

Case Name:

R. v. Murray

**RE: Her Majesty the Queen, Respondent, and
David Murray, Defendant/Applicant**

[2011] O.J. No. 2434

2011 ONSC 2537

Court File No. 65/10

Ontario Superior Court of Justice
Sudbury, Ontario

E.J. Koke J.

Heard: April 6 and 7, 2011.

Judgment: May 13, 2011.

(168 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Protection against self-incrimination, right to silence -- Protection against unreasonable search and seizure -- Application by accused for exclusion of evidence allowed in part -- Police attended single vehicle accident -- Accused taken to hospital from scene -- Statements to ambulance personnel were admissible, as they were made in health emergency context and Charter did not apply -- Statements made to police before and after caution were involuntarily compelled and were inadmissible at trial and for purpose of determining reasonable and probable grounds -- In absence of offending statements, sufficient grounds existed to issue warrant -- Police conduct in obtaining blood samples from hospital personnel infringed accused's rights -- Evidence ruled admissible.

Application by the accused, Murray, for the exclusion of evidence comprised of statements to police and ambulance attendants, blood samples and medical records. Police attended the scene of a single vehicle collision and found two persons trapped inside the upside down vehicle. The accused was in the driver's seat. Broken bottles of alcoholic coolers were found at the scene. Police could not detect an odour of alcohol, but noted that the accused breathed through his nose, was uncooperative, and slurred that he needed a lawyer. The accused was taken to hospital. In the ambulance he stated that he had consumed between three and 90 drinks, that his mother was driving, and that a moose had

jumped in front of the vehicle. Police attended hospital to continue the traffic accident investigation. The officer noted an odour of alcohol on the accused's breath. The accused stated he had consumed a couple of beers and expressed gratitude that he had not killed his passenger. After being cautioned, the accused stated that a Sasquatch ran in front of the vehicle and that he had not been drinking. He told police that he knew he was wrong and was aware that they had a job to do. A lab technician advised police that blood samples were drawn for medical purposes. The technician testified that an officer requested her to obtain blood for police. Eight vials of blood were taken and three vials were subsequently provided to police pursuant to a warrant, in addition to the copies of the accused's hospital records in respect of the other five vials. The accused was subsequently charged with dangerous driving, impaired driving causing bodily harm and driving over-80 causing bodily harm. At issue was admissibility of the accused's statements to police, the validity of the search warrant and search by police, and the admissibility of the blood sample results.

HELD: Application allowed in part. The accused's statements to ambulance attendants were admissible, as they were made in the context of medical personnel attending an emergency and thus the Charter did not apply. The accused's statements to police both before and after the caution was given were involuntarily compelled in an adversarial context and were inadmissible. Due to similar contextual considerations, the inadmissible statements were inadmissible for investigative purposes such as providing reasonable and probable grounds. Even upon excise of the offending statements, sufficient grounds remained for the issuance of the warrant. The actions of the police in obtaining the three blood samples without a warrant were improper and breached the accused's rights. Hospital staff should not have rendered their assistance in obtaining the samples. However, the process whereby the hospital samples were obtained was not so tainted by the improper investigatory actions of the police that the accused's rights would be infringed if the results of the samples were admitted into evidence. Nor would the admission of the test results bring the administration of justice into disrepute. The five hospital samples were taken by hospital personnel for medical reasons, and not for investigative purposes, and were taken with the consent of the accused. The evidence with respect to those tests was relevant to the charges and no issue was raised regarding their reliability. The public had a significant interest in having cases such as this adjudicated on their merits. In the circumstances, the hospital records were admissible.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 10(b), s. 24, s. 24(2)

Highway Traffic Act, R.S.O. c. H.8, s. 199

Counsel:

Philip Zylberberg, Counsel, for the Crown/Respondent.

John Recoskie, Counsel, for the Accused/Applicant.

1 E.J. KOKE J.:-- The Applicant was involved in a motor vehicle accident, following which he was charged with the offences of Impaired Driving causing Bodily Harm, Driving "Over 80" Causing Bodily Harm and Dangerous Driving. He brings this application for an order excluding from evidence certain statements made by him following the accident, and excluding the analysis of blood samples and medical records which were obtained pursuant to a search warrant. He claims that if the evidence is admitted his Charter¹ rights under sections 7, 8 and 10 (b) of the Charter will be breached. He seeks relief under s. 24 of the Charter.

Background Facts

2 On November 12, 2008, at 2:18 a.m., OPP communications were advised of a single vehicle collision on Hwy 144, north of Sudbury, Ontario. Police, fire, and ambulance attended and found two persons trapped in the vehicle. The vehicle was upside down. The vehicle had sustained extensive damage. The accident was reported by civilians coming upon the scene. None actually observed the accident take place.

3 OPP Cst. Bond, the primary investigating officer, arrived at the scene of the accident at 2:37 a.m. Cst. Gibson was already at the scene, as was Emergency Medical Services ("EMS").

4 Cst. Bond observed two occupants in the vehicle in seatbelts. There was a male in the driver's seat, later identified as David Murray, aged 56 and a female in the passenger seat, later identified as David Murray's mother, Grace Murray, aged 90.

5 Cst. Bond testified at the preliminary hearing that his supervisor, Sgt. Pollack, approached him and advised that the driver may have been consuming alcohol.

6 Sgt. Pollack testified that he mentioned this to Cst. Bond because he observed broken bottles of Caesar coolers. Sgt. Pollock testified that he told Cst. Bond that it might be a good idea to assess the driver a little closer. Sgt. Pollock had no interaction with the driver and was aware of no other indicia of impairment.

7 Cst. Bond reported back "that he did not smell anything alcoholic from the driver but that the driver was being somewhat uncooperative".

8 Cst. Bond testified that he thought that Mr. Murray was acting strangely in that he was breathing heavily through his nose and was uncooperative with the paramedics.

9 While in the care of EMS, in the presence of Cst. Bond, Mr. Murray responded to a question by stating "I need my lawyer, I need a lawyer." Cst. Bond noticed that Mr. Murray's speech was slurred.

10 Cst. Bond noted that Mr. Murray did not want to allow paramedics to draw blood for a sugar test.

11 Both David and Grace Murray were taken to the St. Joseph's site of the Sudbury Regional Hospital. Cst. Bond attended the hospital at 4:39 a.m.

12 Before arriving at the hospital Cst. Bond received information through his dispatcher that hospital staff had reported that Mr. Murray may have been drinking.

13 At 4:45 Cst. Bond found Mr. Murray while Mr. Murray was being brought in for a CT scan. Cst. Bond was not present during the scan and waited until 4:58 a.m. to continue his investigation in the Emergency room.

- 14 Cst. Bond took this opportunity to speak to Mr. Murray.
- 15 It was at this time that Cst. Bond first noted an odour of alcohol on Mr. Murray's breath.
- 16 Cst. Bond made contact with lab technician Christine Beausoleil. Ms. Beausoleil testified that blood samples were ordered by the doctor. Mr. Murray asked why blood was being drawn and Ms. Beausoleil advised him that it was for a medical purposes. Ms. Beausoleil testified that she was requested to obtain blood by Cst. Bond and she took some samples for him as well.
- 17 Cst. Bond was present when the samples were taken from Mr. Murray. After blood was taken, Cst. Bond taped three of the vials of blood together and placed one seal on the bundle. Later these three vials were resealed individually in the lab.
- 18 Cst. Bond mentioned to Ms. Beausoleil that he would be obtaining a warrant for the vials of blood.
- 19 Ms. Beausoleil could not recall exactly how many samples she took. She stated "There was ... at least eight and the reason being was there were ones ordered from the doctor and there were also ones taken for the police".
- 20 Ms. Lorrie Sweet, lab technologist, testified that blood samples are usually only retained for seven days unless there is a request by police. Where police are involved the samples are kept on a separate rack "just in case there's something further down the road".
- 21 Ms. Lorrie Sweet testified that she followed her usual practice on this occasion, which was to explain to the officer the proper way to apply the seals since she knows "it makes a difference." She also ensured the officer uses an appropriate pen so that there is no smearing of ink since "the ones the police use smear".
- 22 Cst. Bond continued his investigation by taking a statement from Mr. Murray for "the purposes of a traffic accident report that gets forwarded to the Registrar of Motor vehicles." He testified that when he was at the hospital he was obtaining information for "both purposes, the *HTA* investigation and the Criminal Code Investigation". Cst. Bond agreed that a driver involved in a motor vehicle accident is obligated to provide statements. His investigation under the *Highway Traffic Act* was completed at 6 a.m.
- 23 Cst. Bond testified that Mr. Murray's speech was no longer slurred at the hospital, or to a lesser degree. Cst. Bond indicated that Mr. Murray had calmed down significantly and was no longer belligerent. Cst. Bond agreed that this may have been due either to the fact that the earlier noted symptoms were the result of the accident or that more alcohol had been eliminated by Mr. Murray.
- 24 Cst. Bond obtained a warrant to seize the three blood samples. The samples were sent for analysis to the Centre for Forensic Sciences.
- 25 Cst. Bond also obtained a warrant to obtain copies of Murray's hospital records, which included the results of the laboratory testing of Mr. Murray's blood.

Issues:

- 1) *Are some or all of the statements of the accused following the motor vehicle accident admissible at trial?*

- 2) *Are some or all of the statements of the accused admissible to support an application for a search warrant for the production of the hospital records?*
- 3) *Should the search warrant which was issued for the production of hospital records be quashed?*
- 4) *Did Constable Bond have the requisite subjective belief to seek the search warrant?*
- 5) *Should evidence relying on the blood samples be excluded pursuant to S. 24(2) of the Charter?*

First Issue: Are some or all of the statements of the accused following the motor vehicle accident admissible at trial?

Position of the Accused

26 The Applicant argues that the statements made by him following the accident are inadmissible for any purpose within the criminal proceedings on the basis that they were statutorily compelled and provided without access to counsel.

27 The Applicant relies on the provisions of Section 7 of the *Charter of Rights and Freedoms* which states:

- s. 7 *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

28 The Applicant argues that an analysis of Section 7 requires the following three stages:

- a) Identify a real or imminent deprivation of life, liberty, or security of the person.
- b) Identify and define the relevant principle or principles of fundamental justice.
- c) Determine whether the deprivation has occurred in accordance with the relevant principle(s).

29 With respect to the first stage, the Applicant states that there is no doubt that he faces a real and imminent deprivation of his liberty through the criminal process, if convicted.

30 With respect to the second stage, he argues that the right to silence is a principle of fundamental justice. This right to silence includes the right not to be conscripted into providing evidence against oneself when placed in jeopardy by the criminal process.

31 The Applicant argues that statements made by a driver following an accident are not voluntary since drivers are under a statutory duty to report an accident and there is a corresponding duty on police to complete a report and forward it to the Registrar under Section 199 of the *Highway Traffic Act*² (the "*HTA*").

32 The Applicant relies on the 1999 decision in *R v. White*³ ("*White*") for a discussion of what principles are to be applied in determining whether there has been a deprivation. In that case, the Supreme Court held that statements made under compulsion of s. 61 of the *B.C. Motor Vehicle Act*⁴, (the equivalent reporting provision to s. 199 of the Ontario *Highway Traffic Act*) are inadmissible in

criminal proceedings against the declarant. The court held that their admission in a criminal trial would violate the principle against self-incrimination, which is one of the principles of fundamental justice protected by Section 7 of the Charter.

33 In summary, the Applicant argues that the court should find that Cst. Bond obtained statements from Mr. Murray for the purpose of conducting a *HTA* investigation. In doing so he also collected admissions for the purpose of conducting a criminal investigation. These statements were compelled. It is a principle of fundamental justice that a person not be compelled to incriminate oneself. Accordingly, the court should find that the statements taken from Mr. Murray are not admissible for any purpose in this proceeding, including providing reasonable and probable grounds to obtain warrants for the seizure of blood and medical records.

Position of the Respondent

34 The Respondent argues that not all of the statements relied on by the police in obtaining a search warrant were made in compliance to a section 199 request for information. The Respondent places the statements and information received from Mr. Murray into the four following categories.

1. At 0310, Cst. Bond entered David Murray's ambulance. The ambulance personnel asked David Murray questions and he told them that he had no medical complaints. His speech was slurred. He said that he had had three drinks, and then 90. He said that a moose jumped in front of the car. He said that his mother was driving.

He would not say how many people had been in the car

prior to the collision, then saying that "a whole group of kids ran away. Twenty people took off."

These statements were made in response to questions put by the paramedical personnel.

2. After receiving information at 0428 that David Murray might be impaired, Cst. Bond went to the hospital where, at 0445, he located David Murray in the hospital and confirmed his identity.

At 0447, David Murray was taken into the x-ray room. At 0457, David Murray was returned to the emergency room.

At 0459, Cst. Bond asked him "how much have you had to drink tonight?" and received the answer "a couple". "What were you drinking?" "Beer". "How many?" "A couple through the night".

These statements were made in response to Cst. Bond's questions before cautioning.

3. Cst. Bond advised David Murray that he knew that he had been driving the car, and cautioned him for impaired operation of a motor vehicle. David Murray then said: "I'm just glad I didn't kill my mom".

This statement was made to Cst. Bond under caution.

4. At 0539, Cst. Bond started taking a statement from David Murray for *Highway Traffic Act* purposes, completing it at 0559. During the course of that statement, David Murray said, among other things, that:

- * A sasquatch ran out in front of him;
- * That he was not drinking, after which he winked and chuckled;
- * "56 years old and you'd think I'd know better";
- * "I know I've done wrong and I know you've got a job to do".

This group of statements was made in compliance with David Murray's obligation to provide a statement to a police officer under s. 199 of the Highway Traffic Act (Ontario), and the officer's corresponding obligation to take the statement.

35 The Crown takes the position that:

- * The statements to the ambulance personnel are admissible at trial, whether for their truth (he had no medical complaints), or for the insight that they afford as to the accused's state of mind;
- * The statements at 0459 are admissible if voluntary. While the Crown does not intend to adduce them at trial, they were properly before the justice of the peace who issued search warrants;
- * The statement under caution is admissible if voluntary;
- * The statements made in s. 199 compliance are not admissible at trial, but were properly before the justice of the peace who issued search warrants.

Discussion

Distinguishing White

36 In *White*, the accused driver had fled the scene of an accident in which her vehicle had struck and killed an individual who was on the side of the road changing a tire. The next day she called the police by telephone. A police officer was then dispatched to her home.

37 In several significant areas, the facts on which the *White* decision was based can be distinguished from the facts in the present case.

38 Firstly, the police officer to whom the statements were made in *White* was not conducting a *roadside* accident investigation. The police officer who was dispatched to the home of the accused was dispatched for the sole purpose of investigating the accident and completing an accident report.

39 In *White*, the only statements which the Crown sought to introduce were statements made by the accused directly to the investigating officer. In the present case, the Crown is seeking to intro-

duce statements which were made by the accused to third parties at the accident scene and which were made by him outside of the context of any police investigation or the preparation of a police report.

40 Secondly, in *White*, the sole question before the Court was whether the statements were admissible at the trial of the accused. The Court was not asked to rule on whether the statements could be used to provide reasonable and probable grounds for obtaining a search warrant.

41 Thirdly, in *White*, the accused testified at the voir dire that she knew immediately upon being involved in the accident that she was under a duty to report it. She testified that she felt the officer had attended at her premises to take an accident report, and that she was under a duty to speak to him about the accident. From her perspective therefore, all of her statements were made in response to a duty to provide an accident report, and not for any other purpose such as obtaining medical assistance.

42 Fourthly, unlike the Ontario *Highway Traffic Act*, the British Columbia *Motor Vehicle Act* supplements the reporting scheme by creating use immunity for the declarant in relation to the information provided to complete the report. The declarant is protected against self-incrimination by a statutory guarantee that, with two exceptions, neither the report nor any information contained in it is admissible in a trial or proceeding arising out of the accident. Although this immunity applies only in provincial proceedings, and not in proceedings under the *Criminal Code*, this provision became relevant in *White* because the officer informed the accused that any statement she gave under the British Columbia Motor Vehicle Act could not be used against her in court.

