

SCOTLAND / JUDGMENT

Karling v Purdue [2004] ScotCS 221 (29 September 2004)

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[2004] ScotCS 221 [New search] [Help] Karling v Purdue [2004] ScotCS 221 (29 September 2004)
OUTER HOUSE, COURT OF SESSION A102/03 OPINION OF J GORDON REID Q. C., F. F. I.
Arb. in the cause RICHARD WILHELM KARLING (AP) Pursuer; against DR BASIL NIGEL
PURDUE Defender:

Pursuer: MacAulay Q. C., Young; Balfour & Manson Defender: Ferguson Q. C., MacGregor;
Dundas & Wilson, C. S. 29 September 2004

Introduction

- [1] This Procedure Roll discussion, heard on 24 th and 25 th June and 5 th and 6 th July 2004, concerns the question of immunity from suit of an expert engaged by the pursuer in relation to the charge of murder, of which the pursuer was subsequently convicted in 1995. The pursuer, whose conviction was eventually quashed on appeal, sues the expert for damages for breach of contract and fault and negligence in the following circumstances. Factual Background [2] For the purposes of the Procedure Roll discussion the pursuer's averments are assumed to be true. In summary, his case on record is that in 1995 he was charged with the murder of a woman on 27 th June 1995. A Post Mortem examination was carried out by the Crown on 30 th June 1995. The pursuer was arrested on suspicion of murder. His solicitors instructed the defender to carry out a post mortem examination which he did on or about 22 nd August 1995, and to comment on the likely cause of death. He was engaged to advise the pursuer's defence team on the forensic evidence. He produced a written report on or about 3 rd October 1995 and in a separate part he attached his conclusions. The report and conclusions were not favourable to the pursuer's position. The defender stated that the deceased almost certainly died of suffocation, which was consistent with the Crown post

mortem report. Further reports were prepared for the Crown in October 1995. Following a trial, in which the defender was called to give evidence on behalf of the Crown, the pursuer was, on 19 th December 1995, convicted of murder. An appeal was refused on 13 th February 1997. However, in a further appeal, additional evidence was allowed to be led. The additional scientific evidence was highly critical of the original Crown post mortem and concluded that there was no scientific evidence on which to base the conclusion that the deceased had been suffocated. This led to the quashing of the pursuer's conviction on 16 th May 2001. Duties [3] The pursuer then avers in article 7, page 15E-16A of Condescendence inter alia that:- "The pursuer has suffered loss and damage as a consequence of breach of contract on the part of the defender. The defender was employed on behalf of the pursuer to undertake a post mortem examination and to advise the pursuer's defence team on the forensic evidence. In carrying out these instructions, the defender required to advise whether the pathological evidence enabled a cause of death to be established with any degree of certainty. The defender required to advise on whether further investigations were appropriate to ascertain or confirm the likely cause of death" [4] The pursuer then makes various averments specifying particular breaches of the defender's implied duties of skill and care. At page 16C-D the pursuer avers that:- "It was his duty to advise of other potential causes of death including epilepsy. It was his duty to emphasise the lack of any pathological signs of suffocation. It was his duty to advise that the toxicology tests should be independently verified It was his duty to advise that further investigations were required.... ." [5] In article 8 of the Condescendence at pages 17D-18B of the Closed Record (as amended), the pursuer avers inter alia that:- Separatim, the pursuer has suffered loss and damage as a consequence of fault and negligence on the part of the defender. The defender knew that he was advising in relation to a criminal prosecution being brought against the pursuer. He knew or ought to have known that the pursuer's defence team would rely upon his evidence in relation to the forensic evidence led against the pursuer. He knew or ought to have known that the pursuer's defence team would rely upon the defender's advice in order to identify any further necessary investigations into aspects of the forensic evidence. In carrying out his instructions, he owed a duty of care to the pursuer. In carrying out these instructions, the defender required to advise whether the pathological evidence enabled a cause of death to be established with any degree of certainty. The defender required to advise on whether further investigations were appropriate to ascertain or confirm the likely cause of death." [6] The pursuer then makes various averments specifying particular breaches of the defender's implied duties of skill and care. These are essentially the same as those specified in detail in article 7 of the Condescendence. Loss [7] In the broadest of terms, it is asserted that had the defender performed his duties properly sufficient evidence would have been led which would have given the pursuer a substantial chance of an acquittal. Various heads of loss are then set forth which are said to justify the conclusion for damages of £75,000 plus interest. In particular, at page 20C-D the pursuer makes the following averments:- "The failure of the defender to recommend further toxicological investigations and to properly advise the pursuer's legal team in relation to the absence of reliable evidence of asphyxia prevented the pursuer's defence being properly presented to

the jury. Had the pursuer's defence been properly presented, there was a substantial chance that he would have been acquitted."

Submissions

- [8] Counsel for the defender invited me to sustain the defender's second plea-in-law ("The defender being immune from suit, the action should be dismissed"), which failing to allow a proof before answer leaving all pleas standing. Junior counsel submitted that as the defender prepared a post mortem report and opinion in his capacity as an expert witness, absolute immunity attaches to the defender both in terms of what is contained in that report and opinion, and alleged to have been negligently omitted. No liability attaches no matter how incompetently the defender carried out the post mortem examination or prepared his report. Both the report and the opinion or conclusions were prepared with a view to both forming part of the evidence to be given at the trial of the pursuer. [9] In support of these propositions, counsel cited the Scottish cases of *Watts v McEwan*
- (1905) 7F (HL) 109 ,at 110-112 , *McKie v Strathclyde Joint Police Board* 24/12/03, Lord Wheatley paras 15-17 , and *B v Burns* 1994 SLT 250 . The fact that an individual might give evidence was sufficient to attract immunity from suit. Counsel submitted that if a preliminary statement were given with malice and without probable cause then the immunity which would otherwise apply to such statements did not attach to them (*B v Burns* 1994 SLT 250 at 252F, 253H-I, *McKie* above paragraphs 9, 18 and 34 where malice was averred). [10] Counsel further submitted that *McKie* showed that there was no difference between the law of Scotland and England as to when and why immunity attaches to a witness; it also showed that the privilege attached to preliminary reports; if this were not the case the absolute privilege would be circumvented. Senior counsel observed that as it was accepted by the pursuer that the defender was a potential witness, that, on one view was sufficient for dismissal. At the very least the fact that the defender was a potential witness was a factor to be taken into account. [11] *Davie v Magistrates of Edinburgh* 1953 SC 34 at 40 and *The Ikarian Reefer* 1993 2 LLR 68 at 81 were cited as a reminder of the nature and function of an expert witness; it was submitted that it was clear from articles 8 and 9 of the *Condescence* that the defender was instructed to prepare a report with a view to giving evidence. The passage in the *Ikarian Reefer* was approved in *Stanton v Callaghan* 2000 1QB 75 where it was stressed that it was important not to gloss over what the responsibilities of an expert witness were at 107-8. [12] Junior counsel referred to a number of English authorities, namely *Marrinan v Vibart* 1963 1 QB 234 at 528 which, he submitted simply followed *Watson*, *Evans v London Hospital Medical College* 1981 1 WLR 184 at 189-191 (which concerned inaccurate post mortem reports and an action of damages for negligence) and the test deployed was whether the negligence arose during the course of the preparation of evidence; *Darker v Chief Constable of West Midlands Police Force* 2001 1 AC 435 458 where the test was preparation with a view to giving evidence); *Palmer v Durnford Ford* 1992 QB 483 (an action against an expert engineer) at 487-489 where the principal purpose test was deployed; here the pursuer avers that the defender ought to

