IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

NO. G.R. 76/81

BETWEEN EDWARDS

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 15 July 1982

Counsel: R.B. Walton for Appellant
D.J. Mackenzie for Respondent

Judgment: 9/8/82

JUDGMENT OF COOK J.

The appellant was convicted of driving with excess blood/alcohol on the night of 7th December 1980. Following an accident, a traffic officer, acting upon information he had received, went to the accident and emergency department of the Timaru Hospital, where he spoke with the appellant. From that point onwards, the facts as found by the learned District Court Judge are as follows:-

> "The facts, as I have been able to piece them together, and as I find them to be from the evidence, are that the defendant acknowledged to the Traffic Officer he had been the driver of the vehicle involved in the accident near Pareora. He smelt of liquor and he told the Traffic Officer quite openly that he admitted he had had too much to drink and should not have been driving. He said he had consumed two jugs of beer at the Terminus Hotel and had left there and gone to the Pizza bar on Bay Hill, and then was on his way to a party at St Andrews when the accident happened. A passenger in the vehicle received quite serious injuries. At this point when the Traffic Officer was speaking to the defendant, Mr Davis, a registered medical practitioner, who is a resident Doctor at the Hospital, came into the

cubicle, and the Traffic Officer left the cubicle and he waited nearby.

At the time I am satisfied the Doctor was making an examination of the defendant for injuries which the defendant had complained of initially, and then he was making a general examination for any further injury, and as to the defendant's nervous system. As a result of his examination, the Doctor felt satisfied that the defendant's injuries were quite minor, and that he would not require hospitalisation. He suggested to the defendant that the defendant could go and that he should get a parent or relative to come and get him. The defendant waited about for a little while especially because he was concerned for the welfare of his friend, a passenger of the vehicle, and waited to see how he was getting on. At that stage, when the Doctor had come out of the cubicle, the Traffic Officer spoke to the Doctor and requested the Doctor that a blood sample be taken from the defendant. The Traffic Officer considered the defendant to be affected by alcohol. The Doctor was aware that the Defendant had been the driver of the motor vehicle which had been involved in the accident earlier that night. The Doctor told the Traffic Officer he had finished his examination of the defendant and that the defendant did not require hospitalisation and the Doctor asked the Traffic Officer couldn't the Traffic Officer simply take the defendant to the Police Station and get the normal duty Doctor to take the sample there. The Traffic Officer says he explained to the Doctor he was unable to do that because of the procedures which were laid down in the Transport Act. He was referring to Section 58D(1). So the Doctor took the defendant back, with the defendant's consent, to that same cubicle and there took the blood specimen from the defendant, with his consent of course, and in accordance with the usual medical procedures, and the Traffic Officer, I find, was present when the blood specimen was taken."

I have underlined the findings which are of particular relevanc

The first point taken on appeal is that the procedure followed was that prescribed by Section 58D, which deals with the testing of suspected persons who are in hospital, but that the appellant was not "in a hospital" within the meaning of that expression as used in the Section;

nor was any registered medical practitioner "in immediate charge of the examination, care, or treatment" of him. The Section commences as follows:-

> "(1) Notwithstanding anything in any Act or rule of law, no enforcement officer shall require any person who is in a hospital or doctor's surgery as a result of an accident involving a motor vehicle to undergo a breath screening test or an evidential breath test.
>
> (2) Notwithstanding anything in any Act or rule of law, a registered medical practitioner who is in immediate charge of the examination, care, or treatment of a person who is in a hospital or doctor's surgery -
>
> (a) May take, or cause to be taken by another authorised person, a blood specimen from that person; and
>
> (b) Shall take, or cause to be taken by another authorised person, a blood specimen from that person if requested to do so by an enforcement officer, -
>
> whether or not that person has consented thereto and whether or not that person is capable of giving his consent:
>
> Provided that a blood specimen shall not be taken from a person pursuant to this subsection unless the registered medical practitioner believes that the person is in the hospital or doctor's surgery as a result of an accident involving a motor vehicle and the registered medical practitioner has examined the person and is satisfied that the taking of the blood specimen from him would not be prejudicial to his proper care or treatment."

Subsection (3) provides for a certificate signed by the medical practitioner as to certain matters, including the fact that the person named in the certificate was in a hospital or doctor's surgery and that the practitioner giving the certificate was in immediate charge of the examination, care, or treatment of that person, to be sufficient evidence of those matters until the contrary is proved, but in this case no such certificate was produced as the doctor was called as a witness. No other portion of the section is relevant for present purposes.

