Butterworths

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP232/97

97/1306

BETWEEN POLICE

Appellant

AND WAIRARAPA TRANSPORT LIMITED

Respondent

Hearing: 20 August 1997

Counsel: P K Feltham for Appellant
G W Calver for Respondent

Decision: - 4 SEP 1997

RESERVED DECISION OF McGECHAN J

Solicitors:

Crown Solicitor's Office, Wellington, for Appellant
Gresson Grayson & Calver, Hastings, for Respondent

The Appeal

This is an informant's appeal by Case Stated under s107 against a decision of the District Court at Wellington delivered 29 November 1996 dismissing informations laid under s70B(1)(b)(i) and 70B(7)(b) Transport Act 1962 alleging operation of a vehicle in circumstances where the driver spent more than 11 hours in a 24 hour period driving. It raises a question of statutory interpretation on which District Courts are said to have differed. The question put is as follows:

> "In section 70B(2)(a) of the Transport Act 1962, does the "single continuous period of driving" include non-driving but on duty time falling between two or more periods spent in driving?"

The Section

Section 70B, and potentially relevant s70C(1)(3) and (4) read as follows:

> **"70B. Driving hours—**
>
> (1) No person shall drive any heavy motor vehicle, or any vehicle that is being used under a transport service licence (other than a rental service licence) or in circumstances in which it ought to be being used under such a licence, or any 2 or more such vehicles, and no person shall operate any such vehicle or vehicles, in such a manner that any one person-
>
> (a) Drives any such vehicle for a continuous period exceeding 5½ hours; or
>
> (b) In respect of any 24-hour period during which the person drives any such vehicle-
>
> (i) Spends more than a total of 11 hours in driving any such vehicle; or
>
> (ii) Works or is on duty for more than a total of 14 hours within that period; or
>
> (iii) Does not have at least 9 consecutive hours off duty within that period (not being a 24-hour period that commences during the currency of any such 9-hour off duty period); or
>
> (c) Does not have at least 24 consecutive hours off duty after driving for 66 hours or being on duty for 70 hours, whichever first occurs (which 66-hour or 70-hour periods shall be reckoned as from the close of the most recent 24 consecutive hours off duty and shall include all periods of driving or being on duty, as the case may be).
>
> (2) For the purposes of this section and of section 70C of this Act-

(a) Any 2 or more periods spent in driving shall be deemed to be a single continuous period unless separated by an interval of not less than half an hour which is available to the driver for rest or during which the driver is off duty:

(b) No period shall be counted as available for rest if it is spent by the driver in or on any vehicle referred to in subsection (1) of this section, being a vehicle connected with the driver's business or employment, while that vehicle is moving:

(c) The terms "working" and "on duty" include engaging in any of the following activities:

(i) Driving a vehicle referred to in subsection (1) of this section:

(ii) Loading or unloading any such vehicle or waiting for the loading or unloading of any such vehicle:

(iii) Maintenance, cleaning (other than unpaid cleaning that occurs during any off duty period of not less than 24 hours), or other activities relating to any such vehicle:

(iv) Any other activity (whether or not it relates to a vehicle of any kind) relating to the provision of transport services for passengers or goods:

(v) Any paid employment of any kind (whether or not it relates to any transport service or to any vehicle of any kind), including any period of paid employment that is, or is set aside for or available as, a rest period; but does not include paid leave of any kind, or any other period for which payment is made but during which the person is not required to perform any duties unless that period is a period when the person is to be regarded as working or on duty by virtue of any of subparagraphs (i) to (iv) of this paragraph:

(d) A person shall be deemed to be off duty only when that person is not working or on duty within the meaning of paragraph (c) of this subsection.

(3) The requirements of this section shall apply in respect of any vehicle referred to in subsection (1) of this section whether or not the vehicle is engaged in any transport service or is carrying any load or passengers at any time.

(4) The Director may grant partial or total written exemptions from some or all of the requirements of this section in respect of any driver or operator, any class of driver or operator, any service or occasion, any class of services or occasions, or any time spent on any activity or employment, and may impose conditions relating to the exemption and the records to be kept of driving or time spent in terms of the exemption.

(5) Any exemption granted under subsection (4) of this section may be amended or revoked at any time by the Director in writing.

...

(7) Every person commits an offence who fails to comply with any of the requirements of this section or the conditions of any exemption granted under subsection (4) of this section, and is liable on conviction-

(a) In the case of a driver, to a fine not exceeding $2,000, and the person shall be disqualified from holding or obtaining a licence to drive a heavy motor vehicle and any vehicle being used in the relevant transport service for a period of 1 calendar month or such greater period as the Court thinks fit:

(b) In any other case, to a fine not exceeding $10,000.