The Importance of Context

43 The Court in *White* emphasized that the principle against self-incrimination does not imply that the principle provides absolute protection for an accused against all uses of information that has been compelled by statute or otherwise. The court held that the principle demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue. (*White* at para.45).

44 The Court in *White* approved of the approach applied by the Supreme Court in *S.(R.J.)*⁵ at paras. 107-108, per Iacobucci J. where it was stated:

The principle against self-incrimination may mean different things at different times and in different contexts. The principle admits of many rules. What should the rule be in respect of testimonial compulsion?

I begin this inquiry by asserting that any rule demanded by the principle against self-incrimination which places a limit on compellability is in dynamic tension with an opposing principle of fundamental justice. That is the principle which suggests that, in a search for truth, relevant evidence should be available to the trier of fact ... Obviously, the Charter sanctions deviations from this positive general rule. Sections 11(c) and 13 stand as obvious examples. The question is whether we need another exemption, and if so, why?

The White Decision in Context

45 In *White*, the court's decision that the principle of self-incrimination had been violated was based on the following four considerations:

1. The existence of coercion in how the statement was obtained.
2. The existence of an adversarial relationship between the state and the individual when the statement was obtained;
3. The risk of unreliable confessions; and
4. The risk of an abuse of power by state agents.

46 With respect to the first consideration, the Court in *White* held that the statements to the police were made pursuant to a statutory requirement and were therefore obtained under compulsion.

47 Secondly, the Court held that the relationship between the parties in an accident reporting situation is potentially adversarial. In *White* the court discussed the problems inherent in this relationship as follows:

The provincial decision to vest the responsibility of taking accident reports in the police has the effect of transforming what might otherwise be a partnership relationship into one that is potentially adversarial. Very often, the police officer who is receiving the accident report is simultaneously investigating a possible crime, in relation to which the driver is a suspect. At the same time that the officer is required by s. 61(4) of the *Motor vehicle Act* to obtain information about the accident from the driver, the officer may equally be required or inclined to inform the driver of possible criminal charges and of the driver's legal rights under the Charter, including the right to remain silent. The result is seemingly contradictory instructions from police. Importantly, also, the driver is generally in the officer's immediate physical presence. The result is, quite unlike the situation in *Fitzpatrick*, a context of pronounced psychological and emotional pressure. (para. 57)

48 Thirdly, the court in *White* found that in the circumstances of that case there was a real prospect of unreliable confessions, given the serious consequences which the driver may feel will flow from telling the truth, and that it was reasonable to expect that the chance of unreliable confessions and statements would be dissipated if the driver could be confident that the contents of the accident report could never be used to incriminate him or her in criminal proceedings.

49 With respect to the fourth consideration, the Court found that there was a real risk of an abuse of power by state agents who use their provincially granted investigative powers in relation to a regulated activity to further criminal proceedings. At paragraph 64 the court stated:

... police would have a strong incentive or perhaps an unconscious inclination to overemphasize the extent of the statutory duty to report an accident under the Act, in order to obtain relevant information. The effect of such an overemphasis might be to circumvent or defeat a driver's s. 7 right to remain silent when under investigation for a criminal offence.

50 The Supreme Court gave some direction as to how the police can proceed in paragraph 65 where it stated:

The inability of police to rely upon statements made under the compulsion of s. 61 of the *Motor Vehicle Act* highlights the importance of questioning a driver separately for the purpose of engaging in a criminal investigation. Clearly, police are entitled to question a person who is suspected of a motor vehicle offence, and who is properly advised of and given the opportunity to exercise his or her Charter rights.

Burden of Proof

51 *White* held that an accused who raises a Charter challenge to the admissibility of evidence bears the onus of establishing an infringement of his or her Charter rights. Therefore, if an accused wishes to argue that the admission of a statement into evidence will violate the principle against self-incrimination under s. 7 because he or she was compelled to make a statement by the terms of a provincial statute, it is the accused who must establish on the balance of probabilities that the statement was compelled. Once a prima facie case has been made with respect to an element of a Charter claim, it is left to the Crown to adduce evidence to rebut that prima facie case if it wishes to do so.

The Need for an Honest and Reasonably Held Belief

52 In *White* the Court held that a declarant will be protected by use immunity under s. 7 of the Charter only to the extent that the relevant statements may properly be considered compelled. Compulsion implies an absence of consent. Therefore, if a declarant gives an accident report freely without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements.

53 The Supreme Court held that the test for compulsion is whether, at the time that the accident was reported by the driver, "the driver gave the report on the basis of an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given." (*White* at para. 75).

Analysis

In its argument, the Crown has placed Mr. Murray's statements in 4 contextual categories. I will deal with the statements using these same categories.

1. Statements to Ambulance Attendants.

54 The Crown argues that it is important at the outset to distinguish between statements made to police officers and those made to ambulance attendants. The paramedical staff needed to communicate with their patient for reasons related to their care of him. Their concerns and questions may have related to the following:

1. Whether there were other occupants of the vehicle, who may have needed medical or other attention;
2. Whether he was in pain or discomfort;
3. Whether he was hypoglycaemic, which might have explained his slurred speech;
4. How the accident happened, including how fast the car was driving, which could assist the hospital personnel in knowing what to examine for;
5. Whether he had been drinking, which could assist the hospital personnel in assessing his condition;

6. They needed to keep him alert and answering questions, to see whether there were signs of a closed head injury.

55 The Crown points out that the paramedical personnel were not acting as agents of the State investigating a crime, but rather as medical professionals tending to an injured driver. Their questioning therefore cannot attract any Charter attention.

56 The Crown argues that the statements made in the ambulance also afford probative evidence of David Murray's state of mind:

1. He was unwilling to co-operate with the paramedical staff or the police in telling them how many people were in the car, although they needed to know that information to find out whether to search the vehicle, or the surrounding area, for injured persons;
2. He was flippant in his answers about how much he had had to drink, who was driving, how the accident had occurred, and how many people were in the vicinity.

57 According to the Crown, it is open to the court to draw inferences adverse to David Murray from these statements. Equally, it was open to the issuing justice of the peace to consider them as evidence of probable guilt.

58 In my view, the statements made by Mr. Murray to the ambulance attendants are not protected by any Charter interests and should be admissible at the trial. I agree that the necessary element of state compulsion or coercion is not present with respect to these statements. Neither can it be said that the parties who were involved in these discussions were in an adversarial relationship, or that the admission of these statements would increase the likelihood of abusive conduct by the state. The factors clearly weigh in favour of admitting the evidence as part of the truth seeking function of the court.

2. Statements before Caution (in hospital at 0459 a.m.)

59 The Crown submits that at the time these statements were taken, Mr. Murray's situation can be characterized as follows:

- * He had not been arrested, nor had he been made the subject of any demand to accompany the police or provide them with any samples;
- * There was nothing involuntary about his response to Cst. Bond's questions;
- * He was at the hospital, still in the course of his treatment, and was in the charge of the hospital medical staff and not the police.

60 Mr. Murray did not testify at the preliminary hearing. Although the court in *White* held that the declarant is required to satisfy the court that the statement was made because he or she had an honest and reasonably held belief that the law required that it be made, I do not conclude from that that it is always necessary that the accused testifies as to his or her subjective belief.

61 In *R. v. DaCosta*⁶, Wein J. of the Ontario Superior court accepted that the declarant "felt he had to give a statement because of a generalized non-specific understanding of a driver's responsibilities under the Motor Vehicle Act." (*DaCosta* at par.30). Similarly, in *R. v. Rolph*⁷, D. Carr J. of the Ontario Court of Justice stated that he understood *White* to mean "that there is almost an infer-

ence to be drawn that any driver that is approached by a police officer recognizes the statutory requirements regarding the reporting of an accident." (*Rolph* at para. 7).

62 In my view, the circumstances surrounding the giving of the statement will often dictate whether it was reasonable for a driver to feel under a compulsion to respond to the police requests for information. Cst. Bond agreed that when he was at the hospital he was there for "both purposes", to complete his accident report and to conduct his investigation into the accident. Mr. Murray was uncooperative at the accident scene but was cooperative with Cst. Bond and answered his questions in the hospital. It is reasonable to conclude that once Cst. Bond arrived at the hospital and began to question him, Mr. Murray understood and believed that he was under a legal obligation to cooperate with Cst. Bond and answer his questions.

63 The court in *White* relied on four factors in finding that the requisite context existed to find a Section 7 violation. All four of these factors were present after Cst. Bond arrived at the hospital. Mr. Murray felt compelled to speak to the police, the relationship was clearly adversarial, and there was a risk of unreliable confessions i.e. "twenty people took off; "a whole group of kids ran away"; "my mother was driving". Also, once Cst. Bond began to question Mr. Murray at the hospital the potential existed for abusive conduct by the police.

64 I have concluded that the statements which were made to Cst. Bond in the hospital before the caution constitute a s. 7 Charter violation.

3. Statement after Caution (in hospital)

65 This is the statement wherein Mr. Murray is reported by Cst. Bond to have said "I am just glad I didn't kill my mom". The Crown points out that the following circumstances existed at the time the statement was made:

- * David Murray was not under arrest nor subject to any formal police demand;
- * He was at the hospital, and in the charge of the medical personnel;
- * He had been advised that the reason for the police interaction with him at that time was that they were investigating a criminal offence;
- * He had been advised of his right to remain silent; and
- * He chose to say something in response to the caution.

66 The Crown argues that this statement is admissible at trial if deemed to be voluntary.

67 In my view, the fact that the accused was issued a caution does not change anything in the circumstances of this case. In *White*, the accused made three statements to the police. The first two statements were prior to any caution being given to her and the third was a statement made following a caution. In response to the argument that the post caution statement should be treated differently than the two prior statements the court stated at para. 92:

... The accused who has consulted counsel does not become immune from the reporting requirement set out in the statute. Rather, as I have discussed in these reasons, s. 7 provides protection to the person who is required to report an accident. Thus, when the respondent returned from speaking to counsel, she was still required by law to answer Sgt. Tait's questions regarding the accident, provided those questions were made pursuant to s. 61 of the Motor Vehicle Act.

68 I have already concluded that the only reason Mr. Murray cooperated with the police investigation was because he felt under a compulsion to do so. As such, I regard the circumstances under which these statements were obtained as constituting a Charter violation

4. *Accident Report Statements (in hospital)*

69 At 0539, Cst. Bond began the process of taking a s. 199 statement. David Murray was compelled by statute to answer his questions until that process was completed at 0559. It follows that he had no choice but to provide answers to Cst. Bond's questions.

70 The Crown agrees that should it seek to introduce these statements into evidence at trial, there would be a breach of s. 7 of the Charter.

Section 24(2) Charter Considerations: Would the admission of the Hospital Statements bring the Administration of Justice into Disrepute

71 I have concluded that the statements made by Mr. Murray in the hospital were obtained in a manner that violates the Charter. In determining whether this evidence should be excluded I must determine if (1) the breach is serious enough and (2) the impact on the Charter protected interests of the accused is significant enough to (3) outweigh society's interest in the adjudication of the case on its merits. (See *R. v. Grant*⁸)

72 In conducting this balancing exercise the court must assess each of these three factors to determine whether a reasonable person, fully informed of all of the circumstances and the values underlying the Charter, would conclude that the admission of the evidence could bring the administration of justice into disrepute. (See *R. v. Grant*)

73 At para. 44 in *White*, Iacobucci J. described the principle against self incrimination as

an overarching principle within our criminal justice system, from which a number of specific common law and Charter rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances. Within the Charter, the principle against self-incrimination is embodied in several of the more specific procedural protections such as, for example, the right to counsel in s. 10(b), the right to non-compellability in s. 11(c), and the right to use immunity set out in s. 13. The Charter also provides residual protection to the principle through s. 7.

74 In *Grant*, the Supreme Court referred to the principle against self-incrimination as "one of the cornerstones of our criminal law". (*Grant* at para. 89). The court went on to state that although there is no absolute rule of exclusion of Charter infringing statements under s. 24(2), as there is for involuntary confessions at common law, "as a matter of practice, courts have tended to exclude statements obtained in breach of the Charter, on the ground that admission on balance would bring the administration of justice into disrepute". (*Grant* at para. 91). The court then goes on to state the three lines of inquiry described above "support the *presumptive general*, although not automatic exclusion of statements obtained in breach of the Charter (emphasis added) (*Grant* at para. 92).

75 In this case, Cst. Bond had overheard Mr. Murray inform the ambulance attendants at the trial that he wanted to have a lawyer. He had also observed Mr. Murray to be uncooperative with the ambulance attendants. I have already noted that Cst. Bond could not have anticipated that Mr. Murray would cooperate with him unless Mr. Murray believed that he was under a legal obligation to do

so. In my view, the use of the statements which Cst. Bond elicited from Mr. Murray at the hospital at trial would constitute a serious breach of Mr. Murray's Charter interests. Their use at trial would bring the administration of justice into disrepute, and this concern is not outweighed by society's interest in the adjudication of this case on its merits. The statements, which I have referred to as the hospital statements are therefore excluded from evidence at trial.

Issue 2: Are Some or All of the Statements of the Accused Admissible to Support an Application for a Search Warrant for the Production of the Hospital Records?

Introduction

76 Two search warrants were issued on January 9, 2009, on the basis of Informations to Obtain ("ITO's") sworn by Cst. Bond. One of them was for three vials of David Murray's blood. The Crown is not adducing those vials at trial, nor the laboratory analysis of their blood alcohol concentration. The second was for David Murray's hospital records, which, *inter alia*, revealed the hospital's analysis of his blood alcohol concentration. Since the Crown has chosen not to adduce the evidence in relation to the three vials at trial, I will only be dealing with the search warrant issued for the production of the medical records.

Use of Statements to Support the Search Warrants: Position of the Parties

77 The Applicant argues that the statements which are deemed inadmissible at the trial of the action should be inadmissible for *any* purpose in the criminal proceedings, including supporting reasonable and probable grounds. Therefore none of these statements should have been included or referred to in the ITO which was filed with the Justice of the Peace in support of the application for a search warrant for David Murray's medical records.

78 The Crown agrees that the ITO included references to

- * The statements in the ambulance;
- * The statements before caution; and
- * The post-caution statements.

79 The Crown submits that the information in the ITO's did not make any reference to the statements which it has placed in the fourth category. Those are the statements which the Crown refers to as the s. 199 statement".

80 In the event the court finds that one or more of the statements in the ITO was compelled, the Crown argues that the use of any such statements to demonstrate reasonable and probable cause was permissible and not in breach of the Applicant's Charter rights. In other words, the Crown argues that statements may be inadmissible for the purposes of the trial on the basis that they constitute a s. 7 Charter breach, but remain admissible for the investigative purposes and for the purpose of obtaining a search warrant.

The Crown's argument in Support of Using the Hospital Statements to obtain the Search Warrant

Compelled Co-operation of Drivers

81 The Crown agrees that the police have a number of tools available to them which compel drivers to provide the police with information that may potentially incriminate them. These include;

- * The approved screening device demand;
- * The approved instrument demand;
- * Sobriety tests and police questioning where the drivers reasonably believe that they have no choice but to comply; and
- * The s. 199 accident reports.

82 The Crown argues that there is no material difference between the level of self-incrimination involved in each of these situations. In each case, the driver is conscripted into an investigation that might result in him or her being charged. In each case, the driver is yielding to the power of the State rather than choosing whether or not to assist in the investigation.

Balancing Charter Interests

83 According to the Crown, since the Charter came into force in 1982 the courts have grappled with the problem posed by this self-recruitment. At least two related, but distinguishable, Charter issues have surfaced:

1. Is the driver's right to counsel breached by being made to assist the police before he is able to speak to counsel?
2. Is his right to self-incrimination breached?

