Neutral Citation Number: [2007] EWHC 1025 (QB)

Case No: HQ06X02623

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2007

**Before** :

**THE HON. MR JUSTICE EADY**

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**Between :**

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| **Barbara Buckley** | **Claimant** |
| **- and -** | |
| **James Stewart Dalziel** | **Defendants** |
| **Melanie Dalziel** | |

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**Patrick Moloney QC** (instructed by **Nelsons**) for the **Claimant**
**Victoria Jolliffe** (instructed by **DWF**) for the **Defendants**

Hearing date: 19 April 2007

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

**The Hon. Mr Justice Eady:**

1. This litigation arises out of a neighbours' dispute which some may think has been blown out of proportion and which is undoubtedly causing considerable distress and alarming expense to all concerned. Mr and Mrs Dalziel have a house next door to that of the Claimant, Mrs Buckley, although they are now planning to move in the light of all that has happened. While they were away on holiday in September 2005 Mrs Buckley, to put it as neutrally as possible, authorised the pruning of some of their trees and bushes on or near the boundary. It is Mrs Buckley's case, as pleaded, that the pruning was confined to branches overhanging or protruding into her land by at least one foot, and that the operation became necessary because she was having a fence built towards the edge of her land and the relevant branches were obstructing the process.

2. On their return from holiday, Mr and Mrs Dalziel were upset at what they found and, after a few weeks, Mrs Dalziel reported the matter to the Greater Manchester Police in three telephone conversations which took place on 6, 11 and 13 October 2005. Mr Moloney QC, appearing for Mrs Buckley, described the situation in terms of Mrs Dalziel "nagging" the police until they took an interest. At all events, those calls were recorded in the police log and form the subject matter of a claim in slander against Mrs Dalziel. Because that claim was launched more than twelve months after the relevant causes of action arose, Mrs Buckley has applied by notice dated 14 March 2007 for the court to exercise its discretion under s.32A of the Limitation Act 1980 to disapply the statutory limitation period imposed by s.4A of the Act. It is, I believe, uncontroversial that the deemed date of service of the amended claim form (in which the slander claim was first raised) was 22 November 2006. Thus the period by which the limitation period was exceeded was a few weeks only. In so far as there is any dispute about the dates, it is not critical to the issues now arising.

3. Following Mrs Dalziel's contact with the police, an officer called Ms Darnell came to their home and interviewed her and her husband on 14 October 2005. Having consulted her supervising officer, it seems that Ms Darnell was advised that the activities authorised by Mrs Buckley could possibly amount to a criminal offence (presumably criminal damage) and she thereupon took a witness statement from Mr Dalziel.

4. Mrs Buckley was informed of the complaint by the police officer and, on 24 October 2005, she attended Rochdale police station, where she was arrested, interviewed and bailed. Ultimately, the Crown Prosecution Service decided not to pursue the matter, and she was duly notified in the second week of November.

5. There then elapsed a considerable length of time, and it was only on 7 September 2006 that Mrs Buckley's solicitors wrote to Mr Dalziel to put him on notice that a claim form had been issued raising allegations of libel said to be contained in his police witness statement of 14 October 2005. At that stage, reliance was also placed on allegedly slanderous remarks said to have been uttered by him to his wife and to a Mrs Collins (his mother-in-law). Although these proceedings were issued within the twelve month limitation period, Mr Dalziel has served a notice of application dated 20 February 2007 seeking summary judgment under CPR Part 24. He relies on absolute privilege or immunity from suit (the distinction being immaterial, for present

purposes, since both are manifestations of the same underlying public policy considerations).

6. The original claim form was issued on 8 September 2006 (although never served). The amended claim form was served (together with particulars of claim), as I have said, on or about 22 November. By this time, the claim against Mr Dalziel was confined to libel, and it was sought to add a claim in slander against Mrs Dalziel arising out of the telephone conversations with the police. It is said on Mrs Buckley's behalf that she was only in a position to take action over Mrs Dalziel's involvement after the Greater Manchester Police had consented to a third party disclosure order dated 11 October 2006, the relevant documents (i.e. the police log) being received by Mrs Buckley on 19 October 2006.

