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R. v. St. Michael's Hospital

Between
Her Majesty the Queen, appellant, and
St. Michael's Hospital, Sisters of St. Joseph for Diocese of Toronto in Upper Canada (c.o.b. St. Michael's Hospital) and Wellesley Hospital, respondents

[1987] O.J. No. 2453

2 C.E.L.R. (N.S.) 327

No. 632/86

Ontario District Court - Judicial District of York

Corbett D.C.J.

November 25, 1987.

Environmental offences -- Collection and transportation of pathological waste -- Crown failed to prove that waste was pathological waste -- Accused established due diligence defence -- Canadian Charter of Rights and Freedoms, s. 11(c) -- Environmental Protection Act, R.S.O. 1980, c. 141, ss. 24, 40.

This was an appeal by the Crown from two decisions dismissing the informations against the two respondent hospitals. The hospitals were both charged with using the facilities and equipment of a waste management system for the collection and transportation of pathological waste that was not in accordance with the terms and conditions of a Provisional Certificate of Approval and for transporting the waste to a landfill site contrary to s. 40 of the Environmental Protection Act. The trial judge found that the Crown had failed to prove that the waste in question was hazardous or pathological waste as defined in s. 24 of the Environmental Protection Act. He also found that each hospital had established the defence of due diligence. At issue was whether the trial judge erred in failing to find that there was proof that the waste was pathological waste and whether he erred in finding that the defence of due diligence had been had been made out.

HELD: The appeal was dismissed. The trial judge held that the Crown had failed to prove that the waste was pathological. To prove this the Crown would have to show that the waste was part of a human body or that certain parts of the human body were infectious. Unless evidence which ought to have been admitted would reasonably alter the conclusion of the trial judge, there was no proper reason to interfere with the finding of the trial judge. With regard to the Crown's submission that the trial judge improperly excluded evidence of an agent of one of the hospitals, it was noted that a corporation could not benefit from s. 11(c) of the Charter because it could not be a witness. The trial judge

therefore erred in law in ruling that the statements of the vice-president of the hospital were inadmissible. It was extremely doubtful however that this testimony would be capable of establishing that the waste in question was pathological waste. The trial judge did not err in finding that the hospitals took reasonable care in the circumstances. The degree of care was governed by: the gravity of potential harm, the alternatives available to the accused, the likelihood of harm, the degree of knowledge or skill expected of the accused, and the extent to which the underlying causes of the offence were beyond the control of the accused.

Counsel:

Linda C. McCaffrey, Q.C., for the appellant Crown.
William J. McCorriston, for the respondent Sisters of St. Joseph for Diocese of Toronto in Upper Canada c.o.b. St. Michael's Hospital.
Sylvia N. Watson, for the respondent Wellesley Hospital.

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1 **CORBETT D.C.J.**:-- The Crown appeals from two decisions of His Honour Judge Robert Dnieper in the Provincial Offences Court dismissing two informations against the respondent hospitals. Each hospital was charged with:

> "using the facilities of equipment of a waste management system for the collection and transportation of pathological waste not in accordance with the terms and conditions of a Provisional Certificate of Approval No. A8590 dated February 20, 1985, by transporting hazardous waste from the hospital to the Brock West Land Fill Site in the Township of Pickering Regional Municipality of Durham contrary to Section 40 of the Environmental Protection Act, R.S.O. 1980, c. 141, as amended."

2 The date of the alleged offence was September 25, 1985 for St. Michael's Hospital and October 11, 1985 for the Wellesley Hospital.

3 Similar informations were laid against Women's College Hospital and York-Finch General Hospital. The trials of the four hospitals proceeded together upon consent of all parties before His Honour Judge J.L. Addison from June 24 to June 27, 1986. The trials were not completed when His Honour Judge J.L. Addison died. The trials continued on November 3, 4, 5, 6 and 7, 1986 before His Honour Judge Dnieper. Counsel for the four hospitals consented to proceeding with the trial on the basis of the transcript of the evidence taken by Judge Addison being admitted. All hospitals except St. Michael's Hospital agreed to accept the rulings as to the admissibility of the evidence made by the late Judge Addison.

