REPORTS

STEWART v PAYNE

HIGH COURT OF JUSTICIARY

The Lord Justice Clerk (Lady Dorrian) and Lords Menzies and Drummond Young: 9 December 2016

[2016] HCJAC 122; 2017 S.L.T. 159

Justiciary—Private prosecutions—Families of pedestrians killed in road traffic accidents presenting bills for criminal letters seeking authority to prosecute drivers privately—Driver in each case having lost consciousness at relevant time—Crown determining insufficient evidence of foreseeability—Whether Crown erring in decisions not to prosecute—Whether special circumstances justifying passing of bills.

Families of pedestrians who died in road traffic accidents presented bills for criminal letters seeking authority to prosecute the drivers in terms of ss.1, 1A and 2 of the Road Traffic Act 1988, or alternatively at common law for culpable and reckless driving causing death. The second complainers further sought authority to prosecute on six charges of contravening s.174(1)(a) of the 1988 Act, three charges of obtaining employment or promotion by fraud, and a charge under s.2 of the 1988 Act. In each case, the respondent had lost consciousness at the relevant time and had not been prosecuted by the Crown on the basis of insufficient evidence of foreseeability. The Lord Advocate refused his concurrence to the bills.

Held, (1) that the complainers had both title and interest in relation to the first, and alternative, charge in each bill but the remaining charges were of a general and public nature, lacking the interest, personal and peculiar to a complainer, which was necessary before a bill of criminal letters might be passed (para.81); (2) that the critical question was the quality of the driving at the time of the collision and the Crown had correctly focused on the days in question; it was clear that each respondent's state of knowledge on the relevant day had to be assessed in the context of all the information known to them, including their medical history and any inferences which might reasonably be drawn therefrom, and no error of law had been made (para.84); (3) that permission for a private prosecution would only be granted in exceptional circumstances (paras 85–89); (4) that the test of exceptionality required a complainer to show that the Lord Advocate's decision not to prosecute had to be viewed as an egregious or outrageous failure in the exercise of his public duty and it was difficult to conceive of circumstances in which the court would pass a bill where the Lord Advocate had examined and investigated the case and concluded as a matter of informed judgment that the whole tenor and weight of the evidence did not justify prosecution (paras 91 and 101); (5) that neither respondent's state of knowledge could reasonably be elevated to the degree necessary to be capable of establishing beyond reasonable doubt that on the day in question they drove in the face of an obvious and material danger (paras 97–101); and bills *refused*.

J & P Coats, Ltd v Brown (1909) 6 Adam 19, *distinguished*.

Observed, that there were strong public policy reasons for the requirement of exceptionality before the court would be entitled to pass a bill of criminal letters (para.96).

Opinion, that even if the court had disagreed with the Crown's assessment, or the weight attributed to individual pieces of evidence, it would have been unable to conclude that the Lord Advocate's decision not to prosecute was so extravagantly wrong as to amount to special circumstances justifying the passing of the bills in either case (para.101).

Bills for criminal letters

John and Linda Stewart and Alan and Aileen Convy presented bills for criminal letters seeking authority to prosecute William Payne, and Matthew and Jacqueline McQuade and Yvonne Reilly presented bills for criminal letters seeking authority to prosecute Henry Clarke, each in terms of ss.1, 1A and 2 of the Road Traffic Act 1988, or alternatively at common law for culpable and reckless driving causing death.

The second complainers further sought authority to prosecute the second respondent on six charges of contravening s.174(1)(a) of the 1988 Act, three charges of obtaining employment or promotion by fraud, and a charge under s.2 of the 1988 Act.

Cases referred to

Advocate (HM) v Harris (Andrew), 1993 J.C. 150; 1993 S.L.T. 963; 1993 S.C.C.R. 559.
Alexander (Helen) v Dunn [2016] HCJAC 3; 2016 J.C. 125; 2016 S.L.T. 337.
C v Forsyth, 1995 S.L.T. 905; 1995 S.C.C.R. 553.
J & P Coats Ltd v Brown, 1909 S.C. (J.) 29; (1909) 6 Adam 19; 1909 1 S.L.T. 432.
McBain v Crichton, 1961 J.C. 25 (sub nom Mc Bain v C) 1961 S.L.T. 209.
Meehan (Patrick Connelly) v Inglis, 1975 J.C. 9; 1974 S.L.T. (Notes) 61.
Montgomery v HM Advocate, 2001 S.C. (P.C.) 1; 2001 S.L.T. 37; 2000 S.C.C.R. 1044.
Mowbray (Lynne Agnes) v Crowe, 1993 J.C. 212; 1994 S.L.T. 445; 1993 S.C.C.R. 730.
R v Marison (Lee John) [1997] R.T.R. 457; [1996] Crim. L.R. 909; (1996) 93(29) L.S.G. 29.
Stuurman (Jan Cornelius) v HM Advocate, 1980 J.C. 111; 1980 S.L.T. (Notes) 95.
X v Sweeney 1982 J.C. 70 (sub nom Sweeney v X) 1982 S.C.C.R. 509.

The bills were heard before the High Court.

On 9 December 2016 the court *refused* the bills.

The following opinion of the court was delivered by the Lord Justice Clerk (Lady Dorrian):

OPINION OF THE COURT.—

Background

[1] These are two bills for criminal letters which were heard together. For the sake of convenience they will be referred to under the name of the respondent in each case.

William Payne

[2] On 17 December 2010 in North Hanover Street, Glasgow, William Payne was driving a Range Rover vehicle, registered number H18 HEX when he suffered a vasovagal episode causing him temporarily to lose consciousness and rendering him unable to control the movement or direction of the vehicle. The vehicle mounted the pavement and struck Mhairi Convey and Laura Stewart, causing them injuries from which they died. A further pedestrian, Mark Hopwood, was injured. In March 2012 the Crown intimated to the complainers its decision to take no criminal proceedings against the respondent in respect of s.1 of the Road Traffic Act 1988. The basis upon which the Crown took that decision was that there was insufficient evidence in law to justify such proceedings. In publicly confirming that decision the Crown stated that:

> "In order to bring a criminal prosecution the Crown would need to prove that the driver knew that to drive on the day of the incident was to do so in the face of a known and obvious danger — that he was liable to lose consciousness while driving that morning. Following consideration of all the evidence Crown counsel has concluded that the Crown cannot prove this and as a result has instructed no proceedings."

The decision was not communicated to the respondent.

[3] In January 2016 a bill for criminal letters was presented on behalf of the parents of each of the deceased seeking authority to prosecute the respondent in terms of ss.1, 1A and 2 of the Road Traffic Act 1988 or alternatively at common law for culpably and recklessly driving the vehicle, causing the deaths and injuring Mark Hopwood.

[4] The complainers allege that on the date of the accident the respondent was driving: "in the knowledge that for the period between 25 December 2007 and 17 December 2010, both dates inclusive, he suffered from unexplained dizziness and multiple episodes of loss of consciousness ('blackouts') without provocation, warning or prodrome and consequently had a medical condition that made it unsafe for him to drive."

[5] The basis upon which they advance the assertions in the charge will be apparent from the submissions recorded below, but it essentially lies in averments as to the respondent's medical history involving prior instances of loss of consciousness, his failure to seek advice about driving or to disclose his history to DVLA, the contents of a police interview and the inferences which, according to the complainers, may be drawn from this evidence as to the state of his knowledge about his condition. The complainers also seek authority to bring two further charges, one in terms of s.174(1)(a) of the 1988 Act in respect of knowingly making false statements for the purpose of obtaining a licence and a further charge under s.94(3) of that Act for failing to notify the Secretary of State in writing of a relevant disability.