7. It is Mrs Buckley's case that the Defendants' communications to the police were malicious, and I need to proceed on that assumption for the purposes of the present applications. I shall turn first to Mr Dalziel's application based on absolute privilege or immunity from suit.

8. It has always been recognised that absolute privilege covers defamatory statements made in court proceedings for policy reasons which are obvious and very familiar. The principle has, over the years, been extended to what is said in a witness statement: see e.g. *Watson v McEwan* [1905] AC 480 and *Lincoln v Daniels* [1962] 1 QB 237, 257-8.

9. The policy reasons underlying that process of judicial extension were considered by the House of Lords in *Taylor v Serious Fraud Office* [1999] 2 AC 177. It was there held that, in the context of a criminal investigation, the immunity extended to statements made out of court if they could fairly be said to be part of the process of investigating a crime or possible crime. As was explained by Lord Hope, at p218, the public interest requires that those involved in such an investigation should be able to communicate freely and without being inhibited by the threat of proceedings for defamation. That requirement, therefore, should be accorded priority over the countervailing consideration that sometimes a malicious informant may be able to benefit from such a rule in circumstances which would appear to be unfair or unjust: see e.g. *ibid* at pp221-222.

10. Another consideration which was thought to be relevant to striking the balance between these competing policy considerations is that the communication of defamatory material contained in police witness statements will ordinarily be very limited. As Lord Hope explained at pp218-219:

> "Those who provide information to investigators usually do so in the belief, which may or may not be expressed by them, that the information is being given out of a sense of public duty and in confidence. That information may, if it is to be useful to the investigator, contain material which is defamatory. So long as the information goes no further, no harm is done to anybody. But disclosure releases the defamatory material from the control of the prosecutor. Unless protected, it may be disseminated further and become actionable".

11. Clearly this reasoning supports Mr Dalziel's application, persuasively advanced on his behalf by Ms Jolliffe, since the only claim now remaining against him relates to a police witness statement. How then does Mr Moloney seek to overcome this hurdle?

12. He raised essentially two arguments. First, it is said that their Lordships in *Taylor* were addressing where the policy balance should be struck prior to the enactment of the Human Rights Act 1988 (the decision itself dating from 1997) and would now be required to give greater priority to the protection of reputation in accordance with Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

13. Secondly, Mr Moloney argues that, in any event, different considerations apply to those who are not merely potential witnesses but actually the complainants who set the process of criminal investigation in motion. He also makes the related and overlapping submission that there is a material distinction between those who volunteer defamatory statements and those who are required to co-operate with the police or do so out of a genuine sense of duty.

14. As to the first argument, I can see no basis on which I could or should hold that such a recent decision of the House of Lords was incompatible with the European Convention (which would, of course, have been well in their Lordships' minds in 1997). I have in mind, in particular, the observations of Lord Bingham in *Kay v Lambeth Borough Council* [2006] 2 AC 465 at [40]-[45] on the importance and value of adhering to precedent in the interests of certainty and clarity, and also as to the often generous margin of appreciation accorded to national courts by the judges at Strasbourg.

15. Secondly, although Ms Jolliffe concedes that there may be no direct authority on defamatory statements "volunteered" by a malicious informant, she argues from principle that there is no rational basis for the distinction sought to be drawn between complainants and witnesses. She submits that it would undermine the policy which underlies their Lordships' decision in *Taylor*. In particular, the victims of rape, sexual assault, or domestic violence might (so the argument runs) be inhibited from making complaints if they were protected only by qualified privilege. Of course, the last thing in practice that such victims have in mind is the distinction between qualified and absolute privilege, but in principle there is clearly much force in Ms Jolliffe's argument.

16. Moreover, Ms Jolliffe suggests that once the matter proceeds to the stage where a police statement is being taken it will almost certainly be the case that one or more police officers has decided that such a step is appropriate, and the statement will thus be made effectively at the request of the officer concerned (rather than merely being volunteered). That again would tend to diminish the significance of any rigid distinction between complainants and other witnesses.

