OUTER HOUSE, COURT OF SESSION

A4960/01

OPINION OF LORD WHEATLEY

in the cause

SHIRLEY JANE McKIE

Pursuer;

against

THE STRATHCLYDE JOINT POLICE BOARD & OTHERS

Defenders:

Pursuer: A Smith, Q.C., Milligan; Digby Brown for Cassels, Solicitors, Glasgow

Defenders: Docherty, Q.C., Crawford; Solicitor to Scottish Executive

24 December 2003

[1] The pursuer was formally a detective constable employed by the Strathclyde Joint Police Board and based at Kilmarnock. On Wednesday 8 January 1997, a lady named Marion Ross was found murdered in her home in Kilmarnock, and the pursuer was appointed to be part of the police investigation team. A man named David Asbury was identified as a suspect. In the course of the inquiry, a number of fingerprints which were thought to be of significance to the investigation were found on a bathroom door frame within the deceased's house.

[2] The organisation responsible for considering fingerprint evidence at the instance of police officers investigating criminal offences in Scotland is the Scottish Criminal

Records Office (hereinafter referred to as "SCRO"). The SCRO routinely deal with the examination and comparison of fingerprints found at the scenes of crime. The third to sixth defender identified in the instance of this action (hereinafter referred to collectively and variously as "the third to sixth defenders") are individual officers who were employed throughout the relevant period by the SCRO. They are no longer defenders in the action, although their conduct and its consequences remain at the centre of the case. The second defenders are The Scottish Ministers who, for the purposes of the present action, are vicariously responsible for the individual members of the organisation. The first defenders, the pursuer's former employers, are also no longer parties to the action.

[3] In the course of the investigation following the murder of Marion Ross, the SCRO prepared a report dated 10 April 1997 on the fingerprints discovered on the bathroom door frame within the house occupied by Mrs Ross. In that report it was stated that one of the fingerprints was that of the present pursuer. In terms of the pursuer's averments, this came about in the following way. The fingerprints on the bathroom door frame were sent to SCRO on 16 January 1997 for the purpose of excluding them from the murder inquiry. They were received on that date by the third defender, an employee of SCRO. On 6 February 1997 a request was made that what is termed an elimination fingerprint be taken from the pursuer, and this was done and the print received by the third defender on the following day. On 10 February 1997 the third defender carried out a comparison of the fingerprint taken from the bathroom door frame in the murdered woman's house and the elimination print taken from the pursuer, and concluded that the two prints matched. The third defender then informed Detective Chief Inspector Heath, the police officer is charge of the murder inquiry, of his findings. Detective Chief Inspector Heath then directed that a statement be obtained from the pursuer to explain how her fingerprint came to be found at the murder scene. The pursuer denied that she had been in the house. She had been instructed by her superiors at the outset of the murder inquiry that she should not enter the home of the murdered woman.

[4] The pursuer then avers that on 11 February 1997, the third defender instructed another employee within SCRO named Geddes to compare the two fingerprints. Geddes declined to confirm that there was a match; he was able to find only ten points of similarity between the two fingerprints and not the sixteen that standard practice in this area required. Notwithstanding the conclusions reached by Geddes, the third defender informed another police officer concerned with the murder inquiry that the two fingerprints matched. On 12 February 1997 the third defender asked the fifth defender to check the comparison, and the fifth defender agreed that the two prints were similar. The pursuer at that time emphatically denied that the print taken from the murder scene could have been hers, and on 17 February 1997 she asked that the comparisons again be checked. On that date, the head of SCRO, a Mr Ferry, decided that blind comparisons be carried out by five other employees. None of these employees were prepared to confirm that the two prints matched, for various reasons. On 18 February 1997 the third defender again asked the fifth defender to confirm her comparison of the two fingerprints, which she did. At the same time, another SCRO employee named Dunbar confirmed that in his opinion the two fingerprints were similar. On that date, Mr Ferry informed police officers involved in the murder investigation that three of his officers had confirmed that the two fingerprints were a match. He did not however disclose to the police officers that five of his colleagues

had declined to come to that conclusion. The position of the SCRO in this respect was maintained during the trial of David Asbury, and also throughout the subsequent criminal investigation of the pursuer, and her trial for perjury. During this period two other SCRO employees, namely the fourth and sixth defenders, also confirmed that the two fingerprints matched. The third to sixth defenders therefore prepared and signed the report dated 10 April 1997, which concluded that the fingerprint found on the bathroom door frame was identical to the elimination print supplied by the pursuer.

[5] The claim that the pursuer's fingerprint had been discovered on the bathroom door frame provided a clear inference that she had been within the house of the murdered woman during the investigation. The pursuer avers that, acting on the SCRO report, police officers investigating the murder then claimed that she had been within the house at that time and had left her fingerprint on the bathroom door frame. The pursuer continued to maintain that the fingerprint discovered on the bathroom door frame was not hers, and that it had been wrongly identified as such by those responsible for the report, namely the third to sixth defenders.

[6] In May 1997 the pursuer attended at the High Court in Glasgow to give evidence at the trial of David Asbury. In the course of her evidence, she denied that the fingerprint found on the bathroom door frame belonged to her. Following the trial, Asbury was convicted of murder. A crucial part of the evidence against him was the discovery of what was said to be the deceased's fingerprint on a tin discovered in his house. This evidence was likewise based on a report by SCRO, prepared by some of the officials who were concerned in the preparation of the report relating to the pursuer. Thereafter, following an extensive investigation, the pursuer herself was arrested and charged with perjury. The basis for this allegation was her insistence at the trial of David Asbury that the fingerprint found on the bathroom door frame in the house of Marion Ross was not hers and that by inference she had not been within the house of the murdered woman during the course of the investigation.

[7] Between 21 April 1999 and 14 May 1999, the pursuer stood trial at Glasgow High Court accused of perjury. The case against her was based essentially on the report prepared by the third to sixth defenders. The prosecution led the evidence of the third, fourth and fifth defenders. The pursuer was acquitted of the charge. She maintains that as a consequence of what happened following the various allegations made against her, she has suffered considerable loss, injury and damage and she now seeks compensation.

