Neutral Citation Number: [2008] EWCA Civ 818

Case No: A2/2007/2727

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR RICHARD PARKES QC (SITTING AS A DEPUTY JUDGE OF THE QUEEN'S BENCH DIVISION
HQ068X00858

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 7 2008

Before:

THE RT HON. LORD JUSTICE WARD
THE RT HON. LORD JUSTICE SEDLEY
and
THE RT HON. LORD JUSTICE STANLEY BURNTON

- -

Between:

Richard Anders Westcott	Appellant
- and -	
Dr Sarah Westcott	Respondent

- -
- -

Kenneth Craig (instructed by John Stallard & Co) for the appellant
Nicholas O'Brien (instructed by BP Collins) for the respondent

Hearing date: 8th May 2008

- -

Approved Judgment

Lord Justice Ward:

The issue

1. The surprisingly novel issue in this appeal is whether a person who makes a complaint to the police, thereby instigating a police investigation which does not lead to a prosecution, can shelter behind the defence of absolute privilege if a claim is brought against her in defamation; or whether such a complaint should be protected by qualified privilege so that the defence will only be defeated if the claimant can establish malice.

2. Mr Richard Parkes Q.C., sitting as a deputy judge of the Queen's Bench Division on 29th October 2007, determined in the defendant's favour a preliminary issue, namely, whether the oral publication and/or written publication to the police were protected by absolute privilege and/or immunity from suit. He entered judgment for the defendant accordingly and dismissed the claim with costs. The claimant now appeals with permission granted by Sir Henry Brooke.

The factual background

3. This all arises out of a sad and sorry domestic dispute which has now blown up out of all proportion. A marriage breakdown, difficulties over contact arrangements, and, with emotions inevitably running high, a blazing row between the wife, her husband and her parents-in-law led to the wife complaining to the police that her father-in-law had assaulted her and her child and to father-in-law bringing a retaliatory claim for defamation of his blameless character. In fact the police did not consider the complaint warranted further action. Perhaps the wife will rue making the complaint; perhaps father-in-law will rue not accepting the police's refusal to act as sufficient to assuage his wounded dignity, for here they are in the Court of Appeal. What a great shame for these intelligent parties that the public have been invited into their drawing room. So what is it all about?

4. The claimant, Mr Richard Westcott, a Justice of the Peace, is the father-in-law of the defendant, Dr Sarah Westcott. She is a General Practitioner. She was married to Edward Westcott. They have a son, Daniel, born in 2004. The marriage had broken down and they had separated.

5. On Good Friday, 25th March 2005, the defendant delivered Daniel to the address of her parents-in-law in order for Edward and his parents to have contact with the baby, then six months old. It is not necessary to reveal all the unseemly detail of what happened on that day. It is enough to say that a heated argument developed, tempers were lost, harsh and abusive words were spoken and blows were aimed or struck by one or more of the claimant, the defendant and Edward, and the defendant left in distress taking the baby with her.

6. Later that day she telephoned the police and reported, according to her defence, that:

> "My father-in-law has flipped and hit me and my six month old baby. … I was hit on my upper body. Daniel was hit on his left side. I was hit at least 7 times."

7. The police called on her that evening at her home and a police officer took a statement from her in which she said, among other things,

> "At this point [when the defendant was pushing Edward out of her way] Richard, Edward's father, came between Edward and I. I have never seen Richard like that before. He was extremely angry and started to shout, "How dare you speak to him [Edward] like that in my house". I replied "Fuck off" and this incensed him. Richard then lost it and started to lash out at me.
>
> Richard lashed out several times hitting my upper arms as I tried to defend myself. I had hold of Daniel with my left arm and was trying to fend Richard off with my right arm. As I pushed Richard's arms away I was edging my way towards the lounge.
>
> I wanted to get past Richard in order to get to the front door but Edward was blocking me. I ended up in the lounge because I couldn't get to the front door. …
>
> After a few moments of screaming the words "Help me" I managed to calm myself down and sat down. I got up and went to push past Edward and Richard. At this point Richard lashed out again raising both his arms. He was targeting my upper arms but he hit Daniel at least twice. I don't think he meant to do it but he still did it.
>
> At this stage Edward pushed Richard back and said "That's enough Dad". I gathered up my things and placed Daniel into his pram. Daniel was crying and I was extremely upset. I couldn't believe what had happened. I had never seen Richard like that before. I spoke to Edward briefly before driving away with Daniel."

