Relegated No Longer? The Role of Malice in the Delictual Protection of Liberty: *Whitehouse v Gormley*

Disputes about nomenclature in law sometimes turn out to be no more than exercises in branding. But, on other occasions, the inability to settle on the name of a legal concept may be symptomatic of deeper doctrinal unrest. This, it is submitted, is evident in the case of the delictual protection of the right to liberty. The general heading of "injuries to liberty" describes only the result of the wrongdoing, and does not indicate how that wrongdoing might manifest itself. Terms which do seek to describe the events which may give rise to an actionable injury to liberty tend to consist of an adjective paired with a noun. The various nouns employed include "apprehension", "imprisonment" and "detention", not one of which accurately captures the fact that an actionable constraint on movement may entail simply a restraint on the movement of certain limbs.[1] That, however, is mere pedantry compared to the importance of selecting the appropriate adjective. Which modifier is suitable for describing the conditions under which such physical constraint will be delictual: wronguous/wrongful; unjustified; unlawful; false; or malicious? This goes beyond mere "fair labelling": the selection determines the conditions a citizen must satisfy before an allegation of an infringement of liberty will successfully be actionable. In *Whitehouse v Gormley*,[2] Lord Malcolm, sitting in the Outer House of the Court of Session, resolved the terminological dispute – at least as it applies to police officers – in favour of "malicious" imprisonment, detention, or restraint.

A. FACTS AND ISSUES

Whitehouse joins long list of reported cases – some of which already have featured in these pages[3] – which have arisen after the sale(s) of Rangers Football Club by, and to, various parties.[4] Whitehouse was, as an employee of Duff and Phelps, appointed by Craig Whyte to

[1] For example handcuffing: *Henderson v Chief Constable of Fife Police* 1988 SLT 361.
[2] *Whitehouse v Gormley* [2018] CSOH 93 (hereafter "*Whitehouse*").
[3] See GL Gretton, "The Laws of the Game" (2012) 16(3) *Edinburgh Law Review* 414; DJ Carr, "(D)EBTs, taxes and Rangers FC" (2016) 20(2) *Edinburgh Law Review* 217.
[4] Another interesting decision is *Green v Rangers International Football Club Plc* [2017] CSIH 37; 2017 SC 399, interpreting an indemnity clause for legal fees to exclude expenses incurred in defending criminal trial for fraud. See also *SDI Retail Services v King* [2018] EWHC 1697 (interpretation of bid-matching clause in Sports Direct retail contract for Rangers merchandise).

conduct the administration of Rangers' old holding company. Subsequently, Strathclyde Police were instructed to investigate Whyte's initial share acquisition, and obtained a warrant to search the administrator's offices in London and Manchester. Documents, including items which were privileged and others which were outside the scope of the warrant, were also taken from a search of a connected law firm, for which the authorities later were rebuked by Scottish[5] and English[6] courts. The Crown Office concluded that there were reasonable grounds to charge the pursuer: first, for his involvement in a fraudulent scheme (by obscuring the fact that Craig Whyte was using outside funding to purchase his shares); and, secondly, with attempting to pervert the course of justice. The pursuer was arrested at his home in England and transported to Glasgow, where he was detained for three days in November 2014. After being granted bail, he later was detained overnight pending an appearance in court in September 2015. Subsequently, a series of indictments were issued against the pursuer. Ultimately, however, all charges were dropped in June 2016.

The pursuer raised an action seeking compensation from the Lord Advocate and Police Scotland, craving damages of £9 million. He alleged financial loss (as an insolvency practitioner, the pending prosecution rendered him unable to practice) and reputational damage. His claims were founded on allegations that the Lord Advocate's pursuit of the investigation and prosecution amounted to the delict of malicious prosecution,[7] and that the injury to his liberty brought about by four day's detention at the order of Police Scotland also was actionable in delict. The action against the Lord Advocate was held to be barred by the immunity that attaches to that office;[8] this note therefore will discuss only the claim against the police.

B. ACTIONABLE DETENTION: THE DECISION IN WHITEHOUSE

The protection of liberty through the law of delict in Scotland is under-theorised. The fullest consideration, which unfortunately does not appear to have been relied on in *Whitehouse*, is Chapter 5 of Professor Elspeth Reid's *Personality, Confidentiality and Privacy in Scots Law*.[9]

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[5] *Holman Fenwick Willan v Orr* [2017] HCJAC 38; 2017 JC 239, with expenses following at [2017] HCJAC 39.
[6] *R (Holman and Fenwick) v City of London Police and Others* [2016] EWHC 1005 (Admin).
[7] This is an underdeveloped delict in Scots law. One key question requiring resolution is whether, as in English law (*Willers v Joyce* [2016] UKSC 43; [2016] 3 WLR 477), it applies to the malicious institution of civil proceedings. There may be the germ of such a principle in the delict of wrongful use of diligence: *Henning v Hewetson* (1852) 14 D 487.
[8] *Hector v MacDonald* 1961 SC 370; see *Whitehouse*, paras [89]-[105].
[9] W Green/Thomson Reuters, (Edinburgh, 2010) (hereafter "Reid").