[8] On the basis of this narrative, the pursuer's case of fault appears to be this. Between 12 and 18 February 1997, a number of SCRO employees examined the two fingerprints which had been submitted to them for comparison. Some of these employees confirmed that the two fingerprints were a match, but five other employees declined to do so. However, the head of SCRO (who is not and has never been a party to the action, and is not said to be in any way responsible for the consequences of what happened to the pursuer) ultimately indicated to the police officers conducting the murder inquiry that the fingerprint found at the murder scene matched that submitted for elimination purposes by the pursuer. The pursuer further avers that the differences between the two prints were obvious and, in addition, that the print identified as that of the murdered woman Marion Ross, and which was taken from the

tin discovered in the house of David Asbury, was not in fact that of the deceased. Nonetheless, the third to sixth defenders signed the report to the effect that the fingerprint found at the murder scene and the pursuer's fingerprint were similar. This report was used in the trial against David Asbury, and was also the basis of the investigation and prosecution against the pursuer for perjury. The fourth and fifth defenders gave evidence at Asbury's trial, and the third, fourth and fifth defenders gave evidence at the pursuer's trial. Asbury subsequently appealed against his murder conviction principally on the ground that the fingerprint evidence linking the deceased's fingerprint to the tin found in his house was unreliable. The Crown did not oppose his appeal.

[9] The pursuer's case in short, therefore, is that the third to sixth defenders, for whom the second defenders are vicariously responsible, were in the first place negligent in making an erroneous identification and comparison of the fingerprint found at the murder scene and the pursuer's specimen fingerprint, and declaring them to be similar. Thereafter, despite the fact that some of their colleagues were not prepared to confirm that the two fingerprints were a match, they maliciously maintained their original position. This position was taken by the third to sixth defenders, it was said, despite the obvious nature of the differences between the two sets of fingerprints. The fact that there were two separate misidentifications of fingerprints in the same case, the repeated checking of the comparisons undertaken by SCRO in the earlier stages of the murder investigation, and the obvious nature of the differences between the prints, leads the pursuer to believe and aver that the third to sixth defenders continued to maintain that the prints were a match in order to preserve the reputation of the SCRO, and in order not to compromise the prospects of a successful prosecution in the Asbury case. It is in particular averred by the pursuer that at no time did any member of the SCRO disclose to the police officers involved in the murder inquiry or to anyone else that doubts had been expressed within the organisation as to whether the prints in the pursuer's case were in fact a match. This failure to disclose such a crucial matter, it is said, is indicative of malice on the part of the third to sixth defenders in the preparation and giving of their evidence in the perjury trial against the pursuer. Further, it is claimed that had these doubts been indicated to the appropriate authorities at the appropriate time, the prosecution against the pursuer for perjury would not have taken place.

[10] It is unclear from the pleadings as they stand whether this malice as described by the pursuer is said to have been expressed by the third to sixth defenders individually or as a group. In the course of his submissions, senior counsel for the pursuer claimed that his case was that the third to sixth defenders were acting in concert, and at the same time were responsible as individuals for what he described as the malicious prosecution against the pursuer, although he accepted that this position was not readily evident from an examination of the pleadings. It follows from these submissions that the pursuer's averments of collective malice against the third to sixth defenders are based on them being aware that their identification of the two prints was disputed by some of their colleagues. There are however no averments to this effect, apart from the third defender's understanding of the position adopted by Geddes.

[11] In these circumstances the case called on the procedure roll at the instance of the defenders, who wished to argue for their first and fourth pleas-in-law with a view to having the case dismissed at this stage. The principal argument for the defenders was

concerned with submissions relating to their first plea-in-law to the effect that the actions of the third to sixth defenders, committed in the course of their role as witnesses in a criminal prosecution, were subject to absolute immunity from claims for compensation. Further, it was argued in terms of the defenders' fourth plea-in-law that the third to sixth defenders owed no duty of care to the pursuer, and even if they did, there were in the present case no sufficient or specific averments as to what those duties of care were, nor as to what was the nature of the breach of those duties on which the pursuer's claim was based. Finally, the defenders submitted that in the event of the foregoing arguments being rejected, there were a number of particular averments in the pursuer's pleadings which should be deleted because they were irrelevant and lacked sufficient specification.

[12] The defender's first submission therefore was that in general terms the third to sixth defenders enjoyed an absolute immunity from any kind of prosecution for compensation such as claimed by the pursuer in the present action. The origins of the general principles of this privilege are found in the case of *Watson* v *McEwan* (1905) 7F (HL) 109. In that case it was held that the immunity generally available to a witness in giving evidence extends to statements made on precognition by that witness with a view to giving evidence. In *B* v *Burns* 1994 SLT 250, this protection was extended to apply to statements less formal than a precognition. In that case, the pursuer, who said that she had been raped, brought an action of damages against the alleged offender and five others, claiming that they had each given false information to the police. This information, it was said, provided the accused with a false alibi, as a result of which the alleged offender was not prosecuted and the complainer was arrested, strip searched and prosecuted for wasting police time and rendering the alleged offender liable to suspicion and arrest. The complainer was subsequently acquitted. One of the defenders in the complainer's action for damages sought dismissal, arguing that she had not volunteered information to the police but only responded to their inquiries. Accordingly, it was submitted, her statements were absolutely privileged and attracted such privilege because they had been made in the course of a legal process; and further, her statements could not be said to have caused the complainer's prosecution, which had proceeded from decisions reached by the prosecuting authorities. It was held that, given the paramount objective of encouraging witnesses to give their evidence freely in court, the rule conferring absolute privilege applied equally to precognitions and to less formal statements given at the earlier stages of an investigation, and that the statements made by the defender to the police in these circumstances accordingly enjoyed complete protection. In giving the opinion of the court, Lord Caplan said at p.252:-

> "Given that the paramount objective in conferring privilege is to encourage witnesses to give their evidence freely in court then it seems to us to matter little whether the investigation of a person as a prospective witness is done by way of precognition or at some earlier stage of the proceedings by way of a less formal interview. Particularly in relation to criminal proceedings those charged with investigating cases must be able to explore the testimony likely to be available and the privilege which on any view would be available to the witness in the witness box will be of no benefit to the witness if he or she knows that any information given to those concerned with preparing the case

> at some earlier stage could expose the witness to the risk of civil action."

