IN THE SUPREME COURT OF NEW ZEALAND

SC 34/2009
[2009] NZSC 109

	BETWEEN	LEROY JOHN BARR Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 8 October 2009

Court: Blanchard, Tipping, McGrath, Wilson and Anderson JJ

Counsel: K H Cook and A J Bailey for Appellant
A M Powell and B C L Charmley for Respondent

Judgment: 21 October 2009

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order for payment of medical expenses of $102.60 is set aside.

C In substitution, the appellant is ordered to pay $93 towards medical expenses.

REASONS

(Given by Wilson J)

Introduction

[1] The appellant, Mr Barr, pleaded guilty in the District Court to a charge of driving with excess blood alcohol. He was disqualified from driving for six months

and was ordered to pay a fine of $600 and Court costs of $130. He was also ordered to pay the fee of $102.60 of the medical practitioner who took a blood sample from him ("medical expenses") and the fee of $93 of the analyst who analysed that sample. There was no challenge to the jurisdiction of the District Court to make any of these orders.

[2] Mr Barr appealed to the High Court on the single ground that there was no jurisdiction to order payment of the medical expenses.[1] He was successful. The Police appealed, by leave, to the Court of Appeal.[2] They were successful. The Court of Appeal held that the Costs in Criminal Cases Act 1967 conferred jurisdiction. Mr Barr obtained leave to appeal to this Court.[3]

[3] At no stage during these proceedings did Mr Barr raise any question about the jurisdiction to order payment of the analyst's fee. His counsel apparently thought that there was jurisdiction because that fee was the "blood test fee" which s 67 of the Land Transport Act 1998 renders those convicted on the basis of a blood test liable to pay as a fine. The amount of the fee (now $93) is fixed by a *Gazette* notice.[4]

[4] Prior to the hearing of this appeal, the Court issued a Minute noting that it was at least possible that the "blood test fee", which is defined in s 2 as the fee prescribed under s 67, is the fee for the taking of the blood, not the analysis of it. A "blood test" is defined in s 2 as "the taking of a blood specimen for analysis". These words would in their ordinary meaning not extend to the analysis of the specimen after it is taken. Accordingly, the "blood test fee" appeared to be the fee for the taking of the specimen, rather than its analysis. Counsel were asked to address this question at the hearing.

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1 *Barr v Police* [2009] NZAR 12 (French J).
2 *Police v Barr* [2009] NZCA 124 (Chambers, Robertson and Arnold JJ).
3 [2009] NZSC 62.
4 Currently the Land Transport (Blood Test Fee) Notice 2001.

The "blood test" fee

[5] At the hearing, Mr Cook agreed that the s 67 fee is for the taking of the blood and not for the analysis of it. It followed, counsel accepted, that there was jurisdiction to order payment of the medical expenses, except to the small extent that the expenses claimed of $102.60 exceeded the prescribed fee of $93. That meant however that the issue which had previously arisen over the jurisdiction to order payment of the medical expenses now arose over the analyst's fee. Although no objection had been taken previously to the payment of that fee the legal arguments were the same, submitted Mr Cook, and the Court should hear and rule upon them, even if that were technically unnecessary to dispose of the appeal.

[6] For the Police, Mr Powell submitted that, although the words of the definition of "blood test" do, when looked at on their own, refer only to the taking of blood, the opening words of s 2 provide that all the definitions in the section apply "unless the context otherwise requires". The "context", counsel submitted, includes not only the text around the defined term but also the purpose and the history of the provision.[5] A "blood test" was first defined in drink-driving legislation in this country in s 57A of the Transport Act 1962, as introduced by the Transport Amendment Act (No 3) 1978. A "blood test" was there defined as "the taking of a blood specimen for analysis". There was however no reference to a blood test fee. That term was introduced by the Transport Amendment Act (No 2) 1988. Although the s 57A definition of a "blood test" was retained unamended, it did not apply to the newly introduced s 30AB(4), which required a driver convicted of a blood alcohol offence to pay the gazetted blood test fee.

[7] Mr Powell went on to submit that, when the Land Transport Act 1998 replaced the Transport Act 1962, all definitions directed to breath and blood alcohol offending were consolidated in a single interpretation section, s 2. Those definitions included the definition of a "blood test fee" as the fee prescribed under s 67 but that section is in materially the same terms as s 30AB(4), which was directed to the

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5 Burrows and Carter, *Statute Law in New Zealand* (4th ed, 2009), p 423.

analyst's fee. There was nothing in the Parliamentary materials to suggest that Parliament in 1998 intended to change the practice of making convicted drivers liable to pay the analyst's fee as prescribed by *Gazette* notice. For these reasons, Mr Powell submitted, a "blood test fee" is the fee for the analysis of the blood specimen but a "blood test" is the taking of the blood for that analysis.