It at least is clear that the delict has two elements: (i) the defender must have constrained the pursuer's freedom of movement; (ii) without lawful justification. There was no doubt that there had been a relevant constraint on the pursuer's freedom of movement when he was put in his cell. Less certain, however, is what constitutes an absence of lawful justification: is this established by showing that the officer acted outside the power to arrest, or must something more – e.g. malice – be established?

In answering this question, Lord Malcolm adopted the following starting point:[10]

> The policy is that public officials should be able to act in the public interest free of a concern that if they err, or overstep the mark, they will be subject to a civil suit from anyone harmed by their conduct.

For some, this may be strikingly opposed to the importance with which the right to liberty is regarded by a liberal democracy. That is not a peculiarly modern perspective: we can go back to Stair's statement that "next to life is liberty."[11] One might say that public officials only act in the public interest to the extent that their actions are within a scope of a duty which has been conferred on them by law. If they err or overstep the mark to the degree that they no longer are acting within the scope of that duty, then protection from civil suit may not be warranted.

It may be relevant to consider another delict which may arise in the course of an arrest by a police officer: assault. In *Mason v Orr,*[12] it was opined that the use of force during an arrest would be unjustified if that force was manifestly excessive: such excess would put the conduct outside the scope of the officer's duty. However, it also was stated that the application of force would be unjustified where the officer was not acting pursuant to lawful authorisation; i.e., where the officer's supposed duty has no actual legal basis.[13] Therefore, this suggests that there may be liability for *going wrong* in the exercise of a duty, or for *doing wrong* by doing something which the officer was not at liberty to do because no lawful authorisation had been conferred on him. This seems logical; however, principle in this area has been compromised by the accretion of precedent.

In fact, Lord Malcolm largely viewed his task as one of arbitrating between two irreconcilable lines of authority. The first, typified by the opinion of Lord Kingarth in

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[10] *Whitehouse,* para [135].
[11] *Institutes,* I.9.4.
[12] (1901) 9 SLT 269.
[13] See eg *Downie v Chief Constable of Strathclyde Police* 1997 SCLR 603 at 607-8.

Woodward v Chief Constable of Fife Police,[14] would require a pursuer in the situation of Whitehouse to prove not only that the arresting officer had no power of arrest, but also that the officer acted without probable cause and with malice. The second, reflected in the shrieval decisions of *McKinney v Chief Constable of Strathclyde Police*[15] and *Louden v Chief Constable of Police Scotland*,[16] holds that the pursuer's action would succeed merely by establishing that the police had no power of arrest in the circumstances: probable cause and malice were not necessary elements of the delict. On other words, was an officer effecting a power of arrest which was unlawful nevertheless acting "within competence"?

Lord Malcolm favoured the broader view of "within competence" as adopted by Lord Kingarth in *Woodward*.[17] His Lordship rejected the decision of the Sheriff in *McKinney* as there were "powerful policy reasons for not encouraging civil claims whenever a detention, arrest, or indeed a prosecution can be shown to be unjustified in the particular circumstances."[18] While liberty was unarguably important, it did not "necessarily follow that all unlawful detentions or arrests will sound in damages".[19] His Lordship remarked that "it would be surprising if illegality itself was the sole measure"[20] of determining the availability of the officer's privilege, as it would render the officer liable for honest mistakes or errors in judgment.[21] Four observations can be made about this reasoning.

C. ACTIONABLE DETENTION: ANALYSIS

(i) "General Ambit of His Powers"

For Lord Malcolm, an unlawful arrest by a police officer "will not cease to be within the general ambit of his powers" regardless of the malice involved: proof of malice simply would remove the privilege enjoyed by the officer.[22] He drew this principle from consideration of cases involving alleged misconduct in the ordinary course of an officer's duty: for example, one case involved the surveillance of the pursuer's house in order to find out if one of his

[14] 1998 SLT 1342.
[15] 1998 SLT (Sh Ct) 80. An appeal to the Inner House was rejected. That court was content not to require proof of malice after an application to amend the grounds of appeal to render malice relevant was denied: see *McKinney v Sharp* [2000] ScotCS 152.
[16] 2014 SLT (Sh Ct) 97.
[17] *Whitehouse*, paras [143] and [152].
[18] *Whitehouse*, para [146].
[19] Ibid.
[20] *Whitehouse*, para [150].
[21] *Whitehouse*, paras [150]-[152].
[22] *Whitehouse*, para [163].

