IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Doyle, 2009 NSPC 71

Date: November 17, 2009
Docket : 1930730/731
Registry: Sydney

Between:

Her Majesty the Queen

v.

Elizabeth Ann Doyle

Judge: The Honorable A.P. Ross

Oral decision : November 17th, 2009

Written decision : March 2nd, 2010

Charge: 254(5) and 253(a) cc

COUNSEL : Ms. Darcy MacPherson, for the Crown
Ms. Ann Marie MacInnes, the Defence

By the Court:

[1] Elizabeth Ann Doyle, the accused, was charged with refusing to comply with a demand by police to provide samples of her blood for analysis. The charge of refusal is under s.254(5) of the Criminal Code and dates from July 13th, 2008 at River Ryan, Cape Breton County, Nova Scotia. She was also charged with driving while impaired by alcohol, pursuant to s.253(a). Trial was held in Sydney on October 20th, 2009. A decision was given on November 17th, 2009. Oral reasons were given then for an acquittal on the impaired driving charge. These are reasons for decision with respect to the charge of refusal.

THE FACTS

[2] The relevant facts may be simply stated.

[3] The defendant was the driver in a single vehicle accident at the intersection of Lingan Road and Union highway in the Cape Breton Regional Municipality on July 13th, 2008. The car left the road for no apparent reason at 7:30 a.m. on a sunny Sunday morning. A passer-by saw the defendant climb out of the vehicle. He "walked her" over to the shoulder of the road and lay her down on the ground. Ms. Doyle complained of a sore leg. Despite efforts to keep her prone she made

frequent attempts to sit up. An ambulance arrived at 7:40. Paramedics applied a neck collar and put her on a board. By 7:50 they had her in the back of the ambulance.

[4] Officer Forgeron arrived at 7:44, while Ms. Doyle was still on the ground. He learned from others, and later from Ms. Doyle herself, that she was the driver. He smelled alcohol from her breath. Her speech was laboured. At 7:56 he formed the belief that she had committed the offence of driving while impaired. At 8:08, in the ambulance, he read her a standard police caution. This was followed by an arrest and the usual advisement of her Charter rights. Twice, during this procedure, the officer paused briefly, when the defendant complained of pain, to permit the paramedic to attend to her. Constable Forgeron went over the Charter rights a second time. The officer concluded that it would be impracticable to take the defendant to the detachment for a breath sample. Accordingly he made a demand for a blood sample. Officer Forgeron told her she would be charged with the offence of refusal if she did not comply. The defendant said she understood, but refused.

[5] There is no evidence of the actual time of the blood demand. However a workable estimation can be made. The police caution was given at 8:08, in the back of the ambulance. Present throughout in the back of the ambulance with the accused and the police officer was one Ms. Daigle, an emergency medical responder. Officer Forgeron's testimony of what transpired between the caution and the blood demand occupied 3 minutes of court time. During this 3 minute narrative he recited the Charter caution and demand verbatim from the same card he used on the night in question and spoke about repeating the Charter advice a second time in layman's terms. Ms. Doyle's responses were evidently quite brief. The officer also mentioned the two occasions when Ms. Daigle responded to complaints of discomfort by the accused. The interactions with Ms. Daigle would have taken some time, but neither warranted more than a mention. There was no indication of any medical procedures being employed. I think I may safely conclude as a matter of fact that the blood demand was made at or prior to 8:20.

[6] Presumably the defendant was taken to hospital, but it is unknown when she arrived, or how long she was kept there. There is no evidence that Constable Forgeron spoke to any medical personnel, either at the scene or at hospital, about whether or how long the defendant might be kept in their care. I don't think it is

stretching judicial notice too far to say that there are hospitals in Glace Bay, New Waterford and Sydney, and that none of these (whichever Ms. Doyle was taken to) is much more than 20 minutes by ambulance from the scene of the accident.

THE LAW

[7] The basis for a valid blood demand is set out in s.254(3) of the Criminal Code. The wording of the section has changed somewhat in recent years, but previous case law remains relevant to the issues here. As of July 13, 2008, and still today it reads as follows:

> (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
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> (a) to provide, as soon as practicable,
>
> > (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or
> >
> > (ii) if the peace officer has reasonable grounds to believe that, because of their physical condition,

> the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and
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> (b) if necessary, to accompany the peace officer for that purpose.

