C.A.C. No. 126118

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Spidell, 1996 NSCA 162

Clarke, C.J.N.S.; Matthews and Roscoe, JJ.A.

BETWEEN:		
ALLEN WADE SPIDELL		Mark F. Dempsey for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Kenneth W.F. Fiske, Q.C. for the Respondent
	Respondent	
		Appeal Heard: May 14, 1996
		Judgment Delivered: May 31, 1996

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Matthews, J.A., concurring.

ROSCOE, J.A.:

This is an application for leave and, if granted, an appeal pursuant to s.

839 of the **Criminal Code** from a judgment of the Supreme Court affirming a conviction for refusal of a demand for a sample of blood made pursuant to s. 254(3)(b).

Appeals to this Court from a Summary Conviction Appeal Court are on questions of law alone (s. 839(1) **Criminal Code**).

FACTS

The facts are set out by Justice Carver, of the Supreme Court, as follows:

> On February 13, 1995 at approximately 4:00 p.m. the appellant went to the Emergency Department of the South Shore Regional Hospital for treatment for injuries received in a single motor vehicle accident earlier that day. Dr. Kydd met the appellant at approximately 4:15 p.m. while he was reclining in one of the observation beds. At this time through questioning the appellant told Dr. Kydd he had been drinking and that he had been in a motor vehicle accident which had occurred one half to one hour prior to being in the Emergency Department. Dr. Kydd had asked him if he had been drinking and when the accident had happened as this information might be important to the treatment or any prescription he might give. At this point, Dr. Kydd reported the accident to the R.C.M.P. because he felt he was obliged to report accidents that had not been reported. Mr. Spidell had not been a prior patient of Dr. Kydd.
>
> When Constable White arrived at the hospital in response to the telephone call, Dr. Kydd informed him the appellant had told him he had been drinking, the accident had not previously been reported and that the accident had occurred a half hour to one hour prior to Dr. Kydd seeing him. Dr. Kydd also told Constable White he had noted Mr. Spidell stagger when he came to the hospital.
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> Constable White then met with Mr. Spidell and having formed the opinion Mr. Spidell's ability to operate a motor vehicle was impaired by alcohol, Constable White then read a demand for a blood sample to Mr. Spidell. Mr. Spidell made no reply. Dr. Kydd attempted to take a blood sample from the appellant. At this point the appellant refused to give a sample and asked to contact Mr. Dempsey. He was advised Mr. Dempsey was away for a couple of days. When he was advised there were two other lawyers available in Mr. Dempsey's stead he decided not to speak to them. At this time he refused to supply a sample of blood. He was then charged with refusal under S.254(5) of the **Criminal Code**.

Upon the request of the police officers, Dr. Kydd later prepared a written summary of the events in outpatients and mailed it to their office. Dr. Kydd had not obtained the consent of the appellant to release to the police this or any other information mentioned above. It is to be noted that the written summary did not form an essential or any part of this case of refusal.

Section 8 of the **Charter** provides:

Everyone has the right to be secure against unreasonable search or seizure.

The relevant sections of the **Criminal Code** are as follows:

254. . . .

(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under section 253, [impaired driving or “over 80"] the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

> (a) such samples of the person's breath as in the opinion of a qualified technician, or
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> (b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,
>
> > (i) the person may be incapable of providing a sample of his breath; or
> >
> > (ii) it would be impracticable to obtain a sample of his breath,
>
> such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

(4) Samples of blood may only be taken from a person pursuant to a demand made by a peace officer under

> subsection (3) if the samples are taken by or under the direction of a qualified medical practitioner and the qualified medical practitioner is satisfied that the taking of those samples would not endanger the life or health of the person.
>
> (5) Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.

At the trial, Judge Crawford, of the Provincial Court, found that there had been no breach of the appellant's right to counsel, no unreasonable search and seizure and that the use by the police of information received from Dr. Kydd was not contrary to the principles of fundamental justice. Judge Crawford's ruling on the right to counsel issue was not appealed.