[13] It therefore appears to be plain from these authorities that the absolute immunity from prosecution which has always attached to witnesses giving evidence in court is extended not only to what is said in the course of precognition, but also to the making of less formal statements of all kinds, at all times within the course of an investigation, made with a view to criminal proceedings being taken, and that the reason for the provision of this immunity lies in the administration and interests of justice. Equally, I accept the submission by the defender's junior counsel that, by parity of reasoning, the immunity should be extended to cover not only informal statements, but reports of a technical or scientific nature, such as that produced by the third to sixth defenders in the present case, and which are prepared in the course of a criminal investigation with a view to providing evidence in court.

[14] The position in respect of the immunity available to statements or reports made in the course of a criminal investigation was further considered in the case of *Darker* v *Chief Constable of West Midlands Police* [2001] 1 AC 435. In that case, following a police undercover operation involving an informer, four of the five plaintiffs were indicted on charges of conspiracy to import cannabis resin and a further conspiracy to forge travellers cheques. In the course of the trial, it was ruled that the police had been significantly at fault in respect of matters of disclosure and the charges against the plaintiffs were thrown out on the ground of abuse of process. The plaintiffs then brought an action against the police for damages for conspiracy to injure and misfeasance in public office claiming, among other things, that the police officers had fabricated the evidence against them. Although at first instance and in the Court of Appeal it was decided that the acts of alleged fabrication of evidence were covered by absolute privilege or immunity, it was held in the House of Lords that public policy requires in principle that those who have suffered a wrong should have a right to a remedy; and that, although the absolute immunity from suit given in the interests of the administration of justice to a party or witness, including a police witness, in respect of what he said or did in court extended to statements made for the purpose of court proceedings, public policy did not require this protection to be extended to things done by the police during the investigative process which could not fairly be said to form part of their participation in the judicial process as witnesses; that, in particular, the immunity did not extend to cover the fabrication of false evidence; and that, accordingly, the plaintiff's statement of claim should not have been struck out and the action should be allowed to proceed to trial. At p.448 of the report, Lord Hope of Craighead, in considering the conflict that might exist between the absolute immunity enjoyed by the police and the principle that a wrong ought not to be without a remedy, said:-

> "But there is a crucial difference between statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence, and their conduct at earlier stages in the case when they are performing their functions as enforcers of the law or as investigators. The actions which the police

> take as law enforcers or as investigators may, of course, become the subject of evidence. It may then be necessary for the police officers concerned to assume the functions of witnesses at the trial to describe what they did or what they heard or what they saw. But there is no good reason on grounds of public policy to extend the immunity which attaches to things said or done by them when they are describing these matters to things done by them which cannot fairly be said to form part of their participation in the judicial process as witnesses. 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. The rule of law requires that the police must act within the law when they are enforcing the law or are investigating allegations of criminal conduct."

At p.499 of the report, Lord Hope explained the underlying reasons for his conclusions:-

> "This distinction rests upon the fact that acts which are calculated to create or procure false evidence or to destroy evidence have an independent existence from, and are extraneous to, the evidence that may be given as to the consequences of those acts. It is unlikely that those who have fabricated or destroyed evidence would wish to enter the witness box for the purpose of admitting to their acts of fabrication or destruction. Their acts were done with a view to the giving of evidence not about the acts themselves but about their consequences. The position is different where the allegation related to the content of the evidence or the content of statements made with a view to giving evidence, and not to the doing of an act such as the creation of the fabrication of evidence."

In agreeing with Lord Hope of Craighead, Lord Clyde said at p.459:-

> "It is then not enough that there be an investigation; investigation must also be with a view to an action or to a prosecution which is already under consideration. Before that stage is reached it would be very difficult to justify the grant of an immunity. Even after that stage, if proceedings are commenced, it does not necessary follow that all that is said or done in connection with the proceedings will be immune."

Further, Lord Hutton said at p.469:-

> "The underlying rationale of the immunity given to a witness is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court. This immunity has been extended, as I have described, to proofs of evidence and to prevent witnesses being sued for conspiracy to give false evidence. But the immunity in essence relates *to the giving of evidence*. There is, in my opinion, a distinction

> in principle between what a witness says in court (or what proof of evidence a prospective witness states he will say in court) and the fabrication of evidence such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say, or a police officer planting a brick or drugs on a suspect. In practice, the distinction may appear to be a fine one, as, for example, between the police officer who does not claim to have made a note, but falsely says in the witness box that the suspect made a verbal confession to him (for which statement the police officer has immunity), and a police officer who, to support the evidence he will give in court, fabricates a note containing an admission which the suspect never made. But I consider that this distinction is a real one and that the first example comes within the proper ambit of immunity and the other does not."

[15] To summarise the position in the light of these authorities, then, the protection of absolute privilege is not confined to the witness box, and to precognitions in preparation for what will be said in court, but is extended to the making of informal statements, the compilation of expert and technical reports, and other things done in the course of an investigation with a view to giving evidence. This immunity is however confined to things done in the context of the preparation for giving evidence and does not cover what is done maliciously, for example by way of fabrication of evidence in the course of an investigation. The exclusion of malicious conduct from the cover of the immunity may therefore be connected with the way in which an investigator introduces, distorts or falsely interprets evidence in a way that changes the nature of the investigation. No doubt the question of whether immunity will be available or not, as Lord Hutton noted in *Darker* v *Chief Constable of West Midlands Police*, may be in some cases a matter of difficulty. However, as I shall attempt to explain later, and despite the difficulties caused by the pleadings, the position, at least in principle, appears to be reasonably clear in the present case.

