HOUSE OF LORDS SESSION 2005–06
**[2006] UKHL 41**

*on appeal [2005] EWHC 931 Admin*

# OPINIONS

# OF THE LORDS OF APPEAL

# FOR JUDGMENT IN THE CAUSE

**Jones (Respondent)**
***v.***
**Whalley (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice)**

**Appellate Committee**

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

**Counsel**

*Appellant*:
Timothy King QC
Stuart Mills
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*Respondents*:
Malcolm Swift QC
Simon Reevell
(Instructed by Northern Railways Limited)

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ON
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**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

**Jones (Respondent) *v.* Whalley (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice)**

**[2006] UKHL 41**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. On 17 May 2003 the appellant, Mr Whalley, who is an adult, assaulted and injured the respondent, Mr Jones, at Newton-le-Willows. The matter was reported to the Greater Manchester Police, and an officer of that force interviewed Mr Whalley concerning an offence of assault occasioning actual bodily harm. Mr Whalley admitted commission of that offence. The officer decided that Mr Whalley should not be prosecuted but should instead be cautioned. He was notified of this decision in a standard form bearing the imprint of the Greater Manchester Police. This form explained the effect of the caution:

> "This means that you will not have to go before a criminal court in connection with this matter but that a RECORD will be kept of this warning."

In a section directed to adults, the form stated:

> "WHAT A CAUTION MEANS TO YOU:— The record of caution is a criminal conviction which is citable in a court should you re-offend. Should you re-offend you will almost certainly be charged and placed before a Criminal court."

The form repeated that if Mr Whalley appeared before a Court and was found guilty of another offence then details of this caution might be given to the Court. It is not found as a fact, but it seems safe to infer, that the effect of the form was explained orally to Mr Whalley by the officer, and that Mr Whalley agreed to be cautioned on these terms.

2. On 22 December 2003 Mr Jones, acting as a private prosecutor, laid an information against Mr Whalley, charging him with assault occasioning actually bodily harm contrary to section 47 of the Offences against the Person Act 1861. The matter came before Justices sitting at St Helens, and Mr Whalley submitted that his acceptance of a police caution on the indication that, if he accepted it, he would not face any further criminal proceedings, should preclude a private prosecution. The Justices heard argument on this issue on 25 October 2004, when authority was cited. The Justices were satisfied that to allow the prosecution to proceed would be an abuse of the process of the magistrates' court, and stayed the proceedings. On Mr Jones' appeal to the Queen's Bench Divisional Court by case stated, the court (Sedley LJ and Beatson J) held that the administration and acceptance of a caution were not sufficient to render the exercise of the right of private prosecution an abuse of process: [2005] EWHC 931 (Admin).

3. Mr Whalley now challenges the conclusion of the Divisional Court, contending that the Justices were right, on the facts of this case, to reach the conclusion they did. But he also raises a broader question, not deployed in argument below, whether the right of private prosecution can, or should, survive the implementation of a formal cautioning procedure which has not been quashed and set aside on an application for judicial review.

*Cautions*

4. In *R(R) v Durham Constabulary* [2005] UKHL 21, [2005] 1 WLR 1184, the House had occasion to consider the practice of formal reprimands and warnings established by the Crime and Disorder Act 1998 to replace the practice of cautioning young offenders committing less serious offences. The practice had become discredited, first, because cautions had in some areas been given so repeatedly and predictably that they lacked the desirable effect of deterring young offenders, and, secondly, because they did nothing constructively to address the roots of offending behaviour. Under the new regime, young offenders were no longer to be cautioned, but the new reprimands and

warnings were intended to have teeth, and those warned were to be referred to youth offending teams. By section 65(1) of the 1998 Act, a constable may reprimand or warn a young offender only if he has evidence of the commission of an offence such as to give a realistic prospect of conviction; if the offender admits the offence; if the offender has not previously been convicted of an offence; and if the constable is satisfied that it would not be in the public interest for the offender to be prosecuted. In the Home Office/Youth Justice Board Guidance for the Police and Youth Offending Teams on the Final Warning Scheme (November 2002) it is made clear (paras 1.2 – 1.3) that the object of the new scheme is to prevent offending by young people and divert them from their offending behaviour before they enter the court system. Prominence is given to the requirement that prosecution must be judged to be not in the public interest (paras 4.7(e), 4.26), and by section 56 of the Criminal Justice and Court Services Act 2000 the Police and Criminal Evidence Act 1984 was amended to grant power to bail a young offender pending possible reprimand or warning, thus enabling the public interest to be more fully considered and the views of victims ascertained (paras 4.28, 6.15, chapters 7, 8). But the views of victims, although an important factor in determining the seriousness of an offence, are not conclusive, and victims should not be involved in decisions on disposals for young offenders, which are the responsibility of the police alone (para 8.11).

