

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

[2025] EWCA Civ 1230

Carr LCJ, Sharp P and Coulson LJ

BETWEEN:

XGY

Appellant

-and-

THE CHIEF CONSTABLE OF SUSSEX POLICE

First Respondent

THE CROWN PROSECUTION SERVICE

Second Respondent

APPELLANT'S WRITTEN CASE

A. INTRODUCTION

1. This appeal concerns the disclosure by the First Respondent ("**the police**") and/or the Second Respondent ("**the CPS**") of the Appellant ("**XGY**")'s confidential location ("**the Hampshire location**") to a man ("**DYP**") who had subjected XGY to domestic violence and from whom she remained at risk of repeat victimisation. The Hampshire location

was the fifth location to which XGY had relocated in the four months since she had fled the relationship with DYP at 20 years of age. This location was a local authority flat with security of tenure; it was anticipated by XGY to be her permanent home. She provided the Hampshire location to the police in March 2020. She did so in circumstances importing an obligation of confidence, with a reasonable expectation of privacy, and engaging obligations under the Data Protection Act 2018 (“DPA 2018”). The CPS, relying upon an absolute immunity from suit, has not filed a defence to XGY’s claim. The full circumstances in which the confidentiality and privacy of XGY’s Hampshire location were not maintained are unknown. It is known, by reason of the police having entered a defence, that the police communicated XGY’s location to the CPS, that an advocate, instructed by the CPS in connection with an unrelated bail violation by DYP, disclosed the Hampshire location to DYP by including it in a condition of bail. Internally, the police recorded this event as “*a major muck up*”. In consequence, XGY was rendered homeless, and suffered psychiatric injury and attendant financial losses. XGY seeks damages for breach of confidence and misuse of private information and under the DPA 2018. Her pleaded claims for violation of the Human Rights Act 1998 no longer survive following summary judgment granted in the Respondents’ favour and refusal of permission to appeal on that issue.

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& 559

2. In the Court of Appeal (“CA”), Baroness Carr of Walton-on-the-Hill, Lady Chief Justice, Dame Victoria Sharp, President, and Lord Justice Coulson held that, beyond the re-evaluation in *Arthur JS Hall & Co v Simons* [2002] 1 A.C. 615 (HL) (“*Hall*”) and *Jones v Kaney* [2011] UKSC 13, [2011] 2 A.C. 398 (“*Jones*”) (establishing the liability of advocates to their own clients for the negligent conduct of court proceedings and of expert witnesses for breach of duty to those who retain them), it is necessary for the proper administration of justice that advocates, parties, witnesses, judges and jurors are immune from suit for a statement made in court whatever the cause of action and regardless of whether the statement was made maliciously or was irrelevant to the court proceedings (CA [30]), and that an immunity operated in respect of words spoken by a CPS advocate “*in the ordinary course of court proceedings*” (CA [62]). Further, the Court held that the police’s preparation of the case for the bail hearing was covered by “*the extended immunity*” (CA [68]).

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Issues

3. The central issues in this appeal are:

- (a) **Issue 1 — the CPS and immunity:** whether the Court of Appeal erred in concluding that advocates have the benefit of an absolute common law immunity in respect of anything said or done in the ordinary course of court proceedings, such that the CPS is immune from suit for the disclosure by its advocate of the Hampshire location to DYP when he appeared before the Magistrates' Court for a separate bail violation on 16 April 2020.
- (b) **Issue 2 — the Chief Constable and extended immunity:** whether the Court of Appeal erred in concluding that the Chief Constable, by extension of the absolute common law immunity, is immune from suit in respect of her officer(s)' disclosure of XGY's confidential location to the CPS in connection with DYP's bail.

Summary of the Appellant's case

4. On Issue 1, the Appellant submits that there is no immunity for the claims advanced in breach of confidence, misuse of private information and under the DPA 2018. In reasoning that the immunity applies to all statements in court, irrespective of the cause of action and the circumstances of the alleged conduct, the Court of Appeal adopted the wrong starting point. Immunity applies by and with reference to the pleaded cause of action; it necessarily applies to certain causes of action (for example, claims in defamation based upon the content of statements made by witnesses in judicial proceedings) but not others (such as the breach of duties of care owed by an advocate and/or an expert to their own client). The Appellant submits that her claims fall outside the scope of the immunity. This conclusion is arrived at by considering the causes of action upon which she relies, the nature of the alleged conduct, and the rationale for the immunity. To do otherwise is to generalise existing immunities in a way that was described by Lord Hoffmann in *Hall* as "*illegitimate and dangerous*" [pp.697E-698A].
5. These are novel factual circumstances to which the immunity has not previously been applied. As a matter of principle, any new or expanded immunity must be shown to be

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strictly necessary in the public interest to justify an exception to the general rule that every wrong should have a remedy. Once it is recognised that immunity for the types of claim under consideration would constitute a new or expanded immunity, the policy justification for those particular types of claim falling within the immunity must be carefully weighed against countervailing public interests. If, alternatively, her claims already fall within an existing immunity, then the policy justification and public interest served by the immunity (which is not immutable) should be revisited with the same conclusion¹.

6. Issue 2 only arises if the Appellant fails on Issue 1. Immunity is extended outside of the courtroom only where necessary to preserve the immunity itself. If there is no relevant immunity, the question of extending it cannot arise. Thus, if the Appellant is wrong on Issue 1, the Appellant submits that the Court of Appeal was in any event wrong to extend the immunity to the antecedent administrative acts of the police, in contrast to actions of the police as witnesses of fact.

Terminology

7. In this Written Case, the Appellant adopts the phrase ‘Judicial Proceedings Immunity’ (“JPI”) to refer to the protections afforded to certain participants in judicial proceedings. The phrase ‘core immunity’ is often used in the authorities to draw a distinction between an immunity within court (i.e. the core of the immunity), as compared with its extension outside of court for the purpose of protecting the core immunity, rather than a term referring to the types of claim to which immunity attaches. Whatever the term used, it is, in substance, merely a shorthand to refer to the immunity which has been recognised as existing on grounds of public policy to promote the administration of justice. Terms which refer to the participant’s role (e.g. ‘witness immunity’, ‘advocate immunity’, ‘expert immunity’) can mislead because the scope of immunity is determined by the cause of action and the immunity’s underlying rationale and not usually by the category of participant. For example, the immunity from claims in

¹ This is an expansion of arguments pursued before the Court of Appeal, but the Appellant does not consider that is a “*new point*” for the purposes of UK Supreme Court Practice Direction 5.10.

defamation, and the absence of immunity from claims in malicious prosecution, applies to advocates, witnesses, police officers and experts alike.

8. 'Extension' of JPI is used to refer to the extension of the immunity to statements outside of court in order to preserve the immunity within it (i.e. 'the extended immunity') and 'expansion' is used to refer to a broadening of the categories of cases to which JPI attaches.

Structure

9. The Appellant develops her Written Case as follows:

Section B: General principles

- Rationale for JPI (§§10-13)
- Immunities are narrowly construed and must be strictly justified (§§14-15).
- Immunities apply by category of case and the immunity's rationale (§§16-18)

Section C: The scope of JPI

- Summary of principles to be derived from origins and development of JPI (§§19-20)
- Origins of JPI in defamation and its justification (§§21-23)
- Expansion of JPI in *Watson* and *Marrinan* (§§24-34) HB p. 3246 & 2305
- *Hall* and the advocate immunity cases (§§35-41) HB p. 1059
- *Taylor* and *Darker* (§§42-45) HB p. 3168 & 1538
- *Jones* (§§46-52) HB p. 2025
- *Singh* (§§53-55) HB p. 2988
- Comparative law (§56)
- Conclusion (§§57-58)

Section D: The Court of Appeal's conclusions (§§59-63)

Section E: Causes of action and the nature of the impugned conduct

- Relevance of the cause of action as a matter of principle (§§65-69)

- Breach of confidence (§§70-79)
- Misuse of private information (§§80-86)
- DPA 2018 (§§87-92)
- The nature of the impugned conduct (§§93-102)
- Conclusion (§103)

Section F: The evidence of the Bar Council (§§104-115)

Section G: The extended immunity (issue 2) (§§116-121)

Section H: Strike out as a remedy (§§122-124)

B. GENERAL PRINCIPLES

Rationale for JPI

10. JPI furthers the administration of justice by conferring immunity in respect of statements made in the course of judicial proceedings. This protects free speech, ensuring the court receives full information and can establish the truth. The immunity protects witnesses, advocates and jurors. Judges are also protected, although the position of judges is distinct².
11. Lord Phillips explained in *Jones* that the “*continuous theme that runs through the cases is, in modern parlance, the chilling effect that the risk of claims arising out of conduct in relation to legal proceedings would have. It would make claimants reluctant to resort to litigation. It would make witnesses reluctant to testify. If they did testify, it would make them reluctant to do so freely and frankly*” [pp.408G-409A]. HB p. 2035
12. In *Darker v Chief Constable of the West Midlands* [2001] 1 A.C. 435 (HL) (“**Darker**”), the court identified four related justifications for the immunity, upon which reliance was subsequently placed in *Jones* (per Lord Phillips, [p409A-D]): HB p. 2036

² The immunity of judges is distinct in origin and scope and is not in issue on this appeal: *Sirros v Moore* [1975] QB 118 (CA) [pp.132–136].

HB p. 3021

- (a) To protect witnesses who give evidence in good faith from harassment and vexation by unjustified claims: Lord Hope [*Darker*, p.446F-H] and Lord Hutton [p.464C-E]. HB p. 1549
HB p. 1567
 - (b) To encourage honest and well-meaning persons to assist in establishing the truth and securing justice: Lord Hope [p.447B-C] and Lord Clyde [p.460D]. HB pp. 1550
& 1563
 - (c) To enable witnesses to speak freely and fearlessly: Lord Clyde [p.461B-C]. HB p. 1564
 - (d) To avoid later actions in which the value or truth of in-court evidence would be tried again, where the first proceedings had culminated in a decision: Lord Hope [p.446G-H]. HB p. 1549
13. *Darker* concerned the immunity of witnesses, and *Jones* that of expert witnesses, but the justifications apply to JPI generally. Since *Hall*, the authorities have not recognised any additional rationale for the immunity as it applies to advocates (such as, divided loyalty or the cab rank rule). On the contrary, the authorities recognise that public confidence in the legal system is eroded by the law singling out its own for protection³.

Immunities are narrowly construed and must be strictly justified

14. Any immunity from suit derogates from a person's fundamental right of access to the court and must be justified: *Hall* [p.710D-G]. Incautious encroachment into territory not properly subject to immunity must be avoided, and the protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice: *Darker* [pp.453D-F, 468F-469B]; *Singh v Reading Borough Council and another* [2013] EWCA Civ 909, [2013] 1 W.L.R. 3052 [20] ("*Singh*"). A remedy for a legal wrong remains the default rule. Consequently, the burden lies "*fairly and squarely*" on the party asserting immunity to demonstrate a necessity that is "*strict and cogent*": *Jones* [pp.419E, 433B]; *Singh* [20]. If it were otherwise, the law would be irrational and unfair and public confidence in it would be undermined: *Jones* [p.433B]. HB p. 1154

HB pp. 1556
& 1571
HB p. 2995

HB pp. 2046
& 2060, 2995
HB p. 2060

³ Per Lord Steyn in *Hall* [p.682D – G].

15. Modern authority illustrates that approach. In *Hall* and *Jones* it was determined that the previously recognised immunity of advocates and experts from claims in negligence by their own clients could not be justified. The courts have also ensured, in cases such as *Taylor* and *Darker*, that immunities which do exist are not extended beyond what is strictly necessary.