have known that his evidence would be relied upon by the defence team, so the test is satisfied for immunity to be given; *X v Bedfordshire CC* 1995 2 AC 633 (psychiatric report in relation to place of safety order) at 754-5, which shows that immunity applies where what was done falls within the investigation and preparation of evidence in criminal proceedings; *Hughes v Lloyds Bank plc* 1998 PIQR 98 (medical report provided for negotiating with insurers) at 103, 105, 106 . which was therefore distinguishable on its facts; Evans was not criticised at all in Hughes; *Taylor v Director of Serious Fraud Office* 1999 2 AC 177 (action of defamation based on contents of file not forming part of fraud investigations) at 212, 214, 219, 220, 221; *Stanton v Callaghan* 2000 1 QB 75 (alleged negligence by expert engineer who modified original view when meeting defender's expert which led to settlement at substantially smaller sum than previously advised) at 85, 88-91, 95 98, 100-101, 103 - 8. Chadwick LJ's third proposition at page 100 ("the immunity does not extend to protect an expert who has been retained to advise as to the merits of a party's claim in litigation from a suit by the party by whom he has been retained in respect of that advice, notwithstanding that it was in contemplation at the time when the advice was given that the expert would be a witness at the trial if that litigation were to proceed.") was wrong and inconsistent with the views of the other members of the court and with *Darker* : on the present pleadings, it must be concluded that the defender was an expert for the purposes of litigation, and the work carried out by the defender was in preparation for that litigation; the post mortem report and opinion were intimately connected with the conduct of the case in court and cannot be divorced therefrom; the propositions contained in the judgement of Nourse LJ in *Stanton* was expressly adopted by counsel (page 109-110); *Darker* (action of damages in respect of fabrication of evidence by police) at 445-449, 452, 453-4; 456-461, 469, 471; the principles regarding the immunity of witnesses in connection with judicial proceedings should be of general application. The Scottish cases and *Darker* state that immunity covers witnesses in respect of anything they do or fail to do when what is done or omitted is with a view to forming part of the evidence to be given in judicial proceedings. The test set forth by Lord Clyde in *Darker* should be preferred to other dicta. Thus, the immunity covered the giving of evidence (the core immunity) and work preparatory to giving evidence or with a view to giving evidence. No analogy should be drawn with advocates (*Darker* per Lord Clyde at 456E). Advocates do not "give evidence fearlessly". Reference was made to Cane, *Tort Law and Economic Interests* 2 nd edition 1996, pages 228-230 . [13] Senior Counsel further submitted that the privilege of absolute immunity did not distinguish between prosecution and defence witnesses. It applied to all witnesses in criminal and civil proceedings, whatever the cause of action (*Darker* per Lord Clyde at page 456F). The reason was that the protection of witnesses was necessary for the administration of justice; this would not be served if protection depended upon whether the witnesses were assisting the prosecution or the defence. The policy underlying the immunity was that witnesses should give evidence fearlessly and that a multiplicity of actions in which the truth of evidence is repeatedly tried should be avoided. Senior counsel also drew attention to *Raiss v Palmano* 2001 LLR 341 (plaintiff sued expert where earlier litigation had collapsed following expert's cross examination; expert not

having the qualifications or experience on the basis of which his services were engaged), I think as an extreme example of the application of the principles of immunity from suit. He submitted that immunity applied to actions and omissions citing Stanton per Chadwick LJ at page 88 and Evans at page 190 . If the work is preparatory to court proceedings, it is within the protective circle of immunity (Darker at 458G per Lord Clyde , Hughes per Lord Bingham CJ [as he then was] at page 106). The courts had developed tests for ascertaining whether the work was preparatory to giving evidence or with a view to court proceedings. In Stanton Otton LJ referred to the "intimate connection" (at page 103). In the present case what the defender was asked to do would have affected the way the defence was to be run. What the defender did or was supposed to do was intimately connected with the conduct of the case as the pursuer's averments at page 16C-D of the pleadings demonstrate. The functional test set out in Darker was useful. Here, the defender's function was that of a potential witness. Nourse J's reference in Stanton at 2000 1 QB 109G-H to a substantial purpose test is to be preferred to a principal purpose test; there can be a sufficiently intimate connection when the purpose is substantial but not necessarily the principal purpose. Proximity is not the only touchstone of whether something done is preparatory to giving evidence. The stage of the proceedings in question is relevant but it was necessary to consider also the nature of the proceedings, what was done and why it was done. In the present case, the pursuer's averments show proximity between what was done and what was going to happen. The pursuer avers that the defence team were going to rely upon the defender's evidence. This was at the heart of the defence. The pursuer's averments made it clear that that what the defender did was so closely and intimately connected with the criminal proceedings that it must have been with a view to these proceedings. Had he proceeded as the pursuer averred he would have been a witness for the defence. Evans was correctly decided (see Darker at pp 449E-F, 466D-E, 471E-F ; X v Bedfordshire CC at page 755); the pursuer must fail unless they show that Evans was wrongly decided. The attempt to distinguish it by reference to the Criminal Justice Act 1967 is unsound as the case was decided on a wider basis. The fact that an expert may be engaged in a dual capacity (to advise, and to prepare to give evidence), a matter highlighted in Stanton does not mean immunity applies only to one part of the expert's evidence. Here, the fact that his report was in two parts shows that he was preparing to give evidence. It was difficult to make neat distinctions; to do so would undermine the need for a clear rule. [14] Counsel for the pursuer submitted, in relation to the pleadings, that they disclosed (at 9C-D) that, by attaching his conclusions separately, the defender was acknowledging that part of his report may have been for the pursuer's solicitors eyes only; this distinguished the giving of advice from the giving of evidence. Article 7 of the Condescendence specified various matters in respect of which the defender had a duty to advise. The averments at the beginning of article 8 of the Condescendence related to foreseeability and the delictual case. The averment at 17E referring to "evidence" should not be read narrowly and is intended to refer to advice. The thrust of the case is criticism of advice given at an early stage albeit that there were ongoing criminal proceedings. Averments founded upon by the defender in article 9 at page 20C-D related to causation to

show the link between the failure in duty and the loss claimed. [15] In relation to Taylor counsel for the pursuer referred to various passages in the speeches of Lord Hoffman (208, 212, & 213-5), Lord Hope of Craighead (218-9); the case concerned public officials and the investigations of prosecuting authorities which was a significant distinction; the decision arose because of the newly introduced disclosure procedures; this required an extension of the immunity principle; this case was of no real assistance. In relation to Darker counsel referred to Lord Hope of Craighead's speech at pages 446C-D, G, 447C, H, 448D-E, 449A,F,H; the speech of Lord Mackay of Clashfern at pages 450E-F, 451B, 452C-D; these passages showed that witness immunity was being dragged back to the preparation of evidence for court proceedings; the speech of Lord Cooke of Thorndon at pages 453D-E, 454C-D, F-H; the speech of Lord Clyde at 456H, 457B-C, 458C, and G, 459A, 460A-B, 461A&D. A functional test could be discerned in this case. In the present case, the defender's function was not to prepare a document which set out the evidence which he would give in Court because he was preparing his report at a time when the precise basis of the Crown's case was unclear and he did not know whether he was likely to give evidence on behalf of the accused. His function was to prepare a post mortem report and comment on the likely cause of death, and advise the pursuer through his legal team on any further investigations required in relation to the precise evidence. Reference was also made to the speech of Lord Hutton at pages 464F, 469E 471G. All the speeches emphasised the aim of the immunity principle, the need to justify it and that it should be pulled back to the giving of evidence or the immediate preparation to do so; the functions of a witness and the functions of an investigator are distinguished. In relation to Hall 2002 1 AC 615 (barrister's immunity removed in criminal cases by a majority and unanimously in relation to civil cases) reference was made to Lord Hoffman's speech at pages 678 C-D, 679B-C, ??685, 697, 698E, 707E; to the speech of Lord Hobhouse at 740H, 741B. An analogy could be drawn between an expert and an advocate. [16] In relation to the authorities considering experts, Counsel referred to *Palmer v Durnford Ford* 1992 QB 483 at 486, 488C, 489 ; *Hughes v Lloyds Bank plc* 1998 PIQR 98 , *Stanton v Callaghan* 2000 1 QB 75 . These cases were analysed in detail by junior counsel. From these cases counsel for the pursuer submitted that an expert was in a different position from a lay witness; he gave advice and evidence; there was no immunity in relation to such advice; the "intimate connection" test, which was taken from *Saif Ali v Sydney Mitchell & Co* 1980 AC 198 , should be seen as restrictive and should not be given a wider application than absolutely necessary. *Palmer* showed that the fact that litigation was in contemplation or had begun was not necessarily enough to confer immunity. *Palmer* was approved in *Stanton* and *X v Bedfordshire CC* 1995 2 AC 633 . The passage in the judgement of Chadwick J at page 91 in *Stanton* was the high point in the authorities for the pursuer. Chadwick LJ's three propositions at page 100 in *Stanton* were sound and the third proposition in particular was applicable to the present case; there was no difference in the three judgements in *Stanton* on this point. Counsel accepted the "intimate connection" test as being applicable to the present case. The dual capacity or role of the expert is expressly recognised in *Stanton* . Darker too recognises dual functions; in that case it was the functions of investigation on the one