[6] The complainers aver that there is a sufficiency of evidence which would entitle a conviction to be returned on the charges set out, that the evidence is of apparently sufficient strength to demonstrate reasonable prospects of conviction, and that there are special circumstances existing such as to warrant the granting of the bill. They further aver that the Crown has erred in its analysis of the evidential requirements for the statutory offence of causing death by dangerous driving.

[7] The complainers assert title and interest in respect of all of the charges. The respondent concedes title and interest in relation to the primary charge only. He asserts that there is insufficient evidence to justify proceedings, and that in any event there are no special circumstances to justify passing the bill. Furthermore, it would be oppressive and a breach of the respondent's art.6 rights to do so having regard to (a) excessive delay in proceeding; (b) prejudicial publicity and (c) oppressive actings by the complainers.

[8] The Lord Advocate has refused his concurrence to the bill. He disputes title and interest in respect of the second and third charges only. He asserts that there is insufficient evidence to establish beyond reasonable doubt any of the charges set out in the bill and that *esto* such a sufficiency exists there are no special circumstances justifying passing of the bill.

Harry Clarke

[9] On the afternoon of 22 December 2014, John Sweeney, Lorraine Sweeney, Erin McQuade, Stephanie Tait, Gillian Ewing and Jacqueline Morton were all pedestrians on Queen Street, Glasgow, when they were struck and killed by a Glasgow City Council bin lorry driven in the course of his employment by the respondent. The respondent had lost consciousness, as a result of which the lorry mounted the pavement and hit the pedestrians. A further 15 pedestrians were injured as well as two members of the lorry crew.

[10] On 25 February 2015 the Crown Office and Procurator Fiscal Service issued a public statement renouncing the right to prosecute the respondent. The reasons were subsequently elaborated on in a statement posted on the Crown Office website which stated:

> "In order to prove death by dangerous driving, the Crown requires to prove that the driving fell far below what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that driving in that way would be dangerous.
> As the driver was unconscious at the time he was not in control of the vehicle and did not have the necessary criminal intention, unless it could be proved that it was foreseeable that he would lose consciousness whilst driving that day. In the words of the statute (the Road Traffic Act 1988), regard should be had to whether he was aware or could be expected to be aware that he had an ongoing condition which rendered it unsafe to drive that day.
> Crown counsel considered that there was insufficient evidence that it was foreseeable that he would lose consciousness whilst driving that day".

[11] On 5 January 2016 a bill for criminal letters was raised in the name of the relatives of Erin McQuade, John Sweeney and Lorraine Sweeney. The bill seeks authority to prosecute the respondent on a charge under ss.1, 1A and 2 of the Road Traffic Act 1988 or alternatively for the common law offence of culpably and recklessly driving the vehicle on the date in question and causing the deaths of the pedestrians. The complainers assert that the respondent drove: "dangerously in the knowledge that for the period between 30 June 1976 and 22 December 2014, both dates inclusive, he suffered from dizziness, vertigo, vasovagal attacks, blackouts and in particular had suffered a loss of consciousness behind the wheel of a bus on 7 April 2010 without warning or provocation and consequently had a medical condition that made it unsafe for him to drive. "

[12] The basis upon which they advance the assertions in the charge is set out below, but it essentially lies in averments as to the respondent's medical history, his failure to disclose that history in job applications and to DVLA, his alleged misrepresentations as to that history, his post collision actings and what, according to the complainers, may be inferred from this evidence as to the state of his knowledge about his condition. The complainers also seek authority to bring further charges against the respondent, namely: six charges of contravening s.174(1)(a) of the 1988 Act (in respect of statements made on separate occasions,

two of them occurring after the fatal collision); three charges of obtaining employment or promotion by fraud; and a final charge (11) under s.2 of the 1988 Act, alternatively of culpable and reckless driving, on 20 September 2015.

[13] The complainers aver that there is a sufficiency of evidence which would entitle a conviction to be returned on the charges set out, that the evidence is of apparently sufficient strength to demonstrate reasonable prospects of conviction, and that there are special circumstances existing such as to warrant the granting of the bill. They further aver that the Crown has erred in its analysis of the evidential requirements for the statutory offence of causing death by dangerous driving.

[14] The complainers make averments in relation to title and interest in respect of all of these charges. The respondent concedes title and interest in relation to the primary charge but disputes title and interest in relation the remainder. The relevance of charges post dating the fatal collision is disputed. It is averred that in any event charge 11 is the subject of live proceedings at the instance of the Crown. The respondent asserts that there is insufficient evidence to justify proceedings, and that in any event there are no special circumstances to justify the passing of the bill. Furthermore, he avers that it would be oppressive to pass the bill having regard to (a) excessive delay in taking proceedings; (b) prejudicial publicity and (c) the complainers' involvement in precognition of the respondent during the FAI, in disregard of his privilege against self incrimination. They are thus personally barred from proceeding against him.

[15] The Lord Advocate has refused his concurrence to the bill. He disputes title and interest in respect of the second and third charges only, and echoes in all respects the pleas of the respondent in relation to charges 9, 10 and 11. The Lord Advocate maintains that there is insufficient evidence to establish beyond reasonable doubt any of the charges set out in the bill and that *esto* such a sufficiency exists there are no special circumstances justifying passing of the bill.

Submissions

[16] In accordance with custom in cases of this kind the court heard submissions first from the Lord Advocate. It is clear from the authorities that the accepted procedure in applications of this sort is that the role of the Crown is to explain for the benefit of the court the reasons for refusing to grant concurrence to the bill.

Lord Advocate

Title and interest

[17] To bring a private prosecution an individual must show a wrong personal to themselves, from which they have suffered injury of a substantial nature beyond all others, giving them a special and peculiar interest in bringing proceedings. A wrong of a general and public nature was not sufficient. Title and interest was conceded in respect of the first charge in each bill, or the alternative charge under that heading. However the remaining charges were statutory offences of a general and public nature which would not justify private prosecution. In the case of Clarke, three of the charges post dated the offence for which the complainers have title and interest. In relation to the eleventh charge, the Crown had raised proceedings rendering private prosecution incompetent. There is no authority that evidential charges for which a party would not otherwise have title and interest may competently be included in a bill for criminal letters for that reason alone. Evidence relevant to proof of the primary charge may be led, even though tending to show commission of another crime not charged. Any issue of fair notice is met by the averments set out in the bill or could be met by means of a common law docquet.

Sufficiency of evidence

[18] The complainers would require to lead sufficient admissible, corroborated, credible and reliable evidence such as might reasonably be expected to establish the charges beyond a reasonable doubt. A person was to be regarded as "driving" if he or she was in a substantial and voluntary sense controlling the movement and direction of the vehicle: involuntary actions could not form the basis of a conviction. A person who was unconscious could not be said to be acting voluntarily. However a driver who knew his or her medical condition, whether as a result of advice or experience, and who foresaw or ought to foresee that he may lose consciousness, may be precluded from relying on his medical condition. In those circumstances any act of driving while unconscious

would become a voluntary act (*Alexander (Helen) v Dunn*).

[19] Culpable and reckless conduct involved exposing persons to a significant risk to life or health. Reckless conduct was criminal if there was danger to the lieges, either foreseeable or actual, or if the conduct had caused actual injury but a high degree or recklessness was needed going beyond carelessness or negligence. What was required was an utter disregard of the consequences of his conduct, with total indifference to the safety of the public (*HM Advocate v Harris (Andrew)* at 1993 J.C., p.153; 1993 S.L.T., p.966; 1993 S.C.C.R., p.563). The judicial test for reckless driving in terms of the former s.2 of the Road Traffic Act 1972 was that driving (a) fell far below the standard expected of a competent and careful driving and (b) occurred in the face of obvious and material dangers which were or should have been observed, appreciated and guarded against, or in circumstances which showed a complete disregard for any potential dangers which might result from the way in which the vehicle was being driven. Recklessness was to be determined on an objective basis.

