The Scottish Parliament

JUSTICE 2 COMMITTEE

AGENDA

3rd Meeting, 2004 (Session 2)

Tuesday 20 January 2004

The Committee will meet at 2.00 pm in the Chamber.

1. **Items in private:** The Committee will consider whether to take item 4 in private and whether to take any discussion of the draft Stage 1 report on the Antisocial Behaviour (Scotland) etc Bill in private at any future meeting.

2. **Subordinate legislation:** The Committee will consider the following negative instrument—

   The Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2003 (SSI 2003/621).

3. **Petitions:** The Committee will consider the following petitions—

   **PE347** Petition by Mr Kenneth Mitchell calling for the Scottish Parliament to investigate the practice of shoeing Clydesdale Horses to introduce legislation to make such a style of shoeing illegal unless sanctioned, for medical reasons, by a Veterinary Surgeon.

   **PE565** Petition by Miss Jacqueline Shields calling for the Scottish Parliament to take the necessary steps to provide a protective mechanism to ensure that the welfare concerns of minors is paramount in Scottish law.

   **PE578** Petition by Mr Donald MacKinnon calling for the Scottish Parliament to take the necessary steps to extend the right of absolute privilege available to those who complain about the conduct of a range of public bodies, to young and vulnerable people who report abuse to an appropriate authority.

   **PE659** Petition by Mr Graham Sturton calling for the Scottish Parliament to carry out a review of the sentencing policy on violent crime in Scotland.
4. **Antisocial Behaviour etc (Scotland) Bill**: The Committee will consider a draft Stage 1 report.

Gillian Baxendine / Lynn Tullis  
Clerks to the Committee  
Tel 0131 348 5054
The following papers are enclosed for this meeting:

**Item 2 – Subordinate legislation**

Note by the Clerk (SSI 621 attached) J2/S2/04/4/1

**Item 3 - Petitions**

Note by the Clerk on PE347 and accompanying documents J2/S2/04/3/2
Note by the Clerk on PE565 and accompanying documents J2/S2/04/3/3
Note by the Clerk on PE578 and accompanying documents J2/S2/04/3/4
Note by the Clerk on PE659 and accompanying documents J2/S2/04/3/5

**Item 4 – Antisocial Behaviour etc (Scotland) Bill**

Summary of evidence (PRIVATE PAPER) J2/S2/04/4/6

The following papers are enclosed for information:

**Forthcoming Meetings:**

Tuesday 27 January - Justice 2 Committee meeting (PM)
Tuesday 3 February - Justice 2 Committee meeting (PM)
Tuesday 10 February – Justice 2 Committee meeting (PM)
Tuesday 24 February – Justice 2 Committee meeting (PM)
JUSTICE 2 COMMITTEE

3rd Meeting 2004 (Session 2)

Tuesday 20 January 2004

The Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2003 (SSI 2003/621)

Note by the Clerk

The Instrument

This Order corrects the name of the National Trust for Scotland, which was incorrectly stated in the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, which the Committee considered on 28 October 2003.

Procedure

The Justice 2 Committee has been designated lead Committee and is required to report to Parliament by 9 February 2004.

The Subordinate Legislation Committee considered this instrument on 13 January 2004 and had no comment to make. The instrument was laid on 5 January and comes into force on 30 January 2004.

Under Rule 10.4, the instrument is subject to negative resolution procedure - which means that the Order remains in force unless the Parliament passes a resolution, not later than 40 days after the instrument is laid, calling for its annulment. Any MSP may lodge a motion seeking to annul such an instrument and, if such a motion is lodged, there must be a debate on the instrument at a meeting of the Committee.

15 January 2004

Clerk to the Committee
To the Scottish Parliament

To ban the practice of shoeing of Clydesdale Horses known variously as Couping, Show Shoeing, Foal Slippers and other local names and descriptions

We, the undersigned, declare that many Clydesdale Horses are fitted with shoes that are designed to alter their natural stance. This is done for cosmetic effect only to enhance the chance of winning prizes at shows and exhibitions. This method of shoeing puts pressure on all structures of the limb of the horse causing long term medical problems and may shorten the life of the horse. The Clydesdale Horse breed is a traditional draught horse and is still used for promotional work as well as traditional agricultural work on some small farms and also in forestry work. The breed is now primarily bred and kept as a show horse with large sums of money made on the export market. A horse that has won many prizes is more valuable than one that has not. To improve the chances of winning, it has become the practice of owners of Clydesdale Horses to have a style of shoe fitted to the hind feet that alters the natural stance of the horse. The foot is shaped and a shoe fitted that raises the outside of the foot and lowers the inside of the foot, causing the foot to be unlevel. The shoe often covers only between half to three quarters of the hoof and does not protect it properly. As a result, the hind limbs are subjected to unnatural stresses and are therefore thrown out of balance.

This practice is deemed unnecessary by all vets, some horse owners and many registered farriers. Many Clydesdale Horse owners insist that three types of shoes be fitted to their horses, irrespective of the advice of their vet or farrier. Registered Farriers and Veterinary Surgeons are the only professional individuals to receive training in hoof and leg care of horses. Breed Societies are comprised of the main by horse owners who are only interested in the financial profit to be made rather than full animal welfare.

The Petitioners therefore request the Scottish Parliament investigate this practice (as described in Motion to the Parliament by Nicholas Johnstone, MSP and Dr Sylvia Jackson, MSP), to confirm the potential welfare issues and to introduce legislation to make such style of shoeing illegal unless for medical reasons sanctioned by a Veterinary Surgeon.

Signed: Kenneth A. Mitchell, DWCF  Date: 10th February 2001

Contact Details: Kenneth Mitchell, DWCF, 68 Causewayhead Road, Stirling. FK9 5EZ
Telephone/Fax: 01786 445053
Thank you for your letter of 4 November addressed to Cathy Jamieson regarding PE347 and the coupling of Clydesdale Horses. My Department has recently assumed responsibility for this issue and, hence, I am replying.

First, I should perhaps explain that the Protection of Animals (Scotland) Act 1912 makes it illegal to cause any animal unnecessary suffering and this existing legislation provides adequate protection for horses which have been incorrectly shod. There is, therefore, no need for any additional specific legislation to deal with coup shoeing.

There have been no cases of welfare problems associated with the shoeing of horses for show purposes which have been brought to the attention of the Scottish Executive. However, it is open to anyone to bring cases of apparent suffering to the attention of the appropriate enforcing agencies.

Couping is a layman’s term used to describe the shoeing methods intended to change the gait or stance of horses. Corrective shoeing can be done for welfare purposes to correct a physical defect in the animal (akin to special soles on a person’s shoe). However, there are claims that shoes are being fitted which encourage the inturning of the hocks of the horse to reduce the distance between the rear hooves, this apparently being a feature of the Clydesdale favoured by show judges. Whether this is to the detriment of the welfare of the horse would depend very much on the particular circumstances, particularly the degree of correction involved.
We intend to introduce an Animal Health and Welfare Bill during the next session of Parliament. Originally the welfare aspect of this Bill was to have been fairly narrow but it is possible that the scope of this legislation could be extended to cover much wider animal welfare issues. Officials intend to issue a consultation paper in the late spring of next year.

I hope this is of some help.

ROSS FINNIE
Background

1. Petition 347 (attached, annex A) calls for the Scottish Parliament to investigate the practice of shoeing Clydesdale Horses and to introduce legislation to make such style of shoeing illegal unless sanctioned, for medical reasons, by a veterinary surgeon.

2. Show shoeing (or couping) is a method of shoeing horses that supports only the front of the hoof and causes the back of the hoof to drop. It is used primarily at horse shows and exhibitions to create an exaggerated version of the Clydesdale’s natural stance which is regarded as a desirable feature in the show ring. The late petitioner alleged that couping can cause both short- and long-term medical problems and may shorten the life of the horse.

3. Committee members are reminded to note that the petitioner, Mr Kenneth Mitchell, a registered farrier, has died since submitting this petition. Mr James W Sharp is now the primary contact for the petition.

4. The petition was referred to the former Justice 1 Committee because its subject matter is dealt with by the Scottish Executive’s Justice Department under its responsibilities for criminal sanctions in relation to the protection of domestic and captive wild animals, which is covered mainly by the Protection of Animals (Scotland) Act 1912. It was referred by the Public Petitions Committee to the new Justice 2 Committee for further consideration in the second session of Parliament.

5. The consideration of the petition by the former Justice 1 Committee is set out in detail in note J1/03/3/14. At its 3rd Meeting, 2003 (Session 1), the former Justice 1 Committee, having agreed that the practice of couping is inappropriate and cosmetic, agreed to ask the Scottish Executive that practices associated with the breeding and showing of animals that may lead to cruelty to animals be included when it next considers legislation on animal welfare.

6. In response to the former Justice 1 Committee, the former Minister for Justice wrote to the former Justice 1 Committee’s Convener on 1 March 2003 and referred to a review of animal welfare legislation being undertaken by the Department of the Environment, Fisheries and Rural Affairs in which the Executive has been involved. The Executive also stated that there is awareness of the welfare issues arising from breeding and showing animals.

1 Public Petitions Committee, 2nd Meeting 2003 (Session 2), 25 June 2003.
and agreed that it is appropriate to consider the practice of couping in the context of animal welfare legislation.

7. Following the Scottish Parliament elections in May 2003, the Scottish Executive indicated that it planned to introduce a bill on the protection of animals\(^2\).

8. Dr Sylvia Jackson MSP has been involved in this petition since it was lodged, both as a constituency member and as a member of the cross-party group on animal welfare. Correspondence from Dr Jackson, received on 6 October 2003, welcomed the former Justice 1 Committee’s support for the aims of the petition and indicated that she was considering lodging a member’s bill proposal on this issue, depending on whether it is covered by the forthcoming Scottish Executive bill on the protection of animals.

**Justice 2 Committee Consideration**

9. The Justice 2 Committee considered the petition on 28 October 2003 when it agreed to forward all recent correspondence regarding the petition to the late petitioner’s representative. The Committee also agreed to write to the Scottish Executive in order to establish the timetable for its proposed legislation on the protection of animals and whether such legislation would include provisions on the couping of Clydesdale horses.

10. A written response has now been received from Ross Finnie MSP, the Minister for Environment and Rural Development (attached, annex B) indicating that the Executive believes that existing legislation (the Protection of Animals (Scotland) Act 1912) provides adequate protection for horses which have been incorrectly shod. The Minister also indicates that the Executive does not intend to introduce an Animal Health and Welfare Bill until the next session of Parliament with a consultation paper issued in the late spring of next year.

**Procedure**

11. According to the Standing Orders, where the Public Petitions Committee has referred a petition to another committee, that committee may take such action as it considers appropriate.\(^3\)

**Proposed action**

12. The Committee may wish to invite the petitioner to take part in the Executive consultation exercise when it is launched next year.

13. The Committee is also invited to draw the petitioner’s attention to the existing legislation and recommend that any breaches of this legislation be reported to the relevant authority.

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\(^3\) The Scottish Parliament, *Standing Orders*, Rule 15.6.2(a)
Enclosures

- Annex A - Petition 347
- Annex B – Letter from Ross Finnie MSP, the Minister for Environment and Rural Development

Former Justice 1 Committee papers for reference

- J1/03/3/14
- J1/02/28/9
- J1/02/36/5

Justice 2 Committee papers for reference

- J2/S2/03/12/3

Clerk to the Committee January 2004
Dear Richard,

SCOTTISH LAW (PROTECTION OF MINORS) PE565

Thank you for your letter of 7th January 2004 with regard to the above and please accept my apologies for not writing to you sooner. The Family Law Sub-Committee considered your earlier correspondence at its meeting on 3rd December 2003 and had the following comments to offer:-

a) The Sub-Committee are aware that under the Children (Scotland) Act 1995 children have the right to be heard in relation to many issues of importance.

b) Many children currently exercise their rights with the benefit of legal advice - children can be eligible for legal advice and assistance and for legal aid to assist them in this area.

c) There are many sources of information and advice for children - e.g. Childline, the Scottish Child Law Centre and many children’s charities. The Law Society of Scotland’s website also has a Children and Young Persons section in addition to which there are many solicitors who provide advice to clients who are children.

d) The Law Society of Scotland has recently finalised Child Representation Principles which are currently being consulted upon.

The Society is constantly seeking ways to improve information available to children and young people.

I trust the foregoing is of assistance. If you require any further information please do not hesitate to contact me.

Yours sincerely,

Michael P. Clancy

Director
Dear Mr Hough

SCOTTISH LAW (PROTECTION OF MINORS) PE565

Thank you for your letter of 3 November 2003 concerning representations made to the Parliament in relation to the involvement of children in court proceedings. I understand that you have discussed the Committee’s concerns with Catriona Whyte and confirmed that general information on our approach to all children’s applications was what the Committee wanted.

One of the first sources of help available to an individual is advice and assistance. As its name suggests, this is a form of help available to an individual when they initially approach a solicitor. Advice and assistance can be used to resolve legal difficulties an individual has without the need to go to court. It is also available to give general guidance on particular problems that individuals may have in relation to matters of Scots Law. Advice and assistance is available to assist with problems of Scots Law to all individuals who are financially eligible.

Advice and assistance is not granted by the Board but by the solicitor acting. It is the solicitor who determines whether or not an individual is financially eligible and whether the problem is a matter of Scots Law. Solicitors have an initial limited amount of funding available to them to investigate matters on a client’s behalf. Depending on the subject matter, this limit is either £80 or £150. It is, however, open to solicitors to ask us for extra funding by applying for an increase in authorised expenditure. We will grant such increases where we are satisfied that it is reasonable for additional expenditure to be incurred in relation to a case.

Advice and assistance funding is available to both adults and children provided that a solicitor is satisfied that the individual seeking the advice is both capable of giving instructions and taking advice from the solicitor. It is the solicitor who needs to consider whether or not they have the necessary capacity to instruct a solicitor.
We do not appear to have received an application for civil legal aid from Ms Shields acting on her own behalf although we did receive an application for civil legal aid from the curator acting on her behalf.