hand and giving evidence on the other hand. Stanton and Palmer were therefore consistent with Darker. [17] Junior counsel for the pursuer also analysed the proceedings in Watson in the Court of Session (sub nomine AB v CD 1904 7F 72). He pointed out that Watson was not an expert witness case; the reference in the House of Lords to the witness being a "volunteer" related not to payment but to whether the witness was formally cited (7F (HL) at 112). The ratio in Watson should be confined to Lord Mackay of Clashfern's summary in Darker at 450E , namely 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 the court is narrated to them. In relation to the other authorities on experts, counsel submitted that Burns was not a malicious prosecution case; in Evans, the report was designed to be part of the evidence for which provision was made under section 2 of the Criminal Justice Act 1967; insofar as Evans appears to support immunity in relation to investigatory work, that view was disapproved by Lord Hoffman in Taylor who described Evans as turning on an absence of a duty of care; Lord Cooke of Thorndon was to the same effect; Evans was not an action against the plaintiff's former expert. [18] Counsel for the pursuer further argued that the defender's basic formulation that immunity arose in respect of the report as it was prepared with a view to forming part of the evidence at trial, was expressly rejected in Palmer and is inconsistent with Stanton, and does not readily sit alongside Darker. The distinction that the defender sought to make between ongoing criminal proceedings and the mere possibility of criminal proceedings was unsound (Burns at 252 ; Evans at 191G-H). [19] It was also argued that when the defender submitted that preparation of the report was intimately connected with the subsequent trial, they did so under reference to the pursuer's averments on causation in the pleadings at page 20C-D. These averments were necessary to show a link between the alleged fault and the loss claimed. But such a link was not the proper test. The emphasis in the pleadings was the failure to give advice at the earliest stage. Immunity only covers evidence in court or work that is intimately connected with the evidence (Palmer, Stanton, Darker). Here, the pursuer does not criticise the defender's actual evidence. The report here could not be equated to a report prepared for the purposes of disclosure or exchange. [20] Counsel for the pursuer sought a proof before answer leaving the "immunity" plea standing meantime, although it was conceded that the evidence would add nothing to the pleadings for the purposes of deciding on which side of the line this case fell. It was expressly accepted by junior counsel for the pursuer (and senior counsel did not demur) that if the proper analysis of the pleadings was that the witness function stage had been reached rather than the advisory stage, then the action should be dismissed. [21] Senior counsel, did however, emphasise the dual role of an expert and submitted that if the expert was performing the advisory function he was not immune, but if he is performing a witness function he was. He elaborated on this submission by reference to Stanton, Palmer and Hall. On the pleadings, it could not be said that at the relevant time the defender was not acting in an advisory capacity or that the principal purpose was not advisory. Nourse J's substantial

purpose test in Stanton, if it simply meant more than de minimis, undermined the purpose of the test as it would cover virtually anything an expert would do. If the defender's submission that you cannot have neat distinctions between the advisory function and the witness function, there would be no point in having the test at all. The submission conflicted with Stanton. The difficulty in drawing the line was that there will generally be a link between the advice an expert gives and what may ultimately be said in court. The task is to address the question "What function was the expert performing at the relevant time?" A link between advice and evidence did not operate to extend witness immunity. Senior counsel further submitted that Evans was distinguishable on its facts; there was no question of the experts performing a dual role. [22] Senior counsel submitted that the pleadings focused on the advisory function. An expert will almost always be engaged after an accused has been charged. There was no suggestion that the pursuer had been indicted but this was not significant although the service of the Indictment was an important stage in criminal proceedings. He accepted that the closer one is to "the door of the court" the more difficult it is to say that the principal function is advisory. In Stanton there was a close temporal connection (the joint statement). On the present pleadings it was open to the court to conclude that the work carried out by the defender and the associated alleged failures were not intimately connected with giving evidence. With reference to the averments at page 17C-D of the Closed Record (as amended), these were made in the context of setting up foreseeability. The word "evidence" in the pleadings was a reference to what the defender had to say, not what he had to say in court. Discussion [23] I shall begin by considering the many authorities cited and their application to the present case. I shall then summarise what seem to be the relevant principles and considerations which I derive from these authorities. Finally, I shall endeavour to apply these principles and considerations to the pleadings. Authorities [24] In Watson the majority of the Second Division held that a witness was absolutely privileged in respect of statements made in giving evidence, if pertinent to the matter in issue but that the privilege did not extend to statements made on precognition. The action was for damages against a medical adviser for breach of confidentiality and for defamation; the pursuer had separated from her husband and the defender accepted the appointment on the footing and in the knowledge that his services were required for the pursuer's guidance in relation to a proposed action of separation and aliment (1904 7F at 72). The defender's opinion following an examination of the pursuer was not favourable and after a subsequent joint examination with the husband's advisers, he imparted confidential information to them, namely that the pursuer was intent on procuring an abortion; and subsequently gave evidence voluntarily (he was not cited -see page 73, second last line) for the husband in the separation action. It was alleged that as a result of that evidence the separation action failed. The report is concerned with the allowance of issues. The Lord Ordinary refused the second issue (which related to confidential information disclosed in evidence) and the fourth issue (which related to defamation while giving evidence) on the ground of absolute privilege. The third issue (which related to the defamatory statements to the husband's advisers at or about the time of the joint examination that the pursuer

was bent upon procuring an abortion) was equiperated to words spoken on precognition and was allowed on the basis that absolute privilege did not apply. The first issue (which related to the voluntary disclosure of confidential information to the husband's advisers at or about the time of the joint examination) was approved. The Division adhered on the second and fourth issues on the basis that it is well settled that a witness is absolutely privileged in giving his evidence, pertinent to the issue and cannot be subject to damages for slander for what he says in court (at 81, 82, 85, 86). The first issue was disallowed. The third issue, endorsing the Lord Ordinary's view, was allowed (and became the only remaining issue in the case) on the basis that statements voluntarily given in answer to questions on precognition are not necessarily privileged (at 81,85,86) although there was little discussion by the majority. Lord Young dissented on the ground that it was in the interests of justice and the public in its administration that absolute privilege should apply to the facts previously given in a statement (at 82). That dissenting view was upheld in the House of Lords (at 7F (HL) 109) and the Division reversed on the point. On the general point, the Lord Chancellor, referred to the privilege as "one of necessities of the administration of justice, the immunity of witnesses from actions being brought against them in respect of evidence they have given" (at 110). On the point at issue on appeal his Lordship refers to the "interview between the intended witness and the solicitor who takes from him what we call the proof- that is to say reduces to writing the evidence which the witness is about to give". The point is made 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." I pause to observe here that this statement is similar to counsel for the pursuer's explanation (see paragraphs 14 and 22 above) of the third sentence of the quoted averments at paragraph 5 above. [25] The Lord Chancellor later refers to a person "being examined for the purpose of being a witness" (at 112). The conclusion he reached was that the preliminary examination of a witness by a solicitor was within the same privilege as that which he would have if he had said the same thing in sworn testimony in Court. The result was that the only remaining issue in the case was disallowed and the action dismissed. [26] Although it has been pointed out that Watson was not an expert witness case, that is not strictly speaking correct. The defender was engaged as a skilled medical expert. The Lord Chancellor's views cannot be confined to lay witnesses. Applying his observations to the present pleadings once could envisage the defender being recognised by the pursuer's "defence team" to "find out what [he] can prove". Taking a precognition from an expert is perfectly possible and does happen from time to time. The report about which the pursuer complains could have been communicated orally in an interview or consultation with the defence team, following the defender's forensic investigations, with a view to finding out what scientific facts could be proved or refuted. That would plainly be the principal purpose of the information and opinion being provided. [27] The immunity conferred in Watson was applied to the third defender in Burns where the pursuer sued six defenders for maliciously and without probable cause procuring her

prosecution for wasting police time in connection with allegations of rape which she had made against the first defender. No prosecution for rape took place and the pursuer was acquitted of the charge against her. Her case was that defenders maliciously conspired together to provide the police with false information which gave the first defender an alibi. The third defender pled absolute privilege in the basis that the statements she made were given while she was a potential witness (at 251G). That plea was upheld. The Second Division applied *Watson* and described the principle behind that decision as "persons who may later be required as witnesses must be given protection for it is in the interests of the administration of justice that such persons should feel able to speak freely" (at 252B). The court rejected an argument (at 252E) that *Watson* should be confined to statements made in direct preparation for trial, noting that the paramount objective in conferring privilege is to encourage witnesses to give their evidence freely in court (at 252J). The court took a broad view of the import of *Watson* holding that it did not matter whether the investigation of a person as a prospective witness was done by precognition or by less formal interview; and that it was not critical that proceedings had begun; it was sufficient if the statement is given for the purposes of a prosecution (at 252J-253A). The court also noted the exception for malicious informers or complainers (at 253C -). A statement made to the police at a time when they were preparing for a possible prosecution and were investigating what prospective witnesses would say attracted absolute privilege (at 253H-I).