[16] In normal circumstances, therefore, the report prepared by the third to sixth defenders and the evidence which they gave in court in respect of that report would clearly be covered by the immunity. The preparation of the report was done in the anticipation, and with the purpose, of giving evidence on the matters contained in it and would without doubt fall on the immunity side of the divide described in the speeches of Lord Hope of Craighead and Lord Hutton in the case of *Darker*.

[17] I have no doubt that this principle of immunity would apply even if the subsequent prosecution in which the evidence was given was not the one which the investigation might currently contemplate. Although the report by third to sixth defenders was initially prepared for the Asbury murder trial, the same considerations and protections apply in respect of the evidence given and the report produced in the pursuer's perjury trial. There appears to be no reason why the principle of immunity should be altered simply because the nature of the criminal offence to be tried, or the identity of the accused, is for any reason subsequently altered. The expression of opinion by the third to sixth defenders both in the report and in their testimony in both trials would normally therefore be covered by absolute immunity, and the pursuer's action would fail.

[18] However, as noted above, there is a major exception to the protection afforded by the absolute immunity. It is not available where the cause of action is one of malicious prosecution. The pursuer says that this is the position in the present case. Immunity cannot be available in a prosecution which is based on an abuse of process, even in respect of what is done in preparation for a court case, or for evidence arising out of that abuse of process given in court.

[19] In *Roy* v *Prior* [1971] A.C. 470 it was held that an action should not be dismissed if it could be said that the prosecution complained of was malicious, even though one step of the abuse involved the giving of evidence. At p.477 Lord Morris of Borth-Y-Gest said:-

> "It is well settled that no action will lie against the witness for words spoken in giving evidence in the court even if the evidence is falsely and maliciously given (see *Dawkins* v *Lord Rokeby* (1873) S.R. 8 Q.B. 255, *Watson* v *McEwan* [1905] A.C. 480). If a witness gives false evidence he may be prosecuted if the crime of perjury has been committed but a civil action for damages in respect of the words spoken will not lie (see the judgment of Lord Goddard C.J. in *Hargreaves* v *Bretherton* [1959] 1 QB 45). Nor is this rule to be circumvented by alleging a conspiracy between witnesses to make false statements (see *Marrinan* v *Vibart* [1963] 1 QB 528).
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> This, however, does not involve that an action which is not brought in respect of evidence given in court but is brought in respect of an alleged abuse of process of court, must be defeated if one step in the course of the abuse of the process of the court involved or necessitated the giving of evidence.
>
> It must often happen that a defendant who has sued for damages for a malicious prosecution will have given evidence in the criminal prosecution of which the plaintiff complains. The essence of the complaint in such a case is that criminal proceedings have been instituted not only without reasonable and probable cause but also maliciously. So in actions based upon alleged abuses of the process of court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of any evidence given in the process (see *Elsee* v *Smith* (1822) 2 Chit. 304)."

[20] In *Taylor* v *Director of Public Prosecutions* [1999] 2 AC 177, the court was concerned with whether absolute immunity was available in respect of court statements, which could fairly be said to be part of the procedure of investigating crime or a possible crime with a view to a prosecution. In the course of the speeches it was made clear that the absolute immunity available in such cases was subject to the exception that it would not cover actions based on malicious prosecution.

[21] At page 215 Lord Hoffman said:-

> "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 QB 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 of 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 ...
>
> Actions for defamation and for conspiracy to give false evidence plainly fall within the policy of the immunity and actions for the malicious prosecution fall outside it."

[22] At p.291 Lord Hope of Craighead said:-

> "Just as proceedings for perjury are available to deal with a 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. That is quite a separate matter as it is the malicious abuse of process, not the making of a statement, which provides the cause of action. The public policy argument for extending the absolute privilege, consistently with established principles, seems to me to be unanswerable."

[23] It is therefore an essential ingredient in an action for malicious prosecution that it is without reasonable or probable cause. Accordingly, there have to be relevant averments of both malice and of lack of reasonable and probable cause in order to establish that an action is a malicious prosecution. It cannot be a malicious prosecution if, as in the case of *B* v *Burns*, the defender was simply responding to a police inquiry, for the purpose of establishing the accuracy or otherwise of matters within that enquiry. In those circumstances, absolute immunity continues to prevail.

[24] Counsel for the defenders submitted that malice involves proof that the person concerned was acting from some illegitimate motive, and also that there were no reasonable grounds for the action which was taken (*McCormack* v *The Corporation of the City of Glasgow* 1910 SC 562, per Lord Kinnear at 567). There must be a dishonest discharge of duty and a want of reasonable cause, such as there being no reasonable ground for believing that the subject of the enquiry is guilty. Counsel also submitted that in a case such as the present, there was a need for the averments of malice to be more specific than was normally the case; reference was made to *Hill* v *Campbell* 1905 8 F 220 (per Lord Kinnear at p.225), and *Rae* v *Strathearn* 1924 SC 147 (per Lord Skerrington at p.152-3, Lord Cullen at p.154 and Lord Sands at p.156).

[25] Counsel for the defenders further submitted that, in addition to the question of malice and lack of reasonable and probable cause, there was a further necessary ingredient in a malicious prosecution, if the protection of immunity from suit was to be removed. The pursuer would require to aver and prove that the defenders had been the sole procurers and instigators of the prosecution. Such a situation would arise where the facts about the alleged crime were exclusively within the knowledge of the complainer, so that the prosecuting authorities would in effect have no opportunity to exercise any independent discretion in deciding whether to proceed with the complaint. The complainer would be in effect be the only procurer or instigator of the prosecution. Reference was made to *Martin* v *Watson* 1[996] 1 A.C.470 per Lord Keith of Kinkel (at p.86):-

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgement, and if a prosecution is instituted by the police officer, the proper view of the matter is that the prosecution has been procured by the complainant."

[26] For example, in the case of *Martin* v *Watson*, the complainer had made allegations of indecent exposure and was the only person who could speak to what had happened. In those circumstances, the police had no discretion; the complaint alone led directly to the prosecution.