It is also open to children to apply for legal aid. There is no bar on children involved in court proceedings seeking civil legal aid for representation. Any decision about whether it is appropriate for a child to apply for civil legal aid is a matter for the solicitor acting for the child to consider. As with advice and assistance the solicitor needs to be satisfied that the child is both capable of giving instructions to a solicitor and of taking advice from the solicitor.

Any application for civil legal aid submitted by a child needs to meet the same tests as all other civil legal aid applications. These tests are that an individual is financially eligible to receive civil legal aid, that they have a probable cause or, simply put, a plausible case to put to the court and that it is reasonable in all the circumstances to make legal aid available. If these tests are met then a grant of civil legal aid will be made. It is unusual for the financial eligibility assessment to cause difficulties in a child’s application.

In assessing whether or not the tests of probable cause and reasonableness are met we will take into account the views that the child wishes to express to the court, the likely impact of any orders made by the court on the child and whether there are other parties involved in the proceedings who can represent the child’s wishes. This list is illustrative only as there may be a wide range of issues to consider. The solicitor acting for the child will be best placed to draw these issues to our attention.

In cases involving children it is not unusual for one or more of the other parties involved in the proceedings to be legally aided. In deciding whether or not it is reasonable to make additional public funding available to another potential party, we consider the arguments to be put forward by those already involved in the proceedings. If the child’s wishes appear to coincide exactly with those of another party who is already involved then we will not always consider it reasonable to make additional funding available for the child to enter the proceedings. If, however, the child’s views do not coincide with those of another party then it may be reasonable to grant civil legal aid. Where the child has different views from those expressed by a reporter or a curator then the fact that a curator or reporter is already involved in the proceedings does not prohibit a grant of civil legal aid from being made. We could not, however, automatically make independent representation available to a child because of the requirements of our legislation which oblige us to be satisfied that our statutory tests are met in relation to each civil legal aid application.

From time to time other situations arise where children wish to make civil legal aid applications. A number of applications have been received from children who wish to challenge decisions taken by local authorities in relation to their schooling in terms of the Education (Scotland) Act 1980. Disputes may arise where a child wishes to go to a particular local authority school and this application is rejected. Where the local authority rejects a placing request an appeal can be made to the local sheriff court. The 1980 Act requires that such appeals are made by the parents of the child rather than the child itself. Given this, we do not accept legal aid applications from children to appeal against such decisions as the application can only be made by the parents. There are a number of other provisions in the 1980 Act that can only be challenged by the parents and so any applications submitted by a child have to be rejected.

Legal aid can also be made available by the court for certain proceedings involving children. The Legal Aid (Scotland) Act 1986 details cases where legal aid may be made available for a hearing before the sheriff or on an appeal to the Sheriff Principal or the Court of Session. This is
referred to as children’s legal aid and is quite different to civil and criminal legal aid. These cases involve a variety of matters including issues:

- arising from a children’s hearing;

- in respect of any matter arising under Chapter 2 or 3 of Part II of the Children’s (Scotland) Act 1995;
- in relation to a child protection order or a child assessment order.

Applications for legal aid in respect of proceedings before the sheriff are made to the court. It will consider whether it is in the interests of the child that legal aid be made available and also whether the costs of the case can be met without undue hardship to the child or any other relevant person. Legal aid can be sought by any interested party in the proceedings including the parents of a child, a curator or the child itself. Again, if the child was seeking to make his/her own legal aid application the solicitor acting would need to be satisfied that the child was capable of giving instructions and taking advice.

Legal aid applications can also be made for any appeal arising from these proceedings whether it is taken before the Sheriff Principal or the Court of Session. These legal aid applications are made to the Board. We determine whether or not there are substantial grounds for making or responding to an appeal and, in cases whether legal aid has not previously been made available, whether the financial costs of the appeal cannot be met without undue hardship.

Our approach to legal aid applications involving children both in relation to applying for legal aid and assessing the merits of the application have been well known to the legal profession for several years. It would therefore be surprising if solicitors were unaware that they could make applications for civil legal aid on behalf of a child provided that the subject matter at issue was one where the child could competently be involved in the court case. Likewise, the approach taken by the courts to making legal aid available for certain proceedings involving children have been long established and it seems unlikely to cause the profession any difficulty.

We have publicised guidance on various matters about legal aid applications to the profession in a variety of formats. The Board’s Legal Aid Handbook is one source of information available to the profession. The Board also publishes a journal known as the “Recorder” that details our policy and procedures on a variety of issues. Our website contains relevant guidance and, at the end of October this year, we published guidance for use by Board staff and the profession on our approach to civil legal aid applications. In February this year we published guidance to staff and the profession about our handling of advice and assistance applications. We will be publishing a leaflet both in paper format and on our website about children’s legal aid next year.

There may however be more general issues regarding children’s knowledge of the legal process as a whole or their general entitlement to enter proceedings that need to be considered. This would seem to be a matter that has implications beyond simply submitting legal aid applications. As such, this may be an area that could be explored by a number of different agencies representing children’s interests including the Scottish Child Law Centre, the Scottish Alliance for Children’s Rights and the Scottish Parliament Cross Party Group on Children and Young People as referred to in your letter. We would be happy to engage in fuller discussion with any of these groups in this matter.

Yours sincerely
Lindsay Montgomery
Chief Executive
Background

1. Petition PE565 (attached, annex A) by Ms J Shields calls for the Scottish Parliament to take the necessary steps to provide a protective mechanism to ensure that the welfare concerns of minors is paramount in Scottish law. The petition is prompted by the petitioner’s own experiences of separation from her father, elder brother and sister.

2. Members will be aware that it is not the Committee’s role to examine the specific details of the petitioner’s own case but rather the broader issues raised by the petition.

3. More detailed background information on this petition can be found in paper J2/S2/03/12/4.

4. At its meeting on 28 October 2003, the Committee agreed to seek further information from the Scottish Executive on the procedures which support children involved in civil law and other court proceedings. The Committee also agreed to approach the Law Society of Scotland for its views on the level and appropriateness of advice given to children and young people and the potential for improvement in accessibility to independent legal advice and to approach the Scottish Legal Aid Board to clarify the position with respect to the availability of legal aid for children and young people in private family law cases.

5. Response have now been received from the Scottish Executive (attached, annex B), the Law Society of Scotland (attached, annex C) and the Scottish Legal Aid Board (attached, annex D).

Summary of Executive response

6. The Scottish Executive were asked to comment on—

   the sufficiency of the procedures which support children involved in civil law and other court proceedings

   The letter from the Executive does not appear to directly address this issue.
the adequacy of the guidance available to Sheriffs in considering these cases
The letter from the Executive indicates that written guidance and training is available to sheriffs and that a specific training course is planned for sheriffs on aspects of evidence given by children.

the availability and accessibility of relevant information directed at children
The letter from the Executive refers to Form F9 of the Ordinary Cause Rules 1993.

Summary of the Law Society of Scotland’s response

7. The Law Society was asked to comment on the level and appropriateness of advice given to children and young people and whether it believes that improvement is required in the accessibility of independent legal advice for minors. The Family Law Sub-Committee of the Law Society considered the issue and its response is at annex C. The Society indicates that it is constantly seeking ways to improve information available to children and young people.

Summary of Scottish Legal Aid Board response

8. The Scottish Legal Aid Board (SLAB) was asked to comment on both the availability and awareness of legal aid for minors. The letter from SLAB indicates that funding for advice and assistance from a solicitor is available to children provided that the solicitor is satisfied that the individual seeking advice is both capable of giving instructions and taking advice from the solicitor. SLAB also confirms that it is open for children to apply for civil legal aid and that any such application must meet the same tests as all other civil legal aid applications. SLAB highlights a variety of sources of information available to the legal profession on legal aid applications for minors but does not appear to make specific information available to children and young people.

Procedure

9. The Standing Orders make clear that, where the Public Petitions Committee refers a petition to another committee, it is for that committee then to take “such action as they consider appropriate” (Rule 15.6.2(a)).

Proposed action

10. The committee is invited to consider whether it is satisfied with: the procedures to support children who are involved in civil law and other court proceedings; the guidance available to sheriffs in considering such cases; and the availability and accessibility of information directed at children.

11. If so, the Committee is invited to forward to the petitioner copies of the correspondence from the Executive, Law Society and Legal Aid Board,
highlighting the resources that are available to young people and reaffirming the Committee’s position that it is unable to look at the specific details of the petitioner’s case.

Clerk to the Committee                                           January 2004
Title of Petition:
ABUSE AND MISTREATMENT OF MINORS USING SCOTTISH LAW

We the undersigned, declare that ....

[To ask the Scottish Parliament to investigate 1) The circumstances which have lead to a law society member of Blair & Bryden 34 Union Street Greenock and those she instructs to undermine my rights and freedoms under various articles of ECHR. This has lead to my abuse and mistreatment using Scottish Law to undermine my rights using persecutive court actions funded for over 7 years by the legal aid board who have aided and abetted my mistreatment through Scottish courts. This has lead to long periods of separation from my father, my older brother and sister. All of this in evidence before a legal profession inquiry which is still ongoing and while it is concluded I continue to face persecutive court actions which has lead to my forcible removal by police on three occasions in clear breach of my human rights and against my views and wishes. This all caught on audio and video were police officers informed me I had no rights in this matter. Also they failed to allow me to obtain representation to ensure those rights were not breached under the Children (Scotland) Act 1995 and articles 3, 6, 8, 13, 14 and 17 of the European Court of Human Rights. 2) Also the failure to ensure my views and wishes as expressed in a court hearing at Greenock Sheriff court on 18th September 2002 were recorded on audio as requested to ensure my human rights were not breached, this despite having no legal representation to ensure those rights and freedoms were protected. 3) Also that despite repeated attempts to engage counsel to act for me which included contacting the Scottish Child Law Centre against these persecutive court actions, abuse and mistreatment by a law society member using Scottish law to abuse my rights I have been consistently failed by law society members to act for me. The monopoly of law society members to act in collusion has assisted in my mistreatment and abuse at the hands of Scottish Law. 4) Finally to investigate the circumstances were professionals aided and abetted my mistreatment and abuse by providing fabricated reports to this legal firm in contradiction to the views and wishes expressed by me which allowed that abuse to go on for over 7 years. All of this while an ongoing inquiry into the legal profession completes its findings. This has done nothing to assure my safety and security while these court actions continue. To undermine those rights and the misuse and abuse of Scottish law to persecute me with no protective mechanisms in place to ensure my safety.

The Petitioner(s) therefore request(s) that the Scottish Parliament ....

To take the necessary steps to provide a protective mechanism to assure the welfare concerns of minors is paramount in Scottish Law. Also that the rights of children under European Law are assured to stop the misuse of Scottish Law to impose inhumane treatment on children in that process. Article 3 Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment. Article 6 Right to a fair trial 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Article 8 Right to respect for private and family life 1 Everyone has the right to respect for his private and family life, his home and his correspondence. Article 13 Right to an effective remedy Everyone whose rights and

file://A:\Jacqueline%20Public%20Petition.htm

15/10/02 15/10/02
freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Article 14 Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 17 Prohibition of abuse of rights. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

First Petitioner's Details
Name: Miss Jacqueline Shields
Address: 1 Ashton Terrace, Gourock, Scotland, PA19 1BX
Telephone Number: 07759 275041
E-mail address: Not Supplied

Second Petitioner's Details
Name: Not Supplied
Telephone Number: Not Supplied
Association: Not Supplied
Other relevant information: Not Supplied

On-line Submission Date: 15 October 2002

Please sign and date boxes below:
Signature: [Signature]
Date: [Date: 15/10/02]
Dear Sir

PETITION: SCOTTISH LAW (PROTECTION OF MINORS) PE565

The letter of 4 November from the Convenor of the Committee to the Minister for Justice in connection with the above has been passed to me for reply.

As explained by Peter Beaton in his letter of 14 February, the Executive is not in a position to comment on the specifics as relate to the particular litigation concerned.

Mr Beaton in his letter set out detailed comments on the general issues touched on in Petition PE565 relating to legal representation of children; legal aid; the obligation to take the views of the children into account; the duty, taking account of the age and maturity of the child, to enable that child to indicate whether he or she wishes to express views and how this is to be done; the question of review of parental responsibility when a child reaches 12; and the general issue of protection of the welfare of the child.

As the Committee will be aware, the obligations, rooted in the UN Convention on the Rights of the Child, are that the welfare of the child is paramount. I would refer in that context to section 11(7)(a) of the Children Act 1995. Mr Beaton in his letter set out the duties to take account of the views of a child where any major decision involving parental responsibilities and rights are at stake. There is also a duty to take into account the views of any other person who has parental rights or responsibilities. Section 11 of the 1995 Act places a duty on the court, taking account of the age and maturity of the child, to enable a child to indicate whether he or she wishes to express views, if the child wishes an opportunity to do so and obliges the court to have regard to any views expressed.

The view of the Executive remains that difficult decisions have sometimes to be made in balancing the views of a child with taking decisions as to what would be in the child’s best interests.

11 December 2003
As far as guidance given to sheriffs in considering cases involving children is concerned, written guidance is available to all sheriffs. Training is available for new sheriffs and as part of a refresher course for experienced sheriffs. A specific training course is planned for sheriffs on aspects of evidence given by children.

The position regarding availability and accessibility of relevant information directed at children allowing them to be fully informed as to the rights referred to above and in Mr Beaton’s letter is as follows. When intimation is made to a child the form required to be used by court rules explains what the sheriff has been asked to decide, how the child can make his/her views known to the sheriff; and who can be contacted if the child does not understand the form or if he/she wants help to complete it. The Form is Form F9 of the Ordinary Cause Rules 1993 which is annexed to this letter.

Separately of course there is at present before the Parliament the Vulnerable Witnesses (Scotland) Bill which, amongst other provisions, provides for additional protections for children when giving evidence in criminal or civil cases.

Yours faithfully

PAUL CACKETTE
FORM F9

Rule 33.7(1)(h)

Form of intimation in an action which includes a crave for a section 11 order

PART A Court ref. No.

This part must be completed by the Pursuer’s solicitor in language a child is capable of understanding.

