IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Cite as: R. v. Lavoie, 2002 NSPC 016)

HER MAJESTY THE QUEEN

vs

ROBERT JAMES LAVOIE

D E C I S I O N

Judge: **The Honourable Judge C.H.F. Williams, JPC**
Decision: **Delivered orally April 26, 2002**

Counsel: **Mr. C. Nicholson, Crown Attorney**
Mr. S. MacDonald, Defence Attorney

Introduction

It was between 2330 hours and 2340 hours, November 9, 2000, in the Halifax Regional Municipality. Fire Engine Number 61, from the Ketch Harbour Fire Station, was responding to a Code One (structural fire) alarm in Sambro. The highway to Sambro was winding and narrow with several posted speed limits and all operators had orders to operate at the posted speeds. Nevertheless, on route, and sometime before 2340 hours, the vehicle sustained extensive damage because of a roll- over accident. Upon investigation, the police determined that the operator of the vehicle, Robert James Lavoie, the defendant, was impaired by alcohol and accordingly they charged him with impaired driving and having a blood alcohol concentration that exceeded the legal limit.

Ostensibly, the basis of the police's decision was their seizure, under a search warrant, of the defendant's hospital emergency records and his blood drawn, tested and stored by hospital personnel, the latter, under the instructions of the police. The defendant asserts that the police received private and confidential medical information about him from hospital personnel and, as a result, they have infringed his protected right to be secure from unreasonable search and seizure under the ***Canadian Charter of Rights and Freedoms*** s.8. He seeks a remedy pursuant to the ***Canadian Charter of Rights and Freedoms*** s.24 (2)

Assessment of the *Voire Dire* Evidence and Finding of Facts

First, I should say that the parties agreed that they would conduct the evidence in this case as a *voire dire* to link the defendant's ***Charter*** challenge with that evidence. Further, they agreed that any statements that the defendant made to the police were voluntary statements and would be admitted without the necessity of a further *voire dire*. In addition, all the evidence on the *voire dire* would be admitted as the trial evidence without the necessity to recall the witnesses.

Second, the ***Charter*** challenge was directed at the manner in which the police obtained the impugned evidence. It alleged that the police officer received, on her request, private and confidential hospital information concerning the defendant without a search warrant and without any statute or common law permitting her to do so. He challenges the subsequent search warrant and contends that any evidence as a result ought to excluded pursuant to the ***Charter,*** s. 24(2).

Third, the written statements of the defendant, Exhibits 8 and 9, by agreement, are his voluntary statements and form part of the *voire dire* evidence.

Fourth, the testimonies of Thomas Cooper, Liane Tessier and Constable Guy Lacroix were not part of the *voire dire* proper. However, for trial efficiency and because I cannot view their testimonies in a vacuum and, as they are critical to a fair determination of the issues, the parties agree that these testimonies should be incorporated as part of my deliberations on the evidence presented on the *voire dire*.

Consequently, the total evidence reveals and I accept and find that a roll over accident involving a

fire truck operated by the defendant happened on November 9, 2000 between 2330 hours and 2340 hours. The accident scene was in Ketch Harbour, Halifax Regional Municipality. Nonetheless, a post accident mechanical inspection of the fire truck revealed that the authorized service mechanic for the Halifax Regional Municipality did no regular maintenance on this vehicle. Further, its braking system was operationally deficient and when added to other unsafe mechanical factors, as found, made the vehicle, in the mechanic's opinion, unsafe to be on the highway. I accept that opinion and find accordingly.

I accept and find that the defendant was a volunteer firefighter and, Liane Tessier, another volunteer firefighter, was the only crew member in the vehicle with him. Further, he received a mutual aid call to Sambro in the late evening of November 9, 2000. However, between 2100 hours and 2315 hours, which was before he responded to the call, he had consumed six containers of de-alcoholized malt beverages each having 0.5 per cent alcohol per volume. Tessier observed that the defendant was nervous and seemed concerned about her experience and, when they got into the vehicle she sensed an alcohol type odour emanating from him. She suspected that it was alcohol but was unsure. Nevertheless, from her other observations the defendant did not slur his speech nor had any difficulty getting into the vehicle. However, as they drove along, because she did not know where the light switch was, the defendant reached over to turn on the dash lights and this movement caused the vehicle to veer off the roadway onto its shoulder and gradually back onto the roadway. In any event, Tessier felt that they were going too fast and just before the accident, which occurred about one mile from the fire station, she requested the defendant to slow down.

The defendant, in his written statements to the police noted that when driving, he received a radio transmission from another responding fire engine and as he was reaching to replace the radio he was also taking a turn into the village of Ketch Harbour. He attempted to reduce speed but the vehicle did not respond to his application of the brakes. Seeing no oncoming vehicles he took a wide turn and then moved back onto his side of the road. However, following this manoeuver the back of the truck "fishtailed" and the vehicle rolled over. Consequently, I find on the evidence that I accept, that the accident happened, in part, because of the vehicle's speed, the shifting weight of the water it carried, its centre of mass, and the defendant's over steering to correct his trajectory that "applied lateral forces on the vehicle." However, following the roll over the defendant drove the vehicle, under control, off the highway and parked it in a parking lot behind a nearby church.

Further, I accept and find that at the accident scene, the attending paramedic, Jonathan Meneer, sensed an odour of alcohol on the defendant's breath or around him and informed the police investigator, Constable Cathy Mansley, who had arrived on scene at 0017 hours, of this observation. Meneer also suggested to Mansley that she should check on the defendant, at the hospital, as he smelled something that he thought was alcohol. Meneer departed the scene, with the defendant in an ambulance, at 0023 hours. He arrived at the QE2 Hospital Emergency Department,. Halifax Regional Municipality, at 0049 hours.