4 The charges against Women's College Hospital and York-Finch General Hospital were withdrawn on November 5 because, in the words of the Crown, "there are going to be problems with proving the case beyond a reasonable doubt, specifically with regard to proving that it is infectious waste". The trial continued in respect of St. Michael's Hospital and the Wellesley Hospital.

5 Section 40 of the Environmental Protection Act, R.S.O. 1980, c. 141 (EPA) provides as follows:

> "40. No person shall use any facilities or equipment for the storage, handling, treatment, collection, transportation, processing or disposal of waste that is not part of a waste management system for which a certificate of approval or a provisional certificate of approval has been issued and except in accordance with the terms and conditions of such certificate."

6 Provisional certificate of approval No. A8590 was issued to York Disposal Services Limited subject to conditions which included in item 2 to Sched. B of the certificate, "... no hauled liquid industrial waste, agricultural waste, hazardous waste or hauled sewage shall be transported pursuant to this Provisional Certificate of Approval".

7 Hazardous waste is defined in O. Reg. 309 under the Environmental Protection Act. Section 1 27 defines "hazardous waste" to mean

> "a waste that is a,
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> ...
>
> ix. pathological waste,
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> ...
>
> and includes a mixture of ... pathological waste, ... and any other waste or material ..."
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> "Pathological waste" is defined in s. 1 48 as follows:
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> "'pathological waste' means,
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> i. any part of the human body, including tissues and bodily fluids, but excluding fluids, extracted teeth, hair, nail clippings and the like, that are not infectious,
>
> ...
>
> iii. non anatomical waste infected with communicable disease;"
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> "Waste" is defined in s. 24 of the EPA as follows:
>
> "(d) 'waste' includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other wastes as are designated in the regulation;"

8 Judge Dnieper found the Crown had failed to prove, in respect of each hospital, that the waste in question was hazardous waste or pathological waste. The trial Judge also found that each hospital had established the defence of due diligence or reasonable care. With respect to the Wellesley Hospital, Judge Dnieper was not sure that there had been identification beyond a reasonable doubt that the pathological waste was part of a particular load picked up at the Wellesley Hospital.

9 The first major issue raised on this appeal is whether the trial Judge erred in finding that the Crown failed to establish the waste in question was pathological waste. The Crown submits the trial Judge erred in law in excluding evidence which, if believed, might have resulted in a finding that the Crown had proved its case. Assuming the Crown has proved its case, the second major issue is whether the trial Judge erred in finding that the hospitals established a valid defence of due diligence based on the decision in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299.

The Facts

St. Michael's Hospital

10 The evidence established St. Michael's Hospital is an acute care teaching hospital with over 700 beds and two clinic settings. The hospital employs over 2,500 employees and has over 200 medical staff. There are 35 private doctors offices at the hospital. There is an animal laboratory for research on animals.

11 There are many sources of waste. The substantial amount comes from the kitchens where 5,000 meals a day are prepared. Waste is also generated from the administrative offices, nursing stations, private doctors' offices, and hospital laboratories. Mr. Terrence Stoughton, assistant executive director of Hospital services testified respecting the waste disposal system in place at the relevant time. He described general waste, infectious waste, and anatomical waste. Kitchen waste was disposed of in green plastic bags. The housekeeping department collected the garbage and compressed it using a compactor. The infectious waste was placed in yellow bags and autoclaved at the hospital (that is, treated by heat to remove infection). The anatomical waste was taken to the hospital's incinerator and burned.

12 The waste system in place employed about 154 full-time staff and the hospital had related committees in place. Waste control and disposal matters were discussed and reviewed with the Ministry of Environment. The hospital provided on-going education in the form of lectures given by infection control staff and by memoranda sent to hospital departments.

13 The Ministry guidelines which were published at the time provided that yellow bags were used for pathological or infected waste, green bags were used for non-infectious waste and non-anatomical waste, and red bags were used for anatomical waste. The bio-hazard symbol could be used on a bag that was not yellow to indicate infectious waste.