See *R. v. Therens*⁹; *R. v. Seo*¹⁰; *R. v. Thomsen*¹¹; *R. v. White*, *supra*

84 The Crown argues that in the leading cases dealing with the right to counsel issue, the court struck a balance; the police are entitled to compel the driver(s) to assist. They are able to use that assistance in their investigation, and as a basis for their subsequent actions, including arrests and subsequent legal demands. However, the Crown cannot adduce the evidence directly against the driver at his trial. See *R. v. Milne*¹²; *R. v. Coutts*¹³; *R. v. Elias*; *R. v. Orbanski*, [2005] 2 S.C.R. 3, *supra* *The Illogic in the Applicant's Position*

85 The Crown argues that what the Applicant is asking the court to do is to treat these two types of evidence differently - that obtained despite a breach of right to counsel and that obtained by mandatory accident reports, in that the investigation officers should not be permitted to use the mandatory reports for *any* purposes whatsoever, even for their subsequent investigations. In other words, the officers, in deciding whether to make any breath demands or secure search warrants, are to overlook, or ignore, what they have learned from the reports.

Understanding White

86 It is the position of the Crown that the Applicant's position is based on a misreading of *White*, in which some phrases and paragraphs are read out of context, and given meanings that allow for the illogical result. However, if those passages are read in proper context, the problem does not arise.

87 The Crown points out that in *White*, the court was not asked to rule on whether there was a Charter breach at the point where the driver was required to provide an accident report. Rather, the question was whether the admission into evidence *at a criminal trial* of those statements would offend the principle against self-incrimination as embodied in s. 7 of the Charter.

88 Similarly, the court at no time addressed the issue of whether the report would have afforded grounds for subsequent police actions (breath demands, warrants, arrests, etc.). That issue was not before the court.

89 The Court held that the principle of protection from self-incrimination has the status of an overarching principle, but that does not imply that it provides absolute protection for an accused against *all* uses of information that has been compelled by statute or otherwise. The principle demands different things at different times, with the task in each case being to determine exactly what the principle demands, if anything, *within the particular context at issue*. The Court was careful to provide this caveat, to ensure that its statements would not be applied outside the particular context at issue. (See: *White*, at para. 45).

Subsequent Legal History

90 The Crown states that early on, *White* was applied by Ontario courts to exclude mandatory accident reports as trial evidence, although the Ontario statute does not include a "use immunity" provision protecting the driver from the use of the statement in provincial prosecutions. The Crown does not take issue with those rulings; however, it argues that it is important not to apply passages from those cases out of context. (See: *R. v. Donovan*¹⁴; *R. v. DaCosta*¹⁵; *R. v. Rolph*¹⁶).

91 The Crown submits that in the 2006 case of *R. v. Powers*¹⁷, the British Columbia Court of Appeal read *White* to extend the protection against having the statement admitted at trial to a protection against having the investigating officer consider the statement in his grounds for making a breath demand. The Crown submits that in arriving at this conclusion, the court read the relevant passages of *White* out of context. Wrongly concluding that *White* required exclusion for investigation purposes, that court distinguished the "right to counsel" cases solely on the basis that they involved a different section of the Charter, and not on the basis of any logical or principled difference between the situations. (See: *R. v. Powers*, (2006), 213 CCC (3d) 351 (BCCA)).

92 It is the position of the Crown that *Powers* is binding in British Columbia, but not Ontario and that the *Powers* court was aware of this. The trial judgment, [2005] B.C.J. No. 2076, which was approved by the Court of Appeal, distinguished the Ontario law, and especially *R. v. Milne*, (1996), 28 OR (3d) 577 (CA), on the basis of the use immunity provision of the B.C. legislation, which revealed that the reasoning behind compelling the driver to produce the accident report was not for its use in litigation. The Ontario statute contains no such provision. (See: *R. v. Powers* at paras. 34 - 39).

93 The Crown points out that several Ontario courts have followed *Powers* notwithstanding its misreading of *White* and its internal ruling distinguishing itself from the law in Ontario, thereby falling into similar error. According to the Crown, none of those judgments are binding on this Court. The Crown expects that this issue will soon be resolved in Ontario, as one of those cases (*R. v. Soules*¹⁸), is currently on reserve at the Ontario Court of Appeal.

94 In summary, the Crown submits that reliance on "*White*" should be restricted to those situations where the Crown wishes to introduce the compelled evidence *at trial*. *White* does not stand for the proposition that compelled evidence in the nature of an accident report cannot be relied on for further investigative purposes, such as providing grounds to establish reasonable and probable cause. In the present case, any statements which the court deems were obtained through compulsion should be given the same treatment as that given to statements in the "right to counsel" cases ... the evidence should be excluded for trial purposes only.

Analysis

95 I have concluded that the statements which I have ruled to be inadmissible for the purposes of the trial are also inadmissible for investigative purpose such as providing reasonable and probable grounds. I have arrived at this conclusion because in my view the same contextual considerations apply, whether the statements are used at trial or for the purpose of furthering the investigation. The impact on Mr. Murray's Charter protected rights would also be significant and serious if the statements were used to further the investigation against Mr. Murray, and their use would bring the administration of justice into disrepute. I have also determined that the "right to counsel" cases can be distinguished from these s. 7 "right to be free from self incrimination" cases in a number of significant ways.

Contextual factors

96 The court in *White* held that the principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands within a particular context.

97 In *White*, the court looked at the following considerations in reaching its decision that the compelled statements were to be excluded in the circumstances of that case.

1. The existence of coercion in how the statement was obtained.
2. The existence of an adversarial relationship between the state and the individual when the statement was obtained;
3. The risk of unreliable confessions; and
4. The risk of an abuse of power by state agents.

98 On the issue of whether the statements should be admissible for the purposes of furthering the investigation, such as providing reasonable and probable grounds, it is helpful to consider whether these same considerations apply.

99 With respect to the first factor, I have already determined that the statements made by Mr. Murray to Cst. Bond in the hospital were compelled.

100 Secondly, I have also determined that Mr. Murray must therefore have perceived himself to be in an adversarial relationship with the state when he was being questioned in the hospital.

101 Thirdly, we see that the statements Mr. Murray made to the ambulance attendants, and thereafter to Cst. Bond were anything but reliable, in fact, they bordered on the absurd i.e. he had consumed 90 drinks; a whole group of kids ran away from the accident scene. Clearly. Mr. Murray did not want to say anything which could later incriminate him. I do not see that any different considerations should apply in circumstances where the police could use the statements to further their investigation.

102 Fourthly, for the same reasons as those set out by the court in *White*, I have found that the temptation by the police to abuse their powers would be greater in circumstances where they could use compelled statements at the trial of the accused. I do not see that any different considerations should apply where the police wish to use the statements to further their investigation i.e. obtain a search warrant. The same potential for abuse exists in both situations.

103 In conclusion, I find that the same contextual considerations apply, whether the statements are to be admissible at trial or are to be used to further the police investigation. The use of these statements to further the investigation would constitute a serious breach of Mr. Murray's Charter

rights and would bring the administration of justice into disrepute, just as they would if they were used against Mr. Murray at trial. For this reason, the hospital statements must be excluded for both purposes.

Distinguishing the "Right to Counsel" Cases

104 The Crown argues that what it refers to as the "right to counsel" cases, in which evidence which is inadmissible at trial is admissible to further an investigation, are indistinguishable in principle from the present case. In my view, there are several ways in which these cases can be distinguished.

1) The Purpose of the Roadside Screening test ... as an "Investigative Tool"

105 Firstly, the cases referred to as "right to counsel" cases by the Crown are all cases dealing with a roadside screening test. The roadside screening test, by its very nature is an investigative tool, the objective of which is to reduce the ever-increasing number of fatalities and injuries occurring on the highways. In *R. v. Saunders*¹⁹, Cory J.A. (as he then was) quoted extensively from Cameron J.A.'s reasons in *R. v. Talbourdet*²⁰ in providing justification for the limit the use of this instrument imposed on a motorist's right to be advised upon detention of his or her right to counsel:

19 And this, of course, is where the roadside screening device comes into the picture. It is an investigative tool. Its purpose is to resolve the doubt, which will often exist between "suspicion" on the one hand and "reasonable and probable ground" on the other. When a policeman finds himself in that gray area between suspecting that an offence of this kind is being committed, and having reasonable and probable grounds for believing it is being committed, he may, providing there is good reason for his suspicion, ask the driver to clarify the position by submitting to a preliminary test conducted by means of a roadside screening device. This is a minor inconvenience and the person upon whom such a demand for clarification has been made runs no risk of being found guilty of any offence by submitting to the test. If he passes the test he is free to go on his way; if he fails it then of course, there are reasonable and probable grounds to believe that he may be guilty of an offence, and, in that event, a peace officer may make a further demand of him, namely that he submit to a more definitive test by means of a breathalyser machine. And at that stage he has a right to consult a lawyer: *R. v. Therens*.

20 In my opinion this is a perfectly defensible scheme of law, and law enforcement, which strikes a sensitive balance between the freedom of the individual on one hand and the legitimate concerns of the collective on the other. Provided a person has a right to counsel following a breathalyser demand--when a number of complex legal issues arise in relation to which the average person may need legal advice--what legitimate purpose would be served by insisting that there also be a right to counsel at the earlier, screening stage? The worst that can befall a person who fails a roadside test is that he will then be required to submit to a more refined test.

See *Saunders*, par. 19 and 20

106 There are many uses to which an accident report can be put. Clearly however, it cannot be said that the primary purpose underlying the legislation which requires the completion of the report is that the report is to be used as an investigative tool by the police in determining whether someone has committed a criminal offence.

2) Different Contextual Considerations

107 Secondly, different contextual factors apply to a compelled roadside screening test than to compelled statements which are to be used to complete an accident report. Although the driver is clearly in an adversarial relationship in both situations, it cannot be argued that the accuracy or reliability of the screening test would in any way be compromised by the fact that the results of the test could be used against the accused in the proceedings; neither do I see any basis on which it can be argued that the use of the screening device increases the risk that the police will abuse their powers.

3) Application of Section 1 of the Charter to the "Right to Counsel" Cases

108 Thirdly, the "right to counsel" cases were decided on the basis of an application of s. 1 of the Charter. In *R. v. Orbanski*; *R. v. Elias* the Supreme Court considered both components of the s. 1 justification test. The majority held that the limit to the right to counsel was implicit in the legislation which governed the police actions and was both reasonable and necessary in order for the police officers to fulfill their duty. The court also found that the limit on the right to counsel was demonstratively justified by the objective of reducing the carnage caused by impaired driving, and the infringement of the right to counsel was no more than necessary to meet this objective.

109 It cannot be said that a limit to the right to be free from self incrimination is implicit in s. 199 of the *Highway Traffic Act*; neither is such a limit necessary to ensure that the objectives of the *Act* are carried out. In fact, as I have already noted, it is likely that the information in an accident report will be *more* accurate and reliable in circumstances where the individual who is providing the information has the assurance that he or she is protected against self incrimination.

Conclusion

110 I find that the contextual considerations which led me to conclude that the compelled statements made by Mr. Murray at the hospital are inadmissible at his trial, also apply with respect to the issue of whether the statements can be used to provide reasonable and probable grounds to obtain a search warrant. These considerations can be distinguished from the considerations which are applicable and relevant in the "right to counsel cases". The use of these statements to further the investigation would comprise a serious infringement of Mr. Murray's Charter rights, and would bring the administration of justice into disrepute. The hospital statements are therefore inadmissible for the purposes of providing reasonable and probable grounds for obtaining a search warrant.

Third Issue: Should the Search Warrant be Quashed?

Position of the Applicant

111 The Applicant argues that the search warrant which authorized the production of the Hospital records should be quashed. He sets out the following reasons therefore:

- a) In the ITO, Cst. Bond relays information that he has received from various medical personnel, regarding their observations and opinions concerning the condition of Mr. Murray. Mr. Murray was entitled to an expectation of confidentiality and privacy with respect to this information. Obtaining medical information in this way was a breach of Mr. Murray's Charter rights.
- b) The manner in which the observations and opinions of the health care professionals was reported in the ITO was inaccurate and misleading. Sources of information were left vague and some of the information was based on double hearsay and third hand information.
- c) Cst. Bond did not make full and complete disclosure. He should have included in the affidavit his observation that Mr. Murray's speech was no longer slurred in the hospital, or to a lesser degree. Also, he should have mentioned that his observations at the scene were made shortly after Mr. Murray had spent a considerable amount of time upside down in the vehicle. In stating that blood was drawn for medical reasons, he failed to state that blood was also drawn for solely police purposes, which constituted an obvious Charter breach.
- d) Cst. Bond relied on the inadmissible statements made by Mr. Murray obtained during the course of the *HTA* investigation.
- e) Cst. Bond failed to set out reasonable grounds in the ITO in support of his belief that an offence had been committed. Also, there was a lack of information in the ITO setting out what evidence the medical records were expected to contain and in support of Cst. Bond's belief that the medical records would afford evidence with respect to the commission of an offence. The parameters of the search were so broad as to constitute an over-seizure, constituting an infringement of Mr. Murray's s. 8 rights under the Charter.

Discussion

Medical information: Expectation of Privacy

112 The information Cst. Bond states he received from the medical personnel include:

- 1. a reference to the fact that he attended at the Health Center "and spoke with medical personnel who advised that they noticed the odour of an alcoholic beverage on Mr. Murray's breath" (ITO par.5:12);
- 2. at the scene of the accident he "learned that the paramedics may have smelled the odour of an alcoholic beverage on the driver's breath" (ITO par.6.5);
- 3. while driving to the hospital he received a radio call from the P.C.C. asking "if I would be attending the hospital soon as medical personnel believed that the driver of the vehicle may be impaired by alcohol" (ITO par.6.7).

113 In *R. v. Colbourne*²¹, the police officer overheard a conversation between hospital staff and a lab technician wherein the lab technician disclosed the accused's blood/alcohol level. The Ontario

Court of Appeal agreed with trial judge's finding that this disclosure amounted to a breach of the accused's s. 8 charter rights²². The information was excised from the information relied on to obtain the warrant before the trial judge ruled on the validity of the warrant.

114 In *R v. Dersch*²³ the doctor provided the police with a medical report which included the results of a blood/alcohol test. The blood test had been taken by the doctor while the accused was unconscious, notwithstanding the accused's specific instructions to the doctor that no blood samples be taken. The Supreme Court of Canada ruled that the accused had a reasonable expectation of privacy with respect to this information, and that his s. 8 Charter rights were therefore infringed. The blood/alcohol evidence was therefore ruled to be inadmissible.

115 The information about Mr. Murray which was disclosed by the health care providers was of a general nature. No specific test results were disclosed and their observations could just as easily have been provided by non medical persons. Furthermore, there is no evidence that Cst. Bond solicited this information. However, courts have consistently found that persons in Mr. Murray's situation are entitled to a reasonable expectation of privacy with respect to the observations of their medical providers, and medical providers owe their patients a duty of confidentiality.²⁴ While this is not the most egregious example of improper conduct by medical personnel, I find that the disclosure constitutes a breach of Mr. Murray's s. 8 right to be secure against unreasonable search and seizure.

Information in the ITO - Vague, Misleading, Inaccurate, Hearsay?

116 The Applicant complains that the manner in which Cst. Bond reported the information he received from the health care professionals was inaccurate, misleading and vague and was based on hearsay. He points out that Cst. Bond was unable to provide the names of the medical personnel who provided him with this information.

117 I do not find that the information in the ITO can be characterized or defined by these terms. Cst. Bond testified that he did not know the names of the medical personnel who provided him with his information, and therefore he could not disclose these facts in the ITO. Also, he did not hide the fact that some of his information was based on hearsay. Any weaknesses in the information he submitted to the Justice of the Peace were transparent, and were available for the Justice of the Peace to weigh and assess.

