Neutral Citation Number: [2007] EWHC 2501 (QB)

Case No: HQ068X00858

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2007

**Before** :

**RICHARD PARKES QC**
**(Sitting as a Deputy Judge of the Queen's Bench Division)**

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**Between :**

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| **Richard Westcott** | **Claimant** |
| **- and -** | |
| **Sarah Westcott** | **Defendant** |

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**Mr Ken Craig** (instructed by **John Stallard & Co**) for the Claimant
**Mr Nicholas O'Brien** (instructed by **BP Collins**) for the Defendant

Hearing dates: **10th October 2007**

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Judgment Approved by the court

**Richard Parkes QC :**

1. This is an application for the determination of a preliminary issue as to whether two publications complained of by the Claimant, one oral and one written, are protected by absolute privilege and/or immunity from suit. The order for the trial of the issue was made by Master Eyre, by consent, on the 26th July 2007.

2. The Claimant, Mr Richard Westcott, is the father-in-law of the Defendant, Dr Sarah Westcott. Mr Westcott is a Justice of the Peace who sits on, and on occasion chairs, the family panel at Worcester Magistrates' Court. The marriage between the Defendant and Edward Westcott, the Claimant's son, has broken down. They have a young son, Daniel. On the morning of Good Friday, 25th March 2005, the Defendant visited the Claimant and his wife at the Claimant's home, bringing Daniel, then a baby of six months. The Claimant's son, Edward, was also present. Following the visit, the Defendant made very serious allegations about the Claimant to the police. There is no dispute as to the words which she used. In summary, she telephoned the police that afternoon and told them that after an argument the Claimant, her father-in-law, had "flipped", hitting her and Daniel. She said that he had hit her at least seven times. Later the same day, the Defendant made a written statement to the police in which she repeated the allegations. She said that after she herself had lost her temper with Edward and shouted and sworn at him, the Claimant became very angry at her behaviour and lashed out at her several times hitting her upper arms. Shortly afterwards, she alleged, the Claimant "lashed out" again, hitting the Defendant's upper arms, in the course of which (unintentionally, she thought) he hit Daniel at least twice.

3. It is common ground that as a result of the Defendant making these allegations to the police, Worcester 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 member of the family panel at Worcester Magistrates' Court and 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 which 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 the 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 occasions 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 did happen at the Claimant's house that day.

7. It is very well established that no action will lie against a witness for words spoken as a witness, even though those words were malicious and irrelevant to the matters in issue. That rule is not designed for the benefit of malicious witnesses but is justified by the public benefit in ensuring that honest witnesses are not deterred from telling the truth by the fear of litigation: see for instance *Munster v Lamb* (1883) 11 QBD 588, 607, *per* Fry LJ. However, that privilege extends outside the courtroom. It applies also to statements made in affidavits and witness statements, and to the witness' oral account of events when his statement is being taken (*Watson v McEwan* [1905] AC 480).

8. The increased burden of disclosure which rests on the prosecution in criminal cases, and which gives rise to a duty to disclose not only the material on which the prosecution seeks to rely but also unused material which might be useful to the defence, has much increased the likelihood that witness statements made in the course of criminal investigations will be seen by defendants. The law has developed in response, so that it now provides immunity from suit for any statement which 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" (per Drake J, *Evans v London Hospital Medical College* [1981] 1 WLR 184 at 192). In stating the rationale of the immunity, Drake J cited the words of Salmon J at first instance in *Marrinan v Vibart* [1963] 1 QB 234 at 237, in a judgment later upheld by the Court of Appeal ([1963] 1 QB 582): "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". As Drake J observed in *Evans*, if immunity did not extend to statements made for the purpose of a possible action or prosecution, the immunity for evidence given in court and for statements made in preparation for a hearing could easily be outflanked (pp191-2).

9. Drake J's test in *Evans* was approved by the House of Lords in *Taylor v Serious Fraud Office* [1999] 2 AC 177, where the plaintiffs sued on statements (disclosed in criminal proceedings) which had been made by SFO staff, and by Law Society staff contacted by the SFO for assistance, during an investigation into the plaintiffs' allegedly criminal activities. Lord Hoffmann, approaching the matter on the basis that the test for any extension of absolute privilege was a strict one that required necessity to be shown, but that the decision as to whether immunity was necessary for the administration of justice must form part of a coherent principle, said this (214e-g):

> "..... 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 none the less 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 trial."