[20] It would be necessary to show that the respondent knew, or ought to have known, that he might lose consciousness at the wheel without warning and that driving on the day of the incident carried an obvious and material danger. This had to be assessed in the light of the whole available evidence. The knowledge had to attach to the driver from having been told or because it would be obvious in the circumstances based on human experience. Although the test was an objective one, it started with the knowledge of the potential accused. These cases had to be distinguished from *R v Marison (Lee John)* where the accused knew he had a condition and drove in the face of an obvious and material danger. In each of the present cases the driver lost control due to losing consciousness. In each case subsequent investigations led to diagnosis of a condition supporting the respondent or providing an explanation for what happened. In neither case had there been a previous diagnosis. A simple faint (or vasovagal incident) is a very common occurrence which need not be notified for the purposes of DVLA guidelines. There was evidence that the recurrence rate of a simple faint was not very high, that the majority of people would not have a further episode and that as time passed the risk of recurrence receded.

Payne

[21] Following the incident, tests established that the respondent suffered from a malignant form of vasodepressor syncope syndrome. There was evidence that he had lost consciousness previously on six occasions on four separate dates. There was also evidence from which it could be inferred that he had concealed or misrepresented his medical history. Nevertheless when the totality of the evidence was assessed there was insufficient evidence to establish the essential issue to the required standard. The following factors were relevant:

(i) The last incident was in June 2009, more than 18 months before the fatalities;
(ii) The respondent sought medical advice regarding each previous incident;
(iii) None of the previous incidents occurred whilst the respondent was driving;
(iv) He had never been diagnosed with, or told that he had, any underlying medical condition making him susceptible to loss of consciousness;
(v) None of his medical practitioners advised him that he was unfit to drive or suggested that he should report the position to DVLA;
(vi) The opinion of his medical practitioners at the time was that he did not present a danger when driving;
(vii) He had been advised in 2007 and 2008 that the cause was a viral infection;
(viii) At police interview he said that he understood that the losses of consciousness had been associated with a viral infection; there was insufficient evidence to contradict this as his understanding, which was supported by the evidence of what he had been told in 2007 and 2008.

[22] Between 22 October 2007 and 4 November 2010 the respondent attended his GP practice on approximately 14 occasions and Stobhill hospital on four occasions seeking assistance either in relation to viral symptoms or in relation to the aforesaid episodes of loss of consciousness. After failing to attend a clinic at Stobhill in September 2009 he was advised that a further appointment would be arranged: in fact no such appointment was arranged. No adverse inference fell to be drawn

from the fact that on 2 February 2010 an attendance with his GP recorded that he was currently undergoing investigation for collapse. Up until 17 December 2010 the only diagnosis which the respondent had was of simple faints or reflex vasovagal syncope.

[23] On 3 July 2009 (less than a month after the incident of blacking out on 5 June 2009) the respondent requested from his GP a letter seeking excusal for jury service on medical grounds which was in the following terms: "Mr Payne has had several episodes of unexplained dizziness and collapse over the past year. On occasion he has been admitted to hospital because of these. He feels worse when he is under stress and he is very concerned he may become dizzy and collapse if he has to attend for service. I hope he can therefore be excused jury service at this time."

[24] The respondent told police that the reason for seeking this letter was "my wife was going through a really hard time of it. As I say I am a carer for her and eh, I felt as if I had been away too long, that was the only reason." The notes in the medical records supported the fact that the respondent's wife had her own concerns.

[25] The respondent arranged a medical examination on 2 July 2010 in connection with renewal of his group II HGV entitlement on his driving licence with a private medical practitioner who did not know him and did not have access to his medical records. The respondent answered "no" to the question "is there history of blackout or impaired consciousness within the last five years?" The respondent stated that the reason for going to the private practitioner was that it was £50 cheaper, a point supported by the doctor in question.

[26] The evidence as a whole did not support the proposition that the respondent knew that on the day in question his driving presented an obvious and material danger.

Clarke

[27] The complainers relied on evidence that the respondent had previously experienced a loss of consciousness or impaired consciousness in April 2010 as well as other aspects of his medical history, including evidence from which it might be inferred that he had, in various circumstances, misrepresented or failed to disclose aspects of his medical history. However, the following factors were significant:

(i) The prior incident occurred more than four and a half years previously;
(ii) There was no evidence that the respondent, a professional driver driving on an almost daily basis had suffered any further incidents whilst driving;
(iii) There was no evidence that he had ever been diagnosed with a condition making him susceptible to loss of consciousness;
(iv) He had never been told not to drive by any medical practitioner apart from two brief periods in 2003 and 2010 when under treatment or investigation;
(v) No medical practitioner had told him to report any aspect of his health — dizziness, mental health or loss or impaired consciousness — to DVLA.

[28] There was no direct evidence in relation to the 2010 incident. The admissible evidence is contained in statements by third parties *viz*.: (1) Mr Stewart, a bus inspector, to whom the respondent reported that he had a "black out" for two or three minutes whilst sitting at the wheel of his bus; (2) Dr McCaig, the GP to whom he reported a loss of consciousness for five seconds in a hot canteen; (3) Dr Lyons, an occupational health doctor to whom he reported an episode of impaired, or loss of, consciousness whilst at work, without particular warning although he was aware of feeling warm: it lasted between 5–10 seconds according to an onlooker. Dr Lyons understood this incident to have occurred whilst the respondent had been sitting in a stationary bus; (4) Dr Langan, to whom the respondent said he had had felt light headed and lost consciousness in a hot environment when waiting for lunch; and (5) Professor Rankin, to whom, after the fatal incident, the respondent denied having lost consciousness in 2010.

[29] Although it might be inferred that the respondent did not give truthful accounts to Dr McCaig or Dr Langan, the evidence made it difficult to draw conclusions as to the precise nature of the incident. Someone who had suffered a syncope might not have a clear recollection of events or be sure whether or not he had actually lost consciousness. Reliable conclusions could not be drawn as to (a) whether the respondent suffered a complete or partial loss of consciousness; (b) how long the incident lasted; (c) whether the incident

was provoked by being warm; and (d) whether the respondent had any warning (prodrome) through feeling lightheaded.

[30] Further, although it might be inferred that the respondent misrepresented the circumstances, nevertheless:

(1) He disclosed to all three doctors an incident of impaired or lost consciousness;
(2) He disclosed to Dr Lyons that this occurred at the wheel of a bus;
(3) He gave Dr Lyons authority for disclosure of medical information by his GP;
(4) A physical examination by Dr Lyons showed no underlying abnormality;
(5) None of the doctors concluded that involvement of DVLA was merited; and
(6) The respondent was permitted to return to work as a bus driver.

[31] The differences in the accounts were significant in relation to whether a report should be made to DVLA, but there was no evidential basis to conclude that the respondent himself understood that differing descriptions of the incident would have different implications regarding the factual risk of recurrence. His motive for misrepresenting the true circumstances was speculative.

[32] In any event, had DVLA been notified of the incident in April 2010 it could not be said that the respondent's licence would not have been returned prior to the fatal incident. In determining whether he was fit to drive at the end of any period of revocation, the primary issue would be whether there had been any further episodes in the absence of which the licences would have been renewed.

[33] The evidence taken as a whole did not support the central proposition which would require to be proved.