Her statement concluded:

> "I have since taken Daniel to the hospital for a check up but he appears to be OK. Neither of us have any visible injuries and [illegible] not in any pain. I wish to pursue a formal complaint against Richard and will attend court if I am required to do so."

8. The judge concisely set out the matters which followed and I gratefully adopt his résumé.

> "3. It is common ground that as a result of the defendant's making these allegations to the police Worcestershire Social Services found out about them and advised the defendant to ensure the safety of her son by not visiting the claimant. The claimant contends that as a result he has been seriously compromised in his position as a JP and a member of the

> Family Panel of the Family Proceedings Court and he maintains that the fact that [as he alleges] social services, without any investigation of the facts, appear to regard him as someone from whom his grandchild should be protected, has caused him particular upset and embarrassment.
>
> 4. In consequence of these allegations, which he maintains are wholly false, the claimant issued proceedings in March 2006 seeking damages for slander and libel and an injunction.
>
> 5. The Defendant has pleaded justification and absolute, alternatively qualified, privilege. Her pleaded case in support of the defence of absolute privilege is that the complaint that she made by telephone to the police was published to them in their capacity as investigators of crime with the intention that they should make a record of her complaint and use it as part of an investigation and/or prosecution. As a result of the conversation, a policeman came to see her that evening, asked her to tell him what happened, and recorded her account in a written statement which she dictated. The defendant pleads that the written statement was published to the police in their capacity as investigators of crime with the intention that it be used as part of an investigation and/or prosecution. (Strictly, the defendant dictated her statement rather than writing it, so that publication of the statement to that particular policeman was a slander rather than a libel, but nothing turns on that).
>
> 6. The claimant admits that the occasion of publication would in principle have been protected by qualified privilege, but contends that the allegations were made maliciously, on the basis that the defendant knew perfectly well that they were untrue. He disputes the validity of the plea of absolute privilege which, if made good, would be a complete defence to his claim even if the defendant had made her allegations maliciously. In those circumstances, the parties agreed that it was desirable to determine the question of absolute privilege as a preliminary issue. It is of course no part of my function to decide what actually happened at the claimant's house that day."

The judgment under appeal

9. In a commendable judgment the deputy High Court judge reviewed the authorities as I will do in a moment. I can summarise the conclusions he reached on the application of the principles he extracted from those authorities to the facts of the case as follows:

> (1) The written statement was part of the process of investigating the possible crime which the prior oral complaint disclosed and fell within the immunity from suit recognised by Drake J. in *Evans v London Hospital Medical College* [1981] 1 W.L.R. 184, 192.

(2) There was no rational distinction between the complainant's statement to the police and a statement made by any other witness. To deny the complainant the same protection would undermine the policy underlying the decision in *Taylor v Director of the Serious Fraud Office* [1999] 2 A.C. 177 namely, as the judge defined it,

> "the public interest in free and uninhibited communication by those involved in police investigations should be given priority, notwithstanding the risk that a malicious person may benefit."

(3) Any analogy with the policy considerations which apply to malicious prosecution was unhelpful for the torts are different.

(4) Article 8 of the E.C.H.R. added nothing because:

> "The test of necessity imposed by Article 8(2) as a justification for interference with Convention rights is in practice no different from the test of necessity in the interests of the administration of justice which was stated by the House of Lords in *Taylor*: see per Lord Hoffmann at 214D and G."

(5) If the written statement was protected by absolute privilege, then the oral statement which preceded it should be protected also because:

> "If that were not the case, the object of the protection which applies to the subsequent written statement would be wholly undermined and the immunity would be outflanked, for the complainant could be sued on the original oral complaint instead."