Later, on arrival at the QE2 Hospital Emergency Department, at 0305 hours, Mansley spoke with the attending physician, Dr. Quarin, the emergency room nurse, Mazie Crewe, and the defendant. The Constable smelled a sweet odour on the defendant's breath, observed that his eyes were red and

that he spoke with a calm and clear voice. On her inquiry, he responded that he had consumed beverages containing alcohol. Dr. Quarin informed her that as the defendant's condition was consistent with either impairment or a concussion they were, for hospital purposes, going to draw and test the defendant's blood for alcohol. Following her conversations with the Constable, Dr. Quarin instructed Crewe to extract three blood samples from the defendant, two for routine hospital tests and one specifically for the presence of alcohol.

Crewe, at 0310 hours drew blood from the defendant as instructed. When drawing his blood Crew informed the defendant that it was for routine hospital tests and alcohol. However, after she drew the three vials of blood, Dr. Quarin instructed her to send only one sample to the laboratory and that they should test it for the presence of alcohol. Mansley also spoke with Crew and requested that Crew should inform her of the blood test result when it was completed.

However, the Constable did not formally make a blood demand pursuant to the relevant **Criminal Code** provisions. On the information then available to her since the accident and after interviewing the defendant, she informed the hospital personnel, and personally believed, that she did not have any reasonable and probable grounds to demand that the defendant should provide a sample of his blood for analysis. In any event, she left the hospital at 0337 hours. On my assessment of the witnesses as they testified and on my evaluation of the total evidence, I accept the evidence that uncovered and revealed the above facts and find accordingly.

Michele Ledbetter was the medical laboratory technologist at the QE2 Hospital and she performed, at 0343 hours, the blood tests. Her analysis revealed that the defendant had a blood alcohol concentration of 56mmol/L that, on conversion, was a blood alcohol concentration in excess of the legal maximum of 80 milligrams of alcohol in 100 milliliters of blood. At 0350 hours she called the Emergency Department with the results. On receiving the blood test results and between 0350 hours and 0420 hours, Crewe called Mansley, told her the blood results, as she had requested, and added that it was a high reading.

Then, at 0420 hours, Mansley called Ledbetter and asked whether she had received the defendant's blood specimen and, in addition, the period that the hospital would keep it. When Ledbetter informed her that the hospital's policy was to keep blood specimens for only three days before they would destroy them, Mansley instructed her to secure the defendant's blood samples as she, Mansley, was going to obtain a search warrant for them. Thus, on November 10, 2000, and on Mansley's instructions, Ledbetter secured and stored the defendant's blood samples that were in the hospital's possession to await delivery on the authority of an anticipated search warrant. Again, on my assessment of the witnesses as they testified and on my evaluation of the total evidence I accept the testimonies that showed and exposed the above facts and find accordingly.

Further, I accept and find that after speaking with Ledbetter, on November 10, 2000, Mansley received a telephone call from Dr. Quarin who wanted to know whether she, Mansley, was returning to the hospital to give a blood demand to the defendant. At this point, although she had the hospital blood test details and had requested that Ledbetter preserve the samples, Mansley informed Dr. Quarin that she did not feel that she had grounds to give a blood demand to the defendant.

Additionally, I accept and find that Mansley interviewed Tessier on the evening of November 10, 2000. In this interview, Tessier informed her that she did not smell any alcohol emanating from the defendant and neither did he exhibit any signs of impairment. However, Mansley discussed the investigation with her and advised her that others had smelled alcohol. Three days later, on November 13, 2000, Tessier called Mansley to discuss her previous statement. They met on November 16, 2000 when Tessier suggested that she did smell alcohol and described the manner in which the defendant drove. Mansley now felt that she had grounds to believe that the defendant was an impaired driver on November 9, 2000.

I accept and find that on November 18, 2000, Mansley returned to the QE2 Hospital to obtain statements from hospital personnel that had contact with the defendant when he was a patient. Accordingly, she interviewed Crewe. However, in this interview, they did not refer to the fact that Crewe had informed her of the blood results on November 10, 2000. Crew also informed her that when she attended the defendant she did not smell any alcohol emanating from him. Denise Devison, an emergency room nurse, also gave a statement. Devison was on duty and during her rounds had observed the defendant between 0300 hours and 0530 hours. She also saw him at 0220 hours and then did not smell any alcohol emanating from his person. Again, at 0400 hours when she saw him she did not detect the smell of alcohol. However, at 0530 hours while he was asleep, she did smell alcohol on his breath. Further, I find that Mansley interviewed Ledbetter on November 24, 2000, but, they did not speak about the blood analysis nor the storage of the samples on November 10, 2000.

On December 1, 2000, Mansley swore an Information to Obtain a Search Warrant, obtained a Search Warrant and served it on hospital personnel to obtain the blood samples and pertinent hospital records. Additionally, she delivered these items to Darcy Smyth of the R.C.M.P. Toxicology Services for analysis and interpretation. Further, she obtained a statement from the accused on December 2, 2000. I accept those facts and find accordingly. Additionally, Smyth analyzed the samples on December 6, 2000, and determined that the blood alcohol concentration was 242 milligrams of alcohol in 100 milliliters of serum.

Relevant Legislation

The ***Criminal Code*** s.254 (3) states:

> (3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, 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
>
> (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.

The ***Canadian Charter of Rights and Freedoms*** s. 8 states:

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

24(2) Where in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Issues

Despite the several contentious issues that arose, it seems to me that the defendant has raised and is directly attacking two central and interrelated issues:

(1) Did hospital personnel, on November 10, 2000, give the police confidential information about him that constituted a seizure and now triggers a ***Charter*** scrutiny?

(2) Did Constable Mansley have sufficient grounds to obtain a search warrant on December 1, 2000, to obtain the vials of his blood stored at the hospital since November 10, 2000, on her instructions, and his pertaining hospital records and, if so, did she infringe the ***Canadian Charter of Rights and Freedoms*** s.8, that would warrant their exclusion, under s.24(2), as evidence in the proceedings against him?

Analysis

On the evidence, I think that there are three searches and/or seizures that I must consider:

(1) The confidential information about the defendant that the police requested and received from the emergency room nurse, without a warrant, on November 10, 2000.

(2) The police direction to the laboratory technician, without a search warrant, to secure and store the defendant's blood, on November 10, 2000, when ordinarily, after seventy-two hours, the hospital would have destroyed it.