5. Sections 22 and 23 of the Criminal Justice Act 2003 introduced a new regime, applicable only to adult offenders. It provided for the giving of cautions subject to conditions. Non-compliance with the conditions exposes the offender to prosecution for the original offence. The conditions imposed (s. 22(3)) must be directed to one or both of two objects, facilitating the rehabilitation of the offender and ensuring that he makes reparation for the offence. A conditional caution may only be given by an authorised person and where each of five requirements is satisfied. An authorised person is defined (s. 22(4)) to mean a constable, an investigating officer or a person authorised by a relevant prosecutor (defined in s. 27) for purposes of section 22. The first requirement is that the authorised person has evidence that the offender has committed the offence. The second is that a relevant prosecutor decides (a) that there is sufficient evidence to charge the offender with the offence, and (b) that a conditional caution should be given to the offender in respect of the offence. The third requirement is that the offender admit guilt to the authorised person. The fourth requirement is that the authorised person explains the effect of the conditional caution, warning him that failure to comply with the conditions may result in prosecution for the offence. The last requirement is that the offender signs a document admitting the detailed offence and consenting to the

caution on the specified conditions. By section 24, failure to comply with the conditions without reasonable excuse may lead to the institution of criminal proceedings against the offender for the offence in question. Pursuant to his duty under section 25 of the Act, the Secretary of State has issued a Code of Practice on Conditional Cautioning. This points out (in para 2.2) that "The simple caution will remain available as a disposal, and may be appropriate in cases where no suitable conditions readily suggest themselves, or where prosecution would not be in the public interest". Provision is made for involving victims, but (para 7.1) "it is vital not to give the impression that the victim's views (if any) will be conclusive as to the outcome, which (it should be explained) is at the discretion of the CPS".

6. Neither the reprimand and warning regime established by the 1998 Act nor the conditional cautioning regime introduced by the 2003 Act applies to this case. Mr Whalley is an adult. His caution contained no conditions, and the 2003 Act was not in force when he was cautioned. The procedure adopted when cautioning him was not governed by statute, but was the subject of a series of Home Office circulars, most recently Circular 18/1994 on the Cautioning of Offenders. This set out revised National Standards for Cautioning Offenders. In these the purposes of a formal caution were defined (para 1): to deal quickly and simply with less serious offenders; to divert them from unnecessary appearance in the criminal courts; and to reduce the chances of their re-offending. It is made clear (para 2) that before a caution may be given there must be sufficient evidence, an admission of guilt and informed consent by the offender to the giving of a caution. A note to para 2 provides:

> "In practice consent to the caution should not be sought until it has been decided that cautioning is the correct course. The significance of the caution must be explained: that is, that a record will be kept of the caution, that the fact of a previous caution may influence the decision whether or not to prosecute if the person should offend again, and that it may be cited if the person should subsequently be found guilty of an offence by a court."

Para 3 provides that where the requirements are met, consideration should be given to whether a caution is in the public interest. The police should take into account the public interest principles described in the Code for Crown Prosecutors. These provide that a potential defendant should not be prosecuted, despite the existence of evidence providing a

realistic prospect of conviction, where it is judged that prosecution would not be in the public interest.

*The narrower issue*

7. On behalf of Mr Whalley, Mr Timothy King QC relied on his client's agreement to be cautioned on an express assurance by the police officer that he would not have to go before a criminal court in connection with the matter. He relied by analogy on *R v Croydon Justices, Ex p Dean* [1993] QB 769. In that case the applicant assisted the police in a murder investigation on the understanding, induced by the police, that he would not himself be prosecuted. Some weeks later, at the instance of the CPS, the applicant was charged with a lesser offence connected with the same crime. In committal proceedings before justices it was submitted that the prosecution was an abuse of the process of the court. This contention was rejected by the justices, but accepted by the Divisional Court (Staughton LJ and Buckley J). Mr King pointed out that in that case the police had no authority to bind the CPS just as, in this, the police had no authority to bind Mr Jones. But the court did not regard that point as decisive. At pp 776-777 Staughton LJ said, with the agreement of Buckley J:

