fundamentally irrelevant by reason of the absence of any relevant averments of malice on the part of any of the three police officers involved in the arrest of the pursuer and the subsequent procedures. The Lord Ordinary went on to state that, if he had decided to allow a proof before answer, he would have excluded from probation a number of the pursuer's averments.

[6] At the hearing of the reclaiming motion, counsel for the pursuer and reclaimer intimated that he was no longer seeking a jury trial. He moved us to recall the interlocutor of the Lord Ordinary and allow a proof before answer, and he also stated that, in that event, he accepted that all the averments which the Lord Ordinary had said that he would not have admitted to probation if he had taken that course should be deleted.

[7] Counsel for the pursuer referred us to *Beaton v. Ivory* (1887) 14 R. 1057, *Young v. Magistrates of Glasgow* (1891) 18 R. 825, *Malcolm v. Duncan* (1897) 24 R. 747, *Henderson v. Chief Constable, Fife Police* 1988 S.L.T. 361 and *Woodward v. Chief Constable, Fife Constabulary* 1998 S.L.T. 1342. As the hearing proceeded it became clear that there was no significant dispute as to the legal principles which fell to be applied in this case. It was common ground that the law gives a police officer a high degree of protection in the discharge of his or her duties, and that there is a

presumption that a police officer in the discharge of those duties is acting in good faith (*Ward v. Chief Constable, Strathclyde Police*, 1991 S.L.T. 292 per Lord Clyde at page 298). As Lord President Inglis observed in *Beaton v. Ivory, supra* (at page 1061):

"The presumption in favour of a police officer that he is doing no more than his duty, and doing it honestly and *bona fide*, is a very strong one, and certainly ought not to be overcome by the simple use of the word 'malice'. I think the duty of the pursuer in a case of this kind is to aver facts and circumstances, from which the court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive".

Thus, it was agreed that it was not sufficient for the pursuer simply to aver that the police officers concerned had acted maliciously. There had to be reasonable specification of facts and circumstances which were capable of giving rise to the inference that a police officer had acted maliciously and without probable cause.

[8] Counsel for the pursuer submitted that the pursuer's averments were sufficient to enable the inference of malice to be drawn, and to entitle her to a proof before answer. The Lord Ordinary had subjected the pursuer's averments to too strict a test. Counsel stated that he was founding on three wrongs which had constituted assaults on the pursuer. Originally he sought to found on a fourth alleged wrong, namely the fact that the pursuer had been arrested at her home instead of being invited to attend voluntarily at the police station, but he eventually conceded that he could no longer maintain that position. The three alleged assaults on which he sought to found were (1) the actings of D.S. Morris in watching the pursuer urinate, undress, take a shower, get dried and get dressed, (2) the events at the charge bar and (3) the subsequent intimate search of the pursuer by the two female officers. Counsel invited us to look at the whole picture, from the arrival of the police at the pursuer's house until her departure from Ayr Police Station, rather than view each incident separately. He submitted that an inference of malice on the part of the police officers was readily capable of being made. It was not so much a question of what they had done but rather how they had done it. The pursuer avers that the actions of Superintendent Malcolm were motivated by malice on account of the unnecessary and aggressive manner in which they were carried out, but that she was unaware of the extent to which the two female police officers were acting under the direct orders of Malcolm and the extent to which they were acting on their own initiative. So far as the first alleged wrong was concerned, involving D.S. Morris watching the pursuer at her house, it was averred by the pursuer that Superintendent Malcolm had told her to get dressed and had instructed D.S. Morris to accompany her while she was doing so. In these circumstances counsel conceded that, so far as that particular incident was concerned, malice on the part of Superintendent Malcolm and the other female police officer could not be inferred. Counsel accepted that if that had been the only alleged wrong then the pursuer could have been in difficulties. So far as the second charge was concerned, involving the incident at the charge bar, Superintendent Malcolm had been in charge of the operation and, as it appeared that the two female police officers had been acting on his instructions, no malice on their part could be inferred. However, so far as Superintendent Malcolm was concerned, there had clearly been no need for him to order the other officers to hold the pursuer, who was a police officer