Submissions for the complainers

General

[34] Senior counsel submitted that there were three issues in each case: first, whether there was a legal sufficiency of evidence on the charges; second, whether that evidence was of apparently sufficient strength to show reasonable prospects of conviction; and third, whether special circumstances existed to warrant the granting of the bill in the absence of concurrence. In focusing in each case on whether there was evidence to demonstrate that the respondent knew or ought to have known that he might lose consciousness on the day of the fatal collision, the Crown misdirected itself. In each case the respondent's knowledge that he had a medical condition which presented a danger whilst driving could be inferred from his actions and omissions both before and after the fatal incident. The Crown should have assessed the evidence about (a) the respondent's medical condition and (b) his understanding thereof to ask whether looked at objectively the evidence showed that it would have been obvious to a competent and careful driver that to drive despite the risks posed by his medical condition would be dangerous.

Payne

[35] In relation to the respondent's pre-collision acts and omissions there were four issues:(1) his history of blackouts and knowledge thereanent; (2) his failure to seek medical advice relative to driving; (3) his actions in connection with the renewal of his licence; and (4) the police interview and his post collision actings.

History of blackouts and state of knowledge

[36] Between 25 December 2007 and 5 June 2009 on at least four different dates the respondent suffered six recorded episodes of loss of consciousness without provocation, warning or prodrome. Senior counsel examined the detail of each of these, noting that only two collapses on 25 December 2007 were attributed to a viral infection.

[37] The jury excusal letter was evidence of the respondent's knowledge in 2009, indicating several collapses in the past year. On 2 February 2010 the respondent falsely told his GP that he was undergoing medical investigation for collapse. After the fatal incident he gave accounts of the number of episodes from which it might be inferred that there had been a further three episodes between 17 December 2009 and 17 December 2010.

[38] It would be obvious to a competent and careful driver, knowing what the respondent knew, and what he could be expected to be aware of, that driving on 17 December 2010 would be dangerous and would constitute driving in the face of an obvious and material danger.

Failure to see medical advice

[39] Between 25 December 2007 and the fatal collision the respondent failed to seek advice from any medical professional about driving and failed to notify the DVLA of his medical history or of the nature and extent of his condition, despite it subsisting for more than three months. He did not ask whether it was safe for him to drive.

Actings in connection with renewal of his licence

[40] For his licence renewal in 2005 he had attended his GP who had access to his medical records. She required him to attend for an eye test, from which he would have been aware of the care she took in completing the assessment form. He would have understood that his hospital attendances regarding blackouts would be recorded on the form if completed by his GP. In 2010 he attended a private medical practitioner who did not have access to his records. The respondent failed to provide accurate and complete information about his history of blackouts. The failure to advise the doctor or the DVLA allows the inference that he knew he had a medical condition which made it unsafe for him to drive, about which he lied to secure the renewal of his LGV entitlement.

[41] DVLA guidance distinguished "simple faints" from other more serious types of loss of consciousness by reference to "the three Ps" provocation, prodrome and posture, the most important feature of which was prodrome, namely warning signs that an incident was about to happen. Without a prodrome the incident would not be a simple faint. The losses of consciousness suffered by the respondent between 25 December 2007 and June 2009 were such as required notification to DVLA whose guidelines required notification for faints not associated with provoking factors or which occurred while sitting or lying. Had he notified DVLA they would have been likely to access his medical records with a consequent likelihood of a restriction to or revocation of his LGV entitlement.

Police interview — 5 May 2011

[42] In this interview the respondent:

(a) stated that the loss of consciousness had come on without provocation;
(b) stated that his general health was fine;
(c) denied that he had been attending the doctor for any specific condition stating "all I had things what they call a viral infection … that I've had for the last eh three or four years … then they give you an antibiotic for it and it takes it away";
The first time this happened was 2007 on Christmas Day, when he was told it was a viral infection adding "every time I got a bit of a cough I phoned the doctor to get him to check me to make sure I don't end up with a viral infection again … and basically that's all … that's ever happened";
(d) indicated that he had suffered seven or eight collapses without warning, maintaining that "every time I've been I've been took to the hospital";
(e) said he had not notified his insurance company "because it was always put down to viral infection";
(f) explained that he had gone to the private doctor because it was £50 cheaper, and had undergone what he had described as "a full medical". Regarding the question about a history of blackout or impaired consciousness within five years, he said "well they kept saying to me it was a viral infection that [*sic*] making me black out, it wasnae caused by anything else that they ever told me so I didnae think I was doing anything wrong on that form";
(g) said he had not notified DVLA of his condition, saying: "No, for the, the, the viral infection, they kept telling me it was viral infection so I took it when the antibiotics they gave me cleared that". Asked if he had concerns that he might black out at the wheel he said "No, no, the blackouts were put down to this viral infection". Asked to confirm that on each occasion he was told it was down to a viral infection he confirmed "viral infection".

The medical records do not support this assertion. Only the first two episodes were so attributed. The misleading and incomplete answers to the police permit the inference that he was aware of the relevance of his medical history and deliberately sought to conceal it.

Post collision actings

[43] Apart from his statement to the police, the respondent told the accident and emergency consultant at the hospital that he had no warning before blacking out at the wheel, that he had fallen and injured his back that morning and that he had suffered one blackout two years previously secondary to a viral infection. He did not explain the other blackouts. He was advised not to drive until a diagnosis had been confirmed. On 21 December 2010 a tilt test was carried out. This was positive and the respondent blacked out, this being an abnormal response indicating cardio inhibitory reflex syncope. During medical review, the respondent gave a history of about nine losses of consciousness over four years, with no provocation and all sitting or standing. The respondent was advised not to drive and the matter reported to DVLA. The evidence tends to suggest that the respondent sought to minimise his relevant medical history including the number of previous episodes of loss of consciousness.

Clarke

[44] The respondent's actings and omissions prior to and after the fatal condition were relevant in relation to his knowledge of his medical condition and his fitness to drive.

Pre-collision actings

[45] These related to (1) medical history; (2) job application; (3) DVLA licence renewal.

Medical history

[46] Over a period of 30 years the respondent had consulted doctors regarding dizziness, giddiness, vertigo and similar symptoms. He suffered a vasovagal attack at work on 16 August 1989 and on 25 February 1994, whilst driving a bus, an episode of dizziness, chest pain and palpitations. On referral to the department of cardiology at Stobhill Hospital, Glasgow after that later incident he reported dizziness over a four year period. On review at the clinic on 27 May 1994 he was advised that he should not have been driving during the period of investigation and should have informed DVLC (now DVLA). On 29 November 2001 he completed and signed as part of his renewal application for LGV and bus licences a form in which he made declarations that he did not suffer and had never suffered from (i) fits or blackouts; (ii) severe and recurrent disabling giddiness; or (iii) mental ill health. In fact by this time he had suffered from:

(1) an vasovagal attack at work in 1989;
(2) severe anxiety neurosis related to the stress of working as a bus driver;
(3) an anxiety disorder;
(4) an episode of dizziness driving a bus in 1994; and
(5) repeated episodes of dizziness for four years up to 1994.

[47] Had he provided truthful answers further investigations of his condition would have been undertaken.

[48] In July 2003 the respondent reported episodes of dizziness and his medical records in 2005 revealed a history of anxiety and depression. On 1 December 2006 he completed further declarations to DVLA in the same terms as noted above, and on 18 December 2008 he signed a similar health declaration whilst seeking employment with First Bus containing entries which his medical records demonstrate to have been false. It is reasonable to infer that he responded dishonestly to these questions, deliberately concealing his medical conditions in the understanding that his medical history affected his ability to drive safely.