[8] The position has now been made clear by the Land Transport Amendment Act 2009, which is to come into force on 1 November this year but which does not have retrospective effect. The definition of "blood test" in s 2 of the principal Act is amended by substituting the words "analysis of a blood specimen" for "taking of a blood specimen for analysis". The term "blood test fee" is similarly amended so that it reads "the fee for the analysis of a blood specimen". Section 67 is also amended to make clear that a convicted driver is liable to pay both the analyst's fee as prescribed by *Gazette* notice and the actual and reasonable medical expenses of taking the sample.

[9] Mr Powell also submitted that medical expenses might not be incurred at all for the taking of a blood sample, if for example it is taken in a hospital. And, if medical expenses are incurred, there is likely to be a considerable variation in the amount of those expenses. For example, a rural medical practitioner called out at night from a distance to take a single specimen would be expected to charge considerably more than a city practitioner taking a number of samples. It was therefore inherently unlikely that Parliament would have intended the uniform payment prescribed under s 67 to apply to medical expenses. In contrast, the work required of an analyst would be approximately the same whenever a specimen was analysed and it was therefore reasonable to provide a fixed fee for that work.

[10] Even if Mr Powell's well-made points are assessed collectively, they are not in our view sufficient to displace the ordinary meaning of the words of the definition of a blood test: "the taking of a blood specimen". Anyone reading these words would have no cause to give them anything but their plain meaning, and to give the words "blood test fee" the corresponding meaning of the fee for the taking of a blood specimen. It is not as if s 67 cannot work if those meanings are given to the definitions of "blood test" and "blood test fee". If no medical expenses are incurred,

there is no liability to pay such expenses. Similarly, in the event (however unlikely) that the actual expenses are less than the gazetted fee, the only liability would be for the actual expenses. Conversely, if (as in the present case) the actual expenses exceed the prescribed fee the driver will be liable to pay only the prescribed amount.

[11] In the words of the authors of *Statute Law in New Zealand*: [6]

> A statutory definition is only displaced where there are strong indications to the contrary in the context. That is particularly so where the definition is the stipulative kind that extends the meaning of the word.

Such indications as there are in the present context, however widely the context is understood, cannot be said to point strongly to giving the plain words other than their ordinary meaning. The definition is, in a sense, "stipulative" in nature because it restricts the meaning of the word "test" to a meaning that is not its usual meaning of subjecting blood to examination. It follows that the present appeal must be allowed, to the extent that the medical expenses which Mr Barr was ordered to pay exceeded the sum prescribed under s 67.

[12] That leaves however the question of whether there was jurisdiction to order payment of the analyst's fee. Although not an issue formally raised by the appeal, we will go on to consider it. The point is of general importance and we have heard full argument. The written submissions are relevant by parity of reasoning, and at the hearing counsel addressed us on the alternative hypotheses that there might be jurisdiction to order payment of the medical expenses but not the analyst's fee or jurisdiction to order payment of the analyst's fee but not the medical expenses.

High Court and Court of Appeal

[13] Before examining the relevant provisions of the Costs in Criminal Cases Act and their application, it is helpful to refer to the approach of the High Court and the Court of Appeal in determining whether these provisions authorised the order that the appellant should pay the medical expenses.[7] In the High Court, the Police

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6 Burrows and Carter, p 422, citing *Police v Thompson* [1966] NZLR 813 (CA).

7 In the District Court the appellant did not dispute the jurisdiction of the Court to order payment of either the medical expenses or the analyst's fee.

adopted the "shotgun" approach of contending in the alternative that jurisdiction to require payment of the medical expenses was conferred by s 4(1) of the Costs in Criminal Cases Act or by s 67 of the Land Transport Act or by s 32 of the Sentencing Act 2002 (as a sentence of reparation) or as a "fine" within the definition in s 79 of the Summary Proceedings Act 1957.

[14] French J rejected all of these arguments. She held, following Ellis J in *Accident Rehabilitation and Compensation Insurance Commission v Lovell*,[8] that the definition of costs in the Costs in Criminal Cases Act as "expenses ... incurred ... in carrying out a prosecution" limited the application of the Act to expenses incurred following a decision to prosecute.[9] The medical expenses were therefore excluded because the decision to prosecute was made after they were incurred. Section 67 applied only to the analyst's fee.[10] The order for payment of the medical expenses was not an order for reparation.[11] Nor was it a fine.[12]

[15] In their appeal to the Court of Appeal, the Police sensibly confined their argument to the proposition that the medical expenses were "costs" for the purposes of the Costs in Criminal Cases Act and were properly payable under that Act. In a judgment delivered by Chambers J, the Court agreed. It held that, properly construed, the Act did not limit the award of costs to those incurred following a decision to prosecute.[13] Alternatively, the Court thought that the taking of a blood specimen followed the decision to prosecute because Mr Barr had by that time failed an evidential breath test and would have been prosecuted for driving with excess breath alcohol if he had not requested a blood test.[14]

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8 [1995] NZAR 97 (HC).
9 At para [11].
10 At para [16].
11 At para [18].
12 At para [30].
13 At para [22].
14 At paras [27] and [28].

Costs in Criminal Cases Act

[16] In order to determine whether there was jurisdiction to require the appellant to pay the analyst's fee, it is necessary to examine the relevant provisions of the Act and the regulations made under it.