> "It is submitted on behalf of the Crown Prosecution Service that they alone are entitled, and bound, to decide who shall be prosecuted, at any rate in this category of case; and that the police had no authority and no right to tell the applicant that he would not be prosecuted for any offence in connection with the murder: see section 3(2) of the Prosecution of Offences Act 1985. I can readily accept that. I also accept that the point is one of constitutional importance. But I cannot accept the submission of [counsel for the prosecution] that, in consequence, no such conduct by the police can ever give rise to an abuse of process. The effect on the applicant or for that matter on his father, of an undertaking or promise or representation by the police was likely to have been the same in this case whether it was or was not authorised by the Crown Prosecution Service. It is true that they might have asked their solicitor whether an undertaking, promise or representation by the police was binding and he might have asked the Crown Prosecution Service whether it was made with their authority. But it seems unreasonable to expect that in this case. If the Crown Prosecution Service

> find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage."

At p 778 he concluded:

> "In my judgment the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. [Prosecuting counsel] was eventually disposed to concede as much, provided (i) that the promisor had power to decide, and (ii) that the case was one of bad faith or something akin to that. I do not accept either of those requirements as essential."

Here, Mr King argued, it was necessary to consider the effect on Mr Whalley of the categorical statement the officer made. Mr King distinguished *Hayter v L* [1998] 1 WLR 854, where two defendants who had been cautioned were thereafter privately prosecuted, and the prosecution was held by a Divisional Court (Schiemann LJ and Poole J) not to be an abuse. The point of distinction in that case was that the forms signed by the defendants indicated in terms that such cautions did not preclude the bringing of proceedings by an aggrieved party.

8. To this argument, Mr Malcolm Swift QC (who, like Mr King, did not appear below) advanced a series of answers on behalf of Mr Jones. First, he submitted, the right of private prosecution is expressly preserved by section 6 of the Prosecution of Offences Act 1985. That section provides:

> "(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
>
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

This provision means exactly what it says. Save where the Director of Public Prosecutions is under a duty to take over the conduct of proceedings or, not being under a duty, chooses to do so, Part I of the Act, establishing the CPS, does not preclude the bringing of a private prosecution. To that extent the right of private prosecution survives. But Mr Whalley does not rely on any provision of Part I as defeating the private prosecution brought by Mr Jones.

9. Secondly, Mr Swift relied on Lord Wilberforce's recognition of the right to bring a private prosecution as "a valuable constitutional safeguard against inertia or partiality on the part of authority" in *Gouriet v Union of Post Office Workers* [1978] AC 435, 477. In the same case (p 498) Lord Diplock described private prosecutions as "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law". Strong statements to the same effect have been made extra-judicially by, among others, Lord Simon of Glaisdale: see the Law Commission's *Report on Consents to Prosecution* (LC 255) of 20 October 1998, para 4.4. There are, however, respected commentators who are of opinion that with the establishment of an independent, professional prosecuting service, with consent required to prosecute in some more serious classes of case, with the prosecution of some cases reserved to the Director, and with power in the Director to take over and discontinue private prosecutions, the surviving right is one of little, or even no, value: *op. cit.*, paras 4.5-4.8, 5.7, 5.10-5.24. The Law Commission concluded (para 5.24)

> "that the harm which might result from an unfettered right of prosecution would be either or both of the following:
>
> . . .
>
> (2) the harm (whether to the individual involved in the criminal process or to the public interest in the strict sense) that results from any prosecution successful or not which is not in the public interest."

Mr Swift is entitled to insist that the right of private prosecution continues to exist in England and Wales, and may have a continuing role. But it is hard to regard it as an important constitutional safeguard when, as I understand, private prosecutions are all but unknown in Scotland.