[28] There seems to be no reason to suppose that a statement made to a solicitor acting for an individual, who had been arrested on suspicion of murder when the solicitor was preparing a defence to a possible prosecution and was investigating what prospective witnesses would say, should be treated any differently. Burns was not of course concerned with expert witnesses. The purpose of extending the immunity beyond the witness box is to prevent the core immunity from being outflanked (see e.g. *Watson* at 111 per Lord Chancellor ; Burns at 252H , *Darker* at 447D per Lord Hope of Craighead; 458C-F, per Lord Clyde ; *Palmer* at 488-9). [29] The only other Scottish case cited was *McKie Strathclyde Joint Police Board and Ors 24/12/04 Lord Wheatley*, unreported . This is an unusual action. The fingerprints of the pursuer, a police officer investigating a murder, were reported by the Scottish Criminal Record Office to have been found at the scene of the crime, the murdered woman's house, although there were differing views within the SCRO. At a subsequent murder trial at which the accused was convicted, the pursuer gave evidence that the fingerprint was not hers. Following the trial, further investigations led to the pursuer's prosecution for perjury. She was acquitted. The accused's conviction for murder was quashed on appeal principally on the basis that the fingerprint evidence against him was unreliable. The pursuer sued inter alios the Scottish Ministers on the basis that their employees in the SCRO were negligent in making erroneous fingerprint identification and guilty of malice by maintaining their position (in the face of conflicting views of colleagues) when preparing for and giving evidence in the pursuer's perjury trial. At Procedure Roll the plea of immunity from suit was argued. Lord Wheatley considered *Watson*, and Burns , and quoted extensively from *Darker*. He concluded that "the protection of absolute privilege is not confined to the witness box, and to precognitions in

preparation for what will be said in court, but is extended to the making of informal statements, the compilation of expert and technical reports, and other things done in the course of an investigation with a view to giving evidence. This immunity is however confined to things done in the context of the preparation for giving evidence and does not cover what is done maliciously..." (at paragraph 15). [30] He recognised that the question whether immunity will be available in some cases will be a matter of difficulty. He was further of the view that normally a report prepared by the SCRO would be prepared in the anticipation of and with the purpose of giving evidence on the matters contained within in it; there, the privilege of immunity would apply (paragraph 16) and would extend to the unanticipated perjury trial. He then considered the exception for "malicious prosecution" (which has no application to the issues I have to decide) accepted the principle and allowed a proof before answer (at paragraphs 34, and 54). Plainly, Lord Wheatley saw no difference between the laws of England and Scotland on the main question of witness immunity from suit. He applied *Watson and Burns*, as he was bound to do, and followed *Taylor and Darker*. [31] *Marrinan* concerned a disbarred barrister who sued two police officers for conspiracy to defame him in a report to the Director of Public Prosecutions, in evidence at a criminal trial and at inquiry before the Benchers of Lincoln's Inn. The defendant's plea of immunity from suit was upheld at first instance and by the Court of Appeal. It was held that the plea applied to all forms of action (per *Sellers LJ* at 535. *Watson* was cited and its reasoning adopted. Although the underlying rationale for the rule is discussed, these matters are set forth in much greater detail in later cases which I consider below. [32] *Evans* considered immunity in relation to expert witnesses although they were not acting for the plaintiff. There, the plaintiff was arrested and charged with the murder of her five month old son who died from a condition known as sudden infant death syndrome; the charge followed the results of a post mortem examination by the defendants (a hospital and three of its employees); the findings by the third and fourth defendants were that the child's organs contained various concentrations of morphine. After further investigation, the prosecution offered no evidence at the trial and the plaintiff was acquitted. The plaintiff alleged inter alia that the third and fourth defendants had been negligent in allowing the organs, removed at the post mortem, to become contaminated with morphine and in failing to retract their statements in the light of the findings of the plaintiff's experts; the result was that the prosecution continued to maintain that the child died of morphine poisoning. It was held that the statements were covered by the immunity principle which extended to the collection and analysis of material relevant to an offence or possible offence under investigation. The toxicological analysis was carried out by the third and fourth defendants (186). *Drake J* dismissed an appeal against the striking out of the claim in negligence (a proposed amendment before him alleging malicious prosecution was also rejected as misconceived [188]). He rejected an argument that immunity did not apply because the judicial process had not begun (at 189). In doing so he said this:- "Any disgruntled litigant or convicted person could circumvent the immunity by saying he was challenging the collection and preparation of the evidence, to be taken down as a statement or proof of evidence later, and not

challenging the statement or proof itself. In other words he would seek to base his claim on things said or done by the witness at some time prior to the statement or proof being given by him" (at 190). [33] He went on to observe that it would be a question of fact whether the negligent act or omission arose during the course of preparation of the evidence. He was of the opinion that the immunity must extend also to "acts of the witness in collecting or considering material on which he may later be called to give evidence" (at 191). In considering how to determine the issue of fact he concluded that: "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 possible prosecution in respect of the matter being investigated" (at 192). [34] Applying that test led him to conclude that the defendants were protected by immunity from liability for the alleged negligence. [35] Evans plainly proceeds on the assumption that a duty of care was owed by the defendants to the plaintiff, but that the duty was overridden by the plea of immunity from suit. It accordingly did not matter that the experts being sued had not previously acted for the plaintiff. It also did not matter that the statements made by the defendants were given under sections 2 and 9 of the Criminal Justice Act 1967. The allegations of negligence as summarised by Drake J at page 187 did not relate to the terms of the statutory statements but to actings and omissions of the defendants. Evans has not been overruled although, to some extent it has been superseded by the more authoritative expositions of the law in Darker. If the tests referred to in Evans were applied to the pursuer's pleadings, then, in my opinion, absolute privilege would apply and the defender would be immune from suit. [36] Stanton, however, was concerned with an expert witness engaged by the plaintiffs. There, the defendant advises in a written report that partial underpinning work following subsidence damage to the plaintiffs' house (caused by dehydration of the clay subsoil in turn caused by nearby trees) had been inappropriate; that total underpinning, at much greater cost, was necessary. The plaintiffs, on the basis of this report, sued their insurers. They retained the defendant to provide expert advice to support the claim. Expert reports were exchanged informally. About a month before the trial was due to begin, the defendant produced a further report in draft confirming his earlier views (at 80G-81A). Following a meeting between parties' experts, the experts prepared a joint statement recommending a very much cheaper solution (referred to as the "gap solution"). A few days later, the defendant revised his draft report accordingly, which was finalised and intimated shortly before the trial was due to begin. The plaintiffs settled with the insurers and then sued their expert in contract and negligence on the basis that the cheaper solution would have been ineffective. The Court of Appeal upheld the defendant's plea of immunity from suit. The Court analysed the basis of the claim in some detail (at 85-87) before considering that issue, holding that there was no breach of the defendant's retainer; Chadwick J declined to express any view on the question whether any such immunity would extend to a claim based upon a failure by an expert to act within the confines of his instructions (at 87). This point was not taken up in the discussion before me. [37] In relation to the immunity plea, the defendant in Stanton was described as a potential witness in pending proceedings (at 88). The underlying

rationale of the immunity principle was considered at length. The view was expressed that liability for failure to give careful advice to his client should not inhibit an expert from giving truthful and fair evidence in court; immunity from liability was an exception to the general law which must be justified on some ground of public policy (at 89-91). Following a review of authorities Chadwick LJ set forth three propositions in the following terms (at 100C):-