17. My attention was drawn also to a decision of the Court of Appeal in *Daniels v Griffiths* [1998] EMLR 488, 501. It is to be noted that the constitution of the court on that occasion included both Hirst LJ and Sir Brian Neill. The case lends at least some support to the submission that not only a police witness statement, but also the details of any prior discussions leading to the taking of the statement, would be covered by immunity. Indeed, it is clear that both stages would be embraced within "the process of investigating a crime or possible crime": see e.g. the words of Drake J in *Evans v*

*London Hospital Medical College (University of London)* [1981] 1 WLR 184, 192, as endorsed by their Lordships in *Taylor* at 215A-B (Lord Hoffmann) and 221E-F (Lord Hutton), with whom Lord Goff and Lord Hope agreed.

18. Mr Moloney, on the other hand, skilfully developed an argument to the effect that the common law already acknowledged that complainants are to be distinguished from other witnesses – and for good reason. While it is clear that their Lordships recognised that qualified privilege does not constitute a sufficient protection for witnesses in general, because the threat of proceedings is likely to be an inhibiting factor even if such a defence were arguable, the law does not accord such blanket protection to complainants. Obviously, if the necessary ingredients are present, such a person can be sued for malicious prosecution. It cannot be right, therefore, to assume that precisely the same public policy considerations will lead to blanket protection in the case of malicious complainants. Why, asks Mr Moloney rhetorically, should different policy considerations come into play where either the police or the CPS have decided that the complaint does not even warrant the institution of criminal proceedings? In such circumstances, of course, one of the essential ingredients of the tort of malicious prosecution would be absent; if there has been a malicious and defamatory complaint, there is no particular reason why public policy should require that a malicious complainant should escape liability for defamation through being clothed with immunity from suit. Powerful though this argument is, it has to be acknowledged that it does not cater for Ms Jolliffe's submissions on the need to protect the victims of, for example, rape and domestic violence. On the other hand, there is no reason in principle why a malicious complaint of rape should not lead to a prosecution for perjury or a claim in malicious prosecution where the necessary ingredients are present.

19. Mr Moloney points out that, even after the decision of their Lordships in *Taylor*, it has been acknowledged in the Court of Appeal in *Mahon v Rahn (No.2)* [2000] 1 WLR 2150 as an open question whether it is necessary or desirable to extend the protection of absolute privilege to cover the situation where a malicious informant spontaneously proffers untrue and defamatory allegations to an investigatory authority. It cannot be supposed, therefore, that the decision in *Taylor* is determinative of the issue now before the court.

20. Does this mean that it is necessary for a judge, on a strike out or summary judgment application, to allow the matter to go forward for later determination? This is not so, in my judgment, because there is an issue of pure law which a judge at first instance can determine as readily at the interlocutory stage as following a full trial of the issues. I must remember that, for present purposes, it is necessary to assume that Mr Dalziel was in fact malicious. The issue can accordingly be determined without reference to any disputed facts.

21. It seems to me that I should follow the guidance of their Lordships in giving priority to the need to protect those who provide evidence to police officers (or other investigatory agencies) in the course of an inquiry into possible illegality or wrongdoing. As Lord Hope pointed out, there will at that stage be minimal publication of any defamatory allegations and it is not unreasonable, therefore, in weighing the competing considerations, to give priority to the protection of those who provide such information. The public policy consideration applies with equal validity to those who are mere witnesses and to those who are initial complainants. It may be

unjust that a malicious informant should be accorded comparable protection, but it is difficult to draw a principled distinction in this respect between malicious witnesses and malicious complainants. The House of Lords appears to have recognised that this is a price which has to be paid. It by no means follows that because a malicious complainant can be sued for malicious prosecution or prosecuted for perjury such a person should also be open, at an earlier stage, to a claim in defamation.

22. As Lord Hope observed in *Taylor* at 219G-H:

> "Just as proceedings for perjury are available to deal with the witness who would otherwise be protected against statements made in the witness box, so also the public interest requires that a remedy for malicious prosecution should remain available against those who would be entitled to the benefit of the absolute privilege but who have acted maliciously and without reasonable and probable cause during the investigation process. But that is a quite separate matter as it is the malicious abuse of process, not the making of the statement, which provides the cause of action. The public policy argument for extending the absolute privilege, consistently with established principles, seems to me to be unanswerable."