10. Thirdly, Mr Swift distinguished *R v Croydon Justices, Ex p Dean* [1993] QB 769 by pointing out that the two bodies involved in that case, the police and the CPS, were both arms of the executive, whereas, in the present case, one (the police) is an arm of the executive and the other is a private individual. This is certainly a distinction, and I would agree that *Dean* is a stronger case, and concerned a young person. But what the court relied on in the passage quoted in para 7 above was the effect of the representation on the applicant, and the state has an interest in the integrity of court proceedings. In the present case Mr Whalley was led to believe that if he agreed to be cautioned he would not be prosecuted for this offence. He was probably misled into believing, wrongly, that the caution was a criminal conviction, because that is what the form said, an error into which the Justices also were misled, as the Divisional Court pointed out (para 8) (although the Divisional Court was wrong to suggest that a warning or reprimand given to a young offender under section 65 of the 1998 Act has the status of a conviction: the warning or reprimand may, like a caution, be cited in later proceedings but is not, again like a caution, a conviction). It is not known whether, in the present case, Mr Whalley was alive to the risk of a civil claim against him by Mr Jones, but he doubtless believed that his acceptance of a caution rendered him immune from the risk of prosecution.

11. Mr Swift submitted, fourthly, that the forms considered in *Hayter v L* [1998] 1 WLR 854 stated the true legal position accurately and the form in the present case did not. But Mr Jones was not to be deprived of his rights by a mis-statement in a police form. If the police chose to caution Mr Whalley and not to instigate a prosecution, that was their decision and could not deny to Mr Jones the exercise of a right he enjoyed at law. This is in my opinion correct. But it does not answer the question whether the proceedings brought by Mr Jones were fairly to be regarded by the Justices, in the circumstances, as an abuse of the court's process.

12. Mr Swift relied, fifthly, on the safeguards which exist to prevent or curb misuse of the right of private prosecution. These safeguards, listed in *Hayter* at p 858, include the power of justices to refuse to issue a summons and the Director's power to take over private prosecutions and bring them to an end. The House should not, it was argued, invent any further safeguard. I would accept the value of these safeguards in some cases. Authority shows that the issue of a summons is a judicial act (*R v West London Metropolitan Stipendiary Magistrate, Ex p Klahn* [1979] 1 WLR 933), but in practice summonses are routinely issued without detailed scrutiny, and there is nothing to suggest that the police caution of Mr Whalley was disclosed when application was made for the

summons in the present case. The CPS was, as the Justices record, offered the opportunity to take over Mr Jones' prosecution, but declined to do so for reasons which are not in evidence: the CPS may have disagreed with the police action and favoured prosecution; or it may have agreed with the police decision but preferred to leave the matter to the Justices. It is not clear that either of these safeguards operated effectively in the present case.

13. The narrower issue is whether a private prosecution may or should be regarded as an abuse of the process of the magistrates' court where the defendant has agreed to be formally cautioned by the police on the assurance that, if he agrees, he will not have to go before a criminal court. The abuse complained of is not abuse impairing the fairness of the trial, since evidence of the admission and caution could be excluded. The abuse complained of goes, as in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, to the fairness of trying Mr Whalley at all in the circumstances. The Justices recognised, on the authority of that case, that the power to stay must be used sparingly. But they thought it would be an abuse, and not only, as I infer, because they were misled into regarding the caution as a conviction, which, if true, would have given Mr Whalley a complete defence. I agree with the Justices' conclusion. If Mr Jones had legal grounds for attacking the police decision to caution Mr Whalley, he could apply for judicial review to quash that decision. If successful, the slate would be clean. There would be no citable caution on Mr Whalley's record and Mr Jones would be free to prosecute. But so long as that formal caution stood, induced by a representation that he would not be prosecuted, the private prosecution of Mr Whalley did in my opinion amount to an abuse, as the Justices held.

*The broader issue*

14. In his oral submissions to the House Mr King questioned whether, irrespective of what may be said to, or stated in a form given to, a person who is cautioned, conditionally cautioned, reprimanded or warned, it can ever be other than an abuse of process for a court thereafter to entertain a private prosecution against him. To the extent that this contention was inconsistent with *Hayter*, counsel challenged the correctness of that decision.