[49] The blackout on 7 April 2010 occurred without any warning while the respondent was seated behind the wheel of a stationary bus. Mr Stewart, the inspector who attended, made a 999 call reporting that the driver had passed out at the wheel, and a passenger had reported that he was unconscious for about three minutes. The respondent repeatedly failed to give a true account of what happened, relating inconsistent accounts to several doctors. He misled the doctors to obtain a favourable report in the hope of returning to work as a bus driver. Had he told the truth about the incident he would have been told not to drive and to notify DVLA who would have categorised this in such a way that there would have been a revocation of his licence for three months subject to the identification and treatment of the condition. In the absence of identification and treatment the restriction would have been one year or more depending on the risk presented by his condition

and the preparedness of DVLA to re-issue the licence.

Job applications

[50] On 14 July 2010, in an application for the post of bus driver with Glasgow City Council, the respondent made further false declarations regarding his health. In late 2011 he applied for promotion to the post of HGV driver, making declarations in similar terms, all of which were false. Had the respondent provided truthful answers to Glasgow City Council he would not have been employed by them and would not have gained promotion to drive a bin lorry. It can be inferred that he concealed his medical history knowing that if he accurately disclosed his history, he would not have gained employment as a professional driver and would not have been permitted to drive HGV vehicles.

DVLA licence renewal 2011

[51] On 6 December 2011 the respondent made similar false declarations relating to his health in a renewal application for lorry and bus licences.

[52] Providing false information to the DVLA and its examiner were criminal offences committed with the intention of gaining renewal of his driving licence. In repeatedly lying in order to gain and retain jobs and licences the respondent prevented investigation of his medical condition. This pattern of deception extended beyond the fatal collision.

Actings post collision

[53] These relate to (1) statements to the medical profession; (2) the medical diagnosis; and (3) statements to DVLA.

Statements to the medical profession

[54] Following his admission to hospital on 22 December 2014 the respondent gave three differing accounts of his medical history followed by a fourth account in 2015. From these it can be inferred that he continued to be an untruthful and unreliable historian, deliberately minimising and concealing his medical history and in particular the blackout in 2010. It can be inferred that he did so because he knew he had a medical condition affecting his ability to drive and that, having passed out at the wheel of a bus without warning, this might recur.

Medical diagnosis

[55] Following a positive tilt table test the respondent was diagnosed with neuro-cardiogenic syncope or vasovagal syncope, a condition not susceptible to medical treatment. He was advised not to drive but failed to pass this information to DVLA.

Statements to DVLA

[56] After the fatal incident the respondent continued to mislead DVLA and drove in the knowledge that he suffered from a condition making it unsafe for him to do so. On 7 January 2015 he surrendered his licences for submission to DVLA. On 28 April 2015 DVLA advised the respondent that he satisfied the medical standards for safe driving and issued him with group I and group II licences, the respondent having made false and incomplete declarations in the applications therefor. These licences were revoked for 12 months and 10 years respectively on 25 June 2015, after the FAI. On 20 September 2015 the respondent was found to be driving in Buchanan Street, Glasgow, Baillieston, Glasgow and elsewhere.

[57] Had the respondent sought medical advice in 2010 he would have been diagnosed with neuro-cardiogenic syncope and his licence would only have been returned if a cardiologist estimated the risk of a further sudden disabling event as 20% for group I and 2% for group II. At the FAI the evidence assessed the respondent's risk at 20%, thus his licence would not have been returned to him.

Very special circumstances — both cases

[58] The Crown's focus in each case on whether the respondent knew that it would be unsafe for him to drive on the day in question led to the application of an incorrect test. After applying the incorrect test the Crown had further erred in concluding that there was an insufficiency in law. The analysis placed emphasis on the subjective knowledge of the respondent rather than considering the objective test of what a competent and careful driver with the knowledge of the respondent and considering what the respondent would have known, would have observed, appreciated and guarded against. This flawed legal analysis created the special circumstances which justified passing the bill.

Respondents' submissions

Payne

[59] For the respondent, the Dean of Faculty adopted the submissions of the Lord Advocate in respect of title and interest, sufficiency of evidence and very special circumstances. The complainers asked the court to grant the bill on an interpretation of the evidence which was selective, speculative and unreliable. There was no medical evidence that it was foreseeable that the respondent was at risk of having a blackout while driving. The respondent had driven since 1985. Throughout that period, he had no medical incident while driving prior to 17 December 2010. He had no criminal record and only one Road Traffic Act endorsement which was for a parking offence. The respondent had no reason to believe that he was at risk of suffering an incident while driving. There was no credible and reliable evidence that on the date of the incident the respondent was driving in the face of obvious and material dangers which were or should have been observed, appreciated and guarded against. The credible and reliable evidence was that he lost control while driving as a result of a medical condition outwith his control and which he was not bound to foresee. Even if the Crown was incorrect in its analysis of the evidence, it was not appropriate for the court to act as a review body.

[60] A high test of very special circumstances was necessary to preserve the exceptional nature of the remedy. The Scottish system of criminal prosecution in the public interest had been devised and developed to protect the public interest in general and the interest of the private citizen. A potential consequence of allowing private prosecutions in these circumstances would be that at fatal accident inquiries essential witnesses would not be obliged to answer questions unless they were provided with immunity from prosecution not only by the Crown, but also by putative private prosecutors. In considering whether very special circumstances have been established, the court required to consider any delay in instituting proceedings (*C v Forsyth*). Prejudicial publicity, especially if caused or contributed to by the complainers, also required to be taken into account.

[61] The excessive delay and prejudicial publicity constituted oppression at common law and a breach of the respondent's rights under art.6 of the European Convention on Human Rights.

Delay

[62] The Crown decided in March 2012 not to bring proceedings against the respondent in respect of any of the charges included in the bill. This was communicated to the complainers at meetings on 6 and 7 March 2012, but was not intimated to the respondent. The respondent was not granted immunity by the Crown at the fatal accident inquiry held in 2014. A final decision not to prosecute the respondent was made in March 2015. The first intimation of a private prosecution to the respondent was 10 February 2016.

[63] The delay in bringing proceedings contravened the respondent's right to a fair trial within a reasonable time. The incident occurred on 17 December 2010 but the complainers sought to rely on evidence from as early as 25 December 2007. They were seeking to rely on evidence of what was said at medical consultations, when the doctors have made it clear that they had no recollection of the consultations and were forced to rely on written or printed records which were often brief and sometimes incomplete.

Prejudicial publicity

[64] The level and volume of publicity was prejudicial to a fair trial. There had been many reports of a prejudicial nature in newspapers circulating locally and nationally, and on radio and television. The tone of the coverage was unbalanced and prejudicial, being such as to suggest that the respondent was guilty of a crime. That had been exacerbated by linking the case with that of Harry Clarke. The complainers had issued a number of press releases. The press reporting had contained inaccuracies. In one newspaper it was reported that the respondent had suffered previous blackouts while driving. That was incorrect. There had been long periods during which there were no reporting restrictions.

[65] A private prosecutor is in the same position, and has the same responsibilities, as a public prosecutor. It would not be permissible, and it would be prejudicial, if the Crown were to make public statements about a case which it prosecuted. The same restriction applied to a private prosecutor.

(*C v Forsythper* Lord Marnoch at 1995 S.L.T., p.913; 1995 S.C.C.R., p.568).

Clarke

[66] Senior counsel for the respondent Clarke also adopted the submissions of the Lord Advocate. The Crown had not erred in matters of fact or law and there was no proper basis for passing the bill. The complainers relied on an incomplete selection of public statements by the Crown to seek to demonstrate what they said was the basis of the Crown's decision not to prosecute. The Crown's answers supplied the complete statements by the Crown, with a fuller account of the reasoning, which the respondent adopted. The Crown had not acted capriciously, oppressively, unreasonably, inconsiderately or subject to an erroneous appreciation of the relevant law.

