IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY AP 125/92

BETWEEN DEAN WILLIAM SMITH

APPELLANT

A N D MINISTRY OF TRANSPORT

RESPONDENT

Hearing: 8 June 1992

Counsel: M. Harte for Appellant
V.J. Shaw for Respondent

Judgment: 2 September 1992

JUDGMENT OF ANDERSON J

On 1 April 1992 the appellant was convicted after a defended hearing in the District Court at Pukekohe on an information alleging an offence against s.58(1)(C) of the Transport Act 1962 in that he drove a motor vehicle on a road while the proportion of alcohol in his blood exceeded 80 milligrams of alcohol per 100 millilitres of blood. He appeals against that conviction on the sole ground that s.23(1)(b) of the New Zealand Bill of Rights Act 1990 ("Bill of Rights") was breached in the course of the taking of a blood specimen from him pursuant to s.58D of the Transport Act 1962. The appeal raises the issue of the application or otherwise of the provisions of s.23(1)(b) of the Bill of Rights to procedures for the taking of specimens of blood in hospitals for the purposes of the Transport Act 1962.

Section 58D provides as follows:-

"58D. Hospital blood tests - (1) Notwithstanding anything in this Act or any other Act or rule of law, but subject to subsection (2) of this section, 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 a blood specimen from the person, or cause a blood specimen to be so taken by another registered medical practitioner or an authorised person; and

(b) If requested to do so by an enforcement officer, shall take a blood specimen from the person, or cause a blood specimen to be so taken by another registered medical practitioner or an authorised person; and

(c) May take or cause to be taken by another registered medical practitioner or an authorised person a further blood specimen, if the specimen originally taken is insufficient to be divided into 2 parts in accordance with section 58F(1) of this Act (which further specimen shall for the purposes of this Act be deemed to be part of the original blood specimen taken from the person), -

whether or not the person has consented to the taking of the specimen and whether or not the person is capable of giving consent.

(2) A blood specimen shall not be taken from a person pursuant to this section unless the registered medical practitioner -

(a) Believes that the person is in the hospital or doctor's surgery as a result of an accident involving a motor vehicle; and

(b) Has examined the person and is satisfied that the taking of the blood specimen would not be prejudicial to the person's proper care or treatment.

(3) Notwithstanding anything in any Act or rule of law, no proceeding, civil or criminal, shall be taken against any area health board or Hospital Board or against any person in respect of the taking of a blood specimen pursuant to this section, or in respect of the sending of any blood specimen to a Ministry analyst, on the ground that any person whose consent to the taking of the blood specimen would have been otherwise required by law if this section had not been enacted has not so consented.

(4) Nothing in subsection (3) of this section shall apply with respect of any proceeding on the ground of any negligent act or omission in the taking of any blood specimen."

The District Court Judge held that the provisions of s.23(1)(b) did not apply to cases involving the taking of specimens of blood pursuant to s.58D because of the provision in s.58D(1) for the taking of a specimen "whether or not the person has consented to the taking of the specimen and whether or not the person is capable of giving consent." He held that the irrelevance of consent meant that the procedure followed pursuant to s.58D did not involve a detention as envisaged by s.23(1) of the Bill of Rights. He held further that if the Bill of Rights did apply the Court had a discretion as to whether or not evidence which had been obtained in breach was to be admitted or not. He held that in this case, as a matter of discretion, the blood specimen would not be excluded because "although the defendant, in hindsight, said, as given in evidence, that he would have appreciated the advice of a solicitor, I do not think that advice would have assisted him in any event."