(8) It shall be a defence in any proceedings for an offence of failing to comply with this section if the defendant proves that the failure to comply with this section was due to unavoidable delay in the completion of any journey arising out of circumstances that could not reasonably have been foreseen by the defendant.

(9) Nothing in this section applies in respect of any rail service vehicle, or in respect of any goods service vehicle fitted with 2 axles and having a manufacturer's gross laden weight of less than 14 tonnes that--

(a) Is used within a radius of 50 kilometres of--

(i) The business location of the operator of the vehicle; or

(ii) The normal base of operation for the vehicle; but

(b) Is not used for hire or reward.

70C. Driver logbooks—

(1) Every driver of any vehicle to which this section applies shall maintain a logbook, which shall be in a form approved by the Director, containing a clear and legible record of-

(a) The driver's name and residential address; and

(b) All periods spent-

(i) In driving any vehicle referred to in section 70B (1) of this Act; and

(ii) Working or on duty; and

(iii) As rest periods (being periods of not less than half an hour); and

(iv) Off duty; and

(c) The relevant starting and finishing dates, times, and (except in the case of off duty periods) places of the periods referred to in paragraph (b) of this subsection; and

(d) The registration number of each vehicle driven; and

(e) Where the vehicle is required to be fitted with a distance recorder by or under the Road User Charges Act 1977, the distance recorder readings at the start and finish of each period of driving."

...

(3) Except as provided in subsection (4) of this section—

(a) The date, time, and place of commencement of every period required by subsection (1) of this section to be entered in a logbook, and (where driving is involved in

any such period) the relevant distance recorder reading and vehicle registration number, shall be entered in the driver's logbook at the commencement of that period; and

(b) The date, time,. and place of finishing of any such period, and, where approprite, the relevant distance recorder reading, shall be entered in the driver's logbook at the finish of that period.

(4) Where 2 or more periods spent in driving are deemed by section 70B (2)(a) of this Act to constitute a single continuous period—

(a) The driver may enter the relevant dates, times, and places of commencement and finishing, and (except where more than 1 vehicle is driven) the relevant distance recorder readings and vehicle registration number, as if those 2 or more periods were a single period spent in driving; but

(b) Where the driver so elects, the total of those 2 or more periods, together with any time spent between those periods (wether or not such time is actually spent in driving) shall be treated for the purposes of section 70B(1)(a) and (b) of this Act as a single continuous period spent in driving."

Background Facts

The relevant facts fall within a small compass. The Respondent owns a heavy motor vehicle of the relevant type. It was stopped by a constable on 31 January 1996. The driver's logbook was inspected. It showed driving times and on duty times over the relevant dates. Calculations as to respective "driving" and "on duty" allocations differ, and no exact allocation finding was made in the District Court. Resolution was not vital, as on either calculation the driver did not "drive" more than 10½ hours, but during intervening periods was "on duty" for periods which took total working time beyond 11 hours (though not exceeding 14 hours) per 24 hour period. While the driver was so "on duty" he was loading and unloading. The time was not available to him for rest. The driver did not have intervals of at least half an hour for rest between periods of driving, and was not "off duty" for at least half an hour between periods of driving. The driver did not elect for continuity under s70C(4).

District Court Decision

The District Court Judge gave a detailed reserved decision. The Judge noted prosecution contention that the correct approach was to add actual "driving" time and "on duty" time, producing totals exceeding 11 hours per 24 hour period, and a contrary defence contention the correct calculation reflected time actually spent "driving" and excluded time otherwise "on duty" (e.g. excluded loading or unloading). The question was identified as the proper interpretation of s70B(2)(a) in the context of s70B as a whole, and s70C(4). After reviewing authority, the Judge identified (page 8) the Court's task as determination of the effect of s70B(2)(a) words "any two or more periods spent in driving shall be deemed to be a single continuous period". (With respect, the true and direct question may have been a simpler one: does "driving" include "on duty" time spent loading and unloading, but the point may not matter in the end). The Judge declined to follow *Police v Hislop* (unreported District Court Oamaru, 21 October 1993, MacDonald DCJ), said to rule that on duty periods between periods of driving were to be included as if driving time, the purpose of the legislation being to avoid driver fatigue. The Judge preferred a plain language approach focused on s70B(2)(a) words "2 or more periods spent in driving". "Driving" should be given its ordinary meaning. The section did not say on duty time between driving periods should be included as if it were driving, as would be expected if such were intended; the contrast being drawn in that respect with s70C(4)(b). It was considered inappropriate to try to read into the section words which were not there, particularly given its penal nature. The favoured approach (on duty, loading/unloading, not "driving") was considered consistent with the Act's recognition of a distinction between "on duty" driving time and "on duty" non driving time; and was considered not to produce a result contrary to the purposes of the statute. The Judge accordingly ruled:

> "...the on-duty period of loading and unloading between periods of driving, is not to be included in the calculation of driving time. In other words, the periods actually spent driving are to be added together to provide the total of time spent in driving".

