

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

B E T W E E N:

XGY

Appellant

-and-

CHIEF CONSTABLE OF SUSSEX POLICE

First Respondent

CROWN PROSECUTION SERVICE

Second Respondent

BAR COUNCIL OF ENGLAND AND WALES

Proposed Intervener

FIRST RESPONDENT'S WRITTEN CASE

A. Introduction

1. This appeal raises important questions about the ambit of immunity from suit for words said in court. During a Magistrates' Court bail hearing on 16 April 2020, a CPS advocate disclosed to the court, and thereby to XGY's abusive former partner, the name of the street on which she was planning to live. That information had been included in the file prepared by the police for the CPS for the purposes of the bail hearing.
2. As a result of the disclosure, XGY brought claims for damages under the Human Rights Act 1998 (HRA) and the Data Protection Act 2018 (DPA), for breach of confidence and for misuse of private information. HHJ Brownhill struck out XGY's claims holding that there was a core immunity for things said and done by advocates in court and that the police were entitled to rely on the same immunity by extension because the 'inclusion of [XGY's] address in the CPS file [...] would seem to me to be clearly integral to the Court proceedings' (§90). Ritchie J overturned that decision. He held that – while there was an immunity – it was limited and needed to be justified on the individual facts of each case, an exercise he styled 'justificationism' (§§87 and 89). The Court of Appeal, overruling

HB/804

HB/775

HB/269

HB/213-
214

Ritchie J, held that the CPS had the benefit of the core immunity¹ (§§62-67), the established extension of the core immunity applied to the police (§§68-72), and that the immunity applied to all of the Appellant's claim (§§73-80). The immunity, as applied to both Respondents, was absolute and required no additional justification (§§65, 67-70, 71, 74).

HB/159-161
HB/161-162
HB/162-163
HB/160-162

3. The Chief Constable's position on the point of law and wider public policy issues should not detract from her regret as to the position in which XGY was placed and her support of those, like XGY, who suffer from domestic abuse. The Chief Constable takes her role investigating and prosecuting violence against women and girls (VAWG) extremely seriously. The points taken in this appeal in no way undermine this commitment, which can be seen on the facts of this case by the thorough investigation and prosecution of DYP and the measures taken by the OIC in particular to protect the Appellant as much as she was able. The protection of women and girls from abuse and violence is and remains a matter of the highest priority for the police, nationally and in Sussex.

4. The Appellant's Written Case ('AWC') proceeds on the basis that the core and extended immunity apply by reference to the pleaded cause of action and thus only attach to certain causes of action, such as defamation (§4). On that premise, she contends that the immunity does not apply to any of the causes of action pursued by her because, she says, the courts have not previously applied the immunity to those causes of action. She argues that to 'expand' it to encompass such claims requires justification (AWC §§4 and 20). That argument was not advanced before the Court of Appeal and, although it is touched upon in Ground 3, was not clearly articulated in her Grounds of Appeal. It rests upon a misunderstanding of the nature of the core immunity and the principle which underpins it. The immunity is not concerned with the truth or falsity of a statement, but exists 'to enable people to speak freely without fear of being sued, whether successfully or not' and thereby attaches 'to actions in which the alleged statement constitutes the cause of action' (per Lord Hoffmann in *Taylor v SFO* [1997] [1999] 2 A.C. 177 ('*Taylor*') at 214 E and 215C). The Appellant's argument is an attempt to circumvent that well-established core immunity and, in a manner inimical to the administration of justice, to open the door to all claims by any person arising from the handling of their data or information in the course of court proceedings.

HB/19
HB/19, 25
HB/3205, 3206

¹ Defined at §5.a below.

5. The Chief Constable respectfully submits that HHJ Brownhill and the Court of Appeal were right to find that both the CPS and the police were immune from suit in respect of the disclosure of the road on which XGY lived because:

- a. Advocates, along with other court users, have the benefit of an absolute common law immunity in respect of anything said or done in the ordinary course of court proceedings where that statement constitutes the cause of action ('the core immunity'); and
- b. The Chief Constable's preparation and provision of the file were protected by an established extension of that core immunity.

The appeal should therefore be dismissed. The Chief Constable anticipates that it is likely that she will make few, if any submissions, in relation to Ground 1 at the hearing of this appeal – this is because it is likely that it will be addressed by the CPS. She has, however, set out her case in respect of Ground 1 below, in particular in relation to the law on the core immunity itself. This is necessary because (i) it is upon this foundation that the extension upon which she relies rests; (ii) the principles and rationale underpinning the core immunity are vital context for considering Ground 2; and (iii) she has a strong interest in ensuring that those responsible for prosecuting cases referred to them by the police are not fettered in the discharge of their public functions.

6. The Chief Constable has arranged her written case as follows:

Section B The facts

Section C Core immunity principles

- (i) Core immunity is long-established
- (ii) Core immunity applies regardless of intention or relevance
- (iii) Core immunity applies where the alleged statement constitutes the cause of action

Section D Core immunity should not be outflanked or circumvented

- (i) Core immunity applies regardless of cause of action
- (ii) Core immunity extends outside the courtroom so far as necessary to prevent its circumvention

Section E The modern authorities do not abolish the core immunity

- (i) Core immunity survives the abolition of advocates' immunity from negligence claims brought by their clients

	(ii) Core immunity survives the abolition of experts' immunity from claims in negligence and contract brought by those who instructed them	
Section F	The rationale for the core immunity	
	(i) General principles	
	(ii) Data protection, privacy and breach of confidence claims	
Section G	Ground 1: Application to CPS Advocate	
Section H	Bail hearings as part of criminal proceedings	
Section I	The police's institutional role in criminal proceedings	
Section J	Ground 2: Application to the Chief Constable	
Annex	Comparative case law	

B. The Facts

7. The Chief Constable relies upon the facts as set out in the Statement of Facts and Issues at §§3-14. Further background appears in the judgment of the Court of Appeal at §§31-35 and in greater detail in the High Court judgment of Ritchie J at §§5-9 and the judgment of HHJ Brownhill §§4-25.
- HB/6-9
HB/153-154
HB/171,
172
HB/244-247

C. Core Immunity Principles

(i) *Core immunity is long-established*

8. The rule that an advocate, party or witness has immunity in respect of what he says and does in court has been established for centuries. As Lord Hutton recognised in *Darker v Chief Constable of the West Midlands* [2000] UKHL 44, [2001] 1 AC 435 at 463 ('*Darker*') the rule can be traced to at least *Cutler v Dixon* 4 Co Rep 14b, a King's Bench decision from 1585. The Court of Appeal at §8 expressed the underlying principle in the following terms:
- HB/1566
HB/1535
HB/148
- 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 i.e. that legal claims against them arising from almost anything done or omitted to be done in the course of conducting a case in court are barred. This has been described as the core immunity.
9. The principle remained undisturbed for hundreds of years, applying to anything written or said in legal proceedings. Over the years, it has been restated consistently many times:
- HB/2664
- a. In *R v Skinner* 98 E.R. 529, (1772) Lofft 55, Lord Mansfield² held:

² Since cited by Lord Goddard CJ in *Hargreaves v Bretherton* [1959] 1 QB 45 and Lord Phillips in *Jones v Kaney* [2011] 2 AC 398 at §12.

HB/1849
HB/2034

...neither party, witness, counsel, jury, nor judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If any thing of mala mens is found on such such enquiry, it will be punished suitably. HB/2664

b. In *Dankins v Lord Rokeby* (1873) LR 8 QB 255 at 263, Kelly CB³ held that: HB/1584

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 recognized by law.

10. While it is right that a public policy is not immutable and the rule of immunity requires consideration in the present day conditions (*per* Lord Hutton in *Arthur JS Hall v Simons* [2002] 1 A.C. 615 (*Hall*) at 728A), it remains an accurate statement of the law and, for the reasons developed below, deserves to be preserved. HB/1172

(ii) ***Core immunity applies regardless of intention or relevance***

11. The suggestion that the immunity might depend upon the advocate having acted in good faith in the conduct of proceedings was decisively rejected as long ago as 1883. In *Munster v Lamb* (1883) 11 QBD 588 (*Munster*), the Court of Appeal dealt with an appeal in a defamation claim brought against an advocate in a petty sessional court who had suggested in the course of the proceedings that the plaintiff (who happened to be a barrister) had kept drugs at his house. It rejected the argument that ‘an advocate cannot claim the benefit of the privilege unless he acts bona fide, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant.’ Sir William Brett MR (with whom Fry LJ agreed) was willing (at 599) to assume everything possible in favour of the claimant: words said with malice, without justification or excuse and irrelevant to every issue of fact. Nevertheless, he concluded ‘inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been’. HB/2389 HB/2401 HB/2400

12. In the 143 years since, that decision has not been overturned or doubted. On the contrary, it has been approved many times: by the House of Lords in *Taylor per* Lord Hoffmann at 207F, and in *Darker per* Lord Cooke (453B), and in *Hall per* Lords Hoffmann (690E-G and 697C), Hutton (731G and 733G) and Hobhouse (738D), and by the Supreme Court in *Jones v Kaney* [2011] 2 AC 398 (*Jones*) *per* Lord Hope at §136 (dissenting), and by the Court HB/3198 HB/1556 HB/1134, 1141, 1175, 1177, 1182 HB/2066

³ Since cited by Fry LJ in *Munster v Lamb* (1883) 11 QBD 588 at 606, Lord Phillips in *Jones* at §11 and Lewison LJ in *Singh v Reading Borough Council* [2013] EWCA Civ 909; [2013] 1 WLR 3052 at §21. HB/2407 HB/2034 HB/2995

of Appeal in *Singh v Reading Borough Council* [2013] EWCA Civ 909; [2013] 1 WLR 3052 *per* Lewison LJ at §24. HB/2995

13. Lord Hutton in *Darker* at 464D-E, with whom Lords Hope and Mackay agreed, reiterated: HB/1567

And in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were actuated by malice the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court even though this means that the shield covers the malicious and dishonest witness as well as the honest one. [Emphasis added.]

14. Nonetheless, the core immunity does not leave advocates or witnesses unaccountable for all unacceptable behaviour.⁴ There remain, as the Court of Appeal recognised (at footnote 2 of the judgment), exceptions for claims of perjury, malicious prosecution, analogous claims involving malicious initiation of criminal proceedings and proceedings for contempt of court: see for example, *Chief Constable of South Wales Police v Daniels* [2015] EWCA Civ 680, *per* Lloyd Jones LJ (as he then was) at §33. That is because an action will only lie where the alleged statement constitutes the cause of action. HB/148 HB/1414

(iii) *Core immunity applies so long as the alleged statement constitutes the cause of action*

15. The core immunity applies regardless of how the action is framed, so long as the alleged statement constitutes the cause of action. Where the gist of the action is not the statement itself but some collateral act, the immunity may not apply. It is for this reason that the core immunity does not protect those who falsify evidence, nor stretch to claims such as malicious prosecution, or proceedings for perjury or contempt of court. The principle is clear and there is no need to develop a ‘cause of action test’ (as XGY seems to be inviting in her AWC, from §65 onwards) to determine whether the core immunity applies. HB/43
16. This well-defined boundary to the core immunity was described in *Roy v Prior* [1971] A.C. 470⁵. The House of Lords considered whether the core immunity protecting parties, advocates and witnesses from things said or done in court applied to malicious prosecution HB/2856

⁴ *Id.* §116 of Ritchie J’s judgment in which he said that advocates’ fear of a civil suit would in fact be beneficial to the administration of justice.