[27] In the present case, counsel for the defenders submitted that there are insufficient averments in the pursuer's pleadings in respect of each of these various essential ingredients. There is no suggestion that the defenders gave false or malicious information to the police; there is no substantive suggestion as to what reasonable or probable cause might lie behind the defenders' conduct; and it cannot be said that the defenders exclusively instigated or procured the prosecution of the pursuer for perjury. Rather, they simply undertook a comparison exercise between two fingerprints which they had been given, and submitted the results of that examination to the police. The police were in possession of the whole evidence and, together with the prosecuting authorities, were able to exercise a complete discretion over whether a prosecution took place. Another example of an investigation of this sort was found in the case of *Evans* v *London Hospitals* 1981 1 WLR 186, which was said to be similar to the present case.

[28] I think it is appropriate to deal firstly with the role of the third to sixth defenders in the prosecution, leaving the question of whether the pursuer has sufficiently averred the matters of malice and lack of reasonable and probable cause until later. I do not consider that in a malicious prosecution it is necessary for the pursuer to aver and prove that the defenders were the sole instigators or procurers of the prosecution. Such a requirement does not appear to be present in any of the cases other than *Martin* v *Watson*. There is no mention of the issue of who was responsible for the

prosecution, or of the nature of that responsibility, in the cases of *Darker* or *Taylor*, to take two examples. Certainly there must be a direct connection between the malice complained of and the course of action subsequently undertaken. But the only significance of a case where the person said to be responsible for the prosecution is exclusively in possession of the facts of the complaint is perhaps that in such circumstances the questions of malice and lack of reasonable and probable cause may be more easily found. However, if this conclusion is wrong, I think it is arguable in the present case that, as the comparison of the fingerprints was the only evidential matter on which the prosecution of the pursuer for perjury turned, I would not be prepared to dismiss the action at this stage on the grounds that it had not been established that the third to sixth defender were the sole procurers or instigators of the pursuer's prosecution for perjury.

[29] Returning to the questions of malice and lack of reasonable and probable cause, I have no doubt that the defenders are correct to say that the standard of averment and proof required to establish that a prosecution is malicious in character must be a high one, and that in turn requires that the basis of any claim of malice must be described with particular clarity in the pleadings. The same is true of the question of lack of reasonable and probable cause. I have found that in the present case it is difficult to understand, from an examination of the pursuer's averments, what precisely are the relevant statements of malice, and of lack of reasonable and probable cause. On a consideration of the general narrative of the history of events mentioned earlier, the averments from which the elements of malice and lack of reasonable and probable cause might be ascertained, can be summarised as follows. A fingerprint found at the murder scene was sent to SCRO and received by the third defender. Shortly afterwards he received an elimination print from the pursuer. The third defender stated that the two prints were a match. Thereafter, the third defender asked another SCRO employee, named Geddes, to examine the two prints, but Geddes declined to state that the prints were sufficiently similar. Nonetheless, the third defender informed the police officers in charge of the murder inquiry that the fingerprints found at the murder scene was that of the pursuer. Thereafter, a number of other SCRO employees carried out a comparison examination of the two fingerprints and the majority of them declined to confirm that the two fingerprints matched. It is, however, of particular significance that it is nowhere averred that the third defender had any knowledge of the conclusions of any of his colleagues following their comparison of the prints, with the single exception of Geddes. Subsequently, MacPherson and three other SCRO employees who had decided, following their examination of the fingerprints that the print found at the murder scene matched the pursuer's elimination print, signed their report to that effect. It is also of particular significance that the pursuer's case is specifically and exclusively pled against the actions of the third to sixth defenders, and that it is nowhere suggested that the fourth to sixth defenders were ever made aware of the comparison results of any of their colleagues.

[30] Against that background, the pursuer avers that that the reputation of SCRO was at that time extremely high and rarely if ever challenged in court. The fingerprint evidence against Asbury was of the greatest importance in the murder trial. Had the original identification of the fingerprint as being that of the pursuer required to be revised by SCRO, revealing the doubts expressed by the other officers, this would have had the effect of prejudicing the prospects of a conviction against Asbury, as the same SCRO employees were responsible for the preparation of the report relating to

that case and to the comparison of prints said to belong to the pursuer. In addition, it is claimed that the differences between the latent and elimination prints were obvious and that there were numerous points of distinction which anyone with reasonable experience of the identification or comparison of such marks would have discovered. In these circumstances, the pursuer believes and avers that the employees within SCRO who signed the report became aware during the preparation for the Asbury trial and thereafter that the latent print found on the door frame in the house of Mrs Ross was not that of the pursuer, but nonetheless continued to state that it was in order to maintain the reputation of the organisation for which they worked, and to secure Asbury's conviction. While the original statement by the third defender that the two prints were a match may have been negligent, the pursuer's claim now is that the continued insistence that the latent print found at the murder scene and the elimination print provided by the pursuer were the same became malicious, because the defenders ought to have known what the likely consequences would be for the pursuer if that comparison were accepted. Further, their behaviour is said to be without reasonable and probable cause, because their only justification for behaving in that way was to protect their own reputation against the discovery of their errors, as opposed to providing correct and accurate information to the court in the course of a prosecution.

[31] These various inferences can be drawn from the pursuer's pleadings as they stand, but only with some difficulty. For example, as counsel for the defenders pointed out, there are no averments which suggest why the former third to sixth defenders can be said to have been aware of the consequences for the pursuer should they make a wrong comparison between the latent and elimination prints. There are no averments which suggest that the former third to sixth defenders knew or should have known of the significance, in the course of the investigation into the murder of Mrs Ross, of what might be involved in the discovery of the pursuer's fingerprint on the door frame at the murder scene. Further, as noted earlier, the pursuer specifically relates her loss, injury and damage to the actions of the former third to sixth defenders. These defenders appeared in this action as individuals; they are not sued as members of SCRO, and SCRO is not a party to the action. The pursuer's position is that the third to sixth defenders were responsible both individually and collectively for the bringing of this malicious prosecution against her. In these circumstances, in order to succeed in her claim under the present averments, it would seem inevitable that the pursuer must prove as a matter of inference that the third to sixth defenders knew, or came to know, that their original comparison of the two prints was wrong, and yet deliberately and maliciously continued to claim it was right in order to protect their own reputation, in the knowledge that some of their colleagues had expressed doubts about the validity of the comparison. On the pleadings as they stand, the only defender who is said to be aware of the doubts of his colleagues is the third defender, MacPherson. There are no other averments explaining how the defender's negligence or error become converted into malice. In terms of the present averments, therefore, it seems to me to be arguable that the only case properly and relevantly pled by the pursuer lies against the third defender as an individual. It is also in my view unfortunate, and may cause difficulties for the pursuer at proof, that there are no specific averments as to precisely how the malicious content of the defenders' actions is defined, and that there is no plea in law which reflects this aspect of the pursuer's claim. The absence of such a plea in law strongly suggests that the focus of the remedy sought by the pursuer in the pleadings was not intended to be one of malicious prosecution. Standing the defenders' general plea to the relevancy of the

