

Decision relating to case : POLICE V POTTER

IN THE DISTRICT COURT  
HELD AT GORE

CRN 6017003111

POLICE

Informant

v

POTTER

Defendant

Hearing: 1 May 1996

Decision 31 May 1996

Before: His Honour Judge B P Callaghan

Counsel: Sergeant Payne for the informant  
Mr. Hall for the defendant

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**RESERVED DECISION**

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**Introduction:**

This excessive breath alcohol case involves a rather moot point as to the lawfulness of a police constable's entry onto the defendant's private property and residence.

### Evidence.

In this case the defendant's motor vehicle had been involved in an accident and was found lying on its side in a ditch near Pukerau. Constable Heyrick went to the scene and found the vehicle and noticed a large amount of blood splattered inside the car on the dashboard and also on the outside of the car. There was no driver there.

After doing a registration check and as a result of information from a passer by Constable Heyrick obtained the name of the owner, namely the defendant, and his address.

Constable Heyrick went to the address which was nearby. He went onto the property and up to the house. This, as may be evident, was in the country. Upon going up to the house he saw some lights on and the front door slightly ajar, about three quarters closed. He knocked. There was no reply. He called out to the defendant. There was no reply. He entered the house through the partly open door. He said in his evidence in chief, this was to ascertain Mr Potter's injuries and to see if he required any medical assistance. He noticed the bedroom light was on and went in there. The bedclothes had been pulled back on the bed and there was a large amount of blood on the floor by the bed. He called out to the defendant and the defendant then exited from a closet in the room. Constable Heyrick asked Mr Potter about the motor vehicle in the ditch. Mr Potter volunteered that he had been at the Gore Town & Country Club that evening and he had had about 2 jugs of beer to drink. He said that he had left and fallen asleep whilst driving the vehicle home and crashed. After the accident he said he had walked across the fields to his home. The defendant had a gash on his arm which Constable Heyrick noted had stopped bleeding. Later the defendant was taken to Gore hospital where he received stitches.

As a result of that admission at 12.45am, Constable Heyrick requested the defendant to undergo a breath screening test, and as a result of the testing procedure, an evidential breath test was carried out at the Gore Police Station and a reading of 1040 mg of alcohol per litre of breath was obtained.

At the stage that Constable Heyrick was about to give evidence relating to Mr Potters admissions, an objection was made by counsel for the defendant, as to the admissibility of this evidence relating to the admissions, the evidential breath test and the previous procedures, because the evidence had been unlawfully obtained. Essentially Mr Hall was submitting that Constable Heyrick was a trespasser and was not entitled to go on

the defendant's property or into his house. I noted the objection and the hearing proceeded and Constable Heyrick was cross examined by Mr Hall, counsel for the defendant.

At the end of the prosecution case, Mr Hall on behalf of the defendant, elected not to call evidence but made a submission that the evidence relating to the admissions and subsequent breath alcohol content, were inadmissible because of essentially the unlawfulness of the obtaining of the evidence. I will come to those submissions in a moment. Because I was uncertain as to whether this was a no case submission or the defence case, I queried Mr Hall. Mr Hall made it clear that whether it was a no case to answer submission, or put as a defence case, he was not calling evidence.

At the conclusion of his submissions I clarified the point, and he again confirmed his client's election not to give evidence. If this evidence was to be admitted, he said, then I would have to consider whether the subsequent breath screening test and evidential breath testing procedures were valid. I therefore treated this approach as being the defence case.

Constable Heyrick was cross examined at some length by Mr Hall. Constable Heyrick had said in his evidence in chief, that he had entered the premises to ascertain Mr Potter's injuries, and to see if he required any medical attention. In his cross examination he conceded that he did not enter the property, nor the house, pursuant to either s 66A of the Transport Act or s 317 of the Crimes Act. He stated in his cross examination initially, that he had entered the property because he had taken an oath on his becoming a police constable to preserve life and property, but mainly his evidence related to life aspect. He said that he wished to see if Mr Potter required medical attention. He agreed that he did not know that Mr Potter was at the property or that he had been drinking. He said that as he approached the property there was a light on and the door was ajar. He agreed that there was nothing to suggest that Mr Potter was at home when he arrived. It was put to him that he was in the position of a trespasser, and he said that he did not believe that he was.