23. It is likely that greater damage would be done to someone's reputation by a person telling lies in open court, or even by being prosecuted for a supposed criminal offence, than in the situation where a defamatory complaint goes no further than being recorded in a witness statement or a police log. Ms Jolliffe submits that to draw a clear distinction between immunity for witnesses, on the one hand, and for complainants on the other would be unworkable on a practical level, undesirable on public policy grounds, and not have any solid basis in the decided cases.

24. Mr Moloney argues that "the tide has turned", largely in the light of the enactment of the Human Rights Act 1998, and that the balance has swung in favour of protecting the reputations of those who may be the subject of such complaints, and against protecting the freedom of speech of those who make them. It is, of course, ultimately a question of striking a balance between two competing public policy considerations but it seems to me that I should adopt the balance struck by their Lordships in *Taylor*, as explained in the passages which I have cited above.

25. Accordingly, in the result, I am prepared to hold that Mr Dalziel's communication to the police officer in his witness statement of 14 October 2005 was protected by absolute privilege and immunity from suit. The claim against him should thus be struck out.

26. I turn, therefore, to the limitation point in respect of the slander claim against Mrs Dalziel. The terms of s.32A of the statute derive from the recommendations of Sir Brian Neill's Committee on Defamation Practice and Procedure in July 1991. So too does the adoption of a 12 month limitation period for libel, slander and malicious falsehood, as set out in s.4A. In deciding whether or not to exercise its discretion to disapply the strict provisions of the statute, it is provided that the court must have regard to all the circumstances of the case and, in particular, to the following factors:

a) the length of, and the reasons for, the delay on the part of the claimant;

b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the claimant until after the end of the period mentioned in s.4A (i.e. 12 months)

i) the date on which any such facts did become known to him or her, and

ii) the extent to which he or she acted promptly and reasonably once it was known whether or not the facts in question might be capable of giving rise to an action; and

c) the extent to which, having regard to the delay, relevant evidence is likely –

i) to be unavailable, or

ii) to be less cogent than if the action had been brought within the period mentioned in s.4A.

These provisions were considered by the Court of Appeal in *Steedman v BBC* [2001] EWCA Civ 1534. It was there suggested that the exercise of this discretion should be approached with some caution. Reference was made to the reasoning of the Neill Committee report, which of course the legislature would have had in mind, and in particular to the sort of considerations which were there suggested as being relevant to the exercise of discretion. While it was recognised, for example, that sometimes a claimant might reasonably delay the commencement of proceedings while awaiting the outcome of some other inquiry, such as a police or disciplinary investigation, it was also suggested that little sympathy might be expected where a claim came out of the blue following the expiry of the primary limitation period without any prior warning. In this case, no warning was given to Mrs Dalziel that she herself was on risk of defamation proceedings during the 12 month period. In particular, there was no letter before action to that effect.

27. The ultimate test set out in the statute is whether or not it is "equitable" to allow the action to proceed.

28. It is plainly not the case that the strict limitation period should be disapplied in every case where either the period of "incremental delay" is short or where little or no prejudice has been occasioned to the defendant's ability to advance his or her case. Here, for example, there is little force in any argument that Mrs Dalziel has been prejudiced in her ability to defend the claim against her by the lapse of six or seven weeks following the end of the 12 month period. The question would appear to be whether it would be "equitable" in the circumstances for her to be deprived of the benefit of the short limitation period for some other reason.

29. Mr Moloney's primary submission is that Mrs Buckley simply did not receive the relevant information contained in the police log until 19 October 2006 and was thus not, he submits, in a position to commence the proceedings or, for that matter, even to

send a letter before action. Ms Jolliffe argues, on the other hand, that here it becomes relevant to consider how it came about that this information was obtained so late and, especially, whether or not there was delay within the 12 month period in respect of which Mrs Buckley should herself take the consequences. Ms Jolliffe argues strongly that Mrs Buckley did indeed have reason to suspect the involvement of Mrs Dalziel in the complaint to the police well before 19 October 2006.