herself. In the case of the intimate search, the pursuer's averment is to the effect that Superintendent Malcolm had told the two female police officers to search the pursuer. Counsel accepted that he did not know if the intimate search had been carried out on Superintendent Malcolm's instructions or on the female police officers' own initiative. In these circumstances the intimate nature of the search, and the circumstances in which it was carried out, could not be used to infer malice on the part of Superintendent Malcolm. However, so far as the two female police officers were concerned, there had been no need for them to conduct such an intimate search, and the defender had made no attempt to justify it. Counsel pointed out that the Lord Ordinary had held that, if *ex hypothesi* actuated by malice, the intimate watching of the pursuer by D.S. Morris, the holding of the pursuer at the charge bar for ten minutes and the intimate nature of the search carried out 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. In the case of each incident the conduct of the officer, or officers, had gone so far beyond what was necessary as to justify an inference of malice. On the whole matter counsel submitted that the pursuer's averments were sufficient to entitle her to an enquiry and that a proof before answer should be allowed in relation to all three incidents. The Lord Ordinary, in referring to "an automatic inference of malice" had used the wrong test. Counsel accepted that there were no averments that the three police officers had been acting in concert. If the court was not prepared to regard the three incidents as a course of conduct, then each incident could be looked at individually and the court could allow a proof before answer limited to one or two of the incidents.

[9] Counsel for the defender and respondent submitted that the Lord Ordinary had made a correct analysis of the pursuer's averments and that he had been right to dismiss the action. The pursuer's case would be bound to fail as she had not offered to prove sufficient facts and circumstances capable of inferring malice on the part of any of the three police officers. In the circumstances it was understandable that the pursuer would be distressed and upset at being arrested and charged with perjury, but there was no legal responsibility so far as the defender was concerned. It was accepted that it was the procurator fiscal who had instructed the police to execute the petition warrant. All that the police officers had done was within the ambit of their normal duties, and there was a presumption that they had acted in good faith and without malice. For malice to be able to be inferred from the actings of the police, those actings had to be violent or so palpably extreme that malice could be inferred. Insensitivity would not be sufficient. In the present case the pursuer's averments fell short of what would have been required.

[10] Counsel submitted that in the circumstances of this case it was not permissible to look at the whole picture, as counsel for the pursuer had suggested. So far as malice was concerned, it was necessary to consider whether malice on the part of one or more of the police officers involved could be inferred in relation to each incident. The pursuer had not averred that the police officers had been acting in concert to assault the pursuer, and it could not be inferred that they were acting together for that purpose. In relation to the first incident, Superintendent Malcolm had told D.S. Morris to accompany the pursuer, but there was no averment that he had had any knowledge that D.S. Morris had watched the pursuer in the way which had been averred. In relation to that incident, malice on the part of Superintendent Malcolm and the other

female police officer could not be inferred. The actings of D.S. Morris, as averred by the pursuer, fell far short of justifying an inference of malice, bearing in mind the instruction which she had been given, and the circumstances in which it had been given. It had not been unreasonable for her to keep the pursuer in view all the time when she had just been arrested and charged. D.S. Morris had not gone well beyond what was necessary. With regard to the incidents at the charge bar, the allegation of malice involved only Superintendent Malcolm. The other two officers had simply done what they had been instructed to do, and there was a notice telling the police to hold their prisoners at the charge bar. The holding of the pursuer had not gone well beyond what was necessary. Further, it was not said that Superintendent Malcolm had arranged for the doors to be jammed open. All the averments relating to what had taken place at the charge bar were not capable of inferring malice on the part of Superintendent Malcolm. So far as the intimate search was concerned, it was conceded that the averments could not justify an inference of malice on the part of Superintendent Malcolm. In the circumstances the actions of the two female officers had not gone well beyond what was necessary, bearing in mind the instruction which they had received. In this case there were no specific averments of malice or ill-will on the part of the police. There were no averments of abusive words or of rough treatment, and the pursuer had not been handcuffed. Accordingly, malice had to be capable of being inferred from the individual actions of the police officers. However, the Lord Ordinary was correct to observe that the averments fell far short of what was required to entitle the pursuer to a proof before answer. The reclaiming motion should be refused.