To (1)

The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:---

(a) (3) and (4)
(b) (5)
(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to
decide about your future you should complete Part B of this form and send it to the Sheriff Clerk
at (7) by (8) . An envelope which does not need a postage stamp is enclosed for you to use to
return the form.

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO
COMPLETE IT you may get help from a SOLICITOR or contact the SCOTTISH CHILD
LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 317 500.

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and
may ask you to come and see him or her.

NOTES FOR COMPLETION

(1)
Insert name and address of child.

(2)
Insert relationship to the child of party making the application to court.

(3)
Insert appropriate wording for residence order sought.

(4)
Insert address.

(5)
Insert appropriate wording for contact order sought.

(6)

Insert appropriate wording for any other order sought.

(7)

Insert address of sheriff clerk.

(8)

Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service.

(9)

Insert court reference number.

(10)

Insert name and address of parties to the action.

PART B

IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM

To the Sheriff Clerk, (7)

Court Ref. No. (9)

(10)

QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

Yes

No

If you have ticked YES please also answer Question (2) or (3)

QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?

(Please tick box)

Yes

No
If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

BOX A:

(NAME)

(ADDRESS)

Is this person:---

A friend?

A relative?

A teacher?

Other?

OR

QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

Yes

No

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

BOX B:

WHAT I HAVE TO SAY ABOUT MY FUTURE:---

NAME:

ADDRESS:

DATE:

NOTE

¹Substituted by S.I. 1996 No. 2167 (effective November 1, 1996).
Background

1. Petition PE578 was lodged in November 2002 by Mr Donald MacKinnon. It calls for the Scottish Parliament to take the necessary steps to extend the right of absolute privilege to young and vulnerable people who report abuse to an appropriate authority.

2. The Petitioner wants the Scottish Parliament to consider providing statutory immunity from civil action to children and other vulnerable people who report abuse. Although the petitioner has personal experience of this situation, the purpose of his petition is to address the more general issues raised.

Executive position

3. The Executive position is set out in a letter from the Scottish Executive Education Department dated 19 March 2003

“In effect an allegation by a child of abuse is protected by qualified privilege unless the person is proved to be acting out of malice. A false statement made in good faith would be protected whereas knowingly making a false accusation could be considered to be malicious.”

Providing children and other vulnerable people with absolute privilege would mean extending their statutory immunity from civil suit, even in the case of a complaint being made maliciously. The Executive expressed concern that extending absolute privilege in such a way would risk being non-compliant with ECHR.1

4. The Executive has also provided two written answers in relation to the petition.

Committee consideration

5. At its meeting on 30 September 2003, the Committee agreed to take further advice on whether extending the right of absolute privilege to children and other vulnerable people would risk being non-compliant

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1 Letter from Scottish Executive Education Department, 19 March 2003
with ECHR. The Committee is still awaiting opinions on the ECHR issue.

6. The Committee also agreed to seek information from the Executive on the number of defamation actions which had been raised against young and vulnerable persons who had reported abuse. A response has been received from the Deputy Minister for Justice (attached, annex B) indicating that an Appeal to the Inner House of the Court of Session has been lodged and is due to be heard on 27-29 January 2004. Consequently the Executive considers it to be inappropriate to comment on the matter at this stage.

7. A substantial response has also been received from the petitioner as well as two subsequent emails (attached, annex C).

Options

8. Members are invited to defer consideration of this petition until after the appeal, to which the Deputy Minister for Justice refers, has been heard.

Clerk to the Committee                                           January 2004
Dear Annabel

Petition PE578

Thank you for your letter of 13 October in which you sought the Executive's opinion on whether the McKellar-V-McKinnon & Kelly was a one-off case and whether this case might act as a barrier to others from making similar complaints. I apologise for the delay in responding. You will wish to note that an Appeal to the Inner House of the Court of Session has been lodged and is due to be heard on 27-29 January 2004. In view of the appeal, it would be inappropriate for the Executive to comment on this matter at this stage.

On conclusion of the case, I will be happy to correspond on the subject as appropriate.

Yours sincerely,

Hugh Henry

Hugh Henry
18 October 2003

Richard Hough
Assistant Clerk to the Justice 2 Committee
Room 3.10
Committee Chambers
George IV Bridge
EDINBURGH
EH99 1SP

Dear Mr Hough

PETITION PE 578

I refer to the discussion at Committee on 30 September about my Petition following the appearance before the Committee of Mr Hugh Henry, Deputy Minister who spoke a little about privilege and the Executive’s current position. You will recall that Mr Henry referred to the written answer by the Minister to a PQ by Jackie Baillie MSP. For ease of reference, I have appended a brief extract from the Official Report and the Answer because I would like to ask members of the Committee to consider a few points arising from both. I note that the Committee is also concerned about the number of defamation actions. I will be very interested in the answer you receive, but know that the number will be low simply because raising defamation actions against indigent individuals, most young people, is not economically rational behaviour.

I think the more important question is that raised in discussions with Childline and other similar organisations. You will recall that at your meeting of 16th September, Anne Houston of Childline said “The calls are usually about child-to-child bullying but, on occasion, they are about bullying by adults—indeed, sometimes by teachers—although such calls account for only a small percentage. Our concern is that children and young people already find it difficult enough to come forward and report incidents if an adult has treated them badly and defamation cases can stop children and young people reporting what can sometimes be quite serious cases of bullying at the hands of an adult. We have major concerns that such cases are yet another barrier to something that it is already difficult for children to do, particularly if the adult concerned is a well-respected person or a person in authority. We would hope that that barrier could be removed if things were done through an appropriate authority.”

In his statement to Committee, the Deputy Minister contrasted absolute privilege available to witnesses, amongst others, with the qualified privilege available to “someone making a complaint”. I highlighted in my Petition that, last year, the Parliament passed the Public Services Ombudsman Act of 2002 which gave statutory absolute privilege to anyone making any complaint, however malicious or ill-founded, to the Ombudsman. The underlying rationale for such privilege is the public interest. Does the Committee think that there is a higher degree of public interest in reports to the Ombudsman being made without any risk of a defamation claim than there is for young or vulnerable people being able to report and answer questions in private from those in authority without fear of such a claim being raised? There was no substantive change to defamation law in 2002, just Ombudsman law. Surely child protection law merits as much importance?
The fact is that young people who are “called as witnesses” and “required to give evidence” at hearings deliberating whether there is “enough evidence” to “substantiate... beyond reasonable doubt” are liable to harassment by actions for defamation. I illustrate that by appending letters where Dumfries and Galloway Council referred to “calling of witnesses”, (Appendix 2), the Minister for Education and Industry referred to “the treatment of school aged children who are required to give evidence” (Appendix 3) and one from the Minister for Education, Housing and Fisheries referring to “not enough evidence to substantiate beyond reasonable doubt” (Appendix 4) Thus, contrary to the Deputy Minister’s assertions, there are situations where those making complaints have absolute privilege while some witnesses appear to only have only qualified privilege.

If I may now turn to the Minister’s written answer which states that “Qualified privilege will protect a person from a claim of defamation.” That statement is simply untrue. Qualified privilege is a defence to be argued in court, not a protection from a claim being made. In Scotland, it is an issue to be considered after a Proof before Answer. By way of illustration, in the case brought against my son, the Sheriff decided on 22 May 2000 that the statements complained of were made on occasions of qualified privilege (Appendix 5). There followed two years of legal argument, involving approximately 30 interlocutors before Proof before Answer was heard in June 2002. Legal aid is not available at all. Where is the protection from a claim to which the Minister referred?

In my submission to the Committee in August, I highlighted some statements in an English case Taylor & Others v Director of the Serious Fraud Office 1998. I would remind members that Lord Hutton said “In my opinion the argument should not prevail that the defence of qualified privilege would give adequate protection to investigators and those who spoke to them because I consider that there would be a real risk that an unfounded allegation of malice made by a plaintiff bringing an action for defamation would subject an investigator or informant to harassment to which he should not be subjected”.

The Committee were interested in other cases of defamation claims against children. My final appendices, 6 and 7, refer to cases in Australia and California. In both the defendants were young girls, one 10 years old at the time of her arguably defamatory statement to her mother. In the American case, the alleged defamer was 6 years old and the Appeal Court decided that her telling her parents and grandparents in November 2000 about sexual abuse was an occasion of absolute privilege, reversing the decision of the lower court. (Smith v MD et al 2003) (Appendix 6) The Australian case found that a report about a teacher’s conduct was an occasion of qualified privilege and took three years to come before a jury. They decided that the statements were not made with malice and the teacher lost his case and was subsequently reported as facing bankruptcy. (Heminway v W and Collins.) (appendix 7) I do not know whether the girls in California or Melbourne had to finance their own defences, as they would have to in Scotland.

I would remind you that all I ask of the Committee is to remove the threat of defamation action which affects every young or vulnerable person who reports a concern or an event to an appropriate authority in private and subsequently co-operates with such an authority in investigating such a report.

Yours sincerely

Donald MacKinnon
Tuesday 30 September 2003

Col 192

Jackie Baillie: The risk of defamation action has been raised as a possible barrier to vulnerable witnesses coming forward. What protection is currently available, and do you think that there is a need to extend absolute privilege to individuals who are particularly vulnerable, such as children?

Hugh Henry: Cathy Jamieson recently answered a parliamentary question from you on that very matter. We have no plans to change the law on defamation. There is currently a distinction between the absolute privilege that is available to MPs, judges, advocates and witnesses and the qualified privilege that somebody making a complaint would be entitled to. This bill would not be the vehicle for changing the law on defamation and we have no other bills in the pipeline that would be suitable vehicles for such change. As things stand, it is not our intention to alter the law on defamation; doing that would have significant implications. We understand that it is a matter of balance, but as things stand at the moment the Executive has no intention of introducing any changes.

Justice

S2W-2416 - Jackie Baillie (Dumbarton) (Lab): To ask the Scottish Executive whether it will remove any threat of defamation action against a young person who reports a concern to an appropriate authority where that authority takes no action against the person about whose conduct the complaint is made; whether legislation will be required to achieve this, and, if so, what legislative process it will use.

Answered by Cathy Jamieson (19 September 2003): The Scottish Executive takes child protection very seriously and is committed to protecting children and young people from all forms of abuse. We have made firm commitments to improving child protection services in Scotland through a programme of reform over the next three years.

At the same time, we have a responsibility to individuals who may be accused falsely and maliciously of abuse. To remove wholly the threat of a defamation action – by giving young people absolute privilege, for example – could raise issues under the European Convention on Human Rights since it would impact upon the rights of a potentially defamed person.

At present, a person who reports concerns to an appropriate authority because they have a moral or social duty to do so will benefit from the protection of qualified privilege. Qualified privilege will protect a person from a claim of defamation unless it can be proved that the person making the defamatory statement was motivated by malice.

Our view is that any underlying concerns in this area are best addressed through guidelines on the handling of situations in which young people allege abuse, rather than by attempting to reconcile the divergent interests of accused and accuser through amendments to defamation law.
Messrs Balfour & Manson
Solicitors
54-66 Frederick Street
EDINBURGH
EH2 1LS

29 January 1997

Dear Sirs,

I refer to your letter of 22 January 1997, to the Education Department in respect of your abovenamed client. If you have any questions relating to the Council's evidence at the Hearing please direct such communications to me and not to the Education Department as I am representing them in this matter.

With regard to the evidence which will be put before the Committee, I would advise that the relevant papers are in the process of being sent out. Apart from the formal Committee Report which is the Motion for dismissal, the EIS and yourself perhaps will have seen all the background papers. In any event these papers will be with you very soon. It is likely that there will be, amongst others witnesses from the Education Department and the School. At this stage the witnesses from the Education Department and the School are liable to be Mr Chezeaud, the Rector, Mr Jones, Depute Rector, Mrs Barbour, Principal Teacher - Guidance and Mrs Dignan, Head of Secondary and Adult Education. I have made no decision as yet about the calling of any other witnesses including the children in question. It would be useful if you were to reciprocate by giving me the names of people who will be called by you. Likewise, if there are any papers which are going to be circulated by you. It would be very helpful if these could be forwarded to the Education Department and to me at your earliest opportunity.

Yours faithfully

Group Solicitor (Central)
Russell Brown Esq MP
House of Commons
London
SW1A 0AA

12th September 1997

Dear Russell,

Thank you for your letter of 28 July concerning the future treatment of school aged children who are required to give evidence at local authority disciplinary hearings, following an incident involving the son of a constituent.

First of all, I am, of course, aware of the circumstances surrounding this particular case. The parent in question has raised this matter on more than one occasion with his former Member of Parliament, Sir Hector Monro MP, who corresponded about this with my predecessor.

I can fully appreciate the reaction of the child’s father to the type of close questioning his son was subjected to at the disciplinary hearing. This must have been an extremely stressful and traumatic time, not only for the child, but also for his family. Following the events of the hearing, it was very unfortunate that the outcome was so inconclusive. In an effort to clarify the position for the future, I asked my officials to make enquiries of Dumfries and Galloway Council. I understand from the Council that they have now revised their procedures for handling disciplinary cases and have prepared guidance notes for headteachers which take account of the treatment of young witnesses who are called upon to give evidence at disciplinary hearings. This is to ensure that the lessons learned from this case are properly addressed for the future. I understand that this material is currently being considered by the Council’s education committee in draft form, while the Council awaits the outcome of national discussions within the Scottish Joint Negotiating Committee (SJNC) concerning proposed changes to the existing model disciplinary procedure for teachers. Dumfries and Galloway Council aim to introduce new procedures as soon as the position is clarified nationally.
I hope these comments have been helpful and that the prospective action taken by the Council will provide the appropriate safeguards for the future.

Yours sincerely

BRIAN WILSON
Dear Hector

Thank you for your letter of 26 February on behalf of your constituent, Donald John MacKinnon, 38 New Abbey Road, Dumfries, who is concerned about the trauma suffered by his son following his assault by a teacher at his school, and also at the time it is taking Dumfries and Galloway Council’s Education Committee to come to a decision about the future of the teacher concerned.