[67] The foreseeability of the respondent's loss of consciousness on 22 December 2014 was an issue upon which, at best for the complainers, there was no clear consensus of medical witnesses in support of the position advanced in the bill. In fact, there was a strong body of direct and circumstantial evidence which pointed the other way. The complainers sought to cherry pick a sufficiency from only a small, unrepresentative body of the total available evidence. That was an illegitimately narrow approach.

[68] Private prosecutions must be subject to the same fair trial guarantees as public prosecutions, which had been achieved in part by the imposition of certain duties upon the Crown, including the duty of disclosure. It was not clear that the complainers had procedures in place to ensure that they discharged those duties. There had been no disclosure by the complainers beyond those documents selected in support of the bill. The very limited material (35 documents) specifically mentioned in the inventory attached to the bill did not include statements or transcripts of evidence from the FAI, or all medical reports.

[69] No special circumstances existed to justify passing the bill. It would be oppressive and a breach of the respondent's Convention rights to do so.

Oppression

[70] While it was not unheard of for prosecutions to follow FAIs, there were good and obvious reasons for any prosecution to take place first. It was normal for a prosecution arising out of a fatal accident to be brought to a conclusion before any petition for the holding of an FAI was presented (Cullen Report into Review of Fatal Accident Inquiry Legislation, "the Cullen Report", November 2009, para.2.16). There was no case in which a private prosecution had been attempted after a FAI following a Crown decision not to prosecute.

[71] There was no mention at any of the preliminary hearings for the FAI of the possibility of a private prosecution. Consequently, the respondent prepared for the FAI on the basis that no criminal proceedings were in prospect. Had it been otherwise, there was a strong likelihood that the FAI would have been delayed to await the outcome of any such proceedings. At the very least, as a matter of fairness, the respondent's status as a witness, and whether he could invoke the privilege against self incrimination, could have been determined in advance rather than in the midst of an ongoing FAI.

[72] If the complainers had made clear that private prosecution was a possibility, very different advice would have been offered to the respondent about this. It would have affected the respondent's whole approach to the FAI, including the issue of his representation. He was initially represented by junior counsel but senior counsel became involved at the mention of the possibility of private prosecution. It was likely that senior counsel would have been instructed from the outset if advance warning had been given. The advice to the respondent, without question, would have been to answer no questions where the answers might incriminate him.

[73] The first formal mention of the possibility of a private prosecution was on day 16 of the FAI and only when the sheriff raised the matter in light of media reports. It would be oppressive to allow a prosecution to proceed. The principal effect concerned the position of the respondent in relation to the privilege against self incrimination, but matters of delay and prejudicial publicity arose also. The presentation of the case on behalf of the respondent had been predicated on his giving evidence and supplying a basis in his answers for some of the earlier questioning of other witnesses. The enforced change of approach during the FAI adversely affected the presentation of the

respondent's position, and allowed some of the evidence to seem more damning in the absence of challenge or evidential contradiction. In turn, this change allowed the publication of even more prejudicial headlines about the respondent, especially when he was in effect forced into a change of position about answering questions.

[74] By the time the possibility of a private prosecution was first mentioned it was too late for the respondent's privilege against self incrimination to be given proper respect. By the time the complainers confirmed their position regarding a private prosecution, it was too late retrospectively to remedy the unfairness to the respondent in the circumstances in which he had given his full co-operation with all preparations for the FAI.

[75] The complainers had used the Crown's decision that there would be no prosecution, with no hint of a private prosecution, to have the respondent co-operate fully in continuing investigations and preparations, thereby supplying information which could be used in a private prosecution at their instance and giving the complainers an unfair and unwarranted advantage (*Mowbray (Lynne Agnes) v Crowe*). The respondent co-operated in the process of precognition by the Crown in preparation for the FAI. He provided detailed accounts and answers in precognitions which were given on 6 and 12 May 2015, 8 July 2015 and 31 July 2015. He was asked in detail about issues relating to his medical and employment history. He was not cautioned. He answered all questions, unaware that attempts would be made subsequently to use his answers against him in a private prosecution by the complainers in a manner incompatible with the privilege against self incrimination. With the respondent's consent, all of his precognitions were disclosed by the Crown to the legal representatives of the families represented at the FAI, including the legal representatives of the complainers. The complainers were personally barred from prosecuting the respondent.

Prejudicial publicity

[76] The respondent's right to a fair trial had been compromised because of prejudicial publicity, and to pass the bill would be oppressive. The question for the court was whether the risk of prejudice was so grave that no direction of the trial judge, however careful, could reasonably be expected to remove it (*Stuurman (Jan Cornelius) v HM Advocate*, approved in *Montgomery v HM Advocate*).

[77] It was undeniable that there had been extensive publicity in this case and that much of it had been prejudicial to the prospects of a fair trial. When not restricted by contempt of court considerations, the tabloids showed no restraint in portraying the respondent as a selfish and heartless liar with no conscience. Readers were left in no doubt that he was a man whose selfishness and dishonesty were responsible for the deaths of six innocent people. That was put to him by counsel for the families during his evidence at the FAI. Following his enforced change of attitude to answering questions, arising from the prospect of prosecution, the tenor of the publicity was that the respondent had exploited a legal loophole to avoid admitting his guilt. It seemed clear that the newspapers had associated themselves with the families' views.

[78] The fatal incident attracted considerable publicity due to the uniquely tragic circumstances. It was almost inevitable that the members of any jury would be aware of the case. The FAI was the subject of intense and unusual media coverage. The prejudicial coverage would not have been attempted or allowed if criminal proceedings had commenced. This case was exceptional in that the media had taken full advantage of a significant period during which there were no reporting restrictions. Matters would not have developed in this way and to this extent if the complainers had brought this bill at an earlier stage. The extent and intensity of media coverage had embedded this case as part of the national consciousness.

[79] It was submitted that none of the usual safeguards could guarantee a fair trial:

> — the passage of time
> This was a weak safeguard in this case, given the recency of publication of some of the prejudicial material, a large amount of which was readily available on the internet.
> — The focusing effect of listening to evidence. This too was an insufficient safeguard. Potential jurors were likely to have read material which would be part of the evidence in the trial, the effect of which would be to remind them of what they had previously read. The reporting of the FAI would be brought to mind by the evidence in the trial.

— The trial judge's directions.

No directions by the trial judge would be adequate to guarantee a fair trial. A direction to decide only on the evidence would be inadequate because it would fail to address the residual effect and the conscious or unconscious reminders of the original material.

[80] The present case was high profile. Very few cases had attracted the level of publicity it had generated. Much of the publicity received nationwide coverage, and much of it remained easily accessible on the internet. Recent research ("Are Juries Fair?" by Professor Cheryl Thomas, part of the Ministry of Justice Research Series 1/10, February 2010) suggested that there was grave cause for concern in cases such as this.

Analysis

Title and interest

[81] It was not disputed that the complainers had both title and interest in relation to the first charge (and the first charge in the alternative) in each bill. We consider the concessions in respect of these charges to be well made. Clearly the complainers meet the requirement that they are individuals with a substantial and peculiar interest in the subject matter of those charges, arising out of injuries which they, beyond all others, have suffered. However, we do not accept the complainers' submissions in relation to the remaining charges. In our view these are charges of a general and public nature, lacking that interest, personal and peculiar to a complainer, which is necessary before a bill of criminal letters may be passed. It is not sufficient for the purposes of title and interest that the complainers seek to include these charges for mainly evidential purposes. Some of the subsidiary charges may, to a varying degree, be relevant to aspects of the primary charges which the complainers seek to bring, and to enable the full picture to be put before the jury, but, were the court to pass the bills, these matters could be dealt with other than by inclusion in an indictment. In the Clarke case it would be incompetent to pass the bill relating to charge 11, since the Lord Advocate has not renounced the right to prosecute.