The arguments addressed to us

10. Mr Ken Craig for the appellant submitted that neither the oral complaint nor the written statement made thereafter should be treated as part of the investigation but rather as steps taken to instigate that investigation and consequently neither enjoy the protection of absolute privilege. Even if the written statement can be treated as a statement of the witness entitled to that privilege, when the oral statement was made, no investigation was under way and the complainant should have no immunity. The judge erred in treating the matter as a straightforward application of existing principle because this particular question has been left open by the Court of Appeal. Public policy did not demand that the complainant be thus protected because had a prosecution ensued, she would only have been liable if she had acted maliciously. It was illogical to give immunity to a malicious complainant when she would not enjoy that immunity once a prosecution had been brought and failed. To deny the claimant his remedy was to leave him without any avenue open to redress the injury to his reputation. That infringed his Article 8 rights. The grant of immunity was not necessary in a democratic society. The necessary privilege should not extend beyond qualified privilege where malice is the proper touchstone of liability. Genuine complaints would still be protected.

11. Mr Nicholas O'Brien, for the respondent, supported the judgment for the reasons given by the judge. Public policy demanded that no-one should be discouraged from

giving information to the police. Moreover they should know from the beginning that the information they give will be immune from action. Nothing should be done to outflank the privilege that would be enjoyed were the maker of the statement to give evidence.

Discussion: first, absolute privilege and immunity from suit

12. The doctrine of absolute privilege has long been recognised. As the Earl of Halsbury said in *Watson v M'Ewan* [1905] A.C. 481, 486:

> "By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a court of justice, is too well established now to be shaken."

13. The rationale of this immunity from suit was explained by Fry L.J. in *Munster v Lamb* (1883) 11 Q.B.D. 588, 607:

> "Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law: but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

14. *Watson v M'Ewan* extended the doctrine to cover prior statements made to the party calling the witness or to that party's lawyers. The Lord Chancellor said at p. 487:

> "It appears to me that the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them - that is, to the solicitor or writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply - that from time to time in these various efforts

> which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box." If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me tomorrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which *is a step towards and is part of the administration of justice* - namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony." I add the emphasis.

15. Whilst that much may be well-established, it is less clear what protection is given where the maker of the statement is never required to reduce it to writing or to give evidence in a court of law or tribunal exercising equivalent functions. It may be surprising that the matter has not yet arisen for authoritative determination.

16. An early authority is *Shufflebottom v Allday* (1857) 5 W.R. 315. There the defendant had been robbed and gave a description of the robber to a constable who later arrested the plaintiff. Seeing him in custody, the defendant said, "That is the man". After having been remanded in custody for two days, the plaintiff was then acquitted because the defendant failed to appear at his trial. The defendant then procured a new warrant to be issued for the apprehension of the plaintiff on the same charge. The plaintiff was duly brought before the magistrates but the defendant again failed to appear and the plaintiff was again discharged. Undeterred the defendant issued a third warrant for the plaintiff's arrest, but there appears to have been some agreement not to proceed. The plaintiff brought an action for false imprisonment, slander and malicious prosecution and succeeded at the trial, the trial judge holding that what the defendant said to the constable was not privileged. Pollock C.B. was of the opinion that the verdict on the second count (slander) should be entered for the defendant, saying:

> "This case differs entirely from that which was cited, *Toogood v Spyring*, where the person to whom the defendant stated he had been robbed by the plaintiff was a perfect stranger to the transaction, and there was no duty or authority for communicating the party's suspicions to him. The defendant having been robbed, had a perfect right to say, acting on his

> belief, that the person in custody was the man. If he had sought to load him with obloquy, as for example, if he had said that he had been robbed by him on other occasions, that would have been merely gratuitous, and no privilege would have applied to it."

Martin B. was also of the opinion that the occasion was privileged:

> "The statement was made to an officer of the law, and was one the defendant was entitled to make. In *Toogood v Spyring* Park, B., said that "If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within narrow limits.""