In view of the level of concern expressed by Mr MacKinnon, I asked my officials to make enquiries of Dumfries and Galloway Council. I understand from the Director of Education that following a great deal of deliberation, the Education Committee decided that there was not enough evidence to substantiate the allegations made against the teacher beyond reasonable doubt. The Council have therefore reinstated the teacher, but have sought to ensure as far as is possible that the interests of both the child and the teacher are protected. To this end the Council have retained the services of a supply music teacher thus ensuring that Mr MacKinnon’s son can continue his music studies without the need to come into contact with the other teacher. The Director of Education has also instructed the teacher concerned not to have any direct contact with Mr MacKinnon’s son. In the circumstances, this would seem to represent a sensible arrangement, allowing both parties to continue with their work at the school. Although your constituent will most likely be disappointed at the outcome of the Official Hearing, I am satisfied that the Council have done what they can to protect the interests of both parties in such a difficult situation.

It is, of course, very upsetting that Mr MacKinnon’s son was subjected to the kind of close questioning to which you have referred. I understand his father’s reaction. This has clearly been a very difficult, emotional and stressful time for his son. However, we cannot overlook the interests of the other party involved - the teacher. The career and, indeed, the reputation of the teacher was at stake and in these circumstances the teacher’s legal representative would have been trying to establish the facts.

GFEID/566/97

Recycled
With regard to the procedures governing the dismissal of teachers and the involvement of local authority Education Committees in that process, you may be aware that with effect from 1 April 1996 the Government repealed Schedule 10, Paragraph 6, of The Local Government (Scotland) Act 1973, which specified that teachers could only be dismissed by local authority education committees. This followed up the repeal in 1988 of Section 88 of the Education (Scotland) Act 1980 which set out the fairly elaborate procedures to be followed by local authority education committees in considering any proposal to dismiss a teacher. These procedures guaranteed consideration of each case by the committee and required the agreement of two thirds of the members present to endorse a dismissal proposal. The Government's view was that the provisions contained in both the 1973 Act and the 1980 Act were both cumbersome and exceedingly public, and had been overtaken by the safeguards contained in general employment protection legislation. As there was no justification for retaining this additional protection, teachers have now been put on an equal footing with other local government employees in this regard.

Following the repeal of Section 124 of the Local Government (Scotland) Act 1973, there is no longer a statutory requirement for local authorities to appoint education committees or indeed, for these committees to consider proposals for the dismissal of teachers. Scottish local authorities, including Dumfries and Galloway Council, are therefore free to make alternative appropriate arrangements, if they wish to do so, for the dismissal of teachers.

I hope these comments have been helpful.

Yours ever,

[Signature]

RAYMOND S. ROBERTSON
DUMFRIES: 22 MAY 2000. The Sheriff having resumed consideration of the Cause, Sustains the 3rd and 5th pleas-in-law for the pursuer insofar as the averments relate to a claim of absolute privilege; Sustains the 4th and 6th pleas-in-law for the pursuer; Repels the 2nd plea-in-law for the first defender and the 5th and 6th pleas-in-law for the first defender insofar as relating to a claim of absolute privilege; Repels the 1st and 5th pleas-in-law for the second defender; Sustains the 1st plea-in-law for the first defender and the 7th plea-in-law for the second defender to the extent of excluding from probation the penultimate sentence in Article 3 of the Condescendence, viz.: "The Defenders further repeated the said allegation on numerous occasions to other persons."; Quoad ultra Reserves all preliminary pleas; Allows the pursuer and the first and second defender a Proof Before Answer of their respective averments and appoints the Cause to the Roll on 25 May 2000 at 10 a.m. for a diet of Proof Before Answer to be then assigned; Finds the first and second defender liable to the pursuer in the expenses of the Debate and Allows an account thereof to be given in and Remits the same when lodged to the Auditor of Court to tax and to report; and decrees.

NOTE:

This action for reparation in respect of alleged defamation called for Debate in respect of the 1st and 2nd pleas-in-law for the first defender, and the 1st and 4th pleas-in-law for the second defender. During the course of the Debate, prior to presenting his argument, the Solicitor for the second defender sought leave to add a further preliminary plea as plea-in-law No. 7 — a general plea to the relevancy. This was opposed by the Solicitor for the pursuer but I allowed the amendment under reservation of all questions of expenses which might flow from the late addition of such a plea. The Solicitor for the pursuer could not really point to any prejudice to his client from the addition of such a plea as the matters were already subject of Debate in terms of the preliminary pleas for the first defender. There were also preliminary pleas-in-law Nos. 3, 4, 5 and 6 for the pursuer which in effect simply reflected as matter of law the pursuer’s position in relation to the questions raised on behalf of the defenders.

The incidents giving rise to the action occurred firstly on 28 November 1996 when the first and second defenders, who were fourth-year pupils at St. Joseph’s College, Dumfries where the pursuer was Principal Teacher of Music, had an altercation with the pursuer in the course of which the defenders allege that the pursuer punched the first defender. The defenders made this allegation to a prefect and to the Depute Rector, Mr. E. Jones on 28 November 1996. On 2 December 1996 the pursuer was suspended from his post pending investigation of the matter. On 4 December 1996 the defenders gave statements to Mr. J. Chezea, the Head Teacher repeating the allegation of assault. This was again repeated by the defenders on 16 December 1996 at a Disciplinary Hearing held by the Department of Education of Dumfries and Galloway Council, the pursuer’s employers, and the allegation was again repeated on 20 and 21st February and 2nd March 1997 at a Dismissal Hearing held by the Education Committee of Dumfries and Galloway Council. The pursuer was not however dismissed. The present action was served upon each defender on 3 December 1999.

The arguments for the first and second defenders covered three distinct areas — (1) Time-Bar; (2) Privilege; and (3) Damages.

Time-Bar:
Time-Bar:

The Solicitor for the first defender made reference to section 18A of the Prescription and Limitation (Scotland) Act 1973 as amended. [hereinafter referred to as “the 1973 Act”]. The crucial question was when the defamation first came to the notice of the pursuer. Reference was made to section 18A(4)(b). On the pursuer’s averments in Article 3 of the Condescendence this was on 2 December 1996. [although the pursuer even craved interest upon the damages sought from 28 November 1996] Any right of action accrued at the latest by 2 December 1996 but the action itself was only raised on 3 December 1999 and so fell ouwith the limitation period provided by section 18A of the 1973 Act. Subsequent repetitions by the defenders of the allegation of assault were identical and did not confer a separate right of action. No authority was referred to however for that last proposition.

This argument was adopted in its entirety by the Solicitor for the second defender.

The Solicitor for the pursuer maintained that a right of action accrued to the pursuer each time the defenders made the defamatory allegation. The pursuer was not suing in relation to the original allegation on 28 November 1996 but was suing in relation to the subsequent repetition by the defenders of the allegation in December 1996 and in February and March 1997. In the construction of section 18A of the 1973 Act reference might usefully be made for purposes of comparison to section 17(2)(a) which made provision for continuing negligence. Section 18A did not have such a provision. The pursuer was founding upon separate defamatory statements which all were made after 3 December 1996 and the action was accordingly raised timely in respect of each of these statements.

Privilege:

This matter was raised on the basis of the defenders’ general pleas to the relevancy. The Solicitor for the first defender maintained that the statements made by the defenders in the report to the Head Teacher on 4 December 1996, their evidence to the Disciplinary Hearing on 16 December 1996 and statements to the Dismissal Hearing in February and March 1997 were all covered by qualified privilege. The pursuer had conceded that such privilege attached to the initial report of matters which the defenders made to the Depute Rector, Mr. Jones on 28 November 1996. The subsequent statements were simply an extension of that process. The pursuer made no relevant averments of malice against the defenders so as to justify an inquiry in relation to these subsequent repetitions of the original allegation. There was also a totally unspecific averment in the penultimate sentence of Article 3 of the Condescendence that: “The Defenders further repeated the said allegation on numerous occasions to other persons.”

The Solicitor for the second defender adopted this argument as an alternative but maintained as his primary submission that the defenders were protected by absolute privilege when they made the allegations complained of by the pursuer. Reference was made to Stark v Barr.¹ This privilege covered not only their evidence but also the statements which they had given prior to giving evidence. Reference was made to Stair, Encyclopaedia². If, contrary to that principal submission, the privilege was qualified only the pursuer had not made sufficient averments of malice. The defenders were entitled to know how it was said that malice should be inferred. The pursuer in his averments in Article 2 of the Condescendence referred to having told the defenders that he would be in touch with their parents. That was sufficient reason for them thereafter to make the allegation against him without necessarily doing so maliciously.

¹ 1918 1 SLT 133
² vol. 15 para. 521
The Solicitor for the pursuer submitted that no privilege attached to the defenders or the occasions upon which they made the allegations against the pursuer. These were not quasi-judicial inquiries. Reference was made to *Trapp v Mackie*. Absolute privilege certainly did not apply. If qualified privilege attached to any of the occasions then the pursuer had made sufficient averment of malice by the averments in Article 4 of the Condescendance that the statements were false and calumnious. That there was no truth in the allegation that the pursuer had assaulted the first defender. Reference was also made to the pursuer’s averments in Article 6 of the Condescendance [page 16] to effect that the main issue in question is whether or not an assault took place and whether or not the defenders’ statements were false and malicious. Reference was made to *Stair, Encyclopaedia*. Both defenders were present at the time of the original incident. Since the assault did not take place their allegation to the contrary could only have been made by malice.

**Damages:**

The Solicitor for the first defender attacked the specification of the pursuer’s averments relating to damages in Article 5 of the Condescendance. There was no adequate specification as to what precise injury the pursuer had suffered or as to how this was causally connected with the defenders. It was not said that they had reported the matter to the press. The disciplinary hearing was the action of the employer. There was nothing to suggest substantial loss by the pursuer.

The Solicitor for the second defender adopted these arguments and further particularly took exception to the third-last sentence in that Condescendance.

The Solicitor for the pursuer submitted that the averments were sufficiently specific to give notice of the case which the pursuer sought to make.

It is convenient to deal in turn with the matters raised at Debate in the order in which they were argued.

**Time-Bar:**

Chronologically the matter starts with the incident which occurred on 28 November 1996 and what the defenders said about it to the prefect and then to the depute rector or deputy head teacher as he is otherwise referred to in the same Article of Condescendance. The pursuer does not aver whether he knew anything about these statements at the time, but makes the somewhat curious averments that:

"... Said Statements by the Defenders were made with a view to reporting a crime. It was natural that they would do so to a senior member of staff which in this case was Mr. Jones, the Deputy Head Teacher. It is accepted that they were given on a privileged occasion and not actionable. In any event any damage caused by them was minimal and trivial and would not justify bringing any proceedings..."

[The Solicitor for the pursuer explained at Debate that this concession was to effect that the initial complaint made by the defenders was covered by qualified privilege.]

Whatever the state of the pursuer’s knowledge of the complaint on 28 November 1996 it is clear from his averments in Article 3 of the Condescendance that he certainly had knowledge of it on 2 December 1996 when he “was suspended from his post pending the investigation being completed”. Applying section 18A to the situation as at 2 December 1996 it is clear that any right of action which the pursuer might have had in relation to the statements made

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3 1979 SLT 126
4 vol. 15 para. 538
5 Article 2, page 2 last 6 lines
on 28 November 1996 had accrued. [despite the somewhat odd assertion by the pursuer that the statements in question were “not actionable”.] For whatever reason however the pursuer makes it clear in his averments that he is not in any way attempting to found upon these statements as a ground of action and the issue in relation to time-bar accordingly relates to the statements made by the defenders on 4 December 1996 and subsequent to that date. The question is simply whether, given the fact that a right of action had arguably accrued to the pursuer by 2 December 1996, any subsequent statements relating to the same initial complaint made by the defenders simply form part of the original right of action or constitute separate rights of action as each statement came to be made and in each case first came to the notice of the pursuer. That matter is really settled by authority to effect that separate rights of action are constituted. “Each repetition is a new injury to the person slandered...” — Marshall v Renwick⁶, and while that case dealt with repetition by a person who was not responsible for the original slander, in the later case of Winn v Quillian the Court allowed separate issues against a defendant in respect of a slander which he had originated and thereafter allegedly repeated on a number of different occasions. There is really no reason in principle why a subsequent repetition of a defamatory statement should be subsumed within the right of action relating to the first statement. There may be very different circumstances applicable to the original incident on the one hand and the repetition on the other which affect the rights of a pursuer and defender respectively in relation to what has occurred. Accordingly I consider that the limitation provisions contained in section 18A of the 1973 Act do not operate to preclude the pursuer’s right of action in respect of statements made by the defenders on 4 December 1996 and subsequent to that date which form the grounds of the present action by the pursuer.

Privilege:

The bold contention by the Solicitor for the second defender to effect that the statements by the defenders to the Head Teacher and thereafter in evidence at the disciplinary and dismissal hearings of the employers’ Education Department were covered by absolute privilege, was maintained on the basis of Lord Anderson’s decision in Stack v Barr. Quite apart from the fact that Lord Anderson’s decision concerned a totally different type of factual investigation — an arbitration under statutory provisions — in which the statement complained of was made, the whole question is now clearly settled by the decision of the House of Lords in Trapp v Mackie, which the Solicitor for the second defender dealt with by ignoring that decision both in his initial argument and also in his reply to the argument by the Solicitor for the pursuer. The later decision makes it very clear that absolute privilege only extends to witnesses giving evidence in a Court of law or “before tribunals which, although not courts of justice, nevertheless act in a manner similar to that in which courts of justice act....”⁵⁷ The statements and evidence given by the defendants upon which the pursuer founds in this action did not relate to any such tribunal but merely to a disciplinary investigation and hearing for the purposes of the local authority employer. These domestic procedures by the employers did not require to and did not begin to equate to those of a tribunal acting in a manner similar to that in which courts of justice act. Not one of the features of the tribunal in the case of Trapp v Mackie which Lord Diplock⁵⁸ and Lord Fraser identified as equating to a court of law to justify the protection of absolute privilege for a witness applies to the hearings in the present case, even if language could be strained sufficiently to describe the two domestic hearings in question as “tribunals”. Accordingly I consider that the defendants are not entitled

⁶ 1835 13 S. 1127 per Lord President Hope at p. 1129
⁷ 1899 2 F.322 at p.324
⁸ 1918 1 S.L.T. 133
⁹ 1979 S.C(H.L.) 38; 1979 S.L.T. 126
¹² 1979 S.C(H.L.) 55; 1979 S.L.T at p.135
to invoke the protection of absolute privilege in respect of the statements complained of by the pursuer.