Failure to make Full Disclosure in the ITO

118 The Applicant also complains that the ITO lacked the element of complete and full disclosure. He argues that Cst. Bond should have included references to the fact that Mr. Murray's speech did not appear to be slurred or as slurred after he arrived at the hospital, and that Mr. Murray had spent a considerable amount of time upside down in the vehicle, which may have affected his speech or mental alertness. Of particular concern was the fact that he failed to disclose the fact that three vials of blood was also drawn for police purposes, which he alleges constituted an obvious Charter breach.

119 I find that the failure by Cst. Bond to refer to the fact that Mr. Murray's speech in the hospital was not as slurred as it was earlier in the night and to the fact that Mr. Murray had spent a considerable amount of time upside down in the vehicle were not significant omissions. It is unlikely that the inclusion of the information in the ITO would have affected the decision as to whether there was a sufficient basis for issuing the warrant.

120 With respect to the omission of any specific reference in the ITO to the fact that 3 vials had been obtained at the request of the police, I note that the ITO includes the following information: Cst. Bond was present when the laboratory technician, Christine Beausoleil commenced drawing blood samples from Mr. Murray for medical reasons; he then "... taped three vials together and placed seal number 1K40877 on the bundle of vials"; he then accompanied Ms. Beausoleil to the laboratory where he was advised by Lorrie Sweet, the medical laboratory technologist that the vials had to be separated as they had to be spun in the centrifuge prior to being placed in the refrigerator; he then describes how he removed the seal and placed individual seals on each vial, following which he left the vials in the care of Ms. Sweet.

121 The information in the ITO makes it clear that Cst. Bond took control of three vials of blood immediately after the blood was drawn. He sealed the vials, delivered them to the laboratory, re-sealed them individually and then left the vials in the care of the technologist. In my view it is implicit in the information before the Justice of the Peace that the blood in the three vials was drawn solely for police purposes.

122 Cst. Bond testified that the ITO in support of the warrant to obtain the three vials was submitted to the Justice of the Peace at the same time as the ITO for a warrant to obtain a copy of the hospital records. Therefore, the Justice would have been aware that the three vials were obtained without a warrant (and that Mr. Murray's s. 8 rights may have been infringed in relation thereto) at the time he issued the warrant for the seizure of the hospital records. In my view, there is no evidence of bad faith on the part of Cst. Bond and there was no attempt to mislead the Justice with respect to the seizure of the three vials of blood which were taken for police purposes.

Reliance on Inadmissible Statements in the ITO

123 The Applicant argues that in preparing the ITO Cst. Bond relied on statements made by Mr. Murray which were obtained during the *HTA* investigation and which were therefore subject to protection under s. 7 of the Charter. I have already ruled that the statements which were made at the accident scene were not compelled and are therefore admissible in support of obtaining a search warrant. I have also ruled that the statements by the medical personnel concerning Mr. Murray's possible impairment violate his s. 8 Charter rights and that in my view these statements, together with the statements which were made to Cst. Bond by Mr. Murray in the hospital, should not be relied on as grounds for obtaining a search warrant.

124 The statements in the ITO which were not properly before the Justice of the Peace therefore include the following:

- a) 5.12 ... I spoke to paramedics at the scene of the collision who advised they noted an odour of an alcoholic beverage on Mr. Murray's breath.
- b) 5.12 ... I later attended the St. Joseph Health Centre and spoke with medical personnel who advised that they noticed the odour of an alcoholic beverage on Mr. Murray's breath.
- c) 6.5 ... I learned that the paramedics may have smelled the odour of an alcoholic beverage on the driver's breath d) 6.7 ... At 4:28 a.m. while driving to the hospital he received a radio call from the P.C.C. asking if I would be attending the hospital soon as medical personnel believed that the driver of the vehicle may be impaired by alcohol.

- e) 6.9 ... I asked MURRAY how much alcohol he had to drink tonight and he stated that he had "a couple."... I asked MURRAY what he was drinking and he stated, "Beer"... I asked MURRAY how many beer he had consumed and he replied, "a couple over the night"... I explained to MURRAY that I knew he had been driving the vehicle as I was there when he was extricated from the driver's seat . MURRAY replied, "Yeah, yeah".
- f) 6:10 ... At 5:04 I read MURRAY the caution for impaired operation of a motor vehicle from the card provided and Murray stated, "I'm just glad I didn't kill my mom".

Did the ITO set out Reasonable Grounds that an Offence had been Committed, and was there sufficient information in the ITO setting out what evidence the Medical Reports were expected to contain and in support or Cst. Bond's belief that the medical records would afford evidence with respect to the commission of an offence? Did the warrant for "hospital records, all notes records and documents" represent an over seizure and an infringement of Mr Murray's rights under the Charter?

125 The Applicant argues that Cst. Bond failed to set out reasonable grounds in the ITO in support of his belief that an offence had been committed. He also argues that the ITO was deficient with respect to setting out what information the medical reports were expected to contain and in support of his belief that this information would provide evidence with respect to the commission of an offence. Also, the parameters of the search were so broad as to constitute a "fishing expedition", contrary to s. 8 of the Charter.

126 If we exclude the inadmissible statements set out in para. 124 from the ITO, the ITO still contains the following information: Mr. Murray's vehicle was found overturned at the side of the road, with substantial damage to the rear which likely resulted from striking a rock face; Mr. Murray was discovered upside down in the vehicle, strapped in his seatbelt and behind the wheel; there were bottles containing alcohol scattered about the vehicle; Mr. Murray's speech was slurred; Mr. Murray was uncooperative with ambulance staff and blurted out that his mother was driving the car; while in the ambulance, he was exhaling heavily through his nose; at the hospital, Cst. Bond smelled alcohol on Mr. Murray's breath; blood samples were taken and seals were placed on the samples by Cst. Bond; Mr. Murray was charged with alcohol related driving offences.

127 In my view, once the offending statements in the ITO are excised the ITO still sets out reasonable grounds for Cst. Bond to believe that an alcohol related driving offence had been committed. Also, it would have been self evident to the justice of the peace that the main purpose in obtaining copies of the medical records was to establish the accused's blood alcohol level and as evidence in support of the offence of driving "over 80".

128 Mr. Murray was attended to in the hospital emergency room and his stay at the hospital was relatively brief. In the circumstances the warrant for "all notes, records and documents pertaining to the treatment and physical evaluation of David Murray ... on the 12th of November resulting from a motor vehicle collision that occurred ... on the 12th of November, 2008" was not an over-seizure.

129 The Applicant has not established that the search warrant should fail on these grounds.

Reviewing Informations to Obtain ... The Test and was it met?

130 Search warrants are issued *ex parte* by justices of the peace and are not subject to appeal. However, it is open to a person who has been affected by a warrant to bring an application under s. 8 of the Charter for a declaration that the search, albeit authorized by the warrant, was unreasonable.

131 On such an application, the trial judge is not asked whether he/she would have issued the warrant, but rather whether, based on the record which was before the authorizing justice as amplified on the review, the authorizing judge *could* have granted the authorization. (See *R. v. Garofoli*²⁵ at paras. 53 - 56; *R. v. Hosie*²⁶, at para. 18; *R. v. Araujo*²⁷, at paras. 50 - 61).

132 As to the scope of permitted amplification, the reviewing court should exclude erroneous information. If it was erroneous despite good faith on the part of the police, amplification can correct the information. (See : *R. v. Araujo*, at paras. 55 - 60).

133 Phrased otherwise, "the function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue". (See: *R. v. Araujo*, at para. 57).

134 In *R. v. Araujo* the court phrased the test as follows at para. 57:

the function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue".

135 If the offending statements which are set out in para. 120 above are excised from the ITO, the following information remains on which the Justice of the Peace would have to be satisfied that a search warrant should issue:

- * That his investigation determined that David Murray was driving his vehicle accompanied by his mother, Grace Murray. He lost control of his vehicle which caused it to spin around and enter the ditch backwards, where it struck a rock face and rolled over onto its roof (para. 5.12);
- * There were several bottles of "Mott's Clamato Caesar" alcoholic drinks scattered about the outside of the car and inside the car.
- * That Cst. Bond entered the ambulance and noted that David Murray was slurring his words and was quite uncooperative with the paramedical staff (para. 5.12);
- * That he spoke to David Murray at the hospital and noticed the odour of an alcoholic beverage; and red and glossy eyes (para. 5.13);
- * That from prior investigations and information he believes that the hospital stores medical health records at its Health Information Services office (para. 5.14)
- * That when he arrived at the accident scene he found the two occupants trapped in their seats upside down; they needed extrication by the fire department. (paras. 6.2 and 6.4);
- * That there was extensive damage to the rear of the vehicle consistent with hitting a rock face (para. 6.3);

- * That the driver was being very uncooperative with the paramedical staff; they were trying to ask him questions about his identity and health and he blurted that his mother was driving and that he needed a lawyer. He would not tell them how many people had been in the car at the time of collision. His speech was slurred but Cst. Bond detected no alcoholic smell at the time (para. 6.5)
- * That he learned the identity of the owner of the vehicle from police records: David Murray (para 6.6);
- * That he arrived at the hospital and came upon David Murray in the emergency department (para. 6.8);
- * That he spoke to David Murray after his x-ray; there was a noticeable odour of alcohol. (para. 6.10);
- * That he was present when Christine Beausoleil took blood samples for medical reasons (para. 6.11);
- * That he taped 3 vials together and sealed them (para 6. 11 and 6.12).

136 The information contained in the ITO was comprehensive. If I excise all references to the facts which the Applicant argues should not have been included in the ITO, the test in *Araujo* would be met ... in other words, there is sufficient evidence remaining upon which the justice of the peace could be satisfied that there were reasonable grounds to believe that an alcohol related driving offence had been committed and that a search warrant should issue.

Fourth Issue: Did Constable Bond have the Necessary Subjective Belief to seek the Search Warrant?

137 Constable Bond gave evidence at the voir dire. During cross-examination by the defence he made certain statements which the defence argued raised a new issue, namely that Cst. Bond's evidence revealed that he lacked the requisite subjective belief to seek the January 9, 2009 search warrant for the hospital records.

138 The questions by defence counsel and the responses thereto by Cst. Bond which gave rise to this issue are transcribed as follows:

- Q. So your purpose to go to the hospital was to investigate the accident?
- A. Gather evidence.
- Q. Okay, evidence for what purpose?
- A. Well to further investigate the allegation that there may have been alcohol involved and also to gather evidence to complete a traffic report.
- Q. So you were conducting an investigation for both purposes?
- A. Correct.
- Q. At the same time?
- A. Yes.
- Q. Since you were attending to possibly continue or to continue an impaired investigation. Did you procure or take with you an approved screening device?
- A. No I did not.
- Q. Was one available at the police station for you to take?
- A. I probably had one in the car.
- Q. Okay, so you ...

- A. Oh, the actual breathalyzer?
- Q. No, the approved screening device?
- A. The approved screening device I probably had one in the car.
- Q. You stated that you did not turn your mind to alternative methods of investigation. You did not consider using the approved screening device?
- A. No, I did not.
- Q. And was there reason for that?
- A. I just figured it was easier to go with blood samples.
- Q. If you were in a position to make a demand at the hospital, so hypothetically were are considering that you had other options, I know you didn't, but consider them, but had you been in a position to make either a breath demand or an approved screening device demand, what demand would you have made after you completed your investigation at the hospital?
- A. Sorry, approved screening device or a breathalyzer demand?
- Q. Yes.
- A. With what I had seen so far, probably just approved screening device.
- Q. Thank you. The reason for that is that evidence of impairment was somewhat equivocal?
- A. With him being strapped down to a gurney, a board, for majority of time I was dealing with him, it was hard to obtain physical indicia.

139 After defence counsel indicated it wished to raise this additional issue, both Crown and defence counsel agreed that Cst. Bond should be recalled to provide a more complete response to this new issue. Upon being recalled, Cst. Bond was questioned first by the Crown and then by the defence. The following is a copy of the transcription of Cst. Bond's evidence after he was recalled:

EXAMINATION-IN-CHIEF BY MR. ZYLBERBERG:

- Q. So you are again with us Constable Bond. I want to take you back to the point where Mr. Recoskie asked you about whether you had the approved screening device and you said that you probably had one in the vehicle.
- A. Yes.
- Q. And then he asked you saying as a hypothetical, if you could've made a demand for either an approved screening device or an approved instrument, looking back, which, I believe the question was, which would you have made or words to that effect?
- A. I think it was something like that yes.
- Q. And you indicated that your preference would've been for an approved screening device demand. If hypothetically you were looking back on it, and were going to do one or the other?
- A. Yes.
- Q. Can I ask this other hypothetical? Imagine that you didn't have an approved screening device ...
- A. Okay.
- Q. ... and that you had to decide then and then whether you would've made an approved instrument demand simply yes or no, as opposed to having the approved screening device as a preference?

A. Yes, I think so.

Q. Okay. So what would've been the basis at that point for making that demand without having the benefit of whatever screen would tell you?

A. As for indicia?

Q. Yes, as for your state of knowledge at the time?

A. Right from the start it was an unexplained accident. There was an allegation that there may have been alcohol, unruly behaviour. Immediately trying to deflect responsibility for driving because he said his mother was driving. There was alcohol found in and around the vehicle. This is all building up. There was some slurring while in the ambulance. He would not assist police and paramedics in trying to determine if there was anyone else who had been in the vehicle. Like if - he wouldn't give a straight answer if there was more people in the vehicle as police had a fear that somebody may have been ejected or crushed in the vehicle, we did not know. As we moved along, we got to the hospital. I did smell alcohol on his breath. He had admitted to consuming alcohol and I did see the blood shot eyes once we got to the hospital.

MR. ZYLBERBERG: Those are my questions. Mr. Recoskie may ask the court for leave to cross-examine you further. I leave him to assess that.

A. Sure.

THE COURT: Go ahead and cross-examine.

MR. RECOSKIE: Thank you, Your Honour.

COSS-EXAMINATION BY MR. RECOSKIE:

Q. You understand the difference between the two standards for making a demand under - or for an approved screening device sample and for an approved instrument sample, correct?

A. Yes.

Q. So the approved screening device is used when you're not sure or there is some doubt whether or not you have reasonable, probable grounds ...?

A. Yes.

Q. ... to make a demand for an approved instrument ...

A. Yes.

Q. ... sample. And so there are different thresholds, a reasonable suspicion and a reasonable, probable grounds that the offence has been committed, correct. And between those two, I asked you to choose which you had grounds for.

A. Yes.

Q. And you agreed that you had grounds for an approved screening device demand because you had limited opportunity to observe indicia of impairment of Mr. Murray during the course of that investigation?

A. Movement wise, yes.

Q. Okay. But between the two, you agreed that you were more certain, or you were much more comfortable that you had grounds for the approved screening device demand?

- A. I think that's what I answered, yes.
- Q. Yes. And you would agree that the approved screening device is used when you do not have - when you are not confident that you have reasonable and probable grounds that the offence of over 80 has been committed?
- A. That's for suspicion they had alcohol in their blood.
- Q. Yes. But you agree that the approved screening device is used when you do not have that reasonable, probable grounds?
- A. Yes.
- Q. Okay. So as between those two you would've chosen to do the approved screening device had that been an option?
- A. I'm kind of on the fence with that. I probably would've felt more comfortable with that.
- Q. Okay. So you weren't certain that you had reasonable, probable grounds?
- A. It was building, but as I say I was on the fence. I wasn't sure if I had quite the exact amount needed to go that extra distance.
- Q. Okay. And you swore the information to get the blood or the results based on the blood to secure that information to satisfy yourself that the offence had been committed?
- A. Yes.
- Q. So you had doubt or you were uncertain as to whether there were reasonable, probable grounds that the offence had been committed?
- A. Which?
- Q. The offence of over 80?
- A. No, I had, I think I had enough belief that I had enough for that.
- Q. Okay, but given the option you would have done the approved screening device which is the lower standard?
- A. Yeah.
- Q. Or the lesser standard.
- A. Yes, I'm getting confused. I think I would've as I - sorry -
- Q. It's okay.
- A. I think I would've felt more comfortable going with the approved screening device.
- Q. Because you were confident that you had reasonable suspicion that there was alcohol in his body?
- A. Yes.
- Q. But you were not confident that you had reasonable, probable grounds that he was in fact over 80?
- A. Not totally

140 The defence submits that Cst. Bond answers reveal that he was not confident that he had reasonable and probable grounds to believe that the offences had been committed.