On the facts, the driver had not exceeded the 11 hour maximum driving time and the informations were dismissed.

Appellant's Submissions

Appellant maintains submission that s70B(2)(a) should be interpreted to make a "single continuous period of driving" begin with the first period of driving and end with the last period of driving "regardless of what activity is actually undertaken between the two times, unless the driver is either off duty or the driver is able to rest for not less than half an hour". In concrete terms, five hours driving plus one hour rest (or off duty) plus five hours driving totals 10 hours driving; but five hours driving, plus one hour loading and unloading, plus five hours driving totals 11 hours driving. Appellant submits it is "artificial" to remove "on duty but non driving" time, and calculate time spent driving only; a criticism put as supported by the fact s70B(2)(a) provides only two instances in which continuity is deemed broken. Illustrating, a rest period under half an hour is deemed to be part of an ongoing driving period. It is said to be likewise artificial to speak of "time spent in driving" in isolation from the remainder of the section. In that connection, use of the word "unless" ("unless separated by an interval of not less than half an hour...") is put as significant; determining that rest or off duty periods less than half an hour in interruption are deemed to be ongoing "driving". Appellant urges that if "on duty but non driving" periods (e.g. loading and unloading periods) were intended to be excluded, specific provision would have been made in s70B(2)(a) itself. Attention is drawn to the exclusion from deemed "driving" activity of on duty periods at the start or end of the day, or adjacent to "proper" (half hour plus) rest periods.

Counsel invoked support from *Hislop* (supra), and *LTSA v McNaughten and Allison* (unreported District Court Thames, 27 May 1996, Rea DCJ); putting *Police v Marks and Lightning Transport Limited* (unreported High Court Auckland, 18 December 1995, AP236/95, Temm J) aside as unhelpful beyond clarifying "rest or ... off duty" is disjunctive.

Counsel put s70C(4)(b) as simply clarifying a position already determined by s70B(2)(a) (on duty time included in period of driving), and not as a guide to interpretation.

Last, the submission invoked the statutory intention to promote driver and public safety by preventing driver fatigue, said to occur through on duty activity as well as actual driving. That object, it was said, would be best achieved by a complete break from work between driving. The submission raises situations such as driving for five and a half hours, unloading and loading for three hours, and then driving for a further five and a half hours, otherwise permissible.

Respondent's Submissions

The Respondent supports the District Court's decision, and places particular emphasis on s70B(2)(a) words "periods spent in driving" and plain meaning principles. Counsel drew support from s70C(4), put as for the benefit of goods service drivers such as couriers and taxi drivers engaged in considerable stop start work. Drivers in that category need not fill in log books every few minutes, but can elect to show waiting as driving time, at the price of the total being treated as a single continuous period spent in driving "*whether or not* such time is actually spent in driving" (italics added). Counsel submits "the very inclusion of those words in s70C(4)(b) makes it plain time not actually spent in driving is not to be included in the continuous period deemed by s70B(2)(a)". Counsel puts the purpose of s70B(2)(a) as related to s70B(1)(a) with its prohibition of driving for a continuous period exceeding five and a half hours, apparently seeing this as distinct from the 11 hour total situation. Section 70B(2)(a) ensures drivers get a rest; it not being good enough simply to have a "break" but to be "still working". Thus, if a driver has driven for five hours, unloaded for an hour, then driven for five hours, he is treated as having driven continuously for 10 hours and is in breach of the five and a half hour rule. He has not, however, driven for 11 hours.

Authorities

The Authorities, such as they are, are mixed.