[8] A belief that an offence of impaired driving has occurred within the previous three hours is a precondition common to both a breath and blood demand. To make a blood demand the peace officer must know that the samples will be extracted by qualified medical personnel and that doing so will not endanger the health of the person. There is also the stipulation which is at issue in this case, namely that the physical condition of the person either (I) renders him or her incapable of giving a breath sample, or (ii) otherwise makes it impracticable for the peace officer to obtain a breath sample. If either the "incapable" requirement or the "impracticable" requirement is met, a blood demand may be given. The incapacity or impracticability (as the case may be) must relate directly to the physical condition of the person. Cases have held, for instance, that the unavailability of breath test equipment does not meet the test of impracticability.

[9] The idea of “practicability” is found in s.254(3) at three different points. These three occurrences, like the circumstances to which they refer, impinge on one another. The section should be read as a whole, and the element of practicability interpreted in more or less the same way throughout.

[10] There are obvious tensions between the requirement that the peace officer, if s/he chooses to make a demand of some sort, make it “as soon as practicable” and the requirement that s/he believe “it would be impracticable” to obtain breath samples before proceeding to a blood demand. There is a need to act with reasonable dispatch, yet a need to ascertain whether circumstances are such that a breath demand is not feasible. Is the officer entitled only to consider the situation at a particular moment, or instead required to take a larger context into account? Is an officer required, in some situations, to hold off until certain things become clearer?

[11] Further complicating the situation, and of undoubted importance to law enforcement officials, is the fact that if a sample of breath or blood is obtained within two hours of the driving (or care or control) then the prosecution gains the benefit of an evidentiary presumption that the readings signify the amount of alcohol in the person’s blood at the very time of driving (or care or control). This

is the so-called presumption of identity. It is an evidentiary shortcut which greatly simplifies proof of the offence, and it is undoubtedly, and understandably, in the minds of police officers confronted with possible impaired drivers. While it is sometimes referred to as a two-hour 'limit', the term 'window' may be more appropriate. The police are entitled to demand breath samples beyond the two hour period; they do lose the presumption, but the prosecution can call expert evidence to extrapolate the readings back to the time of driving.

[12] A person may be thought to have committed an impaired driving offence and yet be unconscious or otherwise unable to comprehend any form of demand. In such a case police may have recourse to a warrant to obtain blood samples from a justice of the peace. Sometimes a person may be mentally able to understand a demand for samples, but be physically incapable of providing proper breath samples. Neither of these situations pertained here. Ms. Doyle was sufficiently alert to understand any demand which Constable Forgeron might make, and she was seemingly capable of providing adequate breath samples, given that she was able to speak without effort, sit up, walk with assistance, etc. The issue at hand is whether obtaining breath samples was impracticable. I have no concern about the good faith of the officer here - it is a question of whether his decision to make a blood demand when he did was, in all the circumstances,

justified under s.254(3)(b)(ii). If it was not, it was invalid. If it was invalid, the defendant did not break the law by refusing to comply with it. Ms. Doyle's belief about the lawfulness of the demand is immaterial. Whether, at the time, she thought the demand was properly made is of no consequence. Why she refused does not matter.

CASE LAW

[13] In R. v. Shephard [2009] S.C.J. No 35 the Supreme Court dealt with what constitutes reasonable and probable grounds to demand breath samples under s.254(3). At para. 21 the court confirmed that trial judges should take account of "the totality of the circumstances" in deciding such matters. Although there are additional components to a valid blood demand, it seems reasonable to apply this approach equally to subsections (a)(I) and (a)(ii).

[14] It is useful to look at other cases with roughly similar facts to see how they have been decided. It is not possible to lay down any formula applicable to all factual situations, and appellate courts have not sought to do so. But by having regard to other cases some consistency may be achieved, and police and courts

may have a rough guideline for what could constitute the "impracticability" of a breath demand. I will first refer to some cases from other provinces.