⁵ This case was not put before the Court of Appeal because it was not understood that the principle that the alleged statement needed to constitute the cause of action was challenged by the Appellant. It was, nevertheless, well understood and described by the Court of Appeal – see §9. HB/229

and held that it did not. Lord Morris (with whom their Lordships agreed) explained at 477C-478A that the defendant was not protected by the core immunity, because due regard had to be given to the nature of the action. The claimant was not suing the defendant on or in respect of evidence given in court, but rather for procuring his arrest by means of judicial process which was alleged to be instituted both maliciously and without reasonable cause. An action brought in respect of an alleged abuse of process would not be defeated merely because one step in the course of the abuse involved giving evidence:

HB/2856-2857

HB/2856

What the plaintiff alleges is that the defendant, acting both maliciously and without reasonable cause, procured and brought about his arrest. The plaintiff is not suing the defendant on or in respect of the evidence which the defendant gave in court. The plaintiff is suing the defendant because he alleges that the defendant procured his arrest by means of judicial process which the defendant instituted both maliciously and without reasonable cause. The fact that in order to procure the arrest someone (who might or might not be the defendant himself) would have to give evidence on oath [...] does not have the result that an action, if otherwise sustainable, could not be brought. The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given (though if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause.

17. This principle has been restated many times, including:

- a. Lord Hoffmann in *Taylor* at 215C: ‘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’;
- b. Lord Hope in *Taylor* at 219H in extending the ‘protection of qualified privilege’ to an ‘absolute privilege’:

HB/3206

HB/3210

Such material may however still be actionable on other grounds where malice and lack of reasonable and probable cause can be established. Just as proceedings for perjury are available to deal with the witness who would otherwise be protected against statements made in the witness box, so also the public interest requires that a remedy for malicious prosecution should remain available against those who would be entitled to the benefit of the absolute privilege but who have acted maliciously and without reasonable and probable cause during the investigation process. But that is a quite separate matter as it is the malicious abuse of process, not the making of the statement, which provides the cause of action.

- c. To the same effect, Lord Hoffmann in *Hall* at 697G-H cited himself and Lord Hope in *Taylor*; and
- d. In his review of the authorities, Sir Timothy Lloyd in *Cranford v Jenkins* [2014] EWCA Civ 1035; [2016] QB 231 at §§32-33 also cited the material passages in *Taylor* and *Roy*.

HB/1141

HB/1524

18. That the alleged statement must constitute the cause of action has most recently been approved in *Daniel Rogerson v Erhard-Jensen Ontological/ Phenomenological Initiative Limited* [2025] EWCA Civ 1547, [2026] 1 W.L.R. 2969. Applying both *XGY* and *Singh*, Andrews LJ (with whom Males and Elisabeth Laing LJ agreed) said:

43. It is clear from *XGY*, in which the Court of Appeal followed and applied Lord Hoffmann's analysis in *Taylor*, that the core immunity attaches to the making of statements, and that the key rationale underlying it is to encourage freedom of speech and communication by all those involved in the litigation process which is necessary for the proper interests of justice.

[...]

46. It follows that where the immunity attaches to something that is 'done' in the course of legal proceedings (whether prior to or at the hearing) the act in question must relate in some way to the statement that is the foundation of the cause of action, whatever that cause of action may be. It would encompass, for example, the promulgation of a defamatory statement in pleadings or witness statements; or making reference to confidential information in written or oral submissions, or the act of providing information for use in proceedings in court.

D. Core Immunity Should Not be Outflanked or Circumvented

(i) *Core immunity applies regardless of cause of action*

19. The early cases such as *Cutler* and *Munster* concerned actions for defamation. It is unsurprising that the roots of the core immunity lie in the case law on defamation and conspiracy. English and Welsh law did not have a DPA until 1984; the 'tort of abuse of public office' was only 'emergent' in 1999 (Lord Hoffmann in *Taylor* at 215F); and there was no tort of misuse of private information until about 2004. In that regard, the case law reflects nothing more than the limited causes of action previously available to a litigant. It does not illustrate that there is no immunity beyond defamation, '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' and no other circumstances because 'they did not engage the immunity's underlying rationale' (AWC §20(a)). Were that correct, all the authorities that have applied the immunity to other causes of action would have been wrongly decided⁶.

⁶ Including: *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184 (a claim in negligence), *A & B* (a claim in negligence brought by a covert human intelligence source (CHIS) against the Chief Constable for disclosure of information in criminal proceedings that was said to allow others to identify him; *Cranford* (a claim for breach of a statutory duty pursuant to the Protection from Harassment Act 1997), *CLG* (negligence), *Maghar v Lord Chancellor* [2021] Fam 103 (a Human Rights Act claim); *BHX v GRX* [2021] EWHC 770 (QB) (unreported) (defamation, malicious falsehood, misuse of private

20. Where the alleged statement constitutes the cause of action, however, the same principles and policy reasons apply to all other causes of action. This is not an ‘expansion’ of the core immunity (as the Appellant seeks to term it: AWC §§8 and 24). The courts have consistently found that where the core immunity applies, it must cover all forms and causes of action, however those causes of action are formulated, otherwise the immunity could be circumvented or outflanked. HB/21, 27
21. In *Watson v M'Ewan* (*‘Watson’*) [1905] AC 480 at 485: the House of Lords considered claims for defamation and breach of confidence arising from the actions of a surgeon whom, having accepted instructions on behalf of a wife in anticipation of an action for separation and ailment against her husband, then gave evidence unfavourable to her when appearing for her husband in the same action. The issue was whether the surgeon was entitled to witness immunity covering what he said in the witness box and beforehand (‘the precognition stage’) to the husband’s lawyers. HB/3251
22. It is plain – contrary to XGY’s assertion at AWC §30 – that the House of Lords *did* conclude that the core immunity applied to breach of confidence as well as slander. The breach of confidence claim was not conceded (AWC §30): it was the subject of a cross-appeal which Lord Halsbury dismissed with costs (at 484 and 489). Contrary to the quote in AWC §28, which is taken out of context and in fact concerns whether a duty of confidence existed on the facts, Lord Halsbury opened his speech at 485 by stating in relation to both the appeal (against the dismissal of the slander case) and the cross-appeal (against allowing the breach of confidence claim to proceed): HB/29
HB/3250, 3255
HB/28
HB/3251
- My Lords, when one examines these two appeals, I think it is impossible to say that any different question arises in the one from that which arises in the other. The same judgment is applicable to both.
23. Lord Hope explained *Watson* in *Jones* from §137-142⁷ and described it as appearing to be ‘the first case that the immunity was invoked in response to a claim other than one for HB/2066-2068

information / breach of privacy and harassment) and *Re MBI International & Partners Inc* [2022] Ch. 212 (breach of fiduciary duty, breach of statutory duty, breaches of trust and conspiracy).

⁷ While Lord Hope cited this case in his dissenting judgment in *Jones*, arguing that an expert should be protected from claims in negligence, it was applied by Lord Phillips in the majority (§409B-C) who accepted Lord Hope’s clarification of the litigation and did not query its application to breach of confidence. *Watson* has since been cited on many occasions as authority that the core immunity is not limited to defamation claims, including in *Marrinan*. HB/2036

slander’ (§139). Lord Hope confirmed that despite the convoluted procedural history in *Watson*, the House of Lords’ ruling that the surgeon ‘was entitled to the immunity as the precognition stage must be taken to have extended her claim against him for breach of confidence as well as her claim for slander’ (§141). As Lord Hope summarised:

there were no grounds for distinguishing between the claims that were being made in the action. The immunity extended as much to a claim of damages for breach of a duty of confidence as it did to a claim for slander, or indeed any other claim.

24. *Marrinan v Vibart* [1963] 1 QB 528 (*Marrinan*) was a claim for conspiracy to give false evidence brought against police officers who had made a report to the DPP, and given evidence against the plaintiff in a criminal trial and disciplinary proceedings. Dismissing the claim as misconceived, Sellers LJ at 535 (see too Lord Diplock at 538-539) explained:

It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of conspiracy. I can see no difference in the principles of the matter at all. Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given.

25. Both Sellers LJ and Diplock LJ (as he then was) cited the Australian case of *Cabassi v Vila* (1940) 64 CLR. 130 in support of their conclusions. At AWC §56(a), XGY questions whether the principle in *Cabassi*, that the core immunity applies to all causes of action, ‘has been tested in respect of a privacy or confidentiality-type claim’. While one might think it had been tested in *Watson* (and again in *BHX v GRX* [2021] EWHC 770 (QB) (unreported)), there is little reason to suppose that such claims can succeed. In *Marrinan*, Diplock LJ at 538-539 was adamant that the rule of public policy laid down in *Watson* did not apply only to defamation. Given the Appellant’s approach to the appeals in this court and below, it is worth considering his rejection of the plaintiff’s argument in full:

Mr. Lewis has sought to persuade this court that that rule of public policy, for reasons which it is impossible to explain, applies only to actions for defamation and that, if you are sufficiently ingenious to discover some other way of bringing an action against a witness for evidence which he has given in a court, then the rule of public policy does not apply to that, although all the evils of the action are precisely the same as if it were a direct action for defamation. It seems to me quite plain on the authorities - and on the English authorities as well as the Australian authority [*Cabassi v Vila*] directly in point - that that argument is without foundation.

An attempt very similar to that in this case was made in 1856, in *Revis v. Smith*. There, instead of bringing an action for defamation, an attempt was made to bring a special action on the case, analogous to malicious prosecution. As Crompton J. said in *Henderson v. Broomhead*, ‘That seems to have been done in despair’ - words which in my view are appropriate to this attempt in 1962.

Yet another attempt was made quite recently, in *Hargreaves v. Bretherton*, where an action was brought claiming damages against the defendants for ‘falsely and maliciously and without just occasion or excuse committing perjury in relation to the facts of the case.’ Lord Goddard C.J. in that case dealt with the authorities which have been referred to by my Lord in the present case; and there is only one passage in his judgment to which I desire to refer, for it seems to me to be apt to this case. It is a short paragraph towards the end of his judgment in which he said this: ‘I hope that [counsel for the plaintiff] will not think that I have been discourteous to him if I say that it seems to me that this is an obvious “try-on.” Attempts have been made over a period of 200 or 300 years to bring these actions, but they have universally failed.’

HB/2316

26. The core immunity was not ‘expanded’ by *Watson and Marrinan* (c.f. AWC §24); it applies irrespective of the cause of action where the statement complained of itself constitutes the cause of action. The scope of the immunity is therefore not defined by the cause of action; rather, the question is whether the circumstances in which the statement was made fall within the established scope of the immunity. The Appellant’s approach would produce the untenable result that a person making the same statement in court would be immune from a claim in defamation, but potentially liable for that identical statement recast as an information law tort or a claim under the DPA.

HB/27

27. Faced with these definitive authorities, XGY seeks to derive support from *Hall* for her contrary position that ‘JPI is limited to certain causes of action’ (AWC §36 and see too §40). But *Hall* did not establish that the core immunity is confined to particular causes of action, nor did it even identify negligence as a cause of action to which the immunity, as a matter of principle, does not extend. Rather, it held that the immunity did not afford an advocate immunity from suit in the particular circumstances of a negligence claim brought by their client, to whom they owed a duty of care. The question in *Hall* was whether the immunity applied to the particular claim before the court, not whether negligence as a cause of action was, by definition, outside the scope of the immunity. That negligence claims remained capable of engaging the immunity is demonstrated by *Jones*, in which the Supreme Court was again required to consider the application of the immunity to a negligence claim. *Hall* therefore provides no support for the Appellant’s proposition that the scope of the core immunity is defined by reference to particular causes of action.