On appeal, Justice Carver agreed with Judge Crawford that **R. v. Dersch**, [1993] 3 S.C.R. 768; 85 C.C.C. (3d) 1, the principal case upon which the appellant relied, should be distinguished on the facts. Although Judge Crawford found that part of what Dr. Kydd told Constable White was confidential, and the doctor "may well have breached his duty of confidentiality", Justice Carver was not prepared to accept that there was a breach of the duty of confidentiality.

ISSUES

The appellant submits to this Court that the trial judge and the Summary Conviction Appeal Court judge erred in not finding that there had been a breach of his right pursuant to s. 8 of the **Charter**, not to be subjected to an unreasonable search and seizure. The foundation for this argument is the submission that there was a breach of the privilege of confidentiality between doctor and patient when Dr. Kydd provided information to the R.C.M.P. officers. The appellant says that there was an unreasonable "seizure of information" and that this seizure resulted in the appellant being conscripted to give evidence against himself. The appellant relies on the

decisions of the Supreme Court of Canada in **Dersch, supra**, **R. v. Dyment**, [1988] 2 S.C.R. 768, 45 C.C.C.(3d) 244 and **R. v. Colarusso**, [1994] 1 S.C.R. 20, 87 C.C.C. (3d) 193.

Before addressing the issues, a review of the facts of **Dyment**, **Dersch** and **Colarusso** is necessary. In **Dyment**, the accused was taken to the hospital by an R.C.M.P. officer following a single car accident. The police officer had seen that the accused was the driver of the vehicle. He was bleeding from a head injury. At the hospital a doctor held a vial under the free-flowing wound and collected a blood sample for medical purposes. The accused did not know that the sample had been taken and was not asked to consent. The accused told the doctor that he had earlier consumed beer and antihistamine tablets. After a conversation between the doctor and the police officer, the doctor gave the blood sample to the officer. The evidence did not reveal the contents of the conversation. An analysis of the blood disclosed an alcohol content over the limit. The **Criminal Code** at the time did not provide for a police officer making a demand for a blood sample as it does now.

Justice La Forest, for the majority of the Supreme Court of Canada, held that there had been a warrantless seizure of the blood sample by the police officer, that the accused's privacy rights were violated and that the sample should be excluded from the evidence pursuant to s. 24(2) of the **Charter**.

In **Dersch**, which was decided by the Supreme Court five years after **Dyment**, the accused had been involved in a car accident in which a person was killed. The officer at the scene noted indicia of impairment. The accused was taken to the hospital. He objected to the taking of a blood sample by a doctor. Another doctor took a blood sample for medical purposes while the accused was unconscious. A blood test revealed the presence of alcohol. Later the accused refused a police request for a blood sample. After the police left the hospital, the accused consented to the doctors

taking a second sample. In response to a written request from police, the hospital sent the police a report which included the results of the blood alcohol test and an assessment that the accused was intoxicated when he arrived at the hospital. The doctors did not have the consent of the patient to release information to the police. A search warrant was issued for the first blood sample and testing of it revealed levels of between 178 and 193 milligrams of alcohol in 100 millilitres of blood. The appellant was charged and convicted with criminal negligence causing death, criminal negligence causing bodily harm, impaired driving causing death and impaired driving causing bodily harm. His convictions were upheld by the British Columbia Court of Appeal.

On appeal to the Supreme Court, Justice Major, for the majority, held that although the doctors were not agents of the state, in taking the blood samples against his instructions the doctors' actions were improper. By the provision of specific medical information about the accused to the police without his consent, the doctors violated his common law duty of confidentiality to his patient. Since there was a reasonable expectation of privacy in the information provided to the police, there was a breach of the appellant's s. 8 rights and the evidence of the blood test results should have been excluded. The two charges relating to impairment were dismissed and a new trial was ordered on the criminal negligence charges.