(3) The search and seizure pursuant to the search warrant issued on December 1, 2000.

1. The confidential information about the defendant that the police requested and received from the emergency room nurse, without a warrant, on November 10, 2000.

In ***R.v. Dyment*** (1988), 45 C.C.C (3d) 244 (S.C.C.), La Forest J., discussed the issue of privacy and confidentiality of information between health workers and their patients. He affirmed at p.258:

> This goes back as far as the Hippocratic Oath. The Code of Ethics of the Canadian Medical Association sets forth, as item 6 of the ethical physician's responsibilities to his patient, that he "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": see T.D. Marshall, The Physician and Canadian Law, 2nd ed. (1979), p. 14. This is obviously necessary if one considers the vulnerability of the individual in such circumstances. He is forced to reveal information of a most intimate character and to permit invasions of his body if he is to protect his life or health. Recent trends in health care exacerbate the problems relating to privacy in the medical context, particularly in light of the health-team approach in an institutional setting and modern health information systems.

Further, he emphasized at pp. 258-259:

> 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 ***[page259]*** 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.)

> Under these circumstances, the demands for the protection of personal privacy become more insistent, a truth that has been recognized by governments. I look upon the Hospitals Act and its regulations not so much as justifying the need for privacy in this case but rather as a testimony that such protection is required. Under these circumstances, the courts must be especially alert to prevent undue incursions into the private lives of individuals by loose arrangements between hospital personnel and law enforcement officers. The Charter, it will be remembered, guarantees the right to be secure against unreasonable searches and seizures.

In addition, the protection of privacy and confidentiality is legislated in the ***Hospitals Act***, R.S.N.S. 1989, c.208, s.71 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.
>
> .....
>
> (5) Nothing in this Section prevents the records and particulars of a hospital concerning a person or patient in the hospital or a person or patient formerly in a hospital from being made available to
>
> (c) a person authorized by court order or subpoena;
>
> (d) a person or agency otherwise authorized by law;

.....

> (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.

Thus, hospital personnel, by statute, clearly have a duty to keep confidential any information they have concerning a patient unless that patient authorizes the release of the information. Notable exceptions exist, as for example, in blood demand cases as authorized in the ***Criminal Code*** s.254 subsections (3) and (4). Here, I find that what nurse Crewe told the Constable about the defendant's blood analysis was confidential information and, by divulging it to the police without the defendant's consent or authorization, she breached her duty of confidentiality to the defendant.

The inquiry now turns to whether the unauthorized disclosure was an unreasonable search and seizure affecting the defendant's reasonable expectation of privacy sufficient to trigger a s.8 Charter scrutiny. See, ***Hunter v. Southam Inc,*** [1984] 2 S.C.R. 145. In ***R. v. Spidell***, [1996] N.S.J. No. 211 (C.A.), at para. 20, the court, per Roscoe J.A., propounded some guidelines to assist in the resolution of this issue, as follows:

> The analysis of this issue requires resolution of certain questions:
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> 1. Is information protection by s.8?
>
> 2. Was the information provided to the police by the [nurse] the type of information protected by s.8?
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> 3. Was the [nurse] 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?

Following the directions set out in ***Spidell***, I proceed.

1. *Is information protection by s.8?*

It is now settled law that s.8. protects information. In ***Dyment***, La Forest, J., affirmed this at pp. 255-256 as follows:

> 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 ***[page256]*** 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 (Sch. II).

2. *Was the information provided to the police by the [nurse] the type of information protected by s.8?*

When assessing this factor, Sopinka J, for the majority, opined in ***R.v. Plant,*** [1993] 3 S.C.R. 281 at para. 19:

> 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

Referring to the ***United States v. Miller***, 425 U.S. 435 (1976) he continued in para. 20:

> ...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 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.

Thus, overall, the relationship between the defendant and the nurse is one that is normally confidential. The nature of the information given to the police from his hospital record, that is, the

results of his blood analysis, was personal and confidential in nature and it was part of his biographical core. It was medical information and not neutral information as for example that he was a patient in the hospital. See, for example ***R.v. Dersch*** [1993] 3 S.C.R. 768.

This is not the case where the police had seen hospital personnel drawing blood from the defendant. ***R. v Osborne*** [1995] A.J. No. 581 (C.A.). Here, the police had discussions with the doctor before the nurse extracted the blood. She knew that blood was to be extracted and to be tested for the presence of alcohol. The defendant suggested some collusion between the doctor and the police. This is based upon the proposition that while the doctor ordered the nurse to draw three samples of blood, two for routine hospital purposes and one specifically for blood alcohol, after speaking with the police, she instructed the nurse to send to the laboratory only the sample to be tested for alcohol. They never tested the other two samples for anything. However, there is no record of these discussions before the court and no one subpoenaed the doctor to testify.

Furthermore, the police also asked the nurse whether she was going to draw blood and whether that blood was going to be tested for the presence of alcohol. This was not a case where the police merely asked and received a response that the hospital would take blood samples from the defendant. See: ***R. v. Erickson*** (1992), 72 C.C.C. (3d) 75 (Alta. C.A.). Here, the constable went further and asked what the hospital was going to do with the blood samples and, when informed, requested that the nurse tell her the results of the tests performed on the blood. In ***R. v. Day,*** [1998] O.J. No. 4461 (C.A.), relied upon by the Crown but distinguishable on the facts, the police did not request nor were they provided with the results of the tests performed on the blood stored at the hospital. Here, the nurse, on the police request, provided the test results to the police.

Additionally, the Constable could not confirm by her own senses the usual indicia of impairment by alcohol to ground a reasonable belief to make a blood demand. She had no reasonable and probable grounds to make a demand pursuant to the ***Criminal Code*** s. 254 (3). However, she knew from her enquiries that the hospital intended to extract blood from the defendant and was going to test it for the presence of alcohol. Notwithstanding that she could not lawfully make a blood demand the Constable was still interested in the hospital's analysis as she could possibly use it for her own purposes. Consequently, she requested the nurse to telephone her with the blood test results. The nurse did as the police requested and, without the defendant's consent or authorization, disclosed to her the blood test results.