There remains however the question of qualified privilege. In this respect the argument for the pursuer against the applicability of such limited privilege is in turn virtually unassailable, given the concession on Record that the first statements made on 28 November 1996 were subject to privilege and were not actionable. Whether the defenders’ statements to the school authorities are viewed as reports of a crime or reports as to the behaviour of the pursuer as an employee, they are made in a context in which the defenders had a duty and interest to make the statements and the employers had a duty and interest to receive the information. I consider that it is very clear indeed that qualified privilege applies to the circumstances in which the defenders made the statements complained of by the pursuer on and after 4 December 1996.

Qualified privilege however does not protect the defenders if they are shown to have been acting from malice rather than duty. As matter of relevancy the Solicitors for the defenders questioned the adequacy of the pursuer’s averments of malice. The averments are sketchy in the extreme and are further confused by a typographical error. The averments have been quoted earlier in this Note, but basically what is being maintained by the pursuer is that the defenders knew that he had not assaulted the first defender and in consequence knew that the statements that they made in relation to that assault were false. An inference of malice can be drawn from such deliberately false statements. On the authorities that submission for the pursuer is well founded. Since the pursuer is alleging a deliberately false and malicious allegation made by the defenders the matter requires to proceed further to Proof Before Answer to determine that issue between the parties. That inquiry however does not extend to the wholly unspecific allegation by the pursuer in the penultimate sentence of Article 3 of the Condescendence that “The Defenders further repeated the said allegation on numerous occasions to other persons.” The Solicitor for the pursuer made no attempt to justify that averment at Debate and I accordingly exclude it from probation as being irrelevant and lacking in specification.

**Damages:**

The criticisms which the Solicitors for the defenders made of the pursuer’s pleadings in respect of damages were not really matters of fundamental importance nor was there obvious prejudice to either defender in allowing such averments to proceed to Proof. It is reasonably clear from the terms of Article 5 of the Condescendence what the pursuer’s general position in relation to damages amounts to. Nonetheless the defenders’ pleas to the relevancy cannot be repelled at this stage as the defenders’ position may still require to be protected as matter of relevancy in the light of the evidence which may sought to be led on behalf of the pursuer.

**Expenses:**

Parties were agreed that the expenses of the Debate should follow success. The pursuer has been substantially successful in relation to the arguments advanced.

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13 see generally, Stair op. cit. vol. 15, para. 528; Walker, Delict (2nd ed. 1981) pp.816-821;
14 see also Fraser v Mirza 1993 S.C.(H.L.) 27; 1993 S.L.T. 527

see McTernan v Bennett 1898 1 F. 333; Suzor v McIachlan 1914 S.C.306; Hayford v Forrester-Buton 1927 S.C. 740 per Lord Justice-Clerk Alness at p. 754;
California Anti-SLAPP Project

Smith v. M.D. et al.

Cite as: 105 Cal.App.4th 1169, 130 Cal.Rptr.2d 315

James SMITH, Plaintiff and Respondent
v.
M.D. et al., Defendants and Respondents

M.D., a Minor, etc., Petitioner
v.
Los Angeles County, Respondent;
James Smith, Real Party in Interest

California Court of Appeal, Second District, Div. 2
Nos. B159868, B160628
Filed Jan. 30, 2003

ORIGINAL PROCEEDING; petition for writ of mandate. Frank Y. Jackson, Judge. Petition granted and appeal dismissed.

COUNSEL:
Law Offices of Michael Thomas, Janet L. Keuper and Mirth White for Petitioner.

No appearance by Respondent.

Stephen C. Moore for Real Party in Interest.

BOREN, P.J.

Real party in interest, James Smith, brought a defamation action against petitioner M.D., a minor. Smith alleged that M.D., at six years of age, falsely reported to her grandmother, her parents and the police that Smith had sexually molested her. When M.D.'s demurrer was overruled, this petition for writ of mandate followed. We hold that the Child Abuse and Neglect Reporting Act (Pen.Code, § 11164 et seq.) [FN 1] (Act), including the privileges set forth therein, does not apply to minors who report claimed sexual abuse, and that such minors are therefore entitled to assert the absolute privilege contained within Civil Code section 47, subdivision (b) (Civil Code section 47(b)). Because we conclude the trial court erred in overruling M.D.'s demurrer, we
will issue a peremptory writ of mandate directing respondent court to vacate its order overruling M.D.'s demurrer and to enter an order sustaining the demurrer without leave to amend.

FN1. All further statutory references will be to the Penal Code unless otherwise specified.

I. FACTUAL AND PROCEDURAL BACKGROUND

We take the relevant facts from Smith's complaint, and, in accordance with the standard of review, must take these alleged facts to be true. (Moore v. Conliffe (1994) 7 Cal.4th 634, 638; Phillips v. Desert Hospital Dist. (1989) 49 Cal.3d 699, 702.) We also accept as true all facts appearing in exhibits attached to the complaint. [FN 2] (Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal.App.3d 1624, 1627.)

[FN 2] To the complaint Smith attached police reports and other documents describing relevant events.

In November 2000, M.D., then six years of age, falsely accused Smith of "performing various sexually deviant acts" upon her person. These statements were made first to M.D.'s grandmother and then to M.D.'s parents. After her parents reported the alleged molestation to the police, M.D. was interviewed by police officers. M.D. repeated the accusations to the police. At the time M.D. made each of the statements she knew them to be false. As a result of M.D.'s false accusations, Smith was arrested, booked and jailed. On January 10, 2001, the criminal complaint was dismissed pursuant to section 1385. [FN 3] On January 7, 2002, Smith filed suit against M.D. for defamation. [FN 4]

[FN 3] Section 1385, subdivision (a) provides that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

[FN 4] The complaint set forth three causes of action for slander, based on three different publications.

M.D. demurred to the complaint, urging that Smith had failed to state facts sufficient to constitute a cause of action against her because her statements to her caregivers and the police were absolutely privileged under Civil Code section 47(b). M.D. also asserted that public policy requires that children of tender years be immune from defamation lawsuits based on reports of child sexual abuse.

The trial court overruled M.D.'s demurrer, rejecting her public policy argument. The court also held that minors who report sexual abuse are permissive reporters under section 11166, subdivision (e) [FN 5] of the Act. Relying on Roe v. Superior Court (1991) 229 Cal.App.3d 832 (Roe), the court found that statements made by M.D.'s caregivers to the police could be imputed to M.D. for the purposes of the Act. Citing Begier v. Strom (1996) 46 Cal.App.4th 877 (Begier), the court held that the specific privileges set forth within section 1172, subdivision (a) [FN 6] of the Act override all other privileges, including those contained within Civil Code section 47(b). In other words, M.D., as a permissive reporter, was entitled to assert the section 11172,
subdivision (a) qualified privilege, but not the absolute privilege set forth within Civil Code section 47(b). This petition for writ of mandate followed.

[FN 5] Section 11166, subdivision (c) provides: "Any other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse or neglect may report the known or suspected instance of child abuse or neglect to an agency specified in Section 11165.9."

[FN 6] Section 11172 provides as follows: "No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused. No person required to make a report pursuant to this article, nor any person taking photographs at his or her discretion, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse or neglect, or causing photographs to be taken of a suspected victim of child abuse or neglect, without parental consent, or for disseminating the photographs with the reports required by this article. However, this section shall not be construed to grant immunity from this liability with respect to any other use of the photographs. (b) Any person, who, pursuant to a request from a government agency investigating a report of suspected child abuse or neglect, provides the requesting agency with access to the victim of a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of providing that access. (c) The Legislature finds that even though it has provided immunity from liability to persons required or authorized to make reports pursuant to this article, that immunity does not eliminate the possibility that actions may be brought against those persons based upon required or authorized reports. In order to further limit the financial hardship that those persons may incur as a result of fulfilling their legal responsibilities, it is necessary that they not be unfairly burdened by legal fees incurred in defending those actions. Therefore, a mandated reporter may present a claim to the State Board of Control for reasonable attorney's fees and costs incurred in any action against that person on the basis of making a report required or authorized by this article if the court has dismissed the action upon a demurrer or motion for summary judgment made by that person, or if he or she prevails in the action. The State Board of Control shall allow that claim if the requirements of this subdivision are met, and the claim shall be paid from an appropriation to be made for that purpose. Attorney's fees awarded pursuant to this section shall not exceed an hourly rate greater than the rate charged by the Attorney General of the State of California at the time the award is made and shall not exceed an aggregate amount of fifty thousand dollars ($50,000). 'This subdivision shall not apply if a public entity has provided for the defense of the action pursuant to Section 995 of the Government Code.' (d) A court may award attorney's fees and costs to a commercial film and photographic print processor when a suit is brought against the processor because of a disclosure mandated by this article and the court finds this suit to be frivolous."

II. ISSUES

This petition raises several contentions. First, M.D. urges that minors reporting sexual molestation do not qualify as permissive reporters under the Act. Second, she argues that a six-year-old minor reporting claimed sexual abuse first to her caregivers and then to the police is entitled to assert the absolute privilege set forth in Civil Code section 47(b). Finally, she claims that minors of tender years should be immune from defamation lawsuits based on allegations of child sexual abuse.
III. DISCUSSION

A. Writ Relief

"[A]n order overruling a demurrer is not directly appealable but may be reviewed on appeal from the final judgment." (San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 912-913.) "Appeal is presumed to be an adequate remedy and writ review is rarely granted unless a significant issue of law is raised, or resolution of the issue would result in a final disposition as to the petitioner." (C’esterson v. Superior Court (2002) 101 Cal.App.4th 177, 182.) This petition raises issues of first impression, the resolution of which in M.D.’s favor will result in a final disposition as to her.

B. Standard of Review

In considering the propriety of an order overruling a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. (Traders Sports, Inc. v. City of San Leandro (2001) 93 Cal.App.4th 37, 43.) "We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts properly pled. [Citations.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.]" (Ibid.) "A general demurrer will lie where the complaint 'has included allegations that clearly disclose some defense or bar to recovery.' [Citation.] Thus, a demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense. [Citation.]" (C’esterson v. Superior Court, supra, 101 Cal.App.4th at p. 183.)

The interpretation of the Act is a pure question of law which we review independently. (Rothman v. Jackson (1996) 49 Cal.App.4th 1134, 1139-1140.)

C. The Act does not apply to minors reporting claimed sexual abuse.

The Act requires "a mandated reporter" who "has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect" to make a report to certain designated agencies. (§ 11166, subd. (a).) "Any other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse" may make a report, but is not required to do so. (§ 11166, subd. (e).) These individuals are known as permissive reporters. (Thomas v. Chadwick (1990) 224 Cal.App.3d 813, 819-820, fn. 8.) Section 11172, subdivision (a) provides "[a]ny other person" who makes a child abuse report with qualified immunity.

Smith argues that a six-year-old minor such as M.D. qualifies as "[a]ny other person" as that term is used in sections 11166, subdivision (e) and 11172, subdivision (a), and that M.D. is therefore a permissive reporter under the Act. M.D. responds that the phrase "any other person" refers to third parties who report instances of known or suspected child abuse, not to children who report their own sexual child abuse.
In 1974, Congress enacted the Child Abuse Prevention and Treatment Act of 1974. (Pub.L. No. 93-247 (Jan. 31, 1974) 88 Stat. 4; codified in 42 U.S.C. 5101 et seq.) "Congress intended the federal act to facilitate state programs whose objective is to prevent, identify and treat victims of child abuse. [Citation.]" (Thomas v. Chadwick, supra, 224 Cal.App.3d at p. 825.) Toward that goal federal grants were authorized, conditioned on the requirement that states have laws providing "for the reporting of known or suspected instances of child abuse and neglect." (Former C.F.R. § 1340.3-3(d)(2)(i)). The requirement was "deemed satisfied if a State requires specified persons by law, and has a law or administrative procedure which requires, allows, or encourages all other citizens, to report known or suspected instances of child abuse and neglect to one or more properly constituted authorities with the power and responsibility to perform an investigation and take necessary ameliorative and protective steps." (Ibid., italics added.)

In 1975, our Legislature enacted former Section 11161.6, California's first permissive reporting statute. It allowed, but did not require, "probation officer[s]" who "observe" suspected child abuse to make a report to certain specified agencies. (Former § 11161.6.)

In 1976, former section 11161.6 was amended to provide as follows: "In any case in which a minor is observed by a probation officer or any person other than a person described in Section 11161.5 and it appears to the probation officer or person from observation of the minor that the minor has a physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, or that any injury prohibited by the terms of section 273a has been inflicted upon the minor, he may report such injury to the agencies designed in Section 11161.5.[ ] No probation officer or person shall incur any civil or criminal liability as a result of making any report authorized by this section unless it can be proven that a false report was made and the probation officer or person knew or should have known that the report was false." (Former § 11161.6.)

"Legislators expected that by including lay people as reporters and providing protection for people against possible liability for making reports, the system would be more likely to uncover ongoing child abuse. Neighbors, relatives and friends might be privy to private information or observations which professionals would miss." (Marrus, Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency, supra, 11 Geo. J. Legal Ethics at p. 515, fn. omitted.)
Review of the Act, together with application of the principles of statutory interpretation, persuade us that M.D. is not a permissive reporter under the Act.

"The fundamental goal of statutory interpretation is to ascertain the Legislature's intent to effectuate the purpose of the law, focusing not only on the words used but also the objectives of the statute, the evils to be remedied and the legislative history of the statute. [Citation.]" (Thomas v. Chadwick, supra, 224 Cal.App.3d at p. 821.)