17. I confess I am far from certain whether this should be seen as a case dealing with qualified privilege or absolute privilege. The language is clearly more appropriate to the former yet there was apparently no consideration given to the possibility that the initial complaint to the constable was made maliciously, malice being asserted and established in connection with the claim for malicious prosecution. There was ample evidence there of the defendant's malice in maintaining the charges despite the plaintiff having been exonerated by other witnesses to the robbery. There was also evidence that the defendant's motive in seeking to convict the plaintiff arose from his desire to get his hands on money he knew the plaintiff could pay. It is not at all clear to me whether absolute privilege was even argued and I do not understand why this case should be seen to be an authority for the proposition that such an initial complaint to the constable is not absolutely privileged. The judgments are wholly silent on that point.

18. The next relevant case is *Lincoln v Daniels* [1962] 1 Q.B. 237 where a complaint was made to the Bar Council as opposed to his Inn of Court about professional misconduct of a barrister who then sued for the defamatory remarks alleged to be published in that communication. Devlin L.J. held at p. 263:

> "It is not at all easy to determine the scope and extent of the principle in *Watson v M'Ewan*. I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do in order to protect those who are to participate in the proceedings from a flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for him to do so, as it is practically necessary for a litigant to engage a solicitor. The sense of Lord Halsbury's speech is that the extension of the privilege to proofs and pre-cognition is practically necessary for the administration of justice; without it, in his view, no witness could be called. I do not think that the same degree of necessity can be said to attach to the functions of the Bar Council in relation to the Inns of Court."

19. In *Marriman v Vibert* [1963] 1 Q.B. 234, a conspiracy case, Sellers L.J. held at p. 535:

> "Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence given before the court and in the preparation of the evidence which is to be so given."

The Court of Appeal expressly approved the dictum of the trial judge, Salmon J.:

> "This immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled and possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation."

20. The question of immunity was again explored in *Evans v London Hospital Medical College* [1981] 1 W.L.R. 184. This was a claim for damages for negligence. The plaintiff alleged that as a result of post mortem and analysis results prepared by the defendants, she had been arrested and charged with the murder of her five month old son by morphine poisoning. After further investigation by toxicologists on her behalf the prosecution had offered no evidence at the trial and she had been acquitted. Her claim was struck out by the master on the ground that the defendants were at all times acting in the course of preparing evidence for a possible prosecution and for that reason were immune from any civil proceedings arising from such acts. Drake J. gave this as the test at p. 192:

> "The protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated."

21. *Hasselblad (G.B. Ltd) v Orbison* [1985] Q.B. 475 is the next case in the developing jurisprudence. In the course of proceedings brought by the European Commission against Hasselblad, Mr Orbison wrote a letter to the Commission upon which the appellant then sued for damages for libel. Sir John Donaldson M.R. held at p. 494:

> "The first question which arises is whether this letter is to be regarded as sufficiently closely connected to the process of giving evidence for it to be necessary to extend absolute privilege to it, assuming always that absolute privilege would attach to evidence to the like effect given to the Commission."

He answered that question affirmatively, but concluded that because the Commission was not acting in a manner similar to a court of justice, that privilege could not be claimed. Nevertheless, the public interest in ensuring that the Commission should not be frustrated in the exercise of its functions overrode the public interest that Hasselblad was entitled to have the allegation that its private rights had been infringed

investigated by the court. In the course of that discussion the Master of the Rolls said at p. 503 (and the remarks must be obiter):

> "Mr Burton [counsel for the appellant] takes the point that an informer in England has only the benefit of qualified privilege: *Shufflebottom v Allday* (1857) 5 W.R. 315. Bringing the matter more up to date and relating it to an inquiry similar to that undertaken by the Commission, Mr Burton submits, rightly, that if Mr Orbison's letter had been addressed to the Director General of the Fair Trading, he could have been sued for libel and would have had to be content with the defence of qualified privilege."

22. In *Daniels v Griffiths* [1998] E.M.L.R. 488, the plaintiff sued for damages for slander based on information given to the police by the defendant. The action was struck out by the judge as being an abuse of the process of the court as it was held to be vexatious. In the judgment of Sir Brian Neill, with whom Hirst L.J. agreed, both being hugely experienced in this field,:

> "It is clear … that … the defendant made a statement to the police to the effect that she was being harassed by the plaintiff and that a witness statement was taken from her. The contents of that witness statement 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."