Immunities apply by category of case and the immunity's rationale

16. There should be “a degree of certainty as to the existence of an immunity if it is to be fair and effective”: *Jones* [p.431F]. Accordingly, an immunity is applied with reference to identified categories of case rather than the factual circumstances of a particular case. The Court of Appeal was therefore correct to depart from Ritchie J’s notion in the High Court (“HC”) of “justificationism” in which each case is justified on its facts (CA [30(vi), 63–64]); (HC [87-90]). It is imperative, however, to avoid the vice of generalising the scope of the immunity by reliance upon statements abstracted from the authorities.

HB p. 2058

HB p. 153

p. 213

17. Identifying whether a category of case is within the immunity entails consideration of the immunity’s underlying rationale. Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 A.C. 177 (HL) [pp.213E – 214B] (“**Taylor**”) addressed the dangers in judicial reasoning of too readily accepting or dismissing the defence merely by analogy; the correct approach is to examine the case for recognition in light of the underlying rationale for the defence⁴. Lord Cooke in *Darker* [p.454F-G] envisaged that:

HB p. 3204

HB p. 1557

“Each category of immunity requires separate consideration and justification, while each set of facts requires full examination in determining whether it can be brought within a particular category.”

18. Applying that methodology in *Smart v Forensic Science Service Ltd* [2013] EWCA Civ 783, [2013] P.N.L.R. 32 (“**Smart**”), Moses LJ (with whom Rimer LJ and Aikens LJ agreed) found that the rationale for the immunity did not extend to a claim in negligence relating to the false attribution of an exhibit [28–31]. Aikens LJ expressed the approach this way:

HB p. 3106

“a justifiable boundary has to be drawn somewhere but it cannot be drawn when you

⁴ McHugh J in *Mann v O’Neill* 71 ALJR 903 [912] (Australia); Lord Hutton in *Darker* [pp.468H – 469A].

HB p. 1571

do not know the terrain" [36]. Thus, if the rationale is to promote the better administration of justice by enabling participants to express themselves freely in judicial proceedings, it will not shield actions that do not impact upon freedom of expression in judicial proceedings.

HB p. 3107

C. THE SCOPE OF JPI

Summary of the principles to be derived from origins and development of JPI

19. The Court of Appeal identified that, since at least the sixteenth century, *"it has been recognised by the common law that it is necessary for the administration of justice for certain participants in the administration of justice – advocates, parties, witnesses, judges, and jurors – to be immune from suit ..."* (CA [8]). It then said that: *"in order to prevent the immunity being circumvented or outflanked, however, for many years, the immunity has been held to apply to whatever claim was being made against the advocate or witness for things done or spoken in court and however ingeniously such a claim was framed"* (CA [10, 30(i)] emphasis added unless otherwise indicated).

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& 152

20. That starting point was too broad. In particular, it identified JPI as applying generally, rather than narrowly to specific causes of action and in light of the underlying rationale. It is necessary to consider the historical development of JPI, and how and why it was extended from its origins in the absolute privilege of witnesses against claims for defamation. The following analysis seeks to make good the following propositions:
- (a) That the origins of JPI are in claims of defamation and it was found necessary to include claims in conspiracy to defame, malicious falsehood, and conspiracy to give false evidence, and other causes of action where the tortious conduct essentially consisted of the making of false (including malicious) statements by witnesses or potential witnesses (and the repetition of those statements whether by an advocate, party or juror). There was no immunity in other circumstances as they did not engage the immunity's underlying rationale.
 - (b) That JPI is not a blanket immunity attaching to all things said or done in court, for which any claim must be justified as an exception to the general immunity. On

the contrary, and as required by principle, JPI applies only to causes of action in respect of which the immunity has been recognised as necessary.

- (c) That JPI has not attached to claims for breach of confidence, misuse of private information, or for breaches of the DPA 2018. Thus, immunity for such claims would be an expansion of JPI which must be justified, not as an exception to a general immunity, but as an exceptional encroachment into the general rule that a legal wrong should have a remedy.

Origins of JPI in defamation and its justification

21. As observed by Lord Phillips in *Jones* [pp.407F, 408B-C], the immunity originally took form as a privilege against defamation. The typical situation in which the immunity was invoked was where a witness had given evidence hostile to a party who then sued them. Inevitably, a similar absolute privilege was afforded to counsel in relation to defamatory statements made against a party, or indeed anyone else, in the course of their conduct of legal proceedings: *Jones* [408B]. In *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 [p.263] (“*Dawkins*”) Kelly CB provided a clear statement of the principle:

HB pp. 2034
& 2035

“The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.”

HB p. 2035
HB p. 1584

22. In *Munster v Lamb* (1883) 11 QBD 588 [pp.604-607], the Court of Appeal followed the decision in *Dawkins* and afforded protection to advocates in respect of defamatory statements, even if false and malicious, provided they were made on a privileged occasion, that is, when addressing the evidence as an advocate in court in relation to the case being heard⁵.
23. A compelling justification has always existed, and continues to exist, for JPI (alternatively, absolute privilege) for claims in defamation. A legal bar to proceedings against anyone – party, witness, juror, investigator, solicitor or advocate – in relation to the statements which might otherwise be defamatory, serves an obvious and vital

HB p. 2405

⁵ Brett MR [pp.600-604] and Fry LJ [pp.605-608].

HB pp. 2401
& 2406

public interest. The gist of defamation and the related causes of action (malicious falsehood and/or conspiracy to defame) is that the statement made is false and/or maliciously made. The rationale for barring such claims is that it would be contrary to the administration of justice if participants in judicial proceedings were inhibited from the preparation of evidence, the admission of evidence and/or addressing of the evidence. It follows that an advocate must remain free to admit, test, and make a submission on the evidence without fear of litigation. An advocate must be free, for example, to submit to the court that a witness is dishonest, without that witness being able to sue the advocate in defamation. Were it otherwise, the scope for disgruntled parties to pursue claims by way of defamation would be significant with the consequential chilling effect on legal proceedings described by Lord Phillips (above, §11). One focus of subsequent cases has been whether these justifications, as they apply in defamation claims, apply to other causes of action.

Expansion of JPI in *Watson* and *Marrinan*

24. In the cases of *Watson v M'Ewan* [1905] AC 480 (HL(S)) ("**Watson**") and *Marrinan v Vibart* [1963] 1 QB 528 (CA) ("**Marrinan**"), the immunity which applied to claims in defamation was expanded to certain other causes of action. Both were relied upon by the Court of Appeal (CA [10]). Whether the true effect of these cases was to expand JPI to all causes of action is significant for the appeal. HB p. 3246
HB p. 2305
HB p. 148

Watson

25. *Watson* was an unusual case, the effect of which was the subject of consideration and some disagreement in *Jones*. Lord Hope, in his dissenting judgment in *Jones*, considered the facts of *Watson* to be of "*particular interest, especially because this appears to have been the first case that the immunity was invoked in response to a claim other than one for slander*" [*Jones*, p.440B-D]. HB p. 2067
26. It was a Scottish case in which the defendant, a doctor, had been retained by the wife, and subsequently the husband, in respect of the same proceedings for separation and aliment. The claim concerned statements the doctor had made to the husband's legal team before the hearing and similar statements made subsequently in court including

damaging allegations based on what he had learned when retained by the wife. The wife and her father brought an action against the doctor alleging breach of confidence and slander.

27. The Lord Ordinary at first instance decided that an immunity applied to both the breach of confidence and slander claims in respect of the oral evidence but not in respect of the doctor's out-of-court statements in his precognition –the interview at which the doctor's proof of evidence had been taken: (1904) 7 F. 72 [pp.77-9 (footnoted)]. The Second Division of the Court of Session affirmed this decision⁶ but went further, disallowing the breach of confidence claim but allowing the slander claim in respect of the doctor's precognition: (1904) 7 F. 72. The grounds for disallowing the breach of confidence claim in respect of the precognition related mainly to the fact that the alleged breach of duty was unparticularised. The doctor appealed the decision to allow the slander claim in respect of the precognition and the wife and her father cross-appealed the decision to disallow the breach of confidence claim. HB p. 939
28. On appeal to the House of Lords, the Lord Chancellor, the Earl of Halsbury, introduced his speech by stating that he did not think *"any question arises as to the confidential nature of the employment between patient and medical man. I do not propose to express any opinion upon what would be the legal determination of that question if it arose"* (Watson [1905] AC 480 (HL(S)) [pp.485-486]). This was because the only issue that arose was whether the *"immunity of a witness for evidence given in a court of justice"* applied also to that witness' proof of evidence [p.486]. He considered that the public policy behind the immunity for oral witness evidence must also extend to *"preliminary examination of witnesses"* [p.487]. Lord James and Lord Robertson agreed [p.489]. HB p. 3251
29. Other than the necessary extension of JPI from oral evidence to the content of proofs of evidence, the effect of the judgment is unclear. In *Jones*, both Lord Hope and Lady Hale in their dissenting judgments considered the case to be authority for the HB p. 3252
HB p. 3253
HB p. 3255

⁶ Lord Moncreiff appears to hint that the pursuer's breach of confidence claim in respect of the doctor's oral evidence may not have been barred had she objected to the evidence at the time it was given: (1904) 7 F. 72 [p.86].

HB p. 948

proposition that the immunity applied equally to breach of confidence claims and, indeed, irrespective of the cause of action (Lord Hope [pp.440C-441F]; Lady Hale [p.452A-C]). Lord Phillips observed that the headnote to the House of Lords decision stated that the claim for breach of confidence did not proceed [pp.409G-410E]. His Lordship appeared willing to accept Lord Hope's close analysis to the contrary, but considered it "*right to observe that the focus of the House of Lords appears to have been the claim for slander and the case was not concerned with the duty of care that, under the modern law, is owed by an expert to his client*" [p.410E].

HB p. 2067

HB p. 2079

HB p. 2036

HB p. 2037

30. It is submitted, first, that the House of Lords in *Watson* did not decide that JPI applied to breach of confidence. It appears to have been conceded that JPI applied equally to slander and breach of confidence claims concerning the content of the oral evidence of a witness [p.485]. Further, the ratio of their Lordships' judgment was that the immunity applied to proofs of evidence outside the courtroom as well as oral evidence. The House of Lords did not hear argument or give reasons as to any difference in treatment between a claim in defamation and a claim in breach of confidence. If the House of Lords was intending to expand immunity from defamation to breach of confidence or, even, to all claims irrespective of the cause of action, one would expect significant consideration of the point, but there is none. Generalising the ratio of *Watson* to the application of JPI to all statements irrespective of the cause of action is unwarranted.
31. Secondly, whilst the minority in *Jones* considered *Watson* to be authority for the proposition that JPI applied whatever the cause of action, the majority did not. An expansive reading of *Watson* is inconsistent with the decision of the majority in *Jones* (the substance and effect of which is considered further, below, §§46-52).
32. Thirdly, if (contrary to the Appellant's submission), *Watson* is authority for the proposition that JPI applies to breach of confidence and/or to all causes of action, the case does not offer sufficient reason, 121 years on, for this Court to decline to give consideration to whether the underlying policy rationale for JPI justifies the modern cause of action for breach of confidence falling, as a category, within the scope of JPI.