The evil to be remedied, i.e., the abuse of children, is an evil that has tragic consequences for both the child victim and our society. [FN 7] (Hale & Underwood, Child Abuse: Helping Kids Who Are Hurting (1991) 74 Marq. L.Rev. 560, 561 ["Victims of child abuse and neglect exhibit devastating consequences as adults. Statistically, these individuals have lower IQs, a higher frequency of suicide attempts and more alcohol-related problems. Furthermore, they are significantly more prone to become abusers themselves"]) fn omitted.

[FN 7] "Child abuse and neglect are not modern occurrences. Greek and Roman records suggest the predominance of child abuse during those times. 'Because their fathers could sell, abandon, or maltreat them, Roman children occupied the status of chattels.' Witness accounts throughout history provide vivid stories of how children have been ruthlessly tortured, whipped, burned, disfigured, and even killed." (Richardson, Physician/Hospital Liability for Negligently Reporting Child Abuse (2002) 23 J. Legal Med. 131, 132, fn omitted.) "Even as late as the mid-1800s, infanticide was accepted as a means to control population size and to rid the population of people with birth defects. Children were sold into slavery or used for cheap labor. Abusive practices were common in society at large and parents were influenced by these practices." (Marrus, Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency (1998) 11 Geo. J. Legal Ethics 309, 513, fn omitted.) The first reported criminal cases involving child abuse in the United States date back to the late 1860s. However, it was not until 1874 that the first documented civil child protection case appeared. It was this case that prompted concerned citizens to organize the New York Society for the Prevention of Cruelty to Children. (Trout, Chilling Child Abuse Reporting: Rethinking The CAPTA Amendments (1998) 51 Vand. L.Rev. 183, 189.) By 1905, 400 additional organizations had been formed to prevent cruelty to children or to intervene upon discovery of cruelty. (Freiman, Unequal And Inadequate Protection Under The Law: State Child Abuse Statutes (1982) 50 Geo. Wash. L.Rev. 243, 244.) These organizations were instrumental in calling attention to the maltreatment of children, in bringing criminal complaints against perpetrators, and in placing thousands of neglected children in institutional care. (Trout, Chilling Child Abuse Reporting: Rethinking The CAPTA Amendments, supra, 51 Vand. L.Rev. at p. 189.)

In 1962, the publication of "The Battered Child Syndrome" by Dr. C. Henry Kempe drew wide public attention to the problem of child abuse for the first time. (Singley, Failure To Report Suspected Child Abuse: Civil Liability of Mandated Reporters (1998) 19 J. Juv. L. 236, 228.)

In 1963, California, recognizing the necessity for early detection and reporting of child abuse, became the first state to adopt a mandated child abuse reporting statute when it added former section 11161.5 [FN 8] to the Penal Code. [FN 9] The statute required physicians and surgeons to report suspected instances of child abuse to designated local agencies when it appeared to these professionals "from observation of the minor that the minor may have been a victim" of child abuse. "Physicians were targeted ... because of the assumption that they were more likely than other groups to come in contact with injured children." (Trout, Chilling Child Abuse Reporting: Rethinking The CAPTA Amendments, supra, 51 Vand. L.Rev. at p. 192, fn. 47.)
Also in 1976, our Supreme Court held in Landeros v. Flood (1976) 17 Cal.3d 399 (Landeros) that former section 11161.5 was ambiguous with respect to the state of mind of a physician accused of failing to make a required report of child abuse. The court opined that to prove actionable failure to report, a battered child would be required to show that the physician actually "observed" the injuries and formed the opinion that they were intentionally inflicted upon the child. (Landeros v. Flood, supra, 17 Cal.3d at p. 415.)

In November 1978, the state Department of Justice estimated that only about 10 percent of all cases of child abuse were being reported. (Stecks v. Young (1995) 38 Cal.App.4th 365, 371.) Faced with this reality, a growing population of abused children and the need to comply more fully with federal guidelines, in 1980 the Legislature repealed former sections 11161.5 and 11161.6, and enacted the Child Abuse Reporting Law (§ 11165 et seq.), "a comprehensive scheme of reporting requirements 'aimed at increasing the likelihood that child abuse victims are identified.' [Citations.]" (Stecks v. Young, supra, 38 Cal.App.4th at p. 371.)

The 1980 version of the Act inserted the element of "knowledge" into the required and permissive reporting provisions so that specified individuals would be required to report, and others would be authorized to report, not only direct observations of child abuse, but also "knowledge" of suspected child abuse obtained directly from the child and/or from other sources. (§ 11166, subds. (a)-(c); [FN 10] 65 Ops.Cal.Atty.Gen. 345 (1982).) In addition, the reporting standard was revised to require reporting whenever there exists a "reasonable suspicion" of child abuse. (Krikorian v. Barry (1987) 196 Cal.App.3d 1211, 1217.) These changes were made to address the Landeros court's determination that the existing reporting statute was ambiguous. [FN 11] (Ibid.)

[FN 10] In 1980, section 11166, subdivision (a) read as follows: "Except as provided in subdivision (b), any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she reasonably suspects has been the victim of child abuse shall report such suspected instance of child abuse to a child protective agency immediately or as soon as practicably possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing upon his or her education, knowledge and experience, to suspect child abuse. Subdivision (c) provided that "[a]ny person who had knowledge of or observes a child whom he or she reasonably suspects has been a victim of child abuse may report such suspected instance of child abuse to a child protective agency."

[FN 11] The Legislature made clear that in repealing former sections 11161.5, 11161.6, and in enacting the 1980 Child Abuse Reporting Law it did not intend "to alter the holding in the decision of [Landeros], which imposes civil liability for a failure to report child abuse." (See Historical and Statutory Notes, 51C West's Ann. Pen.Code (2000 ed.) foll. § 11165, p. 566.)

Simultaneously, permissive reporters were granted qualified immunity. [FN 12] It was believed that "extending the limited civil and criminal immunity to "any other person making a report of child abuse or molestation" [would] encourage members of the general public to report known cases of child abuse,' and that "'[t]he limitation on the total immunity for false or negligent reports [was] necessary to prevent a vindictive former spouse or neighbor from making a knowingly false report." (Storch v. Silverman (1986) 186 Cal.App.3d 671, 680, citing State Bar of Cal., Rep. on Assem.
Bill No. 2497 (1979-1980 Reg. Sess. p. 2); State Bar of Cal., Comm. on Juv. Justice, letter to Sen. Omer L. Rains, Feb. 20, 1980 (opining that providing complete immunity to permissive reporters was unwarranted because it would allow "third persons (e.g., a vindictive neighbor or relative) to make a malice-based report and be totally immune from civil or criminal liability").

[FN 12] Former section 11172, subdivision (a) provided, in relevant part: "No child care custodian, medical practitioner, nonmedical practitioner, employee of a child protective agency, or commercial film and photographic print processor who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false."

Following the 1980 enactment, our Legislature continuously amended the reporting provisions as experience revealed areas in need of repair. In 1987, the Legislature once again recast the law, renaming it the Child Abuse and Neglect Reporting Act. (§ 11164, subd. (a), added by Stats.1987, c. 1444, § 1.5.)

In its current form, the Act defines a "child" as "a person under the age of 18 years." (§ 11165.) "Child abuse or neglect" is defined generally as "physical injury inflicted by other than accidental means upon a child by another person." (§ 11165.6.) It also means sexual abuse, which includes sexual assault and sexual exploitation. (§ 11165.1.)

The purpose and intent of the Act "is to protect children from abuse and neglect." (§ 11164, subd. (b).) All persons participating in the investigation of suspected child abuse or neglect are required to "consider the needs of the child victim," and to "do whatever is necessary to prevent psychological harm to the child victim." (Ibid.) The objective of the Act "has been to identify victims, bring them to the attention of the authorities, and, where warranted, permit intervention." (Stecks v. Young, supra, 38 Cal.App.4th at p. 371; see also Storch v. Silverman, supra, 186 Cal.App.3d at p. 678 [legislative scheme was "designed to encourage the reporting of child abuse to the greatest extent possible to prevent further abuse"]).

Thirty-four statutorily enumerated classes of individuals are identified as "mandated reporters" under section 11165.7 of the Act. These individuals are required to "make a report to an agency specified in Section 11165.9 whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." (§ 11166, subd. (a), italics added.) The report must be made "immediately or as soon as is practicably possible by telephone," and the reporter is required to "prepare and send a written report thereof within 36 hours of receiving the information concerning the incident." (Ibid.) Failure to comply with the reporting requirements is punishable as a misdemeanor. (§ 11166, subd. (b).)

Permissive reporters are described in section 11166, subdivision (e) of the Act as follows: "Any other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse or neglect may report the known or suspected instance of child abuse or neglect to an agency specified in Section 11165.9." [FN 13] (§ 11166, subd. (e), italics added.)
The agencies referred to in section 11165.9 include "any police department or sheriff's department, not including a school district police or security department, county probation department, if designated by the county to receive mandated reports, or the county welfare department." (§ 11165.9.)

"[T]he immunity is a key ingredient in maintaining the Act's integrity." (Steekes v. Young, supra, 38 Cal.App.4th at p. 375.) Section 11172, subdivision (a) provides that "[n]o mandated reporter shall be civilly or criminally liable for any report required or authorized by this article." The absolute immunity conferred on mandated reporters was granted to "obviate the chilling effect the spectre of civil lawsuits would have upon a reporter's willingness to become involved." (Thomas v. Chadwick, supra, 224 Cal.App.3d at p. 821; see also Storch v. Silverman, supra, 186 Cal.App.3d at p. 677 [broad immunity provided by the Legislature in recognition of the burden placed upon those professionals required to report instances of suspected and known child abuse].)

With respect to permissive reporters, section 11172, subdivision (a) grants only qualified immunity. "Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, and any person who makes a report of child abuse or neglect known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused." (Italics added.)

Smith, focusing on the words "any other person" as used in sections 11166, subdivision (e) and 11172, subdivision (a) contends the Legislature obviously meant to include six-year-old minors as permissive reporters. To resolve the issue, we look first to the words of the statute. "When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms." (Dobo v. Workers' Comp. Appeals Bd. (1993) 5 Cal.4th 382, 387-388.)

The language of the earlier versions of the reporting statutes is plain. Mandated reporters were required to report (former § 11161.5), and permissive reporters (former § 11161.6) were allowed to report, child abuse if the reporter "observed" suspected abuse. The word "observe" means "To perceive; notice. 2. To watch attentively; observe a child's behavior." (American Heritage Dict. (2d college ed.1982) p. 858.) Sexual abuse is inflicted upon a child. The abuse is experienced, not observed. We therefore conclude that the earlier versions of the mandated and permissive reporting provisions referred to third parties and not to children reporting their own alleged abuse.

Current versions of the reporting provisions include, in addition to individuals who "observe" suspected child abuse, individuals who have "knowledge of" a child whom the reporter "knows or reasonably suspects has been a victim of child abuse or neglect." (§ 11166, subds.(a)(c).) The word "knowledge is defined as: "1. The state or fact of knowing. 2. Familiarity, awareness, or understanding gained through experience or study. 3. The sum or range of what has been perceived, discovered, or learned. 4. Learning; erudition." (American Heritage Dict. (2d college ed.1982) p. 705.) It could be argued that a child "has knowledge of" his or her own abuse when he or she experiences it, and thus qualifies as a permissive reporter.
Continued in Part Two
Smith v. M.D. et al. (concluded)

We are mindful, however, that we do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness. (People v. Pieters, supra, 52 Cal.3d 894, 899.) Nothing contained within the Act suggests that any of its "reporting" provisions are applicable to minors alleging sexual abuse. The Act's definition of "child" (§ 11165), definitions relating to mandating reporting and training (§ 11165.7), provision concerning investigating a child abuse complaint by a parent or guardian against a school employee (§ 11165.14), duty to report provisions (§ 11166) and the "required information" provisions relating to reports (§ 11167) all suggest that "reporters of child abuse" subject to the Act are third party reporters. The Act describes three classes of individuals, mandated reporters, permissive reporters and the protected class, children. The language of the Act makes clear that it applies to the reporting of suspected child abuse and statements made in connection therewith, and not statements made by the protected class to their caregivers and to authorities investigating a subsequently filed complaint.

Our conclusion is bolstered by the legislative history of the Act which establishes that mandated reporters are third parties who, because of their professions, come into close contact with children, and thus are in an ideal position to report suspected child abuse. What section 11166, subdivision (e) evidences is the Legislature's concern that other individuals who come into contact with children be encouraged to report known or suspected child abuse. It seems clear that our Legislature was aware that friends, relatives, and neighbors file the largest number of child abuse reports (Freiman, Unequal And Inadequate Protection Under The Law: State Child Abuse Statutes, supra, 50 Geo. Wash. L.Rev. at p. 259), and that in recognition of this fact section 11166, subdivision (e) was enacted as a catchall provision necessary to encourage these individuals, as well as other third parties, to report known or suspected instances of child abuse.

At least one legal commentator has reached the same conclusion. "Child abuse laws, as most laws concerning children in our society, stem from society's need to protect children, rather than from a concern about children's rights. If an adult is assaulted, he or she is more likely to be capable of reporting the incident to the authorities. Society's view of children, however, is that a child may be too young to protect himself or too frightened to report the abuse to the appropriate authorities." (Marrus, Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency, supra, 11 Geo. J. Legal Ethics at p. 514.) [FN 14] "Because of this reasoning, it is unlikely ... that when legislators expanded the reporting statutes to include everyone as a discretionary or mandatory reporter that they meant to include the abused child in that category. As stated, the reporting statutes were first developed because of the belief that children need added protection. It is unrealistic to expect the
abused child to self report the abuse. If all children were capable of doing this, there 
would be no need for reporting statutes. Children would call Child Protective Services 
on their own and the state would be able to intervene to protect the child." (Id. at p. 
514, fn. 24.)

[FN 14] The author notes that Michigan is the only state to include children as reporters, and 
optines that children were included "to encourage a child who observed another child being 
abused to feel comfortable reporting the abuse to the appropriate authorities." (Marus, Please 
Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency, 
supra, 11 Geo. J. Legal Ethics at p. 514, fn. 24.)
The language of section 11166, subdivision (e), together with the structure and 
legislative history of the statute, convince us that the phrase "a ny other person" used 
in sections 11166, subdivision (e) and 11172, subdivision (a) means third persons who 
acquire knowledge, or observe injuries or other signs indicating that a child has been 
abused. Our conclusion is consistent with the purpose of the Act which is to "combat 
child neglect and the physical, emotional and sexual victimization of children." (Planned 
child protection is aimed at discovering more cases and preventing serious harm by 
taking remedial action."].)