23. The next case of high authority is *Taylor v Serious Fraud Office* [1999] 2 A.C. 177. The S.F.O. was investigating the activities of a Mr Fuller and a Mr Deacon, alleged to have committed a serious and complex fraud. The money passed through the hands of the plaintiff and a company with which he was connected. Investigating lawyers in the S.F.O. wrote to the Attorney General of the Isle of Man requesting his assistance and also spoke to and made a note of the conversation with the Law Society on both occasions suggesting that the plaintiff was a party to the fraud. Fuller and Deacon were duly indicted and the letter and the attendance note were disclosed to them by the S.F.O. as unused material. The plaintiff was shown this when he was asked by Fuller's solicitors to give evidence for Fuller and he began an action for defamation based on the contents of the letter and the file note. His claim was struck out. In Lord Hoffmann's opinion expressed at p. 214:

> "Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.
>
> Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the

> person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but nonetheless valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial."

He dealt with the position of investigators and continued at p. 215:

> "I therefore agree with the test proposed by Drake J. in *Evans v. London Hospital Medical College (University of London)* [1981] 1 W.L.R. 184, 192:
>
> > "the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."
>
> This formulation excludes statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels - but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other."

24. Lord Hope added this interesting observation at p. 219:

> "Under the existing rules all those who participate in a criminal investigation in good faith are entitled to claim the protection of qualified privilege. But that is an imperfect protection, because qualified privilege requires to be pleaded and established as a defence. No action can be struck out on the ground of qualified privilege. The requirement therefore is to extend to *informants*, investigators and prosecutors whose statements are revealed by the operation of the disclosure rules the benefit of the absolute privilege in respect of the statements made which is already accorded to witnesses and potential witnesses," (emphasis added).

At p. 221 Lord Hutton added:

> "Therefore, just as the preliminary examination of a witness by a party's solicitor out of court is a step towards the administration of justice which requires to be protected, I consider that the investigation of a suspected crime is a step

> towards the administration of justice so that the protection of absolute privilege should be given to those who, in the course of their public duty in investigating a suspected crime, speak or write to persons who may be able to provide relevant information, *and to such persons in respect of what they say or write* to the investigators …" (again with the emphasis added by me).

25. In *Mahon v Rahn (No. 2)* [2000] 1 W.L.R. 2150, the defendant's lawyers wrote to a financial services regulatory body investigating the possible fraudulent conduct of the plaintiff's stockbroking firm. The letter was passed to the Serious Fraud Office who later brought criminal proceedings against the plaintiffs and the letter was disclosed to them. After their acquittal they brought a claim for libel based on the defamatory matter in that letter. The Court of Appeal held that the letter was published on an occasion of absolute privilege but in the course of his long judgment Brooke L.J. said this:

> "178. Until quite recently problems like this seldom troubled the English courts. There was a long-established rule that an informer was only protected by qualified privilege (see *Shufflebottom v. Allday* (1857) 28 L.T.(O.S.) 292), but it would be likely to be a rare case in which an aggrieved defendant would be able to adduce the evidence he or she needed in order to sue an informer for defamation. …
>
> 195. I must make it clear that I am not addressing the case, which the S.F.A. probably had in mind, in which some malicious informant spontaneously proffers to an S.R.O. information about an investment adviser which is untrue and defamatory, and the claimant can prove his case in a libel action without the need to rely on documents disclosed in civil or criminal proceedings. Whether any extension of absolute privilege needs to be made in such a case will have to be decided on some other occasion."

This is it.

26. In *Buckley v Dalziel* [2007] EWHC 1025 there was a heated dispute between neighbours, culminating in some generous or perhaps over-generous pruning by the claimant of the defendant's trees and shrubs on the boundaries. The defendants reported the matter to the police. Both Mr and Mrs Dalziel made oral complaints to the officer who attended upon them. He later returned and Mr Dalziel made a written statement of his complaint. In an action for damages for libel based upon that written statement, the claim against Mr Dalziel was dismissed because, per Eady J. at paragraph 21:

> "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."

It was not necessary for the judge to rule upon whether the oral complaint by Mrs Dalziel was also protected because that claim for slander was dismissed because it had been brought out of time and Mrs Dalziel succeeded on that limitation point.