Marrinan

33. In *Marrinan* the plaintiff was a disbarred barrister who brought a claim in respect of statements made against him by the defendant police officers in a report to the Director of Public Prosecutions, and in evidence given at a criminal trial and an inquiry before benchers at Lincoln's Inn. It was pleaded as a claim for conspiracy to make false statements defamatory of him. The police officers denied conspiracy and asserted that the publications relied on were absolutely privileged. Sellers LJ could see no difference in principle between an action in libel and slander and a conspiracy to defame [p.535]. Similarly, Diplock LJ observed that the claim, although an "*ingenious*" alternative means to bring "*an action against a witness for evidence which he has given in a court*", suffered "*all the evils ... as if it were a direct cause of an action in defamation*" [p.538].
34. Sellers LJ did state that "whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule ..." [pp.535-536], but that is to be understood in the context of a case in which a defamation claim was pleaded as a conspiracy to defame in order to circumvent the well-established absolute privilege. The statement regarding the form of action was not a statement of principle that JPI applies to all causes of action (which could not in any event be correct given the causes of action to which JPI does not apply) and it is clearly not a statement as to the scope of the immunity that can be reliably abstracted as a statement of general principle (especially bearing in mind Lord Hoffmann's warning in *Hall* at [p.697E-F]). *Marrinan* is authority for the evidently correct proposition that the immunity applies to a defamation claim and a conspiracy to defame alike, when the defamatory statements are made on an occasion of absolute privilege. In that sense, *Marrinan* did expand the immunity, but its ratio did so in a limited way.

Hall and the advocate immunity cases

35. *Hall* is significant because in addition to considering the immunity of advocates from claims in negligence (as distinct from claims brought in other causes of action) it identifies the general principles to be applied in considering JPI.

36. First, it was recognised in *Hall* that JPI is limited to certain causes of action. Lord Hoffmann stated that *“no one can be sued in defamation for anything said in court. The rule confers an absolute immunity which protects witnesses, lawyers and the judge. ...”* [p.687B-D]. Later in his Lordship’s speech the position was put slightly more broadly [p.697B-E]:

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*“The witness analogy - This argument starts from the well-established rule that a witness is absolutely immune from liability for anything which he says in court. So is the judge, counsel and the parties. They cannot be sued for libel, malicious falsehood or conspiring to give false evidence; *Marrinan v Vibart* [1963] 1 QB 528. The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say. And, as Fry LJ explained in the passage which I have already cited from *Munster v Lamb* 11 QB 588, 607 this policy is regarded as so important that it requires not merely qualified privilege but absolute immunity.”*

Lord Hoffmann there correctly recognised that the immunity applied to claims in defamation and had applied to similar claims pleaded as a conspiracy, and to malicious falsehood.

37. Secondly, it is necessary to proceed by considering the category of case with reference to the underlying rationale of the immunity. Lord Hoffmann in *Hall* cited the dictum of McHugh J in the High Court of Australia in *Mann v O’Neill* 71 ALJR 903 [912], that there is a temptation *“to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence”* (cited in *Hall* at [pp.697F-698A]). Concomitantly, it is necessary to be clear about what the rationale is. The rationale of what is described as witness immunity was not merely that *“everyone would find litigation more agreeable if no awkward consequences could follow from anything which the participants did”* (*Hall* [p.698A-B]). Rather, it was necessary to go further and identify *“why the public interest requires that a particular participant should be free from the stress created by the possibility that he might be sued”*, in particular, how the

HB p. 4017

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HB p. 1142

participant would “otherwise behave differently in a way which was contrary to the public interest” [p.698B]. The immunity of witnesses was based upon the perception that they would otherwise be less inclined to come forward and tell the truth [p.697H].

HB p. 1142

HB p. 1141

38. Thirdly, and relatedly, dispensing with the need to test an expanded category of case against the rationale would generalise the immunity in a way that is illegitimate. At [p.697D-F] Lord Hoffmann addressed Lord Diplock’s characterisation in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 (HL) [p.222A] (“*Saif Ali*”) of witness immunity as a “general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice”. He then observed that “stated at this level of generality, it includes immunity for advocates for anything that they may do” but warned that “to generalise the witness immunity in this way is illegitimate and dangerous” [Hall, p.697D-F]. It is illegitimate in the sense that the principled approach requires the necessity of the immunity to be scrutinised by reference to the policy rationale that underpins it, and dangerous in the sense that, absent that constraint, immunity will be granted by default, extinguishing valid legal rights where no sufficient public interest requires it.

HB p. 1141

HB p. 2885

HB p. 1141

39. Lord Steyn similarly considered that the immunity that had hitherto been recognised in respect of the negligence of advocates had little if anything to do with the policy justifications of the immunity of witnesses from claims in defamation, and, accordingly, whilst the analogy “seemed at first to have some attractiveness, it has no or virtually no weight at all” [p.679B-C]. Lord Hope similarly considered the immunity of witnesses to be no more than “a make-weight argument” for the immunity of an advocate from negligence, and that, ultimately, “each of these immunities needs to be justified, and this can be done only on grounds which are relevant to the public interest in the efficient and impartial administration of justice” [pp.714G-715A].

HB p. 1123

HB p. 1159

40. What is to be drawn from *Hall* is that JPI applies to claims in defamation, malicious falsehood, and conspiracy to give false evidence and that there is no general immunity in court from civil liability, whatever the cause of action. Generalising the immunity to other and distinct causes of action – in that case, the immunity of advocates when in

court from cases in negligence – must be justified on its own terms, rather than simply by analogy with an existing immunity.

41. A further good reason to treat immunity in negligence as distinct was the prior legal relationship and duty existing between lawyer and client which gives rise to the duty of care in negligence (*Hall* [pp.698E]; similarly, *Jones* [pp.417H-419B]). This point is considered further, below (§§65-66, 75).

HB p. 1142
p. 2044

Taylor and Darker

42. *Taylor* and *Darker* were both decided shortly prior to *Hall*. In both cases, it was accepted that the impugned statements, if made in court, would attract immunity. The central issue was whether certain actions, outside of court, fell within an extension of the immunity. These cases are of greater relevance to the extension of the immunity as considered in Issue 2. They nevertheless merit brief consideration here in the context of the scope of JPI as it applies inside the courtroom.

HB p. 3168
HB p. 1556

43. *Taylor* concerned statements made by the Serious Fraud Office and others, out of court but in the context of an investigation with a view to prosecution. The statements were alleged to be defamatory. Because the claim was in defamation, there was no dispute as to whether the cause of action itself fell within the immunity. The sole question was whether that protection extended to statements made out of court. It was held that the statements made in the impugned letter and file note were subject to immunity from suit in respect of an action for defamation. Lord Hoffmann described the “settled” position that “persons taking part in a trial – the judge, the advocates, the witnesses – could not be sued for anything written or spoken in the course of the proceedings” [p.207F–208A]. That is a statement which must be read alongside His Lordship’s subsequent analysis of the causes of action which do and do not fall within the immunity and some “disputed ground”, which are addressed at §44 below, and his narrower description of the causes of action to which the immunity applies in *Hall* (see §§36-38 above).

HB p. 3168

HB p. 3198

44. Lord Hoffmann also stated in *Taylor* that “as the policy of the immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes

the cause of action” [p.215C]. He observed that the immunity does apply to a claim pleaded as a conspiracy to give false evidence, but not to actions for malicious prosecution where the cause of action consists of abusing the legal process. That was correct as a description of the causes of action to which JPI does and does not attach. However, he was not intending to set out a universal statement of principle, still less a test for ascertaining whether a cause of action fell within the immunity. This is made plain by Lord Hoffmann’s further observations, which followed immediately, that between the ends of “*actions for defamation and for conspiracy to give false evidence*” (clearly within the immunity and its policy justification) and malicious prosecution (clearly outside it), there is “*some disputed ground*” [p.215E]. He thus left open whether the immunity applied to claims for negligence relating to a carelessly prepared post-mortem report⁷ or misfeasance in public office [p.215E-F]. Lord Hoffmann’s analysis is consistent with the proposition that there is no blanket immunity for things said in court, and that JPI proceeds with reference to specified causes of action and the rationale for their inclusion within the scope of JPI.

HB p. 3206

HB p. 3206

HB p. 3206

45. *Darker* concerned allegations that police officers had fabricated evidence against the claimants as part of an investigation and prosecution. It bore similarities to *Taylor* in that the House accepted that JPI existed when “*in the witness box*”, and the issue was how far backward it extended [p.446C-D]. It distinguished between the acts of police officers as witnesses and as investigators. It concerned the extension rather than expansion of JPI.

HB p. 1549

Jones

46. The majority in *Jones* (Lord Phillips, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson) considered that the immunity of an expert witness from claims in negligence brought by their own clients could no longer be justified. As with *Hall*, it is of significant relevance to the general principles to be applied in this appeal. The approach of the majority in *Jones* in relation to the principles to be applied is consistent with the majority in *Hall*.

⁷ The facts of the case of *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184 (QB).

HB p. 1660

47. The dissenting judges, Lord Hope and Lady Hale, considered that the immunity applied to all causes of action, for which they considered *Watson* to be authority (per Lord Hope at [p.441E-F] and Lady Hale [p.452A-C]). It was Lord Hope's analysis that *"the need for certainty ... makes it necessary to extend the protection of the rule to all witnesses and to all causes of action that may be brought against them"* [p.442G] and Lady Hale's that *"it should not matter what the source of that liability might be: whether saying or writing something which is defamatory of someone else; or saying or writing something in breach of a duty of confidence owed to someone else; or saying or writing something in breach of a contractual duty owed to someone else; or saying or writing something in breach of what would otherwise be a tortious duty owed to someone else"* [p.452A-C].
- HB p. 2068
p. 2079
- HB p. 2069
- HB p. 2079
48. That is consistent with the approach of the Court of Appeal here, but inconsistent with the majority views in both *Jones* and *Hall*. It is, in the Appellant's respectful submission, an approach characterised by Lord Hoffmann in *Hall* as an *"illegitimate and dangerous"* generalisation of JPI.
49. Although there are differences in the analyses of the majority, their disagreement with the minority was, fundamentally, that the immunity did not apply to all causes of action and, in the case of negligence, it needed to be justified, other than simply by reference to a generalised immunity of witnesses. The majority's speeches tend to emphasise that the immunity was founded and focused upon the absolute privilege from defamation (per Lord Phillips [p.407F] and Lord Collins [p.423F-G]). Lord Collins observed that the immunity did not apply irrespective of the cause of action: *"in England there has never been complete immunity for expert witness evidence, any more than there has been complete immunity for other witnesses. The general principle does not preclude prosecutions for perjury, or for perverting the course of justice, or for contempt of court, or liability for malicious prosecution, or misfeasance in public office [citing *Darker*]"* [p.426E]. In apparent contrast, Lord Brown, in a short concurring judgment, described it as long established that *"witnesses of fact enjoy complete immunity ... from any form of civil action"* [p.422G]. However, as part of the majority, he implicitly agreed that expert testimony could give rise to liability in certain causes of action (at least in negligence), but not others (at least in relation to defamation). Lord Dyson referred to *Palmer v Durnford* [1992] QB 483 (which applied the immunity to a
- HB p. 2034
p. 2050
- HB p. 2053
- HB p. 2049

claim in negligence against an expert witness) and noted that it had not been disputed in that case that “*witnesses ... enjoy immunity from any form of civil action*” [p.430G-H], before then considering it to have been wrongly decided (or, at least, to have found an immunity which could no longer be justified on policy grounds) [pp.432G-433F]. Lord Dyson emphasised the starting approach to be the general rule that every wrong should have a remedy and that any exception must be justified [p.432B-C], rather than starting from “*a different general rule*” that witnesses may not be sued for anything said in court and that any exception must be justified [p.432C-E].

HB p. 2057

HB p. 2059

HB p. 2059

50. Consistent with *Hall*, the majority in *Jones* concluded that there is no generalised immunity for things said in court by a witness. Instead, the policy justifications for an immunity in respect of a particular cause of action must be carefully analysed and be sufficient to justify an immunity, which remains an exception to the general rule that every wrong should have a remedy.