Cases where blood demand valid

[15] In R. v. Pearce [1988] M.J. No. 574 (Q.B.) a blood demand was found to be valid when made at hospital upon an accused whom the police officer had accompanied in the ambulance. The demand was made some 52 minutes after the officer discovered the accused behind the wheel in a single car accident. The officer initially held off making any form of demand because, in his words, "I wasn't totally sure in my mind ... till I got there what the situation was... many times we've gone to a hospital and subject is immediately released virtually, you know, where a breathalyzer demand would be appropriate . . . in this case obviously he is going to be there for some time, a breathalyzer demand wouldn't be appropriate." The accused contended that even these circumstances did not fulfil the impracticability requirement, but the court said that impracticable does not equate to impossible. The court, seemingly rejecting the idea that police might bring a breath machine to the hospital, noted that impracticable "connotes a degree of reason and involves some regard for practice." It went on to say "with time running out, the peace officer had reasonable and probable ground to

believe that by reason of the appellant's physical condition, for which he was at the hospital, it would be impracticable to obtain a sample of his breath within the time limited . . ." It seems the court regarded the two hour "limit" as a legitimate practical consideration.

[16] In R. v. Randle [2009] A.J. No. 577 (P.C.) the accused struck a light standard, smelled of alcohol, failed a roadside screening device, and was just being given a breath demand when emergency personnel arrived, did an assessment, and decided to take him to hospital. The time of arrest was 21:39. The police officer accompanied the accused to hospital. They arrived there at 22:00. The officer told the attending physician that the accused was subject to a breath demand to go to the police station, but that this would not occur unless he were considered medically fit to do so. The officer also told the doctor that if the accused was not deemed fit to accompany the officer to the station, a blood demand would be given. At 22:51 the doctor told the officer that the accused would be kept for further examination. The doctor agreed with the officer's suggestion that "it was impractical ... to come with me for a breath sample". Defence argued that the officer should have inquired of the physician when the accused would be released. However the court found the impracticability of obtaining breath samples was shown by the facts and the blood demand was

valid. At para.11 the court said that the section “requires only that by reason of the person’s physical condition the person is unable to accompany the officer. . . for example the person is held at a hospital for medical observation or treatment.”

[17] In R. v. Wytiuk [1989] M.J. No.492 (Q.B.) the accused collided with a truck at 5:00. He suffered a laceration to the forehead. A police officer arrived at 5:50 and accompanied the accused to hospital in the ambulance. They arrived at 6:10. The doctor arrived at 6:20 and attended to the accused immediately. Vital signs were normal; he was alert and oriented. A few minutes later the police officer chose to give a blood demand because, in her words “the gentleman was at this point going to be getting some stitches in his head and I would not have been able to get him to a breathalyzer unit within the two-hour limit.” The accused made some phone calls. The blood demand was reiterated at 6:53. The accused replied that while he was prepared to provide a breath sample, he would not provide a blood sample. He was charged with refusal. In brief concluding reasons the appellate court judge found the accused to have been properly convicted, saying that the section “gives a peace officer a wide discretion to determine the impracticability or the capability of an accused to provide a breath sample.”

[18] In R. v. Salmon [1999] B.C.J. No.2893 the British Columbia Court of Appeal had occasion to consider the validity of a blood demand made in the following circumstances. There was an explosion aboard a boat at about 3:00. A police officer and an ambulance both arrived on scene very quickly. The accused, suffering from burns, was taken to the nearest hospital, arriving at 4:10. Treatment began immediately. The police officer arrived minutes later, and at 4:25 made a blood demand. At 5:16 the demand was repeated. The accused refused. The officer testified to a belief that the accused would be held overnight in hospital. In fact, the accused was discharged at 6:45, by which time the officer himself had left. At para.12 the court concluded that “the evidence does not disclose that extensive inquiries were made by Constable Matheson of the hospital staff, the ambulance staff or the appellant himself, though some inquiries were undertaken. . . But it was quite apparent to Constable Matheson that at 4:25 and at 5:16 the appellant was in the early stages of treatment, which was not going to be concluded for some time ... (and) cannot be faulted for his conclusion that the taking of a breath sample was impracticable.”

[19] At para.9 of the judgement Lambert J.A. states “I think there is a relationship between the question of practicability in these introductory words of the section and the question of impracticability in paragraph (b)(ii). I am not

suggesting that the timing of the conclusions of practicability and impracticability must be absolutely identical, but the decisions must be made about them at about the same time, in light of the circumstances that exist at that time or are considered to exist at that time, and in the light . . . of the duration of the time period which might be required to pass before it would be practical to obtain a sample of breath rather than a sample of blood."