Analysis

141 Cst. Bond's responses to the questions as to whether he had the requisite subjective belief that he had reasonable and probable grounds were seemingly contradictory and inconsistent. In response to the hypothetical question put to him by defence counsel, he stated that if he been in a position to make either a breath demand or an approved screening device demand at the hospital, he

would have chosen the approved screening device. He explained that at that time it was hard for him to obtain physical indicia because Mr. Murray was strapped to a gurney.

142 Following his recall, a second hypothetical was then put to him by Crown counsel, and he stated that if he had not had an approved screening device available to him at the hospital, but he did have an approved instrument available, he would have made an approved instrument demand. He stated that the basis for such a demand would have included the following indicia:

- * An unexplained accident
- * Allegations of alcohol, unruly behaviour
- * Trying to deflect responsibility for driving because he said his mother was driving
- * Alcohol found in and around the vehicle
- * Slurring in the ambulance
- * Refusal to assist police and paramedics in trying to determine whether anyone else in the vehicle
- * Smell of alcohol on his breath
- * Blood shot eyes
- * Admission of consuming alcohol

143 In cross-examination following his recall, Cst. Bond confirmed that if he was presented with the choice of using the approved screening device or the approved instrument at the hospital, he would have felt more comfortable that he had grounds for the approved screening device demand. He agreed that the reason for this was that he was confident that he had reasonable suspicion that there was alcohol in his body but not totally confident that he had reasonable and probable grounds that Mr. Murray was in fact over 80.

144 Defence counsel's questions were focused on Cst. Bond's state of mind and subjective belief on the night of November 12, 2008, shortly after the collision and when he attended at the hospital. However, it was not until January 9, 2009 that Cst. Bond swore the Information to Obtain in which he asserted that he had reasonable grounds to believe that the items to be sought would afford evidence with respect to the commission of the offences of both impaired driving causing bodily harm and "over 80". Any issue with respect to Cst. Bond's state of mind must therefore be directed to his belief on January 9, 2009 and not to his belief while he was at the hospital.

145 There was only one exchange between defence counsel and Cst. Bond which deal with Cst. Bond's subjective belief on January 9, 2001. This exchange was as follows:

- Q. Okay. And you swore the information to get the blood or the results based on the blood to secure that information to satisfy yourself that the offence had been committed?
- A. Yes.
- Q. So you had doubt or you were uncertain as to whether there were reasonable, probable grounds that the offence had been committed?
- A. Which?
- Q. The offence of over 80?
- A. No, I had, I think I had enough belief that I had enough for that.

146 Unfortunately, the record is incomplete on this issue. Cst. Bond was not asked to elaborate on his consultations and deliberations after November 12, 2008. That is because of how the issue was framed in court; the questions were not focused on his subjective assessment after November 12. The examination by defence counsel was aimed at making a point about Cst. Bond's level of certainty on the earlier date, the examination by Crown counsel responded to that examination, and the further cross-examination extended that inquiry. As a result, the evidence is directed to a tangential issue, related to the issue in question, but not the issue in question itself.

147 I agree that the evidence discloses that there is an issue as to whether Cst. Bond had the requisite subjective belief on the night of the accident to support an ITO for the production of the hospital records. The evidence with respect to his belief on January 9, 2009 includes the following:

- * A statement sworn on January 9, 2009 in which Cst. Bond deposes that he has reasonable and probable grounds.
- * Cst. Bond's evidence at the voir dire that he had consulted with other officers about the warrant before preparing the Information to Obtain on January 9, 2009.
- * Cst. Bond's evidence at the voir dire in response to the question as to whether he had reasonable and probable grounds that the offence of "over 80" had been committed when he swore the information in which he stated "No, I had, I think I had enough belief that I had enough for that."

148 In considering the evidence before me, I am satisfied that when Cst. Bond swore the ITO on January 9, 2009 he had reasonable and probable grounds to believe that Mr. Murray had committed an offence and that the hospital records would afford evidence in relation to that offence. This belief was supported by the objective grounds which he set out in his cross-examination.

Issue Five: Should the results of the blood analysis contained in the Hospital Records, be excluded pursuant to s. 24(2) of the Charter?

149 Eight vials of blood were taken from Mr. Murray at the hospital. Three of the vials were segregated and set aside for police purposes. These three vials were later seized by the police following the issuance of a search warrant, and analyzed to determine the blood alcohol content. The other 5 vials were analyzed by the hospital and the results of this blood analysis are contained in the hospital records.

150 The Crown does not seek to have the blood analysis of the three vials admitted into evidence, but does seek to have the evidence pertaining to the 5 vials taken by the hospital for medical purposes admitted into evidence. The Applicant argues that the evidence derived from an analysis of the blood in the 5 hospital samples should be excluded, on the basis that this evidence was "obtained in a manner that violated Mr. Murray's Charter rights" and that having regard to all of the circumstances of this case, "the admission of it in the proceedings would bring the administration of justice into disrepute".

Review of the Circumstances

151 The relevant circumstances in which these blood samples were obtained are as follows:

- * Mr. Murray, together with his mother was located in an overturned vehicle at the side of the road.

- * Constable Bond arrived at the scene at 2:37 a.m. Mr. Murray and his mother were extricated from the ambulance and placed in an ambulance.
- * Cst. Bond observed that Mr. Murray was uncooperative with the ambulance personnel and that he would not let them draw blood for the sugar test.
- * Mr. Murray was taken to hospital. Cst. Bond attended at the hospital at 4:39 a.m. Prior to arriving at the hospital Cst. Bond was informed through his police radio that hospital staff had reported that Mr. Murray may have been drinking.
- * Cst. Bond spoke to Mr. Murray in the Emergency Room and detected the odour of alcohol on his breath.
- * Ms. Beausoleil, the lab attendant, attended on Mr. Murray to take blood. Mr. Murray asked why blood was being drawn and Ms. Beausoleil advised him that it was for a medical purpose.
- * Ms. Beausoleil testified that in addition to the vials of blood she took for medical purposes, she took three additional vials at the request of Cst. Bond for police purposes. She did not inform Mr. Murray that she was taking samples for the police.
- * Ms. Lorrie Sweet, the lab technologist, assisted Cst. Bond in applying seals to the three vials. She testified that blood samples are usually only retained for seven days, unless there is a request by police, and that where police are involved, the samples are kept on a separate rack.
- * On January 9, 2009, Cst. Bond obtained two search warrants. One of the search warrants was for the three vials of blood and one was for the hospital records of Mr. Murray, which contained blood analysis results of the five vials taken for medical purposes.
- * Cst. Bond was an inexperienced investigator. He acknowledges that he should not have requested that the three blood samples be drawn without first obtaining a search warrant. He was of the belief at the time that he was following accepted police procedure.

Position of the Parties

152 The Applicant argues that the taking of the three vials of blood for police purposes represents a very serious s. 8 charter breach. Notwithstanding the fact that the Crown does not intend to rely on the test results of the blood in these three vials, the Applicant argues that the circumstances and the manner in which this blood was taken so taint the entire blood taking process that the results from the other five vials should be excluded as well. To admit any of this evidence would cast disrepute on the administration of justice.

153 The Crown concedes that the manner in which the three vials of blood were obtained presents a legitimate argument both for and against the exclusion of the evidence derived from the three vials. It argues that the Charter is not engaged when medical personnel take blood samples for medical purposes, and the test results from the five vials should therefore be admitted into evidence. It refers to the taking of the three samples as a "marginal and minor increment to the already lawful incursion on Mr. Murray's privacy", and that to admit the evidence pertaining to the five vials would not bring the administration of justice into disrepute.

Analysis

154 Although the Crown is not seeking to admit the evidence pertaining to the three blood samples taken for police purposes, it is necessary to review the circumstances and manner in which these samples were obtained, since the taking of these samples was so closely related to the taking of the five samples for hospital purposes.

155 In *R v. Grant*, *supra* at para. 71 the court stated that "when faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

- (1) the seriousness of the *Charter*-infringing state conduct,
- (2) the impact of the breach on the *Charter*-protected interests of the accused, and
- (3) society's interest in the adjudication of the case on its merits."

156 The three vials of blood which were taken for police purposes were obtained without a search warrant, and therefore in violation of established *Charter* standards. Furthermore, Mr. Murray was not informed that blood was being taken for police purposes and was under the impression that all of the blood being taken was being taken for hospital purposes. In my view, the taking of these three vials of blood represents a serious breach of Mr. Murray's *Charter* rights. In *Grant*, *supra* at para. 109 the Supreme court had the following to say about bodily evidence taken in violation of s. 8:

In the context of bodily evidence obtained in violation of s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion on these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.

157 In *R. v. Dersch*²⁸, the accused refused the taking of blood samples and subsequently had them taken by a doctor while unconscious. Madame Justice L'Heureux-Dub   had the following to say with respect to the exclusion of evidence at para 41:

When examining a *Charter* violation such as the one here in issue, the above analysis is, in my view, entirely applicable. Although the respondent argues that both the police and the doctors acted in good faith and, therefore, if there was a breach of the appellant's rights, it was not a serious one, I find, as did La Forest J. in *Dyment*, [1988] 2 S.C.R. 417, *supra*, that the *Charter* violation was, in fact, very serious. The appellant's right to control the functions of his own body was breached and for that reason, the confidence in one's ability to candidly exchange information with a medical professional was lost. This cannot be treated lightly, whether or not all was done in good faith, a fact that I do not doubt for a moment. The importance of maintaining confidentiality in the doctor-patient relationship is a longstanding goal which is, as expanded upon in *Dyment*, *supra*, at p. 433, integrated into the Canadian Medical Association's Code of Ethics. In fact, in our modern informational society, where intimate details of one's life may be availa-

ble through computerized information accessible to many more persons than those initially entrusted with the knowledge, the security that information will be kept in privacy may be even more significant than one could have historically imagined.

158 The seriousness of the breach is increased in this case because not only was Mr. Murray's bodily integrity violated, his privacy interests with respect to his medical care and treatment were also infringed. The evidence indicates that the hospital personnel disclosed to the police that they suspected that Mr. Murray, who was their patient, may have been impaired. Mr. Murray was in their care and there would have existed an expectation of privacy on his part with respect to their observations of his physical and mental condition. Not only did the hospital cooperate with the police in taking blood samples from Mr. Murray at the request of the police, thereafter they assisted the police in placing seals on the samples and agreed to store the samples well beyond the retention period for medical samples. The Applicant describes the relationship between the medical personnel and the police as "loose and cozy"; I agree that this is an apt description. In fact, by their actions in taking the three additional samples the hospital personnel effectively became the agents of the police.

159 The Charter-Protected interests of Mr. Murray in the circumstances of this case was significant. In *Grant*, *supra* at para 78 the court stated :

"... an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not."

160 Clearly, society has a compelling interest in the adjudication of serious offences such as the ones with which Mr. Murray is charged in this case. Notwithstanding this fact, if I was required to rule on the admissibility of the test results of the three vials I would rule against their admissibility. The Charter breach was flagrant and serious and it impacted and violated Mr. Murray's bodily integrity. If courts do not distance themselves from conduct of this kind, respect for the justice system will be diminished.

161 The question which remains to be answered is whether the conduct of the police in obtaining these three vials of evidence is so egregious that it taints the entire evidence gathering process in such a way that the evidence which is derived from the five vials taken for medical purposes must also be excluded.

162 The Applicant argues that a temporal relationship between a Charter violation and the obtaining of the evidence is sufficient to support a finding that the evidence was obtained in a manner that infringed or denied a right under the Charter.

163 Chief Justice Dickson, writing for the majority in *R. v. Strachan*²⁹ found that a causal relationship between a *Charter* breach and the obtainment of evidence is not required. In order for s. 24(2) to apply, the breach can be temporally related. The court found that it is sufficient if the evidence is obtained at the time of, or following the breach. At para. 40 of *Strachan* Justice Dickson wrote:

... Requiring a causal link will tend to distort the analysis of the conduct that led to the discovery of evidence. The inquiry will tend to focus narrowly on the actions most directly responsible for the discovery of evidence rather than on the entire course of events leading to its discovery. This will almost inevitably lead to an intellectual endeavour essentially amounting to "splitting hairs" between conduct that violated the Charter and that which did not.

164 The fact that a causal link is not required for a breach to lead to exclusion of evidence is demonstrated by the Ontario Court of Appeal in *R. v. Flintoff*⁶⁰, a case in which the accused was strip searched when brought to the police station for breath tests. The court excluded the breathalyzer evidence and at para. 30 of the judgment, Finlayson J.A. stated:

Even with the absence of a causal connection, a court faced with a flagrant and intrusive violation of s. 8 of the Charter must give, as LeDain J. stated in *Therens*, supra, "adequate recognition to the intrinsic harm that is caused by a violation of a Charter right or freedom, apart from its bearing on the obtaining of evidence." It is important to note that immediately prior to making this point, LeDain J. in *Therens*, supra, considered the wording of the French version of s. 24(2) that does not speak of "in a manner" but instead states "obtenues dans des conditions qui portent atteinte aux droits et libert s garantis par la pr sente charte". As well, if an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained is adopted, then the temporal connection takes on greater importance. The breathalyzer test was tainted by the humiliating and unconstitutional strip search, which formed an integral part of a single investigatory transaction.

165 The Crown argues that there was no Charter breach when the hospital staff obtained and tested blood samples from David Murray. The evidence in the hospital records is reliable and was obtained on the initiative of the medical staff and with Mr. Murray's consent. Furthermore, even in the absence of a warrant, the evidence would be obtainable by having hospital personnel attest to their observations, actions and tests.

166 Clearly, there is a temporal connection to the taking of the five hospital samples, the results of which the Crown wishes to have admitted into evidence, and the three additional samples which were improperly taken at the request for the police. The *Flintoff* case can be distinguished from the present case however in that in *Flintoff* the police were involved in *both* the improper strip search and in the subsequent properly administered breathalyzer test. Both the strip search and the breathalyzer test were related to the arrest and investigation of the accused and both were carried out on the initiative of the police. In both instances, the Charter was engaged and the improper actions of the police in conducting the strip search were therefore viewed as tainting all of their investigative actions. By contrast, the five samples which the Crown seeks to have admitted into evidence in the present case were not taken on the initiative of the police but on the initiative of the hospital staff, for medical purposes and with the consent of Mr. Murray. They were not obtained as part of the police investigation, or to quote Finlayson J.A. in *Flintoff*, they did not form "an integral part of a single investigatory transaction".

167 I find therefore that the process in which these 5 hospital samples were obtained was not tainted by the improper actions of the police in the same way as the breathalyzer evidence in *Flintoff* was tainted by the actions of the police in forcing the accused to undergo a strip search.

168 In conclusion, I find that the actions of the police in obtaining the 3 samples without a warrant were improper and an infringement of the accused's rights, and the hospital staff should not have rendered their assistance to the police in obtaining these three samples. However, I do not find that the process whereby the hospital samples were obtained was so tainted by the improper investigatory actions of the police that Mr. Murray's s. 8 rights will be infringed if the results of these samples are admitted into evidence. Nor do I find that the admission of these test results in the circumstances of this case would bring the administration of justice into disrepute. The five hospital samples were taken by hospital personnel for medical reasons, and not for investigative purposes, and were taken with the consent of the accused. The evidence with respect to these tests is relevant to the charges and no issue has been raised as their reliability. The charges in this case involve drinking and driving. The public has a significant interest in having cases such as this adjudicated on their merits. In the circumstances, the hospital records are admissible.