10. Approving Drake J's formulation of the test in *Evans*, Lord Hoffmann stated that it excluded statements which were wholly extraneous to the investigation - irrelevant and gratuitous libels - but applied equally to statements made by persons assisting the inquiry to investigators and to statements by investigators to those persons or each other.

11. However, given that the policy of the immunity was to encourage freedom of expression, it was limited to actions in which the alleged statement constituted the cause of action. On that basis, the immunity did not apply to actions for

malicious prosecution, where the cause of action consisted in abusing legal process by maliciously and without reasonable cause setting the law in motion against the plaintiff, even though an essential step in setting the law in motion was a statement made by the defendant to the prosecuting authority (*ibid.*, 215d). Similarly, Lord Hope saw the public interest as requiring that a remedy in malicious prosecution should remain available, but regarded that as a quite different matter, because it was the malicious abuse of process, not the making of the statement, which provided the cause of action (*ibid.*, 220g-h).

12. Until recently, the position of the person (whether victim or mere witness) who comes forward to inform the police of the commission of a crime does not seem to have arisen directly for decision. Indeed, in *Mahon v Rahn (No.2)* [2000] 1 WLR 2150 at 2190h-2191a, Brooke LJ stated that the question of whether absolute privilege should be extended to cover the case of the malicious informant who spontaneously offers information, and does not have to rely to prove his case on documents disclosed in civil or criminal proceedings, would have to be decided on another occasion. In *Gatley on Libel and Slander*, 10th ed., para 13.12, it is said that informers have traditionally been protected only by qualified privilege, and *Shufflebottom v Allday* (1857) WR 315 is cited, where it appears that qualified privilege was held to protect a complaint of theft to a policeman. That decision was assumed to be correct by the Court of Appeal in *Hasselblad Ltd v Orbinson* [1985] QB 475 at 503, but the question was not argued, not being in point on the appeal. However, there would have been no question in 1857 of an argument for absolute privilege being advanced for a complaint to the police. It was not, after all, until 1905 that protection was extended to the statements made by a witness to a solicitor in preparation for giving evidence in the witness box, and moreover modern policy considerations are far removed from those prevailing in the mid-nineteenth century. That being so, I do not find the decision in *Shufflebottom* of any practical assistance in determining this issue.

13. However, in *Daniels v Griffiths* [1998] EMLR 489 at 501 Sir Brian Neill (giving the leading judgment, with which Hirst and Swinton Thomas LJJ agreed) expressed the view that a defendant's statement to the police complaining of harassment by the plaintiff, together with the details of any previous discussions leading to the taking of the witness statement, appeared to be covered by the rule as to immunity (in other words, protected by absolute privilege: in this context there is no meaningful distinction to be made between the two), but the court refused to strike out a slander claim based on the defendant's complaints to the police because the documentary evidence was incomplete and the facts were not sufficiently clear to justify that course.

14. Most recently, Eady J had to consider the status of a witness statement made by a complainant to the police. In *Buckley v Dalziel* [2007] EWHC 1025 (QB), the defendants, Mr and Mrs Dalziel, reported the claimant, Mrs Buckley, to the police for pruning certain of their trees and bushes near the common boundary while they were away on holiday. Mrs Dalziel made number of

telephone calls to the police, which resulted in Mrs Buckley's slander claim. However, the slander claim was launched over 12 months after the cause of action arose, and Eady J refused to exercise his discretion under s32A, Limitation Act 1980 to disapply the statutory limitation period. That being so, the question of whether absolute privilege applied to the initial oral complaint did not need to be decided. However, the police responded to Mrs Dalziel's complaints by sending an officer round and taking a witness statement from her husband. Mrs Buckley sued - within the limitation period - on the alleged libel contained in the witness statement. The Dalziels applied for summary judgment on the ground that the witness statement was protected by absolute privilege or immunity from suit, so that the claim was bound to fail. The application succeeded. Eady J held that he should follow the guidance of the House of Lords in *Taylor v Serious Fraud Office* [1999] 2 AC 177 in giving priority to the need to protect those who provide evidence to police officers in the course of inquiries into possible wrongdoing. In his view, the public policy considerations applied with equal validity to those who are mere witnesses and to those who are initial complainants, and he found it difficult to draw a principled distinction between malicious witnesses and malicious complainants. He therefore found that the Mr Dalziel's communication to the police in his witness statement was protected by absolute privilege and immunity from suit.