HB/1059

HB/31, 32

HB/2025

28. The Appellant's approach is wrong not only in principle but also in its proposed method of developing the common law. It invites the Court to define the immunity by reference to a list of causes of action, thereby attempting to turn a common law principle into a comprehensive and exhaustive set of rules extending beyond what is necessary to determine this appeal. The common law should be developed 'only interstitially': see Lord Goff in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 378 and more recently Lord Collins in *Singularis Holdings v PricewaterhouseCoopers* [2015] AC 1675 at §§65-69. Lord Collins at §66 quoted Justice Cardozo in saying 'We do not pick our rules of law full-blossomed from the trees ... [The judge] legislates only between gaps. He fills the open spaces in the law.' The attempt by the Appellant to draw comprehensive bright-line rules about which causes of action attract immunity – and to make the cause of action the threshold question before considering whether immunity attaches – is inconsistent with that restrained and incremental approach to the development of the common law. HB/3071-3072 HB/3072
29. If examining what Lord Hoffmann said in *Hall* as the Appellant invites, it is necessary first to turn back to his earlier judgment in *Taylor*. *Taylor* concerned a libel claim arising from two documents created in the course of an SFO criminal fraud investigation. The first was a letter from the SFO to the Isle of Man Attorney-General, requesting assistance and setting out the SFO's factual assessment, including its suspicion that the plaintiff had participated in the fraud. The second was a file note recording a conversation between the SFO investigator and a Law Society employee, including their shared view that the plaintiff was a co-conspirator and should be struck off. Neither document was a pleading, witness statement or other document generated for the purposes of initiating proceedings or within any ongoing proceedings. They were investigative communications created before any criminal proceedings were commenced. HB/3168
30. Lord Hoffmann from 207F-208E, giving the leading speech, stated: HB/3198
- Likewise, the core of the principle of immunity from suit is not in doubt. By the end of the 19th century it was settled 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. The immunity was absolute and could not be defeated even by proof of malice. [...] The immunity from suit [...] is designed 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. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity

is absolute and cannot be removed by the court or affected by subsequent publication of the statement.

31. At 215C, Lord Hoffmann (*obiter*) went on to consider whether the ‘absolute immunity’ applied to the statements under consideration. He did not suggest that it was limited to certain causes of action. Instead, he set out the rationale behind the core immunity and, with that touchstone, explained those causes of action that necessarily fall outside it because the alleged statements do not themselves constitute the wrong relied upon: HB/3206

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. In *Marrinan v. Vibart* [1963] 1 Q.B. 528 the Court of Appeal held that the immunity in respect of statements made in court or with a view to a prosecution could not be circumvented by alleging that it formed part of a conspiracy with other witnesses to give false evidence. That seems to me to be right. On the other hand, the immunity does not apply to actions for malicious prosecution where the cause of action consists in abusing legal process by maliciously and without reasonable cause setting the law in motion against the plaintiff. It does not matter that an essential step in setting the law in motion was a statement made by the defendant to a prosecuting authority or even the court: see *Roy v. Prior* [1971] A.C. 470. HB/3206

Actions for defamation and for conspiracy to give false evidence plainly fall within the policy of the immunity and actions for malicious prosecution fall outside it. In between, there is some disputed ground.

32. Lord Hoffmann in *Hall*, giving one of the two main speeches for the majority and with which Lords Browne-Wilkinson and Lord Millett agreed. He did not retreat from his speech in *Taylor*. Instead, he held at 697B-C:

... 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 QBD 588, 607 this policy is regarded as so important that it requires not merely qualified privilege but absolute immunity. HB/1141

33. Lord Hobhouse in *Hall* at 740G cited *Roy v Prior* and expressed the same principle: HB/1184

A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity.

34. While Lord Hobhouse dissented in part in *Hall*, this passage was quoted by Lord Phillips in *Jones* at §1. Lord Phillips went on to say at §12 that the origins of the privilege were in defamation law but that this ‘privilege was extended, in the form of immunity from suit, to other forms of action in tort.’ HB/2032
HB/2034
35. The same principle was repeated by Lord Clyde in *Darker* at 456F-G (citing *Marrianan* and *Cabassi*): HB/1559
- So far as concerns the principles regarding the immunity of witnesses in connection with judicial proceedings, those principles should be of general application regardless of the particular form of the action. Thus, for example, whether the action is one of defamation or of negligence or, as in the present case, of conspiracy to injure and misfeasance in a public office, the same principles should apply.
36. It appeared in the minority judgments of Lord Hope and Lady Hale in *Jones* in which Lady Hale said at §176: HB/2079
- Lord Hope DPSC has demonstrated, to my mind convincingly, that there is House of Lords’ authority, in the shape of *Watson v M’Ewan* [1905] AC 480 , for the general proposition that no cause of action of any kind lies against any witness in respect of the evidence he gives to a court. The rule was first developed as a protection against suits in defamation, but there is no reason in principle to limit it to these. If the purpose is to ensure that witnesses can prepare and give their evidence freely to the court, irrespective of whether it might otherwise constitute a tort or a breach of contract against someone else, then 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. The rule has been taken for granted by courts at all levels for a very long time. [Emphasis added.]
37. The Appellant at AWC §49 suggests that on this point, Lord Hope and Lady Hale were inconsistent with the majority views in *Jones* and *Hall* and that the majority in *Hall*’s ‘disagreement with the minority was, fundamentally, that the immunity did not apply to all causes of action’ and needed justification. This analysis is, however, contrary to Lord Phillips’s leading judgment quoted at §34 above and Lord Brown’s concurring judgment at §65 describing that it has been ‘long-established that witnesses of fact enjoy complete immunity—immunity, that is, from any form of civil action in respect of evidence given (or foreshadowed in a statement made) in the course of proceedings.’ HB/35
HB/2032
HB/2034
HB/2049

38. The rule has continued to be applied in such cases as:
- a. *Chief Constable of South Wales Police v Daniels* [2015] EWCA Civ 680, *per* Lloyd Jones LJ (as he then was) at §33: ‘It is well established that the immunity or privilege, where it applies, bars a claim whatever the cause of action, with the exception of suits for malicious prosecution (and analogous claims involving malicious initiation of criminal proceedings) and prosecution for perjury and proceedings for contempt of court’. HB/1414
 - b. *Reading Borough Council v Singh* [2013] EWCA Civ 909; [2013] 1 WLR 3052 in which Lewison J at §34 quoted Auld LJ: ‘the rule is there, not to protect the person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest. Given that rationale for the rule, there can be no logical basis for differentiating between different types of claim in its application.’ HB/2998
 - c. *Cramford* at §§69-70 where Sir Timothy Lloyd concluded ‘the policy of the immunity rule applies just as much to a claim in harassment based on such a statement as it does to a claim in defamation’. HB/1532
39. That this position is settled is illustrated by this summary in Clerk & Lindsell on Torts, 24th edition (2023, consolidated to July 2025) at 21-85:
- With regard to judicial proceedings ‘neither party, witness, counsel, jury or judge, can be put to answer civilly, or criminally, for words spoken in office’. The rule is not confined to actions of defamation but applies whatever cause of action is sought to be derived from what was said or done in judicial proceedings, unless perhaps the gist of the action is an abuse of the process of the court arising from some act or statement in the proceedings, or where the antecedent act was not within the immunity.
40. Moreover, statutes are drafted on the basis that the ordinary rules and principles of common law apply to the statutory provisions. Parliament is presumed not to have intended to change the common law unless it has indicated such intention either expressly or by necessary implication: *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539 (HL) at 573G-574A. There is no such indication within the HRA or the DPA, just as there was not in the Protection from Harassment Act 1997. To give full effect to the underlying principle, it must extend to claims under the HRA or DPA, otherwise claims barred at common law can simply be reframed under these statutes and the public policy

of the immunity would be undermined. This is, perhaps, all the more crucial given the lower threshold required to bring some of these claims⁸.

(ii) *Core immunity extends outside the courtroom so far as necessary to prevent its circumvention*

41. The core immunity must cover events outside of the trial so far as practically necessary to avoid it being circumvented or outflanked. It was extended by *Watson* to statements made by a witness to a party and his solicitor in preparing for a trial. As explained by Lord Halsbury at 487, if the witness could be sued on the proof of evidence, the protection for evidence given in court could easily be outflanked and rendered of little use. HB/3253
42. The extent to which the immunity extends back from things said and done in court was considered by the House of Lords in *Taylor*. The facts of *Taylor* (at §29 above) are instructive and arose for the first time due to recently widened disclosure obligations (209B). The majority in the House of Lords (Lords Goff, Hoffmann, Hope and Hutton) held that the core immunity which applies to parties, judges, juries, advocates and witnesses in respect of statements made in court extended to out of court statements which could fairly be said to be part of the process of investigating a crime or possible crime with a view to a prosecution. HB/3168
HB/3196-3197
HB/3200
43. Having introduced the immunity principle at 208B, as described at §30 above, Lord Hoffmann formulated the issue to be determined as ‘whether the immunity extends more generally to statements made to or by investigators for the purposes of a criminal investigation’. In setting out his rationale for concluding that the two documents were covered by an extension to the core immunity (213-215), he explained from 214D: HB/3199
HB/3204-3206
HB/3205
- the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.

⁸ The threshold for establishing causation in claims for breaches of Articles 2 and 3 of the European Convention on Human Rights claims is lower than that in negligence: it is concerned with matters which had a real prospect or substantial chance of altering an outcome, or measures that judged reasonably might have avoided the risk. The question of whether any threshold of seriousness applies to claims for damages under the General Data Protection Regulation and the DPA is currently being considered by this court: *Michael Farley and others v Paymaster (1836) Limited* UKSC/2025/0185 (the hearing is 7-8 October 2026).

Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for out of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. [...] the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.

44. Turning to investigators (from 214G), he found that ‘the same degree of necessity applies’. HB/3205

It would be,

an incoherent rule which gave a potential witness immunity in respect of the statements which he made to an investigator but offered no similar immunity to the investigator if he passed that information to a colleague engaged in the investigation or put it to another potential witness. In my view it is necessary for the administration of justice that investigators should be able to exchange information, theories and hypotheses among themselves and to put them to other persons assisting in the inquiry without fear of being sued if such statements are disclosed in the course of the proceedings.