27. In *Alexandrovic v Khan* [2008] EWHC 594 (QB) Pitchford J. found the reasoning in *Buckley v Dalziel* and of Richard Parkes Q.C. in this case to be "compelling" and he too held the public policy priority to be that those who have complaints should be free to make them without fear that they will be challenged in later proceedings even if those who are malicious obtain the benefit of such protection, since the primary interest to be protected is the due administration of criminal justice.

Malicious Prosecution

28. The leading case here is *Martin v Watson* [1996] 1 A.C. 74. Following a complaint of indecent exposure made by the defendant against the plaintiff, a detective constable laid information before the justices who issued a warrant for the arrest of the plaintiff. At the hearing in the magistrates' court, however, the prosecution offered no evidence and the charge was dismissed. The plaintiff brought his claim against the defendant in the county court for malicious prosecution. In this tort the unlawful act is committed by the prosecutor and the question at issue was, therefore, whether or not the defendant was properly to be regarded, in all the circumstances, as having set the law in motion against the plaintiff. It was held that she had. A "powerful argument" was mounted on behalf of the defendant that a decision against her would tend to discourage members of the public from bringing criminal activities to the notice of the police, lest they should find themselves harassed by actions of malicious prosecution in the event that the alleged perpetrator of the offence were acquitted. Lord Keith of Kinkel observed at p. 88:

> "Analogies were sought to be drawn with the immunity afforded in respect of evidence given in a court of law, which extends also to statements made to solicitors engaged in preparation for pending proceedings: *Watson v M'Ewan* … No such analogy is, however, helpful. The essential feature of malicious prosecution is an abuse of the process of the court. If that has occurred it is immaterial that the abuse has involved giving evidence in a court of law. That was held in *Roy v Prior* [1971] A.C. 470 in relation to an action for malicious arrest. …
>
> Similar considerations apply to statements made to the police under circumstances where the maker falls to be regarded as having in substance procured the prosecution. There is no way of testing the truthfulness of such statements before the prosecution is brought. To deny any remedy to a person whose liberty has been interfered with as a result of unfounded and malicious accusations in such circumstances would constitute a serious denial of justice."

29. The matter was debated in *Taylor v Serious Fraud Office*. Lord Hoffmann said at p. 215:

> "… the immunity does not apply to actions for malicious prosecution where the cause of action consists in abusing legal process by maliciously and without reasonable cause setting the law in motion against the plaintiff. It does not matter that an essential step in setting the law in motion was a statement made by the defendant to a prosecuting authority or even the court: see *Roy v Prior* [1971] A.C. 470.
>
> Actions for defamation and for conspiracy to give false evidence plainly fall within the policy of the immunity and actions for malicious prosecution fall outside it."

Lord Hope of Craighead said at p. 219:

> "Such material [material revealed by the prosecution] may however still be actionable on other grounds where malice and lack of reasonable and probable cause can be established. 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."

Absolute immunity and human rights

30. This question received some consideration in Strasbourg in *A v United Kingdom* (2003) 36 E.H.R.R. 51, a case concerning the absolute immunity in respect of statements made by a Member of Parliament in Parliament. Dealing with an alleged violation of Article 6 of the Convention, the court acknowledged in paragraph 74 that the Contracting States enjoy a certain margin of appreciation though the limitations must not restrict or reduce access to a court in such a way or to such an extent that the very essence of the right is impaired. The court had first to examine whether the limitation pursued a legitimate aim and the court concluded:

> "77. … the parliamentary immunity enjoyed by the M.P. in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary."

As for proportionality the court held:

> "78. … In this regard the court notes that the immunity concerned was absolute in nature and applied to both criminal

> and civil proceedings. The court agrees with the applicant's submission that the broader the immunity, the more compelling must be its justification in order that it can be said to be compatible with the Convention. However, it recalls its analysis in the above-mentioned Fayed case as followed by the Commission in the Young case, to the effect that, when examining the proportionality of an immunity, its absolute nature cannot be decisive."