14 On September 25, 1985, a load of waste was transported from St. Michael's Hospital to the Brock West landfill site in Pickering by York Disposal Services Limited. The load (22,680 kilograms) was dumped at the site on the working face of the landfill. The load measured 6 feet by 40 feet and was 1 foot to 6 feet in height. The load consisted mainly of green garbage bags and cardboard boxes. As a result of complaints about a small quantity of the waste, Julian Wieder (informant, a provincial officer with the Ministry of Environment), Ray Lecce (manager of York Disposal), John Wood (director of housekeeping for St. Michael's) and Alex Connor (public health inspector), met and viewed the waste. Photographs were taken (Ex. 6a). In some bags, tubes, gloves, syringes and so on, were found. Some bags appeared to contain autoclaved material: one green bag contained some flesh-like material which was placed in a yellow plastic bag (Ex. 6A, No. 3-6 blown-up as Ex. 40). It was decided to bury this waste. The information were sworn in June 1986, some 9 months later.

Wellesley Hospital

15 The evidence established the Wellesley Hospital produces over 6,000 lbs. a day of non-infectious garbage. The hospital produces about 5,000 meals a day and has its own butcher. Institutional garbage is produced from offices and laboratories.

16 Mr. Samuel Bakewell (senior vice-president) testified with respect to the waste disposal system of the Wellesley Hospital at the relevant time. The Wellesley Hospital used York Disposal on a daily basis and also used PWM, a licensed carrier, for its infectious waste. Anatomical waste was incinerated at the hospital's incinerator. Red garbage bags were used for the removal of infectious linens to the central laundry. Garbage coming from laboratories was autoclaved. There were on-going committees respecting waste and its disposal. Mr. Bakewell testified that the procedures for waste management, particularly infectious waste, were standard throughout North America and that the separation stream used by other hospitals is much the same as that at the Wellesley Hospital.

17 On October 11, 1985, a load of waste was transported from the Wellesley Hospital to the Brock West landfill site in Pickering by York Disposal Services Limited. The load weighed over 17,000 lbs. and was dumped at the site. The

load consisted mainly of black garbage bags and boxes. Two bags contained pads, gowns, tubing, and so on. Two boxes contained tubes (filled and unfilled phials), needles, and the like. A red plastic bag with a black plastic bag inside contained 2 pieces of fleshy, yellowy-red material, each of golf-ball size.

18 After a complaint, Julian Wieder, Alex Connor, Mr. Bakewell, and Peter Allott (project coordinator medical services, Wellesley Hospital) met at the working face of the site, viewed the waste, and photographed it. The waste was then buried. The information was sworn in June 1986.

The Crown's Case

19 In these cases the burden rested with the Crown to prove beyond a reasonable doubt that the alleged waste was pathological. On these appeals, the Crown submits that the definition of pathological waste creates an exception for body fluids that are not infectious and that the onus of proving that a body fluid is not infectious lies upon the accused hospitals, as a fact peculiarly within their knowledge. However, throughout the trial, the Crown assumed and conceded that it had the onus of proving the waste was infectious.

20 The Crown relied upon the Provincial Offences Act, R.S.O. 1980, c. 400, in subs. 48(3) provides as follows:

> "(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information."

21 The Crown also relied upon several cases respecting the onus of proof of exceptions. In R. v. Turner (1816), M. & S. 206. John Turner was charged with being a person not qualified or authorized to kill game. The burden of proving such qualification was held to lie on the defendant when the prosecutor had proved everything which, but for the defendant's being qualified (to kill game) would subject the defendant to the penalty.

22 In John v. Humphreys, [1955] 1 All E.R. 793, a driver was charged with driving without a licence. The statute provided "a person shall not drive a motor vehicle on a road unless he is a holder of a licence ...". It was held that the burden of proof that the defendant had a licence lay on him because that fact was peculiarly in his own knowledge.