D. Roe and Begier are inapplicable.

The trial court, citing Roe, held that the statements made by M.D.'s grandmother and 
M.D.'s parents to the police could be imputed to M.D. for purposes of the Act. Roe is, 
of course, inapplicable since we have held that the Act does not apply to minors such as 
M.D. who report their own alleged child abuse. Moreover, Roe is distinguishable.

In Roe, a husband sued his former wife for defamation, claiming that the wife, a 
permissive reporter under the Act, knowingly made a false report of child sexual 
abuse to a psychotherapist, a mandated reporter under the Act, with the purpose of 
caus ing the psychotherapist to file a false suspected child abuse report. (Roe, supra, 
229 Cal.App.3d at pp. 835, 841-843.) The Roe court held, properly we believe, that if 
it could be proved that the wife engaged the services of the psychotherapist for the 
purpose of causing a false child abuse report to be filed with the police, equity would 
require the report be imputed to the wife, for the purposes of the Act. (Id. at p. 843.)

The Roe holding makes sense because psychotherapists are mandated reporters under 
the Act and are required, under threat of criminal prosecution, to report allegations 
of child abuse to the authorities. (§ 11166, subd. (b).) [FN 15] Here, however, a 
permissive reporter (if we accept Smith's interpretation of the Act) told her caregivers, 
also permissive reporters under the Act, that she had been sexually abused. Unlike the 
wife in Roe, M.D. could not be assured her caregivers would forward her allegations 
to the authorities because her caregivers were permissive reporters, and, as such, 
could not be held criminally or civilly liable for failing to do so.

[FN 15] Section 11166, subdivision (b) provides that "a ny mandated reporter who fails to 
report as incident of known or reasonably suspected child abuse or neglect as required by this 
section is guilty of a misdemeanor punishable by up to six months confinement in a county 
jail or by a fine of one thousand dollars ($1,000) or by both that fine and punishment."
*Begier*, too, is inapplicable. In that case, the plaintiff filed an action against his former wife for malicious prosecution and intentional infliction of emotional distress based upon her alleged conduct in filing a false police report accusing plaintiff of molesting the couple's daughter and repeating that charge in the couple's dissolution action. (*Begier, supra*, 46 Cal.App.4th at p. 880.) The trial court sustained the wife's demurrer as to the intentional infliction of emotional distress cause of action, but overruled the demurrer as to the malicious prosecution count. (*Ibid.*) The Court of Appeal affirmed the judgment as to the cause of action for malicious prosecution, but reversed as to the cause of action for intentional infliction of emotional distress. (*Id.* at p. 882.) The *Begier* court held that the alleged false accusations within the dissolution action were privileged under Civil Code section 47(b). (*Begier, supra*, 46 Cal.App.4th at p. 882.) The court also held, however, that even if the filing of a false child abuse police report is subject to the litigation privilege found in Civil Code section 47(b), the Legislature's direction in section 11172 that a person who knowingly makes a false report of child abuse "is liable for any damages caused" creates a limited exception to the privilege. (*Begier, supra*, 46 Cal.App.4th at pp. 883-885.)

In reaching its decision, the *Begier* court discerned within the Act "a legislative effort to balance, on the one hand, the public interest in ferreting out cases of child abuse so that the child victims can be protected from harm and, on the other hand, the policy of protecting the reputations of those who might be falsely accused. [Citation.] The Legislature has struck that balance by withholding immunity from those who knowingly make false reports of child abuse. If we were to hold that same conduct privileged under Civil Code section 47, we would essentially nullify the Legislature's determination that liability should attach." (*Begier, supra*, 46 Cal.App.4th at p. 885, fn. omitted.)

The crucial distinction between *Begier* and the instant case is that unlike the former wife in *Begier*, M.D. is not a permissive reporter under the Act. Accordingly, she is entitled to assert privileges found outside the Act, including the privilege embodied within Civil Code section 47(b).

**E. M.D. is entitled to assert the absolute litigation privilege set forth in Civil Code section 47(b).**

M.D. contends her statements to her grandmother, her parents and the police are subject to the absolute litigation privilege found in Civil Code section 47(b).

Civil Code section 47(b) provides an absolute immunity for any communication made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law...."

The privilege "promotes effectiveness of judicial proceedings by encouraging 'open channels of communication and the presentation of evidence' in judicial proceedings. [Citation.] A further purpose is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213.) The
privilege "is given a broad application in furtherance of the public policy it is

1. M.D.'s statements to the police.

M.D. contends her statements to the police are privileged as statements made in any
"other official proceeding authorized by law." We agree.

California appellate courts are split on the issue of whether the absolute privilege of
Civil Code section 47(b) shields testimony or statements to officials conducting
criminal investigations. (Beroiz v. Wahl (2000) 84 Cal.App.4th 485, 495.) The
(Williams), which concluded that the absolute privilege shielded the report to the
police by a president of a car dealership of what he believed to be criminal activity
conducted by a discharged employee. (See, e.g., Beroiz v. Wahl, supra, 84
Cal.App.4th at pp. 495, 489-490 [statements by residents of a condominium complex
initiating a criminal investigation against plaintiffs in Mexico absolutely privileged];
101, 112 [company's communication to police accusing terminated employee of threat
of violence protected by absolute privilege of Civil Code section 47(b) even if the
report was made in bad faith]; Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996)
47 Cal.App.4th 777, 781-783 [law firm's letters to third persons in connection with
the firm's investigation preparatory to filing a complaint with the Attorney General
held rationanally connected to anticipated litigation]; Passman v. Torkan (1995) 34
Cal.App.4th 607, 616-620 [letter by party to district attorney's office recommending
investigation and prosecution of opposing party subject to absolute privilege of Civil
Code section 47(b)]; Hunsucker v. Sunnyvale Hilton Inn (1994) 23 Cal.App.4th 1498,
1502-1505 [absolute privilege of Civil Code section 47(b) applied where hotel
management called police upon being informed by a maid that a customer was seen
brandishing a gun]; Cote v. Henderson (1990) 218 Cal.App.3d 796, 806 [report of
rape to police was absolutely privileged under Civil Code section 47(b)]; Kim v.
Walker (1989) 208 Cal.App.3d 375, 383 [attorney's communications to plaintiff's
parole agent were absolutely privileged]; Johnson v. Symantec Corp. (N.D.Cal.1999)
58 F.Supp.2d 1107, 1113 [police reports were absolutely privileged under Civil Code
section 47(b)(3)]; Forro Precision, Inc. v. Intern. Business Machines (9th Cir.1982)
673 F.2d 1045, 1056 [communications by IBM officials to police were absolutely
privileged].

The other side of the split is represented by Fenelon v. Superior Court (1990) 223
Cal.App.3d 1476 (Fenelon) which holds that a knowingly false police report is not
absolutely privileged, as the police department is not a quasi-judicial body. (Id. at pp.
1478, 1483.) According to the Fenelon court, false police reports are entitled to only
the qualified privilege for communications to interested parties. (Id. at p. 1483.)
Fenelon, however, has been criticized by cases following Williams on the basis that
"the constitutional and procedural safeguards governing California's judicial system
undermine the concern that applying the absolute privilege to police reports endangers
the rights of the reported wrongdoer." (Beroiz v. Wahl, supra, 84 Cal.App.4th at pp.
495-496.) While the Williams court recognized the importance of communication
between citizens and the police, and that effective investigation requires an open
channel of communication that would not be possible if a qualified rather than an absolute privilege applied (Williams, supra, 129 Cal.App.3d at pp. 753-754), the Fenelon court feared abuse of the absolute privilege.

We agree with the Williams court, and conclude that police investigations are official proceedings within the meaning of the absolute official proceeding privilege of Civil Code section 47(b). Thus, we conclude that M.D.'s statements to the police that Smith sexually abused her are absolutely privileged.

2. M.D.'s statements to her parents and her grandmother.

We next consider whether the absolute litigation privilege applies to protect the allegedly defamatory statements made by M.D. to her parents and grandmother.

To be protected under the privilege statements must be made: (1) in, or in anticipation of litigation; (2) by participants in the litigation; (3) in order to achieve the objects of the litigation; and (4) they must have some "connection or logical relation to the action." (Rothman v. Jackson, supra, 49 Cal.App.4th at p. 1145.)

It is clear that M.D.'s statements to her caregivers that Smith had sexually abused her were logically related to the criminal proceeding that followed, and that the statements were made in order to achieve the objects of the litigation. Smith claims, however, that the privilege is inapplicable under the facts of this case because the record is devoid of any evidence showing that the statements were made in anticipation of litigation, and because M.D.'s caregivers were nonparticipants in the criminal action. We disagree.

Smith claims that the privilege applies "only if, when the statement is made, litigation is actually and in good faith suggested or proposed. Thus, M.D.'s statement[s] to her caregivers are] absolutely protected only if, when she made the statement[s], either she or her caregivers had suggested in good faith referring the matter to law enforcement." While most adults would know that protection and/or relief for wrongs perpetrated upon them is available from governmental authorities such as the police, we cannot conclude that a child of tender years would have the same sophisticated knowledge. It is the parents who would know to seek relief from the police and/or courts for the protection of the child. The fact that M.D.'s parents contacted the police following M.D.'s statements shows that they contemplated initiating a criminal investigation. This, we believe, is sufficient.

We also believe that under the facts presented M.D.'s caregivers must be considered participants in the criminal litigation. M.D.'s communications were made to her parents and grandmother, individuals who are charged with not only her care, but also her protection. We have no difficulty in concluding that children of tender years, such as M.D., simply do not think to pick up the telephone and report alleged sex abuse by a neighbor to the police. Under ordinary circumstances their first instinct would be to seek the counsel of an adult such as a parent, grandparent or trusted friend. (Ayala & Martyn, "To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter's Privileges (1993) 9 St. John's J. Legal Comment 163, 179["W]hen children are faced with a serious problem and are unsure about how to
handle themselves, their first reaction is usually to seek assistance and advice from their parents. Because children are inclined to confide in their parents, there exists a need for the free flow of highly personal information"). If such an individual reports the incident to the police on behalf of the child, that person necessarily becomes involved in any criminal litigation flowing from the child's report of abuse. We conclude that under the facts of this case, where the alleged victim is of tender years, and has communicated an alleged crime to trusted adults, those adults must be considered "participants" in any criminal and/or civil litigation that follows. [FN 16]

[FN 16] Parents and other adults who report child abuse and neglect based on information from minors are permissive reporters under the Act. As such they are entitled to qualified, rather than absolute, immunity. (§ 11172, subd. (a).) Nothing contained in this opinion should be construed to mean that parents and other caregivers who report child abuse to the police are entitled, as a result of being a minor's conduit to the police, to absolute immunity. We find support for our conclusion in the guardian ad litem statute which provides that children under the age of 12 may not seek any relief from the courts in the absence of the appointment of a guardian ad litem to protect the minor's interest (Code Civ. Proc., § 372, subs. (a)) and in De Los Santos v. Superior Court (1980) 27 Cal.3d 677 which holds that knowledge obtained by a minor's parent, as guardian ad litem, to secure information to communicate to an attorney, is protected by the attorney-client privilege, as though the minor had communicated directly to the attorney. (Id. at pp. 683-684.)

Allowing minors such as M.D. to assert the absolute privilege found in Civil Code section 47(b) promotes the principal purpose of the statute, which "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations]." (Silberg v. Anderson, supra, 50 Cal.3d at p. 213.) It also promotes California's interest in identifying child abuse victims. (Storch v. Silverman, supra, 186 Cal.App.3d at p. 676 ["The state has a strong interest in the prevention of child abuse. Since the child abuser often repeats the abuse, identification of a victim offers an opportunity for intervention by authorities. However, identification is often difficult due to the natural characteristics of the child and the private or special circumstances in which the abuse may occur"], fn. omitted.)

F. A malicious prosecution action is not viable.

The fact that a communication may be absolutely privileged under Civil Code section 47(b) for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. (Fremont Comp. Ins. Co. v. Superior Court (1996) 44 Cal.App.4th 867, 877.) "The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied. [Citations]." (Albertson v. Raboff (1956) 46 Cal.2d 375, 382.)

"A termination is favorable when it reflects "the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant." [Citation.] 'It is not enough ... merely to show that the proceeding was dismissed.' [Citation.] The termination must demonstrate the

Here, the criminal action was dismissed in the interest of justice pursuant to section 1385. Such a dismissal is generally not deemed a favorable termination of the proceedings because it leaves open the question of the defendant's guilt or innocence. (De La Riva v. Owl Drug Co. (1967) 253 Cal.App.2d 593, 599-600 [holding a dismissal pursuant to section 1385 reflects ambiguously on the merits of the action as it "implies considerations which would favor each side to [the] litigation"]; accord (Minasian v. Sapse (1978) 80 Cal.App.3d 823, 827, fn. 4.) Under the circumstance, it would appear that Smith does not have a claim for malicious prosecution.

G. Public policy does not preclude suits for defamation against minors.

M.D., citing public policy considerations, contends that children seven years of age and younger should be immune from defamation lawsuits based on the reporting of child abuse. We find no support for such a contention in the law.

The tort of defamation arises from intentional harm to an individual's reputation, and has two forms, libel [FN 17] and slander. [FN 18] (Lundquist v. Reuss (1994) 7 Cal.4th 1193, 1203.) Civil liability for defamation exists as the result of an "intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage. [Citations.] Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made." (Ringler Associates Inc. v. Maryland Casualty Co. (2000) 80 Cal.App.4th 1165, 1179.)

[FN 17] Libel is statutorily defined as follows: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which cause him [or her] to be shunned or avoided, or which has a tendency to injure him in his [or her] occupation." (Civ.Code, § 45.)