The parliamentary immunity was not regarded as imposing a disproportionate restriction on the right of access to the court. As for the alleged violation of Article 8, the court held in paragraph 102 that the central issues of legitimate aim and proportionality that arise in relation to the applicant's Article 8 complaint were the same as those arising in relation to her Article 6(1) complaint. Accordingly there was no violation of Article 8.

31. In *Buckley v Dalziel* Eady J. stated that he could see no basis on which he could or should hold that such a recent decision of the House of Lords as *Taylor* was incompatible with the European Convention.

Conclusions

32. The authorities recited above have made it clear that the justification for absolute immunity from suit will depend upon the necessity for the due administration of criminal justice that complaints of alleged criminal conduct should always be capable of being made to the police free from fear that the person accused will subsequently involve the complainant in costly litigation. There is a countervailing public interest in play which is that no-one should have his or her reputation traduced, certainly not without affording him or her a remedy to redress the wrong. A balance has to be struck between these competing demands: is it necessary to clothe the occasion with absolute privilege in which event even the malicious complainant will escape being held to account, or is it enough to allow only the genuine complainant a defence? Put it another way: is it necessary to protect from vexatious litigation those persons making complaint of criminal activity even at the cost of sometimes granting that impunity to malicious and untruthful informants? It is not an easy balance to strike. We must be slow to extend the ambit of immunity.

33. Even if, for I have my doubts about it, *Shufflebottom* is seen as an authority that the informant is only protected by qualified privilege, nevertheless there are powerful modern authorities – *Daniels v Griffiths* and *Buckley v Dalziel* – expressing the contrary view. Since public policy provides the answer, it is the public policy considerations of the 21st century not those of the 19th century which prevail. In any event *Mahon v Rahn* has left the question open.

34. In my judgment the answer is to be found in *Taylor*. That establishes that immunity for out of court statements is not confined to persons who are subsequently called as witnesses. The policy being to be enable people to speak freely, without inhibition and without fear of being sued, the person in question must know at the time he speaks whether or not the immunity will attach. Because society expects that criminal activity will be reported and when reported investigated and, when appropriate, prosecuted, all those who participate in a criminal investigation are entitled to the

benefit of absolute privilege in respect of the statements which they make. That applies whether they are informants, investigators, or prosecutors. The answer to the argument that immunity should not give protection to a malicious informer was tellingly given by Lord Simon of Glaisdale in *D. v National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, 233:

> "I cannot leave this particular class of relevant evidence withheld from the court" [the identity of the informant who gave information of ill treatment of children to the N.S.P.C.C.] "without noting, in view of an argument for the respondent, that the rule can operate to the advantage of the untruthful or malicious or revengeful or self-interested or even demented police informant as much as one who brings information from a high-minded sense of civic duty. Experience seems to have shown that though the resulting immunity from disclosure can be abused the balance of public interest lies in generally respecting it."

35. The test proposed by Drake J. in *Evans v London Hospital Medical College* received endorsement from their Lordships in *Taylor*. Thus the question is whether the oral statement made by the defendant and her subsequent written statement can each fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated.

36. The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. Making an oral complaint is the first step in that process of investigation. In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack. There is no logic in conferring immunity at the end of the process but not from the very beginning of the process. Mr Craig's distinction between instigation and investigation is flawed accordingly. In my judgment, any inhibition on the freedom to complain will seriously erode the rigours of the criminal justice system and will be contrary to the public interest. In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged.

37. It is not illogical, as Mr Craig contends, to give immunity for defamatory statements yet require malice to be established in order to succeed in a claim for malicious prosecution. These are different torts. They protect different public interests – the wider administration of justice in the case of the making of defamatory statements and the narrower need to prevent abuse of the process of the court in the case of malicious prosecution. The analogy between the two torts was rejected as unhelpful by Lord Keith in *Martin v Watson*.

38. The appeal of Article 8 to the European Convention on Human Rights is also misplaced. It is true that the Human Rights Act 1998 was enacted some ten days after their Lordships delivered their speeches in *Taylor* but it seems to me to be unrealistic to suggest that their Lordships were unaware of the implications of Parliament's

determination to give the Convention some statutory force. Article 8 did not seem to present their Lordships with any potential difficulty. In any event, I am quite satisfied that the public interest in the administration of justice does constitute a legitimate aim and the immunity does not constitute a disproportionate restriction on the right to respect for one's private life because the necessity to speak freely overrides the sanctity of a good reputation.