15. Mr Ken Craig, for the Claimant, accepted that *Buckley v Dalziel* ran counter to his contention that the Defendant's written statement to the police should not be held to be absolutely privileged, but he submitted that the case was wrongly decided and should not be followed. As far as concerned the Defendant's initial oral complaint to the police, which he described as the more important part of Mr Westcott's claim, he submitted that the question of the status of such complaints to the police had not been decided by Eady J in *Buckley v Dalziel* and that there was no necessity for extending the scope of absolute privilege any further. He accepted that both publications were protected by qualified privilege, but insisted that Mr Westcott should not be prevented from vindicating his reputation, which would be the effect of a ruling that absolute privilege applied. For the Defendant, Mr Nicholas O'Brien's broad position was that *Buckley v Dalziel* was rightly decided and that there was no logical distinction to be made between the written statement made by a complainant to the police, and the prior oral complaint which gave rise to the statement.

16. Mr Craig's first submission was that there is a crucial difference between making a statement for the purpose of assisting in the investigation of crime, and making a statement (oral or written) for the purposes of instigating the investigation. He argued that Drake J's test in *Evans*, that the protection of absolute privilege applies only to a statement which 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 possible prosecution, could not be said to reach a statement made for the purpose of setting an investigation in motion. Both the original oral complaint made by the Defendant, and the written statement which followed it, were part of the instigating of the investigation, not of the

investigation as such. On his argument, the investigation begins after a written complaint is made, not after (and certainly not upon) the making of an initial oral complaint. He referred to the Criminal Procedure and Investigations Act 1996, s22(1), which provides that for the purposes of Part II of the Act a criminal investigation is an investigation conducted by police officers with a view to it being ascertained (a) whether a person should be charged with an offence and (b) whether a person charged with an offence is guilty of it. On that definition, he argued, it could not be said that either an initial oral complaint or a written statement was anything other than preparatory to an investigation. They are the steps that cause an investigation to be launched, but are not part of it.

17. Secondly, Mr Craig argued that Eady J had been wrong to find force in the argument advanced by counsel for the defendant in *Buckley* to the effect that there was no rational basis for any distinction between complainants and 'mere' witnesses, a distinction which, she had submitted, would undermine the policy underlying the decision in *Taylor* and discourage (in particular) the victims of rape, sexual assault and domestic violence from coming forward. He suggested that Eady J cannot have taken into account the similar argument raised before the House of Lords in *Martin v Watson* [1996] 1 AC 74, which was rejected by Lord Keith at 87G-88C. Had that argument and its authoritative rejection by the House of Lords been placed before Eady J, Mr Craig submitted, the judge would not have been persuaded that to distinguish between complainants and other witnesses would be likely to discourage victims of crime from coming forward. I should say at once that Mr Craig's argument is undermined by the fact that *Martin v Watson* was in fact cited to Eady J, although he did not mention the case in his judgment. Mr Craig argued that the public policy considerations which underlay the decision in *Taylor*, namely that the proper administration of justice requires that persons assisting the police with their inquiries should have the same inducement to speak freely (without fear of being sued, successfully or not) as those whose information subsequently forms the basis of evidence at trial, did not apply to a victim's initial complaint to the police, nor to the written witness statement which follows it.

18. Thirdly, Mr Craig argued that there was no logical reason for any distinction to be drawn between the liability of a complainant in malicious prosecution and in defamation. Why, he asked, should a malicious complainant to the police have immunity if the victim of the complaint is <u>not</u> prosecuted (so that there is no question of malicious prosecution) but lose that immunity if the victim of the complaint <u>is</u> prosecuted? The mischief was the same in both cases, and a genuine complainant who was not deterred by the prospect of a suit in malicious prosecution was unlikely to be deterred by the risk of a claim in defamation.