Decision

[11] As we have said, counsel for the pursuer invited us to look at the whole picture as a series of events from which malice could be inferred. However, the pursuer has no averments of concert and it was agreed that, if it was possible to infer malice on the part of any of the police officers, then (1) in relation to the incident at the pursuer's house, malice could only be inferred on the part of D.S. Morris; (2) in relation to the events at the charge bar, malice could only be inferred on the part of Superintendent Malcolm and (3) in relation to the intimate search of the pursuer at Ayr Police Station, malice could only be inferred on the part of the two female officers. In these circumstances we consider that each of the three alleged wrongs has to be considered individually, and not as part of a course of conduct on the part of the police.

[12] In relation to each of the incidents the pursuer has made detailed averments, and the question for our determination is whether, in each case, the pursuer has averred facts and circumstances which are capable of supporting the inference that the police officer, or officers, concerned was, or were, actuated by malice. In the circumstances of this case, any inference of malice has to be based on the actions of the officer or officers concerned. In this connection the Lord Ordinary stated in paragraph [27] that certain of the pursuer's averments fell short of what would be required to justify "an automatic inference of malice" without any more being pled. Counsel for the pursuer was critical of the use of the term "automatic inference of malice" but we note that the Lord Ordinary went on to observe that it was accordingly necessary to look at the pursuer's other averments to see whether any of them might relevantly entitle a judge to draw the inference of malice. Looking at the Lord Ordinary's Opinion as a whole, we are satisfied that he applied the correct test.

[13] Turning to the three alleged wrongs, the pursuer was told in her house that she was under arrest, and Superintendent Malcolm told her to get dressed. D.S. Morris was instructed to accompany her, and what has been criticised was the way in which she carried out that instruction. However, bearing in mind that the pursuer had just been arrested and charged with a serious offence, and that it was D.S. Morris's duty to accompany her while she got dressed, we cannot regard the fact that D.S. Morris decided, in the exercise of her duty, to keep the pursuer in view the whole time was conduct which is capable, on its own, of giving rise to an inference of malice and lack of probable cause on her part. So far as the events at the charge bar were concerned, the pursuer avers that there was a notice there which told police officers to hold their prisoners. The pursuer avers that she was held by the two female police officers for about ten minutes, and it appears that this was done while she was giving her details to the duty officer. It may well be that Superintendent Malcolm had a discretion not to order the pursuer to be held but that does not mean that he was not entitled to instruct her to be held. While it is averred that the doors at the side of the charge bar were jammed open, it is not suggested that Superintendent Malcolm had been responsible for that being done. Further, when the pursuer was taken to the police office in order to be charged, it does not, on the face of it, seem unreasonable for Superintendent Malcolm to object to other officers attempting to converse with her. It is not disputed that, in taking the pursuer to the charge bar, Superintendent Malcolm was performing one of his official duties. We have considered all the averments relating to the events at the charge bar made by the pursuer, but we have reached the conclusion that these averments are not capable of justifying an inference of malice and lack of probable cause on the part of Superintendent Malcolm. So far as the intimate search was concerned, the two female officers had been instructed to search the pursuer, and in that respect they were performing their duties. The pursuer avers that the intimate nature of the search was unnecessary but she does not aver what form a search of a woman who has just been charged with a serious offence normally takes. In the circumstances we are quite unable to conclude that the intimate nature of this search, as far as it went, is capable of justifying an inference of malice and lack of probable cause on the part of the two female police officers or either of them.

[14] Having given anxious consideration to the averments which the pursuer has made on record, we have reached the conclusion that, in relation to each of the three alleged wrongs, her averments fall short of what would be necessary to be capable of justifying an inference of malice and lack of probable cause on the part of any of the police officers involved. In our opinion, the Lord Ordinary was right to hold that the pursuer's case is irrelevant by reason of the absence of relevant averments of malice on the part of any of the three officers involved. The reclaiming motion is therefore refused.