23 In R. v. Senate Securities Limited, [1964] 2 O.R. 710, the accuseds were charged that they "traded in securities" contrary to the Securities Act, R.S.O. 1950, c. 351, which made it an offence to trade in securities unless a person or company was registered under the Act. The Court held that the information laid was not required to aver that the accuseds were not registered and the onus was on the accused to prove the exceptions.

24 The definition of pathological waste in s. 1 48 of O. Reg. 309 uses negative terms. Merely because a definition uses negative elements does not, in my view, bring the case within the reverse onus rules of the above cases or within subs. 48(3) of the Provincial Offences Act.

25 Under s. 1 48i the prosecution must establish beyond a reasonable doubt that the waste is part of a human body or that certain parts of the human body (fluids, extracted teeth, hair, nail clippings and the like) are infectious. I interpret the clause "that are not infectious" to modify the excluded parts and not the clause "any part of the human body". Proof beyond a reasonable doubt that a substance was human body tissue would satisfy the definition and would not require the Crown to prove it was infectious. However, the Crown would have to prove that a human bodily fluid, such as blood, was infectious.

26 In these cases, the trial Judge found the case failed for want of proof as the Crown had not proved the waste was pathological. The trial Judge found no evidence to prove the prohibited waste was part of the human body. Unless evidence which ought to have been admitted would reasonably alter the conclusion of the trial Judge, there is no proper reason to interfere with the finding of the trial Judge, which is largely a matter of fact.

Admission By Agent

27 It was submitted on behalf of the appellant that the trial Judge erred in excluding evidence of admissions by Mr. Samuel Bakewell, senior vice-president of the Wellesley Hospital, an accountant by profession. The housekeeping department of the hospital was responsible for the segregation and disposal of hospital waste and was one of the departments which reported to Mr. Bakewell.

28 A voir dire was held to determine the admissibility of oral statements made by Mr. Bakewell to Julian Wieder. It was agreed at trial that Mr. Bakewell was an agent of the Wellesley Hospital. Judge Dnieper held that there was no evidence that appropriate safeguards were taken prior to taking a statement from an accused person and the Crown did not prove the voluntary nature of the statements. Evidence was led that the hospital had a concern on October 11, 1985 that Metropolitan Toronto might cut off its access to the site and counsel for the hospital submitted statements were made to preclude this possibility.

29 A corporation not being a witness is not a person that can benefit from s. 11(c) of the Canadian Charter of Rights and Freedoms wherein a person charged with an offence has the right not to be compelled to be a witness in proceedings against that person: R. v. F.G. Lister & Company (1986), 24 C.R.R. 120. The hospital is not incriminating itself when its vice-president is giving damaging evidence.

30 Statements made to third persons by an agent within the scope of the agent's authority during the continuance of the agency are admissible against the principal: R. v. Strand Electric Limited, [1969] 1 O.R. 190. In this case, the statements made by Mr. Bakewell were within the scope of his authority as an agent of the Wellesley Hospital. The trial Judge erred in law in holding that the proposed statements made by Mr. Bakewell were inadmissible.

31 It is extremely doubtful an admission by Mr. Bakewell at trial would be capable of establishing beyond a reasonable doubt that the particular waste was pathological waste. No samples of the alleged waste were analyzed to determine its nature. No opportunity to analyze the waste existed after the dates of the alleged offences since the alleged waste was buried months before the informations were laid.

Expert Evidence

32 Judge Dnieper refused to qualify Alexander Connor, a public heath inspector, as an expert witness in the determination of the nature of tissue. Mr. Connor was a certified public health inspector with the Durham Region Health Department with 15 years experience. He had worked for 2 years in a hospital in Africa "attending to operations in the O.R.", helped out on occasion in the ward, assisted in two autopsies for humans. He assisted in hundreds of post mortem examinations of animals as manager of an abattoir in Africa.

33 Judge Dnieper refused to qualify Robert Hopper as an expert in human placenta in respect of St. Michael's Hospital. Mr. Hopper was an employee of Decom Medical Waste Systems and collected and transported human placenta. As a result he saw 300-400 placenta a day. He picked up the placenta and in some instances repackaged them and transported them to Kentucky. He had also been a funeral director for 30 years and was involved over the previous 10 years in various government and hospital association committees respecting transportation of pathological waste. Judge Dnieper asked, "I take it essentially, you are a truck driver?" Mr. Hopper relied, "I drive a truck, yes, sir" (vol. 4, p. 496).