19. Mr Craig's fourth submission was founded on the Claimant's rights under Article 8 of the European Convention on Human Rights and Fundamental

Freedoms, brought into English law by the Human Rights Act 1998. He submits that the Claimant's Article 8 rights include a right to protect his reputation. That is no longer controversial: see for instance *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] QB 972 at [68]. Article 8(2) requires that there be no interference by a public authority (which includes a court) with the exercise of Article 8 rights except such as is necessary in a democratic society for (*inter alia*) the prevention of disorder or crime or for the protection of the rights and freedoms of others. Any extension of the ambit of absolute privilege to complaints to the police, whether an initial oral complaint or a written witness statement, would amount to an interference with the Claimant's right to protect his reputation, because he would be left without any possibility of vindicating his reputation in defamation; and since s6(1) makes it unlawful for a court to act in a way which is incompatible with a Convention right, the court should only sanction an extension of absolute privilege in so far as the test of necessity in Article 8(2) is satisfied. That could not be the case here, he submitted, because there could be no necessity for allowing absolute privilege in defamation when there is no necessity for a similar privilege in malicious prosecution. In other words, the House of Lords in *Taylor v Serious Fraud Office* was considering where the policy balance should be struck before the passing of the Human Rights Act 1998; but that balance should now be struck differently, to give greater weight to Article 8 considerations.

20. Finally, Mr Craig submitted that the same arguments applied with still greater force to the Defendant's initial oral complaint to the police than they did to the subsequent written witness statement, and that there was no authority directly on the point. He argued that Eady J could have decided in *Buckley* that Mrs Dalziel's initial oral complaints to the police were absolutely privileged, but chose not to do so. I do not think that is right: the fact is that it was not necessary for the judge to decide the point, because those complaints were statute-barred and he declined to disapply the limitation period.

21. I will try to state my conclusions first on the status of the Defendant's witness statement, and then consider the oral complaint which she first made to the police.

22. I have great difficulty in accepting the argument that the making of a written witness statement to the police, following an initial oral complaint, is not part of the process of investigating the possible crime which the prior oral complaint disclosed. It seems to me that the process of taking a witness statement is an essential early step in an embryonic investigation, and it is the product of a police decision to take that step. If so, it falls within the scope of the formulation stated by Drake J in *Evans v London Hospital Medical College*.

23. Furthermore, it is not easy to construct a rational distinction between the position of a complainant, visited by police for the purposes of giving a written statement,

and that of any other witness invited to give a statement. If a witness giving information to the police is protected by absolute privilege, even if his or her evidence is not admissible, or of limited value, as *Taylor v Serious Fraud Office* shows, it is not clear to me why a complainant - who will usually be both witness and alleged victim - should not also receive the same protection. It seems to me that to deny that protection to a complainant would be to undermine the policy underlying the decision in *Taylor*, namely that 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. If complainants are not to have the protection of absolute privilege, that would tend to deter them (including the victims of sexual or domestic violence) from coming forward and speaking freely. I am conscious that similar arguments were rejected by Lord Keith in *Martin v Watson* [1996] 1 AC 74 at 87G-88C, but those arguments were advanced in a case of malicious prosecution, where (as Lord Keith himself observed at 88D) analogies with defamation are unhelpful, and where, given the ordeal which is likely to be suffered by a person who has been the subject of a malicious prosecution and the importance of the fact that in that case the process of the court is abused, the courts have struck the balance between the protection of complainants and the interests of the victim of malice somewhat differently.

24. Of course, Mr Craig argues that there is every reason to distinguish in this context between complainants and witnesses, because while other witnesses, as *Taylor* shows, have complete immunity, the law does not give the same immunity to complainants, who may be sued for malicious prosecution. That being so, given that the complainant whose complaint is taken seriously may be exposed to liability for malicious prosecution, why should the complainant whose complaint does not even lead to a decision to prosecute be shielded from all liability? Both of them, after all, are *ex hypothesi* malicious, and the distinction between them turns on a decision made by the police or CPS. I see the force of this argument, but I think that part of the answer is to be found in the speech of Lord Hoffmann in *Taylor* at p215C-D. The policy of the immunity in defamation is to encourage freedom of expression, and for that reason it is limited to actions in which the alleged statement constitutes the cause of action. By contrast, 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 claimant. The same point is made by Lord Hope at p219H, and by Lord Keith in *Martin v Watson* [1996] 1 AC 74 at 88D. There is a related ground for the distinction, which lies in the widely differing likely consequences of each tort, as Eady J suggested in *Buckley v Dalziel* at [21]-[23]. A complaint to the police, even if malicious, is unlikely to be published other than to police and, at the most, other relevant authorities (here, the local Social Services), while a malicious complaint which results in a prosecution will have very much graver consequences for the victim, who may have to endure the humiliation of public trial. Moreover, the degree of exposure faced by a complainant to the risk of an action in malicious falsehood, even if a prosecution does go ahead, can be exaggerated. In most cases the complainant will not be the prosecutor, and the complainant will only be regarded as the prosecutor where the

circumstances are such that the facts relating to the alleged crime are exclusively within the complainant's knowledge, so that it is virtually impossible for the police officer to exercise any independent discretion or judgment in the matter, and where the conduct of the complainant is such as to make it virtually inevitable that a prosecution will result from the complaint (see *Clerk & Lindsell on Torts*, 19th ed., para.16.12).