30. It emerges from the evidence that Mrs Buckley in fact suspected Mrs Dalziel's involvement as early as 14 October 2005, when she was first visited by Ms Darnell, and certainly from the date of her arrest (24 October 2005). It is pleaded in the amended reply (at para. 6A.6.3) that during this interview Mrs Buckley had been told that her neighbours (i.e. in the plural) had complained of acts of criminal damage. There is also available a transcript of the police interview, which shows that Mrs Buckley was informed by Ms Darnell that both Mr and Mrs Dalziel had been parties to the complaint. In her witness statement Mrs Buckley refers to the fact that Ms Darnell had referred to "Stewart and Melanie" and states also that she was not expressly told that "the complaint was made by Mr Dalziel or Mrs Dalziel". Although no warning was given to Mrs Dalziel, by way of letter before action during the limitation period, it is to be noted that when she required "a complete and unequivocal apology" and an undertaking not to repeat the allegations, this was sought from both Mr and Mrs Dalziel (and indeed Mrs Collins). Nevertheless, she chose to single out Mr Dalziel in her initial claim form issued in September 2006.

31. Although the police log was revealed to Mrs Buckley only in October 2006, it is necessary to recall that there was considerable delay beforehand in making any request or application to obtain it. She did not instruct solicitors until 19 June 2006 (i.e. eight months after the causes of action arose).

32. Ms Jolliffe also takes the point that the original claim form against Mr Dalziel was issued "protectively" in September 2006; that is to say, before all the necessary facts had been obtained. It is reasonable to assume that the words complained of in the (unserved) particulars of claim were based on Ms Darnell's witness statement obtained in August 2006, which referred quite expressly to Mrs Dalziel's involvement in making the complaint. She stated that "Melanie simply reiterated what Stewart had said" (i.e. during a visit to their home on 14 October 2005). While Mrs Buckley may not have had the information about the telephone calls now relied upon, as giving rise to a cause of action in slander, she nevertheless was aware in general terms of Mrs Dalziel's involvement. These are all plainly relevant circumstances for the court to take into account in judging whether or not it is "equitable" to disapply the strict provisions of the 12 month limitation period brought in by Parliament specifically for these causes of action in 1996.

33. Ms Jolliffe also points to the fact that Mrs Buckley was not inhibited in launching proceedings against Mr Dalziel within the limitation period by the fact that she lacked particularity as to the defamatory words *he* was supposed to have uttered. Why, she asks, could Mrs Buckley not have launched "protective" proceedings of a similarly general nature against Mrs Dalziel?

34. Some of the delay Mrs Buckley seeks to explain by her state of distress, brought about by Mr and Mrs Dalziel's actions and particularly by the fact of her arrest, during the eight months prior to the instruction of solicitors in June 2006. It may be that she

over-reacted or that she was, by the standards of some people, unduly sensitive in this regard. The fact remains, however, that a large portion of the primary limitation period went by without her taking any steps. Moreover, it is clear from the evidence that distress has been caused to all parties in this litigation. It is by no means confined to Mrs Buckley. If she is allowed to proceed outside the 12 month limitation period, therefore, one of the consequences will be that the stress is prolonged for Mrs Dalziel (and, for that matter, for her husband also). In deciding what is "equitable", it would seem that the court has to take both sides into account and the respective advantages and disadvantages of disapplying the primary limitation period.

35. As defamation actions go, the allegation here is *relatively* trivial. Of course any allegation of criminal conduct has to be taken seriously, and I have no doubt that Mrs Buckley did indeed suffer anxiety and distress over the police involvement. It is important to have in mind, on the other hand, that there is little or no damage to reputation, and the primary purpose of any defamation claim is to vindicate and restore reputation. Mrs Buckley was not accused of criminal behaviour in a vacuum. Mr and Mrs Dalziel pointed out to the police what she had done and invited them to come and see the consequences. Whether it actually amounted to a criminal offence, therefore, is perhaps of less significance than what she had actually done to the trees and shrubs. Against that background, it is unreal to suggest that her reputation in the eyes of the police officer was actually damaged at all as a result of anything said by Mrs Dalziel. It is true, of course, that reputation is not the only factor to be taken into account when assessing damages in defamation proceedings. Injured feelings also have a role to play. In this particular case, however, that is the main focus of Mrs Buckley's complaint. The absence of actual damage to reputation must plainly be a relevant consideration in determining whether or not to take the exceptional step of disapplying the limitation period.