[20] In R. v. Smallridge [2000] A.J. No. 625 (P.C.) the accused was in a motor vehicle accident at 2:45. Police arrived on scene at 2:55, by which time emergency medical personnel were placing the accused in the back of an ambulance, complaining of a sore leg and sore neck. There were some small cuts to the forehead. The constable accompanied the accused in the ambulance. There were signs of impairment and some admissions of drinking. The police officer waited with the accused until x-rays were concluded at 3:38, at which time a blood demand was made. Samples were taken. The court rejected defence counsel's submission that the Edmonton police should have a portable breathalyzer device to bring to hospital. It found that the impracticality of obtaining a breath sample flowed from the physical condition of the accused. At para. 8 the court stated that "the Crown has demonstrated a physical condition that required immediate medical attention which made it impractical to put the

accused before a breathalyzer instrument within the two hour limit fixed by the Code." It went on to say "the demands of preserving life and health should prevail over the legal priority of using the least invasive means of testing for blood alcohol levels."

[21] In R. v. Fouquette [2009] A.J. No. 294 (P.C.) the court found at para.31 that the police officer, by the time he and the accused arrived at the hospital, appeared to have the grounds set out in (a)(ii) to make a blood demand.

[22] In R. v. Robertson [2002] A.J. No. 90 (P.C.) the accused was in a two car collision. An ambulance came within minutes. The accused was conscious and alert, but unsteady on his feet and smelling of alcohol. A cervical collar was applied as a precaution and he was strapped to a gurney. A police officer arrived at 5:14 at which time the accused was in the ambulance. The officer formulated grounds for and made a breath demand at 5:29. The ambulance left for hospital a few minutes later, arriving at 5:45. With the accused still on the gurney awaiting an x-ray, the officer spoke to a doctor at 6:40. At 6:43 he made a blood demand which was complied with.

[23] The court said at para. 91 "other considerations such as going beyond the two hour time limit to invoke the presumption of s.258 of the Code do not govern. Timing is but one factor to consider." Citing R. v. Walkom [1998] A.J. No. 1776 it noted that the two hour limit was simply a prerequisite to an evidentiary shortcut which does not of itself justify resort to the more intrusive investigatory technique of taking blood samples." However, it noted as well that the law entitled the police to act within a reasonable time period. After pointing out that the emergency room was very busy that evening, and that the officer may have had to wait for hours for a potential discharge the court said, at para 100, "some reasonable time limit must be imposed in this type of situation, as the constable must also have in mind the requirement to make the demand and take the samples as soon as is practicable."

[24] In R. v. Caruth [2009] A.J. No. 1129 the Alberta Court of Appeal dealt with a case where a police officer read a blood demand because he believed the accused had suffered an asthma attack. Beginning at para.17 the Court summarized some principles which help to determine whether there is a legal basis for a blood demand. Citing R. v. Pavel (1989) 53 C.C.C.(3d) 296 (Ont. C.A.) it said "Given the highly intrusive nature of taking a blood sample, the state must comply strictly with the conditions set forth in the Criminal Code before such

a substantial interference is justified." It noted that the "incapacity" or "impracticability" must be by reason of the physical condition of the person. It referred to the Supreme Court's decision in Shepherd, above, and went on to say at para 21 "Whether or not the officer's belief was reasonable is based on facts known by or available to the peace officer at the time he formed the requisite belief." It went on to say that no authority was presented which precluded a police officer from relying on knowledge gained from personal experiences. At para.23 it said "the officer is entitled to rely on the circumstances as understood by the officer at the time, even where it has been established later that the officer was under a misapprehension of facts."

Cases where blood demand invalid

[25] In R. v. MacMillan [1989] P.E.I.J. No.86 (S.C.) the police officer arrived at an accident scene at 8:45 and made a breath demand at 9:03 to which the accused agreed. However the accused was taken to hospital by ambulance and the officer followed. At 10:16 the officer decided to make a blood demand, saying "at the time the two hour time limit in which to obtain a sample was running short. I had no choice but to give the accused a blood demand at the hospital." The court found that the medical check took over an hour, but that the accused would

have been available for discharge at or about 10:16 if the doctor had not been required to take the blood samples. The court found that this would have allowed 29 minutes to take the accused to the barracks and administer a test, but that "regardless of the time frame available, that option (the blood demand) only existed if the preconditions stipulated in the section prevailed. Otherwise the breath testing was mandatory." In effect the court said that the two-hour window within which the presumption of identity would operate was not a proper consideration for a police officer in deciding whether to make a blood demand, saying "not always will circumstances permit strict compliance within the two hour time limit." The court found the blood demand to be invalid.