15. The broad lines of the argument may be summarised in this way. The practice of cautioning, originally developed by the police as a

pragmatic response to a certain class of case, has grown into something much more sophisticated and specific, as evidenced by the statutory regimes established by the 1998 and 2003 Acts and a series of Home Office Circulars. While there are obvious differences between the young offender, conditional cautioning and simple cautioning regimes, they have shared objectives of seeking to keep people out of the criminal courts and preventing further offending. Underlying a decision to reprimand, warn, caution conditionally or caution simpliciter, and fundamental to each, is a judgment made by a responsible official that prosecution would not be in the public interest, or at least that the public interest would be better served by not prosecuting. Such a judgment, like a decision not to prosecute, is not immune from challenge. If shown to be unlawful on any of the familiar grounds relied on to seek judicial review, it may be quashed and set aside. But so long as the decision stands the judgment should be respected, and it would be wrong in principle to allow it to be circumvented at the behest of a private prosecutor whose motives may have little or nothing to do with the public interest. The right to prosecute privately is a factor of little weight in the balance, since it is a somewhat anomalous historical survival; it cannot outweigh an extant decision of a responsible official on what will best serve the public interest. On this argument, paradoxically, the statement made in the form given to Mr Whalley, in its reference to going before a criminal court, was accurate, and the statement in the *Hayter* forms was inaccurate.

16. I see very considerable force in this argument. A crime is an offence against the good order of the state. It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest. I would not, therefore, reject this argument. But nor do I think the House should in this appeal accept it, for reasons which I find, cumulatively, to be compelling. It was not advanced in the Divisional Court, so we lack the benefit of its judgment on it. It was scarcely foreshadowed in Mr Whalley's written case, and there was no hint that the correctness of *Hayter* was to be challenged. Thus Mr Swift had little opportunity to prepare an argument in reply. The question is one of some importance, and should not be resolved in the absence of representation of the Crown or any police force, both of whom might be expected to have views on how the issue should be decided. The question is one which might well benefit from legislative

attention. It is not necessary to resolve this question to decide the present appeal.

17. For these reasons and those given by my noble and learned friend Lord Rodger of Earlsferry with which I agree, I would therefore allow the appeal on the narrower ground, set aside the decision of the Divisional Court, uphold the decision of the Justices and dismiss the proceedings. I would invite written submissions on costs within 14 days.

**LORD RODGER OF EARLSFERRY**

My Lords,

18. In May 2003 the appellant, Mr Whalley, assaulted and injured the respondent, Mr Jones. When interviewed by the Greater Manchester Police, he admitted the offence. The officer concerned decided that Mr Whalley should not be prosecuted, but should be cautioned. In the case of the Greater Manchester Police the effects of a caution are set out on a standard form. It is not in dispute that Mr Whalley was informed of those effects and agreed to be cautioned.

19. Mr Whalley's standard form told him that a decision had been made that he was to receive a caution for the offence of assault occasioning actual bodily harm for which he had been interviewed. The notice continued:

> "This means you will not have to go before a criminal court in connexion with this matter but that a RECORD will be kept of this warning."

The form went on to spell out the other consequences of the caution.

20. Having been told this, Mr Whalley would have been entitled to assume that, since he had accepted the caution with its attendant effects, he would not now be prosecuted for the assault on Mr Jones. The form warned him, however, that details of his caution would be disclosed to

the victim in accordance with the victims' charter. And, presumably, having been made aware that there was to be no public prosecution, the victim, Mr Jones, initiated a private prosecution against him. Some months later, the Chief Crown Prosecutor for Merseyside declined to take over the prosecution. The House knows nothing about the reasons for that decision. In October 2004, the justices held that it would be an abuse of the process of the court to allow the prosecution to proceed and so they stayed the proceedings. Mr Jones appealed and the Divisional Court reversed the justices, holding that in the circumstances the prosecution was not an abuse of process.

21. When the police officer cautioned Mr Whalley, he was not acting under a statutory scheme. But nor was he off on a frolic of his own, or on a frolic of the Greater Manchester Police. On the contrary, he was acting in accordance with an officially recognised policy which was intended to be followed by police forces throughout the country in accordance with guidance issued by the Home Office. The current guidance was to be found in Home Office Circular 18/1994, to which was annexed a revised version of the National Standards for Cautioning. Paragraph 1 of the Standards describes the purposes of a formal caution as being to deal quickly and simply with less serious offenders, "to divert them from unnecessary appearance in the criminal courts," and to reduce the chances of their re-offending. All worthwhile policy objectives. Before the police can contemplate administering a caution, there must be sufficient evidence of the offender's guilt and he must admit the offence. Provided these requirements are met, "consideration should be given to whether a caution is in the public interest": para 3. The police are told that they should take into account the public interest principles described in the Code for Crown Prosecutors. In their turn, Crown Prosecutors are told in para 8.3 of the current Code for Crown Prosecutors that a simple caution should only be given if the public interest justifies it and in accordance with Home Office guidelines.