In my view the fact that a medical practitioner may take a blood specimen without the consent of the subject and whether the subject is capable or not of giving consent is of limited relevance. It has been held that the authority accorded to registered medical practitioners in terms of s.58D does not extend to a requirement that a medical practitioner take a blood specimen by brute force - see *MOT v Atherton* [1991] 3 NZLR 509. I respectfully agree with the observations to such effect made in that case by Barker J. One needs little imagination to envisage the potential danger to medical personnel and the subject in an attempt to insert a needle into the subject to extract a blood specimen in circumstances of active resistance. Indeed the legislature recognises this potential situation by providing for the taking of blood without consent, as opposed to the taking of blood against the

subject's will, and further by providing specifically in s.58E(2) for an offence of refusing or failing to permit a registered medical practitioner or authorised person to take a blood specimen pursuant to s.58D. Of relevance also is s.11 of the Bill of Rights which declares that everyone has the right to refuse to undergo any medical treatment. I also take the view that if acts done by a person or body in the performance of any public function, power or duty, conferred or imposed on that person or body by or pursuant to law, are not regulated by s.23 of the Bill of Rights if they are done without the consent of the subject, then s.23 becomes virtually meaningless because it would be confined to extraordinary situations where people may have actually consented to arrest or detention. Since s.23 is not confined to valid or lawful arrests - *R v Butcher (supra)* - the view that absence of consent to detention, lawful or unlawful, excludes the application of s.23 of the Bill of Rights is plainly wrong.

This case requires a consideration of the concept of detention for the purposes of the Bill of Rights. In *R v Clarke* (T.12/92, Hamilton Registry) Doogue J held that there had been no relevant detention so as to render s.23(1)(b) applicable in circumstances where a blood specimen had been taken, pursuant to s.58D of the Transport Act 1962, from a subject who was unconscious in a hospital awaiting treatment for serious injuries suffered in a motor vehicle accident. The Judge in that case found that the only possible argument that could be advanced on behalf of the accused was that there was a theoretical restraint on his liberty when the specimen was taken by the medical practitioner but that in fact there was no restraint on liberty because the subject was quite incapable at the time of exercising any rights that might have been available to him. Of course it may frequently be the case that persons are incapable of exercising rights, by reason of arrest or detention and it cannot be the case that detention ceases to be such if a detained person should fall asleep or become unconscious. Accordingly Doogue J's finding needs to be considered in the context of the judgment as a whole. It is plain from a

consideration of the whole of the judgment in *Clarke* that Doogue J was mindful of the scope of the concept of detention as examined by Le Dain J in the following manner in *R v Thomsen* (1988) 40 CCC (3d) 411:-

> "In its use of the word 'detention', s.10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee."

I interpret Doogue J's observations as a recognition that the provisions of the Bill of Rights are to be applied realistically for the benefit of the subject and not flagged in a merely fanciful way as a perceived technical objection to due process. The submissions on behalf of Mr Clarke were adjudged to fall into the latter category since the inherent proposition that the taking of the blood specimen should be postponed until Mr Clarke should recover his faculties was plainly untenable.

Whether a person is arrested or detained is a mixed question of law and fact. It must be assumed that the rights recognised by s.23 of the Bill of Rights are intended to be assured in circumstances where there might reasonably be some benefit from according them. In some cases the question whether a claimed breach of s.23 ought be considered in terms of the subject not having been detained, or clearly not having been disadvantaged so that evidence ought not be excluded, may be difficult to decide. In most cases the application of s.23 will be obvious. In a case such as the present the issue is not whether the section applies to the taking of blood specimens pursuant to s.58D of the Transport Act 1962, but whether it ought be applied so as to exclude the evidence of the blood sample in the present case. That question requires of course a consideration of the facts of the case and the principles of s.23 of the Bill of Rights.

It is now well established that the Bill of Rights is not to be interpreted narrowly or over technically, lest its intended purpose be defeated by inflexible legalism - *R v Butcher supra.* It has also been noted by the Court of Appeal that there are clear advantages not merely to the subject but to the community as a whole in letting people know their rights - *MOT v Noort* 8 CRNZ 114, 136-7, per Richardson J :-

> "Clearly it is not in the interests of the community as a whole or of the individual that the individual should be left under a veil of ignorance. Citizens should know where they stand, what the law expects of them. That is particularly obvious where legislature such as the Transport Act sets out a statutory process for the obtaining of information which becomes the foundation of criminal charges."