[26] In R. v. Hass [2007] B.C.J. No. 2060 (P.C.) the accuse drove into a ditch. He was extracted from his vehicle and restrained on a spine board. After being seen briefly at a local clinic the doctor decided that although there were no signs of serious injury medical protocol demanded that given the nature of the crash he should be flown to a larger center for further diagnostic testing, and remain strapped to the board in the meantime. Police believed this meant there was no possibility of obtaining breath samples, and so a blood demand was made. The accused declined, at the same time offering to give a breath sample. The nearest breathalyzer device was miles away by water. The court found that the

defendant had only minor injuries, and there was no physical impediment to him providing a breath sample. He had been immobilized against his will, because medical protocol dictated it. The court concluded that the only impracticability was related to his immobilization, not his physical capability of providing a breath sample. It said that nothing precluded the police officer making a breath demand, to be administered by other police officers near the hospital where the accused would be taken. It placed importance in the lapse of time, saying at para. 12 that "the test is not whether the police would be deprived of an investigatory tool, it is whether the physical condition of the accused warrants this means of conscripting a person to provide evidence against himself."

[27] In R. v. Shroepfler [2006] A.J. No. 990 (P.C.) the accused struck a parked car at 7:30. When police arrived the accused was already in an ambulance. He arrested the accused and gave a breath demand. The officer then followed the ambulance to hospital where the officer observed the doctor assess the accused. Upon learning that the accused was going to remain at hospital for tests, a blood demand was given. The court was concerned that the officer made no notes of his conversation with the doctor, nor of the doctor's statements to the accused, and had only a vague memory of such. It cited the following passage from MacMillan, above concerning the impracticability of a breath demand : "the belief

would almost invariably be based on an opinion by a medical person. That is not to say, of course, that there might not well exist circumstances, for instance, at the scene of an accident, in which the officer might be justified in arriving at the belief based on his own reasonable observations." In the final analysis the court did not find any substantiation of the officer's belief that because of the physical condition of the accused it was impracticable for the accused to accompany to officer in order to obtain breath samples. It found the blood demand to be invalid.

Nova Scotia authority

[28] In R. v. Hiltz (1988) 82 N.S.R. (2d) 387 (NSCA) the accused was found unconscious in his vehicle. He was put in an ambulance and regained consciousness en route to the hospital, displaying signs of impairment. A blood demand was made; the accused complied. His injuries however were minor and he was discharged 40 minutes after first being found behind the wheel. At that point a breath demand was made; the accused again complied. At trial the accused challenged the validity of the second demand.

[29] At para. 8 the court stated "an officer can ask for blood samples only if he cannot at the time practicably obtain breath samples." This is not equivalent to

the statement: if an officer cannot at the time practicably obtain breath samples, he can (i.e. is entitled to) ask for blood samples. Hiltz does not stand for the proposition that at any point where a breath demand is impracticable a blood demand becomes appropriate. Thus Hiltz does not resolve the issue in the instant case. At the time the blood demand was made to Ms. Doyle there is no doubt that obtaining samples would have been impracticable. But making a demand and obtaining samples are not same thing. Ms. Doyle's counsel argues that the officer, in the circumstances, should have waited until the medical status of the accused was determined and then make the appropriate form of demand. Alternately Defense would argue that the officer should at most have made a breath demand, given that the section requires the person to provide samples "as soon as practicable".

[30] At para.4 the court noted that the police officer "not knowing the extent of the injuries or how long the accused would be in hospital . . . gave him a demand for a blood sample." A blood sample was obtained, but police feared it had been contaminated and as the accused had recovered sufficiently to provide breath samples, made that second demand. Comparing the facts, Mr. Hiltz and Ms. Doyle were both under the control of ambulance personnel when police made the blood demand. In both cases the officer could not know whether or how long the

hospital would keep the suspect for treatment. Mr. Hiltz had been unconscious; Ms. Doyle was alert and oriented from the outset. Arguably being unconscious creates a greater likelihood that the person would be kept for observation, although I have no medical opinion to this effect. But as to whether Hiltz provides guidance, given the similarities in the facts, I note that the court in Hiltz made no finding about the validity of the blood demand because the issue at trial concerned the second breath demand.