22. What is clear from the National Standards is that a police officer should not decide to administer a caution, rather than to prosecute, unless he is satisfied that cautioning rather than prosecution is in the public interest. Presumably, the officer in this case was so satisfied. If that view was untenable, his decision to caution rather than to prosecute could be set aside on judicial review. But Mr Jones has not challenged the officer's decision. The assumption must be that the police officer was entitled to decide that it was in the public interest for Mr Whalley to be given a caution and so avoid an "unnecessary appearance in the criminal courts". On that basis the officer represented to Mr Whalley that he would not have to go before a criminal court for the offence.

23. In these circumstances, where such an assurance had been given to Mr Whalley, any subsequent decision by the Crown Prosecutor to prosecute him would have been capable of being regarded as an abuse of process: *R v Croydon Justices, Ex p Dean* [1993] QB 769, 778F-G per Staughton LJ. What happened in this case, however, was that Mr Jones, a private individual, unconnected with the police or prosecuting authorities, initiated the prosecution, despite the assurance given to Mr Whalley. Whether or not Mr Jones was consulted before the police officer took the decision to caution rather than to prosecute and to give that assurance, he was certainly not a party to it. So there is no question of Mr Jones being estopped from initiating the prosecution. Nor did he do anything to give Mr Whalley any legitimate expectation that he would not be prosecuted. The question is, rather, whether the magistrates were entitled to stay the proceedings because it offended their sense of justice and propriety to be asked to try the accused in these circumstances: *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G-H per Lord Lowry.

24. Nowadays public prosecutions are the rule. So, usually, the court will be concerned to prevent its process being misused by a public prosecutor. But, in times gone by, when private prosecutions were the rule, the court must have had the power to guard against the corresponding danger of its process being misused by a private prosecutor. So, in this case the justices had the same power to stay for abuse of process as they would have had in the case of a public prosecution. Having duly considered the matter, the justices came to the view that it would be an abuse of their process to allow Mr Jones to continue with the prosecution of Mr Whalley, after the police had given him an assurance that he would not have to go to court in respect of the offence. Clearly, they considered that it offended their sense of justice and propriety to be asked to try the accused in the face of that assurance, irrespective of the fact that the prosecution was initiated by a private individual rather than by a public official. Not only was that a view which was open to the justices, but it is one which I share.

25. Looking at the matter from a slightly different angle, it seems to me that allowing private prosecutions to proceed, despite an assurance that the offender would not have to go to court, would tend to undermine not only the non-statutory system of cautions, but also the schemes for cautioning young offenders and adult offenders which Parliament has endorsed in the Crime and Disorder Act 1998 and the Criminal Justice Act 2003. A court is entitled to ensure that its process is not misused in this way.

26. In the course of the hearing, the House was referred to the decision of the Divisional Court in *Hayter v L* [1998] 1 WLR 854. In that case the defendants had assaulted and injured a young man. The police cautioned them, but the terms of the caution indicated that it did not preclude the bringing of proceedings by an aggrieved party. The victim's father then initiated a prosecution of the defendants. They contended that the proceedings should be stayed as an abuse of process. The justices dismissed the informations, but the Divisional Court allowed the prosecutor's appeal.

27. The qualification in a caution of that type means that the decision in *Hayter* is distinguishable from the present case and, for that reason, the House did not hear full submissions on it. I accordingly agree with my noble and learned friend, Lord Bingham of Cornhill, that it would not be appropriate to express a concluded view about the broader argument relating to it. Accordingly, I make only one tentative observation.

28. Plainly, the *Hayter* type of qualification to the caution would alert the offender to the lingering possibility of a private prosecution. So the reaction of a court to being asked to try the case in such circumstances might well be different from its reaction in a case where the caution was not qualified in that way – although, in *Hayter*'s case, the qualification does not actually seem to have weighed with the justices. The point which concerns me, however, is not the effect of such a qualified caution on the court's sense of propriety and justice, but, rather, whether it is proper for a police officer to insert the qualification in the caution and, if so, in what circumstances.