pursuer's case, the pursuer's ability to explore these areas of evidence in support of her claim may become significantly restricted at any proof.

[32] However, the central fact in the case as averred, is that but for the misidentification by the third to sixth defenders of the fingerprint found at the murder scene there would have been no prosecution of the pursuer on the charge of perjury. Further, despite the problems of clarity and relevance described earlier, the pursuer does aver that the failure to disclose the doubts that had been expressed within SCRO to the pursuer or her advisors, or to the Crown, or to the jury in her trial, was indicative of malice in the preparation for and the giving of the evidence of the third to sixth defenders. In particular the pursuer offers to prove that had these matters been disclosed to the Crown, it is likely that she would not have been prosecuted at all. In these circumstances, and despite the absence of a plea in law reflecting this position, I am prepared for present purposes to conclude that one possible inference from the pleadings as they stand may be that the third defender was guilty of being responsible for a malicious prosecution, which was without reasonable and probable cause, and that this caused the pursuer to suffer loss, injury and damage, because he was aware that one of his colleagues was not prepared to say that the two fingerprints matched. Beyond that, as I have said, there are no detailed averments that the fourth to sixth defenders were acting maliciously. All that is said is that they were wrong or negligent in making their initial comparisons and that somehow, in their insistence on their position, their behaviour became malicious. Again it seems to me that the way in which the case is pled may provide significant difficulties for the pursuer at inquiry.

[33] In considering the consequences of the lack of relevancy in the pursuer's pleadings, however, regard may properly be had at the same time to the nature and quality of the defence pled in response to those averments. In their answer to article 8 of the condescendence, the defenders make a number of averments in reply to the pursuer's claims. In respect of the critical question of the comparison made by the third to sixth defenders between the print found at the murder scene and that supplied by the pursuer, the only averments made by the defenders appear to be that these comparisons were made in good faith, and that the differences, referred to by the pursuer as being obvious, are explained by the latent print being a complex print not laid down in one continuous movement and affected by distortion when different pressures were applied. In the course of his submissions, defenders' counsel indicated that his position was that the latent print found at the murder scene was in fact that of the pursuer. I think that this is somewhat unsatisfactory. In the face of a specific claim by the pursuer that the fingerprint found at the murder scene was not hers, supplemented by a number of statements to the effect that the comparisons made by others indicated that the differences were obvious, the defenders have responded with a simple denial. There is nothing else in the pleadings which suggest how the defenders intend to prove that the fingerprint found at the murder scene belonged to the pursuer. Indeed, by suggesting that in making their fingerprint comparison the third to sixth defenders acted in good faith, the defenders could be said to have offered, on one view, an implied acceptance that the latent print did not belong to the pursuer. When a party to an action is in a position of knowledge about a disputed central issue in a case, that party cannot, in my view, simply cover his position with a simple denial. Pleadings should not be left in a state where the court has to guess what a party's position on such crucial matters is to be. A failure to admit or deny a fact which is within a party's knowledge yields a presumption that the fact as averred by

the other side against him should be held to be admitted. Similarly, when knowledge of a fact rests with a party, as knowledge of the fingerprint must rest with the defenders in the present case, it is not enough to respond to a claim against that fact with a simple denial. A detailed response is desirable. Senior counsel for the defender stated in submissions that the defenders' position was that the pursuer was to be put to the proof of her averments that the print was not hers, against the background that the defenders would be prepared to prove that it was. That position is not readily understandable from the defender's pleadings and in such a critical matter it is in my view unsatisfactory that the matter should be left in this way. It need hardly be added in the present case that, if I am right, the responsibility to plead the position candidly and clearly through their representatives is particularly incumbent upon an organisation such as SCRO, whose sole purpose and existence is concerned with the investigation and examination of the matters in dispute.

[34] In all the circumstances therefore I am satisfied that the pursuer should be entitled to an enquiry on her claim that she suffered a malicious prosecution without reasonable and probable grounds. The question of malice is in essence that the third defender, knowing that his identification of the fingerprint was wrong, continued to maintain it was correct in the knowledge that such a conclusion would foreseeably provoke further investigation involving the pursuer which would cause her significant difficulties. The lack of probable or reasonable grounds for the prosecution are found in the reasons attributed to the defender for their conduct, namely the desire to protect the reputation of SCRO. On the basis of the pursuer's averments it must be dubious whether there is, as the pursuer's counsel claimed in submission, a case of concerted malice by the third to sixth defenders against the pursuer, and the claim against the fourth to sixth defenders in this respect appears to be of doubtful relevance and significantly lacking in specification. However, it is only irrelevant material which is excluded at debate; averments of doubtful relevance, on which the pursuer must now peril her case, should be remitted to enquiry. On that restricted basis, I will allow the pursuer a proof of her averments on malicious prosecution.

[35] The next part of the defender's submissions was concerned with the various averments of negligence and reckless or deliberate conduct connected with the identification by the third to sixth defenders of the fingerprint found at the murder scene as being that of the pursuer. Defender's counsel submitted that the pursuer had made no relevant averments in her pleadings about what duties of care were incumbent upon the defenders and in what respect these duties had been breached. The pursuer requires, it was said, to demonstrate that such a duty exists as a matter of substantive law. Any duty of care must include the elements of foreseeability and proximity and it must be shown to be fair, just and reasonable that such a duty should exist. Reference was made to *Caparo Industries* v *Dickman* 1990 2 A.C.605 per Lord Bridge of Harwick at 617 G:-

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the

> benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."