The **Colarusso** case dealt with the taking of blood samples by a coroner. The accused had been involved in two separate motor vehicle accidents within the span of a few minutes. One person was killed and two were injured. It was apparent to police officers at the scene that the appellant was under the influence of alcohol. He was placed under arrest and informed of his right to counsel. Because the accused was also injured in the second collision, the police took him to the hospital. Blood and urine samples were taken by the hospital staff for medical purposes. In order to perform his statutory duty of determining the cause of death of the other driver, the

coroner requested, in writing, and was given, specimens of blood and urine from the samples already obtained. The coroner then gave the samples to the police officer present in the hospital to take them to another lab for analysis. The police officer first took the specimens to the police station where he prepared the requisition for the laboratory tests which included a blood alcohol test. It was not clear how the police received the results of the analysis, but the technician from the laboratory was called by the Crown at the appellant's trial on several charges including impaired driving causing death. His convictions were upheld by the Ontario Court of Appeal.

The majority of the Supreme Court of Canada adopted the judgment of Justice La Forest which held that there was a seizure of the bodily fluids by the police and there had been a breach of the accused's rights under s. 8 of the **Charter**, but that to admit the evidence would not bring the administration of justice into disrepute.

First Issue: Duty of Confidentiality

The first issue raised by the appellant is whether Dr. Kydd owed a duty of confidentiality to the appellant. Rule 6 of the **Code of Ethics** of the Canadian Medical Association provides:

> An ethical physician will keep in confidence information derived from his patient, or from a colleague, regarding a patient and divulge it only with the permission of the patient except when the law requires him to do so.

Section 71 of the **Hospitals Act**, R.S.N.S. 1989, c.208 is as follows:

> 71 (1) The records and particulars of a hospital concerning a person or patient in the hospital or a person or patient formerly in the hospital shall be confidential and shall not be made available to any person or agency except with the consent or authorization of the person or patient concerned.
>
> . . .
>
> (7) Nothing contained herein prevents a hospital or

> a qualified medical practitioner from disclosing general information on the condition of a person or patient unless that person or patient directs otherwise.

It is recognized however, that there are exceptions to these general rules which may explain why Dr. Kydd thought he was under a duty to report the appellant's accident. A doctor is required to report suspected abuse of children and elders, the existence of certain contagious diseases, and details of certain events such as births and deaths. As well, s. 279(7) of the **Motor Vehicle Act,** R.S.N.S. 1989, c. 293 provides that a doctor may report that a patient is, in the opinion of the doctor, afflicted in such a manner to make it unsafe to drive a motor vehicle. (For discussion of other exceptions to the general rule of confidentiality of medical information see: **Doctors and Hospitals: Legal Duties**, Butterworths, 1991, Meagher, Marr and Meagher, p.246 *et seq.*; **Legal Liability of Doctors and Hospitals in Canada,** Carswell, 1978, Picard, p. 34 *et seq*. and **Canadian Health Information**, 2nd Edition, Butterworths, 1992, Rozovsky and Rozovsky, p. 87 *et seq*.) It is interesting to note that in **Law and Medical Ethics**, 4th Edition, Butterworths, London, the authors, Mason and McCall Smith in a chapter dealing with medical confidentiality, list one of the exceptions to the general rule as the requirement of the **Road Traffic Act** 1988 (U.K.) that a doctor must provide on request any evidence which she or he has which may lead to the identification of a driver involved in an accident.

In **Dyment**, Justice La Forest discussed the issue of privacy and confidentiality and, after referring to the medical **Code of Ethics**, said that confidentiality is required because of the vulnerability of the patient at the time he consults a physician, especially in the hospital setting. He continued at page 258 as follows:

> . . . The "Report of the Commission of Inquiry into the Confidentiality of Health Information" (The Krever Commission), 1980, has drawn attention to the problem in the law enforcement context in the following passage, vol.

2, at p. 91:

> . . . the primary concern of physicians, hospitals, their employees and other health-care providers must be the care of their patients. It is not an unreasonable assumption to make that persons in need of health care might, in some circumstances, be deterred from seeking it if they believed that physicians, hospital employees and other health-care providers were obliged to disclose confidential health information to the police in those circumstances. *A free exchange of information between physicians and hospitals and the police should not be encouraged or permitted. Certainly physicians, hospital employees and other health-care workers ought not to be made part of the law enforcement machinery of the state*.
>
> [Emphasis added by La Forest, J.]