HB p. 2059

51. Lord Hope recognised the logic of the majority to be that there would also be no immunity for other causes of action, specifically identifying breach of confidence [p.171E-G]:

HB p. 2077

“Other duties giving rise to the risk of liability.

*The argument in favour of removing the immunity concentrated on the duties of care that arise from the contractual relationship and, in tort, from the relationship of reliance on the services of the professional. There are however other circumstances that need to be considered that might give rise to liability from which, as matters stand, experts enjoy immunity. There is the duty of confidentiality which was the subject of the proceedings against the expert in *Watson v M'Ewan* [1905] AC 480. Is the immunity to be removed in cases of that kind too, where the expert agrees to give evidence for the other side or feels himself bound when giving evidence for his own side to reveal information which the court needs if it is to be told the truth but which his client maintains was confidential?”*

52. Lord Hope was correct to draw the analogy between duties of care and of confidence, and to recognise the implication of the principles applied by the majority in *Jones* that

other causes of action may also give rise to liability for things said in court. However, for the reasons set out below, it is respectfully submitted that Lord Hope’s rhetorical question does not point to a policy justification sufficient to justify an immunity for claims in breach of confidence (see below at §73).

Singh

53. *Singh* concerned allegations that a school had pressured third parties to give false evidence against the claimant in breach of a contractual duty of trust and confidence owed to her and which was material to her claim to unfair dismissal. Similar to *Taylor* and *Darker*, the case ultimately turned on the limits to the extended immunity, however, some of the reasoning is relevant to the scope of JPI.

54. Lewison LJ, with whom Gloster LJ and Maurice Kay LJ agreed, gave the judgment of the Court. He explained that the immunity originated in defamation (*Singh* [21]), but that the courts had extended it, where “*necessary*”, to prevent claimants from outflanking this rule by suing in respect of statements in similar causes of action or by bringing an action based on statements made prior to proceedings [28, 66]. He deprecated the overbroad notion that the immunity “*attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement*” [46]. Statements to that effect could not be taken literally, given developments concerning the negligence of expert witnesses and advocates, deceit, and negligence in the handling and preparation of exhibits for use in a criminal trial [43-46].

HB p. 2995

HB pp. 2996
& 3005

HB p. 3000

HB p. 3000

55. In relation to breach of confidence, Lewison LJ cited *Imerman v Tchenguiz* [2011] Fam 116 (CA) (“*Imerman*”), which concerned the obtaining of confidential documents for use in family proceedings. An injunction was granted in that case on the basis of breach of confidence. Although the case had not considered JPI, Lewison LJ’s view was that the case was (*Singh* [63]):

HB p. 1896

“[I]nconsistent with the broad proposition that no civil liability lies for anything said or done in the course of litigation. In principle if a person misuses what he knows to be

HB p. 3004

confidential information and thereby causes loss, the person whose confidential information has been misused is entitled to recover compensation.”

Comparative law

56. In Commonwealth and American jurisprudence there is limited yet conflicting authority on the question whether JPI, or its equivalent, applies to all causes of action and to privacy or confidentiality-related claims specifically. Outside of the United States, the authorities may be said to point away from an automatic immunity in respect of privacy or confidentiality-related claims.

(a) In Australia, courts have made broad statements to the effect that JPI applies to all causes of action: *Cabassi v Vila* (1940) 64 CLR 130 [p.141]. However, the Appellant is not aware of any case where this has been tested in respect of a privacy or confidentiality-type claim. A freestanding privacy tort is new in Australia, and it is worth noting that the Australian Parliament felt the need to explicitly import the absolute privilege in defamation into privacy law when creating this cause of action by statute: Privacy and Other Legislation Amendment Act 2024, sch2(8):

HB p. 3483

HB p. 900

(b) The Appellant is aware of one case in New Zealand where a claim in defamation, privacy and breach of confidence (among other causes of action) was made partly in respect of statements in an affidavit: *NR v MR* [2014] NZHC 863. The defamation claim was disposed of on the grounds of absolute privilege [66-67]. But there was no resort to JPI in respect of the privacy and breach of confidence claims, which were rejected on conventional grounds [106-107].

HB p. 4049

HB p. 4069

HB p. 4080

(c) Similarly in Canada, the Appellant’s research has uncovered one case in which a privacy claim was made in respect of a communication in legal proceedings, namely financial information served in family law proceedings: *Duncan v Lessing* 2018 BCCA 9 [66-75]. There, the Court found that an explicit statutory defence of absolute privilege in British Columbia applied regardless of an immunity at common law. However, the question whether a common law JPI applied to privacy claims was left open. The Court was reluctant to decide that it did apply.

HB p. 3698

It considered that the boundaries of JPI were “*not firmly set*” and that JPI did not apply to all causes of action, relying on *Amato v. Welsh*, 2013 ONCA 258 [68-70].

HB p. 3353
p. 3381

- (d) JPI varies across the common laws of US States. It is clear that JPI applies to privacy and confidentiality-related claims in some States: *McGrew v. Heinold Commodities, Inc.*, 147 Ill. App. 3d 104, 114 (1986). Then again, JPI has been applied in the US to a whole raft of causes of action which it would not be in this jurisdiction⁸, such as fraud and malicious prosecution: *Simms v. Seaman*, 308 Conn. 523 (2012). In that sense there are fundamental differences in civil procedure and substantive law in the United States which make it difficult to draw lessons as to how JPI should apply in this jurisdiction.

Conclusion

57. There is no general or blanket immunity that applies to any statement made by an advocate, or other participant in a judicial process, irrespective of the cause of action. As observed by Lord Hoffmann in *Taylor*, some causes of action are clearly within the immunity, and others are outside it, between which there is “*disputed ground*.” Statements to the effect that JPI applies whatever the nature of the claim are overly broad and generalise the immunity in a way that Lord Hoffmann condemned in *Hall* as “*illegitimate and dangerous*”. Where a claim does not fall clearly within an established category, the starting point is the general rule that every wrong should have a remedy, and any further exception to that rule must be justified by compelling reasons of public policy. The underlying rationale for the immunity will inform both whether a case falls within an established category and, if it does not, whether an expansion of the immunity is justified. Claims for breach of confidence, misuse of private information and under the DPA 2018⁹ are not established categories of JPI and the proper approach is to assess

HB p. 3206

⁸ T Leigh Anenson, ‘Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers’ (2004) 31 *Pepp L Rev* 915, 918–20.

⁹ In *CLG v Chief Constable of Merseyside* [2015] EWCA Civ 836, JPI was raised as a defence to a claim concerning a police officer’s witness statement which revealed an address to which the claimants, at risk of harm, had fled. It was pleaded both in negligence, and further to the Human Rights Act 1998 and Data Protection Act 1998 [1]. The Court of Appeal applied JPI to the claim in negligence [25], [32]. The Data Protection Act claim was refused for other reasons [41-46]. No direct consideration was given to the application of JPI to Data Protection Act claims. The Court of Appeal also appeared to have thought it significant that there was no claim for breach of confidence [11].

HB p. 1427

HB p. 1428,
1435 & 1438
1440-1442
1430 & 804-
805

whether there exists sufficient justification as a matter of public policy for an expansion of JPI.

58. The closest any authority comes to placing a claim for breach of confidence within the scope of the immunity is *Watson*, but there is doubt as to its true ratio, and in reaching their conclusion (extending the immunity of witnesses to preparatory statements made out of court) their Lordships were not asked to, and did not, articulate any policy justification for applying immunity to claims for breach of confidence, or which could apply by analogy to claims for misuse of private information or for breach of the DPA 2018. Further, as the Court of Appeal acknowledged in *Singh*, the strict protection of confidential material in modern authorities such as *Imerman* confirms that a breach of confidence remains an actionable wrong, even where it occurs in the shadow of litigation.

HB p. 1896

D. THE COURT OF APPEAL'S CONCLUSIONS

59. For the reasons set out above, it is submitted that the Court of Appeal erred in reasoning that the immunity applies "*whatever claim was being made*" (CA [10, 30(i)]) which "*inevitably*" leads to the conclusion that the claims for breach of confidence, misuse of private information and breaches of the DPA 2018 must fail (CA [62]).
60. The Court of Appeal recited the reasoning of the House of Lords in *Hall* (CA [26-29]). Respectfully, however, the Court of Appeal's conclusions are inconsistent with the principled approach in *Hall* and its warning against generalising the immunity. Contrary to the Court of Appeal's reliance upon *Marrinan* and *Watson* (CA [10]), for the reasons set out above (§§24-34), those authorities do not support the proposition that JPI applies irrespective of the cause of action.
61. The Court of Appeal's reliance (CA [10-11]) on *Crawford v Jenkins* [2014] EWCA Civ 1035, [2016] QB 231 ("*Crawford*"); *King v Stiefel* [2021] EWHC 1045 (Comm), [2022] 1 All ER (Comm) 990 ("*King*") and *El Haddad v Al Rostamani* [2024] EWHC 448 (Ch) (unreported) ("*El Haddad*") is similarly misplaced. *Crawford*¹⁰ is authority for the proposition that

HB pp. 148
& 152

HB p. 159

HB p. 151

HB p. 2305,
3246 & 148

HB p. 148

HB p. 1514

HB p. 2084
p.1595

¹⁰ To note in respect of *Crawford* that an addendum at p.251D-E of the law report states: "30 October 2014. The Supreme Court (Lord Kerr of Tonghmore, Lord Wilson and Lord Hughes JJSC) dismissed an application by the

HB p. 1534

JPI protects statements made by a complainant to the police (which were pleaded as amounting to the tort of false imprisonment, but were addressed, essentially, as an allegation of malicious procurement of an arrest and detention by the police) and a claim in harassment by way of the same statements made to the police¹¹. In so finding, the court did not rely on a generalised immunity; to the contrary, it bore “*well in mind*” that the scope of immunity must be strictly limited, made reference to Lord Hoffmann’s “*disputed ground*” in *Taylor*, considered the warning against generalising the immunity, and carefully reached the conclusion that the policy militated in favour of the immunity applying to the pleaded causes of action as it would to a claim in defamation [57, 70]. Having undertaken that necessary scrutiny, Sir Timothy Lloyd (with whom Lady Justice Sharp and Lord Justice Beatson agreed) concluded, first, that there was “*no question of an abuse of the process of the court ... and correspondingly, no reason to treat a claim for compensation for the arrest as one to which the otherwise general witness immunity rule does not apply*” [56] and with regard to the statements made to the police, “*the policy behind the witness immunity rule is the same in relation to the present claim as it would be as regards a defamation claim*” [57]. Sir Timothy Lloyd concluded similarly with respect to the harassment claim, holding that it would be inconsistent with the policy of the witness immunity rule to exclude a course of conduct under the Protection from Harassment Act 1997, “*so far as it consists or includes statements which would be within the rule in the case of a defamation claim*” [68-70]. Thus, *Crawford* is consistent with and illustrative of the principled approach required by cases such as *Hall* in scrutinising the specific causes of action as against the rationale for the immunity. Just as in *Marrinan*, the substantial overlap in substance with a claim in defamation, and thus also with the associated policy considerations applicable to JPI and defamation claims, was (correctly) a weighty factor in finding that applying JPI to the pleaded causes of action was justified. *Crawford* is not authority for the proposition that JPI applies irrespective of the cause of action.

HB p. 1530
HB p. 1532

HB p. 1530

HB p. 1530

HB p. 1532

claimant for permission to appeal because, although it was arguable that the reasoning of the Court of Appeal was erroneous, ultimately the claimant would not succeed.”