34 Counsel for the appellant submitted that the trial Judge erred in refusing to qualify these witnesses as expert witnesses and relied on R. v. German, [1947] O.R. 395, where it was held at p. 98 that a person of ordinary intelligence may be permitted to give opinion evidence on a matter of personal knowledge such as the apparent age of a person and the speed of a motor vehicle. This case involved a charge of dangerous driving and driving while intoxicated.

35 Counsel for the appellant also relied on Graat v. R., [1982] 2 S.C.R. 819, involving a charge of impaired driving. This case also held that a non-expert may give opinion evidence respecting intoxication. Mr. Justice Dickson, as he then

was, stated at p. 380:

> "Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.
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> ...
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> Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances."

36 In the instant cases, persons were sought to be qualified as experts in matters requiring scientific, technical or specialized testimony. As such, neither was qualified as an expert in human tissue. Judge Dnieper did not err in law in refusing to qualify these witnesses as expert witnesses. On the other hand to the extent that Mr. Hopper could identify human placenta in the content of his experience in transporting placenta, his opinion might be admissible. However, the weight to be given to such an opinion would not be great in the circumstances.

The Due Diligence Defence

37 The defence of due diligence is open to an accused with respect to public welfare offences including environmental offences. The leading case is R. v. Sault Ste. Marie, supra. For this defence to succeed, the accused must exercise all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

38 Counsel for the appellant also referred to R. v. Gonder (1981), 62 C.C.C. (2d) 326 where the Court took into account whether there was a standard practice of care commonly acknowledged as a reasonable level of care, whether the accused acted in accordance with that standard, and whether there were any special circumstances of the case which might require a different level of care other than the level suggested by the standard practice. With regard to special circumstances the degree of care warranted would be governed by (p. 332): the gravity of potential harm, the alternatives available to the accused, the likelihood of harm, the degree of knowledge or skill expected of the accused, and the extent underlying causes of the offence are beyond the control of the accused.

39 Having reviewed the evidence with respect to due diligence, I cannot find that the trial Judge erred in either case in finding that the respective hospitals took reasonable care in the circumstances.

Bias Undue Influence

40 No allegations of bias were substantiated in relation to Judge Addison. The late Judge Addison had expressed difficulty in understanding why any non-compliance by the hospitals was not addressed in a civil context rather than using the criminal law system. Crown counsel sought instructions and the Crown concluded it was a matter of public interest to proceed with the case. Although Judge Addison stated that the trial might be an exercise in futility, he concluded that he had no authority to withdraw the charges and continued the trial.

41 I have reviewed the allegations of bias and undue interference alleged with respect to Judge Dnieper. The trial

proceedings were difficult for the prosecution because the trial Judge belittled the case sought to be presented by the prosecution. However, I cannot find that his actions constituted bias or undue interference.

Conclusion

42 It is not my duty as an appellate Judge under s. 104 of the Provincial Offences Act to re-try the case nor to substitute my view of the evidence for that of the trial Judge. The trial Judge found the Crown did not prove that the alleged waste was "pathological", as defined. No error on the part of the trial Judge has been successfully advanced on these appeals save that the trial Judge erred in respect of the Wellesley Hospital in failing to admit in evidence statements by Mr. Bakewell about the source of the waste. As indicated earlier, such evidence, if believed does not satisfy me as the trial Judge might have come to a different conclusion.

43 Even if it could be successfully argued that the trial Judge erred in finding Crown had not proved its case, I find no reason to interfere with the trial Judge's finding that each hospital established the due diligence defence. Such a finding is largely a matter of fact and I find no reason to interfere with the trial Judge's finding.

44 In the result, these appeals are dismissed. I may be spoken to with respect to costs.

CORBETT D.C.J.

qp/s/bbd