Since it is not, in my view, necessary in this case to determine whether there was a breach of the doctor's duty of confidentiality, and furthermore, since I am not satisfied that all the relevant evidence and proper authorities are before this Court, I would adopt the approach of the trial judge by concluding:

> . . . Although it could be argued that the physical observations were no more than what could have been observed by any layperson, it is clear that the defendant's statements as to his prior drinking and as to the time of the accident were made in response to the doctor's questions and as part of the course of medical diagnosis and treatment.
>
> I find that at least part of what the doctor told Cst. White was confidential information and that in divulging it to the police without his patient's consent, the doctor may well have breached his duty of confidentiality to the defendant. For the purposes of considering the next issue, I will assume, without finally deciding, that he did so.

Second Issue: Charter, Section 8

Therefore, assuming that there was a breach of the appellant's right of confidentiality when Dr. Kydd telephoned the police, the next issue is whether there was an unreasonable search or seizure resulting in a violation of the appellant's s.8 rights. What is protected by s. 8 is a person's reasonable expectation of privacy (**Hunter v. Southam**, [1984] 2 S.C.R. 145). The analysis of this issue requires resolution of certain questions:

1. Is information protected by s. 8?
2. Was the information provided to the police by the doctor the type of information protected by s. 8?
3. Was the doctor an agent of the state?
4. Did the information provide evidence of an offence?
5. Was there a search or a seizure?
6. If so, was the search or seizure unreasonable in the circumstances?

In my opinion if the answer to the first five questions is negative, there is no unreasonable search or seizure and therefore no breach of s. 8. Affirmative answers to one or more could lead to a different conclusion.

It is acknowledged by the respondent that Constable White would not have acquired any knowledge about the appellant within two hours of the accident except for the telephone call from Dr. Kydd. Additionally, it is conceded by the Crown that Constable White would not have had reasonable and probable grounds to make the demand for a blood sample without the information received from Dr. Kydd that the appellant had been driving within the previous hour and that he had been in an accident. The evidence accepted by Judge Crawford established that the officer confirmed by his own senses the usual indicia of impairment by alcohol.

1. Is information protected by s. 8?

The Supreme Court of Canada settled this question in **Dyment**. Justice La Forest reasoned that the first challenge in balancing an individual's right to privacy against societal needs, notably law enforcement, is to identify the situations in which there are privacy considerations. He adopted the findings of a federal **Task Force on Privacy and Computers, 1972**, which classified the claims of privacy as:

1. those involving territorial or spatial aspects;

2. those related to the person; and

3. those that arise in the information context.

La Forest, J. expanded upon the applicability of s. 8 protection for information in the following passage at p. 255 (C.C.C.):

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained: see, for example, the **Privacy Act**, S.C.1980-81-82-83, c. 111.

Therefore the first question must be answered affirmatively, information is protected by s. 8 of the **Charter**.

2. Was the information provided to the police by the doctor the type of information protected by s. 8?

The concept of constitutional protection for privacy of information was further developed in **R. v. Plant**, [1993] 3 S.C.R. 281; 84 C.C.C.(3d) 203 where the issue involved the use by police of computerized power consumption records in an investigation of marijuana cultivation. After reference to the above passage from **Dyment**, Sopinka, J., for the majority, said at paragraph 18:

> Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained, and the seriousness of the crime being investigated, allow for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement . . .

Sopinka, J. referred to the American position as set forth in **United States v. Miller**, 425 U.S. 435 (1976) and continued:

> . . . I do agree with that aspect of the **Miller** decision which would suggest that in order for constitutional protection to be extended, the information seized must be of a "personal and confidential" nature. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. The computer records investigated in the case at bar while revealing the pattern of electricity consumption in the residence cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption reveals very little about the personal lifestyle or private decisions of the occupant of the residence.

A similar analysis as that undertaken in **Plant** suggests that in this case, although the relationship between the appellant and the doctor is one normally expected to be confidential, the nature of the information provided to the police, that is, that the appellant was driving, when he had been driving and that he had consumed

alcohol, is not personal and confidential in nature. It is not part of the biographical core of the appellant nor can it be said to involve intimate details of his personal lifestyle or a private decision. The information does not become "medical" in nature simply because it was given to a doctor. It is, in my opinion, closer to the neutral nature of the power consumption records than, for example, the blood test results in **Dersch**. The information in this case is, of the type referred to by Major, J. in **Dersch** at paragraph 23, that is, "neutral information, such as the presence of the patient in the hospital..."