- (i) an expert witness who gives evidence at a trial is immune from suit in respect of anything which he says in court, and that immunity will extend to the contents of the report which he adopts as, or incorporates in, his evidence; (ii) where an expert witness gives evidence at a trial the immunity which he would enjoy in respect of that evidence is not to be circumvented by a suit based on the report itself; and (iii) the immunity does not extend to protect an expert who has been retained to advise as to the merits of a party's claim in litigation from a suit by the party by whom he has been retained in respect of that advice, notwithstanding that it was in contemplation at the time when the advice was given that the expert would be a witness at the trial if that litigation were to proceed. [38] Chadwick LJ concluded that the only basis upon which immunity could be conferred in the case before him was whether the immunity was necessary for the orderly management and conduct of the trial which was in prospect. He excluded the multiplicity of actions ground because no trial had taken place. That seems to me to be questionable as the basis of this ground is that it is not in the public interest to prolong litigation by issues previously litigated being raised again between different parties. It is not essential that a proof take place in the first action. However, his Lordship took the view that meetings between experts were in the public interest; they usually led to narrowing of issues and reduced court time (at 101). This justified immunity in the case before him (at 102). As for Chadwick J's third proposition, quoted above, it seems to me, with respect that it is not consistent with Watson, as interpreted in Burns or with Evans. It seems to me that if it were in "contemplation" that the expert would be a possible or prospective witness, any technical report or statement would fall within the protective circle of immunity as being a statement made which was part of the preparation for giving evidence, and was made with a view to giving evidence, i.e. with at least the prospect of giving evidence. If the expert were a prospective witness, a phrase used in Burns at 252J, at the time of making his investigations and writing his report, the statement would attract absolute privilege. I am not therefore prepared to accept Chadwick LJ's third proposition, at least in relation to criminal proceedings. [39] Otton LJ in Stanton described the extension of witness immunity to pre-trial work in preparing cases as illustrative of the court's recognition that the smooth administration of justice relies on not only what happens in the courtroom but also what goes on before; the hearing could not neatly be divorced from the preparatory work it depends on. He described the pre-trial immunity as a tailored immunity and applied the intimate connection test, namely whether the work in question can be said to be "so intimately connected with the conduct of the case in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing" (at 103G). [40] He also adopted the principal

purpose test in *Palmer* (at 104). He drew no distinction between the various categories of expert or the nature of the proceedings, criminal or civil. He observed that the need to ensure that the administration of justice was not impeded was paramount (at 107D). He emphasised the role and responsibilities of expert witnesses and in particular their duty to the court (at 107-8). His conclusion was that the engineering expert enjoyed immunity on "any basis" when attending the meeting with his opposite number. The basis was that it was in the public interest that agreement should be reached on some aspects of the evidence (at 108). Otton LJ does not appear expressly to have adopted Chadwick LJ's third proposition [41] Nourse LJ noted that Chadwick LJ and Otton LJ were not entirely at one with each other on all aspects of the witness immunity principle. He did not draw any distinction between civil and criminal proceedings (at 109C). The only distinction he drew between expert and lay witnesses was the dual capacity or role of an expert (*ibid*). He doubted the principal purpose test in *Palmer* preferring a substantial purpose test. His view on the facts was that it was clear that the defendant's draft report, the joint statement and his final report were all prepared for the principal, if not the sole purpose of his giving evidence in court; the immunity was not lost by the fact that the defendant did not give evidence (at 109-110). [42] It seems to me reasonably plain that the defendant in *Stanton* was entitled to plead immunity on the basis of *Watson*. It was unnecessary to introduce either an intimate connection test or a principal purpose test. These seem to me simply components of the principles more broadly drawn in *Watson* and applied in *Burns*. If one applies the principles set forth in *Watson* and *Burns* then if immunity arises the intimate connection test and the principal purpose test will usually be passed. A report by an expert at an early stage may well shape and affect the way a cause is to be conducted when it comes to a hearing whether it be a criminal trial or a proof; a report prepared at an early stage in a civil claim i.e. before an action is raised, will often affect decisions on the content of the pleadings which in turn affect the content of the evidence that may be led at the proof; this applies to a report prepared for a potential pursuer as well as a potential defender. This might satisfy the intimate connection test but it may be questionable whether the principal purpose at such an early stage would be satisfied. These difficulties, which will arise in civil claims are less likely to arise in relation to criminal proceedings because an arrest and charge will usually have occurred and possibly the service of an Indictment served before a defence expert is instructed. Even when no charge has yet been laid, the immunity can apply as *Evans* illustrates. [43] In *Palmer*, an expert had produced a report about the engine failure of a new lorry tractor unit. On the basis of that report, the plaintiffs sued two companies. Expert reports were in due course exchanged. The expert changed his mind in relation to one company but maintained his position as to the other company. After the expert had given evidence in court the plaintiffs abandoned their case. They sued the expert and their solicitors. It was alleged that the expert lacked the necessary qualifications and experience and that he should have advised at the outset that there was no claim against one of the companies, and had persisted in an obviously wrong view in relation to the other company on one point that so damaged his credibility on another well founded part of the claim against the other company that the whole action had to be abandoned. The claim against the

expert was for the loss suffered in pursuing an unmeritorious claim against one company and the loss of opportunity to make good some part of their claim against the other company. Mr Simon Tuckey Q. C. sitting as a Deputy High Court Judge rejected, as too wide, the submission that whenever an expert is retained with the possibility that he may have to give evidence in court, he is immune from suit for everything he does (at 488). In particular, he could see no good reason why an expert should not be liable for the advice which he gives to his client as to the merits of the claim particularly if proceedings had not begun and a fortiori as to whether the expert was qualified to advise at all. The judge adopted a similar approach to that taken in *Saif Ali v Sydney Mitchell & Co* 1980 AC 198. He was of the view that the production or approval of a report for the purposes of disclosure would be immune but work done for the principal purpose of advising the client would not (at 488F-G). He put the matter this way:- "Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading thereto. I do not think that difficulty in drawing the line precisely should result in a case such as this being denied all remedy against his expert" (at 489) He declined to strike out that part of the claim relating to the expert's report. Because of the complexity of the statement of claim he was unable to strike out any other part of the claim on the grounds of immunity from suit. However, part of the plaintiffs' claims sought to impugn the result of the earlier proceedings as they still contended that part of their original claim against one company was good. That part was struck out as an abuse of process on the ground that it was not in the interests of justice to allow a subsequent claim to be pursued which necessarily involves saying that a previous decision of the court is wrong. This is sometimes referred to as a collateral attack on an earlier decision. [44] In *Hughes*, the plaintiff sued her GP for negligently understating her injuries and their effect following a road traffic accident following which she settled her claim against the other driver involved on the basis of her GP's written report. The Court of Appeal, in allowing an appeal, held that the GP was not immune from suit and declined to strike out the action. Although the plaintiff had a solicitor pursuing personal injury claim it was she who contacted the GP and sought reports from him; there was no suggestion of court proceedings at that stage; the GP did not examine the plaintiff for the purposes of producing a report, which was in the form of a letter; he provided the report for the purposes of negotiating a settlement (at P104). The Court quoted extensively from *Palmer* and concluded that identifying whether immunity applies was extremely difficult; each case had to be decided on its own facts; the letters written by the GP could not be regarded as preliminary to his giving evidence as an expert; the letters or reports were not provided for the purposes of disclosure but for the purposes of negotiation; the GP would probably not have been her expert witness in any proceedings and if he did give evidence he would have required to make a further detailed examination of the plaintiff. [45] It is not entirely clear whether the Court of Appeal actually adopted the test in *Palmer*. Even if they did, they acknowledged that each case must depend upon its own facts. The facts in *Hughes*, and for that matter, *Palmer*, are quite different from those set forth in the pleadings in this case. I am concerned with criminal proceedings in which an expert is engaged by a solicitor where criminal proceedings were "on-going" (the phrase