¹¹ A separate framing of the harassment allegation based on text messages sent to the Claimant was dismissed because “*there language is simple not capable of being seen as harassment*” even if assumed to be a course of conduct which was itself doubtful [71 – 75].

HB p. 1533,
para 73

62. *King* and *El Haddad* were first instance decisions concerning allegations of conspiracies by lawyers and their clients to defraud or procure the discontinuance of proceedings. In *King*, the conspiracy allegations were struck out in their entirety as failing to disclose a complete cause of action (*King* [234]). A discrete but academic issue arose as to whether counsel's conduct of the action in court fell within the scope of JPI [318-335]. This aspect of the alleged conspiracy appears to have centred on (i) the manner of counsel's cross-examination and the materials put to the Claimant in the course of that cross-examination and (ii) counsel's presentation of the costs' position, including via witness statements [87, 156(v), 159]¹². It is difficult to derive any statement of principle from this unusual case; clearly, the conduct of the advocate in court in confronting the claimant with evidence and in making submissions based on the evidence falls squarely within the fundamental public policy rationale for JPI. *El Haddad* involved similar allegations against various lawyers to the effect that they had combined knowingly to mislead the court by preparing and deploying false evidence and advancing false submissions (*El Haddad* [15-17, 25-26, 89]). Fancourt J concluded that the alleged conspiracy fell squarely within the scope of JPI (absent the elements necessary to advance a claim for malicious arrest or prosecution or other abuse of process) [86 – 109]¹³. Neither case supports the conclusion that JPI applies irrespective of the cause of action and without reference to the rationale of the immunity, or that JPI extends specifically to claims of breach of confidence, misuse of private information, and the DPA 2018.
63. Rather than proceed on the basis that JPI applies irrespective of the cause of action, the Court of Appeal should instead have considered whether the claims for breach of confidence, misuse of private information, and/or the claim under the DPA 2018 fell within the established scope of JPI by considering the cause of action under consideration and the underpinning rationale for the recognition of the immunity.

HB pp. 2084
& 1595

HB p. 2132

HB p. 2146

HB pp. 2104,
2117 & 2118

HB pp. 1600,
1602, 1619
& 1624

HB p. 1618

¹² Other allegations were made against counsel in respect of conduct in relation to mediation and the conduct of out-of-court discussions but these were not considered in the context of the immunity submissions.

¹³ He expressly preserved claims for malicious arrest or prosecution and cognate abuse of process, as well as a conspiracy independently arguable without relying upon the giving of false evidence [82].

64. The Court of Appeal's judgment has been applied in *Rogerson v Erhard-Jensen Ontological/Phenomenological Initiative Ltd* [2025] EWCA Civ 1547, [2026] 1 W.L.R. 2969 ("**Rogerson**"). Andrews LJ (with whom Elisabeth Laing LJ and Males LJ agreed) found that none of the justifications for the principle of JPI applied to the act of commencement of an arbitration aimed at stifling protected disclosures or penalising someone for making them [55] noting that the core immunity attaches principally to statements, not to every act or omission occurring in litigation [43-45]. Andrews LJ gave, as possible examples of protected conduct, reference to confidential information in submissions and providing information for use in court [46]. Those illustrations were immaterial to the judgment and appear to have arisen from the judgment now under appeal. The judgment does not illuminate the correct approach in principle.
- HB p. 2731
- HB p. 2744
- HB p. 2742
- HB p. 2742

E. CAUSES OF ACTION AND THE NATURE OF THE IMPUGNED CONDUCT

Relevance of the cause of action as a matter of principle

65. There are at least two broad respects in which the characteristics of the cause of action may be relevant to an assessment of policy justifications. First, the nature of the protected right or obligation may carry a weight that militates against the right being extinguished. Thus, in *Hall*, a relevant factor against immunity was that the advocate had assumed a duty of care towards their client [p.698D - F]. Similarly, in *Jones*, the majority emphasised the distinguishing features of an expert owing a contractual and/or common law duty towards their retaining client (per Lord Phillips [p.409E-G], Lord Brown [p.423A-C], Lord Collins [p.426C-D], Lord Kerr [p.427F], and Lord Dyson [pp.429D-430E, 432B-436A]). That an obligation to exercise reasonable skill and care had been assumed by the advocate and expert underlined the unfairness in leaving a wrong in discharging that obligation without a remedy.
- HB p. 1142
- HB p. 2036
- HB p. 2050, 2053, 2054, 2056 & 2059
66. Relatedly, applying JPI to causes of action created by pre-existing and ongoing duties, such as the duty in negligence of an advocate or expert towards a client, produces arbitrary distinctions in which the advocate or expert may be liable throughout the course of fulfilling the duties towards their client, until the moment they are acting in

or preparing for court proceedings (see, by analogy, Lord Dyson [p.431B-H] in *Jones* rejecting precisely this anomaly).

HB p. 2058

67. Secondly, it may be that the limiting features within the cause of action itself – quite apart from the existence or otherwise of immunity – are sufficient to render a blanket immunity unnecessary. As Lord Wilberforce cautioned in *Saif Ali* [pp.214E-216A], it is an error to conflate immunity from suit with the substantive defences that make a claim unlikely to succeed, for reasons quite apart from any immunity. JPI should not be deployed as a blunt instrument to bar claims where the ordinary elements of the tort already provide sufficient protection against abusive litigation. In *Hall* the majority emphasised the particular features of claims in negligence against advocates that would prevent liability from interfering with the administration of justice in a way which did not exist with claims in defamation. Not least, the only pre-existing legal relationship and duty is between the advocate and their own client. There is no such relationship between an advocate and their opponent’s client, or between prosecuting counsel and the defendant: *Hall* [p.679D]. Moreover, an attempt by a criminal defendant to challenge a subsisting conviction by suing the prosecution advocate would fail under the principle in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL): see the analysis of Lord Steyn in *Hall* [pp.679D-680B]. Thus, the scope for a duty in negligence to open the door to scurrilous claims from indeterminate numbers of claimants is significantly confined, even in the absence of immunity.

HB p. 2901

HB p. 1141

HB p. 1141

68. Conversely, where the cause of action bears similarity with a claim in defamation that may weigh in favour of concluding that the cause of action does or should fall within JPI (see §34 above in relation to *Marrinan*, and §61 in relation to *Crawford*).

HB p. 2305

69. It is necessary, therefore, to consider claims for breach of confidence, misuse of private information, and breach of the DPA 2018, and how the characteristics of such claims may or may not result in claims tending to interfere with the administration of justice. In the analysis below, it is explained how the causes of action arise in XGY’s claim, but it is how they may generally arise and interact with the administration of justice that is critical.

Breach of confidence

70. A breach of confidence claim arises from a pre-existing obligation of confidence. It protects an interest distinct from reputation or from the truth of an allegation about statements in evidence. It can arise through the law of contract or equity. The equitable obligation arises where the recipient knows, or ought to know, that the information is confidential, and its content is governed by the conscience of the reasonable recipient: *Vestergaard Frandsen S/A v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556 [22–28].
71. Several characteristics of a claim for breach of confidence are relevant to whether expanding JPI to such claims is strictly necessary to promote the administration of justice. First, there is a strong public interest in upholding duties of confidence: *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 (CA) [67-68], which strengthens the starting point that a wrong should not be without a remedy. Outside the law of contract, the origins of a breach of confidence claim are equitable. The Supreme Court has recently emphasised the distinct role of equity as providing “*a discretionary remedy...that...intervenes to put right defects or inadequacies in the common law. That is frequently because equity perceives that the strict pursuit of a common law right would be contrary to conscience*”: *Wolverhampton City Council and others v London Gypsies and Travellers* [2023] UKSC 47, [2024] A.C. 983 [149]. One example of equity providing a remedy in respect even of statements said in court is a civil fraud claim to set aside a judgment¹⁴. In a cause of action concerned at its core with remedying unconscionable outcomes, there must be particularly compelling justification for an absolute bar to such claims proceeding.
72. The public confidence dimension is striking in XGY’s case. It is accepted, at least by the Court of Appeal and Bar Council, that there was a clear and obvious error¹⁵. The error occurred in the particularly important context of the protection of victims of violence against women and girls from repeat victimisation, for which the State bears

HB p. 3240

HB p. 1207

¹⁴ Thomas Grant and David Mumford (eds), *Civil Fraud: Law, Practice & Procedure* (1st edn, Thomson Reuters 2018) para 38-002 and the cases cited therein.

¹⁵ Dr Van Dellen described what happened to XGY as an “*unequivocal personal data breach*” at [70(a)] of his statement. See also (CA [60, 62]).

HB p. 158

responsibility. Yet XGY is left without a remedy. The consequences for public confidence, and the public interest more generally, are illuminated by the evidence in support of the Centre for Women’s Justice’s proposed intervention. The statement of Ms Ellis explains that victims of domestic abuse may have no practical choice but to entrust that information to the police and prosecuting authorities. A rule denying every remedy when protected information is unnecessarily disclosed in court risks weakening confidence in those authorities, discouraging cooperation and exposing victims to renewed danger, displacement and trauma. Those consequences bear directly upon, rather than stand apart from, the effective administration of justice. The law has elsewhere recognised the public interest in preserving justified confidences so as to maintain the flow of information to the police: *Swinney v Chief Constable of Northumbria Police* [1997] QB 464 (CA) (per Hirst LJ [p.484B], Gibson LJ [p.486B], and Ward LJ [p.487B]).

HB p. 3150,
p. 3152 &
p. 3153

73. In his dissenting judgment in *Jones*, Lord Hope [pp.451F-452A] raised the prospect of the ability of an expert witness to switch sides during a legal dispute and breach the confidentiality of their previous client by revealing matters in court, using this hypothetical (which resembled *Watson*) to argue in favour of retaining a blanket immunity. However, this scenario illustrates the problematic consequences of the Court of Appeal’s approach. If the immunity acts as a bar to claims in breach of confidence, a client whose highly sensitive information is wrongfully exposed during proceedings would be left without equitable redress. As a matter of public policy, the inability of the expert’s first client to seek a remedy for breach of confidence is a reason against applying JPI to breach of confidence, rather than the reverse.
74. Secondly, there is no material overlap with defamation and similar claims. A breach of confidence claim does not concern the truth or otherwise of a statement made in court. Instead, it is concerned with whether the information was confidential, and whether that confidence has been breached without justification. A breach of confidence will not, certainly in the ordinary run of cases, enable collateral attacks on concluded proceedings. Neither will it impinge, given the available defences, upon free speech in the sense of leading to fear or caution in making remarks in court that might otherwise

HB p. 2078

be defamatory; it is concerned only with whether the information is received in circumstances imparting an obligation of confidentiality.