The case of first impression is *Police v Hislop* (unreported District Court Oamaru, 21 October 1993, MacDonald DCJ). The report supplied is of a ruling on a "no case" submission. There appears to be a subsequent ruling in the District Court at Dunedin 15 February 1994, referred to in both the *Marks* and *McNaughten* cases (supra) to which I will come. I have not been supplied with a copy of this subsequent ruling. *Hislop* involved charges under s70B(1)(a) of driving for a continuous period exceeding five and a half hours. The driver concerned had in fact driven for periods totalling not more than five and a half hours, which had been interspersed by loading and unloading activities, taking total work hours to seven or eight. If the latter loading/unloading activities were classified as "driving", the section was breached. If not, it was not. The Judge saw the purpose of the legislation as "to promote road safety by ensuring that drivers of heavy motor vehicles are not fatigued through long hours of work" and accepted "...as a general proposition that that object would be best achieved by requiring the driver to have a complete break from work between driving". The Judge then turned to the statutory words. Basically, it was accepted that "driving" was to be given its ordinary meaning, and "on duty" time not spent driving was not included. It followed there were three periods of driving. As these were not interspersed with rest or off duty periods, the three were to be aggregated under s70B(2)(a) into one continuous period of 5½ hours, prima facie permissible. The Judge accepted this consequence followed on the plain wording, "even though that construction would not be entirely consistent with the intent of the legislation in that it would not provide the driver with a complete break from work". The came a twist particular to the case. The Judge turned to s70C(4). His Honour considered there was room for inference from the relevant log book entries that an election to record the totality as driving had been made, which would of course take total driving on a continuous basis past 5½ hours. So far, that causes no concern in law. It was a question of factual inference as to a s70C(4) election peculiar to that case. Then, however, the Judge observed:

> "The further aspect to consider is that really the defendant has no choice anyway because the periods of driving involved here would be deemed to be a single continuous period by virtue of section 70B(2)(a)".
>
> [*Police v Hislop* (supra) p4-5]

His Honour then reiterated a view s70C(4)(b) prima facie was applicable, and dismissed the no case submission.

It appears that in the subsequent Dunedin decision on 15 February 1994 the Judge may have taken these conclusions rather further. I am disadvantaged, and irritated, by absence of a copy of the full decision; but the decision from which the present appeal is brought records it as follows:

> "His Honour Judge MacDonald in Hislop (Dunedin decision) included the on-duty period between the two periods of driving as if it were driving time. He explained his decision in the following words:
>
> > "It connects the separate acts of driving so as to make it a single continuous period of driving. The whole point of the recording of a continuous period of driving is surely so as to indicate that the driver has not been resting or off-duty. Therefore, I take the view that the distinction between off-duty and resting on the one hand, and being on-duty on the other, is there for a purpose. That purpose is to give effect to the overall aim of the legislation which is to avoid driver fatigue."

If, as appears, MacDonald DCJ was moving beyond s70C(4) outcomes, and ruling generally that on-duty periods between driving are deemed in themselves to be "driving" within s70B(1)(a), the ruling concerned is clearly in point in the present case.

The next, and seemingly only authority at High Court level, is ***Police v Marks and Lightning Transport Limited*** (unreported High Court Auckland, 18 December 1995, AP236/95, Temm J). The case involved s70B(1)(a) (exceeding five and a half hours). The driver was shown to have driven continuously for five and a half hours until midday. He then rested for half an hour, and then drove for three and a half hours until 4 pm. From 4 pm until 10 pm he loaded other trucks, with regular intervals in the staff cafeteria exceeding half an hour. From 10 pm to 11 pm he resumed driving. If the period of sporadic loading of other trucks between 4 pm and 10 pm counted as "driving", he was in breach of both provisions: if not, he was not. As an additional complication, his log book showed this time as on duty, loading. Temm J in an oral decision focused on interpretation of s70B(2)(a). His Honour regarded the ***Hislop*** (Dunedin) decision as ruling one could not "rest" if "on duty"; and overruled that approach. It now appears one can rest on duty. Generations of workmen will breathe the easier. The driver concerned had regular rest (exceeding half hour

periods) in the cafeteria. That sufficed to break continuity. The log book entry "on duty" did not displace that simple fact. (Section 70C does not appear to have been raised). Dismissal was upheld. The intervention of recognised rest periods distinguishes *Marks* from our present case, but I note two potentially relevant generalities. First, Temm J regarded the District Court Judge as correct in identifying driver fatigue as the mischief against which the legislation is directed. Second, His Honour observed:

> "Where s.70B(2)(a) requires two separate periods spent in driving to be deemed to be a single continuous period, the District Court Judge was right to recognise that that could only be done where the two periods were not separated either by at least a half hour period when the driver was off duty, or at least a half hour period which was available to the driver or rest."
>
> [*Police v Marks and Lightning Transport Limited* (supra) p5]

His Honour did not go as far as saying intervening on duty activity was to be counted as driving in itself and added to actual driving time.

LTSA v McNaughten and Allison (unreported District Court Thames, 27 May 1996, Rea DCJ) involved charges under s70B(1)(a) (exceeding five and a half hours) and 70B(1)(b)(i) (exceeding 11 hours). The facts have some complexities. The Judge recognised *Hislop* (supra) insofar as holding "available for rest" required the driver to be "off duty" has been overruled by *Marks* (supra). On the particular facts, the driver was loading and unloading, was thus "on duty", and in distinction to *Marks* (supra) was unable to show periods of rest. Driving times were aggregated. Again, s70C was not raised, and there was no suggestion loading or unloading time in itself amounted to additional driving time.