29. The National Standards indicate that a police officer should not administer a caution unless he concludes that it is in the public interest to divert the offender from an unnecessary appearance in the criminal courts. Prima facie, this would seem to suggest that the officer should have concluded that it is unnecessary for the offender to appear in the criminal courts, whether at the instance of a public or a private prosecutor. Some support for that view might perhaps be found in para 7 of the Home Office circular which contemplates the police giving the victim details of the offender in order to institute civil, but not criminal, proceedings. On that assumption, however, it would be difficult to see how the officer could administer a caution but simultaneously contemplate – by including the *Hayter* qualification - that it could be in the public interest for the offender to be prosecuted by the victim. The inclusion of the qualification suggests, however, that the officer has

concluded that, while it would not be in the public interest for a public prosecution to be mounted, it would none the less be legitimate, and not contrary to the public interest, for the victim to prosecute, if so advised. Your Lordships heard no submissions on whether it is appropriate for a police officer to issue a caution, with the various consequences for the offender, on that basis. Nor was counsel in a position to explain whether there is an established practice of issuing such qualified cautions in certain kinds of cases. So I simply draw attention to the point but express no view on it.

30. For these reasons, as well as for those given by Lord Bingham, I would allow the appeal and make the order which he proposes.

**LORD CARSWELL**

My Lords,

31. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I am in agreement with his reasons and conclusions on the narrower ground, and for those reasons I would allow the appeal and make the order which he proposes.

32. On the broader ground, I would also be reluctant to express a firm opinion. I agree with your Lordships that the right to bring a private prosecution retains a residual value, although in modern circumstances I would not wish to overstate its importance. I am conscious of the possibility that it is capable of being abused, the safeguard against which is the right of the public prosecutor to take over the prosecution, an area in which it behoves public prosecutors to be both vigilant and sensitive. I am rather more concerned about the utility of routinely inserting a caveat into cautions that the administration and acceptance of the caution do not preclude the possibility of private prosecution. I fear that the effect could be to deter offenders from accepting cautions in proper cases. Correctly used, and not over-used, cautions play a useful part in criminal justice and I would not like to see that usefulness impaired. I should therefore wish to have fuller argument on the correctness of *Hayter v L* [1998] 1 WLR 854 and its implications before expressing a final view on the broader issue.

**LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

33. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Bingham of Cornhill and for the reasons he gives I too would allow the appeal and make the order indicated.

34. Like Lord Bingham—and, I apprehend, in common also with my noble and learned friend Lord Rodger of Earlsferry, whose opinion in draft I have also had the advantage of reading—I too see considerable force in the wider argument advanced by the appellant, namely that once an offender has been formally cautioned (unless that caution is quashed in judicial review proceedings), he cannot be prosecuted, whether publicly or privately, for the same offence. Plainly, however, such a rule, were it to be established, would substantially diminish what many understand to be the present scope for private prosecutions and, as Lord Bingham observes, the question needs to be subject to altogether fuller argument than was addressed to the House on this occasion.

35. I too, therefore, would allow this appeal on the narrow ground that it is an abuse of process to prosecute someone who has accepted a formal caution on the express assurance that he "will not have to go before a criminal court in connection with this matter." The respondent submits that the victim cannot properly be deprived of his right to bring a private prosecution by a police mis-statement (Mr Swift's fourth argument set out by Lord Bingham at para 11 above). (This submission, of course, necessarily supposes that the wider argument is wrong.) I see the force of this but the answer to it lies to my mind in the victim's right to apply to have the caution quashed on the ground that it was induced by misrepresentation. (Any such application in future would inevitably now attract full argument on the wider issue too.)

36. The difficulty, of course, in deciding the present appeal on the narrow ground is that, until the wider issue is resolved by further litigation or, preferably perhaps, by legislation, it remains unclear whether, when administering a caution, the police should warn the offenders, as in *Hayter v L* [1998] 1 WLR 854, 855, that the caution "did not preclude an aggrieved party from bringing criminal proceedings or a civil action" or, as here, should assure them of immunity from criminal process. To say nothing about the consequences would

obviously be unhelpful. Perhaps the best and safest course would be to give the *Hayter* warning but in modified terms, stating that a caution *may* not preclude a private prosecution and will not preclude a civil action.

**LORD MANCE**

My Lords,

37. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood. On the narrower issue, and subject to some comments below regarding the right to institute a private prosecution, I agree with Lord Bingham's and Lord Rodger's reasoning and do not wish to add anything. I too would therefore allow the appeal and make the order indicated.