accepted by counsel for the pursuers). The contrast in the two sets of facts is that in *Palmer* and *Hughes*, in particular, proceedings were perhaps, at best, a remote possibility, whereas in the present case, criminal proceedings were "on-going" and a trial was, at the very least, a real possibility; the defender, at the time he was carrying out his investigations and preparing his report, was at that stage a potential witness. [46] In *Darker* the plaintiffs sued the police for damages for inter alia fabricating evidence against them which led to a criminal trial which had, in effect, to be abandoned and the plaintiffs were discharged. In the House of Lords, the plea of immunity from suit, advanced successfully on behalf of the chief constable, was discussed and ultimately rejected. Lord Hope of Craighead described the core immunity (at 445H-446B). He observed that the principle that a wrong ought not to be without a remedy had to be balanced against the public interest in the administration of justice; the immunity conferred was a derogation from a person's right of access to the court which had to be justified (at 446D). When discussing the extension of the core immunity as exemplified in *Watson* Lord Hope said this:- "... it is normal practice for police witnesses to undergo a preliminary examination during the preparatory stage in order to find out what they can prove. Prosecutors and defence solicitors require this information in order that they may take an informed decision as to which witnesses to call and whether they should be cross-examined and, if so, on what grounds. The trial process would be inhibited if police witnesses and potential police witnesses were to be exposed to action for things said or done by them during the preparatory stage when they are undergoing this preliminary examination. The same approach can properly be taken to the preparation of technical reports by police officers with expertise such as ballistics or fingerprinting. As in the case of other expert witnesses, it would be unduly inhibit the trial process if they did not have the protection of the immunity in regard to the content of the reports which they had prepared with a view to giving evidence should the matter come to trial." (at 447H-448B) [47] The last sentence of the passage indicates that the same approach is applicable to expert witnesses or potential expert witnesses for the defence as well as those for the Crown. The results of investigations may be such that a potential Crown expert ends up being led in evidence by the defence or, as in the present case, vice versa. It cannot make any difference, in my opinion, whether the potential witness is actually called to give evidence or which side calls him. The premise upon which these views proceed is that the trial process would be unduly inhibited if there were no such immunity. [48] Lord Hope drew the distinction, necessary in the appeal before him, between an act and evidence that may be given about the act or its consequences (at 449B) where the statement is made "with a view to giving evidence". The acts of a witness in collecting material on which he may later be called to give evidence are not protected by the immunity (at 449G). He contrasted this with statements made out of court which are clearly and directly made in relation to the proceedings in court (at 449H-450A). [49] Lord Mackay of Clashfern summarised the extension of the privilege of absolute immunity in *Watson* by referring to 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 the court is narrated to them". The basis of his view that immunity could not be successfully claimed in *Darker* was that there were materials in the

plaintiffs' allegations which did not depend as a cause of action on alleged statements relating to the preparation of evidence (at 451B). Thus the decision in Evans did not extend the immunity to alleged negligent conduct not reflected in or related to a written report (at 451G). [50] Lord Cooke of Thorndon's views proceeded on the basis that none of the conduct complained of could fairly be said to be part of the process of investigating a crime (at 453A). He considered that conduct "which is primarily and naturally to be seen as belonging to the investigatory function, even though it may have some ultimate link with the giving of evidence, should not be within the general protection". He described Evans as a case of alleged negligent preparation of evidence (at 454C). He advocated a "functional approach" (at 455F-G). Lord Clyde thought that there had to be some degree of certainty about the existence of an immunity for it to be effective and that it was important that the person concerned should know in advance with some certainty that what he says will be protected (at 457D). He considered that if a potential witness provided a statement but was not called, the immunity should apply; the immunity should not depend upon the chance of a particular person being called as a witness (at 458F). Immunity, he said, should apply "at the early stages of a litigation or a prosecution where evidence is being collected with a view to court proceedings" (at 458G) although he recognised that delicate issues of fact might arise in determining this issue. He, too, advocated the functional approach and observed that "Some activities which may be described as investigative may thus be covered by the immunity, such as the preparation of reports with a view to these forming part of the evidence to be given in court" (at 459E-F). [51] Lord Hutton considered the rationale underlying the principle of absolute privilege at some length. He considered that Evans was correctly decided on its facts (at 471G) observing that "Although the plaintiff alleged that it was done negligently, the organs were removed from the body and examined for the genuine purpose of making a report which would constitute a statement of evidence for a possible prosecution and therefore, in my opinion, came within the ambit of the immunity (at 471G).....the honest (though negligent) examination of articles to enable a statement of evidence to be made comes within the concept of the preparation of a statement of evidence" (at 472B). He contrasted that position with the situation where steps are taken prior to the making of the statement for the wrongful purpose of fabricating false evidence which was not covered by the immunity.(at 471H-472A). [52] Darker makes it clear that, in relation to criminal proceedings at least, the core immunity extends to expert reports prepared with a view to giving evidence. "With a view to" is not defined in Darker. It seems to me to include expert reports prepared where there is a real prospect that the expert may give evidence along the lines of the terms of his report or in relation to the investigations made for the purposes of preparing the report. If that is correct, it would seem that the defender's investigations and his report fall within the scope of the extension to the core immunity. [53] Taylor concerned an action of defamation. It did not relate to expert witnesses. The defendants, investigating a fraud, wrote to the Isle of Man authorities for assistance; in the letter they portrayed the plaintiff as a suspected party to the fraud. A copy of the letter and a file memo containing similar material came into the plaintiff's possession. One of the issues discussed by the House of Lords was whether immunity extended

generally to statements made to or by investigators for the purposes of a criminal investigation. Lord Hoffman observed that the test for the application of the privilege of absolute immunity was a strict one (at 214). He stated that the person in question must know at the time he speaks whether or not the immunity will attach, it being often unclear at the time of investigation whether any crime has been committed at all (*ibid*). He agreed with Drake J's test in *Evans* although in a later passage he professed to express no view on the case (at 215) and concluded that the statements relied upon were protected by absolute immunity. Lord Hope of Craighead agreed with Lord Hoffman, as did Lord Goff of Chieveley, and added a number of points relating to those involved in the criminal investigation process. He referred to "potential witnesses" being protected by the traditional witness immunity (at 218C-D). Lord Hutton agreed with Lords Hoffman and Hope. He, too, expressly agreed with Drake J's test in *Evans*. Lord Lloyd of Berwick declined to decide the appeal on the immunity from suit point but observed that in *Evans* the third and fourth defendants were "clearly potential witnesses" (at 204); and that this was how Lord Browne-Wilkinson in *X (Minors)* at page 775 also understood the case; it was therefore not of assistance in the appeal before him (at 204). [54] Taylor makes it plain that whenever an expert becomes a potential witness, at least in relation to criminal proceedings, absolute privilege will attach to reports prepared and investigations carried out with a view to giving evidence and of course to the evidence actually given. [55] Lord Browne Wilkinson in *X (Minors)* at 755, spoke of investigations having an "immediate link" with "possible proceedings" being immune from claims. These were complex proceedings. His Lordship's observation was made in relation to one of the several cases heard by the House of Lords; that case concerned allegations of child abuse and breach of duty by the local authority proceeding on the basis of a psychiatric diagnosis which was said to have been inadequate in a number of respects. It was held that the psychiatrist must have known that if abuse was discovered, proceedings would ensue which would be based on the psychiatrist's findings; the immediate link referred to above was present and so these investigations could not be made the basis of a subsequent claim. Lord Browne- Wilkinson approved the reasoning in *Evans* in relation to criminal proceedings (at 755), and did not doubt the soundness of the decision in *Palmer*. Whether he approved the reasoning in *Palmer* remains unclear. [56] In *Hall*, three appeals were considered by the House. In the first (*Hall*) solicitors sued for their fees in relation to a building contract dispute which had eventually been settled; the defendants counterclaimed for damages based on the firm's negligence in failing to advise of the weakness of the case, failing to pursue the case to trial, failing to understand certain aspects of the case and failing to obtain expert evidence and advise on the liability of third parties. In the second appeal (*Barratt v Seddon*) solicitors were sued for their advice and conduct in relation to the financial aspects of matrimonial proceedings with particular reference to valuation of and the agreement reached, and approved by the court, in relation to the former matrimonial home. In the third appeal (*Harris*), solicitors were also sued in relation to their conduct of the financial aspects of matrimonial proceedings; Mrs Harris sued in respect of a consent order which she agreed to following advice from counsel at the door of the court; she alleged *inter alia* that the solicitors failed to brief counsel competent in the