E.J. KOKE J.

cp/e/qlafr/qlvxw/qlana/qlbdp/qljxh

1 *Canadian Charter of Rights and Freedoms*, being Part 1 of *The Constitution Act, 1982*

2 *Highway Traffic Act*, R.S.O. c. H.8 as amended

3 *R. v. White*, [1999] S.C.J. No. 28

4 *British Columbia Motor Vehicle Act*, R.S.B.C. 1979, c. 288 as amended

5 *R. v. S. (R.J.)* [1995] 1 S.C.R. 451

6 *R. v. DaCosta*, [2001] O.J. No. 2392 (Sup.Ct. J.)

7 *R. v. Rolph*, [2002] O.J. No. 3591 (Ont. Ct. J.)

8 *R. v. Grant*, [2009] S.C.J. No. 32 (S.C.C.)

9 *R. v. Therens*, [1985] 1 S.C.R. 613

10 *R. v. Seo*, (1986), 25 CCC (3d) 385 (Ont CA)

11 *R. v. Thomsen*, [1988] 1 SCR 640

12 *R. v. Milne*, (1996), 28 OR (3d) 577 (CA)

- 13 *R. v. Coutts*, (1999), 45 OR (3d) 288 (CA)
- 14 *R. v. Donovan*, [2001] O.J. No. 1614 (Sup. Ct.)
- 15 *R. v. DaCosta*, (2001) 156 CCC (3d) 520 (Sup. Ct.)
- 16 *R. v. Rolph*, [2002] O.J. No. 3591 (OCJ)
- 17 *R. v. Powers*, (2006) 213 C.C.C. (3rd) 351 (B.C.C.A.)
- 18 *R. v. Soules*, [2010] O.J. No. 602 (Sup. Ct.)
- 19 *R. v. Saunders* (1988), 41 C.C.C. (3rd) 532, 36 C.R.R. 175 (Ont. C.A.)
- 20 *R. v. Talbourdet* (1984), 12 C.C.C. (3rd) 173 (Sask. C.A.)
- 21 *R v. Colbourne*, [1998] O.J. No. 5913 at para 70-71 (Gen. Div.)
- 22 *R v. Colbourne*, [2001] O.J. No. 3620 at para 35-36 (C.A.)
- 23 *R v. Dersch*, [1993] 3 S.C.R. 768
- 24 See *R v. Dersch*, supra; *R v. Colbourne*, supra; *R v. Dagloria*, [1994] O.J. No. 1010
- 25 *R. v. Garofoli*, [1990] 2 S.C.R. 1421
- 26 *R. v. Hosie*, [1996] O.J. No. 2175 (C.A.)
- 27 *R. v. Araujo*, [2000] 2 S.C.R. 992
- 28 *R v. Dersch*, [1993] S.C.J. No. 116 (S.CC.)
- 29 *R v. Strachan*, [1988] S.C.J. No. 94 (S.C.C)
- 30 *R. v. Flintoff*, [1998] O.J. No. 2337 (Ont. C.A.)

Case Name:

R. v. Murray

**Between
Her Majesty the Queen, and
David Murray, Defendant**

[2011] O.J. No. 2875

2011 ONSC 3735

17 M.V.R. (6th) 29

2011 CarswellOnt 5605

Court File No. 65/10

Ontario Superior Court of Justice

E.J. Koke J.

Heard: June 13-16, 2011.

Judgment: June 22, 2011.

(95 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Dangerous operation of motor vehicle -- Impaired driving or driving over the legal limit -- Impaired driving causing bodily harm -- Trial of accused charged with impaired driving and driving over the legal limit causing bodily harm, and dangerous driving -- Accused guilty -- Accused flipped car into ditch -- His mother, the passenger, was injured -- Accused's failure to negotiate curve in road was caused by his high blood/alcohol content (BAC) and resulted in mother's injuries -- BAC, taken at hospital, caused accused's impairment -- Accident was a result of accused's choice to drink and drive, which was a choice a reasonable and prudent driver would not make -- Post-accident drinking defied common sense and did not cause high BAC.

Trial of accused charged with impaired driving and driving over the legal limit causing bodily harm, and dangerous driving. Accused flipped his car into a ditch. His mother, the passenger, was injured. Accused and his mother were found by police hanging upside down from their seatbelts. Accused

taken to hospital. Blood sample was taken and tested by hospital technician. Empty alcohol bottles were found in accused's car. Accused's speech was slurred and he smelled of alcohol. Accused argued he drank after the accident occurred.

HELD: Accused guilty. Hospital laboratory tests reliably determined accused's blood/alcohol content (BAC). Accused's failure to negotiate curve in road was caused by his high BAC and resulted in mother's injuries. Accused's BAC caused his impairment. The accident was a result of his choice to drink and drive, which was a departure from a choice a reasonable and prudent driver would make. Post-accident drinking defied common sense and did not cause the high BAC. Normal people do not drink large quantities of alcohol after a car accident while hanging upside down.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 249(3), s. 255(2), s. 255(2.1), s. 255(2.10)

Counsel:

Philip M. Zylberberg, for the Crown.

Berk Keaney and John Recoskie, for the defendant.

1 E.J. KOKE J.:-- In the early morning hours of November 12, 2008 police were called to the scene of a single vehicle motor vehicle accident on Hwy 144, east of the city of Sudbury, Ontario. Hwy 144 runs in a north south direction and connects the city of Timmins in the North with Hwy 17 and the city of Sudbury to the south. Upon arrival, the police found the vehicle on its roof, badly damaged and in a ditch on the west side of the road.

2 There were two occupants trapped in the overturned vehicle; the accused, David Murray hanging from his seatbelt in the driver's seat and Mr. Murray's 90 year old mother, Grace Murray hanging upside from her seatbelt in the front passenger seat.

3 Mr. Murray was subsequently charged with the offences of Impaired Driving causing Bodily Harm (s. 255(2) C.C.C.), Driving over "80" causing Bodily Harm (s. 255(2.10) C.C.C.), and Dangerous Driving (249(3) C.C.C.).

SUMMARY OF EVIDENCE

Evidence of Darren Crabs

4 Mr. Crabs is a truck driver. Early in the morning on November 12, 2008 he was driving his truck on Hwy 144 when he observed glass and other debris scattered across the highway. He observed a vehicle on its roof in the ditch on the west side of the roadway.

5 Mr. Crabs did not feel that he could pull his rig over on to the side of the road safely and so he did not stop to investigate further but he made a 911 call on his cell phone to the police and reported the accident.

Evidence of Scott Mitchell

6 Mr. Mitchell was travelling southbound on Hwy 144 in the early morning of November 12, 2008 when he observed an overturned vehicle in the ditch. He called 911 and after doing so he decided to return to the scene and investigate further. Upon further investigation he reported to the 911 dispatcher that there was a woman in the vehicle on the front passenger side of the vehicle and a man on the driver's side.

7 Mr. Mitchell testified that there were items scattered on the road, including tools. He heard a male voice calling out from inside the vehicle, "I want to get out". He reported that he had no difficulty in understanding the individual who called out and that he appeared to be speaking clearly.

Evidence of Constable Wayne Gibson

8 Constable Wayne Gibson is a 28 year veteran police officer with the City of Sudbury Police Department. In the early hours of November 12, 2008 he was travelling southbound on hwy 144 on what he described was a clear cold night. As he approached the cut off to the town of Lively, On. he observed what appeared to be dust in the air. He then observed a vehicle on its roof on the side of the roadway. His police notes indicated that it was 2:31 a.m. when he made this observation.

9 Constable Gibson stopped at the accident scene and investigated further. He observed a man behind the wheel and heard a woman's voice from within the car. He observed that the man appeared to be hanging from his seatbelt and was blue in the face. The male was unresponsive and Constable Gibson did not believe he was alive.

10 Hwy 144 is a Provincial highway and Constable Gibson explained that normally the OPP has jurisdiction to investigate accidents which occur on Provincial roadways. Constable Gibson remained at the scene until the arrival of OPP Constable Carey Bond.

Evidence of James Urquhart

11 James Urquhart is trained as a primary care paramedic and works for the city of Sudbury. He was called to respond to the accident. Mr. Urquhart testified that the fire department and one other ambulance unit were already present at the scene when he arrived. He observed that there were two individuals trapped in the overturned vehicle, a female on the front passenger side and a male on the front driver's side. Mr. Urquhart and his partner Claude Ferguson assisted in extricating the male from the vehicle, whose name he learned was David Murray.

12 Mr. Murray was collared and boarded and placed in a stretcher in the back of Mr. Urquhart's ambulance. He was asked questions about the cause of the accident, the speed at which his vehicle was travelling, how many times the vehicle rolled over and whether he lost consciousness. Mr. Urquhart explained that these types of questions are asked because depending on the nature of the accident and the speed of the vehicle, a person may have injuries which are not apparent at first.

13 Mr. Murray did not answer the question concerning the speed of the vehicle. He was asked if there was anyone else in vehicle and he did not answer this question either. With respect to the cause of the accident he stated that a moose had jumped out in front of his car and also that a bear had jumped out in front of it. He was asked if he had anything to drink and he replied that he had had three drinks and then that he had had 90 drinks in total. Mr. Urquhart described Mr. Murray as verbally belligerent. Mr. Urquhart testified that Mr. Murray's speech was a little slurred but he was speaking in complete sentences and Mr. Urquhart was able to understand what he was saying.

Evidence of Constable Carey Bond

14 Constable Bond has been a police officer with the OPP for 21 years. He was on duty on the night of November 12, 2008. Officer Bond was notified by dispatch at 2:18 a.m. on that night that there had been a motor vehicle accident on hwy 144 and he was directed to attend at the scene.

15 Constable Bond arrived at the accident scene at 2:37 a.m. When he arrived, he observed that Constable Gibson of the Greater Sudbury Police force was already there, as well as the paramedics, the fire department and Mr. Mitchell.

16 Constable Murray described the weather as dry, cool and clear. He testified that he knows the location of the accident well. He described the curve in the road where the accident occurred as a "fairly easy curve" and "not a difficult curve for a driver to negotiate". He explained that there is a rock cut on both sides of the curve and so it is a blind curve. He stated that traffic on this portion of Hwy 144 would be light at the hour of the morning when the accident occurred traffic.

17 Constable Bond determined that there was a male and a female occupant in the overturned vehicle. He observed that there was blood coming from an injury to the head of the female occupant but he could not observe any visible injuries to the male occupant.

18 Constable Bond testified that he found some alcohol bottles at the scene. He found 2 full bottles of what he described as Motts Ceasar coolers on the ground outside of the vehicle, one full bottle of Motts Ceasar inside the vehicle and a broken bottle of Motts Ceasar with the cap still attached to the neck inside the vehicle.

19 After Mr. Murray was extricated from the vehicle by emergency services personnel he was placed in an ambulance. Constable Bond went into the ambulance and observed that Mr. Murray was being what he described as uncooperative and belligerent with the ambulance personnel. According to Constable Bond, Mr. Murray stated that someone else was driving. He refused to inform ambulance personnel how many people were in the vehicle and he refused to allow them to draw blood from him.

20 Mr. Murray and his mother were taken to the Sudbury Regional Hospital. At 4:45 a.m. Officer Bond attended at the hospital for the purpose of continuing his investigation. He testified that he encountered Mr. Murray being taken out of the X-ray room.

21 Officer Bond accompanied Mr. Murray as he was taken to another room. He asked Mr. Murray some questions and when Mr. Murray answered he noticed an odour of alcohol coming from his breath.

22 Officer Bond testified that a lab technician, Christine Beausoleil came into the room to take Mr. Murray's blood. He stated that he believes she took a total of 8 vials of blood. His notes indicate that these were taken at 5:05 a.m. When she had taken the 8 vials he took 3 of the vials and taped them together, placing a seal on these samples.

23 After blood samples were taken from Mr. Murray, Constable Bond accompanied Ms. Beausoleil to the laboratory. They took with them the three vials which he had taped together and he stated that he thinks she took the other five there as well.

24 In cross examination Constable Bond confirmed that when he arrived in the lab he was informed that the three vials could not be taped together. They had to be sealed individually so they could be spun. He then proceeded to separate the three vials and seal them individually.

25 Officer Bond interviewed Mr. Murray's mother on August 16, 2008. She informed him that she and David Murray were on their way to her home in Lively, Ontario. She stated that she did not know what happened that night but she did recall the street lights coming on in Chelmsford, at which time she thought they were almost home. She confirmed that she was not driving the vehicle.

Evidence of Constable Terry Yeomans

26 Constable Yeomans has been a police officer for 15 years. He has been with the OPP since 2001. Although he has been trained and is certified to undertake accident reconstructions he did not complete a formal reconstruction with respect to this accident. He did study the scene of the accident however and took a number of pictures.

27 One of the pictures taken by Constable Yeomans is taken of the car after it was righted and depicts a partially full bottle of Crown Royal rye whiskey situated on the dashboard on the passenger side of the vehicle, as well as a can of beer in the foot well on the passenger side.

28 Constable Yeomans pointed out marks on the roadway to the north of the accident scene, and continuing into the area of the ditch which he stated indicated the direction of travel of Mr. Murray's vehicle.

29 Constable Yeomans noted the presence of what appeared to be an anti adhesive agent which had been applied to the travelled portion of the road. Constable Yeomans testified that he is familiar with the roadway where the accident occurred and could not see anything there that would prevent a car from negotiating the curve. He had personally seen other vehicles negotiating the curve on many occasions with no difficulty.

Evidence of Sergeant Pollock

30 Sergeant Pollock has been a police officer with the OPP for 23 years. He attended at the scene of the accident, arriving at 2:27 a.m where he observed what he described as a serious auto accident. He testified that when he arrived at the location of the accident the ambulance personnel and some City of Sudbury police officers were already there.

31 Sergeant Pollock observed what he described as two elderly people in the overturned vehicle, held in place by their seatbelts. He described the location of the accident as a flat section of road with a slight curve.

32 Sergeant Pollock found some bottles of what he described as Ceasar cooler liquor in the vehicle. He testified that some of the bottles were broken, with the caps still in place and some with the caps removed. After the vehicle was righted he also found two empty cans of beer on the floor of the vehicle, with the tabs pulled in the open position. He also found what he believes is a 500 ml. bottle of Crown Royal rye whiskey in the vehicle on the dashboard, which he believes was at least half empty.

Examination of Christine Beausoleil

33 Christine Beausoleil is employed as a laboratory technician at the Greater Sudbury Hospital and was employed in this capacity in November, 2008. She testified that between 2 and 3 a.m. on Nov. 12, 2008 she received orders from a doctor to take blood samples from Mr. Murray. She believes that she took about 8 samples.

34 Ms. Beausoleil testified that when she arrived in the room to take the samples Constable Bond was already there, with Mr. Murray.

35 Ms. Beausoleil explained that each of the vials of blood is labelled and the label contains the name and date of birth of the person from whom the blood is taken. The name of the patient is cross referenced with the patient's arm band.

36 Ms. Beausoleil took more samples than the amount required by the hospital. She testified that there were samples ordered from the Doctor and ones taken for the police. She knew that the police wanted some and that additional samples of blood were obtained on the direction of a police officer.

37 Ms. Beausoleil testified that after the blood was drawn all the samples were delivered to the lab at the same time, and that Constable Bond accompanied her to the lab. Upon arrival, Constable Bond was instructed to separate the vials which had been taken for police purposes so they could be spun. He separated the vials and then proceeded to label them individually, following which they were stored in a separate refrigerator.

Evidence of Lorrie Ann Sweet

38 Ms. Sweet is employed by the Sudbury Regional Hospital as a lab technologist and was working in this capacity in the early morning of November 12, 2008.

39 Ms. Sweet testified that as a technologist, she is trained and is responsible for analyzing blood specimens, operating the machines and reporting to the doctor.

40 Ms. Sweet testified that early in the morning on November 12, 2008 she received a number of blood specimens which had been taken from David Murray. She stated that when the specimens were delivered to her Constable Bond was present. She explained to Constable Bond how to properly seal and label a biochemistry tube so that it would be noticeable if it was ever opened.

