



CROWN OFFICE  
25 CHAMBERS STREET  
EDINBURGH EH1 1LA

Telephone: 0300 020 3000

Adam Tomkins MSP  
Convener  
Justice Committee

By email to:  
[JusticeCommittee@parliament.scot](mailto:JusticeCommittee@parliament.scot)

5<sup>th</sup> February 2021

Dear Convener

I refer to your letter of 27 January and to my reply of 1 February 2021 in which I undertook to respond substantively to you once the actions raised by Mr Clark and Mr Whitehouse had been disposed of.

Mr Whitehouse's case called at the Commercial Court of the Court of Session yesterday, 4 February, and the action itself has now been disposed of, although there is an ongoing process in relation to an application by Mr Whitehouse to use documents from that case for other purposes. Late this afternoon, Mr Clark's case was disposed of by the Court without the need for appearance.

I can, accordingly, now update you on the financial implications of these two cases. I also intend to make a statement in the Scottish Parliament on the matter next week.

It is a matter of public record that, in these two cases, substantial claims for damages were advanced against myself, as Lord Advocate, and against the Chief Constable.



Those claims related to criminal proceedings against Mr. Clark and Mr. Whitehouse which were initiated in 2014. Confirmation that there would be no further proceedings was intimated to Mr Clark and Mr Whitehouse by letter dated 25 May 2016. The Advocate Depute confirmed that there would be no further proceedings, so far as these two pursuers were concerned, at a continued preliminary hearing on 3 June 2016.

Although the claims related to events which occurred before I was appointed as Lord Advocate, in terms of section 61(2) of the Scotland Act 1998, it was and is for me, as the current incumbent of that office, to answer them.

When these actions were raised, the general understanding of the law was that the Lord Advocate had an absolute immunity from civil liability at common law in respect of prosecution decisions. That was the effect of a decision of the First Division of the Court of Session, *Hester v. Macdonald*, decided in 1961. In response to the claims against me, I took a preliminary plea of immunity, relying on *Hester*. That plea was sustained in the Outer House, but, on appeal, a specially convened larger bench of the Court of Session concluded, in October 2019, that *Hester* had been wrongly decided, thereby opening the way for a finding of liability against me at common law.

Thereafter, on 26 August 2020 admissions of liability were made on my behalf to each of these two pursuers in respect of petition of September 2015 and the two indictments. Those admissions followed the conclusion of a very substantial and lengthy investigation into the circumstances which had been undertaken by the legal team, including a team of external counsel, instructed on my behalf.



As a result of those investigations, I accepted: (i) that, so far as these two pursuers were concerned, the charges against them lacked objective probable cause; and (ii) that, so far as these two pursuers were concerned, certain of the prosecution decisions in this case met the legal test for a malicious prosecution.

I should make clear that the legal test for a malicious prosecution can, in certain circumstances, be met even though no individual had "malice" in the ordinary sense of a spiteful motive against the pursuers. The basis upon which I have accepted liability in these case did not depend on any individual having subjective "malice" in that sense.

Following the admissions of liability on my behalf, mediations took place between each of the two pursuers and my representatives. Following the production, analysis and scrutiny of material vouching the losses sustained by each of the pursuers as a result of their prosecution, an agreement was reached with each pursuer that he would be paid a sum by way of damages of £10.5 million. Each of these pursuers was a very high earning individual, and the settlement figure, in each case, reflected the actual loss which the pursuer was able to demonstrate had been caused to him by the wrongful prosecutions.

In addition to these payments by way of damages, interim payments have been made to each of the pursuers in respect of legal expenses. In respect of Mr Whitehouse, that sum is £1,650,000.00 and in respect of Mr Clark, the figure is £1,436,250.00. The final liability in respect of judicial expenses in the civil action has not yet been assessed; and I will confirm the final figures to you in due course.

Costs have also been incurred in defending these actions. I have been represented throughout by solicitors in SGLD and by external counsel, and COPFS staff have been engaged in work in relation to these actions.



I cannot at this time provide figures for the internal or external costs involved; but will confirm those to you in due course, to the extent that is possible having regard to the deployment of internal resource which may not be quantifiable in financial terms.

I understand that the Chief Constable has also settled the claims against him brought by Mr. Clark and Mr. Whitehouse. I am not party to those settlements, and am unaware of their terms.

### **Other proceedings**

There are other cases pending against me arising from the same prosecution. As you will appreciate, the question of liability will fall to be addressed separately in respect of each claim. An admission of liability has been made on my behalf in two of those cases but those cases have not yet concluded. I am defending other cases, and in one of those, it is anticipated that a proof (a hearing of evidence) will be required. These cases are, of course, sub judice, and, as a result, I cannot comment on them further at this time.

### **Budgetary implications**

Arrangements have been made so that the settlement of these claims will not affect the operational effectiveness of COPFS. In particular, the payments will not require to be met from the COPFS resource allocation which was announced as part of the Scottish Government budget last week. That allocation involves an increase in COPFS funding from £124.9m in 2020-21 to £146.8m in 2021-22, representing an increased resource allocation of £21.9m and additional capital funding of £0.5m.



The COPFS budget allocation will enable the Service to maintain an effective, fair and rigorous system of criminal prosecution and investigation of deaths, responding to the changing nature of its caseload, during the forthcoming year.

The increased funding this year has been required by, among other things, the need to respond to the increase in sexual offences being reported to the Crown, to investigate deaths related to the Covid-19 pandemic, to pursue international investigations and prosecutions with EU counterparts following the UK's withdrawal from the European Union, and to maintain and reinforce the arrangements which are already in place for the effective investigation and prosecution of the largest and most complex cases.

I should be clear that this budget allocation to COPFS would not, without further funding, permit expansion of the Service as part of the system-wide response to the backlog of cases which has built up during the Covid-19 pandemic. However, it provides a sound basis from which the Service can expand, as part of that system-wide response, in line with the additional resource which is to be made available for that purpose. A Justice-wide allocation of £50m has been provided in the Scottish Budget announcement; the COPFS share will be agreed in due course.



I will be glad to assist the Committee further with its scrutiny of the COPFS budget and to provide further information, to the extent that I may properly do so, in relation to the cases to which I have referred above.

Yours Sincerely

A handwritten signature in black ink, appearing to read "W. James Wolffe".

**W. JAMES WOLFFE, QC**