The process by which the information was given to the police is also relevant. The police, in this case, did not demand or request that the particulars be given, as in **Dersch**, or surreptitiously divert it to their own use as in **Colarusso**. They did not seek or search for it. Once the police had the information, they were, as found by the trial judge, bound by a duty to investigate the matter further. (See also: **R. v. D.(M)** (1994), B.C.A.C. 101 and **R. v. Waniandy** (1995), 162 A.R. 293 (A.C.))

In blood demand cases, as set out in s. 254(3) and (4), the police and medical personnel are required to exchange some information about a suspect. The officer must obtain an opinion from the doctor that the taking of blood will not endanger the life or health of the person; that necessitates the provision by the doctor of some indication of the person's status. The same is the case in s. 256(1) of the **Code**, which allows an application for a warrant to obtain a blood sample provides that a justice may issue a warrant if satisfied there are reasonable and probable grounds to believe that a drinking and driving offence has been committed and:

> (b) a qualified medical practitioner is of the opinion that,
>
> (i) by reason of any physical or mental condition of the person that resulted from the consumption of alcohol, the accident or any other occurrence related to or resulting from the accident, the person is unable to consent to the taking of samples of his blood, and

> (ii) the taking of samples of blood from the person would not endanger the life or health of the person,

It is not suggested by the appellant that any of the **Code** provisions respecting blood samples and the involvement of medical personnel in those procedures are unconstitutional.

In my opinion the appellant did not prove that there is a reasonable expectation of privacy in the type of information that was voluntarily provided by the doctor to the police in this case.

3. Was the doctor an agent of the state?

This question was addressed in **Dersch** where the appellant had argued that the doctors who took blood samples without the consent of the patient were subject to the **Charter**. Major, J. said: (paragraph 20)

> There are some types of circumstances in which a doctor clearly acts as an agent of government in taking a blood sample from a patient. A doctor who takes a blood sample illegally at the request of police is acting as an agent of government and his or her actions are subject to the **Charter**: **R. v. Pohoretsky**, [1987] 1 S.C.R. 945. Similarly, a doctor involved in taking a blood sample pursuant to s. 254 or s. 256 of the **Criminal Code**, R.S.C. 1985, c. C-46, would be acting as an agent of government, as mandated by statute, and the doctor's actions would be subject to **Charter** scrutiny.
>
> In this case the first blood sample was not taken pursuant to s. 254 or s. 256 of the **Criminal Code**, nor at the request of the police. The trial judge accepted the evidence of the doctors that the blood sample was taken solely for medical purposes. Therefore, Dr. Gilbert and Dr. Leckie were not acting as agents of government for the purposes of the **Charter** in taking the first blood sample from the appellant.

In this case, Dr. Kydd was obtaining a medical history to assist in the diagnosis and treatment of the appellant when he received the information regarding

the appellant's driving and drinking. He was not acting on any instructions from the police in either asking the questions or reporting the answers to the police. There was no pre-arranged plan or procedure involving the supply of information to the police.

The facts of this case can be contrasted with those of **R. v. Dorfer**, [1996] B.C.J. 332 (Q.L.) a decision of the British Columbia Court of Appeal. In that case, the police, in an attempt to gather DNA material from a suspect who was imprisoned, met with the prison dentist who would be treating the prisoner, and arranged for the dentist to set aside swabs containing blood and saliva. In addressing the issues of whether the dental procedure was state activity and whether the dentist was acting as an agent, Macfarlane, J.A., for the court, said:

> [para29] As to the first question I am of the view that the dental procedure would have occurred, and have been performed in the same way if the police had not intervened. The intervention of the police had no effect, and was not intended to have any effect upon the dental treatment. At issue is not the dental treatment, but the retention of the residual material. Thus, in my opinion, the entire dental procedure ought not to be characterized as state activity.
>
> [para30] As to the second question I think the trial judge was correct to conclude that the dentist and his assistant became agents of the state in preserving the dental material for law enforcement purposes. I find support for that view in what was said in **R. v. Colarusso** . . .