officers was being sheltered there;[23] and another an injury suffered in the dispersal of a crowd.[24] In the former case, the action fell within the chief constable's general duty to maintain discipline,[25] and in the latter the conduct occurred in the exercise of the officer's general duty to maintain order.[26] Those are duties which the constable is under generally. However, it could be argued that arrest is different. There is no general duty to arrest a party whom the constable reasonable suspects to have committed a crime. The duty imposed on constables is to "take such lawful measures… as may be needed to bring offenders with all due speed to justice."[27] This duty, it may be argued, is not being exercised where the measures taken are not lawful. Instead, the focus should be on whether the officer had the power to arrest the suspect in the circumstances. It is that power which the officer is exercising when detaining the suspect, and that detention will not be pursuant to the general duty if the arrest does not constitute a "lawful measure". Therefore, the argument would conclude that an arrest is something within the ambit of the constable's powers if it is lawful; an arrest which was unlawful would not be within the "general ambit of his powers".

(ii) Conflation with Malicious Prosecution

At certain points in his opinion, Lord Malcolm appears to treat the requirements of false imprisonment and malicious prosecution as the same. For instance, His Lordship resolves an issue relating to the Lord Advocate's alleged malicious prosecution in the context of the discussion of false imprisonment,[28] and it is clear that he considered the prosecutor's immunity and the "privilege" of a police officer to substantially be analogous.[29] His Lordship also fortifies a proposition relating to the content of "malice" within unjustified detention with reference to a decision of the Privy Council on malicious prosecution,[30] in which a false imprisonment claim succeeded at first instance despite the malice necessary for malicious imprisonment being found lacking on appeal.

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[23] *Robertson v Keith* 1936 SC 29, discussed in Whitehouse, para [163].
[24] *Ward v Chief Constable of Strathclyde Police* 1991 SLT 292.
[25] Police (Scotland) Act 1876 section 6; see now the Chief Constable's power to direct and control constables under the Police and Fire Reform (Scotland) Act 2012, section 17(2)(a).
[26] See now the 2012 Act, section 20(1)(b).
[27] 2012 Act, section 20(1)(d).
[28] *Whitehouse*, paras [166]-[168].
[29] *Whitehouse*, para [166].
[30] *Whitehouse*, para [164], referring to *Juman v Attorney General of Trinidad and Tobago* [2017] UKPC 3.

These two delicts are distinct, so reading concepts across from one to the other may be inadvisable. One distinction is that the judicial system is centrally relevant to a claim for malicious prosecution in a way that it is not for false imprisonment. A successful claim for the former involves a conclusion that the judicial process has been used as an instrument to inflict injury on the pursuer, a finding which should not lightly be reached. That may justify imposing a more stringent test of intention – malice – for this delict.

(iii) Comparison with other Jurisdictions?

It is noteworthy that, unlike his discussion of malicious prosecution,[31] Lord Malcolm's treatment of the claim against the police has few comparative overtures.[32] English law, which sustains the distinction between malicious prosecution and false imprisonment discussed above, is worth consideration. Once absence of authority is proven, the tort of false imprisonment in English law is one of strict liability. This is even the case where, for instance, when the authority was exercised honestly for the duration of a detention which subsequently is rendered retrospectively unlawful by judicial decision.[33] Malice is not a requirement,[34] and the "heavy"[35] burden of justifying the imprisonment falls on the defendant.[36] The fact that the burden for malicious prosecution falls on the claimant again suggests that these two causes of actions should not readily be conflated.[37] The Scots pursuer, in comparison, is doubly disadvantaged: they receive no assistance from the burden of proof and have a higher hurdle to get over in order to impugn the detention.

This claimant-friendly approach does not appear to be one unique to the common law. As Professor Reid notes, South African law does not require proof of malice in respect of an

[31] See *Whitehouse*, para [99]-[102] (US and Canadian case law on prosecutorial immunity cited).
[32] His Lordship cites at para 164 the Northern Irish decision of *Salmon v Chief Constable of PSNI* [2013] NIQB 10 for the proposition that "a negligent investigation which leads to an arrest does not sound in damages", but all the case holds is that no damages will be awarded for a negligent investigation where the arrest was lawful.
[33] As in *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19.
[34] *Weldon v Home Office* [1992] 1 AC 58 at 135.
[35] *Connor v Chief Constable of Merseyside Police* [2006] EWCA Civ 1549, para [65] per Waller LJ.
[36] *Holroyd v Doncaster* (1826) 3 Bing 492.
[37] *Hicks v Faulker* (1878) 8 QBD 167 at 170.