25. I am of course sympathetic in principle to the argument based on the Claimant's right under Article 8 of the European Convention to protect his reputation, a right which may be negated if the Defendant's complaint is held to be protected by absolute privilege. However, I am not persuaded by it, for two reasons. Firstly, the House of Lords decided in *Taylor v Serious Fraud Office* that the public interest required that the protection of those who provide evidence to the police should be given a higher priority than the reputation rights of those who are defamed in consequence. Like Eady J in *Buckley v Dalziel*, I am not prepared to hold that the balance which the House of Lords decided was appropriate in *Taylor* should be reconsidered in the light of the enactment of the Human Rights Act 1998. The speeches of their Lordships were delivered a matter of days before the Act received Royal Assent, and the terms of the European Convention will have been very much in their minds. Moreover, like Eady J, I also bear in mind the words of Lord Bingham in *Kay v Lambeth Borough Council* [2006] 2 AC 465 at [40]-[45] about the importance of adhering to our domestic rule of precedent, given in particular the generous margin of appreciation accorded by Strasbourg. Secondly, it seems to me that in the present case Article 8 considerations add nothing, since 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.

26. I should add that although I did not find Mr Craig's argument by reference to the definition of a criminal investigation at s22 of the Criminal Procedure and Investigations Act 1996 particularly helpful, since it is no more than a definition for the limited purposes of that Act, it seems to me that when police attend to take a witness statement from a complainant who has previously made an oral complaint, that can fairly be described as part of an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence. As Mr O'Brien points out, that conclusion is the stronger when one considers s23, which provides that the Secretary of State shall prepare a code of practice containing provisions designed to secure that (inter alia) information obtained in the course of a criminal investigation which may be relevant to the investigation is recorded. It is hardly conceivable that a witness statement (or, for that matter, a complainant's first oral complaint to police) would not fall within the scope of that rubric.

27. In short, I can find no rational basis to distinguish between the position of a complainant who provides a witness statement to the police and the position of any other witness who does the same, and I therefore respectfully agree with the

reasoning and conclusions of Eady J in *Buckley v Dalziel*, and conclude, as he did, that I should adhere to the balance struck by the House of Lords in *Taylor v Serious Fraud Office* and give priority to the need to protect those who give evidence to the police and to encourage them to speak freely without the fear of being sued in defamation for doing so. I therefore hold that the Defendant's written statement to the police is protected by absolute privilege and immunity from suit.

28. There remains the question of the Defendant's original oral complaint to the police, which Mr Craig understandably put at the front of his case. In my judgment this can be dealt with shortly. If it is right, as I have held, that the Defendant's written statement is protected by absolute privilege, then it seems to me to follow that the oral complaint which precedes it must be protected also. 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.

29. There is a close analogy here with the reasoning which led the House of Lords in *Watson v McEwan* [1905] AC480 to extend privilege for witnesses beyond evidence given in the witness box to statements made to a solicitor preparing the case for trial. As the Earl of Halsbury said at p487:

> "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 to-morrow 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."

30. The same concern to prevent a flank attack was expressed by Devlin LJ in *Lincoln v Daniels* [1962] 1 QB 237 at 260, and by Drake J in *Evans v London Hospital* [1981] 1 WLR 184 at 191H, where he observed, in the context of immunity for statements given by witnesses before the start of a prosecution, that if immunity did not extend to such statements it would mean that the immunity attaching to the giving of evidence in court or the formal statements made in preparation for the court hearing could easily be outflanked and rendered of little use.

31. Moreover, it seems to me, as it did to Eady J in *Buckley v Dalziel* at [17], that any discussions between complainant and police which precede the written witness statement are in any case embraced within Drake J's formulation "the process of investigating a crime or possible crime", and in this connection I draw some support from the views of the Court of Appeal in *Daniels v Griffths* [1998] EMLR 488, 501.

32. In the result, I conclude that the Defendant's oral complaint to the police is also protected by absolute privilege and immunity from suit, and it follows that the claim must be struck out.