[FN 18] Slander is statutorily defined as follows: "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: [ ] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [ ] 2. Imputes to him [or her] the present existence of an infectious, contagious, or loathsome disease; [ ] 3. Tends directly to injure him [or her] in respect to his [or her] office, profession, trade or business, either by imputing to him [or her] general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his [or her] office, profession, trade, or business that has a natural tendency to lessen its profits; [ ] 4. Imputes to him [or her] impotence or a want of chastity; or [ ] 5. Which, by natural consequence, causes actual damage." (Civ.Code, § 46.)

The general proposition that an infant is liable for his torts is established in California by Family Law section 6600 which provides that "[a] minor is civilly liable for a wrong done by the minor, but is not liable in exemplary damages unless at the time of the act the minor was capable of knowing that the act was wrongful." Section 6600 "indicates clearly that the Legislature intended that a minor ... should be liable in compensatory damages for his tortuous conduct even though he was not capable of
knowing the wrongful character of his act at the time he committed it." (Mullen v. Bruce (1959) 168 Cal.App.2d 494, 497 [discussing former Civil Code section 41 [FN 19]].)

[FN 19] Former Civil Code section 41, enacted in 1872, provided: "A minor, or a person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful." Family Law section 6600 "continues without substantive change the part of former Civil Code section 41 that related to minors. The part of the former section that related to persons of unsound mind is continued in new Civil Code Section 41." (Cal. Law Revision Comm., 29 E West's Ann. Fam. Code (1994 ed.) foll. § 6600, p. 58.)

Other authorities have upheld the general rule that a child of tender years may be held liable for his or her torts. (Weisbart v. Flohr (1968) 260 Cal.App.2d 281 [holding a seven-year-old boy who willfully threatened a five-year-old girl with harm through shooting of an arrow at or toward her, and who thereafter made good the threat and, consequently, inflicted an assault and battery on the girl, responsible for damage caused by him irrespective of whether or not he was guilty of technical negligence]; Singer v. Marx (1956) 144 Cal.App.2d 637 [holding a nine-year-old boy responsible for striking a neighborhood girl with a rock thrown by him in the direction of two neighbor girls living on the same street]; Ellis v. D'Angelo (1953) 116 Cal.App.2d 310 [holding a four-year-old defendant could be sued for damage caused by a battery when he pushed the plaintiff violently to the floor].)

Smith, pointing to Civil Code section 48.7, [FN 20] which prohibits a person charged with child abuse from bringing a defamation action against a minor and others while criminal charges are pending, contends that our Legislature must have contemplated meritorious actions for defamation against minors reporting child sexual abuse. We disagree. Section 48.7 was enacted "to prevent a person accused of crimes against children from intimidating victims, witnesses and parents by filing or threatening to file a civil slander or libel action" while the criminal action was pending. (Sen. Republican Caucus, 3d reading analysis of Assem. Bill No. 42, (1981-1982 Reg. Sess.) as amended June 17, 1981, p. 2.) The proponents of the legislation argued that the legislation was necessary because "the tactic of bringing a defamation action may produce a chilling effect on the willingness of persons to participate in the prosecution of actual crimes against the minors." (Ibid.) We view the enactment of Civil Code section 48.7 as an acknowledgement of the litigious nature of our society, and recognition of the possibility that defamation actions could be filed against minors, including those of tender years, as tactical maneuvers.

[FN 20] Civil Code section 48.7, subdivision (a) provides: "No person charged by indictment, information, or other accusatory pleading of child abuse may bring a civil libel or slander action against the minor, the parent or guardian of the minor, or any witness, based upon any statements made by the minor, parent or guardian, or witness which are reasonably believed to be in furtherance of the prosecution of the criminal charges while the charges are pending before a trial court. The charges are not pending within the meaning of this section after dismissal, after pronouncement of judgment, or during an appeal from a judgment. [ ] Any applicable statute of limitations shall be tolled during the period that such charges are pending before a trial court."

While we are satisfied that the statements here were privileged under Civil Code section 47(b), we believe that the question of immunity from such lawsuits is a matter best left to the Legislature.

H. M.D.'s appeal from the denial of her anti-SLAPP motion is moot.
M.D. filed, concurrently with her demurrer, a special motion to strike Smith's defamation complaint under Code of Civil Procedure section 425.16 (the anti-SLAPP statute). She argued that her statements to her caregivers and the police were absolutely privileged under Civil Code section 47(b). When the motion was denied, M.D., through her guardian ad litem, filed a timely notice of appeal.

The anti-SLAPP statute permits a defendant to file a special motion to strike in response to a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights. (Gallimore v. State Farm Fire & Casualty Ins. Co. (2002) 102 Cal.App.4th 1388, 1395.) The statute provides in pertinent part that, "[a] cause of action arising from any act of that person in furtherance of the person's right of petition or free speech ... in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) Although we believe the statute, which is to be construed broadly (Code Civ. Proc., § 425.16, subd. (a)), applies to Smith's defamation complaint, we need not decide the issue since we have determined, in connection with the writ petition, that the statements made by M.D. to her caregivers and the police are absolutely privileged pursuant to Civil Code section 47(b), and that M.D.'s demurrer should, therefore, have been sustained without leave to amend. We thus conclude that M.D.'s appeal from the order denying her Code of Civil Procedure section 425.16 motion is moot.

IV. CONCLUSION

By this reversal we preclude Smith from any relief or compensation for the grievous injury which we must assume, based upon our required acceptance of the truth of his pleadings, resulted from intentionally false and malicious acts on the part of M.D. "We do so because we are obligated to honor the determination of the Legislature that protection of one innocent segment of society warrants occasional injury to another." (Thomas v. Chadwick, supra, 224 Cal.App.3d at p. 827.)

V. DISPOSITION

Let a writ of mandate issue directing the superior court to set aside its order overruling petitioner's demurrer to real party's complaint for defamation, and issue a new and different order sustaining without leave to amend petitioner's demurrer to the complaint. Petitioner's appeal (B159868) is dismissed. The temporary stay is vacated. Petitioner is awarded the costs of this petition.

We concur: NOTT, and DOI TODD, JJ.
SECTION: NEWS; Pg. 2

LENGTH: 341 words

HEADLINE: Bankruptcy fear in slander claim loss

BYLINE: KELLY RYAN

BODY:
A JURY yesterday threw out a primary school teacher's landmark legal claim for slander.

Stephen Geoffrey Hemingway is believed to be facing bankruptcy after being ordered to pay the legal costs of those he unsuccessfully tried to sue.

The 45-year-old bachelor claimed he was defamed by a 10-year-old student and Princes Hill Primary School principal Gillian Collins over allegations he had looked down girls' tops and up their dresses. He also attempted to sue the Education Department for breach of contract, claiming the girl's comments caused the end of his 21-year teaching career.

But County Court Judge Frank Shelton dismissed that part of Mr Hemingway's claim on Thursday, ruling the teacher was technically since employed by the department.

A day earlier, the judge dismissed Mr Hemingway's civil action against the girl, now aged 13. He ruled that the girl had not shown malice when she repeated her claims about Mr Hemingway to her mother.

Six female jurors took an hour to find against Mr Hemingway.

It found that Ms Collins had not defamed Mr Hemingway by repeating the girl's claims in the presence of a teaching union official on June 11, 1998.

The jurors had heard Mr Hemingway had been shocked and angry when told of the girl's allegations against him.

But it had also heard that he had been aware of "vicious rumours" circulated by students about him as early as 1994.

The defamation case, unusual for the youthful age of one of the defendants, attracted legal interest.

The child defendant -- who cannot be identified -- appeared in court in school uniform every day with her father.

Now a high school student, the girl said she had not known what the word pervert meant earlier on the day she told her mother that Mr Hemingway was one.

Now a law student at university, Mr Hemingway lives in his Coburg home with his mother and sister.

The legal costs awarded against him are expected to run into tens of thousands of dollars.

Neither Mr Hemingway nor Ms Collins commented on the verdict.

LOAD-DATE: November 12, 2001
Written Answers

Thursday 18 September 2003

(S2W-2415)
Jackie Baillie (Dumbarton) (Lab): To ask the Scottish Executive whether it will remove any threat of defamation action against a young person who reports a concern to an appropriate authority where that authority takes no action against the person about whose conduct the complaint is made; whether legislation will be required to achieve this, and, if so, what legislative process it will use.

Cathy Jamieson: The Scottish Executive takes child protection very seriously and is committed to protecting children and young people from all forms of abuse. We have made firm commitments to improving child protection services in Scotland through a programme of reform over the next three years.

At the same time, we have a responsibility to individuals who may be accused falsely and maliciously of abuse. To remove wholly the threat of a defamation action – by giving young people absolute privilege, for example – could raise issues under the European Convention on Human Rights since it would impact upon the rights of a potentially defamed person.

At present, a person who reports concerns to an appropriate authority because they have a moral or social duty to do so will benefit from the protection of qualified privilege. Qualified privilege will protect a person from a claim of defamation unless it can be proved that the person making the defamatory statement was motivated by malice.

Our view is that any underlying concerns in this area are best addressed through guidelines on the handling of situations in which young people allege abuse, rather than by attempting to reconcile the divergent interests of accused and accuser through amendments to defamation law.
Written Answers

Friday 31 October 2003

Legislation

David Mundell (South of Scotland) (Con): To ask the Scottish Executive whether it will introduce legislation to amend the defamation laws as suggested in petition PE578 to the Parliament.

(S2W-3147)

Cathy Jamieson: Petition PE578 invites the Scottish Parliament to consider extending absolute privilege to children and other vulnerable people reporting abuse to an appropriate authority.

At present, any person, including the alleged victim, who reports such matters to an appropriate authority will benefit from the protection of qualified privilege. Qualified privilege will protect the person from a successful claim of defamation, unless it can be proved that the person making the defamatory statement was motivated by malice.

The Scottish Executive takes child protection very seriously and is committed to protecting children and young people from all forms of abuse. However, the Executive also has a responsibility to individuals who may be accused falsely and maliciously of abuse. Extending absolute privilege to young people could impact unfairly on the rights of a potentially defamed person. The practical effect of extending absolute privilege would be to offer protection to an individual who maliciously makes false allegations of abuse. The Executive does not consider that it is necessary or desirable to do this to achieve the objective of protecting children and young people.

The underlying concerns in this area are best addressed through guidelines on the handling of situations in which young people allege abuse, rather than by attempting to reconcile the divergent interests of accused and accuser through amendments to defamation law.
Background

1. Petition PE659 (attached) by Mr Graham Sturton calls for the Scottish Parliament to carry out a review of sentencing policy on violent crime in Scotland.

2. Mr Sturton’s concerns regarding sentencing policy are promoted by his own experiences: the sentence given to the individual who was convicted of murdering his daughter was reduced on appeal. The petitioner is aware that the Parliament is unable to intervene in an individual case and has made it clear that he is not asking the committee to do so. However, the petitioner requested that the petition be forwarded to the justice committee as a demonstration of the strength of feeling on the general issue. Members will wish to note that 1,800 people signed the petition.

3. The Public Petitions Committee considered the petition on 29 October when it agreed to forward the petition to the Justice 1 Committee.

Consideration of Petition PE375

4. Members will recall Petition PE375 by Mrs Elaine Crawford which called for the Scottish Parliament to carry out a review of the criminal injuries compensation procedure and policy and a review of sentencing policy on violent crime. At its meeting on 28 October 2003, the Committee agreed that, given the work carried out by the previous Justice 1 Committee on sentencing and the establishment of the Sentencing Commission, it would note the petitioner’s concerns in relation to sentencing and pass the petition to the Sentencing Commission for information.

5. It is because the Justice 2 Committee considered the issue of sentencing policy on violent crime in relation to PE375 that PE659 has been referred to it.

Consideration of sentencing policy

6. In June 2001 the Justice 1 Committee of the previous Parliament commissioned NFO System Three to conduct a research study into public attitudes towards sentencing and the use of imprisonment in Scotland. The findings of this research were published on 11 March 2002.¹ In September

¹ http://www.scottish.parliament.uk/S1/official_report/cttee/just1-02/j1r02-pats-01.htm
2001 the Committee agreed to consider the issue of sentencing policy once its research on attitudes to sentencing was complete. The Committee’s report on the inquiry into Alternatives to Custody was subsequently published in March 2003.²

Sentencing Commission for Scotland

7. On 1 September 2003 Lord MacLean was appointed to the Chair of the new Sentencing Commission. The Commission is intended to “tackle head-on the public’s ongoing concerns about sentencing - and form a central plank in building public trust in the justice system.” Specifically, the Commission will examine:

- The scope to improve consistency of sentencing;
- The effectiveness of sentences in reducing re-offending;
- The arrangements for early release from prison, and supervision of short term prisoners on their release;
- The basis on which fines are determined.³

8. On 18 November 2003 the full membership of the Sentencing Commission for Scotland was announced by the Justice Minister Cathy Jamieson. The Commission will initially examine the early release of prisoners from Scottish jails and their subsequent supervision, and the effectiveness of the use of bail and remand in ensuring public safety. The Commission will go on to examine the key areas of consistency of sentencing, the effectiveness of sentencing in reducing re-offending, and the basis on which fines are determined. The Commission met for the first time on Wednesday 26 November 2003 and again on Monday 5 January 2004. The Commission will tackle its remit on a staged basis, issuing reports and making recommendations to Ministers as it completes each area of its work. It is expected that the Commission will consult widely in the course of its work.

Procedure

9. The Standing Orders make clear that, where the Public Petitions Committee refers a petition to another committee, it is for that committee then to take “such action as they consider appropriate” (Rule 15.6.2(a)).

Options

10. Given the work carried out by the previous Justice 1 Committee on sentencing and the recent establishment of the Sentencing Commission, the Committee is invited to note the petitioner’s concerns in relation to sentencing and forward the petition to the Sentencing Commission, highlighting the clear strength of feeling demonstrated by the 1,800 people who signed the petition.

Clerk to the Committee

January 2004

² [http://www.scottish.parliament.uk/S1/official_report/cttee/just1-03/j1r03-03-vol01-01.htm](http://www.scottish.parliament.uk/S1/official_report/cttee/just1-03/j1r03-03-vol01-01.htm)

³ Scottish Executive press release, 1 September 2003