The meaning to be attributed to the phrase "in a hospital" as it appears in Section 58D(1) quoted above, was considered in Ministry of Transport v Douglas (Rotorua Registry, M.10/80, Barker J.) In that case the respondent had been the driver of a car which had injured some other people who were endeavouring to start another car. Although not himself injured, the respondent took the injured persons to the hospital where, after being requested to do so by a Traffic Officer, he underwent two positive breath tests. The issue was whether or not the respondent was "in a hospital' at the time when the breath tests were taken. The learned Magistrate (as he then was) held that he was. On appeal, Barker J. held that he was not:-

> "Although the subsection might have been more happily drafted, I think that on a fair, large and liberal reading, it refers to persons who are in a hospital or doctor's surgery as a result of an accident as meaning persons who have come to the hospital or doctor's surgery to receive treatment. In other words, the presence of such person must be a necessary consequence of the accident, not just an incidental result in the broad sense, as held by the learned Magistrate. Any other meaning would not be consonant with the normal principles of statutory interpretation: I think that the scheme of this portion of the legislation, from a consideration of Section 58D as a whole, is clear enough."

In the present case the appellant had, of course, come to the hospital as a result of an accident, but it follows from the judgment of Barker J., with which I respectfully agree, that there is a distinction between being in a hospital as a result of an accident and being at a hospital for some other reason.

A situation closer to the present one was considered in Brantsma v Ministry of Transport (Auckland Registry, M.1907/80, Pritchard J.) In that case the appellant had driven his car into a power pole. At the hospital, the Traffic Officer met the appellant in the casualty waiting room, and was told by the appellant that he had been released from hospital and was free to go home. The Traffic Officer then requested a screening breath test,

which proved positive. When dealing with the issue of the legality of this test, in the light of Section 58D(1), the judgment of Pritchard J. included the following:-

> "I am in respectful agreement with the reasoning of Barker J. in Ministry of Transport v Douglas and I am thereby led to the further conclusion that the prohibition of s.58D(1) ceases to apply once the person concerned has received all the treatment that is to be given on the occasion of his going to hospital and he is free to leave the premises. He is then not at the hospital to receive treatment: he is there for some other reason - probably waiting for transport to take him home. It is not the intention of s.58D(1) that the precincts of a hospital should provide a sanctuary from the law but only to ensure that, while the subject is 'in hospital', his medical or surgical treatment and welfare must have priority over the attentions of zealous enforcement officers."

In coming to this decision, Pritchard J. noted with approval the similar reasoning of the House of Lords in Bourlet v Porter, (1973) 2 All E.R. 800, a case which dealt with corresponding English legislation, although the words used were not identical, and of the English Court of Appeal in the Attorney General's Reference (No. 1 of 1976) (1977) R.T.R. 284, which dealt with the meaning of the phrase "at hospital", and the status of a person who, after receiving treatment at a hospital, is permitted to leave and is doing so. In the former case, the House of Lords was of the opinion that being "at a hospital as a patient" is a status which ceases once the treatment for which the person came to the hospital is completed and he is discharged, while in the latter the Court of Appeal held that a person who is at a hospital for treatment will cease to be a patient as soon as the treatment for that visit is over.

As indicated above, in the present case the District Court Judge found that:-

> "As a result of his examination, the Doctor felt satisfied that the defendant's injuries were quite minor, and that he would not require hospitalisation. He

> suggested to the defendant that the defendant could go and that he should get a parent or relative to come and get him. The defendant waited about for a little while especially because he was concerned for the welfare of his friend, a passenger of the vehicle, and waited to see how he was getting on ... The Doctor told the Traffic Officer he had finished his examination of the defendant and that the defendant did not require hospitalisation and the Doctor asked the Traffic Officer couldn't the Traffic Officer simply take the defendant to the Police Station and get the normal duty Doctor to take the blood sample there."

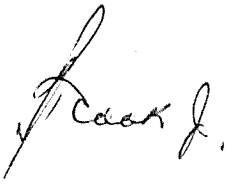
I can only read this as meaning that the purpose for which the appellant had come to the hospital was at an end. He was free to go but remained for a different purpose, not for examination, care, or treatment but to learn how a friend was faring. This was understandable, especially as the friend had received quite serious injuries.

In these circumstances I do not think it can be said that the medical practitioner was any longer "in immediate charge of the examination, care, or treatment" of the appellant or that the latter was any longer "in hospital"; consequently the power to take a blood sample, or cause one to be taken, either on his own initiative (58D(2)(a)) or at the request of an enforcement officer (58D(2)(b)), no longer existed.

It was submitted for the Ministry of Transport that the doctor could not be said to have totally relinquished responsibility and that to a degree the appellant was still under his care but, in view of the finding of fact made by the District Court Judge, I do not think that that can be maintained. I may say, also, that it was not suggested for the Ministry that,the appellant having consented to the blood sample being taken,this validated the matter.

With reluctance, because one can see that the question whether a person is "in" or "at" hospital may well pose problems, I can only find that in this case the point on appeal is well-taken and that the appeal against conviction

must be allowed.



Solicitors:

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