Consequently, in my opinion, the place and the manner in which the information was released lead me to conclude that the defendant had a reasonable expectation of privacy in the information voluntarily provided by the nurse to the police. Accordingly, the information provided to Mansley by Crewe was protected by s.8.

3. *Was the emergency room nurse an agent of the state?*

In ***Dersch***, the context in which hospital personnel may be considered state agents was addressed by Major, J. at para.20, as follows:

> 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.

Here, nurse Crewe was the defendant's health care worker when she lawfully came into possession of his blood test results. On the evidence, the hospital obtained the blood samples solely for hospital purposes. She acted on the instructions of the police to report to the police. This was a prearranged plan or procedure involving the supply of information to the police on the request of the police. It involved taking something in which the defendant had a reasonable expectation of privacy and giving it to the police without the defendant's consent or other lawful authorization. I therefore conclude that there was, without any statutory or other authorization, a free and voluntary exchange of information between the nurse and the police. This collusion was illegal and made the nurse "part of the law enforcement machinery of the state." In short, I conclude that, in the circumstances, nurse Crewe was an agent of the state.

4. Did the information provide evidence of an offence?

The Constable used the information that Crewe gave to her as part of the reasonable and probable grounds to obtain a search warrant. Exhibit 3, para.16. Without that information Constable Mansley would not have called the laboratory and instructed Ledbetter to seize and store the defendant's blood samples. I do not doubt that the information established for Mansley, for the first time, what she herself had no belief in from speaking to the defendant, the paramedic or the doctor, that is, the defendant was driving at the time of the accident with a blood alcohol concentration greater than the legal limit. The police subsequently charged the defendant with impaired driving and having a blood alcohol concentration in excess of the legal limit while operating a motor vehicle. Thus, Crewe provided what to the police was evidence of an offence. See, ***Dersch***, ***Dyment*** and ***R.v. Colarusso,*** [1994] 1 S.C.R.20.

5. Was there a search or a seizure?

As was put by La Forest J., in ***Dyment*** at pp. 256-257:

> It should be observed, however, that s. 8 of the **Charter** does not protect only against searches, or against seizures made in connection with searches. It protects against searches or ***[page257]*** seizures. As Errico Co. Ct. J. put it in Re Milton and The Queen (1985), 16 C.R.R. 215 at p. 226 (B.C. Co. Ct.): "The words are used disjunctively and although in instances it is a search and seizure that will be under

> scrutiny as was the situation in Southam, the Charter is worded so that a seizure simpliciter could offend against the section.": see also R. v. Dzagic (1985), 19 C.C.C. (3d) 98, 50 O.R. (2d) 462, 16 C.R.R. 310 at p. 319 (Ont. H.C.J.).
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> As I see it, the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent.

Thus, s. 8 ***Charter*** protects individuals from the conduct of agents of the state. Here, the defendant did not consent to release information contained in his hospital records. Further, hospital employees could not release it to a total stranger, Constable Mansley, for purposes other than medical purposes, unless otherwise authorized by law. Additionally, I think that for the police to request and take the information, violating the defendant's right to privacy, was a seizure for the purposes of s.8 ***Charter***. See, ***Dyment***.

6. Was the search or seizure unreasonable in the circumstances?

As I have reasoned, the divulging of the confidential information by the hospital staff to the police and the receipt of that information by the police, on their request, violated s. 8 ***Charter*** and, in the circumstances of this case, was unreasonable. I will also address this point under the s.24 **Charter** reasoning.

2. The police direction to the laboratory technician, without a warrant, to secure and store the defendant's blood, on November 10, 2000, when ordinarily the hospital, after seventy-two hours, would have destroyed it.

Here, the inquiry focuses on whether in retrieving and setting aside the defendant's blood samples, Michele Ledbetter, the laboratory technologist, acted as an agent of the state. Receiving the information concerning the blood tests, Constable Mansley, on November 10, 2000, now wanted to obtain the blood samples for prosecution purposes. To ensure that the samples were still available the Constable called Ledbetter and enquired whether she had received the defendant's blood samples and the period that the hospital would keep them. When Ledbetter advised her that the standing policy was that after seventy-two hours the hospital destroyed the blood specimens, Constable Mansley instructed Ledbetter to set aside the defendant's blood samples and to secure them as she, Mansley, was going to obtain a search warrant. The Constable never obtained a search warrant until December 1, 2000.

The evidence is not clear, but it would appear that the hospital had concluded whatever tests they were going to perform on the defendant's blood samples. The whole blood had been separated from the blood serum and both specimens would, in the ordinary course of events, be destroyed. In my view, they were not abandoned specimen or waste as in ***R.v. Krist*** (1995), 100 C.C.C. (3d) 58 (B.C.C.A.), the taking of garbage bags from the curbside by the police and ***R.v. Stillman*** (1995), 97 C.C.C. (3d) 164 (N.B.C.A.), police's retrieval of a mucus laden tissue discarded in a waste basket.

Here, we have blood samples taken for medical purposes and, in my view, would remain as such until destroyed by the hospital.