75. Thirdly, a claim will arise only where there is a pre-existing obligation of confidentiality, and the class of potential claimant is therefore limited. In contrast to a defamation claim which can be pursued by any person who considers themselves to be defamed by something said in court, pre-existing obligations of confidence will arise in more limited circumstances. Information received by an advocate about a party or witness will generally be received with the expectation that it may be referred to in court, rather than with any obligation of confidence. There is no scope for broad and indeterminate liability to any number of third parties which, absent JPI, would undermine the administration of justice by having a chilling effect on freedom of speech in the courtroom.
76. Fourthly, the application of JPI – just as with the pre-existing obligations in negligence of an advocate or expert – would lead to arbitrary and unprincipled distinctions. Thus, those involved in law enforcement will be obliged to respect obligations of confidence in the ordinary way¹⁶, until the point that actions which breach that obligation are in or preparatory to court proceedings. There is no principled basis for the appearance in or preparing to appear in court being the point at which obligations of confidence cease to be enforceable. The arbitrariness of the distinction is illustrated by XGY’s case, because no JPI is claimed in respect of the disclosure of her Epsom location by the custody sergeant’s imposition of a bail condition, but it *is* claimed in respect of the Hampshire disclosure by the advocate seeking a bail condition stating her Hampshire location. As considered further below (§§76, 107-111), there are no particular features of the position of advocates in court proceedings such that the advocate, but not the custody sergeant, should be relieved of the duty to abide by an obligation of confidence.
77. Fifthly, where disclosure of confidential information is properly required in the course of court proceedings, a defence will generally be available to any claim for breach of

¹⁶ See, for example, the successful claim for misuse of private information and breach of data protection legislation brought against a police force in respect of information which put the claimant at risk from her ex-husband in *Ali v Chief Constable of Bedfordshire Police* [2023] EWHC 938 (KB) (unreported).

confidence. A duty of confidence may lawfully be breached if disclosure is compelled or otherwise necessary in legal proceedings: *British Steel v Granada Television* [1981] A.C. 1096 (HL). The powers of the court to order disclosure take into account, but ultimately override, confidentiality: *Science Research Council v Nasse* [1980] AC 1028 (HL) [p.1065E-F]. As described in *Phipson on Evidence*, paras 8-14¹⁷, that a person has been summonsed “to produce documents is a defence to an allegation of breach of confidence”. Further, “the fact that a third party owes a duty to another not to release a document without his consent, not being privileged, is not an absolute objection to a witness summons, any more than a duty of confidence owed by a witness to another ... justifies a refusal to answer a question asked in evidence, or such a duty owed by a litigant to a third party justifies failing to give disclosure”. In this case, XGY’s location did not have to be disclosed; indeed, it was never intended for disclosure in court. Nonetheless, claimants will not succeed in civil claims in respect of the use of confidential information which is genuinely necessary or mandatory in legal proceedings. As such, there are limiting factors within the cause of action itself which render an immunity unnecessary.

HB p. 2962
p. 4257

78. Sixthly, advocates and other participants in court proceedings already do respect obligations of privacy and confidentiality and are well used to so doing. In the ordinary course of litigation, parties do not behave as if they are able to breach confidentiality with impunity on the assumption that they will be able to rely on JPI. Respondents to disclosure requests generally await a court order before disclosing confidential information about a third party. That would be superfluous if they could just rely on JPI. Litigation does not of itself dissolve an existing obligation of confidence. Courts have long controlled or restrained the use of privileged or confidential material obtained or deployed for proceedings: *Lord Ashburton v Pape* [1913] 2 Ch 469 (CA) [pp.472–475]; *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431 [pp.438E, 440C–H]; *Imerman* [61, 68–69, 141]. The Bar Council reports SBA representatives as saying (no doubt correctly) that “counsel conducting hearings involving personal data are generally highly conscious of the sensitive nature of the data handled” (van Dellen [84])¹⁸. Thus,

HB p. 1201
pp. 2021 &
2023
pp. 1929,
1931 & 1949

¹⁷ Hodge M Malek KC (ed), *Phipson on Evidence* (21st edn, Sweet & Maxwell 2025).

¹⁸ Statement from Dr Anton van Dellen in support of the Bar Council’s intervention in this appeal.

potential liability for breach of confidence does not overlay any new or additional consideration that will, realistically, cause advocates (or other participants) to act any differently; advocates already proceed on the basis that confidentiality is to be respected.

79. Finally, extinguishing the right to a remedy for breach of confidence has other important consequences for the administration of justice as it is the primary vehicle by which the public interest in the maintenance of legal professional privilege (“LPP”) is achieved as breach of confidence is the most obvious framing for applications for injunctive relief and other remedies to prevent or to prevent further breach of LPP.

Misuse of private information

80. Misuse of private information raises distinct issues. It protects an interest distinct from reputation and does not require a pre-existing confidential relationship between the parties. It operates via a two-stage test. The court asks, first, whether the claimant had a reasonable expectation of privacy in respect of the information and, secondly, whether that privacy interest is outweighed by the competing right or public interest relied upon to justify its use or disclosure: *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158 [47–58] (“*Bloomberg*”); *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] UKSC 15, [2026] A.C. 63 (“*Abbasi*”) [80].

HB p. 1345
HB p. 1378
p. 1012

81. At the first stage, the court considers all the circumstances, including the nature of the information, the claimant’s position, the circumstances in which the information came into the defendant’s possession, and the effect of disclosure: *Bloomberg* [49–50]. The Supreme Court explained in *Bloomberg* that while there is no necessary overlap with breach of confidence: “... confidentiality may well be relevant to whether there is a reasonable expectation of privacy. In particular, if information is confidential that is likely to support the reasonableness of an expectation of privacy” [150].

HB p. 1401

82. *Bloomberg* identifies information concerning a person’s home and involvement in crime as a victim or witness as ordinarily private, while observing that physical location and information deriving from a public criminal hearing are ordinarily not private: *Bloomberg* [52–54]. The Hampshire location was XGY’s confidential, safe home location

HB p. 1379

and it was supplied to the police by a victim of domestic abuse subject to an express restriction against disclosure to DYP. Those circumstances were capable of establishing a particularly strong reasonable expectation of privacy.

83. The second stage ensures that the interests of the administration of justice are given weighty consideration. The courts are experienced in assessing whether legitimate public interests (including the need for courts to receive full information, the open justice principle, fair hearing rights, public safety, the prevention of crime and the protection of the rights of others) objectively justify disclosure (*Abbasi* [80, 99, 127–130]). On the assumed facts of this appeal, there was no reason to convey the Hampshire location to the Court, still less to DYP; XGY's location was irrelevant to the matters in respect of which DYP appeared before Court that morning.

HB pp. 1012,
1017, 1025–
1026

84. These limitations are important to whether immunity attaching to misuse of private information claims, as a category, is genuinely necessary for the purpose of promoting the administration of justice. Court-based disclosures will rarely give rise to an arguable claim for misuse of private information. The interests of the administration of justice are already accommodated within the tort.

85. As to the Respondents' contention that substantive defences are inferior to absolute immunity because the former do not exclude the chilling effect of potential litigation, the Appellant submits that this argument ought to be rejected for two reasons:

(a) The Civil Procedure Rules 1998 afford a summary procedure for the dispatch of abusive or unmeritorious claims (*Hall* [pp.681F–682C]).

HB p. 912
p. 1125

(b) Mere discomfort or inconvenience of potential litigation cannot justify the immunity unless its "*chilling effect*" causes participants to behave in a way that harms the public interest (above, §37). Here, the threat of litigation incentivises greater care in the handling of sensitive information. Such a consequence actively serves the public interest.

86. Similarly to breach of confidence as a cause of action, misuse of private information claims are distinguishable from those in defamation. A misuse of private information

does not concern the truth or otherwise of a statement made in court, and the same considerations as at §74 above apply.

DPA 2018

87. Part 3 DPA 2018 applies to the circumstances in which XGY's Hampshire location was revealed to DYP because the processing was undertaken by competent authorities for a law-enforcement purpose: ss.29-31. HB p. 777
HB p. 778
88. The most pertinent of the data protection principles are:
- (a) The first (reflected in s.35 DPA 2018): *"processing of personal data for any of the law enforcement purposes must be lawful and fair".* By s.35, processing is lawful only where the data subject has given consent or the processing by a competent authority is necessary for law enforcement purposes. On the assumed facts of this appeal there was neither consent nor necessity. HB p. 784
HB p. 784
 - (b) The second (reflected in s.36 DPA 2018) *"the law enforcement purpose for which personal data is collected ... must be specified, explicit and legitimate"* and data must not be processed *"in a manner that is incompatible with the purpose for which [the controller collected it]¹⁹".* On the assumed facts of this appeal, the police collected XGY's confidential location to assist in the investigation and prosecution of the crimes of which she had been the victim. Causing its revelation to DYP via the CPS in the context of unrelated proceedings was – at least arguably – incompatible with the purpose for which it was collected. HB p. 785
 - (c) The third (reflected in s.37 DPA 2018) *"personal data processed for any of the law enforcement purposes must be adequate, relevant and not excessive in relation to the purpose for which it is processed"*. XGY asserts that the communication of her Hampshire location by the police to the CPS and by the CPS to DYP was inadequate and/or irrelevant. HB p. 785

¹⁹ As amended by the Data (Use and Access) Act 2025.

- (d) The fourth (reflected in s.38 DPA 2018) is the requirement of accuracy in relation to the purpose for which the data is processed. *Bartosik v Chief Constable of Scotland* [2022] CSOH 55 clarifies that the requirement of “accuracy” does not import a requirement to erase or rectify the content of inaccurate witness statements used for law enforcement purposes [20–24]. It follows that a DPA 2018 claim cannot be founded on the content of evidential statements and is not therefore akin to a claim in defamation which JPI seeks to prevent. HB p. 785
HB p. 1279
HB pp. 1288-1291
89. Where “sensitive processing²⁰” is involved²¹, the test is more exacting: absent consent, the processing must be strictly necessary, satisfy a condition in Schedule 8 and be supported by an appropriate policy document: ss. 35(5) and 42. The Schedule 8 conditions include processing necessary for the administration of justice and in connection with legal proceedings or the establishment, exercise or defence of legal rights: paras 2 and 6. Those provisions exclude remedies in respect of genuinely necessary use even in respect of sensitive personal data, but do not confer a blanket immunity. HB p. 784
HB p. 800
HB pp. 784 & 787
HB p. 800
90. There are significant restrictions as to the circumstances in which a breach of the DPA 2018 will give rise to a remedy:
- (a) Compensation under s.169 is available only where the claimant proves a contravention, legally recognisable damage and a causal connection between the two: s. 169(1) and (5). *Farley v Paymaster (1836) Ltd (t/a Equiniti)* [2025] EWCA Civ 1117, [2026] 2 All E.R. 414 concerned Article 82 UK GDPR and s. 168, but the approach to compensable damage is instructive by analogy. The Court of Appeal rejected a separate threshold of seriousness²², [60, 75–76] but emphasised that a contravention of data protection law alone does not confer a right to damages; actual material or non-material damage and causation must be proven. Anxiety founded upon a feared consequence must have an objectively well-founded basis HB p. 795
HB p. 795
HB p. 1669 p. 921 & 795
HB pp. 1686 & 1690

²⁰ Defined by DPA, s.35(8) to include data revealing racial or ethnic origin, political opinions religious or philosophical beliefs or trade union membership, uniquely identifying genetic or biometric data, health data and data concerning an individual’s sex life or sexual orientation. HB p. 784

²¹ It is not contended that disclosure of the Hampshire location entailed sensitive processing.

²² Permission to appeal has been granted in *Farley* on the seriousness issue: UKSC/2025/0185.

and cannot be hypothetical or speculative [75–85]. A fleeting or transient reaction may also fail to constitute damage at all [95].

HB p. 1690

HB p. 1695

(b) The controller or processor will not be liable if they prove that they were not in any way responsible for the event giving rise to the damage: s.169(3).

HB p. 795

91. The statutory limitations within the DPA 2018 afford significant latitude in respect of the processing of data for law enforcement purposes and the availability of a remedy under s.169 is narrowly circumscribed. The statutory scheme expressly accommodates legitimate processing for law enforcement purposes and does not impose liability merely because personal data is used in connection with proceedings nor even if data is inadvertently disclosed. Ill-founded claims will be susceptible to strike-out or summary judgment. Liability is neither strict nor owed to an indeterminate class merely because information has entered the criminal justice process. A remedy will however be available where the processing is without consent, unnecessary and results in damage. That strikes an appropriate balance, in the public interest, which affords latitude to data processing in the law enforcement context, whilst still maintaining the rights of the data subject. In so doing, the DPA 2018 reflects the balance Parliament has struck between protections for and freedoms to use personal data with specific consideration of law enforcement processing²³.