The legal requirements of a charge of dangerous driving

[82] A person drives dangerously if (a) the standard of his driving falls far below that which would be expected of a competent and careful driver; and (b) it would be obvious to a competent and careful driver that to drive in such a way would be dangerous. The test for dangerous driving is an objective one, directing attention to the quality of the driving at the time in question. Although the test is an objective one, in determining whether the driving was dangerous regard must be had to circumstances shown to have been within the knowledge of the individual driver (s.2A(3) of the 1988 Act).

[83] A person who falls unconscious at the wheel is, on the face of it, no longer driving voluntarily. However, if the driver is aware that he has a medical condition liable to render him unconscious whilst driving, he may be precluded from relying on that condition as a basis for maintaining that his acts were involuntary. The driver would, however, need to know that he had such a condition. A driver who has been diagnosed with a condition rendering him liable to fall unconscious clearly has that knowledge. Thus a diabetic who knew his condition pre-disposed him to hypoglycaemic episodes rendering him unconscious without warning knew that to drive was to do so in the face of obvious and material danger. The driver in question had suffered such incidents on an increasing basis prior to the accident, including incidents whilst at the wheel (*R v Marison*) — he thus knew that at the material time he was driving in a defective state. The Lord Advocate accepted, correctly, that the knowledge that one is in a defective state rendering it dangerous to drive, need not come from the diagnosis of a condition. Past experience and medical history of the driver might be sufficient to create in him the knowledge that to drive at any given time might be dangerous. Clearly the evidential obstacles in the way of establishing the latter may be greater than in relation to the former, but there is no reason why a driver's general medical history and experience might not be sufficient to create the necessary knowledge in the absence of a diagnosis.

[84] In *Marison* the driving was said to begin at the start of the driver's journey on the day in question and to conclude with the collision. The critical question in any case such as this is the

quality of the driving at the time of the collision. The Crown was thus correct to focus on the day in question in each case. In doing so they were not taking an over narrow approach to the issue. In particular the Crown did not focus only on the state of health of each respondent on the day in question, or at the start of their journeys. It is clear that the Crown correctly considered that the state of knowledge of each respondent on the day in question had to be assessed in the context of all the information known to each of them, including their medical history and any inferences which might reasonably be drawn therefrom. Accordingly we do not consider that the Crown made an error of law.

Special circumstances

[85] Scotland has for many centuries had a system of public prosecution in which the Lord Advocate is recognised as prosecutor in the public interest. By 1961 this system of public prosecution had become so well acknowledged and respected that the court was able to say that "private prosecutions have almost gone into disuse" (*McBain v Crichton*, Lord Justice General at 1961 J.C., p.29; 1961 S.L.T., p.211). Although it remains open to a private citizen to apply to the court for permission to bring a private prosecution where the Lord Advocate has declined to prosecute or grant his concurrence to a private prosecution, the circumstances in which such permission may be granted have repeatedly been described as exceptional.

[86] The reasons for the requirement of exceptionality are related to the constitutional role of the Lord Advocate. In *McBain v Crichton* the Lord Justice General (p.29 (p.210)) observed that the Lord Advocate: "… is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion."

These features were also mentioned by Lord Guthrie (p.31 (p.212)) to explain why it would only be in "highly exceptional circumstances" that private prosecution will be authorised.

[87] This exceptionality is emphasised in every case in which an application for criminal letters has been made. So for example, in *C v Forsyth* the Lord Justice Clerk (Ross) noted (at p.912 (p.566)) that: "It is well recognised that private prosecution is allowed only in exceptional cases" and in *Meehan (Patrick Connelly) v Inglis*, the Lord Justice Clerk (Wheatley) observed (at 1975 J.C., p.12; 1974 S.L.T. (Notes), p.62) that permission of the court to proceed with a bill for criminal letters: "will only be granted in very special circumstances."

[88] This was recognised by senior counsel for the complainers who acknowledged that it was necessary for her to persuade the court that there existed special circumstances such as to justify passing the bills in the present cases.

[89] No bill has ever been passed in the face of opposition by the Lord Advocate, and only two have been passed without the Lord Advocate's concurrence, emphasising the truly exceptional nature of the remedy. The case for such a remedy must be the exception to the rule, calling for exceptional treatment (*J & P Coats Ltd v Brown*, Lord Justice Clerk at 1909 S.C. (J.), p.34; (1909) 6 Adam, p.39; 1909 1 S.L.T., p.438). The case of *X v Sweeney* was clearly exceptional. The Lord Advocate had not declined to prosecute, but during the prosecution, the primary witness lost her mental composure and the Crown had allowed the indictment to fall. For that reason, although the witness had subsequently recovered, the prosecution could not recommence. The bill was based largely on the evidence upon which the Lord Advocate had proceeded to present the original indictment.

[90] The basis upon which senior counsel for the complainers submitted that there existed special circumstances was (i) that the Crown had erred in its analysis of the legal and evidential requirements necessary to establish the charge of dangerous driving; and (ii) that the Crown had erred in its assessment of sufficiency. An error in law as to the components of an offence, at least an egregious one, might justify passing bills of criminal letters, but as we have explained above, we do not consider that such an error has been made.

[91] In respect of the second argument, even if we agreed with that submission (as to which, see below), this would not necessarily constitute a special or extraordinary circumstance such as to justify the passing of a bill for criminal letters. An error of judgment by the Crown is not sufficient to meet the test of exceptionality. In our view the test of exceptionality would require to show that the Lord Advocate's decision not to prosecute had to be viewed in the circumstances as an egregious or outrageous failure in the exercise of his public duty in the circumstances. For example, as discussed in argument in *J & P Coats Ltd v Brown*, if it could be shown that the Lord Advocate had failed in his public duty, and had acted oppressively, capriciously, or wantonly, the circumstances might properly be described as exceptional, allowing a bill to be passed. It is quite difficult to conceive of circumstances in which the court would pass a bill where the Lord Advocate had examined and investigated the circumstances of the case and concluded as a matter of informed judgment that the whole tenor and weight of the evidence did not justify prosecution.

[92] At first sight it might be thought that the case of *J & P Coats Ltd v Brown* gave some comfort to the complainers' submissions, but on close examination of the case we are satisfied that is not so. In declining to prosecute, or to grant his concurrence, in that case the Lord Advocate explained that he considered that the injured party's claim lay in the civil court rather than the criminal. The Lord Advocate also indicated that he based his decision on the improbability of a conviction, apparently raising the possibility that the decision on the case was ultimately based on a disagreement with the Lord Advocate's assessment of sufficiency in circumstances which might avail the complainers in the present case. The basis for the Lord Advocate's view as to that improbability is not made clear in the reports of the case or in his statement to the court which is reproduced in the SLT report at (1909) 1 S.L.T. pp.435–436. The Lord Justice General referred to the Lord Advocate as adopting "a more than usual reticence", and in relation to the issue of whether the prospective accused might be thought to have the knowledge imputed by the documents, it appears that the submissions fell foul of the assumption that where the Lord Advocate does not offer a reason for his conclusion it will be assumed that there was none (see the opinion of the Lord Justice General at p.40 (p.49) (p.441); see also similar observations in relation to the giving of reasons by the Lord Advocate in *Meehan v Inglis* at 1975 J.C., p.15). It does not seem that detailed arguments were advanced as to any alleged insufficiency of evidence, or in relation to factors which were thought to undermine the strength of the evidence available to the Lord Advocate. What he said to the court was that (at p.38 (pp.45–46) (p.440)): "The line between the domain of civil and criminal law was sometimes difficult to draw, but in this case the information laid before him disclosed a question which, in his judgment, lay well within the region of the civil law, and plainly outside the region of the criminal law." He added that (at p.38 (pp.45–46) (p.440)): "he satisfied himself that he had information to enable him to form a judgment, and he came without any hesitation to think that there was no reason for altering the judgment at which he had formerly arrived, and that there were no sufficient grounds here for a criminal prosecution."