38. The broader issue is one of some importance. It requires some consideration of the general value of any right of private prosecution in modern conditions. It was not raised below or touched on in the appellant's case, and its implications have not been properly explored. They may be more substantial than might appear. Prosecutions brought without police or Crown Prosecution Service involvement are not uncommon. They may be initiated by private bodies such as high street stores, by charities such as the NSPCC and RSPCA, or by private individuals as in the present case. To treat a police decision to accept a caution as by itself fatal to the maintenance of any private prosecution, even where the terms of the caution expressly reserve that possibility, would be a step which would, at the least, require very careful thought, and might very well, even if it were thought appropriate, require legislation.

39. The Law Commission's approach in their *Report on Consents to Prosecution* (LC 255) of 20 October 1998 is of interest. The Commission addressed the right to bring a private prosecution in paragraphs 5.3 and 5.4 under the heading of "The Fundamental Principle". It pointed out that it had in its prior consultation paper considered the significance of private prosecutions, and had (in agreement with the statements of Lord Simon of Glaisdale and Lord Diplock and Lord Wilberforce quoted in Lord Bingham's opinion at paragraph 9) concluded that "the right to private prosecution was 'an

important one which should not be lightly set aside'" and "should be unrestricted unless some very good reason to the contrary exists". The Commission was (like your Lordships' House in the present case) only concerned with social and legal conditions in England and Wales. In Scotland, private prosecutions are apparently very rare, but without knowing more about the different Scottish environment leading to this being so, I cannot regard it as undermining the traditional English view that the right to institute a private prosecution is an important right and safeguard possessed by any aggrieved citizen.

40. The Commission went on at paragraphs 5.7 and 5.10 to 5.12 to recite criticisms of the right which it had received in the light of its consultation paper, and concluded at paragraph 5.13:

> "We see the force of these points but do not believe that it is appropriate to consider abolishing the right of private prosecution without specific consideration which has neither been sought nor given in this project. The issues raised on the question of retention of the right of private prosecution are complex and they are not capable of being resolved within the scope of this report".

41. At paragraph 5.19 the Commission identified two types of harm as likely to result if private prosecutions were instituted in cases failing the tests applied by the Crown Prosecution Service when deciding whether to prosecute, viz the harm resulting (1) from an unsuccessful prosecution of an innocent defendant and (2) from any prosecution, successful or not, which is not in the public interest. But at paragraph 5.22 they recited three factors which, as they concluded in their consultation paper, demonstrated that these potential harms did not undermine the fundamental principle of the right to institute a private prosecution. The factors were:

> "(1) There is always a risk that an individual Crown Prosecutor will either misapply the Code or – more likely, given the width of the Code tests – apply a personal interpretation to the tests which, although not wrong, might differ from that of other prosecutors.
>
> (2) The Code itself may, in the eyes of some, fail to achieve a proper balance between the rights of the defendant and the interests of the community.

> (3) It should not be assumed that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. If, for example, a case is turned down by the CPS because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if the case is a serious one, then a private prosecution might be thought desirable."

42. In the circumstances, the Commission made no suggestion that the right of private prosecution be abolished, but proposed a reformed regime for requiring consent of the Attorney General or Director of Public Prosecutions in the case of certain offences.

43. The right of private prosecution operates and has been explained at the highest level as a safeguard against wrongful refusal or failure by public prosecuting authorities to institute proceedings: see the statements by Lord Simon, Lord Diplock and Lord Wilberforce to which I have already referred and paragraph 5.3 of the Law Commission's report. That justification is relevant not just where police fail to take any action at all, but also where their only response is to obtain a caution. Further, as the Law Commission pointed out in their third factor (cf paragraph 5.22), it cannot always be assumed that, if it is wrong to bring a public prosecution, then it is also wrong to bring a private prosecution. While it is a matter of speculation, it is not impossible that such a thought played its part in the decision of the Chief Crown Prosecutor for Merseyside in the present case, declining to take over the prosecution with a view to bringing it to an end.

44. As matters stand, I do not consider that police, when cautioning an admitted offender, should give any unqualified assurance that the person being cautioned will not thereafter "have to go before a criminal court in connection with this matter". Rather, I agree with Lord Brown that they should give a warning along the lines given in *Hayter v L* [1998] 1 WLR 854, but that it would be preferable to give it in slightly modified terms, stating that the caution may not preclude a private prosecution (and will not preclude a civil action) by an aggrieved party. A court before which any such private prosecution is brought will retain a power to stay the proceedings in the event that it concludes that, despite the warning, it would be abusive for them to continue.