At one part of his cross examination he was asked if in effect he was making a search of the property. His answer was that he was trying to ascertain if Mr Potter was home, if that's what Mr Hall meant. He finally agreed after a fairly exhausting cross-examination, that because he did not know that anyone was injured in the property, that he could not be entering pursuant to his oath as a police officer to protect life. Immediately before that he had said he felt he was acting pursuant to his oath.

Constable Heyrick, however, had earlier said he did not agree that he was a trespasser. When the question put to him about not having any authority under law, with reference to s 66a of the Transport Act, s 317 of the Crimes Act and his oath, he agreed he had no authority. His agreement was a reluctant one. I found Constable Heyrick to be an honest and straightforward witness. I clearly felt that while Constable Heyrick had so agreed, he was not withdrawing from his initial evidence that he went into the house to ascertain Mr Potter's injuries, and to see if medical attention was required for Mr Potter. This was confirmed in his re-examination, where he said he believed it was the defendant who had been injured.

### Facts.

I find the following facts. The defendant Mr Potter was driving his motor vehicle on the night of 8 January 1996 on his way home to his address at Pukerau from the Gore Town & Country Club. He had been drinking alcohol. He fell asleep at the wheel and the car crashed into a ditch, and as a result of the accident the car was lying on its side. The defendant was injured in the accident, and he received a gash to his arm which was subsequently stitched at the Gore Hospital.

At about 12.20pm on 19 January 1996 Constable Heyrick, a police constable stationed at Gore, was dispatched to the scene of the accident. Upon arriving at the accident scene Constable Heyrick found the car in the position previously referred to and saw blood in the car, on the dashboard area, and on the outside of the car.

As a result of what he saw, Constable Heyrick had concerns about the persons who may have been in the car at the time of the accident. As a result of information received, and with the assistance of a passer-by, Constable Heyrick ascertained who the owner was, ie the defendant, and that he lived close by. The defendant is the owner of the car.

Constable Heyrick then went to the property of the defendant. He entered upon the property. The reason for Constable Heyrick going to the property was that he believed that the owner (who turned out to be the defendant) had been injured in the accident, and he wished to ascertain the injuries the owner suffered, and to see if he required medical attention. Constable Heyrick went on to the property and went up to the house.

Upon going up to the house he noticed that there was a least one light on inside. The door to the house was three quarters closed and obviously was ajar. Constable Heyrick knocked on the door and called out. He received no reply. As a result of his concerns about the defendant's injuries, that I have referred to, he decided to enter the dwelling house. He noticed a light on in a bedroom and went in and saw that the bedclothes were pulled back and there was a large amount of blood on the floor by the bed.

Constable Heyrick called out the defendant's name, and the defendant came out of a cupboard that he was obviously hiding in. Constable Heyrick enquired of the defendant about the accident, and the defendant told him that he had been at the Town & Country Club, that he had been drinking, that he had fallen asleep at the wheel as he was driving home, and that after the crash he walked from his vehicle, across some fields to his home.

Constable Heyrick requested that the defendant undergo a breath screening test, which the defendant agreed to, and it was carried out pursuant to the Transport Breath Test Notice (No 2) 1989 with an approved device. As a result of a positive test the defendant was requested to accompany the constable in accordance within the provisions of the Transport Act. Subsequently the defendant gave a sample of his breath.

As a result of an evidential breath test, carried out with an approved device, under the provisions of the Notice referred to, the defendant's breath alcohol limit was 1040mg of alcohol per litre of breath. All the procedures were carried out in accordance with the Transport Act.

Constable Heyrick did not enter the property for the purposes of carrying out any tests under the Blood and Breath Alcohol provisions of the Transport Act. Constable Heyrick had no cause to suspect the defendant had been drinking alcohol until the defendant made the admission to him. Constable Heyrick did not enter the property pursuant to any powers in s 66 (A) of the Transport Act or s 317 of the Crimes Act.

Constable Heyrick's entry onto the property and into the dwelling, was I find, within his general powers as a police constable, and was genuinely motivated to render assistance to the defendant, whom he believed had been injured in the accident.

### Submissions.

Mr Hall made extensive submissions, which largely centred on the fact that Constable Heyrick had no authority to go onto the defendant's property in these circumstances, and as a result he was a trespasser. This rendered the defendant's admissions, and subsequent Transport Act procedures, unlawful. The evidence he says was unfairly and unlawfully obtained. He likened the evidence so obtained as to an illegal search under the Bill of Rights Act. I am not going to refer specifically to each part of the submissions but have taken them all into account.