relevant failed, failed to inform themselves properly of the facts and failed to give proper advice on the possibility of setting aside such an order. The House considered generally the scope in England of the general principle barring a collateral attack in a civil action on the decision of a criminal court (Lord Steyn at 675H). Lord Steyn noted that Lord Diplock in *Saif Ali* thought that the immunity of a barrister could be justified by reference to *inter alia* the general immunity from civil liability which attaches to those participating in proceedings before a court of justice (at 677H). He attached little weight to this analogy (at 679B). On the issue of relitigation, he noted that it was *prima facie* an abuse to initiate a collateral civil challenge to a criminal conviction (at 679G-H) (This consideration does not apply as the pursuer's conviction was quashed.). Lord Steyn favoured the abolition of immunity from suit of advocates in criminal and civil proceedings (at 683G). Lord Browne- Wilkinson agreed with Lords Steyn and Hoffman. [57] Lord Hoffmann considered the question of immunity of barristers by reference to divided loyalty (duty to the court etc), the cab rank rule, the witness analogy and collateral challenge (at 686-7). His Lordship considered *Saif Ali* noting that the test for the out of court immunity adopted by the majority in the House was "whether the work was so "intimately connected" with the conduct of the case in court as to amount to a decision as to how it would be conducted at the hearing" (at 688A-B). Lord Hoffman then began his reconsideration of the question by observing that in general English law provides a remedy in damages for a person who has suffered injury as a result of professional negligence (at 688G). In relation to witness immunity he stated that the immunity was "based upon a perception that witnesses would otherwise be less inclined to come forward and tell the truth. They would behave differently in a way which was inimical to the interests of justice." He rejects Lord Diplock's rationale of the witness immunity in *Saif Ali* ("to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play" (1980 AC 198 at 222)) as merely suggesting that "everyone would find litigation more agreeable if no awkward consequences could follow from anything which the participants did" (at 698A-B). "The witness rule depends upon the proposition that without it, witnesses would be more reluctant to assist the court" (at 698C). Significantly, Lord Hoffman analysed *Stanton* by describing it as "an example of a general immunity for acts done in the course of litigation" which fell squarely within the traditional witness immunity. He stated that "the alleged cause of action was a statement of the evidence which the witness proposed to give to the court. A witness owes no duty to anyone in respect of the evidence he gives to the court" (at 698D-E). He contrasted that with the position of a lawyer who owes a duty of care to his client. Similarly a professional man providing information, advice or an opinion owes a duty of care to his client. [58] Lord Hoffman concluded by expressing the opinion that the immunity of lawyers should be abolished altogether, pointing out that the acts of lawyers which are "intimately connected" with the conduct of the litigation and those which were not was a distinction which was very difficult to apply with any degree of consistency (at 707E). [59] Lord Hope of Craighead, in considering the basic principle of immunity and its justification drew from the common law and human rights law (at 710-711). Lord Hoffmann, on the other hand, did not consider human rights issues arose at all (at 707D). Lord Hope considered that the risks to the

efficient administration of criminal justice which would result from the removal of the core immunity greatly outweighed the benefits (712A); but the retention of the core immunity of the advocate from claims by his client for negligence was no longer justified (712B). He accepted Lord Hoffmann's analysis in relation to witness immunity (714C). He summarised that immunity of witnesses by stating that "it is in the public interest that those who are called upon to give evidence in court or who have to perform duties there should be enabled to do so without the risk of being sued for defamation or negligence" (at 714G-H). In a powerful, illuminating and persuasive exposition, he supported the retention of the advocate's core immunity in relation to criminal proceedings. However, he regarded the core immunity for advocates in civil proceedings as no longer justifiable because of the difficulty in finding a satisfactory way of defining limits of that immunity. He noted that the "intimately connected" test was not an easy test to apply in civil proceedings but that no more satisfactory test had been found (at 724F-G). [60] Lord Hutton agreed with Lord Hoffman's views on the issue of collateral attack on an earlier judgment. Lord Hutton considered that the retention of the immunity for civil proceedings was no longer justifiable (at 728D). He noted that the public perception now was that if a professional man fails to exercise his professional skills with reasonable care he should be liable in damages to his client for losses caused thereby (at 728E). He also considered that the "intimately connected" test has proved difficult to apply in practice (at 728H-729H) but adopted it in relation to criminal proceedings (at 735A). He was against the abolition of the immunity in relation to criminal proceedings (at 730C), being persuaded by the "vexation" argument (at 731D-734C). He drew an analogy between defence counsel and a surgeon, each owing a duty of care to his client and patient (at 733F) but rationalised the preservation of the immunity in the former but not the latter by reference to counsel's "important public duty which is essential for the proper administration of justice" (at 733F). Lord Hutton did not comment on the witness immunity analogy, perhaps because he considered this in detail in *Darker*. [61] Lord Hobhouse of Woodborough was also not prepared to declare that immunity should no longer be recognised for advocates engaged in criminal litigation (735D). He alludes briefly to witness immunity (at 740G-H). He observes that an expert is in a special position similar to that of an advocate. "He is selected and paid by the party instructing him. Part of his duties include advising the party instructing him. If that advice is negligently given the expert, like the lawyer, is liable. But once the expert becomes engaged on providing expert evidence for use in court ... his relationship to the court becomes paramount and he enjoys the civil immunity attributable to that function" (at 741B-C citing *Stanton*). In relation to civil litigation he favoured the abolition of the immunity; one of his reasons was the difficulty in defining the boundaries of such immunity (at 745C-D). He did not consider these difficulties were of the same order in criminal proceedings (at 750D-E) and was not in favour of the abolition of the advocate's immunity in relation to criminal proceedings (at 750B). [62] Lord Millett agreed with Lord Steyn and Lord Hoffmann. He did not consider witness immunity. [63] Lord Hope of Craighead and Lord Hutton sat in *Hall* which was decided on 20th July 2000, and in *Darker* which was decided a week later on 27th July 2000. It is somewhat remarkable that so far as I can detect, there is no reference in either case to the other. The

subject matter in both was immunity from suit; in particular both discussed witness immunity and the immunity of experts. The citation of authority in each case was similar but not identical. The treatment of these authorities was not identical (e.g. Stanton is mentioned by Lord Hope only briefly in Darker at 447G and not at all in Hall. Stanton receives limited discussion in Hall by Lord Hoffman (at 698D) and Lord Hobhouse of Woodborough (at 741B). I therefore hesitate to hold that the law currently treats or should treat advocates and expert witnesses in the same way either in or in relation to criminal proceedings. The arguments for doing so in relation to civil proceedings are stronger where the dividing line is particularly difficult to draw. That difficulty was one of the reasons which led to the removal of immunity from suit for advocates. [64] In Raiss, the plaintiff sued his expert for negligence arising out of an earlier action by the plaintiff against a firm of surveyors who had advised him about the renewal of a lease of premises in Covent Garden. That action was abandoned after the expert had been cross-examined. The basis of the claim was that the defendant expert had informed the plaintiff and his solicitors that he had considerable experience of Covent Garden properties and that he was on the RICS panel of arbiters, and that the plaintiff had a good claim against the surveyors; in fact he had no such experience and was not on the panel; in evidence he had considerable difficulty in justifying his opinion that the surveyors had been negligent. It was held that there was no distinction between the criticism of the defendant's performance as a witness and the fact that he was not a panel member. The principle of witness immunity from suit applied to all aspects of the claim, even to an allegation of dishonesty, and the action was struck out. Mr Justice Eady considered Watson, Saif Ali, Palmer, Stanton, Darker, and Hall. It was apparently common ground that Hall did not undermine the rationale of the witness immunity principle. The judge concluded, following Palmer, that:- "...there is clear authority that provided the test of "principal and proximate connection" is satisfied, the pre-hearing work of an expert will come within the protective circle of the witness immunity principle" (at 343) [65] The judge then considered the pleadings in detail and concluded, perhaps surprisingly, that the alleged dishonest representation of panel membership was covered by the immunity, but that in any event, there was no reasonable prospect of proving that such misrepresentation caused any loss (at 347). The latter basis seems to be the better analysis. The significance of this case is that the judge expressly followed Stanton and Palmer noting that they were unaffected by Hall or Darker. However, it is difficult to see how Palmer was being followed on this point given the observations in Palmer referred to above in paragraph 43. It seems to me however, that Hall, in particular, criticised the utility of the intimately connected test which is the basis of the principal purpose test in Palmer. Hall was not directly concerned with witness immunity but Darker was. Lord Hope did not expressly adopt the test in either Stanton or Palmer preferring the phrase "reports....prepared with a view to giving evidence" (at 2000 1 AC 448B , and see also 447G, 449C-D, D-E ; Lord Mackay of Clashfern used similar language (at 450D, F) as did Lord Clyde (at 458G, 459A, F) and Lord Hoffman in Taylor (at 215 quoting a passage from Evans with which Lord Hutton also agreed - at 221). In the light of these authorities the following considerations appear to be relevant:- When a witness comes to court to give evidence he has the benefit of an absolute immunity in respect of the evidence