In the present case a traffic officer interviewed the appellant briefly at about 2.30 am on 19 August 1991 at Middlemore Hospital where the appellant had been taken following a motor accident. The traffic officer then identified himself to a doctor who was attending to the treatment of the appellant and requested the doctor to take or cause to be taken a specimen of blood, which the doctor did. On the appeal it is not suggested that there was any vitiating aspect of the procedure for taking the specimen except the alleged breach of the Bill of Rights. The traffic officer made no mention in his evidence in chief at trial as to whether he did or did not advise the appellant of rights pursuant to s.23 of the Bill of Rights, and he was not cross-examined on the issue. Mr Smith himself was asked if anything was said to him at the hospital about a solicitor. The whole of the evidence on the issue is reproduced below:-

> "Did anyone say anything to you at the hospital about a solicitor.
> Was a solicitor mentioned....not that I recall, no.
> Were you asked if you wanted one....not that I recall, no.
> Would you have availed yourself of one if you had been offered one....I would think so, yes, after the seriousness of what happened. I think I probably would have got one.

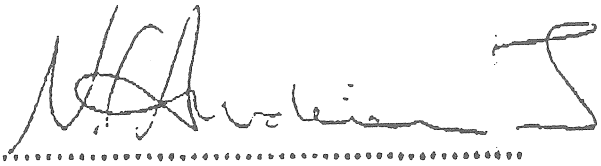
Why....because of the situation.
THE COURT - Did you think anything about a Lawyer then....at the time?
Yes....I was in pretty much of a state.
Did you think about it at the time....No."

Although the District Court Judge seems not to have specifically found that the appellant was not informed of his rights pursuant to s.23(1)(b), because such a finding was not necessary having regard to the view taken by the Judge that there was no relevant detention, the evidence sufficiently shows that the appellant was not in fact informed of or accorded the rights recognised by s.23(1)(b) of the Bill of Rights. This was a case where there was no apparent reason why the appellant should not have been told of his right to consult and instruct a lawyer without delay and accorded the opportunity of exercising those rights by telephone, as contemplated in the case of *Noort*. He would then have had the benefit of knowing where he stood. Further, there was in my judgment a relevant detention from the time the doctor prepared to and manifested to the appellant his intention to take the specimen. It would over technical to regard the detention as limited to the time taken actually to insert a needle and extract blood, because such a view would necessarily result in the nature of the detention automatically excluding the opportunity for the subject to be told of the rights recognised by s.23 of the Bill of Rights. There is little if any probative value in this case in enquiring of the subject what he may or may not have done if he had been accorded the rights secured by s.23. What is plain is that he would have been informed of his rights and given an opportunity to exercise them if s.23 had been observed. There is nothing in this case to suggest that he would have waived his rights. The appeal must succeed.

I am not unmindful of the diffidence some medical practitioners may feel at the prospect of having to inform patients of their rights under s.23 of the Bill of Rights, in circumstances where it is inexpedient for a law enforcement officer

so to do. However they are invested with powers and responsibilities pursuant to s.58D of the Transport Act 1962 and are clearly within the contemplation of s.3(b) of the Bill of Rights. I would think however that a law enforcement officer would wish to be present in connection with the according of rights in terms of s.23 of the Bill of Rights, or during the taking of a blood specimen when such rights are not sensibly able to be accorded, so that any potential and unjustified challenge by a defendant based on the Bill of Rights can be met. Obviously it would be undesirable to have a situation where the doctor who took the specimen may certify to that effect but may have to attend Court anyway to give evidence in connection with the Bill of Rights.

For the above reasons in the particular case, considered in the light of its own facts for the purposes of the Bill of Rights, I allow the appeal quash the conviction, sentence and orders imposed on the appellant.



N.C. Anderson, J.

Solicitors for Appellant: Michael Harte, Barrister, Auckland

Solicitors for Respondent: Crown Solicitor, Auckland