Consequently, I find that when Ledbetter, acting under the instruction of the police, gathered the defendant's blood specimens and secured and stored them in a locked container she became an agent of the state in preserving the blood samples for law enforcement purposes. I find support for this view in what La Forest J. said, in ***Colarusso*** at paras. 74 and 75:

> These excerpts make it clear that when a bodily fluid sample ends up being used by the police in a criminal prosecution, even when (as in Dyment) the sample was initially extracted for medical purposes in the absence of the police, the Court must focus on the actions of the police because s. 8 guarantees protection against the actions of the state or state actors, a protection that is particularly strict in relation to law enforcement activities. As discussed in Dyment the actions of the doctor are relevant and important. Though he or she may have obtained the sample under lawful circumstances, the limited purpose for which it was obtained cannot be ignored. Equally, the lawful possession of the sample by another cannot be allowed to detract from the review of the police actions which must remain a primary focus for the Court. The same is true in the present case. The police cannot rely on the actions of the coroner to shift the Court's focus away from their actions. The fact that the sample in this case may have initially been properly seized by the coroner is relevant, but this does not necessarily preclude a finding that the police may also have seized the sample or that the subsequent appropriation of the evidence for use in a criminal prosecution may make the seizure unreasonable.
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> Consequently, in dealing with a situation in which a bodily sample is seized by a party other than the police, but ultimately winds up being used against the individual by the criminal law enforcement arm of the state, it is essential that the court go beyond the initial non-police seizure and determine whether the actions of the police (or other agent of the criminal law enforcement arm of the state) constitute a seizure by the state in and of themselves or make the initially valid seizure by the coroner unreasonable. That being so, the actions of the agents of the criminal law enforcement arm of the state will be subject to scrutiny under s. 8 of the **Charter** even if, absent the intervention of the police, the initial non-police seizure would not run afoul of the Charter.

By collecting and storing the defendant's blood samples without his consent, Ledbetter, acting for the state, effected a seizure of the samples. ***Dyment***. Given the concerns expressed by La Forest J.,

in ***Colarusso*** and in ***Dyment*** and, Iacobucci J., writing for the majority in ***R.v. Borden*** (1994), 92 C.C.C (3d) 404 (S.C.C.), I must further ask myself if it was reasonable for the defendant, a patient in the hospital, to expect that his health care workers, employees of the hospital, will not collaborate with or help the police in taking possession of his blood that they took from him for medical purposes? I think that in the circumstances of this case the answer must be yes. Additionally, I think that it was reasonable for the defendant to expect that the police would not obtain his blood sample by this procedure. Consequently, in my opinion, when Ledbetter, acting as a state agent, retrieved and stored the defendant's blood samples for law enforcement purposes, without a search warrant, she and Constable Mansley violated the rights of the defendant protected by s. 8 of the ***Charter***.

3. The search and seizure pursuant to the search warrant issued on December 1, 2000.

This line of inquiry is to assess the sufficiency of the Information to Obtain a Search Warrant as disclosed by the voire dire evidence. At first blush, the Information to Obtain a Search Warrant appears to provide a basis upon which the Justice of the Peace could conclude that the police had reasonable and probable grounds to believe that the defendant had committed the offence of impaired driving and that his blood stored at the hospital, the subject of the search warrant, could provide evidence of the commission of that offence. However, on the voire dire evidence it became apparent that Constable Mansley, the officer who swore the Information, had made significant errors of omission and commission that called into question the integrity of the process and the validity of the issued search warrant.

In my view, Mansley's testimony was inconsistent with that of other witnesses on crucial facts. In addition, I felt that she adjusted her testimony to make out the Crown's case. Further, I felt that it was misleading and it called into question the reliability of her evidence, her testimonial credit and the integrity of the case against the defendant. I say that when I considered and assessed the Information to Obtain a Search Warrant, **Exhibit 3** against my findings of facts.

First, in paragraph 3, of the Information, Mansley swore that the defendant and Tessier "were en route to the hospital **prior** to arrival of the informant . . . " Yet, Meneer testified, and I accepted and found, that she was at the scene when he and the ambulance, with the defendant, were still present and that they had a "chit chat" at the back of the ambulance. He further testified that he told her to check on the defendant at the hospital as he smelled something that he thought was alcohol. In addition, he testified that he did not call the R.C.M.P. dispatch that evening and that the only other contact he had with the police was at the hospital. Thomas Cooper, another Crown witness, also placed Mansley at the accident scene when the ambulance was present. This evidence, that I accepted and found, but omitted by Mansley, impacted upon the information presented in paragraphs. 3, 5 and 11 of the Information to Obtain.

Second, in the opinion of Constable Guy Lacroix, the traffic accident analyst mentioned in para. 4, when addressing the cause of the accident, he stated in his report, Exhibit 2, p.4:

> According to my calculations for the Critical Curve Speed, a vehicle under 83km/hr should be able to make the right hand turn by 1095 Highway 349 without leaving the westbound lane.
>
> However, in this case, the firetruck left the west bound lane and moved to the eastbound lane. The speed found using the Yaw mark calculations put the vehicle at 75km/hr at the bottom of the slope and end of the curve.
>
> Under these circumstances it is my opinion that the speed was not the only factor involved in the roll over of the firetruck. The weight shift (center of mass is higher than a regular vehicle), the load (water) carried by the truck, the speed (75km/hr) and the driver over steering maneuver to correct his trajectory had, for affect, applied lateral forces on the vehicle.

This, in my view, modified the information presented in paragraphs 6, 12 and to some extent 13 and 14 of the information to Obtain. I found, on the evidence, that no witness could state with any certainty the posted speed limit at or near the accident scene.

Third, Liane Tessier testified and I accepted and found that she told Mansley on the evening of November 10, 2000 that she did not smell any alcohol nor saw any signs of impairment by alcohol. However, she had her suspicions but could not be sure as what she sensed was "a strange smell like alcohol, weird smell, industrial smell, medicine kind of smell." When in the fire truck he wanted her to turn on the lights and siren but she did not know the location of the switches. Therefore, he "leaned across to do so and the vehicle moved to the right and onto the shoulder and he got it back onto the road." In addition, she testified that Constable Mansley discussed the case with her and informed her that two persons had mentioned that they had smelled alcohol. That bit of information caused her to change her mind as she now felt that other persons confirmed her suspicions. This testimony amplified and varied the information presented in paragraph 9 of the Information to Obtain.

Fourth, Denise Devison testified, and I accepted and found, that Constable Mansley took her statement on November 18, 2000. Further, on November 10, 2000, she saw the defendant between 0300 hours and 0530 hours. Although she checked on him at 0220 hours and 0400 hours, she smelled no alcohol emanating from him. It was only at 0530 hours that she did detect a smell of alcohol from his breath and he was asleep. These findings of facts, omitted by Mansley, in my view, changed and amplified the information presented in paragraph 10 of the Information to Obtain.