[93] This was sufficient to satisfy Lord McLaren, in the minority, that the bill, should not be passed. However, it seems tolerably clear that the majority were unpersuaded that the decision had indeed been made upon a full investigation. The Lord Advocate had indicated that if the injured party succeeded in a civil suit, he would reconsider his decision not to prosecute. The Lord Justice Clerk observed, in relation to this submission (at p.36 (p.41) (p.439)): "I confess I was not able to follow the line of thought indicated by such a statement. If the Lord Advocate has already had the case fully investigated in his department, one would expect that he would know now whether it was permissible to take criminal proceedings. If he has not had such an investigation made, then it is difficult to see how he can be held to be in a proper position to consider whether he should give his concurrence to a prosecution or not."

[94] The Lord Justice General (p.40 (p.48) (p.441)) agreed that there was an inconsistency in the Lord Advocate's position. Certainly the majority proceeded on the basis that there was available a very clear sufficiency of evidence of a fraud of considerable magnitude. However, of considerable importance is that fact (commented upon later in *Meehan v Inglis*) that the *prima facie* case for a prosecution was available from undisputed documents, and was not dependent upon statements from witnesses furnished *ex parte* or inferences

drawn from other evidence. There might also, standing the attitude of the Lord Advocate, have been a concern that commercial crime prosecutions were not afforded sufficient priority (see for example, the opinion of the Lord Justice General at p.40 (p.48) (p.441)). However it be the case, the circumstances were very different from those which apply here.

[95] The present case is one in which there has been a full investigation and assessment of the evidence, with the conclusion that there was not a sufficiency to prosecute. That assessment is one which does not turn on the *prima facie* content of documents or records but on a professional assessment of the whole circumstances of the case. To examine the decision made against that background would put into stark question the issue raised by Lord McLaren in *J & P Coats Ltd v Brown* (at p.38 (p.46) (pp.440–441)), namely: "In such circumstances I am confronted with the question, how am I to form an independent opinion on the facts as to whether there are or are not grounds for a criminal prosecution? It is one thing to say that we may give redress against an arbitrary refusal of the Lord Advocate's concurrence, or a refusal on legal grounds which are disclosed to us; and it is quite a different proposition that we are to review the Lord Advocate's decision that the facts do not warrant a prosecution. If it were intended by the constitution of the country that this Court should undertake such a review, we should either have the power of calling for the Crown precognitions, or of employing an agent to institute an independent inquiry and to report to us. Nothing of the kind has ever been done, and your Lordships are not proposing to make such an inquiry."

Similar observations were made by the Lord Justice General (Emslie) in *Meehan v Inglis* (1975 J.C., p.14):

> "Lord Clyde did not say that the Lord Advocate was not obliged to give his reasons for refusing to concur in a private prosecution. What he said was that it is utterly inconsistent with our system which is essentially one of prosecution in the public interest that 'the Courts should *examine* ... the reasons which have affected the Lord Advocate in deciding how to exercise his discretion and it would be still more absurd for this Court to review their soundness.' We see no reason to differ from that expression of opinion in so far as it is directed to cases where the Lord Advocate's reasons for refusing concurrence are derived from an exercise of his impartial judgment after exhaustive investigation of all sources of evidence. The position would, of course, be otherwise if the reasons turned upon a question of law or relevancy or, as in *J & P Coats Ltd v Brown*, upon the construction of documents."

(see also *McBain v Crichton*, per Lord Guthrie, p.31 (pp.211–212)).

[96] The concerns which were expressed in those cases are precisely the concerns with which this court is faced in relation to the second argument for the complainers. This case is not a judicial review and this court does not have investigatory powers. There are strong public policy reasons for the requirement of exceptionality before the court would be entitled to pass a bill of criminal letters on grounds such as those advanced in the second argument for the complainers. The court must be very conscious of the constitutional arrangements under which the role of prosecutor is given to the Lord Advocate, and take care not to confuse the functions of the court with those of the Lord Advocate.

[97] Looking at the evidence as a whole as far as we think it appropriate, we do not consider that the Crown erred in its assessment of either case. In each case the driver lost control through a loss of consciousness; in each case the explanation for this was identified only in post accident investigation. In neither case had there been a prior diagnosis of an underlying condition liable to render the driver unconscious without warning. The complainers' case thus turns on a question whether the medical history of each respondent and the inferences capable of being drawn therefrom were such as to create in each of them the knowledge that to drive on the day in question was to do so in the face of obvious and material dangers. The basis upon which the complainers advance their argument is one which adopts a selective approach to the evidence and does not accord with the basis upon which such decisions must be taken by a public prosecutor. As the Lord Advocate submitted, it is important in the public interest that prosecutors exercise their judgment independently, robustly, forensically and objectively on the whole evidence available.

[98] In the case of Payne the Lord Advocate concluded that there was insufficient evidence to

rebut evidence that the respondent reasonably believed his losses of consciousness to be attributable to a viral infection, with positive evidence that he had been told they were so attributable in 2007 and 2008. It was also relevant that none of the previous incidents of loss of consciousness had occurred whilst driving.

[99] In the case of Clarke the Crown considered it a very significant factor that the previous loss of consciousness occurred four and a half years prior to the fatal accident, and that there was no evidence of any further incidents when driving, despite the respondent being a professional driver who drove almost daily. The Crown assessed that reliable conclusions could not be drawn as to the nature of the 2010 incident. The respondent had disclosed the incident to several doctors, and told one of them that he had been at the wheel of a bus at the time. In so far as he did misrepresent the circumstances, the Crown considered that it could not be concluded that he did so deliberately and in any event his reasons for doing so were speculative.

[100] On an assessment of the whole evidence the Crown concluded that the evidence in each case, taken as a whole, was not sufficient to support the central propositions which required to be proved. In seeking to argue the contrary, the complainers advance a circumstantial argument dependent on inferences from other evidence which, in each case, is far from unequivocal. In neither case do we consider that the acts or omissions of the respondent, in the changed circumstances after the accident, allow inferences to be drawn as to the state of their knowledge at the time of the accident. We do not consider that the state of knowledge of either respondent can reasonably be elevated to the degree necessary to be capable of establishing beyond reasonable doubt that on the day in question they drove in the face of an obvious and material danger.

[101] The assessment of sufficiency in a circumstantial case is one which is highly fact sensitive, and dependent on the drawing of inferences: it is one in respect of which there may be room for differing views within the scope of a reasonable exercise of professional judgment. As we have already indicated, it is quite difficult to conceive of circumstances in which the court would pass a bill where the Lord Advocate had examined and investigated the circumstances of the case and concluded as a matter of informed professional judgment that the whole tenor and weight of the evidence did not justify prosecution, unless in making that decision the Lord Advocate had acted oppressively, capriciously, or wantonly. Accordingly, even if we had disagreed with the Crown's assessment, or the weight attributed to individual pieces of evidence, we would be unable to conclude that the decision of the Lord Advocate not to prosecute was so extravagantly wrong as to amount to special circumstances justifying the passing of the bills in either case.

Additional matters

[102] Given the conclusion we have reached in relation to the primary issues in the case, it is not necessary for us to comment in detail on the submissions made in relation to delay, publicity and oppression. We would merely observe that the arguments in each case were strengthened by the fact that the effect of delays and adverse publicity operated in combination. In addition, on the effect of the precognition of Clarke, we consider that his case is in that respect on all fours with the appellant in *Mowbray v Crowe*.

Decision

[103] For the reasons given we will refuse to pass the bill in either case.

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