[31] Hiltz appears to assign importance to the two hour time limit within which a sample carries the so-called "presumption of identity" (that the blood alcohol level at the time of the test is presumed to the b.a.l. at the time of driving). At para. 10 the court noted that the accused "had recovered sufficiently within the two-hour period and breath analysis within that period had become practicable."

[32] In R. v. MacFadden 240 N.S.R. (2d) 146 the accused's motor vehicle left the road at 7:00. Police arrived at 7:30. Fire and ambulance were already there and the accused was on a back board and in a neck brace. The officer went inside the ambulance with the accused and there noted a smell of alcohol. The accused admitted to driving. The accused and another injured person were taken to hospital. At 8:00 the first officer contacted a second and relayed the

particulars, saying he had grounds to arrest for impaired driving and suggesting the second officer give the accused either a breath or blood demand. A blood demand was given, but the court found that before doing so the second officer had not checked on the accused's medical condition with any medical staff, nor had she noticed any physical injuries. Indeed, the officer knew the accused had not even been assessed by medical staff prior to making the blood demand. Concern over this lack of inquiry about the accused's physical condition and possible timing to complete a medical assessment led the court to conclude that a blood demand was not warranted.

[33] At para. 31 and 35 of the judgement the phrase "may be incapable of providing a sample...", which is found in the section, seems to be equated with "would be incapable" or "couldn't provide a breath sample by reason of physical condition". Be that as it may, I must take whatever direction is applicable from this summary conviction appeal court decision. At para.37 the court said "I am satisfied in this case the officer may not have even truly considered the option of obtaining a breath sample." At para 38 it quoted with approval this passage from R. v. Hanet [1996] A.J. No. 210 : "Rushing into the hospital emergency room and demanding blood samples without observing the statutory safeguards is not what the public would expect of police officers . . ."

[34] In a case factually similar to the case at hand, R. v. Farrell [2009] N.S.J. No.15 (NSCA) the accused was involved in a single car accident at approximately 10:00. She was being removed by fire personnel just as the police officer arrived on scene. She was screaming in pain, and strapped to a backboard. The officer detected an odour of alcohol. He accompanied her in the ambulance which arrived at the hospital at 10:58. Being of the opinion that the accused would be at hospital for some time while she was being examined and treated, the officer read a blood demand at 11:11. A sample was taken by the emergency room doctor at 11:24. The trial judge found as a fact that the officer had formed the intention to make the blood demand shortly after arriving at he accident scene, before he had any clear indication of the extent of the accused's injuries. He also found that the officer made no inquiry of the attending physician whether the accused was able to provide a breath sample.

[35] The appeal concerned two issues - the validity of the demand and the admissibility of the evidence. The Court upheld the ruling of the trial judge that the demand was invalid, and that the taking of the samples constituted a breach of the accused's s.8 Charter rights. However it overturned the decision to exclude the results of the blood analysis pursuant to s.24. In the case before me the accused refused Constable Forgeron's blood demand, and so the question of

exclusion of evidence does not arise. A refusal is not evidence of an offence, it is the offence. It is the conclusion of the trial judge that the blood demand was invalid, upheld by the Court of Appeal, which informs my analysis of the present case.

[36] At para.12 the Court states "the belief of the police officer that the person is incapable or it is impractical to obtain a breath sample must be held at the time the demand for blood is given." At para 14 it states "While it is apparent that the trial judge did consider the officer's belief at the time of the accident, he also went on to consider the situation at the hospital." At para 16 it notes "The trial judge found as a fact that the officer did not consider giving a breath demand at any time." At para.20 it alluded to the finding at trial that the police officer "made up his mind at the scene of the accident to seek a blood sample as soon as possible after arriving at the hospital and did not reassess the situation at the hospital." Given these findings, the decision that the blood demand was invalid was reasonable and supportable.

Other cases

[37] R. v. Pederson [2004] B.C.J. No.229 (BCCA) dealt with a telewarrant procedure used to obtain a warrant for blood samples. It thus concerned the

practicability of the applicant police officer appearing personally before a JP to obtain the warrant. While s.254(3) and s.487.1(1) are different sections, the court had to consider the meaning of "impracticable" and whether it must pertain to circumstances beyond the control of the police officer. While not making a firm finding on this point, the court noted that the officer was "constrained by circumstances beyond his control : the time that passes while the appellant's injuries were treated and he prepared the Information to Obtain and the time it would have taken to personally attend on a justice of the peace."