Fifth, Michele Ledbetter testified, and I accepted and found, that she performed the blood tests. However, shortly after she had called in the results to the emergency room, on November 10, 2000, she received a telephone call from Constable Mansley. The Constable asked her whether she had received the defendant's blood and how long it would be kept. When she advised the Constable that

the hospital would keep the samples for only three days after which they would destroy them, the Constable then instructed her to secure the samples as she, the Constable, was going to obtain a search warrant for them. Ledbetter secured and stored the blood samples on November 10, 2000. These findings of facts, omitted by Mansley, I think, transformed and amplified the information presented in paragraph 15 of the Information to Obtain.

Sixth, Mazie Crewe testified, and I accepted and found, that on November 10, 2000, in the emergency room, she told Constable Mansley, after her inquiry, that the hospital was going to test the defendant's blood for alcohol. Constable Mansley then requested Crewe to contact and to inform her of the blood test results. On November 10, 2000, between 0350 hours and 0420 hours, Crewe telephoned Mansley and told her the blood test results. These findings of facts, omitted by Mansley, modified and amplified the information presented in paragraph 18 of the Information to Obtain.

Nonetheless, it would appear from the decided cases that the State's interest in detecting crimes might prevail over the individual's right to privacy. However, it is clear that a search warrant may issue only where "credibly-based probability replaces suspicions." ***Southam Inc***. In ***R. v. Debot***, [1989] 2 S.C.R. 1140, a case related to the police conducting a warrantless search pursuant to the tip of a known informant, the factors articulated establishing principled concerns about the use of informants in general seem to be equally applicable here to the information given to the police by the hospital staff.

Here, the sufficiency of the information depends primarily upon the inferences that can be drawn from the " tips" in **Exhibit 3** and the evidence adduced by the Crown on the *voir dire*. Constable Mansley noted that "during the course of the investigation," without specifying times and dates, certain information came to her attention. The flow of the information as presented suggested that the sources were credible and compelling. However, the credit of the sources of information is not the issue as it became apparent from the evidence that specifying the dates when the Constable received the information was the critical factor. Sheltering behind the expression "during the course of the investigation" without giving an explanation about how, when and in what circumstances she got that knowledge, in my view, does not strengthen the informant's credibility as demanded in ***Debot***.

In my view, the validity of the search warrant also depends on the sufficiency of the Constable 's knowledge, in the first instance, before she approached the hospital staff for corroborative information. There was a motor vehicle accident where the operator was taken to the hospital with injuries and the attending paramedic said that he thought he detected a smell of alcohol. Nonetheless, Constable Mansley testified that on November 10, 2000 she did not believe that she had reasonable and probable grounds to give a blood demand. It was however obvious, from her discussions with Meneer and Dr. Quarin and her subsequent conduct, that she had suspicions that alcohol may have been a factor for the vehicular accident.

The evidence reveals that the Constable, on November 10, 2000, knew the blood test results from an arrangement that she made with a hospital employee. Further, on November 10, 2000, she had requested another hospital employee, to secure and store, for her, the defendant's blood samples.

Significantly, she mentioned these two employees, Crewe and Ledbetter, as sources of information. However, all of what they said or did were omitted from the Information to Obtain when presented to the justice.

Consequently, without prior judicial authorization or lawful authority, she instructed hospital personnel to seize and store the defendant's blood, essentially until she could make out a case to obtain a warrant to seize it by subsequent validation. Accordingly, it is reasonable to conclude, on the evidence that I accept, that she embarked upon a course of action that she knew or ought to have known was not only illegal but also unethical and then attempted to conceal her transgressions.

I am mindful of the test enunciated by Sopinka J., in ***R.v. Garofoli*** (1990), 60 C.C.C. (3d) 161 (S.C.C.), at p.188:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

He stated further, at p.189:

> The reviewing judge should not set aside this decision unless he or she is satisfied on the whole of the material presented that there was no basis for the authorization.

I think that the Constable failed to inform the justice of the peace of crucial information for the basis of her belief and masked the true state of affairs. Consequently, she deprived the judicial officer of the opportunity to assess fairly whether the state's interest in crime detection outweighed the defendant's privacy interests.

Further, I think that judicial officers can perform satisfactorily their judicial function, "in a neutral and impartial manner," only if informants give them accurate and candid information on the case. Here, unknown to the justice of the peace and not revealed by the police to him were that the items sought to be seized on December 1, 2000, were already seized by agents of the state on November 10, 2000. Further, I think that the Constable's reliance on the ritualistic phrase "during the course of the investigation" without regard to details when combined with her deliberate omissions of crucial information is unacceptable and ought not to be condoned by the court.

Consequently, when I consider all the circumstances, it is my view, that when we reveal all the facts, there was insufficient material upon which the Justice of the Peace could have made a judicious

consideration to grant a search warrant in this case. I therefore conclude, on the totality of the circumstances, that the search warrant was invalid and, as a consequence, the search and seizure pertaining to it, was unreasonable.

*Should the impugned evidence be admitted under s.24(2) **Charter**?*

The violation of the s.8 ***Charter*** rights occurred when, on her request, the Constable obtained the alcohol screening tests from the nurse. It was this first ***Charter*** infringement that enabled the Constable to instruct the laboratory technician, without prior judicial authority, to preserve and store the blood samples which demonstrated the excess alcohol readings. This second and latter infringement was to give the Constable time to get a search warrant to validate the seizure. These violations trigger a consideration of s.24(2) ***Charter.***

Whenever the court contemplates the exclusion of evidence, ***Collins v. The Queen*** (1987), 33 C.C.C. (3d) 1 (S.C.C.), and ***R.v. Stillman*** (1997), 113 C.C.C.(3d) 321 (S.C.C.), set out that I must consider the fairness of the trial, the seriousness of the ***Charter*** violation and the possibility that if I were to exclude the evidence whether the exclusion would bring the administration of justice into greater disrepute than if I were to admit it.