36. Ms Jolliffe has argued that, in these circumstances, more distress and damage is likely to be caused to Mrs Buckley by allowing the proceedings to go ahead (perhaps being reported in the local newspapers) than by allowing the parties to "draw a line" under these unfortunate events. This added stress, and no doubt significant expenditure, might well in these circumstances be thought disproportionate to any possible legitimate advantage which Mrs Buckley may gain from being allowed to proceed.

37. Having taken all these considerations into account, I am not persuaded that this is a case in which to take the exceptional step of disapplying the limitation period. Accordingly, Mrs Buckley's application in this respect is refused.

38. That brings me, finally, to an added complication which arose in the course of argument. Mr Moloney drew my attention to differing versions of the police officer's account of events on 14 October 2005. The first statement appears to have been drafted in August 2006 and the second in the following December. Mrs Buckley's case, it is said, has been based up to now on the first version. She now wishes to plead her case differently, or on an alternative basis, in the light of the second.

39. No explanation has been offered for the apparent inconsistencies between the two statements. For Mr Moloney's purpose, the most important difference is that the second statement suggests that there was a two stage process. Matters were discussed with Mr Dalziel at his home in the morning, without any written statement being taken, and it was only after going back to the police station and obtaining advice from

the supervising officer that the statement was taken during the course of a second visit. It will be remembered that the supervising officer expressed the view that what Mrs Buckley had done could possibly give rise to a criminal offence. Mr Moloney wishes to be able to argue that the preliminary conversations found causes of action in slander which would not (he submits) be themselves protected by absolute privilege. If Mrs Buckley were permitted to rely upon what Mr Dalziel said about her in the course of the conversations, she would be able to defeat his defence of qualified privilege by proving that he was motivated by malice (as I must assume).

40. Clearly, Mr Moloney's submission is inconsistent with the legal position for which Ms Jolliffe contends; namely, that the preliminary discussions should be protected for the same policy reasons as any written statement and that, accordingly, Mr Dalziel's oral remarks would equally be the subject of immunity. This would appear, to some extent, to be supported by the observations of Sir Brian Neill in *Daniels v Griffiths* at p501 to the effect that the contents of the witness statement in that case "and the details of any previous discussions leading to the taking of the witness statement would appear to be covered by the rule as to immunity". It is right to say that this cannot be taken as a definitive statement of the law (nor, I imagine, was it intended to be), especially in the light of the subsequent observations made by members of the Court of Appeal in *Mahon v Rahn (No. 2)* which would appear to suggest, as Ms Jolliffe concedes, that the circumstances now under consideration may require to be addressed in some future appellate case – not being covered by any binding authority to date.

41. Against this background, Mr Moloney invited the court, in the event of concluding that Mr Dalziel was entitled to rely upon absolute privilege in respect of the currently pleaded case, to afford Mrs Buckley an opportunity of re-pleading the particulars of claim so as to avoid that consequence. He argues, in particular, that he should be allowed to amend notwithstanding the fact that the limitation period has passed, since the cause(s) of action he now wishes to pray in aid would arise from "the same facts or substantially the same facts" as those originally relied upon: CPR 17.4(2). This contention would involve a rather broad interpretation of "the same facts", since what is now raised is a series of oral remarks made on an earlier occasion.

42. Although it is accepted that the second witness statement of the police officer came to the attention of Mrs Buckley's advisers in December or January, so far as I understand it, the first time that this proposal for amendment was raised was during the course of Mr Moloney's submissions in court. Thus, there seems to have been a delay in addressing the matter for some three to four months. Against this background, it does not seem to me to be fair or desirable to leave matters in the air any longer. I do not consider that it would serve the interests of justice or, in particular, the overriding objective of the CPR. It is better that matters are concluded now in the light of my rulings.

43. In the result, Mr Dalziel succeeds in relation to the defence of absolute privilege or immunity from suit, and Mrs Dalziel succeeds on the limitation point. I know that Mrs Buckley will be very disappointed by this outcome, but I consider that when viewed objectively it is probably in the best interests of all the protagonists in this unhappy affair.