45. Lord Hoffmann approved the test that ‘the protection exists only where the statement or conduct was such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated’. He observed that this formulation would, therefore, exclude statements which were ‘wholly extraneous to the investigation—irrelevant and gratuitous libels’ (at 215B). HB/3206

46. Lord Hope, who agreed with Lord Hoffmann, held at 219H, ‘[t]he public policy argument for extending the absolute privilege, consistently with established principles, seems to me to be unanswerable.’ HB/3210

47. *Taylor* established that, to prevent the core immunity being circumvented or outflanked by proceeding against participants in the judicial process in respect of statements made outside court, it extends to out-of-court statements which can fairly be regarded as part of the process of investigating a crime or possible crime with a view to prosecution. That principle has since been applied on numerous occasions, most notably by the House of Lords in *Darker*, as well as the Court of Appeal (*CLG v Chief Constable of Merseyside Police* [2015] EWCA Civ 836 (*CLG*)), and the High Court (*A & B*). HB/1538
HB/1427
HB/950

48. *Darker* was handed down on 27 July 2000, with Lords Hope and Hutton again delivering speeches. Contrary to the AWC §42, that was one week after the decision in *Hall* (discussed further from §52 below). It concerned claims in conspiracy to injure and misfeasance in public office arising from allegations that police officers had fabricated evidence. There was no challenge to the existence of the core immunity. Lord Hope recorded that its existence was not in issue (at 446C). The question was instead how the core immunity applied to witnesses and investigators, and whether it protected the conduct alleged. Their Lordships unanimously held that it did not extend to the fabrication of false evidence. Such conduct could not fairly be characterised as part of the police’s participation in the judicial process in their capacity as witnesses or potential witnesses; it was, rather, conduct which preceded and was distinct from their potential participation as witnesses (see Lord Hope 448C-449B, 450B). Lord Hope at 448C explained:
- [the] 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 as enforcers of the law or as investigators.
49. The former was protected, the latter was not. The act of fabricating evidence during an investigation was distinct from preparing to give evidence and could not be fairly said to form part of their participation in the judicial process as witnesses. As Lord Hope continued, the ‘purpose of the immunity is to protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence. It is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators’. In the same vein, Lord Cooke confirmed that, although it ‘is well understandable that the freedom of police investigators to communicate inter se and with others should be inviolate’, procuring false evidence is not ‘exchang[ing] information, theories and hypotheses’ (quoting Lord Hoffmann in *Taylor*) (454E-F).
50. While the facts of *Darker* differ considerably from those in the present appeal, *Taylor* was also approved and applied in *CLG*. The factual similarities between *CLG* and the present case may render it of assistance to this court. *CLG* concerned the inadvertent disclosure of the new address of witnesses to a shooting, who had relocated following anonymous threats, to the defendants in criminal proceedings. The Court of Appeal held that the police

were protected by witness immunity in respect of that disclosure. The then Vice-Chancellor, Moore-Bick LJ – with whom Fulford and Vos LJJ agreed – explained at §32 HB/1438 that the application of the immunity did not depend on the method of the communication of the address from the officer to the CPS:

...the claim is based not on anything that D.C. Gaffney said in his statement, but on what the police and CPS subsequently did with it. It is accepted that the CPS should have been alerted to the fact that the statement contained sensitive information and that on this occasion the system for ensuring that it was examined by the Disclosure Officer broke down. The question for decision, however, is whether the transmission of the statement by the police to the CPS was part and parcel of preparing for D.C. Gaffney to give evidence in support of the application by the prosecution for a warrant of arrest. In my view it was, because it falls squarely within Lord Hoffmann's statement in *Taylor v Director of the Serious Fraud Office*, to which I referred earlier. It is true that the action in the present case is not based on the nature of the statement itself, as it would be if the claim were for defamation, but it is based on the transmission by the police to the CPS of a statement required for the purposes of enabling D.C. Gaffney to give evidence in court, as he subsequently did. In substance, the position is essentially the same as if D.C. Gaffney had made his statement orally to a representative of the CPS. To hold the police liable for communicating its contents to the CPS would outflank the immunity to which they were entitled in relation to the evidence once given in court. In my view, therefore, the police are immune from action in respect of the transmission of his statement to the CPS, despite the fact that it was carried out negligently. [Emphasis added.]

51. As Moore-Bick LJ said, the extension to the core immunity would have applied if the address had been passed less formally, in the course of a conversation. It follows that it would also have applied had it been conveyed in a more formal way, as required by the instruments which govern the provision of information from the police to the CPS (described from §102 below), as part of the file.

E. The modern authorities did not abolish the core immunity

(i) Core immunity survives the abolition of advocates' immunity from negligence claims brought by their clients

52. The House of Lords abolished in *Hall* only a 'wider immunity enjoyed by a barrister from a claim by his own client for failure to exercise reasonable skill and care in the conduct of litigation on behalf of the client' which 'overlapped' with the core immunity (*Jones per Lord Phillips* at [13]). HB/2035

53. The speeches of their Lordships show that they did not sweep aside the immunity of advocates in court proceedings generally. As Lord Steyn explained at 679B, the court only considered the ‘immunities enjoyed by those who participate in court proceedings’ by analogy. Lords Steyn and Hope (at 714G) agreed that the analogy was unpersuasive having ‘little, if anything, to do with the alleged legal policy which required immunity from actions for negligent acts’. HB/1123 HB/1158 HB/1123
54. Lord Hoffmann at 697D-F cautioned against applying the witness immunity by analogy to the negligence of lawyers in claims brought by their clients. It was that which, he warned, would mean generalising the policy of the witness immunity in a way that was ‘illegitimate and dangerous’. Taken in context, his concern was in defining the immunity so generally that it covered advocates ‘for anything that they may do’ – something already precluded by his requirement that the cause of action to constitute the statement. He found that the advocate was the only person liable to be sued for negligence by his own client, not because of any wider application of the core immunity, but ‘because he is the only person who has undertaken a duty of care to his client’ (698F). The Appellant is, therefore, wrong to say this demonstrates ‘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’ (AWC §7). Because of the presence of a duty of care, the category of participant was material. HB/1141 HB/1142 HB/2/20
55. Despite the partial dissents (Lords Hope, Hutton and Hobhouse held the immunity was still required in criminal proceedings), their Lordships were united on the existence of the core immunity. Lord Hobhouse described civil immunity granted to all those taking part in a trial as ‘not just privilege for the purposes of the law of defamation but is a true immunity’ (at 740). Lord Hope too stressed the surviving general immunity at 724H-725A: HB/1060 HB/1184 HB/1168-1169
- ...again I would stress the point which I have already mentioned several times, that the immunity to which I refer is the advocate’s immunity against claims by his client for negligence. I would retain the immunity of the advocate against claims for negligence by third parties.
56. In *Hall*, their Lordships concluded that the fundamental principle that there should be a remedy for a wrong was not displaced by the public policy arguments in favour of maintaining advocates’ immunity from actions for negligence by their clients. In particular, they rejected the argument that immunity from negligence was necessary to ensure that barristers complied with their duty to the court given the high threshold required to establish negligence (see Lord Steyn at 681G-682 and described by Lord Hobhouse at HB/1125

737H as ‘an important element of protection against unjustified liabilities’). This can be contrasted with the myriad causes of action to which the core immunity applies which do not benefit from the high threshold required for a negligence claim (described at §40 above). They also observed that the fear of unfounded actions and the commensurate negative effect on the conduct of advocates had ‘a most flimsy foundation, unsupported by empirical evidence’ (Lord Steyn at 682C-D). Lord Hoffmann warned that ‘the bogey of vexatious claims’ should not be exaggerated and was confident it was countered by proper insurance and developments in the civil justice system (at 691).

HB/1181

HB/1126

HB/1135

57. Fears of such unfounded actions in the context of the core immunity may, however, enjoy a more stable foundation today as the empirical evidence demonstrates a statistically significant increase in claims and complaints in the recent years, perhaps attributable to the availability of free public Gen AI tools (see paragraph 22-24 of Dr Van Dellan’s witness statement). This includes an 81% increase in complaints between 2024/2025 and 2025/2026 to the Information Commissioner’s Office which the ICO attributes to ‘greater public awareness of data protection rights and an increased confidence in how to exercise them’. It further includes a 29% increase in complaints made to the Bar Standards Board against barristers between the 2024/2025 and 2025/2026⁹. This may be thought to be the beginning of the “tsunami” of small to medium sized civil litigation by LIPs’ that Lord Briggs described extra-judicially in May 2026 and ‘the tidal wave of claims’ (similar concerns have been expressed by members of the senior judiciary extra-curially).

58. Since *Hall*, most notably in *Jones* by Lord Phillips at §§1, 12 and 13 and Lord Brown at §65, it has been recognised in a wide range of cases that the advocates immunity survived in relation to claimants other than the advocates’ client.

HB/2032,
2034-2035,
2049

(ii) *Core immunity survives the abolition of experts’ immunity from negligence claims in negligence and contract brought by those who instructed them*

59. In *Jones*, the Supreme Court held that the continued existence of an immunity needs to be justified. Their Lordships found no justification had been shown for continuing to hold expert witnesses immune from suit for breach of duty in relation to the evidence which they gave in court or for the views which they expressed in anticipation of court

HB/2025

⁹ 1,857 in 2024/2025 and 2,394 in 2025/2026.

proceedings. Accordingly, they abolished the immunity from suit for breach of duty which expert witnesses had enjoyed in relation to their participation in legal proceedings.

60. In carving out expert witnesses' protection, the Supreme Court did not further disturb the core immunity (see for example Lord Phillips at §62, Lord Brown at §65). It was common ground that if immunity was to be effective it must apply to views expressed not only in court, but in contemplation of, or at least preparation for, possible proceedings (§45). Whether the immunity still applied to a particular class of people or set of circumstances had to be determined generally, on the basis of whether public policy justified its continuation (Lord Phillips at §51). HB/2049
HB/2044
HB/2046
61. A summary of all of the principles outlined above was given by Lord Sumption sitting in the Privy Council (in the minority, but with whom Lord Kerr in the majority agreed on the rationale for the principle at [102]). In *Cranford Adjusters and ors v Sagcor General Insurance (Cayman) Ltd and anor* [2014] A.C. 366 at §125, considering among other things, the relationship between the tort of malicious prosecution and the core immunity, Lord Sumption explained the landscape and inroads shaping the core immunity: HB/1484
HB/1490-1491
- The immunity applies in subsequent proceedings which seek to assert liability not just for things said or done in the face of the court in earlier proceedings but also for statements sufficiently closely connected with them, for example by a potential witness when a witness statement is taken from him: *Watson v M'Ewan* [1905] AC 480 ; *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177. As a general rule, it applies not just in subsequent actions for defamation but irrespective of the cause of action: *Hargreaves v Bretherton* [1959] 1 QB 45 , and *Marrinan v Vibart* [1963] 1 QB 528. No doubt, in recent years, some inroads have been made into the full breadth of the principle. It no longer applies to expert witnesses: *Jones v Kaney* [2011] 2 AC 398. Nor does it exclude the liability of a barrister in negligence to his own client: *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. But these inroads reflect the voluntary and contractual character of the participation of experts and lawyers. They do not discredit the underlying policy. [Emphasis added.] HB/1491

F. The Rationale for the Core Immunity

(i) *General principles*

62. There is no dispute that the cornerstone of any system of justice is that where there is a wrong there should be a remedy. To deny a remedy should always be regarded as exceptional. Any justification must be necessary, requires strict and cogent justification and must be kept under review (see for example Lord Dyson in *Jones* at §113-114). HB/2060

63. The scope of the immunity requires a balance between the public interest in every wrong having a remedy and the protection of the administration of justice. The Court of Appeal in its judgment at §14, drawing upon a wealth of authority, described that second interest as ‘the encouragement of freedom of speech and communication in court proceedings, which is necessary to protect the proper administration of justice and the interests of justice’ (*Taylor* at 208¹⁰; *Hall* at 679 and *Jones* at §§55-57, 67, 85-87, 108-114). HB/149
HB/3199
HB/1123
HB/2047-2048, 2050, 2054, 2059-2060
64. The immunity exists principally to protect bona fide participants who would otherwise have to defend claims. That requires a rule which necessarily also protects some malicious conduct. In a well-known passage in the context of witness immunity, Fry LJ in *Munster* at 607 (later cited with approval by Lords Hoffmann and Hutton in *Taylor* at 207 and 221 and *Hall* at 690E-G) considered this rationale and why it extended to protect the malicious or vexatious as well as those acting in good faith: HB/2408
HB/3198, 3212
HB/1134
- The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions. HB/2408
65. The fact that the immunity may protect wrongful conduct is not an accidental consequence which can be disregarded; it is an inherent feature of an immunity which is designed to operate prospectively and with certainty. Without a universal shield, an immunity which depended upon the absence of malice, dishonesty or negligence would not provide the certainty necessary to achieve its underlying purpose: the participant would remain exposed to the prospect of having to defend a subsequent claim as to his or her state of mind or conduct. Lord Hutton in *Darker* at 464 put it this way: HB/1567
- The reason for the rule is grounded in public policy: it is to protect a witness who has given evidence in good faith in court from being harassed and vexed by an action for defamation brought against him in respect of the words which he has spoken in the witness box. If this protection were not given persons

¹⁰ Lord Hoffmann in *Taylor* at 208 was approved in *Darker* (see 435 and at 447, 450) and is provided above at §30. HB/3199
HB/1538, 1550, 1553

required to give evidence in other cases might be deterred from doing so by the fear of an action for defamation. And in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were actuated by malice the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court even though this means that the shield covers the malicious and dishonest witness as well as the honest one.