[36] Defenders' counsel submitted that in terms of what was said by Lord Bridge in *Caparo* v *Dickman* the pursuer's averments in the present case did not disclose a sufficient degree of proximity between the third and sixth defenders and the pursuer. The defenders had simply been instructed by the police to compare two fingerprints. They had no direct relationship with the pursuer. The third to sixth defenders could not have been reasonably expected to foresee that any damage would be caused to the pursuer if that comparison was carried out without sufficient care to satisfy the test of neighbourhood laid down in *Donoghue* v *Stevenson* [1932] A.C. 562. Further, the third to sixth defenders had done nothing to indicate that they had adopted a voluntary assumption of responsibility in respect of the pursuer in the course of her investigation and prosecution for perjury.

[37] Counsel for the defenders then linked the submissions on proximity to the additional premise that it was not fair, just and reasonable that a duty of care should be imposed on fingerprint experts towards persons, such as the pursuer, whose fingerprints were being examined for the purpose of giving or preparing to give evidence in court. Such an idea was contrary to public policy. Reference was made to *Darker* v *Chief Constable of West Midlands Police* per Lord Hope of Craighead at p.446-8 and Lord Mackay of Clashfern at p.451. These considerations of public policy, which were also reflected in the question of immunity from prosecution, were said to apply equally to the questions of duty of care.

[38] In *Elguzouli-Daf* v *Commissioner of Police for the Metropolis* [1995] Q.B.335, the plaintiffs were arrested, charged and remanded in custody for serious offences but, after periods of detention of twenty-two and eighty-five days respectively, the Crown Prosecution Service discontinued proceedings against them. The plaintiffs raised actions against the Crown Prosecution Service alleging negligence and failing to act with reasonable diligence in obtaining and disclosing the results of forensic scientific evidence which showed one of the plaintiffs to be innocent, and taking too long in the case of the other to reach the conclusion that a prosecution was bound to fail. These cases were thrown out on the grounds that in the absence of any voluntary assumption of responsibility to a particular defendant in any criminal proceeding, there was no general duty of care owed by the Crown Prosecution Service in the conduct of its prosecution of a defendant for reasons of public policy, and that the Crown Prosecution Service was therefore immune from actions of negligence (see Steyn LJ at p.349 C-E). Further, in that case it was decided that the imposition of a duty of care on the Crown Prosecution Service towards persons whom they prosecuted would not be fair, just and reasonable (per Morritt LJ at 351H-353A).

[39] Counsel submitted that this was further re-enforced by what was said in *Hill* v *Chief Constable of West Yorkshire* 1989 1 AC 53, where it was held there was no

sufficient degree of proximity between the victims of the Yorkshire Ripper and the police (see Lord Keith of Kinkel, p.62F-64A). While it is accepted that the Crown Prosecution Service is a prosecuting authority, and the police are the investigative agent of the state, on the one hand, and the SCRO is an independent body acting for the prosecution authority on the other, counsel maintained that the same proximity and policy considerations should apply to an independent body such as the SCRO which was acting at the instance of the prosecuting authorities.

[40] Further references said to support this general line of authority were as follows. In *Taylor* v *The Director of the Serious Fraud Office*, Lord Hoffman said at p.125E-F:-

> "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. In *Evans* v *London Hospital Medical College (University of London)* [1981] 1 WLR 184, Drake J held that it included reliance on the statement in an action for negligence in which it was alleged that a carelessly prepared post-mortem report had led to the plaintiff being unjustifiably arrested and charged with murder. I express no view on this case, which I think might nowadays have been decided on the ground that the defendants owed the plaintiff no duty of care."

[41] *Cowan* v *Chief Constable of Avon & Somerset Constabulary* 2001 EWCA Civ 1699 (reported in *The Times Law Reports* on December 11, 2001) was concerned with the liability of a police force in negligence when officers failed to prevent an offence being committed against an individual member of the public. The court held that it was only if particular responsibility towards an individual arose in the circumstances of the case, establishing a sufficiently close relationship, that a duty of care might be owed to that individual.

[42] Counsel maintained that the third to sixth defenders had not assumed any responsibility for the pursuer in the present circumstances. They simply carried out a comparison at the request of the police investigating a murder. The exercise of this comparison, the provision of their report, and their subsequent evidence did not give rise to a sufficient proximity of relationship between the pursuer and the third to sixth defenders such as to produce a duty of care. Any general duty of care owed by the SCRO towards those whose fingerprints they have to examine would be difficult to formulate, and that supported the view that no such duty arises. Finally, public policy does not suggest that it would be fair, just and reasonable to impose that a duty of care on the third to sixth defenders.

[43] While these submissions carefully and accurately reflected the authorities submitted by defenders' counsel, I was not convinced that they justified the rejection of the pursuer's case at this stage. As has been made clear on a number of occasions, the description of the ingredients of a duty of care described by Lord Bridge in *Caparo* v *Dickman* is not intended to provide specific and detailed requirements of what must be established in order to define that duty in particular circumstances, but is rather an indication of the general characteristics that might be found in such a duty. While I have no difficulty in accepting that the third to sixth defenders have not done

anything to suggest that they have assumed any responsibility towards the pursuer, that does not mean that the court is therefore excluded from finding that a sufficient degree of proximity exists between the pursuer and the defender which would justify the existence of such a duty. In the present case, the pursuer was at the material time a police officer engaged in a murder trial. In my view, it cannot be in doubt that the defenders, charged to make a comparison between a fingerprint found at the murder scene and a fingerprint taken from the pursuer, may be said to have a duty of care towards the pursuer in the examination and comparison of those fingerprints. Whether the relationship is sufficiently proximate to establish that duty can only properly and fairly be concluded after inquiry. This is particularly so when the averments made by the pursuer are that the position adopted by the third to sixth defenders was malicious. I do not therefore consider that the defenders' submission in this matter should preclude the pursuer's claim to proof at this stage.