Mr Hall mentioned that in respect of the admissibility of this evidence, it was a two pronged approach. First, the Court must decide whether the evidence has been unlawfully obtained, and secondly, if the Court decides it was unlawfully obtained, should it exercise its discretion to exclude it.

With reference to Howden v Ministry of Transport [1987] 2 NZLR 747 ( Court of Appeal) Mr Hall submitted that the Court was to consider not only the case before it, but also, the necessity of maintaining effective control over conduct of Law Enforcement Officers by requiring them to observe the rights of the individual, particularly the right to privacy of his own home. He referred to Edwards v Police [1994] 2 NZLR 164 a decision of Tipping J, where it was stated that there needed to be balance between “the interests of society in having offences prosecuted and the interests of citizens in having the police observe the law”. In that case Tipping J stated that by excluding the unlawfully obtained evidence the Court could “vindicate and give tangible recognition to the substantial breach of rights” which occurred in that case.

Mr Hall also drew my attention to Ministry of Transport v Abram and Jays [1990] DCR 193, in which the learned District Court Judge in a Blood/Breath Alcohol case held that an expressed or implied licence given to an enforcement officer to enter onto private property to make inquiries, gave authority to proceed to the door of a residence or a garage, but did not give the right to enter the premises without permission being given.

In respect of the first part of his submission Mr Hall referred to the Edwards decision and in particular to the dicta of Tipping J at page 168 where this is said;

“the fundamental starting point on the question whether the constable entered the premises lawfully is this, no one is permitted to set foot on the land of another unless they can show

lawful justification for doing so. As long ago as 1765 Lord Camden CJ in Entick v Carrington (1765) 19 State TR 1029 said: "If he will tread upon his neighbour's ground he must justify it by law". Accordingly a police officer, like any citizen, may go onto and remain on the land of another only in circumstances which are justified in law. There will be justification and thus no trespass if:

- (a) The entry is authorised by statute.
- (b) The entry is expressly or impliedly authorised by or on behalf of the land owner.
- (c) The entry is justified by the doctrine of necessity
- (d) The entry is justified on some other basis recognised by law."

Mr Hall also submitted in his view that there was a distinction between entry onto the property i.e. the land, as opposed to entry into a residence. As I understood his submission he submitted that whilst in some cases there may be a licence to enter onto a property as opposed to going into a residence, there is certainly no licence to go into a residence with reference to the particular circumstance of this case. He submitted that the cases had recognised a distinction between the property as such and a residence and referred to a decision of late Justice Wylie in Burich v Ministry of Transport (1988) 3 CRNZ 177.

Sgt Payne for the Police submitted that what the officer did here was reasonable, even if prima facie it was unlawful. He submitted that Constable Heyrick was well entitled to made enquiries to check to see if there was any serious and life threatening injuries to the owner of the car.

### **Discussion.**

In Howden v Ministry of Transport [1987] 2 NZLR 747 the Court of Appeal held that the power to require a person to undergo a breath screening test conferred by s 58 (a) of the Transport Act may be exercised on private property only if the presence of the enforcement officer on such property is lawful, that is to say, with the licence, expressed or implied of the occupier. This was in accord with the earlier Court of Appeal decision of Transport Ministry v Payn [1977] 2 NZLR 50. To enter a private property for the sole purpose of carrying out a breath alcohol check of a driver who's driving, or other behaviour, has given no cause for suspicion does not come within an implied licence. In Howden's case the Court of Appeal referred to Robson v Hallett [1967] 2 ALLER 407, as being a case which His Honour the President of the Court of Appeal stated was one in which the doctrine of implied licence "was either invented or articulated".

However the entry onto private property to enquire about an accident, and no doubt to consider the possibility of a breath screening test if reasonable grounds emerged to suspect the consumption of alcohol, falls well within the kind of implied licence exercisable by law enforcement officers, see Tipa v Ministry of Transport (unreported C A 17/2/89 C.A. 348/88).

It is interesting to note that in Howdens case in regard to the licence to enter upon property under this Legislation the President stated at page 751:

“Entering private property for random checking of a driver whose driving or other prior behaviour has given no cause for suspicion, is quite a different thing. It is a very considerable intrusion into privacy. In my opinion it would not be reasonable to hold that an occupier gives any implied licence to police or traffic officers to enter for those purposes. Most New Zealander householders, I suspect, if confronted with that question would answer it No. Whether or not that suspicion is correct, it certainly could not be maintained that the answer Yes is required so clearly as to justify the Courts in asserting that such an implied licence exists.”