66. Lord Halsbury in *Watson* found that the ‘privilege of a witness, the immunity from responsibility in an action’ to be ‘settled law and cannot be doubted’ (at 486). He explained:

It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

HB/3253

67. Civil liability, of course, is not the only mechanism for addressing misconduct occurring within the judicial process. There are other mechanisms by which misconduct may be addressed including perjury, malicious prosecution and analogous claims involving malicious initiation of criminal proceedings as well as proceedings for contempt of court and professional disciplinary processes and sanctions. The question is whether the public interest requires those mechanisms to be supplemented by a further civil action against the participant. The rationale underlying the immunity is such that, ordinarily, it does not.

68. To be effective, the immunity has to be known at the time the person acts. Lord Hoffmann in *Taylor* at 214E explained:

HB/3205

The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed.

69. The need for foreseeability further militates against the Appellant’s argument for a list of causes of action. That approach would require all court participants to have not only a knowledge of that list but the ability to foresee how a claim might subsequently be formulated against them.

70. A further strand justifying the immunity is ‘to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again’ (*Roy v Prior* at 480 *per* Lord Wilberforce, cited in *Darker* at 446, 457, *Jones* at §17). The immunity prevents the court in subsequent proceedings from having to investigate, and potentially adjudicate upon, the

HB/2859
HB/1549,
1560
HB/2036

propriety, truth or motivation of conduct undertaken in earlier proceedings. This protects the finality of the original process and avoids a multiplicity of satellite litigation.

71. These strands are interrelated. The immunity exists because the administration of justice requires participants to communicate freely and without fear of subsequent civil liability. That objective in turn requires the scope of the immunity to be sufficiently certain to be relied upon prospectively. Certainty is undermined if each case gives rise to collateral litigation as to whether the particular conduct was sufficiently justified. The fact that conduct is malicious, dishonest, negligent, mistaken or otherwise wrongful does not take it outside the immunity if it falls within the category of conduct to which the immunity attaches. That is a consequence of the policy which the immunity is designed to serve, rather than a reason to qualify the rule, as Ritchie J found, on a case-by-case basis.

HB/184-
185, 212-
216

(ii) Data protection, privacy and breach of confidence claims

72. What marks out the claims under the DPA 2018, misuse of private information and breach of confidence, is that, unlike claims in professional negligence, they can be brought by anyone whose data/information is being handled and without the need to demonstrate a duty of care.

- a. For a claim under the DPA, a living person needs to demonstrate that (a) their data was processed (i.e. acquired, retained, used or disclosed) and (b) that such processing was contrary to the Data Protection Principles (i.e. the processing was unlawful, or unnecessary, or inadequate, or excessive, or retained for too long etc).
- b. For a claim for misuse of private information, a claimant needs to demonstrate that they had a reasonable expectation of privacy concerning that information and that their right to privacy outweighed a competing right or public interest in favour of disclosure.
- c. For a claim for breach of confidence (a) the information must have the 'necessary quality of confidence about it', (b) the information must have been imparted in circumstances importing an obligation of confidence, and (c) there must be an unauthorised use or disclosure of that information.

HB/794-795

73. In any given criminal case, a great number of people will have their data processed and their private and/or confidential information revealed. This will include complainants, defendants, witnesses, their family members, police officers, court staff, prosecution staff,

probation staff, and third parties captured in evidence such as footage. Indeed, the starting position is that ‘the courts have recognised that those who make statements to the police, or give information as witnesses, may do so in circumstances where an equitable obligation of confidence is owed to them’ (*Mitchell v News Group Newspapers Ltd* [2014] EWHC 879 (QB) at §16-§17). It is difficult to envisage circumstances where a claim could not be brought under these causes of action due to the fact of revealing a person’s personal data or private/confidential information (irrespective of whether it was defamatory): a complainant’s sexual history or drug habit revealed, embarrassing marital disputes made public, a witness’s financial position laid bare, the events of board meetings, discussions with medical personnel (as in *Watson*), details of confidential informants (as in *A & B* and *CLG*), inappropriate conduct by the whole team in the office in an Employment Tribunal claim, a driver’s history of infringements in a civil claim, racism or other discriminatory conduct from a complainant as context to the defendant’s actions.

74. These examples of personal data / private information / confidential information, and countless more, will be revealed in almost every criminal or civil trial in every court in the country. The harm does not lie in whether claims arising from such disclosure will be made out (whether, for example, disclosure to an advocate can be proven to be necessary) but that they will be brought at all. This goes to the heart of the rationale of the core immunity.

G. Ground 1: Application to the CPS advocate in XGY

75. The Appellant’s argument in respect of Ground 1 appears to be as follows: judicial proceedings immunity grew from absolute privilege in claims for defamation. The scope of the immunity ‘applies by and with reference to’ the cause of action. It applies only to a limited selection of causes of action in respect of which the core immunity has been recognised as necessary. Therefore she says the Court of Appeal erred by ‘reasoning that the immunity applies to all statements in court, irrespective of the cause of action and the circumstances of the alleged conduct’ (AWC §4). HB/19
76. Instead, the Appellant maintains, the Court must first consider the cause of action to see whether it has previously been recognised that the core immunity applies to that cause of action. Because ‘JPI has not attached to claims for breach of confidence, misuse of private information, or for breaches of the DPA 2018...immunity for such claims would be an expansion of JPI which must be justified...as an exceptional encroachment’ (AWC §20(c)). HB/26

Factually, this is wrong: the core immunity has been held to defeat claims for breach of confidence (*Watson*), misuse of private information (*BHX v GRX and GRU* [2021] EWHC 770 (QB)) and negligence claims pertaining to the release of personal data (*CLG and A & B*). The core immunity applies to these claims not by virtue of an expansion of the core immunity, but because they already sit within it (and have been found to do so).

77. Notwithstanding, the Appellant argues that 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 conclusion’. She admits this is an ‘expansion of the arguments pursued before the Court of Appeal’ (footnote 1). Whichever route she takes, the Appellant contends there is no principled basis for ‘extending’ the core immunity in this appeal: the interests protected by breach of confidence, misuse of private information and the DPA 2018 are said to be distinct from those protected by the causes of action to which the immunity historically applied: the rationale underlying JPI cannot be transposed to them (see, for example, AWC §95).
HB/20
HB/20
HB/54-55
78. This is a novel approach seeking to apply an entirely new ‘cause of action test’ that was not suggested before the Court of Appeal or in the courts below (see for example §§94-96 of HHJ Brownhill’s judgment or §16 the Appellant’s Replacement Skeleton Argument in the Court of Appeal which describes Ritchie J’s approach as ‘unimpeachable’ and §28 which relied on *Jones* to conclude, ‘Like witnesses, advocates continue to benefit from immunity in respect of defamation claims and **indeed any cause of action** that arises from the evidence at trial to protect them from vexatious claims’).
HB/270-271
HB/426
HB/430
79. Nonetheless, drawing together the threads from the authorities and argument above, the Appellant’s arguments must fail. There is already a long-established common law core immunity which applies to conduct in the course of criminal proceedings. A bail hearing is part of those proceedings. The immunity is deliberately broad and has repeatedly been protected against attempts to circumvent it. Nothing in the modern authorities abolished the core immunity that applies to the CPS and Chief Constable in this appeal. The only questions for this court are therefore:
a. to what conduct does the immunity apply; and

- b. whether the particular conduct falls within the existing core immunity or, in the case of the police, the established extension of the core immunity. This is determined by reference not to the cause of action but to the immunity's rationale.

If the core immunity or its extension apply, there is no need to justify the application on a case-by-case basis (as the Court of Appeal correctly stated at §65(i)).

HB/160-161

80. The Chief Constable has had the benefit of seeing the CPS's written case and adopts the submissions made in respect of Ground 1. The position can therefore be put shortly:

- a. As regards the CPS, the impugned conduct was the statement of XGY's address in open court in front of DYP.
- b. That conduct occurred in the course of a bail hearing;
- c. The causes of action on which XGY seeks to bring her claims all consist of that statement;
- d. The conduct falls squarely within the core immunity;
- e. The fact that the disclosure occurred in error does not alter that conclusion.

81. Insofar as the Appellant seeks to argue that no immunity should apply to advocates (and by extension police officers) because other professionals are not afforded immunity from comparable challenges, the comparison is misplaced. Immunity is not a perk attached to a profession; it is a legal protection justified by the particular public interest served by the immunity. The question instead is whether immunity is justified by the function and policy of advocacy, not whether every other profession enjoys an equivalent immunity.

82. Drawing an analogy with doctors (AWC §§107-111) forgets that advocates operate in adversarial proceedings. An advocate's immunity is not justified by the mere fact of being a professional, but by the particular function they perform within an adversarial system. The advocate must be free to advance their client's case, including by making submissions and taking forensic decisions which may detrimentally affect the interests of others, without the risk of collateral litigation arising from the proper discharge of that function. Advocates (and police officers and staff), are participants in legal proceedings, entitled to the same protection as all the other participants. Those functions raise considerations quite different from those arising in the provision of medical care or another professional role. It is not the case that the advocate is placed in a privileged position above other

HB/60-61

professionals; on the contrary they are afforded the same protection necessarily afforded to all participants in the legal process.

83. It also seems unlikely that the advocate's own client is 'likely to be the largest category of potential claimant' *c.f.* AWC §106 given the potential breadth of data and information claims (addressed above at §73). HB/59
84. In summary, Ground 1 should be dismissed because the Appellant's new approach of defining the scope of the core immunity by reference to the cause of action pleaded is unsustainable. This approach:
- a. Directly conflicts with *Watson* and *Marrinan*;
 - b. Rests on a misreading of *Hall*;
 - c. Lacks any principled foundation and would produce arbitrary and inconsistent outcomes depending on the cause of action selected;
 - d. Conflicts with the need for certainty when the relevant act is undertaken;
 - e. Would require parties to return to court (though which court is unclear) each time Parliament creates a new cause of action;
 - f. Would undermine the purpose of the core immunity by making its application contingent upon subsequent developments in the law and rendering the protection it affords nugatory.