In my view the trial judge did not err in concluding that Dr. Kydd was not acting as an agent of the state in either obtaining or reporting the information.

4. Did the information provide evidence of an offence?

The information given to the police provided at least part of the reasonable and probable grounds to make the demand for the blood sample. Without the information from Dr. Kydd, Constable White would not have come to the hospital to

investigate, nor would he have known that the appellant had been driving within the previous two hours. Constable White confirmed for himself, the belief that the appellant had been drinking, by speaking with the appellant and observing that he did have the usual indicia of impairment, that is, a strong smell of alcohol, slurred speech, and glassy eyes.

This case is distinguishable from **Dersch**, **Dyment** and **Colarusso** on the basis that what was provided to the police was not evidence of an offence. There was no blood sample or test results. The offence charged is refusal, not impairment, or over 80. It is the appellant's refusal to supply the sample that resulted in the criminal charge, not the information supplied by the doctor.

5. Was there a search or a seizure?

Although information is subject to the protection of s. 8, can it be said that there was a search or seizure in this case? The appellant submits that when the police officer received and then used the information to further the investigation, he seized it. The appellant refers to the following passage from the decision of Major, J.A., as he then was, in **R. v. Erickson** (1992), 72 C.C.C. (3d) 75 (Alta.C.A.):

> The acquisition of the medical information by the constable was analogous at least to a search, as contemplated by s. 8 of the Charter. The Supreme Court of Canada in **Dyment** ruled that the Charter protects "people, not things". Thus, while the actual physical document containing the results was not seized initially, the information therein was. It would make no sense to suggest that while the blood sample in **Dyment** could not be seized without a warrant, the information relating to the blood upon which the warrant was based in the present case could be freely disclosed. Such disclosure, while it is information only, in these unusual circumstances is comparable to a search for purposes of s. 8.

The significant difference between **Erickson** and the present case is that there, the police went to the hospital and after having been advised that the accused

may have been impaired, asked the doctor whether a blood sample had been taken, and then whether an alcohol screen had been done. Having received this information, the police officer then asked to see and was shown the results of the blood test.

The essence of a seizure is the taking of a thing from a person by a public authority (**Dyment**). In **Dyment** there was a suggestion that the police were merely given the evidence by the doctor, and that they had not demanded or seized it. La Forest, J. rejected that submission and said:

> . . . This submission suffers from several flaws. To begin with, though we have no evidence to indicate the nature of the "conversation" between the doctor and the officer, I find it hard to believe the doctor merely volunteered it. Like the Krever Commission, I am not, as presently advised, prepared to say that doctors and hospitals should be prohibited from giving information to the police no matter what the circumstances may be. But it is one thing to inform, quite another to supply material which, if used, amounts, in the words of Lamer J. in **Pohoretsky**, supra, p. 402 C.C.C., p. 703 D.L.R., p. 949 S.C.R., to conscripting the accused against himself. However, the most important flaw, and the matter that has compelling weight, is that when the officer took the sample from the doctor, he took something that the doctor held for medical purposes only, subject to a well-founded expectation that it was to be kept private . . .

It is apparent that had in fact the information been volunteered by the doctor that the result would have been different.

In my opinion there was no search or seizure by the police in the unusual circumstances of this case.

6. If there was a search or a seizure, was it unreasonable in the circumstances?

Having found that there was no search or seizure, it is not necessary to answer this question, but had I found there was a seizure of the information concerning

the appellant by the police from the doctor, I would have concluded that it was reasonable.

CONCLUSION

Even if it is assumed that the doctor breached his patient's confidentiality, since he was not an agent of the state, his assistance in providing components of the reasonable and probable grounds, cannot taint the actions of the police which were blameless. The information provided to the police by the doctor was not the private, intimate information protected by s. 8 of the **Charter**, but was neutral in nature. Neither the trial judge nor the Summary Conviction Appeal Court judge erred in distinguishing this case from **Dyment** and **Dersch**.

The appeal should therefore be dismissed.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.