which he gives in the witness box in a court of justice. He is immune from any civil action that may be brought against him on the ground that the things said or done by them in the ordinary course of the proceedings were said or done (i) falsely and maliciously without reasonable and probable cause, or (ii) negligently (Watson at 110 ; Burns at 252G ; McKie paragraph 15; Darker per Lord Hope of Craighead at 445H-446B); (the privilege does not extend to statements made by a person who, in relation to criminal proceedings is an informer or instigator of the inquiry process if that person acts with malice and without probable cause - malicious prosecution (Burns at 253C-D ; McKie paragraphs 18-23 ; Taylor per Lord Hope of Craighead at 291)). The underlying rationale of the immunity is that witnesses should speak freely (Hall per Lord Hoffman at 697C, G-H), and the desirability of avoiding repeated litigation on the same issue (Darker per Lord Clyde at 461B & D) ; without the rule witnesses would be reluctant to assist the court (Hall per Lord Hoffman at 698C); originally it was to protect a witness who had given evidence in good faith from being harassed and vexed by an action of defamation based on what he said in court (Darker per Lord Hutton at 464C-D; 469E). The immunity would be worthless if confined to the actual giving of evidence in court (Darker per Lord Clyde at 458D). Accordingly, the immunity covers a statement of the evidence which the witness might give if called to give evidence. The immunity thus applies to a potential or prospective witness (Burns at 252G-I) who may not, in the event, be called to give evidence (Darker per Lord Clyde at 458E); and where proceedings are merely in contemplation but have not yet commenced (Darker per Lord Hope at 447E). Moreover, immunity applies to the early stages of litigation where evidence is being collected with a view to court proceedings (Darker per Lord Clyde at 458G; Lord Hope at 448B). In particular, the immunity applies to the compilation of expert and technical reports in the course of an investigation with a view to giving evidence (Darker at 448B ; McKie at paragraph 15). Whether evidence is provided with a view to court proceedings is a question of fact (at 458G); Negligent conduct, such as examination or removal of organs in a post mortem examination, for the purposes of making a report with a view to giving evidence will be protected on the ground that the conduct forms part of the preparation by a potential witness (Evans at 190 ; Darker per Lord Hutton at 471G-472B). This is because the conduct relates directly to what requires to be done to enable the witness to give evidence; and is part of the normal function of an expert witness or potential expert witness (Darker at 448C per Lord Hope). Absolute immunity exists 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 a possible prosecution in respect of the matter being investigated (Evans at 192; Taylor per Lord Hoffmann at 214-215 Lord Hoffman at 221; Darker per Lord Hope at 448B, Lord Mackay of Clashfern at 450D, Lord Clyde at 458G); Where investigations have an immediate link with possible proceedings immunity applies (X Minors v Bedfordshire County Council at 755 per Lord Browne Wilkinson). When an expert is engaged in the context of an existing litigation or a prospective litigation, he may perform a dual role. The first is advisory and the second is in his capacity as expert witness with all the responsibilities to the court as which that entails (see Davie v Magistrates of Edinburgh 1953 SC 34 at 40 and 42 ; National Justice Compania SA v Prudential Assurance Co

Ltd 1993 2 Lloyd's Rep. 68 at 81-82 ; Stanton at 108). In one sense, all communications by an expert to his client constitute advice in one shape or form. He may advise him of his factual findings following on investigation; he may advise him of his conclusions based on those findings and/or other established or assumed facts. He may suggest a particular strategy or tactic. Part or all of this may be included in a report to be lodged as a production to which he may in due course speak. All of the foregoing may be intimately or closely connected with proceedings, actual, contemplated or possible. The difficulty of identifying whether the work of an expert or part of it falls within or outwith the protective circle of immunity is greater in the context of civil proceedings than criminal proceedings. The period between engagement and the giving of evidence or the settlement of the case may be several years. Initial engagement may occur where litigation is not in contemplation (e.g. Hughes). In criminal proceedings a defence expert is unlikely (although it is possible) to be engaged before criminal proceedings are "on-going". As with advocates prior to Hall , the acts of an expert which are "intimately connected" with the conduct of the litigation and those which are not is a distinction which is very difficult to apply with any degree of consistency (Hall per Lord Hoffman at 707E , Lord Hope at 724F-G ; Lord Hutton at 728H-729H) and may not truly represent the touchstone of immunity. Pleadings [66] In its simplest form, the pursuer's case is that he was arrested on suspicion of murder. He engaged the expert services of the defender to carry out a post mortem and advise on the likely cause of death. The defender carried out a post mortem examination, obtained information from the police and a Crown instructed pathologist, and produced a written report in two distinct parts. The second part contained conclusions which were separable from the first part. The report did not assist the defence. It is not disputed that the defender was led as a Crown witness at the trial. Following the pursuer's conviction for murder, the forensic evidence was impugned and the Crown accepted that the conviction fell to be quashed. The complaint against the defender, put simply is that he failed in his duty to advise the pursuer's defence team properly on the forensic evidence (article 7 page 15E). The background to the defender's negligence is that he ought to have known that the defence team would rely upon his evidence in relation to the forensic evidence led against the pursuer (article 8 page 17D-E). Although article 7 is a contract case and article 8 is a delict case, in substance, they amount to the same complaints. They stand or fall together so far as relevancy is concerned. Counsel did not suggest otherwise. If this summary fairly reflects the pursuer's case on record, which I consider it does, it is difficult, if not impossible, to conclude other than that (i) when the services of the defender were engaged, the pursuer and the defence team, at the very least, contemplated that the defender would give evidence for the defence, (ii) when the services of the defender were engaged, he contemplated that it was, at the very least, a real possibility that he would give evidence based upon his post mortem examination, and that any comments, observations, opinion or advice given would be acted on by the defence team in relation to its preparations to resist the accusation being levelled against the pursuer, (iii) the defender was thus engaged with a view to him giving evidence for the defence or with a view to his findings and opinion being used to test or negate Crown forensic evidence, (iv) the defender's services were closely and intimately connected with

the ongoing criminal proceedings, (v) the principal purpose for which he was engaged was with a view to giving evidence on behalf of the pursuer in those criminal proceedings, (vi) having regard to the format of his report, the defender considered at the time that at least the first part of his "formal" report would be used in the criminal proceedings; there being no other obvious reason to prepare a report in severable parts. It is difficult to see what more would be required to bring the defender within the scope of witness immunity as set out in the authorities. The pursuer sprinkles his pleadings with references to "advice" in an attempt to characterise the defender's function as advisory. However, the use of such a label cannot affect the substance of the pursuer's case, which is he engaged an expert as a potential or prospective witness essentially with a view to testing or negating the Crown forensic evidence; that expert acted in breach of duty (contractual and delictual); instead of reporting as he did he ought, the pursuer avers, to have "concluded that the cause of death was unascertained" (page 20A of the pleadings). Had he done so, this, he alleges, would likely have led to an acquittal. In my opinion, the link in time and function with the criminal proceedings is more than sufficiently close to lead to the conclusion, on the authorities, that in relation to his engagement to perform professional or expert services, this defender is immune from suit at the instance of the pursuer. [67] It seems to me that it will generally be easier to reach a conclusion that a forensic expert is immune from suit where he is engaged in the course of ongoing criminal proceedings; there is a relatively short space of time between engagement and trial, the fact finding role will usually mean that the expert and his client will have in view that the expert will give evidence if his findings are favourable. In civil proceedings, as the English authorities illustrate, the position will often not be clear cut. Experts may be engaged before actions are raised; their role may initially be restricted, and subsequently broadened e.g. as to topic to report on, and as to function. Some experts are particularly good at providing detailed background information which can be used in cross examination, but are not themselves skilled at giving evidence and explaining their position simply and persuasively to the court. In civil proceedings many permutations are possible where fine distinctions may have to be made. These considerations support the argument that, in relation to civil proceedings, the expert witness should no longer enjoy immunity from suit, except in relation to defamation (cf Cane, Tort law and Economic Interests 2 nd ed pages 229-30, & 237). However, the pursuer's case is such that no such fine distinctions need be contemplated or made. The pleadings seem to me to disclose a direct and immediate link between the defender's investigations and the ongoing (not merely possible or contemplated) criminal proceedings. [68] If the defender's report (both parts) had been favourable to the pursuer and had proceeded upon an exhaustive post mortem examination requiring no further investigation but containing conclusions which no competent expert would reach, it seems to me likely that if the report had been accepted at face value by the defence team it would have been produced in the criminal proceedings at some stage and the defender would have spoken to it in evidence. It and the underlying investigations would have constituted the foundation for his evidence and would have been part of the preparatory work necessary to enable him to give evidence, In these circumstances, the investigations and report would have been covered by the principle of

witness immunity as a pre trial statement by a potential witness with a view to his giving evidence. I do not see why the position should be different if the report is unfavourable but negligent and further investigations should have been proposed. Result [69] I shall sustain the defender's second plea-in-law and dismiss the action, reserving meantime all questions of expenses. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2004/221.html>

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