(a) fairness of the trial

The Crown, citing ***Day*** and ***Osborne***, has made much of the fact that the blood samples could be considered as real evidence and their inclusion would not affect the trial fairness. However, the Supreme Court has noted that the mere fact that the impugned evidence is classified "real" or "conscriptive" should not in and of itself be determinative of its admissibility. ***Thompson Newspapers Ltd. v. Canada(Director of Investigation and Research, Restrictive Trade Practices Commission),*** [1990] 1 S.C.R. 425; ***R.v. Wise,*** [1992] 1 S.C.R. 527; ***R.v. Mellenthin***, [1992] 3 S.C.R. 615; ***Dersch***, per L'Heureux-Dubé J. It is a matter that requires close scrutiny.

Here, the evidence is ambivalent concerning the reason for the hospital drawing the impugned blood samples from the defendant. I note that the doctor, who did not testify, initially ordered that the nurse take three samples of blood. The nurse informed the defendant that she was taking blood for routine tests and that the doctor also wanted an alcohol test. The evidence is that the doctor and the police had some discussions, which is not in evidence, as the police took no notes. After these discussions, the doctor instructed the nurse to send only one sample to the laboratory which should be tested for the presence of alcohol. The hospital did not do any of the routine tests.

On closer scrutiny, the evidence reveals that when the Constable asked the nurse whether she was going to draw blood, the nurse response was that only if it was to be a "legal alcohol test." The Constable replied that she had no reasonable and probable grounds to give a blood demand. Subsequently, the nurse informed the Constable that the doctor "wanted a legal alcohol test done." The evidence, however, is unclear on whether the doctor was acting on her own initiative to help the police or whether she was acting in collusion with the police. ***Erickson***, affirmed,[1993] 2

S.C.R. 649, supports the proposition that blood samples obtained without the involvement of the state should be classified as "real" evidence.

However, I note the words of La Forest J., in ***Colarusso***, at para.115:

> The importance of determining that the blood sample was real evidence goes only so far as it demonstrates that the sample was given by consent and existed independently of the subsequent **Charter** violation. *The coercive powers of the state played no role in creating the sample which was ultimately used to incriminate the appellant*. As I discussed in R. v. Wise, supra, at p. 570, the prior existence of the sample is important in that it demonstrates "that [the sample] could have been discovered in any event". In my view, the independent and prior existence of the sample completely apart from any s. 8 infringement by the state is an important consideration weighing on the side of allowing the introduction of the evidence. [Emphasis added.]

Here, in my view, the Crown has not shown that the "coercive powers of the state played no role in creating the sample which was ultimately used to incriminate" the defendant. The evidence supports a strong inference that the hospital drew the blood samples to help the police. Thus, here, the dubious prior independent existence of the blood samples quite apart from any police s.8 infringement is an important consideration weighing heavily on the side of excluding them as evidence in these proceedings.

(b) seriousness of the violation

Here, I must consider, among other things, whether the Constable acted in good faith or her conduct was deliberate, wilful or flagrant. Another consideration is whether she was motivated by urgency or necessity to prevent the loss or destruction of the evidence. ***R. v. Therens,*** [1985] 1 S.C.R. 613 at p.652.

It is clear that the Constable made an arrangement with the hospital staff first to provide her with the blood test results and second to preserve the blood samples. The defendant had a reasonable expectation of privacy in respect to the results of any tests that were performed on him. He would also have a reasonable expectation of privacy in respect to the blood samples if in fact they were drawn only for medical purposes. But, without the doctor's testimony the evidence is unclear as to the reason why she ordered the drawing of blood from the defendant. Significantly, however, I note that she directed that they should do only an alcohol screening test. In addition, when the lab had completed the test she called the Constable insisting that the Constable return to the hospital and give to the defendant a legal blood demand. Notwithstanding, the Constable insisted that she, the Constable, had no reasonable and probable grounds to give a blood demand. Thus, there was no need to pursue the matter any further.

Furthermore, when she arrived at the hospital in the early hours of November 10, 2000, the Constable knew that she required further evidence of intoxication before she could make a formal demand for a blood sample. She may have suspected that the defendant was impaired. Nonetheless, her personal observations and her discussions with the ambulance paramedic who was at the accident scene, the attending emergency room doctor and nurse, did not satisfy her of that fact. She had no evidence of his driving and the smell on his breath was ambivalent. His speech was clear and he was concussed. Again, any presumable signs of impairment were ambivalent.

However, she must have reasoned that, possibly, she could still use the blood sample and the results of the hospital analysis as evidence against the defendant and, she might have regarded the blood samples to be the best available evidence. After all, they obtained it within three hours of the accident. Still, she had no reasonable and probable grounds to believe that he had committed an offence. In spite of these hurdles, however, it appears that she still wanted to continue her investigation because of the nature and type of accident, a firefighter operating an emergency vehicle.

Despite having no reasonable and probable grounds to believe that the defendant had committed an offence, the Constable solicited the hospital staff to breach their duty of confidentiality with respect to the defendant. The hospital staff cooperated with her to create and preserve the evidence that she required. Being assured that the potential evidence was preserved, the Constable then went about putting together justifications to legally obtain that evidence. On that basis, it is difficult to conclude that either the police or the hospital staff acted in good faith. The strategy adopted by the police, in collusion with the hospital staff, led to a serious and flagrant violation of s.8. I do not think that the Constable's conduct was inadvertent. On the contrary, it was a deliberate and wilful circumvention of all procedural steps of which she was aware. Here, they all knew that they were not following proper procedures and had no valid statutory authority to do what they did. Thus the search warrant subsequently secured by the Constable, based upon the information she received as a direct result of the unreasonable search was a bold and farcical attempt to validate an illegal act. See, ***R. v. Kokesch***, [1990] 3 S.C.R. 3. The court ought not to condone such actions. To this end I am mindful of the words of La Forest J., in ***Dymen***t at p.261:

> The need of law enforcement are important, even beneficent, but there is a danger when this goal is pursued with too much zeal. Given the danger to individual privacy of an easy flow of information from hospitals and others, the taking by the police of a blood sample from a doctor who had obtained it for medical purposes cannot be viewed as anything but unreasonable in the absence of compelling circumstances of pressing necessity: see **R. v. Santa** (1983), 23 M.V.R. 300, 6 C.R.R. 244 at p. 251 (Sask. Prov. Ct.). The need to follow established rules in cases like this is overwhelming. We would do well to heed the wise and eloquent words of Brandeis J. (dissenting), in **Olmstead v. United States**, 277 U.S. 438 at p. 479 (1928): "The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning but

without understanding."