H. Bail Hearings are Part of Criminal Proceedings

85. The following section reinforces the arguments in respect of Ground 1 above but is of greater significance in the context of Ground 2.
86. The Court of Appeal held that core immunity and its extensions apply to bail hearings and are not restricted to criminal trials (§§56-61, 64(iii) and (iv) and 65(iii)). The Appellant obtained permission to argue that the Court of Appeal erred in concluding that the core immunity attaches to police preparations in respect of a bail hearing (Grounds of Appeal §16). It is not clear if she seeks to maintain this argument: it does not feature in any part of her AWC. She would be correct to abandon this argument. Bail proceedings are not merely administrative or procedural. They comprise an integral part of the proceedings in a criminal court. Any immunity that applies to a disclosure made in the course of a criminal trial applies equally to a disclosure made during a bail hearing. HB/157-161 HB/291

87. It has long been established that the core immunity applies ‘in the ordinary course of any proceedings in any court’ or ‘in the course of judicial proceedings’ (see, by way of example, Chief Barron Kelly in *Dawkins v Lord Rokeby* (1872-73) LR 8 QB 255 at 263 and Sellers LJ in *Marrinan v Vibart* [1963] 1 QB 528 at 535). HB/1584
HB/2312
88. The long title of the Bail Act 1976 – which applied to the bail proceedings at which the disclosure was made – provides it is ‘An Act to make provision in relation to bail in or in connection with criminal proceedings in England and Wales, ...’. Accordingly, proceedings under the Bail Act 1976 form part of the criminal process. In *R v Blandford Justices ex parte Pamment* [1990] 1 WLR 1490 at 1494, Taylor LJ, with whom Balcombe LJ and Lord Donaldson, Master of the Rolls, said: HB/2594
- There can be no possible ground for describing an order granting or refusing bail to a defendant as collateral to the criminal proceedings...the grant or refusal of bail to a defendant in criminal proceedings is an integral part of the process. HB/2594
89. Prior to the present case, there was other Court of Appeal authority demonstrating matters relating to bail in criminal proceedings are covered by the core immunity. *Gizzonio v Chief Constable of Derbyshire Police* [1998] Lexis Citation 4431 (CA) (unreported) was a claim for misfeasance in public office brought against police officers who were suggested to have improperly objected to bail by providing the CPS advocate with information which was false or unreliable. The information was later used by the CPS in the course of a bail hearing. Henry LJ (with whom Aldous LJ and Sir Christopher Staughton agreed) held at page 10 that ‘all matters relating to bail were part of the investigatory or preparatory process in criminal proceedings. Absolute immunity therefore applies.’¹¹ HB/1719
HB/1726
90. That conclusion is consistent with the nature and purpose of a bail hearing. At a bail hearing, the court determines the defendant’s detention or release. It must assess the evidence placed before it. It will consider whether bail should be granted and, if so, whether any conditions are necessary. The prosecution must put relevant information before the court, including about the circumstances of the alleged offence/s, the defendant, the complainant and any risks said to arise. Information about a complainant’s location can be

¹¹ *Gizzonio* was cited in the argument in *Darker v Chief Constable of West Midlands* [2000] UKHL 44, [2001] 1 AC 435 before the House of Lords – see pages 439E, 441H and 443E – but their Lordships did not revert to the case in their speeches. HB/1539,
1542, 1544,
1546

directly relevant to the formulation of a protective bail condition. Here, the CPS advocate did not provide XGY's address for some extraneous or gratuitous purpose. No matter how misguided, the address was given in seeking a bail condition intended to protect XGY.

91. During a bail application, the court may take into account matters which are not strictly admissible evidence (*R (DPP) v Haverling Magistrates' Court* [2001] 1 WLR 805 at §§39-41). It is common practice for relevant material to be presented by a police officer and that material may range across a spectrum from mere assertion to documentary evidence. Bail conditions frequently identify geographical locations, for example by prohibiting a defendant from entering a particular area. In order to formulate conditions which are sensible and proportionate, the court may require information identifying the relevant locations. This may include the addresses of complainants, witnesses or scenes of crimes. Such information is often put before the court in a relatively informal way, but the defendant will always have the opportunity to comment on and, if desired, challenge that information. Whether particular information is ultimately challenged, accepted or regarded as irrelevant cannot necessarily be known in advance. Information provided to a CPS advocate for potential use at a bail hearing may accordingly include material which could, if challenged, require evidential support, even though the issue is never subsequently raised in the criminal proceedings or at trial. HB/2509
92. Opposing bail and seeking the imposition of conditions are core prosecutorial functions performed in the course of criminal proceedings. It is therefore immaterial, for the purposes of the core immunity, whether information provided or relied upon at a bail hearing is subsequently used at trial. The policy underlying immunity – namely, that participants in judicial proceedings must be able to discharge their functions fearlessly and without the chilling effect of potential civil liability (described from §62 above) – applies with equal force to bail proceedings. Indeed, given that bail decisions may directly concern the protection of complainants, witnesses and the public, there is a particular need for prosecutors to be able to place relevant information before the court without fear of subsequent civil proceedings.
93. The point was summed up by Spencer J in *A v B v Chief Constable of Hampshire Constabulary* [2012] EWHC 1517 (QB) (*'A v B'*) at §33. That first instance decision bears factual similarities with the present case and may be instructive: HB/930

In his skeleton argument, and in his oral submissions, [Counsel for the Claimant] still sought to draw a distinction between things said in the course of giving evidence, on the one hand, and disclosure by prosecuting counsel at court in a preliminary hearing, on the other. This is to misunderstand the rationale of the core immunity rule. It is not the giving of the evidence or otherwise that attracts immunity. It is the circumstances surrounding court proceedings and the leeway which must be given to parties, advocates, witnesses, judges and jury to speak freely, as the authorities make clear.

HB/930

I. The police's institutional role in criminal proceedings

94. It is the duty of the DPP to take over the conduct of all criminal proceedings (bar a few specified exceptions) instituted on behalf of a police force (s.3(2) of the Prosecution of Offences Act 1985). That statutory transfer of conduct does not, however, exclude the police from the prosecution process. Rather, it reflects the division of functions within a public prosecution, in which the CPS assumes conduct of the proceedings but depends upon the police, as the investigating authority, to provide the information and material upon which the prosecution is conducted.

HB/812

95. The police therefore occupy a unique position in criminal proceedings. This is relevant because many of the authorities describe the immunities as applying to parties, their advocates and their witnesses. But:

- a. The police are not a party: although they provide information and instructions to the advocate, proceedings are brought in the name of the Crown. Unlike a party in civil proceedings, the police do not have a privileged relationship with the Crown in criminal proceedings other than in respect of legal advice sought and received from the CPS (*Goodridge v. Chief Constable of Hampshire* [1999] 1 WLR 1558 at 1565).
- b. The police are not the advocate: the CPS employs or instructs advocates to fulfil that role.
- c. While police officers routinely give evidence as witnesses, that is incidental to their disclosure function in support of the Crown's role as prosecutor.

HB/1735

96. Nonetheless, the police have an institutional role in the administration of criminal justice which includes an obligation to provide information to the prosecuting authority. In order for the CPS to discharge its disclosure obligations pursuant to s.3(1) of the Criminal Procedure and Investigations Act 1996 ('CPIA'), it must disclose 'prosecution material', which is material in its possession or that came into its possession in connection with that case. How prosecution material comes into the possession of the CPS is addressed in the

HB/769

Code of Practice ‘designed to secure’ that such material is ‘recorded’, ‘retained’ and ‘revealed to a person who is involved in the prosecution of criminal proceedings’.¹²

HB/772
HB/4249

Paragraph 7 of the Code of Practice deals with ‘revelation of material to prosecutor’ and the disclosure officer must provide to the prosecutor all material scheduled and must accede to the prosecutor’s request to inspect any material retained by the police (§7.4).

HB/4252

97. The same approach, requiring full disclosure from the police to the prosecutor, is in place in Scotland and Northern Ireland. In Scotland, section 117(2) of the Criminal Justice and Licensing (Scotland) Act 2010 provides that ‘the investigating agency must provide the prosecutor with details of all the information that may be relevant to the case’ (see also *McCarthy v HM Advocate* 2021 JC 100 at §4). In Northern Ireland, s.35 of the Justice (Northern Ireland) Act 2002 requires the Chief Constable to give information to the DPP on request, a relationship that was described by the Northern Ireland Court of Appeal in *Beatty v DPP* [2022] NICA 13 in the following terms:

HB/766

HB/2319
HB/806

25. While the DPP and the Chief Constable/Police Service are independent statutory agencies performing their respective statutory duties, functions and discretionary powers independently of each other, there is nonetheless a certain hierarchical element in their relationship. This flows from certain provisions of the Justice Act. [...]

HB/1308

26. The next feature of the relationship between the DPP and the Chief Constable/Police Service is found in section 35(5) of the Justice Act. This provision expresses most emphatically the investigative/prosecutorial dichotomy already noted. In short, the Chief Constable/Police Service must equip the DPP with all information amassed by them in the course of any given investigation into suspected crime to enable prosecutorial decision making to be undertaken.

98. A similar and detailed analysis of the importance of full disclosure and the free-flow of information from the police to the prosecution was considered by the Canadian Supreme Court in *R v. McNeil* (2009) 1 SCR 66, addressed in the Annex below at §135). At §23, the Canadian Supreme Court noted that:

HB/4101

While the roles of the Crown and the police are separate and distinct, the police have a duty to participate in prosecutions: see, for example, s. 42(1)(e) of the Ontario Police Services Act. Of particular relevance here is the police’s duty to participate in the disclosure process. The means by which the Crown comes to be in possession of the fruits of the investigation lies in the corollary duty of

¹² The empowering provision for the Code of Practice is s.23 CPIA, which also sets out its purpose, and the most recent iteration of the Code, which only has effect in England and Wales, was laid before Parliament on 7 September 2020 and given effect by the Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2020.

HB/772
HB/4253-4255

police investigators to disclose to the Crown all relevant material in their possession. The police's obligation to disclose all material pertaining to the investigation of an accused to the prosecuting Crown was recognized long before *Stinchcombe*.

99. Accordingly, where the police discharge their disclosure functions in connection with criminal proceedings, their conduct is not merely antecedent to the proceedings: it is a necessary part of the machinery, set out in statute and statutory codes of practice, by which those proceedings are conducted. The police are not an outsider to proceedings, publishing or sharing information which subsequently finds its way into the litigation.

100. In the context of a public prosecution conducted by the CPS, the police service therefore occupies a difficult and somewhat anomalous position. Yet where prosecutorial functions are divided between different public bodies, it is particularly important that the protections afforded to parties, witnesses and advocates should also extend to the police when, in support of the CPS, it performs public functions on behalf of the Crown in an essential part of the judicial process.

101. There are many reasons why the CPS may require a complainant's address be provided to it by the police. The CPS may, for example, need to write to the complainant about the conduct of the prosecution, to liaise over dates to avoid for trial, to issue a witness warning letter and/or to comply with the Victim's Charter. Accordingly, provision of the complainant's address by the police to the CPS is not only well-established practice, it is enshrined in the applicable guidance.

102. As the Court of Appeal observed at §56, the police were obliged to prepare a file for the CPS in advance of a bail hearing. The information that the prosecutor relied on in this case was contained in the file provided to him and prepared by the police for the express purpose of, and use in court in, a bail hearing in criminal proceedings. That file had to comply with statutory guidance for police officers and crown prosecutors published by the Second Respondent under s37A of PACE: the 'Charging (The Director's Guidance)', then in its fifth edition, published May 2013 ('the 2013 guidance').