39. I would therefore uphold the deputy judge's careful and well-reasoned judgment and dismiss the appeal.

Lord Justice Sedley:

40. I agree with both judgments.

Lord Justice Stanley Burnton:

41. I agree with Ward LJ's conclusion and his reasons for dismissing this appeal. I add a few words of my own.

42. In my judgment, a number of inter-related matters have particular relevance to the issue raised on this appeal. First, at the present date the public interest in victims or witnesses of crime coming forward to the police is more pressing and more important than the protection of the reputation of the person accused of the crime. It would be very undesirable, for example, if victims of rape, particularly where the alleged perpetrator is a man with substantial resources, were to be deterred by the risk of defamation proceedings from complaining to the Police.

43. Secondly, particularly where the crime is alleged to have taken place in private, the protection afforded by qualified privilege is more apparent than real. If the alleged perpetrator alleges that the victim has lied and made up her allegation, the alleged lie, if established, may well be sufficient evidence of malice. Thus, in the present case, the Appellant contends that the fact that the Respondent's allegation is false is evidence of malice sufficient to overcome a defence of qualified privilege: he pleads, in paragraph 12 of his Amended Particulars of Claim, "The allegations were made by the Defendant maliciously, in that she knew that they were not true." The defence of qualified privilege in such a case does not protect against the risk of being sued, with the attendant costs of litigation, and in practice adds little to the defence of justification.

44. Thirdly, the distinction between the first report of an alleged crime and a statement made during its investigation is liable to be arbitrary. If the latter is protected, so should be the former. I respectfully agree with the statement of Eady J in *Buckley v Dalziel* cited at [26] above. A report to the police that a crime has been committed, without naming its alleged perpetrator, will normally not be defamatory of him or her, and therefore cannot be the subject of a defamation claim; and a subsequent statement to the police made by the person who made the first report, naming the perpetrator, will, it is common ground, be protected by absolute privilege. The same initial report, but naming the perpetrator, will be protected only by qualified privilege. A solicitor consulted by a victim or witness would advise that the client should not name the perpetrator until the police have opened a file on the alleged crime; once that has been

done, presumably, the complainant may make any allegation under the umbrella of absolute privilege.

45. Fourthly, I find it difficult to reconcile qualified privilege for the initial complaint to the police with the principle protecting the identity of informants to the police and certain other public authorities from disclosure in civil proceedings applied by the House of Lords in *Reg.* v. *Lewes Justices* [1973] A.C. 388 and *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1, [1978] AC 171. In *D* the plaintiff had made it clear that she wished to obtain the name of the informant in order to sue for defamation: see the submissions of Thomas Bingham QC, as he then was, at [1978] AC 181. Lord Hailsham said, at [1978] AC 222:

> The circumstantiality of the allegations was such that if, as I must now assume, they were in fact erroneous, it is difficult to reconcile them with good faith and a sound mind. It may, of course, be that at the trial, where, if it takes place, these questions may be canvassed, some perfectly innocent explanation may emerge. In the meantime, however, I make no assumption either as to the good or as to the bad faith of the informant. But, whether I am right or wrong, what is plain is that, if the appellant society's claim to withhold disclosure is upheld, the non-disclosure would serve to protect a malicious or reckless as well as a bona fide informant.

The effect of the decision of the House of Lords was to protect the informant against the claim for defamation, on the ground that the public interest required it. It was, it must be conceded, assumed that such a claim could be brought, and it was not suggested that it would be precluded by absolute privilege. However, why, I ask rhetorically, should the protection against such a claim depend on the adventitious circumstance that the person accused does not know the identity of the informant?

46. Lastly, the Appellant has a degree of vindication by virtue of the decision of the CPS that the evidence was insufficient to create a reasonable prospect of his conviction, and a man is considered to be innocent unless proved guilty. That must be sufficient for him.