In Edwards v Police Tipping J adopted the approach of the President in Howden's case in asking himself a similar question to resolve whether or not the constable had implied licence to enter upon the property. Tipping J said at page 170;

“Subject to the time of day and subject, of course, to revocation, it may well be that householders should be regarded as giving law enforcement officers an implied licence to come onto their property to make bona fide and reasonable inquiries in the course of their duties. It is not necessary to go that far in order to decide this case. That is because the constable here had reasonable cause to suspect that the person seen going onto the subject property had committed an imprisonable offence. In relation to an implied licence wider than that: See Tipa v Ministry of Transport (Court of Appeal, Wellington CA 348/88, 17 February 1989) which involved the making of inquiries about an accident and Adam v Ministry of Transport (High Court, Napier, AP 3/92, 29 May 1992) per Gallen J which involved the making of inquiries about a non-functioning tail light”. (The emphasis is mine.)

Whilst all of the above cases are helpful, no case refers specifically to where there is implied licence to enter into a dwelling in the type of circumstances here. Also this case is unlike the cases that are referred to above or were referred to during the hearing, in that this was not entry onto the private property of the defendant for the purpose of carrying out a breath or blood alcohol check. It was, as I have held, for the purpose of ascertaining the injuries to the driver, and to see if medical attention was required.

As it turns out the belief of the police constable was confirmed upon seeing the blood in the defendant's bedroom, and the gash to his arm. In my view the police constable's entry both onto the land, and into the house, were reasonable in the particular circumstances of this case. In addition, if it needs to be said, the police constable's



concerns were bona fide. Indeed, taking all the circumstances into account, I believe the police constable could well be criticised if he had not pursued his concerns for the driver.

As was said in the Edward's case, necessity may in effect give a person an implied licence to enter private property. I also note in the commentary on "Specific Torts" in Halsbury's Laws of England ( Vol 45, para 1407), the editor suggests there is a defence, if you like, to trespass, where a person enters on the land for the preservation of life. This is in addition to an exercise of the legal right whether statutory or otherwise, such as an implied licence. Halsbury states;

"It seems that the person may be entitled to enter onto the land of another, and to do acts there which otherwise would amount to a trespass, if such entry and acts are reasonably necessary for the preservation of the property of the person entering or of the person who's land is entered, or for the preservation of life, and if the entry is made and the acts are done in a reasonable manner".

One of the cases referred to in Halsbury, Cope v Sharpe 2 [1912] 1 KB. 496 refers to a test for this defence as being was the entry reasonably necessary?

Also Tipping J in Edwards in the passage emphasised above foresaw that there may be situations where householders might well give police constables an implied licence to go onto property to make bona fide and reasonable enquiries in the course of their duties. That comment in my view could well apply to this type of situation.

### Decision.

In my view the police constable's entry here was justified, whether it be an extension of the already recognised implied licence, necessity, or being reasonably necessary in these particular circumstances.

I do not therefore consider the distinction between land and a dwellinghouse to be in issue here. While this decision may be interpreted as giving an authority for entry into a dwelling, such interpretation must be restricted to these special facts. The entry here was not in my finding a trespass. The police constable was on an errand of mercy, making bona fide enquiries about the injuries to the defendant. Even had the defendant not been injured, in the end result I still consider the entry was reasonable.

Upon discovering the defendant, the immediate inquiry made related to the accident. It was the defendant who volunteered he had been drinking. There is no suggestion that the defendant told the police constable to leave. There can be no doubt that the hiding in the wardrobe could be seen as being an attempt by the defendant to save himself from apprehension, but he willingly came out. Given that the police constable's entry was in my view justified, the subsequent evidence is not to be excluded merely because of its prejudicial nature.

In my view the admissions and the subsequent evidence were lawfully and fairly obtained.

If the evidence here was unfairly, or unlawfully, obtained, the Court still has the discretion to admit the evidence. Howden's case referred to the fact that the Court should be mindful of maintaining effective control over the conduct of law enforcement officers. In the Edward's decision Tipping J recognised there needed to be a balance between that and the interests of society in having offences prosecuted.

In my view I would have exercised my discretion in the particular circumstances of this case as I have found them to be, to admit the evidence if it had been unlawfully or unfairly obtained.

**Conclusion:**

The prosecution have in my view, proved the charge and each ingredient of it beyond reasonable doubt and a conviction will be entered.

B P Callaghan  
District Court Judge