In our present case, the Judge expressly differed from the asserted effect of the *Hislop* (Dunedin) decision. Her Honour preferred the plain meaning approach centred on the words "spent in driving" and the implications of s70C(4)(b), considering the outcome not contrary to the purpose of the statute.

Decision

The problem is a familiar one in the interpretation field. The Court must reconcile words actually used, and apparent legislative intention.

The problem is also relatively limited. This is not a s70B(1)(a) 5½ hour continuity case, despite the emphasis in the question posed and in argument upon s70B(2)(a) considerations. It is a s70B(1)(b)(i) 11 hours maximum case. It involves a question whether intervals "on duty" (loading and unloading) between intervals of driving are to be recognised in themselves as "driving", thus taking "driving" totalities past the permissible 11 hours maximum.

As a matter of plain meaning, I am entirely satisfied "driving" does not include "on duty" activity of another character, such as loading or unloading. "Driving" connotes vehicle guidance. If I may be forgiven, "driving" is not "not driving". This obvious truth is reinforced for purposes of the section by the terms of s70B(2)(c)(i) and (ii) which distinguish between "driving" and "loading or unloading", and subsequent sub-enumerated activities. In that light, it would be surprising if s70B(2)(a) somehow transmogrified non driving activity into "driving", i.e. converted non driving activity, such as loading or unloading carried on between spells of driving, into that same "driving" activity. It would require clear words. An example of that very possibility is found in s70C(4)(b) situations, which carry a specific qualification ("*whether or not* such time is actually spent in driving") but no equivalent is found in s70B(1) or (2)(a). That comparative silence is telling. The concept, and the thrust of s70B(2)(a), are to interrupt excessive and dangerous driving continuity. The driver must not drive more than five and a half hours, with at least half an hour available for rest, or spent on duty. A few minutes by the roadside after five hours and 25 minutes, followed by another five hours and 25 minutes will not do. However, a direction to interrupt is not a requirement to convert. The driver must interrupt his journey for at least half an hour, but the language does not specially convert that very half hour of non driving into some notional "driving" to be added to actual driving periods.

The concern advanced by the Appellant in favour of a different interpretation looks less to language than to consequences. At that level, it has some force. If all that is required is interruption, and time spent not in rest but in loading or unloading or like activities is not treated as "driving", there seems more room for insufficient rest and driver fatigue. The concern is not illusory. For example, a driver could spent alternate one hour periods driving, then loading and unloading, for a total of 10½ hours, before a mandatory aggregated half hour rest or off duty period came into force. If the loading and unloading was heavy work, the driver could be significantly fatigued when driving towards the end of the period involved.

However, while a Court will do what it can within purposive principles and s5(j), there are limits to the extent a Court can reshape plain language. There is a point past which the Court must leave weighing unsatisfactory policy outcomes to Parliament and to legislative amendment. That is the more so in situations such as the present, where policy considerations can involve complex compromises. I agree, for example, with MacDonald DCJ in *Hislop (Oamaru)* that reduction of driver fatigue would best be promoted by requiring complete rest breaks. That would be the ideal. However, the ideal is not always attainable. For all the Court can know, it might be quite impracticable as a matter of accepted economics of road transport to cut back driver hours "in motion" by deeming loading and unloading to come within "driving" classification. It is possible, at least for younger drivers and within reasonable limits, that a diversion to loading and unloading, with its quite different demands, could amount to a sufficient interruption to reduce driver fatigue. Perhaps, for some, "a change is as good as a rest". No studies preceding the legislation were put in evidence. The Court has no expertise. It simply cannot know, beyond possibly impracticable ideals, what realistic policy dictates may require. These are matters involving research and expertise which are better left to Government, and ultimately the legislature.

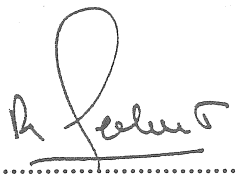
In the circumstances, I concur with the Judge's preference for a plain meaning approach. I do not interpret s70B, and in particular s70B(2)(a), as bringing within a single continuous period of driving intermediate non driving activity while on duty. In plain language, intermediate spells spent loading and unloading are not to be added on to time spent driving for the purpose of s70B(1)(b)(i).

Answer

The question as posed is answered "no".

If that outcome is considered a danger to road safety, legislative amendment is required.

It is a proper test case. There will be no order as to costs.



R A McGechan J