injury to liberty.[38] Also, as in English law, the burden is placed the defendant to justify the detention.[39]

(iv) The Impact of the ECHR

While Whitehouse did raise a claim for a violation of Article 5 of the ECHR, this was not examined at this stage of the litigation. That being said, human rights considerations played no role in Lord Malcolm's consideration of the delictual position. There may be understandable reticence towards constitutionalising of the law of delict, but surely it cannot be denied that the ECHR should be relevant in drawing the parameters of a particular delict,[40] especially where Article 5(5) provides that Contracting States must provide "an enforceable right to compensation" for citizens detained contrary to Article 5(1). In *McCaffer v Lord Advocate,*[41] Sheriff Deutsch held that, in relation to Article 5(5):[42]

> …for a right to compensation to arise in favour of the pursuer he must show that there was no reasonable suspicion of his having committed an offence but there is nothing within that provision pointing to a requirement that he must aver and prove malice. To impose such a requirement would be an unwarranted restriction on the remedy and a breach of the convention.

Although that case concerned an action brought against prosecutors, the proposition necessarily holds true for an action against the police.[43] At the very least, then, retaining the requirement of malice for injuries to liberty simply results in a two stage process: if malice is not proved, the delict of "malicious" imprisonment is not established, and the pursuer must have recourse to arguments under the Human Rights Act 1998. But this seems inefficient. As others have argued,[44] if the "malice" requirement is incompatible with the ECHR, it should be expunged as a requirement in the law of delict.

D. LOCATING THE PROPER ADJECTIVE

If malice is no longer a requirement, the question therefore becomes: which adjective should be employed to describe what makes detention actionable detention? Professor Reid

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[38] Reid, para 5.24, citing *Minister of Correctional Services v Tobani* (2003) (5) SA 126.
[39] See eg *Minister of Law and Order v Hurley* 1986 (3) SA 568.
[40] The most obvious example of this influence can be seen in English law regarding the tort of misuse of private information: *Campbell v MGN* [2004] 2 AC 457.
[41] 2015 SLT (Sh Ct) 44.
[42] Ibid, para [48].
[43] Ibid: para [49].
[44] PW Ferguson, "Malice and Negligence", 2007 SLT (News) 127 at 130; E Reid, "Malice in the Jungle of Torts", (2013) 87 *Tulane Law Review* 901 at 917-918.

convincingly has argued in favour of a "reasonable exercise" of "professional duty" test, which would impose liability for careless actions.[45] The delict therefore would be one of *unreasonable* detention. Another approach, contrary to that adopted in *Whitehouse*, would be to make "reasonable grounds" the determinative factor. This would be consistent with Article 5 of the ECHR and maps onto the now-statutory power of arrest without warrant, which requires "reasonable grounds for suspecting that the person has committed or is committing an offence."[46] If those reasonable grounds exist, then the statutory power is engaged, and the subsequent detention is not delictual.

This would therefore affirm the delict as one of *unjustified* detention. Once reasonable grounds are established, it should not be open to the pursuer to challenge the detention on grounds of malice. This would align arrests under the statutory power with the arrests made pursuant to a warrant: the warrant by itself provides overwhelming justification for detention, and malice should be irrelevant, at least for the delict of unjustified detention.[47] But, if reasonable grounds are not established, then there is no basis on which the officer can claim a liberty to carry out the conduct in question. In other words, the police officer's shield comes not from the nature of his office, but from the particular duty or power the exercise of which resulted in the impugned conduct. Though this does not address Lord Malcolm's concern that an officer may be liable for an honest mistake,[48] this can be reflected in the award of damages granted to the pursuer, and any floodgates concerns are severely undermined by the fact that *unjustified* detention represents the law in other jurisdictions.[49]

E. CONCLUSION

It is inherently problematic for a legal system to prevaricate over the situations in which a citizen can claim damages for a deprivation of liberty by the state. In that respect, if Lord Malcolm's opinion is the final word on this subject, then at least we have a careful, detailed opinion providing justification for the need to show malice before that right will be exigible. However, if that is the case, then we may wish to consider why the Scots law of delict is less jealous of the right to liberty than its geographical and juridical neighbours.

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[45] Ibid, Reid, 918.
[46] Criminal Justice (Scotland) Act 2016, section 1(1).
[47] See Reid, paras 5.14-5.15.
[48] *Whitehouse*, paras [151]-[152].
[49] Arguably, though the "reasonable grounds" criterion is used by both jurisdictions, the power of arrest under section 1(1) of the 2016 Act is wider than that in English law: Police and Criminal Evidence Act 1984, section 24.

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