[38] In R. v. Squires [2002] O.J. No. 2314 the Ontario Court of Appeal had a situation where police found the accused at the scene of a single car crash and arrested him for impaired driving at 1:03. Ambulance and fire personnel arrived at just this time and transported the accused to hospital. The officer followed. They arrived at 1:35. The accused was examined immediately as the officer observed. At 2:02, nearly one hour after the initial arrest, the officer read a breathalyzer demand. At 2:57 the accused was turned over to a technician. Attempts to administer the test shortly afterwards failed, and the accused was charged with refusal. The issue was whether the breath demand was made "as soon as practicable."

[39] The Court at para 31 referred with approval to a number of cases where "as soon as practicable" was interpreted to mean "within a reasonably prompt time" and not "as soon as possible." On the facts pertaining it found that the demand met this criterion. It said at para. 32 "the decision to postpone additional legal steps, both at the accident scene and for about 20 minutes at the hospital, was entirely appropriate in the circumstances of this case." It found no fault with the police officer allowing priority to be given to the accused's health. It noted "additional legal steps, including the demand, should only be taken once an accused person is able to understand the questions and respond to them in a meaningful way."

DISCUSSION

[40] The issue is whether the police officer, in the circumstances, was entitled to make a demand for blood samples. In the vast majority of cases a demand is for breath samples. In order to make a blood demand the police officer must have an honest and objectively reasonable belief that circumstances warrant it. The taking of a blood sample by legal coercion (given that the accused is told that refusal constitutes an offence) is obviously a significant intrusion on a person's rights. It is a "search" of their body, an intrusion on their privacy, and a means of

conscripting evidence from the person which the state may then use to incriminate them. It hardly needs to be said that the evils of impaired driving justify significant curtailment of individual liberties by police, but the means by which evidence such as a blood sample is obtained must accord with the law.

Police practice

[41] The wording of s.254 and the case law surrounding it call for a regard to practice. There are various things which commonly occur after a demand is made. Between a breath demand and the actual taking of samples an accused must be transported, perhaps over a significant distance. A technician may have to be summonsed and an instrument readied. There may be a need to search the person and/or the vehicle. There must be advice as to rights and an opportunity given to exercise them. Clearly, therefore, the "impracticability" of obtaining breath samples must relate to more than the usual exigencies, and that 'something more' must arise from the physical condition of the accused.

[42] Crown has argued in the present case that a blood demand was the only appropriate demand *at the time it was made*. Even if this is correct - one should perhaps leave open the possibility of a breath demand - I think it implies the

wrong test. It suggests that the form of demand can be based upon a consideration of the circumstances at a moment in time, without regard to how events are likely to unfold. The section itself contemplates intervals of time, for instance in the requirement that samples, once demanded, be provided "as soon as practicable". I have already noted the usual steps and exigencies which may affect the time interval between demand and test. In addition, the section uses the words "would be impracticable". This seems to suggest something more than the circumstances pertaining at the very moment the police officer is deciding whether a blood demand is necessary. It seems capable of referring to time in the reasonably near future, to things which occur commonly as a matter of practice and experience, to an interval of time. Salmon, above, lends support to this view.

[43] It may well be (although this does not arise for decision) that Constable Forgeron could not be faulted for making a *breath* demand on Ms. Doyle at the time he did, i.e. when she was at the scene under control of the ambulance attendants. Breath samples would only be provided when practicable, which here would mean after her legitimate medical needs had been attended to. If it later transpired that she were kept in hospital for observation or treatment, or something else cropped up which prevented the taking of breath samples within a

reasonable period of time, he could at that later time make a blood demand, as was done in Robertson, above. Consecutive demands - one blood, another breath - were considered lawful in Hiltz.

Medical practice

[44] The practice of emergency response personnel, and the practice of attending physicians and other personnel in hospitals are also things which a police officer is entitled to take into account. So too is the need to ensure that the life and health of the accused is protected, even if medical personnel are not on the scene. A police officer who believes an impaired driving offence has occurred and who has grounds to make a demand may thus be forced to defer to medical needs, or to medical personnel. In the case of Ms. Doyle it is the latter. Officer Forgeron was not himself providing medical care, but Ms. Doyle was in the control of others who were. This is a common occurrence, and Constable Forgeron acted appropriately by suspending his investigation whenever the accused required medical attention.