103. The 2013 guidance sets out the material and information required for charging and for subsequent management of the case at initial hearings. Section 32 of the 2013 guidance incorporated the National File Standard. The National File Standard applicable in this case

was updated in May 2015. It provided that for the first Magistrates' Court hearing where there is an anticipated not guilty plea or the case will go to the Crown Court, the file 'MUST INCLUDE' the MG9 List of Witness. It records that this document is 'Not Discloseable to all parties'. The MG9 form requires the name and contact details of the witnesses. HB/4179

104. These requirements remain in the current National File Standard contained at Annex 5 of the Director's Guidance, now in its sixth edition (effective from 31 December 2020) which stresses the importance of compliance and requires that the MG9 be included and contain updated information. HB/4222

105. These policies are important in demonstrating the justification for extending the advocate's (or party's) immunity. Without the provision of the necessary information to a prosecutor, he or she cannot do their job. What the prosecutor says in court is a product of the information with which they have been provided by their client or, in the case of criminal proceedings, by the police. Accordingly, the provision of information to the prosecutor by the police is an essential extension of the advocate's function, even though it is done by a different actor. The extension of the advocate's immunity is tied to function, not to the status of the individual, as per Lord Clyde in *Darker* at 459: HB/1562

That the police may mount prosecutions or that prosecutors may engage in detective work should not obscure the critical consideration of the function which is being performed. It is to the function that the immunity attaches rather than to the individual who performs it.

Some activities which may be described as investigative may thus be covered by the immunity, such as the preparation of reports with a view to these forming part of the evidence to be given in court.

106. Without the protection of an extension to the core immunity described below, the police would be placed in the uniquely unfortunate position of acting both like a party to proceedings and being required by law to undertake administrative functions in support of the advocate as would a solicitor – and having specific obligations placed on them under both statute (for example the Criminal Procedure and Investigations Act 1996) and under the guidance, as above. Yet they would have none of the protections that a party, witness or advocate doing the same thing would have. It is instructive to remember that in civil proceedings those who carry out the same functions as the police do in criminal proceedings are all protected by the core immunity. HB/769

107. The policy justification for extending the core immunity in these circumstances to critical administrative work by the police in supporting the CPS is particularly strong given the essential public function the police undertake to ensure the operation of the criminal justice system. The justice system demands a full and free-flowing transfer of information from the police to the CPS; and that cannot happen if the police hesitate before passing information to the CPS for fear of litigation or if that fear manifests in the review of every piece of data processed (at great financial and opportunity cost to the police and thus the public) to check for potential civil liability.

J. Ground 2: Application to the police in XGY

108. The questions for this court are as follows:

- a. to what conduct does the immunity apply; and
- b. whether the particular conduct falls within the established extension of the core immunity. Once more, this is determined by considering not the cause of action but the immunity's rationale.

109. The authorities described above establish a coherent principle. The protection afforded by the core immunity cannot be circumvented by characterising as a separate actionable act something which, viewed in substance, forms part of the process by which evidence is prepared, information is communicated or the case is put before the court. Immunity does not turn on whether the act occurred physically in the courtroom, on the particular form or document in which the information was communicated, on whether the information ultimately becomes evidence in criminal proceedings, or on an 'ingenious' cause of action pleaded. The question is whether the act can fairly be said to form part of the relevant judicial process and whether protection is necessary to prevent the immunity attaching to that process from being outflanked. HB/2315

110. Here, the provision of XGY's address to the CPS advocate was part of the judicial process and application of the extension to the core immunity is required to prevent that immunity being outflanked. It was not an act collateral to the criminal proceedings, nor an act undertaken for some purpose extraneous to them. It was the communication of information for use in criminal proceedings, in which the prosecution was inviting the court to impose a bail condition designed to protect XGY. If the Appellant could

circumvent the immunity applicable to the presentation of the prosecution's case at the bail hearing by suing in respect of the particular means by which the underlying information was transmitted to the advocate beforehand, the protection would depend upon the form of the communication rather than its substance and could readily be outflanked.

111. The authorities afford no support for any distinction between the disclosure by the CPS at court and the disclosure to the CPS before court. In *Taylor*, as described at §29 above, the claim was founded on two allegedly defamatory documents. First was a letter from the SFO to the Isle of Man Attorney General setting out the SFO's suspicion that the plaintiff had participated in the fraud (described by Lord Hoffmann at 205B-G).^{HB/3196} Second was a file note recording the shared view of an SFO investigator and a Law Society employee that the plaintiff was a co-conspirator who should be struck off (205H). Those^{HB/3196} documents were not witness statements or proofs of evidence, and had, to use the Appellant's expression, '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' (AWC §94). Neither^{HB/54} statement was said to be evidence and the Law Society employee was 'not intended to be called as a witness' (Lord Hoffmann at 213H). Far from their Lordships explaining that^{HB/3204} the application of the immunity is justified because it concerned information contained in a document likely to become evidence, or related to the evidence, their Lordships said no such thing (see too Lord Hoffmann at 214E). On the contrary, their reasoning points in^{HB/3205} the opposite direction. Even though they were investigative communications that took place outside court and were unlikely to be presented as evidence, their Lordships held that they were protected. To hold otherwise would allow the immunity protecting the judicial process to be defeated by the form in which information was communicated, rather than by asking whether, in substance and function, the act formed part of that process. The same analysis applies here: the police's inclusion of XGY's address in the file for the CPS was a step in communicating information for use at the bail hearing, not a freestanding act divorced from the conduct of the proceedings.

112. The nature of bail proceedings makes that point particularly acute. Such proceedings will often involve the communication of important information to the court without the formal giving of evidence. As explained at §91 above, magistrates may act on material which is not admissible evidence and which may never be deployed as evidence

been recorded, perhaps in a file note to ensure that it is not lost sight of should further reference to it become necessary, it is at risk now of being disclosed to the defence’:

HB/3209-
3210

The risk to the administration of justice lies in the inhibiting effect of collateral use of this material. A criminal investigation may travel in various directions before it settles down and concentrates on the activities of those against whom the prosecutor believes there is sufficient evidence. Those who provide information to investigators usually do so in the belief, which may or may not be expressed by them, that the information is being given out of a sense of public duty and in confidence. That information may, if it is to be useful to the investigator, contain material which is defamatory. So long as the information goes no further, no harm is done to anybody. But disclosure releases the defamatory material from the control of the prosecutor. Unless protected, it may be disseminated further and become actionable.

It requires little imagination to appreciate the damaging effects on the supply of information if those who supply it are to be subjected to claims for damages for defamation arising from what they have said. The process of investigation is likely to be inhibited if the investigator is at risk of such a claim because of something which he has recorded for his own use, or for use by others in his team, in a file note. [...] the imposition of liability in such circumstances may lead to the exercise of the investigatory function being carried on in a detrimentally defensive frame of mind. This may prejudice the defendant, because other possible lines of inquiry which might assist his defence will not appear anywhere in writing lest they should be thought, following disclosure, to be defamatory. [...]

115. As explained above and as Lord Hope emphasised, the immunity remains justified by the significant disadvantages to the public interest that abolition of the rule would entail.

As Lord Phillips said in *Jones* at §51, ‘the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable’.

HB/2046

116. Finally, the Appellant places significance on the fact that the police were not providing a location ‘within the context of a witness statement’ as in *CLG* (see AWC §118-119). But neither *CLG* nor *Darker* before it confined immunity to witness statements alone.

HB/63

The Court of Appeal in *CLG* at §32 confirmed that ‘the position is essentially the same as if D.C. Gaffney had made his statement orally’. In *Darker*, Lord Hope also made this clear when describing the protection afforded to something ‘said or done’ (see too Lord Cooke’s wider construction above and Lord Hutton’s description at 472B of ‘examination of articles to enable a statement of evidence’ also falling within the immunity). In response to questions from the Lady Chief Justice in the Court of Appeal, leading counsel conceded that, had the police provided XGY’s address in a witness statement rather than as part of the court file, the act would have fallen within the scope of the immunity. This appears to remain her position. It exemplifies the lack of principle in the Appellant’s formulation of

HB/1438

HB/1549

HB/1575

the scope of immunity: it begs the question how a witness statement could be protected, regardless of the cause of action, when any other form of words would remain exposed. What matters is not the form in which the information is communicated, but whether, in substance, the act forms part of the protected judicial process. The outcome, were the Appellant to be correct, is that the police would need simply to place the entire contents of the court file into a witness statement to ensure protection from the extension to the core immunity.

117. In summary, Ground 2 should be dismissed because the Appellant's approach:
- a. Characterises an integral part of the judicial process as a separate and actionable act, disaggregating the very process which the immunity protects;
 - b. Creates an arbitrary distinction between material disclosed in court and that shared before the court hearing pursuant to a process prescribed by statutory guidance;
 - c. Creates a similarly arbitrary distinction between material recorded in a witness statement and material recorded elsewhere;
 - d. Would inhibit the police and the CPS in the discharge of their essential public functions, fostering the 'detrimentally defensive frame of mind' described by Lord Hope and impairing the administration of justice; and
 - e. Seeks to circumvent and outflank the core immunity.

K. Conclusion

118. The First Respondent respectfully invites the Supreme Court to dismiss the appeal for the following reasons:
- (1) The Court of Appeal did not err in concluding that advocates have the benefit of a core immunity from suit in respect of anything said or done 'in the ordinary course of proceedings'; and
 - (2) The Court of Appeal did not err in concluding that the Chief Constable, by an extension of the core immunity, is immune from suit in respect of the inclusion of the road on which XGY was planning to live in the file prepared for and provided to the CPS for a bail hearing.

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5 Essex Chambers

8th September 2026

Annex: International Comparators

119. Where issues of legal policy are concerned, the Supreme Court may be assisted by being informed about the position in other common law countries. While perhaps of only limited assistance given the issues arising in this appeal, the following Annex is nonetheless provided. It demonstrates that the common law jurisdictions considered have all maintained, and for the most part speak with one voice on, the existence of a common law ‘core immunity’:

- a. It protects all things said and done in the courtroom as well as acts ‘intimately connected’ (Australia and New Zealand) or ‘intimately associated’ with (USA) or ‘during’ or ‘incidental to’ or ‘in the processing and furtherance of’ (Canada) the judicial phase / the proceedings;
- b. It attaches to the function of the person saying the words or doing the act, and not to their title or status; and
- c. Whether or not it originally derived from the law of defamation, it protects against all causes of action other than malicious process torts, contempt of court proceedings, or in respect of perjury, and (other than in Australia) professional negligence where there exists a duty of care.

120. This Annex addresses the following three topics:

- a. The ambit of the immunity in Canada, Australia and New Zealand;
- b. Prosecutorial immunity as a distinct North American concept; and
- c. The significance of the disclosure obligations of the police, as considered by the Canadian Supreme Court.