41 She testified that the test results of Mr. Murray indicated a blood/alcohol level of 61.2 millimols per litre.

Examination of Ben Joseph

42 Mr. Ben Joseph is a Forensic Scientist who is employed with the Centre for Forensic Sciences as a toxicologist. He was qualified as an expert to assess and give opinion evidence with respect to the toxicological effects of alcohol on the human body, the impairing effects of alcohol on driving and the absorption, distribution and elimination of alcohol in the human body.

43 Mr. Joseph reviewed and analyzed the blood/alcohol results of the blood tests conducted by Ms. Sweet and provided the following opinions to the court:

- a) A serum alcohol concentration of 6 mmol/L is equivalent to a blood alcohol concentration (BAC) of 234 to 256 milligrams of alcohol in 100 millilitres of blood.
- b) Based on a serum alcohol concentration of 6 mmol/L collected at 5 a.m. on Nov. 12, 2008, the projected BAC at or between 10:00 p.m. on November 11, 2008 and 2:18 a.m. on Nov. 12, 2008 is 240 to 395 milligrams of alcohol in 100 millilitres of blood. This projection assumes that there has been no consumption of alcoholic beverages after the incident and before the blood was collected.
- c) Impairment with respect to driving becomes significant at a BAC of 50 mg/100 mL and increases from then onward. An individual would be impaired in their ability to operate a vehicle at the BAC set out above.

Mr. Joseph's analysis and opinions were included in a report which was filed with the court as an exhibit.

ISSUES AND ANALYSIS

1) Bolus Drinking and Drinking after the Offence

44 Counsel for Mr. Murray points out that the evidence at the scene of the accident included some containers of alcohol which had been opened. These containers included a bottle of Crown Royal Rye Whiskey which was located on the dashboard of the vehicle after it had been righted. This bottle was estimated to be a 500ml. or 750 ml. container and it was described as being about half empty. In addition, two empty cans of beer were located on the floor of the vehicle with the pull tabs in the open position, as well as some empty bottles of Caesar's coolers from which the caps had been removed.

45 Counsel points out that one of the assumptions which underlies Mr. Joseph's toxicology report is that there was no consumption of alcoholic beverages after the incident and before the blood was collected. Another assumption is that there was no consumption of large quantities of alcoholic beverages by Mr. Murray immediately or within 15 minutes before the time of the accident. This is referred to as "bolus drinking".

46 Defence counsel argues that these are not valid assumptions in the circumstances of this case because it is possible that Mr. Murray consumed a sufficient amount of alcohol within 15 minutes prior to the accident and / or after the accident while he was trapped upside down in his vehicle, to raise his BAC above the level of 80 milligrams in 100 millilitres of blood, which is the level required to support a charge under section 255(2.1) of the CCC or otherwise provide evidentiary support for a charge of impaired or dangerous driving.

47 The onus is on the Crown to prove the facts underlying Mr. Joseph's report, including the assumptions on which the expert relies.¹ Also, the two assumptions which are being challenged by Mr. Murray (no bolus drinking ... no drinking after the offence) are matters of fact for the trial judge to determine on the evidence or lack thereof presented at the trial.²

48 With respect to the "no bolus drinking" assumption, the Crown is in the unenviable position of having to prove a negative. The Crown may however request that the court rely on the common sense inference that people do not normally ingest large amounts of alcohol just prior to, or while driving.

49 This common sense approach was endorsed by the Ontario Court of Appeal in *R. v. Grosse*³ where the court stated that:

The trial judge was also entitled to consider that it was inherently unlikely that the respondent, in the space of less than 30 minutes, before embarking on his trip home to Brampton would consume the equivalent of nine ounces of alcohol. This was not a matter of taking judicial notice of drinking patterns but merely applying common sense as to how ordinary people behave.

50 In *R. v. Philips*⁴, after the Ontario Court of Appeal reviewed some of the scientific literature on drinking habits and patterns, bolus drinking was described as a "relatively rare" phenomenon.

51 This common sense approach to determine the issue of bolus drinking was also adopted by the Court of Appeal in *R. v. Bulman*⁵ where Gillese J.A. stated at par. 13:

The jury was aware that Mr. Wigmore's expert testimony was dependent on an underlying assumption that had to be proven by the Crown - namely, that the appellant had not consumed a large quantity of alcohol shortly before driving ("bolus drinking"). Whether Mr. Wigmore's underlying assumption was proven was a question of fact for the jury to decide. In making this finding, the jurors were entitled to rely upon their common sense, and to draw inferences about how normal people behave. A reasonable inference is that normal people do not consume large quantities of alcohol shortly before, or while, driving.

52 Mr. Joseph states in his report that for a Male, age 68, height 175 cms and weight 85 kgs, to have a BAC of 80 mg/100mL at the time of the incident and a BAC of 234 to 256 mg/100 mL at 5:00 a.m., the individual would have had to consume a minimum of between 7 3/4 and 13 1/2 bottles of beer (5% alc. v/v, 341 mL each) or 11 3/4 fl. oz. of spirits (40% alc. v/v) or some combination thereof shortly prior to the incident or between the time of the incident and the time the blood was obtained.

53 If I was to accept the argument of bolus or post accident drinking, I would have to entertain the possibility that in the early morning hours on Nov. 12, 2008, Mr. Murray, while sitting next to his 90 year old mother, drank enough alcohol to raise his blood alcohol levels from 80 mg/100mL to a range of 234 to 256 mg/100mL, within 15 minutes before losing control of his automobile. As indicated in the Ben Joseph report, this would consist of a substantial sum of alcohol. In the alternative, I would have to consider the possibility that Mr. Murray, while hanging upside down in his overturned and badly damaged vehicle, continued drinking alcohol or commenced drinking sufficient quantities of alcohol to raise his blood alcohol level from 80 mg/100mL. to a range of 234 to 256 mg/100mL.

54 I agree that common sense dictates that normal people do not consume large quantities of alcohol shortly before, or while driving. I find it even less likely that someone would drink such large quantities of alcohol while driving and seated next to an elderly parent. I find it almost impossible to imagine that someone would be drinking substantial quantities of alcohol while hanging upside down in an overturned and badly damaged vehicle, assuming it is even possible to drink alcohol in that position. Applying common sense to the circumstances of this case, I find Mr. Murray's blood alcohol readings were not the result of bolus drinking or post accident drinking.

55 In conclusion, the possibility that Mr. Murray's blood/alcohol readings were affected by bolus or after the accident drinking does not raise a reasonable doubt in my mind.

2) Toxicology Assumption: A Serum to Blood Ratio that Ranges from 1.1 to 1.2

56 Three additional assumptions on which Mr. Joseph based his conclusions are the following:

- a) A rate of elimination of alcohol from the blood ranging from 10 to 20 milligrams of alcohol in 100 millilitres of blood per hour (mg/100 mL/hr.).
- b) Allowance for a plateau of up to two hours.
- c) A serum-to-blood ratio that ranges from 1.1 to 1.2.

57 In the *Paszczenko; Lima* case the issue before the Ontario Court of Appeal concerned the manner in which the Crown must prove the facts underlying the four assumptions upon which expert

toxicology reports are generally filed in "over 80" cases. These four assumptions include two of the assumptions I have just mentioned and which I will refer to as the "rate of elimination" and "plateau" assumptions, as well as the "no bolus drinking" and "no post incident drinking" assumptions.

58 The court in *Paszczenko;Lima* held that although there must be a basis established for all four assumptions, there is a difference in the way the courts deal with the "plateau" and the "rate of elimination" assumptions and the way the courts deal with the "no bolus drinking" and "no post incident drinking" assumptions.

59 The court held that the first two assumptions, the "plateau" and "rate of elimination" assumptions are really matters of science upon which an expert should be able to rely and in the absence of a challenge to the expert, these assumptions do not need to be proved by case specific evidence, other than the toxicologist's report. The latter two assumptions, the "no bolus drinking" and "no post incident drinking" are case specific however and as we have already seen in this case they are matters of fact for the trial judge to determine on the evidence presented at trial.

60 Mr. Joseph included a fifth assumption in his report, namely the assumption that the serum-to-blood ratio ranges from 1.1 to 1.2. Mr. Joseph explains in his report that a serum-to-blood ratio ranging from 1.1 to 1.2 is representative of the majority of individuals. A serum-to-blood ratio of less than 1.1 will result in a higher projected maximum BAC and a conversion ratio greater than 1.2 will result in a lower projected minimum BAC.

61 Counsel for Mr. Murray argues that this fifth assumption has not been proven by the Crown and that there is a possibility that Mr. Murray may have a serum-to-blood ratio which falls outside of the 1.1 to 1.2 range. He challenges the report on that basis.

62 I note that this assumption was not challenged in any way when it was put forth by Mr. Joseph. Neither have I been referred to any scientific literature which suggests that this assumption should not be relied on when determining an individual's BAC.

63 I place this assumption in the same category as the "plateau" and "rate of elimination" assumptions. It is an assumption which is based on scientific evidence on which an expert should be entitled to rely, and on which he or she can support the conclusions drawn. In the circumstances of this case therefore, and in the absence of any challenge to Mr. Joseph, I find that this assumption need not be proved by case-specific evidence led at trial, other than Mr. Joseph's toxicological report which has been filed.

3) Factual Inconsistencies in the Toxicological Report

64 Mr. Joseph based his report on hospital medical records of Mr. Murray. The hospital medical records were filed as an exhibit at trial. The hospital records reveal that the test results indicated an ethanol concentration of 61.2 mmol/L. Counsel for Mr. Murray points out that Mr. Joseph's report states that Mr. Murray's medical records indicate that his ethanol concentration was 61 mmol/L, which is .2mmol/L less than that indicated in the medical records which were filed with the court. He questions the reliability of the toxicological report based on this inconsistency.

65 Mr. Joseph was not questioned on this apparent inconsistency when he gave his evidence and he was therefore not given an opportunity to provide an explanation. I am reasonably confident that if he would have been asked why he used the lower number he would have replied that he had rounded off the higher number in order to eliminate the decimal or the fraction, and provide for an

easier calculation. He might also have pointed out that by rounding it off he provided Mr. Murray with a lower or more favourable result. In my view, this apparent inconsistency does not lessen the reliability of Mr. Joseph's report.

66 Counsel for the accused also points out that Mr. Joseph refers to the subject of his analysis as being 68 years old. In fact, the hospital records indicate that Mr. Murray was 56 years old on Nov. 12, 2008. Unfortunately, this inconsistency was not pointed out to Mr. Joseph and he was not given an opportunity to provide an explanation for this apparent inconsistency either. The inconsistency was first raised by the defence in final argument.

67 There is no evidence before me as to whether this inconsistency is simply a result of a typographical error, or some other clerical error, and that Mr. Joseph's calculations were in fact premised on the basis that the subject of the report was 56 years old. If this were the case, the calculations would still be valid. Neither is there any evidence before me to suggest that a 12 year difference would affect the conclusions reached by Mr. Joseph in any material way and I accept that they would not; the test results and the blood readings are what they are. Furthermore, the only time the age is specifically referred to in the toxicology report is in relation to determining how much alcohol would have had to have been consumed post incident or by way of bolus drinking to raise the blood alcohol level from 80 mg/100mL to a range of 234 to 256 mg/100mL. I have already indicated that I reject the bolus and post incident drinking arguments. In the circumstances I am not prepared to find that this apparent error lessens the reliability of the toxicological report.

68 Mr. Murray also argues that it appears that since it appears that Mr. Joseph received the records of a man who apparently is 68 years old and has an ethanol concentration of 61 mmol/L he may have received the medical reports of some other person. I am not prepared to accept this argument. Numerous facts contained in Mr. Joseph's toxicological report support the fact that he reviewed Mr. Murray's medical records, including a reference to Mr. Murray's name, his middle initial, the date and time of the "incident", and the date and time that the blood samples were drawn. I am prepared to find as a fact that Mr. Joseph examined the records of the accused who is before the court.

4) The Reliability of the Hospital Test

69 The accused argues that the alcohol content of the blood obtained in the hospital for medical purposes should not be used to prove the charges against the accused in the circumstances of this case. He objects to the admission of this evidence on the basis that the capability, accuracy and reliability of the hospital testing machine had not been established.

70 The Ontario Court of Appeal dealt with the admissibility of hospital test results in *R v Redmond*⁶. In *Redmond*, the Court considered and reviewed the decision of the Saskatchewan Court of Appeal in *R. v. Bird*⁷, a case in which that court held that the results of the tests conducted by the two technologists were inadmissible as evidence of the blood alcohol content. The basis for the decision by the Saskatchewan court was that the technologists who conducted the tests were only qualified as experts in the operation of the machines but not for the purpose of establishing their capability, accuracy or reliability in analyzing blood.

71 The Court in *Redmond* rejected the reasoning of the majority in *Bird* and adopted the dissenting position of Wakeling J.A. of the Saskatchewan court who held that the inability of the laborato-

ry technologists to describe how the machines operated and their efficacy in comparison with other methods of determining blood-alcohol content went to weight and not admissibility.

72 The Ontario Court cited with approval the following comments of Wakeling J.A. on the reliance on mechanical aids generally by experts in giving evidence:

I am further influenced by my knowledge that many experts give testimony which involves the application of information made available through the use of specialized instruments. Some examples which come to mind include the chartered accountant's use of computers, and the medical profession's use of an x-ray machine. These experts would not likely be able to confirm their expertise in the technical functioning of these instruments as it would obviously take a much different form of training and background to explain the intricacies of the instrument and the chemical, electronic or other concepts which it utilizes in its function. I accept it is not asking too much to have the expert say the instrument is in general use and generally accepted as being accurate, but I also see no problem in a trial judge reaching that conclusion where the facts clearly support that result. If by so doing the trial judge is engaged in an act of faith, it is one firmly based on the reality that experts are not likely to utilize ineffective and inaccurate instruments to make scientific analyses of critical importance within their field of expertise⁸

73 In this case, the blood samples were tested by Laurie Ann Sweet, a technologist employed with the Sudbury Regional Hospital. Ms. Sweet explained that as a technologist, her job was to analyze the specimens, run the machines and report to the doctor.

74 Ms. Sweet testified that upon receipt of the blood samples she followed standard procedures. She stated that she tested approximately 12 analytes. One of the tests she conducted was to determine the ethanol or alcohol concentration in Mr. Murray's blood. She stated that this specimen was run on an instrument which she described as a closed system which performed the analysis and displayed a digital readout. The results were released into a computer system which was accessed directly by the doctor.

75 Ms. Sweet was asked in what circumstances she would not release the results to the doctor and she replied that in cases where she might be suspicious that the analyzer was not working properly she might repeat the test, but that in most cases everything goes right straight through.

76 Unfortunately, very few questions were directed to Ms. Sweet with respect to the type of instrument which was used in her laboratory to test ethanol levels, the maintenance of the instrument and any safeguards that may have been in place. She was not cross-examined by the defence. In this respect, I find myself in somewhat the same position as Wakeling J.A. who, in referring to the evidence of the two technologists who conducted the testing stated at p. 64 of the Saskatchewan decision:

I agree that it would have been preferable to lead some evidence that the instrument is in general use for this purpose, and is generally recognized as capable of producing accurate results. To have done so would no doubt have made the trial judge's ruling less vexing to him, but its absence does not create a fundamental and irretrievable oversight if there is other credible evidence from which this

conclusion can be reasonably drawn, which was certainly the case here. I cannot accept that the failure of these two witnesses to say the obvious creates such a flaw in their testimony as to make it unacceptable.⁹

77 In assessing how much weight I am to place on the test results, I am compelled to consider not only the fact that the testing was conducted by a qualified technologist, but also the fact the laboratory in which the testing equipment was located and in which the testing and analysis was performed was in a large urban hospital. This laboratory was designed to service doctors and other trained medical professionals. It is implicit that these medical professionals were prepared to rely on the laboratory results to make their decisions, decisions which impact the health, and sometimes the life of hospital patients. It is also implicit that a laboratory which is designed and operated for these purposes will use reliable and well maintained and calibrated equipment.