HB p. 775

HB p. 795

HB p. 775

92. The Appellant respectfully submits that the Court of Appeal was in error in taking issue at [60] with Ritchie J's statement that the Hampshire location was irrelevant to DYP's bail hearing. The police had considered and imposed appropriate bail conditions upon DYP in relation to XGY's allegations of criminality against him; nothing further was necessary and his appearance was in connection with unrelated court-imposed bail conditions. A lawful basis for seeking a protective bail condition does not, without more, establish that it was necessary to disclose XGY's precise location openly to DYP.

HB p. 158

²³ *Rogerson* [58]: JPI ought not to operate to defeat a remedy contrary to clear parliamentary intention.

HB p. 2744

The nature of the impugned conduct

93. The Appellant submits above that the Court of Appeal erred in concluding that JPI applies irrespective of the cause of action, that the causes of action upon which she relies have not previously been identified as falling within the immunity and that, accordingly, an expansion of the immunity to cover the causes of action she advances requires a public interest of sufficient importance to extinguish her right to a remedy. The Appellant further submits (acknowledging that there is overlap between these submissions) that a similar result is arrived at by examining whether the nature of the impugned conduct is such that it falls outside of the scope of the immunity, when examined against its rationale.
94. First, it is necessary to identify the nature of the impugned conduct. This was an administrative error in the sense that it arose either from the manner in which the Appellant's confidential location had been recorded by the police and/or communicated by the police to the CPS and/or the manner in which the CPS then dealt with that information. Although the facts have not been determined, it appears that a root cause was a long-standing and known systemic failure in the systems operated by the police and CPS for alerting the latter to the confidentiality of addresses provided by the police. At any rate, the task was an information-handling one; it had nothing to do with the evidence to be adduced in the sense of being evidence relied upon by a party in furtherance of a case, and the causes of action did not allege that the statement was false. The Court of Appeal itself accepted that the disclosure was an error (CA [60, 62]) (albeit that the Court of Appeal erred in its understanding that DYP had appeared in Court in respect of the Appellant's allegations)²⁴. HB p. 158
95. Secondly, it is necessary to consider the rationale underpinning the immunity (§§10-12 above): that the administration of justice is promoted by the examination of evidence being undertaken free of exposure to claims challenging the veracity of statements made by witnesses so as to promote the public interest in witnesses of fact giving an unencumbered account of the truth. Examined by reference to that rationale, advocates are protected when they re-state the evidence of witnesses (whether in

²⁴ Statement of Facts and Issues ("SFI") at [9] and CA [3].

argument or during questioning), or re-state the allegation made by a party, or make a submission as to the veracity or import of the evidence. The rationale lies firmly within the examination of evidence in legal proceedings (and its preparation). The Appellant submits that the nature of the impugned conduct of the CPS advocate does not fall within the immunity when examined against its rationale.

96. An example of the limits of immunity being applied with reference to its underlying rationale is *Taylor*. The House asked whether protection was required by the rationale of the immunity, namely “*to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say*” [p.208D]. If that object is to be achieved, then the immunity cannot turn on the contingency of whether a person who makes a statement out of court will later be called to give evidence within court, and the immunity applied [p.214D-G]. For that reason, the impugned acts fell within the rationale of its immunity, and thus its proper scope. HB p. 3168
HB p. 3199
HB p. 3205
97. The authorities provide several examples of this methodology being applied to identify whether the immunity ought to apply while ensuring that the immunity is not expanded beyond its function:
- (a) In *Darker*, it was alleged that police officers had engaged in conduct prior to and distinct from their evidence which included fabricating statements and other evidence, procuring an informer to fabricate evidence, using him as an agent provocateur and obstructing disclosure. The House held that JPI did not apply as the immunity of witnesses did not extend to the misconduct of police during the investigative process, even though the alleged misconduct had the potential to affect the prosecution or become the subject of later testimony. Per Lord Hope [p.448B-D]: “*there is a crucial difference between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence, and their conduct at earlier stages in the case when they are performing their functions*” HB p. 1538
HB p. 1551

as enforcers of the law or as investigators.” Extending the immunity to such acts did not fall within the rationale of the immunity, which serves to protect the function of a witness rather than other acts and omissions in the investigation of crime.

- (b) *Smeaton v Butcher* [2000] E.M.L.R. 985 (CA) was a libel claim about a witness statement. Clarke LJ (with whom Latham LJ agreed) held that absolute privilege does not apply where the statement makes “*no reference at all to the subject-matter of the proceedings*” [26]. Their Lordships’ analysis demonstrates that, when scrutinised against the rationale for the immunity, and even when concerned with an alleged defamatory remark within the courtroom, the immunity is not unlimited.

HB p. 3109

HB p. 3116
- (c) *Singh* (above, §§53-55) held that improperly pressuring a witness to produce an inaccurate statement was a “*free-standing act*” [71]; the means of procuring the evidence did not fall within the rationale for protecting the admission and discussion of evidence.

HB p. 2988

HB p. 3006
- (d) In *Daniels v Chief Constable of South Wales* [2015] EWCA Civ 680 (unreported), Lloyd-Jones LJ analysed the scope of the immunity by reference to the underlying rationale at [32-41] and observed at [42] that “*the fact that an activity may be intimately associated with the judicial phase of the criminal process, as distinct from the administrative or investigatory function, does not, in itself, necessarily give rise to an immunity.*” Implicit in that conclusion is that there would be still less justification for including administrative functions within its scope. Immunity was found not to bar a misfeasance claim founded on the contents of the schedule of unused material or any express or implied representation of compliance, but upon the way in which the disclosure exercise was performed [43-48]. The Court did not finally determine the immunity issue. The Chief Constable had failed to establish that the pleaded conduct would clearly fall within the immunity, and the question was left to be reconsidered at trial in light of the facts found [48].

HB p. 1404

HB pp. 1414-1419

HB pp. 1419-1421

HB p. 1421

- (e) In *Smart*, the Court of Appeal set aside the strike-out and permitted claims concerning alleged deceit and negligence in the handling and preparation of forensic exhibits to proceed after later material revealed unexplained alterations to exhibit records [27-28, 35-38]. As above (§18), per Aikens LJ, “*a justifiable boundary has to be drawn somewhere*”, and “*whether there is immunity or not will depend on the precise facts of a particular case*” [36]. That is not to say that every case requires its own consideration of whether the immunity is justified, but that, in ensuring a “*justifiable boundary*”, the circumstances of particular cases will need to be analysed with reference to whether they properly fall within the immunity, with reference to its rationale. HB p. 3097
HB p3106, 3107-3108
HB p. 3107
98. The approach is unsurprising set against the overarching principle that absolute immunity is inconsistent with the rule of law and the protection it affords must not be given any wider application than is absolutely necessary (above, §14, *Darker* [p.453D-E] and *Smart* [25]). Applying the immunity to acts, whether in court or otherwise, that are beyond its rationale will inevitably lead to wider application than is necessary. HB p. 1556
HB p. 3105
99. Allowing claims in respect of impugned conduct not falling within the rationale of the immunity is not outflanking it; it is simply to acknowledge that the purpose and scope of JPI is not without limit. It is different to cases in which ostensibly defamation claims have been creatively pleaded with reference to different causes of action.
100. In substance, the Court of Appeal’s justification for applying the immunity was not that liability attaching to the impugned conduct in this case advances the administration of justice, but that a contrary result would undermine certainty in the application of JPI and thus undermine the effectiveness of JPI generally (CA [16, 65(i), 68]). In that sense, the issue is really a problem of categorisation: whether asking if a particular act falls beyond the rationale of the immunity will expose participants in proceedings to myriad claims which test the boundary. However, the fact that the boundary may sometimes be tested is not sufficient reason to reject that distinction. HB p. 149, 160 & 161
101. First, it is necessary to avoid expanding JPI into areas remote from its origins and objectives. It is striking that what started as an absolute privilege in defamation is now

said here to operate as a peremptory bar to a claim relating to a “*major muck up*” in which a confidential location of a victim of domestic violence was revealed in error to the person from whom it was being withheld. It has nothing at all to do with why absolute privilege in the context of defamation claims was recognised in court proceedings, nor the policy reasons for such immunity, which are compelling and of continued relevance (above, §23). The disadvantages of limiting JPI to cases falling within its rationale must be weighed against the disadvantages of the alternative, broader approach which denies a remedy in cases for which there is no justification, beyond the broader justification of protecting the immunity for other cases.

102. Second, the practical difficulty in the boundary being tested should not be overstated. In many cases the nature of the impugned conduct, as here, will readily reveal itself to be of a different category to the sort of submission or evidence in pursuit of a case with which JPI is concerned. Insofar as there is a problematic penumbra, the courts will be well able to resolve them, in many instances on a preliminary or summary basis.

Conclusion

103. The nature of the conduct giving rise to the claim, whether viewed through the lens of the particular cause of action or the nature of the impugned conduct, is relevant to assessing whether the claim falls within JPI. The analysis of the particular cause of action is relevant to assessing whether the claimed immunity falls within its rationale, and whether an immunity is necessary to further the administration of justice. Claims for breach of confidence, misuse of private information and breaches of the DPA 2018 do not fall within the rationale of the immunity and attaching immunity to such claims is not necessary for the administration of justice. The same is true in respect of the administrative nature of the conduct, concerned with error in handling confidential data rather than the pursuit of a case or restatement of evidence. It is unsurprising that, whether focusing on the cause of action or the particular conduct as against the rationale of the immunity, the result is the same, as it generally will be; both are centrally concerned with not extending JPI beyond its purpose.

F. THE EVIDENCE OF THE BAR COUNCIL

104. The Bar Council (CA [61]) advances a number of considerations relevant to whether the asserted immunity falls within the rationale of JPI and the policy justifications for an immunity of the breadth of that accepted by the Court of Appeal. A further statement from Dr Anton van Dellen has been provided in support of the Bar Council’s intervention in this appeal. Broadly, Dr van Dellen’s evidence relates to the context in which advocates work, the impact on advocates if the appeal were to be successful, and the impact upon the administration of justice. HB p. 158
105. In respect of that evidence, it is respectfully submitted, first, that the courts have become increasingly wary of exactly these sorts of “*gloomy speculations*”²⁵ regarding the effects of affording a remedy. The asserted impacts of a narrower approach to JPI are largely speculative. In *Hall*, Lord Hoffmann warned against an immunity based “*merely upon intuitions*”; an “*‘empathy heuristic’ will not do*” [p.689A-B]. In *Ridehalgh v Horsefield* [1994] Ch 205 (CA) it was argued by the Bar Council that barristers should have immunity from wasted costs orders²⁶, because otherwise it would affect the ability of the barrister “*to be able to perform his duty to the court fearlessly and independently*” (*Hall* [p.694D-E]). But, as Lord Steyn observed in *Hall*, barristers “*are occasionally guilty of wholly unjustifiable conduct which occasions a waste of expenditure*” and the rule “*has not been detrimental to the functioning of the court system or indeed the interests of the Bar*” [p.678B]. Lord Hoffmann similarly “*found no suggestion that it has changed standards of advocacy for the worse*” [p.694G]. HB p. 1059
HB p. 1133
HB p. 2665
HB p. 1059
HB p. 1122
p. 1138
106. It is striking that no evidence is provided by the Bar Council in relation to any negative effects arising from the immunity having been removed in *Hall* in respect of what is likely to be the largest category of potential claimant; the advocate’s own client. Similar arguments were also rejected in *Jones* in respect of experts. Indeed, there is an apparent dearth of subsequent reported cases, let alone evidence, of substantial HB p. 1059
HB p. 2025

²⁵ See Lord Steyn’s summary of the academic commentary in *Hall* [pp.677H–678E].