(i) *The ambit of the immunity in Canada, Australia and New Zealand*

Canada

121. A leading appellate authority is *Elliott v Insurance Crime Prevention Bureau* 2005 NSCA 115, a case about whether investigators were protected by witness immunity. Cromwell JA (as he then was) set out the principles for witness immunity at §§102, 112-115, including that ‘witness immunity’ was ‘part of a larger immunity which applies to participants in judicial or quasi-judicial proceedings’, that it applies to ‘actions of any sort’, and that immunity attaches due to the fact that the words were said in judicial proceedings. After considering the UK law §§162-186, Cromwell JA summarised the at §211 that while the

HB/3796

HB/3828,
3831-3832

HB/3846-
3856
HB/3864

immunity also protects communications that may or may not become part of the judicial process, the test is less certain for that kind of communication:

To decide whether the immunity applies, the case law has looked to whether the action is based on the ‘judicial phase’ of the proceedings, whether it relates to ‘matters of advocacy’ or whether the ‘principal purpose’ was to prepare evidence for court. These are primarily questions of fact and the burden is on the parties claiming the immunity to prove facts which bring them within it.

HB/3864

122. *Elliott* has been relied upon by Provincial Courts of Appeal in numerous cases (*Reynolds v. Kingston (Police Services Board)*, 2007 ONCA 166; *Hamburger v. Fung*, 2015 BCCA 444; *Patel v. McMurtry*, 2023 SKCA 74; and *Tubarsky v O’Chiese First Nation*, 2025 ABCA 267). In *Tubarsky*, the Alberta Court of Appeal emphasised at §§23-26 that a statement was absolutely immune if made ‘during’ or ‘incidental to’ or ‘in the processing and furtherance of a proceeding and at §26 summarised the ambit of the protection.

HB/4135

HB/4141-4142

HB/4142

123. Citing *Hargreaves v Bretherton* [1958] 3 All ER 122, the Court of Appeal for Ontario has also stated that the ‘immunity extends to any action, however framed, and is not limited to actions for defamation’ (*Samuel Manu-Tech Inc. v Redipac Recycling Corporation*, 1999 CanLII 3776 (ON CA) at §20). The Appellant is correct to say that the British Columbia Court of Appeal in *Duncan v. Lessing and Lessing Brandon Company LLP*, 2018 BCCA 9 declined to determine whether absolute immunity applied to claims under the Privacy Act (at §§67-75), but that was at least in part because, as set out at §59, the ‘effect of s. 2(3)(b) of the Privacy Act is to incorporate the absolute privilege that applies in the law of defamation to breach of privacy claims by creating a statutory exception to the tort.’ The court further considered at §§55-57, relying on Lord Hoffmann’s speech in *Taylor* at 207-208, that the ‘two common law rules’ of implied undertaking concerning documents obtained in disclosure and the absolute immunity of those involved in judicial proceedings ‘together provide a coherent structure to ensure that privacy interests are protected in civil litigation to a limited extent, but not to the extent of interfering with the broad public interest in securing justice.’

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Australia

124. The Australian High Court applies the core immunity more absolutely than any other jurisdiction in the common law world: the core immunity applies to all persons,

irrespective of any cause of action, including professional negligence. Unlike in the UK (*Darker*), it also applies to a person who fabricated evidence for court proceedings,¹³.

125. The lead authority, decided after *Hall*, is *D’Orta-Ekenaike v Victoria Legal Aid and anor* [2005] HCA 12; (2005) 223 CLR 1, where the High Court maintained the immunity of advocates from negligence claims brought by their own clients:¹⁴
- HB/3568
HB/3602

86. [...] there is no reason to depart from the test described in *Giannarelli* as work done in court or ‘work done out of court which leads to a decision affecting the conduct of the case in court’ or, as the latter class of case was described in the Explanatory Memorandum for the Bill that became the Practice Act, ‘work intimately connected with’ work in a court. (We do not consider the two statements of the test differ in any significant way.)

87. As Mason CJ demonstrated in *Giannarelli*[97], ‘it would be artificial in the extreme to draw the line at the courtroom door’. And no other geographical line can be drawn that would not encounter the same difficulties. The criterion adopted in *Giannarelli* accords with the purpose of the immunity. It describes the acts or omissions to which immunity attaches by reference to the conduct of the case. And it is the conduct of the case that generates the result which should not be impugned.

New Zealand

126. The New Zealand Supreme Court in *Chamberlains v Lai* [2006] NZSC 70 departed from Australia and aligned itself to the approach in *Hall* in refusing immunity to negligence claims brought against one’s own barrister.
- HB/3495

(ii) Prosecutorial immunity in North America

127. In addition to the common law core immunity in Canada and state-by-state immunity principles in the USA, both jurisdictions maintain a distinct principle of prosecutorial immunity. They are, however, different and differently applied in a number of important ways.

128. In Canada, the immunity attaches exclusively to the office of the prosecutor as a servant of the Crown and exists to protect the independence of the prosecutor without fear of political or judicial interference (see *Nelles v. Ontario* [1989] 2 S.C.R. 170, *Proulx v. Quebec (Attorney General)* [2001] 3 SCR 9, *Henry v. British Columbia (Attorney General)* [2015] 2

¹³ *Commonwealth of Australia v Griffiths & Anor* [2007] NSWCA 370 at §§84-94 and, comparing the English cases with *Cabassi*, at §§149-150.

¹⁴ Albeit the High Court in *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 held that the immunity did not extend to negligent advice to settle a claim.

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3415

SCR 214, and *Ontario (Attorney General) v. Clark* [2021] 1 SCR 607). The immunity does not extend to malicious prosecution claims (*Nelles*) or Charter claims for non-disclosure of material in criminal proceedings (*Henry*). The police as investigators of crime are not covered by immunity (*Clark*), but the Supreme Court has left open whether the police might be protected by the immunity when acting as agents of the Crown (*R. v Campbell* [1999] 1 S.C.R. 565 at [37]).

129. In the USA, it is one of a patchwork of immunities that protect different actors in the judicial process from claims brought under §1983 of the US Code, enacted by the 1871 Civil Rights Act. The courts have held that the 1871 Act did not intend to remove common law immunities said to be in place at the time, and have thus preserved absolute judicial, prosecutorial, legislative and witness immunities (as well as limited executive immunity). The principle behind the immunity was identified in the seminal judgment of Judge Learned Hand in *Gregoire v Biddle*, 177 F.2d 579, 581 (2d Cir. 1949):

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

130. The immunity attaches to function, and not the position or job title of the actor, as set out in *Forrester v White*, 484 U.S. 219 (1988):

Running through our cases, with fair consistency, is a ‘functional’ approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to

particular forms of liability would likely have on the appropriate exercise of those functions.

131. The immunity applies to prosecutors (*Imbler v Pachtman*, 242 U.S. 409 (1976)), who are an ‘integral part of the judicial process’ and ‘were intimately associated with the judicial phase of the criminal process’. Again, this is tied to function and not title (*Buckley v Fitzsimmons*, 509 U.S. 259 (1993)).

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3452-3453

132. The Supreme Court in *Van de Kamp v Goldstein*, 555 U.S. 335 (2009), held that the immunity extends to claims that the prosecutor failed to disclose impeachment material, said to be due to systemic failings in the prosecutor’s office. The court held that specific decisions in the context of an individual’s prosecution, even if administrative, were protected by the immunity:

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In our view, however, these differences do not require a different outcome. The critical element of any information system is the information it contains. Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training. Again, determining the criteria for inclusion or exclusion requires knowledge of the law. [...]

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We recognize that sometimes it would be easy for a court to determine that an office’s decision about an information system was inadequate. Suppose, for example, the office had no system at all. But the same could be said of a prosecutor’s trial error. Immunity does not exist to help prosecutors in the easy case; it exists because the easy cases bring difficult cases in their wake. And, as *Imbler* pointed out, the likely presence of too many difficult cases threatens, not prosecutors, but the public, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decision-making process. Such is true of the kinds of claims before us, to all of which *Imbler*’s functional considerations apply. Consequently, where a §1983 plaintiff claims that a prosecutor’s management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.

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133. It is respectfully submitted that the analysis of Justice Breyer, who delivered the unanimous opinion of the Court in *Van de Kamp*, applies *mutatis mutandis* to the facts of this case.

134. Generally, the police have significantly more protection in the USA and enjoy qualified privilege from suit in §1983 claims (*Pierson v Ray*, 386 U.S. 547 (1967)). The Supreme Court has, similarly to the Canadian authorities, refused to extend the

absolute immunity to the police in their investigative role, including in the application to the court for a warrant (*Malley v Briggs*, 475 U.S. 335 (1986)).

(iii) ***Canadian authority on the disclosure obligations of the police***

135. The leading Canadian authority regarding the police's disclosure obligations is the Supreme Court's decision in *R v McNeil* (2009) 1 SCR 66, Charron J giving the unified judgment of the Court. *McNeil* concerned the obligation on the Crown to disclose the police disciplinary records and criminal investigation file of the main police witness, an officer himself accused of drugs-related criminality. The Court at §13 rejected the proposition that, for the purposes of disclosure, the state was one indivisible Crown entity but went on to consider:

- a. the balance between privacy and disclosure in criminal proceedings

[19] As this Court confirmed in *Mills*, the Crown's obligation under *Stinchcombe* to disclose the fruits of the investigation does not signify that no residual privacy interest can exist in the contents of the Crown's file. It should come as no surprise that any number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation. Criminal investigative files may contain highly sensitive material including: outlines of unproven allegations; statements of complainants or witnesses — at times concerning very personal matters; personal addresses and phone numbers; photographs; medical reports; bank statements; search warrant information; surveillance reports; communications intercepted by wiretap; scientific evidence including DNA information; criminal records, etc. The privacy legislation of all 10 provinces addresses the disclosure of information contained in law enforcement files.

- b. and the onus on the police to disclose all relevant information to the Crown so that the prosecutor was able to properly comply with its disclosure obligations.

[23] Under our Canadian system of law enforcement, the general duty to investigate crime falls on the police, not the Crown. The fruits of the investigation against an accused person, therefore, will generally have been gathered, and any resulting criminal charge laid, by the police. While the roles of the Crown and the police are separate and distinct, the police have a duty to participate in prosecutions: see, for example, s. 42(1)(e) of the Ontario Police Services Act. Of particular relevance here is the police's duty to participate in the disclosure process. The means by which the Crown comes to be in possession of the fruits of the investigation lies in the corollary duty of police investigators to disclose to the Crown all relevant material in their possession. The police's obligation to disclose all material pertaining to the investigation of an accused to the prosecuting Crown was recognized long before *Stinchcombe*. The state of the law was well summed up by the Honourable G. Arthur Martin, Q.C., in his Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("Martin Report"), at pp. 167-68:

It is well settled and accepted by all, including the police, that the police, although operating independently of Crown counsel, have a duty to disclose to Crown counsel all relevant information uncovered during the investigation of a crime, including information which assists the accused. . . . As one commentator has observed, ‘the duty of the police to disclose relevant information about a case, to the Crown, is a duty that existed before [Stinchcombe, supra]’.

[Emphasis added.]

136. *McNeil* was very recently considered and followed in *Edmonton (Police Service) v McKee* 2026 SCC 24 at §§127-133:

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[127] The police and Crown work together and the Crown’s Stinchcombe duty is engaged upon receipt of material from the police (McNeil, at para. 23). To enable the Crown to discharge its own Stinchcombe duty, the police must equip the Crown with the information required to review, reassess, and, where appropriate, override the initial police assessment.

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137. The Chief Constable submits that the principles set out in *McNeil* and *McKee* apply with equal weight to the position in the United Kingdom. In order for the CPS to properly exercise its functions in criminal proceedings, the police must provide it with all the information. Anything that undermines complete and full disclosure from the police to the CPS, such as fear of litigation arising from that disclosure, jeopardises the fairness of criminal proceedings and the justice system as a whole.