78 On these facts, I am prepared to find that the test results are acceptable from the standpoint of accuracy and reliability. In making this finding, I accept the submission of the defence that I must make this finding on the criminal standard of proof and I so find.

DISPOSITION OF CHARGES

Count 2: Blood/Alcohol Concentration in Excess of 80 ml/100 mL, causing accident resulting in Bodily Harm (Section 255(2.1) CCC)

79 In considering this charge, I take note of the fact that the defence admits that Mr. Murray was the driver of the automobile and that his mother, Grace Murray, was injured as a result of the accident. The defence has also advised the court that the time of the accident is not in issue.

80 As indicated above, I have accepted the hospital test results, and Mr. Joseph's toxicology report as accurate and reliable, and I find as a fact that Mr. Murray's blood/alcohol content at the time of the accident was somewhere within the range of 240 and 395 milligrams of alcohol in 100 millilitres of blood.

81 The question before me therefore is whether the alcohol content in Mr. Murray's blood was causally related to the accident which caused bodily harm to Mr. Murray's mother.

82 Mr. Murray did not give evidence at the trial. He did inform Mr. Urquhart, the ambulance attendant that a moose had jumped in front of his car, and also that a bear had jumped in front of his car. He also informed Mr. Urquhart that he had had 3 drinks prior to the accident and that he had 90 drinks prior to the accident. These comments were made by Mr. Murray in a conversation in which Mr. Urquhart described Mr. Murray as verbally belligerent.

83 For some reason Mr. Murray chose to be uncooperative with the ambulance attendants. He provided them with nonsensical answers to their questions and in the circumstances I am unable to place any weight on Mr. Murray's comments, in so far as determining the cause of the accident.

84 It is the expert evidence of Mr. Joseph that impairment with respect to driving becomes significant at a BAC of 50 mg/100 mL and increases from then onward. I have found that Mr. Murray's BAC was significantly in excess of 50 mg/100mL and I find that Mr. Murray's ability to operate his vehicle was significantly impaired at the time of the accident.

85 The evidence indicates that Mr. Murray was driving on an unlit two lane highway on what has been described as a cold clear night. Sergeant Pollock described the location of the accident as a flat section of road with a slight curve. Constable Yeomans testified that he is familiar with the roadway

were the accident occurred and could not see anything there that would prevent a car from negotiating the curve. He had personally seen other vehicles negotiating the curve on many occasions with no difficulty. Although the curve in the road is located in what has been referred to as a rock cut, which would have restricted Mr. Murray's long range view, there is no evidence before the court that this section of road is any more hazardous than any other section of 2 lane road in Northern Ontario, where rock cuts are commonplace.

86 As stated by Mr. Joseph, the operation of a motor vehicle requires the integrity of a variety of sensory, motor, and intellectual faculties including divided attention, choice reaction time, judgment of speed and distance, risk assessment, vigilance, and vision. These faculties are all significantly impaired when alcohol is present in the body in the amounts which I have found to be present in Mr. Murray's blood, and accordingly I find that Mr. Murray's ability to drive was significantly impaired at the time he attempted to negotiate the blind curve on Hwy 144.

87 Mr. Murray failed to negotiate a curve in the road, causing him to leave the travelled portion of the roadway and enter the ditch. The evidence before the court is such that I find that an ordinary, careful driver would have been able to negotiate this curve safely. In the absence of any other explanation, I find that Mr. Murray's failure to safely negotiate this curve was causally related to the fact that his blood/alcohol content at the time was higher than 80 ml/100 ml., resulting in the impairment of his ability to drive his vehicle. His failure to do so caused an accident in which Mrs. Murray was injured. Accordingly, I find Mr. Murray guilty of count 2 of the indictment.

Count 1: Operating vehicle while Ability Impaired by alcohol, causing bodily harm (Section 255(2) CCC)

88 I have found that Mr. Murray operated his vehicle with a BAC of between 240 and 395 milligrams of alcohol in 100 millilitres of blood. I have also accepted the opinion of Mr. Joseph that this BAC would result in significant impairment of a person's ability to drive an automobile.

89 Mr. Murray's BAC is not the only indicia of impairment. Constable Bond and Mr. Urquhart testified that his speech was slurred and Constable Bond smelled alcohol on his breath. Mr. Murray gave nonsensical answers to the ambulance attendants.

90 I have already pointed out that Mr. Murray failed to negotiate a section of road that an ordinary, careful driver in full control of his or her faculties would negotiate in similar circumstances. Mr. Murray was not in full control of his faculties due to his impairment from alcohol, and I find that this caused the accident in which his mother was injured.

91 Accordingly, I find Mr. Murray guilty of count one of the indictment.

Count 3: Operating a vehicle in a manner Dangerous to the Public, causing bodily harm (Section 249(3) CCC)

92 Mr. Murray has admitted that he was the driver of an automobile that failed to negotiate a curve on Hwy 144 in the early morning hours of Nov. 12, 2008, causing it to roll over. He has also admitted that his mother, who was a passenger in the vehicle, was injured as a result of the accident. Mr. Murray is guilty of this charge if the Crown can prove that Mr. Murray's driving on the night in question was a marked departure from what a reasonable, prudent driver would do in the same circumstances.

93 I have found that Mr. Murray consumed a significant amount of alcohol prior to the accident, and that as a result his ability to drive was impaired and that this impairment was the cause of the accident.

94 Mr. Murray chose to drive after drinking a substantial amount of alcohol. Empty and partially empty containers of alcohol were located in his vehicle at the accident scene. This accident did not occur as a result of a momentary lapse in attention on Mr. Murray's part. It resulted from a pattern of behaviour which commenced when Mr. Murray decided to drive after having consumed alcohol. The accident was a consequence of these earlier actions.

95 I find that Mr. Murray's actions constitute a marked departure from what a reasonable, prudent driver would do when operating a vehicle and I find him guilty of this charge.

E.J. KOKE J.

cp/e/qlafr/qlvxw/qljyw/qlana

1 See *R. v. Paszczenko; R. v. Lima*, [2010] O.J. No.3974 (C.A.) at par.21

2 See *R.v. Calabretta*, 2008 ONCJ 27, para. 27; par. 9-11, aff'd [2008] O.J. No.4188 (S.C): *Paszczenko* at paras. 23-26.

3 *R. v. Grosse*(1996), 29 O.R. (3d) 785 at p.792

4 *R v. Phillips (1988)*, 42 C.C.C. (3d) 150 at p.158-162

5 *R. v. Bulman* [2007] O.J. No. 913

6 *R. v. Redmond* [1990] O.J. No. 143

7 *R. v. Bird* (1989), 71 C.R. (3d) 52.

8 *Redmond* at p. 5

9 *Redmond* at P. 4

Case Name:
R. v. Murray

**RE: Her Majesty the Queen, Applicant, and
David Murray, Defendant/Respondent**

[2011] O.J. No. 2869

2011 ONSC 2538

Court File No. 65/10

Ontario Superior Court of Justice
Sudbury, Ontario

E.J. Koke J.

Heard: April 6-7, 2011.
Judgment: May 13, 2011.

(24 paras.)

Counsel:

Philip Zylberberg, Counsel, for the Crown/Respondent.

John Recoskie, Counsel, for the Accused/Applicant.

**RESPONDENT'S APPLICATION TO ADMIT OUT
OF COURT STATEMENT
REASONS FOR DECISION**

1 E.J. KOKE J.:-- The Respondent was involved in a single vehicle motor vehicle accident, following which he was charged with the offences of Impaired Driving causing Bodily Harm, Driving "Over 80" Causing Bodily Harm and Dangerous Driving. At issue is whether the Respondent or his 90 year old mother, Grace Murray was driving his vehicle. His mother is deceased, having died from causes unrelated to the accident. The Crown applies for an order admitting an out of court statement of Grace Murray in evidence at the trial of the Respondent.

Background Facts

2 On Nov. 12, 2008, David Murray was involved in a single motor vehicle accident. The vehicle was found on its roof in a ditch alongside Highway 144, north east of the city of Sudbury, Ontario. It had two occupants trapped upside down inside it; David Murray in the driver's seat with his seat-belt on and Grace Murray in the passenger's seat with her seatbelt on.

3 At the time, Grace Murray was 90 years old. Grace Murray has since died. The Crown does not allege that the accident caused her death.

4 Grace Murray was injured in the accident, suffering multiple facial contusions and lacerations, facial fractures, high intraocular pressure in her right eye, and a closed-head injury with subarachnoid bleeding.

5 On November 16, 2008, Cst. Bond, the investigating officer, visited Grace Murray at the hospital. She told Cst. Bond that she did not have much memory of the accident. She referred to street lights in Chelmsford, some 20 kilometres away. She confirmed that she had not been the driver of the motor vehicle.

6 Grace Murray also provided a written statement to Cst. Bond, which is the subject matter of this application. In it she stated that she had not driven the car that night, nor for a long time.

7 The Statement is as follows:

The OPP are investigating the motor vehicle collision in which you were involved.

Q. What can you tell me about it?

A. Well I don't know what happened that night. I saw the street lights coming on and I thought it was so much nicer. This was in Chelmsford. But that's not the way it worked. I just remember thinking we were over the worst part but the lights were coming on. When we got to Chelmsford I thought we were almost home to Lively. You know I live in Lively.

Q. Who was driving the car?

A. I certainly wasn't. I haven't driven a car since God knows when. I haven't driven a car in a long, long time.

Q. Do you remember who was with you?

A. It was David and me in the car. That's all. We were heading home to Lively I think.

8 Cst. Bond had received information from a family member that Grace Murray was suffering from the early stages of dementia. The hospital records support that she has dementia. She was discharged to her own home on November 18, 2008.

9 At the preliminary hearing Cst. Bond was asked whether Mrs. Murray seemed alert in respect of the issue that she had not driven a car for a long time. He answered that she was very quick to answer that question, and did not have to think about the answer.

10 Cst. Bond was asked whether he found the references to the Chelmsford street lights nonsensical, and answered that it was not that the answer was nonsensical but rather that her mind was continually drawn to the memory of the street lights.

The Issue

11 The Crown seeks to admit the statement on the issue of whether David Murray was driving the vehicle at the material time. The Crown has put the Crown to the proof that he was the driver of the vehicle.

Legal Principles

12 The statement in question is hearsay, in that it was made out of court by a person other than the deponent, and which the Crown is adducing for the truth of its contents. Since it is hearsay, its admissibility is to be decided on a principled basis.

13 When relying on a principled approach to hearsay, a statement will be admitted if its admission is (1) *necessary* and the statement is (2) *reliable*.¹

14 Reliability in this context means threshold reliability and not ultimate reliability, based fundamentally on the principle that it not be unfair to the accused for the evidence to be admitted. This can occur in one of two ways, which are not mutually exclusive:

- a) Because of the circumstances in which it came about, the contents of the statement are so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process; or
- b) Although the evidence may not be so cogent, the circumstances allow for sufficient testing of the evidence by means other than contemporaneous cross-examination.²

15 In *R. v. Smith*, supra, the court referred to the test of reliability as requiring a "*circumstantial guarantee of trustworthiness*" and not whether the statement can be relied upon to an absolute certainty, but whether there are circumstances which would not give rise to a reasonable apprehension traditionally associated with hearsay evidence.³

16 The Crown wishes to introduce the statement and therefore the circumstantial guarantee of trustworthiness must be proven, on a balance of probabilities, by the Crown.⁴

Discussion

17 The parties agree that the test for necessity has been met in this case because Mrs. Murray passed away. The court only has to determine therefore whether the test of reliability has been met.

18 The Crown's position that the statement meets the reliability test is based on the following:

- a) Mrs. Murray had no reason to lie to the officer on that issue;
- b) Mrs. Murray understood the question and answered without hesitation;
- c) There is objective evidence which supports the truth of the statement; this evidence includes the following:

1. David Murray was found upside down, strapped into the driver's seat;
 2. Grace Murray was found upside down, strapped into the passenger's seat;
 3. David Murray was the registered owner of the vehicle;
 4. Grace Murray was aged 90 with a starting state of dementia, less likely to drive a car than her younger son.
- d) There is no reason to believe that contemporaneous cross-examination would have added anything to the process.
- e) When Cst. Bond went to interview Grace Murray on November 12, David Murray told Grace Murray to "button it up";

19 The defence argues that Mrs. Murray's responses may have been influenced by her mental condition. Although the Crown alleges that Mrs. Murray had no reason to lie to the officer on the issue, this finding cannot be tested in itself. Also, although the Crown states that Mrs. Murray understood the question, the defence argues that there is nothing in Cst. Bond's evidence which supports a finding that Mrs. Murray understood the question or the consequences of making the statement.

20 With respect to the fact that Mr. Murray seemed anxious to prevent his mother from answering the police questions, the defence argues that this should not necessarily be interpreted as an indication that Mr. Murray felt culpable. Neither the police nor the Crown ever investigated whether the statement could have been influenced by the relationship between Mrs. Murray, her motive for making a statement or her degenerating mental state.

21 I find that the objective evidence clearly supports Mrs. Murray's statement that she was not driving. However if the reliability of the statement is to be based on the manner in which Mrs. Murray responded to the questions, or on a belief that she had no reason to lie, there must be some determination as to the degree to which Mrs. Murray's mental state was impaired by her dementia.

22 Following the motor vehicle accident on November 12, 2008 Mrs. Murray was admitted to Sudbury Regional Hospital where she remained until she was discharged on November 17, 2008. Copies of the hospital records were filed in support of this application. A review of these records is helpful in arriving at an understanding of Mrs. Murray's mental state. The records indicate the following:

- a) Mrs. Murray presented with mild confusion, mostly related to date and time. She knew where she was and she was coherent in providing medical information to hospital staff.
- b) The medical information Mrs. Murray was able to provide about herself was limited. She knew she was normally taking six different medications a day but she was unable to tell the doctors which ones. She denied the use of any anticoagulants.
- c) She sustained facial injuries and she was informed that after the swelling went down she would have a deformity. She was advised that she could undergo surgery but the only benefit would be cosmetic. When this was

discussed with her she indicated that she was not interested in pursuing surgery with regards to this.

- d) Dr. Padma Pranam saw her in the early hours of November 12, 2008 and reported as follows:

She lives alone and I think she is independent with her activities of daily living. She has an excellent social history dictated and it appears that she has been well taken care of by her son and also she has a lot of good friends who bring her food sometimes and a friend assists with her transportation and paying bills and dispensing medications and the grandchildren keep in touch with her by phone. She has been functioning perfectly well. She has been started on Aricept. After she was found to have moderate dementia by geriatric assessment.

- e) Mrs. Murray was discharged on November 17, 2008 by Dr. Caroline Mailloux who reported as follows:

She was kept here in the hospital under observation in view of her age as well to make sure that she had proper support at home. She does have evidence of obvious dementia and according to her son this is baseline and it has not worsened. Her neuro vitals were unremarkable. She is ambulating and transferring independently. She does live alone and has a neighbour who checks on her once daily. She has CCAC three times per week and this will be increased to daily for a period of time.

23 In my view, it is significant that Mrs. Murray lived alone before the motor vehicle accident. Following her 5 day stay at the hospital, during which time the hospital staff and her doctors had an opportunity to observe her, she was released back to her own home without any apparent hesitation on the part of her medical providers. This strongly suggests that her cognitive deficits were not severe, and that her statement that she had not driven a car since "God knows when", can be relied upon.

24 I have already pointed out that the accuracy of Mrs. Murray's statement is strongly supported by the objective evidence. In my view her statement has met the test of reliability and can therefore be admitted.

E.J. KOKE J.

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1 *R v. Smith*, (1992), 75 CCC (3d) 257 (SCC) at paras. 28 - 36.

2 *R. v. Khelawon*, [2006] 2 S.C.R. 787 at para. 49; 67.

3 *R. v. Smith*, *supra*, at para. 30.

4 *R. v. Hawkins* (1996) 111 C.C.C. (3d) 129 (S.C.C.)