(c) *the effect of exclusion on the reputation on the administration of justice.*

In balancing the fairness of admission against the seriousness of the violation, I must first affirm that the essential values that are protected by s.8 ***Charter*** should not be trivialized or be minimized. ***Dyment***. Second, as was expressed by Sopinka J., in ***Kokesch***, at para. 43: " The court must refuse to condone, and must dissociate itself from egregious police conduct."

As an aside, even assuming that the hospital drew the blood samples for medical purposes only, the Constable became aware of their existence. She also knew that the blood samples, in the normal course of events, would be lawfully at the hospital for three days. If in that period she had developed, independently, reasonable and probable grounds to believe that the defendant was impaired at the time of the accident it appears to be feasible, under ***Southam Inc.***, that a seizure pursuant to a warrant could be admissible if executed within that time frame. I need not, however, decide that point.

Furthermore, even without the existing blood sample the Constable, theoretically, had several available means to pursue in order to obtain evidence for conviction. For example, she could have made a breathalyser or blood demand pursuant to ***Criminal Code,*** s. 254. In effect, however, what prevented her from making any legal demands was that she did not believe that she had the legal prerequisite to do so. Even when the doctor urged her to make a blood demand, after they all knew the test results, she still insisted that she did not believe that she had the legal prerequisites to do so. On the whole, therefore, the ***Charter*** violation was not minimal to the outcome of this trial as the Constable had no legal basis to obtain the evidence by other investigative means. The court, therefore, ought not to allow "a low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude." ***Southam Inc***., p.167.

Driving while under the influence of alcohol is a very serious offence and the punishment of drivers impaired by alcohol is an affirmed societal goal. Here, the blood samples and the hospital records are required for a conviction. Their exclusion, to some degree and without any counterbalance, could affect the repute of the administration of justice. However, I think that the unlawful conduct of the police and her attempts to conceal it was neither trivial nor minor. It was a zealous, well-meaning but deliberate and flagrant encroachment on the defendant's protected constitutional rights. Further, it also demonstrated a disregard to the limits of her own legal and constitutional powers to intrude upon the defendant's reasonable expectation of privacy.

Appropriate here are the words of La Forest J., in ***Dymen***t at p. 262:

> I would add one further thought. In sensitive areas like this, it is important in the interests of law enforcement that there be clear rules for the guidance of police conduct, so as to maintain the support of the citizenry for law enforcement authorities. It is also important for them to know precisely how far they should go for their own

protection and guidance.

We should also do well to heed his wise words also as expressed in **Dyment** at p. 263:

> In my view, the trust and confidence of the public in the administration of medical facilities would be seriously taxed if an easy and informal flow of information, and particularly of bodily substances from hospitals to the police, were allowed. In **R. v. DeCoste** (1983), 60 N.S.R. (2d) 170 at p. 174, 9 C.R.R. 154 (N.S.S.C.), Grant J. stated his belief that "members of the public consider a hospital as a place where the sick and injured are treated and not a place where a doctor would take blood from an unconscious or semi-conscious person for the sole purpose of satisfying the unlawful demand or request of a police officer". I agree, and I do think that they would feel differently about doctors and medical personnel freely handing over blood taken for medical purposes to a police officer or the police officer accepting it when there are well-known and recognized procedures for obtaining such evidence when the police have reasonable and probable grounds for believing a crime has been committed. In such a case, all are implicated in a flagrant breach of personal privacy. Though he spoke in terms of the pre-Charter "community shock" test, Mitchell J. in this case was substantially right when he stated at p. 537 C.C.C., p. 620 D.L.R., p. 355 Nfld. & P.E.I.R.:
>
> > If the court received evidence obtained by taking a blood sample without consent, medical necessity or lawful authority, and without the police having any probable cause, it would bring the administration of justice into disrepute . . . What happened here constitutes such a gross violation to the sanctity, integrity and privacy of the appellant's bodily substances and medical records that the community would be shocked and appalled if the court allowed the admission of this evidence in the face of the **Charter**.
>
> Such a practice would bring both the administration of health services and the administration of justice into disrepute.

Consequently, it is also appropriate and, in the results, I adopt the view expressed by MacKinnon A.C.J.O, in ***R. v. Duguay, Murphy and Sevigny*** (1985), 18 C.C.C. (3d) 289, affirmed 46 C.C.C. (3d) 1 (Ont. C.A.), at p.300:

> If the court should turn a blind eye to this kind of conduct, then the police may assume that they have the court's tacit approval of it. I do not view the exclusion of the evidence as a punishment of the police for their conduct, although it is hoped that it will act as a future deterrent. It is rather an affirmation of fundamental values of our society, and the only means in this case of ensuring that the individual's **Charter** rights are not illusory.

Disposition and Conclusion

Here, I conclude that, on the evidence presented and on the analysis that I have made, the administration of justice would suffer far greater disrepute from the admission of this evidence than from their exclusion. I would therefore exclude, as evidence, the exhibits seized pursuant to the search warrant executed on December 1, 2000, and any and everything pertaining to their subsequent analysis and conversion. As the Crown has not shown that the warrantless search and seizures on November 10, 2000, were reasonable, on the above analysis, the results of those searches are also inadmissible and are excluded as evidence, in these proceedings, against the defendant.

Consequently, on the remaining evidence before me I conclude that the Crown has not proved beyond a reasonable doubt the elements of the offences as charged. Accordingly, I find the defendant not guilty as charged and will enter acquittals on the record.