[45] Treatment decisions, whether in accordance with medical protocol or not, arise directly from the physical condition of the person, and may properly take

into account events which precede the time at which the person “presents” to medical personnel. Shock, confusion, disorientation - these may be indicative of underlying problems and are surely part of the “physical condition” of an accused. Many common medical practices are precautionary and informed by whatever information medical personnel may have of the preceding events.

[46] In many cases it is the steps taken by medical personnel, rather than the physical condition of the person *per se*, which creates the impracticability of a breath demand. It may later be determined that an accused who is strapped to a board, put on a stretcher, administered medical tests, taken to hospital, put under observation, x-rayed, etc. is perfectly fine. But it would make no sense to allow such an accused to argue later that a blood demand was not based on his “physical condition”.

[47] Reasonable steps taken by police or medical personnel to protect the health of an accused should not later be second guessed if it transpires that such measures were actually not necessary. Sensible precautions taken to ensure the health and safety of a person, taken because of the circumstances of an accident or a preliminary observation of the person’s condition, are matters of common practice that ought to inform the meaning of “impracticable” in s.254(3)(b)(ii). In

such cases there is no reason for courts to entertain argument, after the fact, about whether the accused was, in fact, physically capable of providing a breath sample, nor to conduct any in-depth inquiry of the physical condition fo the accused. I am thus wary of the reasoning in Hass, and sympathetic to the reasoning in Caruth, above. That being said, the present case turns on different considerations.

Implications for police and medical personnel

[48] Going hand in glove with a demand, whether for breath or blood samples, is the requirement to accompany the peace officer. Where the accused is under the control of medical personnel en route to (or in) a hospital the peace officer must accompany the accused, rather than the other way around, but the individual is nevertheless under a form of detention and the time which the peace officer assumes control over the accused's movements is merely suspended. In the circumstances of this case, where the police officer formulates grounds at the scene but the accused, in accordance with medical protocols, is being taken to a hospital, the officer is, as a practical matter, required to accompany the accused to hospital. This is so whether s/he makes a breath demand at the scene, or makes a blood demand at the scene. I have noted above that it may have been

better had Constable Forgeron made a breath demand at the scene and, if necessary, a blood demand later. Considering the practical implications of the various courses of action, one thing is clear. Whether the police officer makes a breath demand at the scene, a blood demand at the scene, or holds off and later makes a demand of one kind or the other, s/he will have to accompany the accused to the hospital and await the outcome of the medical assessment and any ensuing tests or treatment. In practice, therefore, nothing is gained by making a blood demand at the scene - putting aside the rare case where the three hour limit within which a demand must be made may come into play - except that there is no longer a need to mobilize a breath technician at the nearest detachment.

[49] For medical personnel, however, the implications may be different. Blood demands made at first opportunity, without knowing if the person needs ongoing care, simply because s/he is going to hospital in an ambulance, will force doctors into taking samples in more cases. In such cases doctors (or nurses) are conscripted as agents of the state to obtain evidence. This is primarily, and should as much as possible remain, a police function. Doctors and nurses have no shortage of medically necessary procedures to keep them busy.

CONCLUSION

[50] Defense has argued that Constable Forgeron acted precipitously : that he did not follow the accused to hospital, did not ascertain her medical condition, did not inquire how long she might be held for treatment, nor even allow sufficient time for he himself to make any such assessment. I think these arguments have merit. For the reasons given above I conclude that the blood demand was invalid. The evidence fails to show that it was impracticable, in all the circumstances, to obtain a breath sample within a reasonable time. This being so, the accused is found not guilty of refusing to comply.

[51] It is not necessary on the facts of this case to determine whether or in what circumstances a police officer should forego the evidentiary benefit of the two hour window for obtaining samples. Parliament has *not* explicitly said, in s.254(3)(a)(ii), that "the person may be incapable . . or it would be impracticable to obtain a sample of breath *within two hours*". It is by no means clear that where Ms. Doyle was concerned, the police would have lost that advantage by holding off for a reasonable time. If another case arises where a police officer opts to make a blood demand simply in order to obtain samples within the two hour window, another decision will be needed.

Dated at Sydney, Nova Scotia this 2nd day of March, 2010.

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Judge A. Peter Ross