²⁶ Under s.51 of the Supreme Court Act 1981.

difficulties of a sort that might have justified (and were claimed to justify) immunity (Jones [p.421H]).

HB p. 2048

107. Second, there is no basis to consider advocacy as an exceptional profession which uniquely warrants the benefit of an immunity from suit. Comparable challenges are faced by many professions that are not afforded immunity. A doctor in A&E may, in the early hours of the morning, be called upon to undertake unexpected and urgent life-saving surgery. There may be difficult judgments to make about which patient(s) to prioritise. But liability applies. The doctor has the resilience that can be expected of the ordinary professional, has professional indemnity insurance, and may only be held liable if the error was such that no competent member of the profession would have made that mistake. It cannot be said that, in contrast, the pressures faced by advocates warrants special status and immunity. This was recognised by Lord Diplock in *Saif Ali* [p.220D-F] in 1978 (albeit, at that time, that there were other reasons why the public interest weighed in favour of the immunity of advocates from claims by their own clients):

HB p. 2907

“The salvor and the surgeon, like the barrister, may be called upon to make immediate decisions which, if in the result they turn out to be wrong, may have disastrous consequences. Yet neither salvors nor surgeons are immune from liability for negligent conduct of a salvage or surgical operation; nor does it seem that the absence of absolute immunity from negligence has disabled members of professions other than the law from giving their best services to those to whom they are rendered”.

108. A similar point was made by Lord Hoffmann in *Hall* at [p.689A-B]:

HB p. 1133

“Members of other professions, and the public in general, are bound to view with some scepticism the claims of lawyers that the public interest requires them to have a special immunity from liability for negligence”.

109. His Lordship also observed that: *“there are many professional activities which require delicate judgment and advocacy is not the only one which may involve a divided loyalty”,* but we do not say doctors *“should have immunity merely because they do a difficult job in which it is easy to make a bona fide error of judgment”* [p.690B-D].

HB p. 1134

110. Lord Steyn in *Hall* also recognised that affording to advocates in court an immunity because of the particular difficulty or importance of their work in court amounts to unequal treatment and offends the public interest: *“public confidence in the legal system is not enhanced by the existence of the immunity. The appearance is created that the law singles its own for protection no matter how flagrant the breach of the barrister”* [p.681E]. Further, it *“tends to erode confidence in the legal system if advocates, alone among professional men, are immune from liability in negligence”* [p.682F]. HB p.1059
HB p. 1125
HB p. 1126
111. The special features prayed in aid by the Bar Council include that advocates now have access to vast amounts of data due to their increased use of digital systems (van Dellen, [25-28]). But the challenges of data handling in practice (van Dellen [30] et seq) are, likewise, not unfamiliar to other professions. Consider, for example, the data handling challenges faced by social workers, or doctors, or police officers. The fact that advocates have access to significant personal data, including of a sensitive nature, equally demonstrates the importance of advocates acting appropriately in relation to their handling and use of such data, and underlines the cost of an immunity which denies victims a remedy.
112. Third, the proposition that any narrowing of the immunity may be a factor *“driving practitioners away from the publicly funded Bar”* is tenuous (van Dellen [41]). The pressures on the Bar described by the Bar Council (van Dellen [37-41]) are unrelated to and exist quite apart from the boundary to JPI. Notably, there is no evidence advanced that the sweeping away of immunity from claims in negligence has had any bearing on barristers either leaving or changing their practice. To postulate that this might in fact be the case is precisely the sort of intuitive speculation that was recognised in *Hall* and *Jones* as insufficient to justify immunity.
113. Fourth, generative AI and litigants in person are not sufficient reason to apply an immunity in claims to which it would not otherwise be justified. Funding requirements generally militate against pursuit of vexatious claims, whether that is the merits criteria for legal aid, or the willingness of a legal representative to act on a conditional fee agreement, or the costs and adverse-costs risks of privately funded proceedings. In that

sense, there may be some force in the Bar Council's observation regarding litigants in person in that the litigant in person may be more prone to pursuing a meritless or vexatious case, and be able to use generative AI to do so. But the notion that litigants in person justifies a peremptory bar for all claims, including the meritorious, is a surprising one. It clearly cannot be sufficient justification for an immunity. Whilst not denying the significance of generative AI (van Dellen [21-24]), the courts cannot, in a principled way, respond to the challenges by granting immunities. The consequence of vexatious claims should also not be overstated. As observed by Lord Hoffmann in *Hall*: “one should not exaggerate the bogey of vexatious claims. ... every other profession has to put up with them. A practitioner who is properly insured can usually expect such claims to be handled by solicitors instructed by the underwriters” [p.691A-B].

HB p. 1135

114. Finally, any difficulty that might arise must be sufficient to outweigh the importance of affording a remedy for a wrong. Lord Hope in *Hall* foresaw (as above, and in contrast to other members of the court) significant difficulty in removing the immunity in civil cases but still considered that the immunity was “disproportionate” as a “derogation from the right of access to the court which is no longer clearly justifiable on the grounds of public interest” [p.724H]. The point is that it is not enough for the Respondents and Bar Council to point to some adverse effect. Instead, it must be a weighty reason which is sufficient, exceptionally, to justify immunity.

HB p. 1168

Conclusion

115. As identified by Lord Hoffmann in *Hall*, finding litigation more agreeable or the possibility of awkward consequences is insufficient in the context of justifying an exceptional immunity from suit. Rather, it is necessary to go further and identify how, in the absence of immunity, the participant in the judicial process would “otherwise behave differently in a way which was contrary to the public interest” (above, §37). The evidence of the Bar Council does not do so, other than by way of tenuous speculations of the sort that the courts have been increasingly and rightly sceptical.

HB pp. 1141-1142

G. EXTENDED IMMUNITY

116. Issue 2 remains independently decisive of the Appellant's claims against the police even if the CPS counsel's statement fell within JPI. It is XGY's claim that the police accepted her confidential location in circumstances that imported an obligation of confidence and failed to discharge the duties that arose by reason of that confidence. It appears that while initial care was taken during the imposition of police bail, thereafter insufficient care was taken when recording the location on a contact card and supplying it to the CPS without any effective warning. This occurred in the context of what appears to have been a long-standing and known breakdown in technological arrangements for the handling of sensitive information (Particulars of Claim [25–31]; Defence [17(iii)]; SFI [13–14]; CA [33–35]).

HB pp. 544–554, 598, 8–9, 154

117. The Court of Appeal found that [68]:

HB p. 161

“the police’s preparation of the case for the bail hearing was covered by the extended immunity identified in Watson, Taylor and CLG. There can be no doubt that the preparation of the file for the CPS was part of the process of criminal investigation and the administration of justice. With the removal of the erroneous “evidential” requirement identified by Ritchie J, this case is no different to CLG and the same result must eventuate. A finding that no immunity applied to the police activity would outflank the core immunity of the CPS advocate.”

HB pp. 3246, 3168, 1427

118. However, here in contrast with *CLG v Chief Constable of Merseyside* [2015] EWCA Civ 836 (unreported) the police were not providing an location within the context of a witness statement (or even in a document that was preparatory to a witness statement). Instead, the police were preparing a file negligently and failing to safeguard XGY's confidentiality in so doing. This was a “free-standing act” to use Lewison LJ's language in *Singh* [71], and it was an error of law to extend immunity to it.

HB p. 1427

HB p. 3006

119. For that reason, *CLG* is distinguishable. There, the substance of the officer's evidence about the service of the summonses was the location itself. The statement was provided to establish the evidential foundation for the arrest warrants, the location had not been provided in confidence, and the reliance upon the location was within the court's oversight of the statement's admission as evidence (*CLG* [3–8, 11, 32]). *CLG* was a protected statement because it carried the same evidential substance as the officer's

HB p. 1427

HB pp. 1428–1429, 1430 & 1438

testimony. Here, no evidence was being prepared to prove XGY's address, and the police did not request a condition in relation to the Hampshire location (nor indeed any condition in relation to XGY). Even if the police had intended to seek court-imposed bail conditions, withholding the location from DYP would not have prevented the police from describing risk, requesting non-contact or privately informing the court.

120. As noted above, whether the impugned conduct falls within the immunity must be tested against its rationale. The preparation of a file does not in any way impinge upon the preparation of evidence or prevent the examination of evidence being undertaken free of exposure to claims challenging the veracity of statements made by witnesses or advocates. Police liability for prior mishandling of restricted data would not impeach the CPS's courtroom presentation. As *Darker*, *Singh*, and *Daniels* establish, past wrongs are not immune from suit merely because they are or may end up incorporated into protected speech. The dicta in *Gizzonio v Chief Constable of Derbyshire* [1998] Lexis Citation 4431 (relied upon by the Court of Appeal [69]) that immunity applies to the provision of information as "*part of the investigatory or preparatory process in criminal proceedings*" is overly broad, and is superseded by the more nuanced analysis in cases such as *Darker*.

HB p. 1726

HB p. 161

121. The distinction between any statement in court and the impugned police conduct is underlined by the fact that the tortious act was complete prior to the advocate divulging the location in open court. For her misuse of private information claim, loss of control occurred upon the careless handling and transmission of sensitive information. Damages may compensate misuse itself because it prevents the claimant from controlling the information, apart from material damage or distress: *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [2016] F.S.R. 12 at [111]; affirmed [2015] EWCA Civ 1291, [2017] Q.B. 149 at [45].

HB p. 1808

HB p. 1758

H. STRIKE OUT AS A REMEDY

122. Summary disposal is safe only if the immunity supplies a clear answer to whether, on the pleaded case, the claim(s) are barred by the immunity. In *Darker*, Lord Clyde stressed that immunity cuts across the ordinary right to a remedy and should be allowed

reluctantly [pp.456H–457B], and that drawing the line may require the court to study *“precisely what was being done and how closely it was linked with the proceedings in court”* [p.460B–E]. His Lordship identified the pertinent question as whether the claim was *“so clearly countered by an absolute immunity as to require it to be struck out”*; on the pleaded facts, it was not [p.461G] (see also Lord Mackay [pp.450-451] and Lord Hutton [p.462]).

HB pp. 1559-1560

HB p. 1563

HB pp. 1564, 1553-1554, 1565

123. Issue 1, in particular, raises issues of fact that are inapt for strike out. The police filed a defence, but the claim was determined without disclosure or witness evidence capable of explaining the chain by which XGY’s location and the confidentiality restriction were recorded, transferred and placed before the advocate: (CA [33–35, 41–45, 66]). The available material did not explain, among other matters, which records carried the restriction; how the CPS file was generated; who saw or failed to see the restriction; whether the exact location was included for a forensic purpose or through an automatic or administrative process; what the police intended the advocate to do with it; or what systems and guidance governed the transfer. Those matters may be relevant to whether the immunity applies.

HB p. 154, 155 & 161

124. The Court of Appeal treated the case as factually straightforward and the police file as necessarily part of protected preparation (CA [66–70]). On XGY’s pleaded case, the wrong included failing to preserve an express confidentiality restriction while recording and transmitting the address, and in relation to the police the tort was complete before anything was said in court. The Court of Appeal also accepted that the exact location should not have been referred to openly (CA [60]). In the absence of a developed account of the handling process and its purpose, it was unsafe to treat the entire causal chain as indistinguishable from the advocate’s later words. It is not a case that is so clearly countered by an absolute immunity as to require it to be struck out.

HB p. 161

HB p, 158

I. CONCLUSION

125. The Court is respectfully invited to grant the appeal for the reasons set out above.

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