[44] The next part of this submission by defenders' counsel was that there were no relevant averments that the third to sixth defenders had failed to exercise reasonable care, and in particular that there were no relevant averments of a duty of care owed by the third to sixth defenders in the circumstances, or that they had breached those duties of care in any particular way. It was submitted that it was difficult to ascertain the nature of the fault that had been alleged against the defenders. There were none of the standard averments as to what duty of care was being breached. There were no averments that the third to sixth defenders failed to exercise reasonable care in any respect. All that is said was that there were numerous points of difference in the fingerprint comparisons. The standard of care incumbent upon a reasonable man in these circumstances is defined in the case of *Hunter* v *Hanley* 1955 SC 200 at p.205-206:-

> "The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care."

Further:-

> "To establish liability by a doctor where deviation from normal practice is alleged three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender had not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on the pursuer to establish these three facts, and without all three his case will fail."

[45] Counsel submitted that this was the normal test universally applied and should be considered appropriate in respect of the third to sixth defenders as experts in the identification of fingerprints. There were in the present case, however, no averments of normal practice or a failure to adopt it; nor were there averments that no other expert would have behaved as the defenders are said to have done. There was no attempt to link the actions of the third to sixth defenders to any standard of

competence. There were therefore no averments of any kind to indicate that the third to sixth defenders had failed to take reasonable care.

[46] I did not consider that these submission were of particular relevance to the present case. The case as tabled by the pursuer against the defenders is not one of professional negligence but of malicious prosecution. In such a case, the primary requirement in the pursuer is to plead that the defenders have acted maliciously and without reasonable and probable cause. If those matters are proved, then the pursuer's right to compensation flows from the fact that the prosecution was malicious, as opposed to any failure to act against a standard of normal professional practice. I do not therefore consider that the defender's submission in this matter justifies repelling the pursuer's case at this stage.

[47] The final part of the defenders' submissions was based on the premise that should the foregoing arguments all fail, then certain passages of the averments in the closed record should be deleted. In particular, in condescendence 2 at p.17B-C, there is a series of averments about a subsequent investigation by two independent police officers, who concluded that there had been criminal conduct on the part of the SCRO, or their officers. To allow such evidence, it was argued, would usurp the function of the court. Reference made to *Stair Encyclopaedia of the Laws of Scotland* Vol. 10, paras. 647; 648-650. The evidence referred to post-dated the pursuer's trial and could therefore have no relevance to the present issue.

[48] I disagree with this submission. The findings of this independent police inquiry could in my view have a direct bearing on the circumstances of the defenders' examination and comparison of the fingerprints in question, and the fact that the investigation post-dated the pursuer's trial is of no materiality. The same considerations apply to the averments at p.17D-E of the record concerning a meeting on 15 August 2000 between members of SCRO and two independent experts, which the defenders also wished to have deleted.

[49] The defenders also submitted that the pursuer's averments on negligence should be deleted if the substantive arguments about their relevance should fail. In particular it was submitted that at p. 7B in article 2 of the condescendence the words "negligently" and "recklessly" should be taken out. Further, at p.15D-16A, the defenders argued that the following averments should be deleted:-

> "*Esto* any error had been made in that identification at the outset, it would have been obvious to any employee of SCRO who had any reasonable experience of the identification or comparison of such marks, who was alerted to the suggestion that the fingerprint was not validly identified that the original identification was erroneous. The print comparison was such that there were numerous points of difference between the latent and the pursuer's print. Any single point of difference would have alerted any fingerprint examiner of the fact that the prints were not a match, no matter how many points of similarity there were. Notwithstanding the obvious difference between the prints, the employees of SCRO continue to maintain that there was a match."

I can see no reason why these averments should be taken out. Given that the action is one for malicious prosecution, there is nothing irrelevant or inconsistent about describing the actions of the defenders in a manner which is normally associated with allegations of negligence, particularly as the pursuer goes on to make averments of malice at a later stage.

[50] Next at p.16D-E the defenders submitted that the following averments should be deleted:-

> "Following the acquittal of the pursuer, hereinafter condescended upon, formal enquiries were held. No fingerprint expert, other than those within SCRO, has maintained that the claimed match is a valid one. Numerous experts throughout the world have been invited to comment to enquiries, and none has stated that the latent matches that of the pursuer."

Again, standing by my decision on the earlier submissions made by the defenders, I can see no reason why these averments should be removed. Part of the pursuer's case is that the differences between the two fingerprints were obvious and the averments complained of are undoubtedly relevant to a consideration of that issue.

[51] Next the defenders sought to delete the averments in article 10 of condescendence at p.25D of the closed record, namely:-

> "By so doing, they were continuing to act in a negligent or reckless manner as to the truck or falsity of the opinion that they expressed or were, by that time, well aware that their evidence to that effect was wrong."

The word "truck" in this passage is presumably a mistake, and should read "truth". While there may be some force in the defender's submission that averments of negligence and recklessness might be inconsistent with allegations of malice, I do not think that they are so at odds that they should be excluded from probation at this stage.

[52] Finally, in this chapter, on page 28 of the closed record, the defenders submitted that the words "fault" and "negligence" should be deleted from the pursuer's first pleas in law. I shall similarly refuse that request.

[53] In conclusion counsel for the defenders submitted that if the view taken was that this was a case of malicious prosecution, but that there was no justification for holding that the defenders were covered by absolute immunity in terms of the earlier submissions, and that the objections to the relevance of the duties of care and breach thereof were not made out in terms of the later submissions, then the averments in respect of malicious prosecution at p.15A-D, p.16A-D, p.17D and p.18C-E should also be deleted. However, as I have found against the defenders in respect of the arguments on absolute immunity, these points need not be dealt with.

[54] In all the circumstances, I shall repel the first plea in law for the second defender; repel also the second defender's second and third pleas in law; repel the pursuer's

third, fourth and fifth pleas in law, and thereafter allow a proof before answer on the basis outlined above. I shall reserve the question of expenses.