[17] Section 4(1) of the Act provides that:

> Where any defendant is convicted by any Court of any offence, the Court may, subject to any regulations made under this Act, order him to pay such sum as it thinks just and reasonable towards the costs of the prosecution.

Costs are defined in s 2 as "any expenses properly incurred by a party in carrying out a prosecution ...". Section 13(1) authorises the making of regulations "prescribing the heads of costs that may be ordered to be paid under this Act".

[18] The Costs in Criminal Cases Regulations 1987[15] were made under the authority of the Act. Regulation 3 authorises the making of orders for payment of the expenses detailed in the Schedule to the Regulations. These include (as para 3C(b)(ii)) "disbursements reasonably and properly incurred; including ... the costs of enquiries and scientific and other investigations and tests".

[19] The cost of analysing the blood specimen taken from the appellant was plainly the cost of a scientific test. What is not so clear however is whether, in terms of the definition of "costs", it was an expense incurred "in carrying out a prosecution", that being the statutory requirement.

Carrying out a prosecution

[20] The question of whether an expense incurred prior to the making of a decision to prosecute can ever be said to be an expense incurred in carrying out a prosecution has been the subject of divergent judicial opinion. French J thought that it could not, the Court of Appeal that it could. Ellis J held in *Lovell* in an ex tempore judgment that the cost of obtaining a report on which was based the decision to

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15 SR 1987/200.

prosecute could not be seen to be an expense incurred in carrying out a prosecution.[16] On similar wording, but for the purposes of a different costs regime, the Court of Appeal of England came to the same conclusion in *R v Maher*.[17]

[21] The words "in carrying out a prosecution" are capable of being construed as imposing a temporal limit; expenses incurred prior to the decision to prosecute are not recoverable. For a number of reasons however we prefer what was accepted to be an available alternative interpretation, namely that expenses incurred prior to the decision to prosecute are recoverable in the discretion of the Court, provided that there is a sufficient nexus between the incurring of the expense and the prosecution. Whether that is so requires a judicial assessment on the facts and circumstances of the particular case.

[22] First, a high degree of protection is already conferred on convicted defendants by the cumulative jurisdictional requirements that, before an expense is recoverable from them, it must be established that payment of the expense is "just and reasonable"[18] and the expense was "properly incurred".[19] Secondly, even if the expense satisfies these statutory requirements the Court retains a residual discretion as to whether to order payment. Thirdly, whether or not an expense is capable of being recovered should not turn on the somewhat arbitrary basis of whether or not it happens to have been incurred before the decision to prosecute was made. Fourthly, it may be difficult to determine precisely when that decision was made. Fifthly, expenses incurred prior to the decision to prosecute were recoverable under the corresponding provisions of the Crimes Act 1908[20] and the Crimes Act 1961,[21] and there is no reason to think that Parliament was intending to adopt a more restrictive approach in enacting the 1967 Act. Sixthly, and reinforcing the previous point, the Hon J R Hanan, as the Minister responsible for the legislation which became the 1967 Act, told Parliament that it was desirable "to leave the widest possible discretion to the Courts".[22] Seventhly, a successful defendant may recover under

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16 At p 100.
17 [1983] 1 QB 784.
18 Section 4(1).
19 Definition of "costs" in s 2.
20 Section 449.
21 Section 402(1).
22 (1967) 354 NZPD 4140.

s 5(1) such sum as the Court thinks just and reasonable towards the costs of the defence, and a Court should have the power to include in that sum an expense reasonably incurred by the defendant in preparing the defence, prior to the decision to prosecute.

[23] For these reasons, we conclude that the Act does not impose a temporal limit preventing the recovery of expenses incurred before the decision to prosecute is made. There must however be a sufficient nexus between the incurring of the expense and the prosecution.

This case

[24] On the present facts, there was a sufficient, indeed a very close nexus between the incurring of the analyst's fee and the prosecution. Mr Barr failed a breath screening test and then an evidential breath test. Having failed both those tests, there was a high probability that he would fail a blood test. The result of that test would then become crucial evidence in the prosecution. The cost of analysing the blood specimen was therefore a "cost" for the purposes of the Costs in Criminal Cases Act and the Costs in Criminal Cases Regulations. There must be an equally close nexus where a defendant elects not to have an evidential breath test and to go straight to a blood test. There is no challenge to the amount of the analyst's fee.

[25] Had it been necessary to rule on it, we could not however have endorsed the alternative basis of the judgment of the Court of Appeal that, at the time the blood specimen was taken, a decision to prosecute had been made. As this Court emphasised in *Aylwin v Police*, the rights of a driver to elect to have a blood test and to be advised of that right "must be regarded as providing effective protection against the consequences of an error in a breath-screening test or an evidential breath test". [23] It would be inconsistent with that protection if the Police could be regarded as having decided to prosecute before a driver was advised of the right to a blood test and, if sought, before that test was administered and the blood specimen analysed.

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[23] [2009] 2 NZLR 1 at para [11].

Result

[26] The appeal is allowed, by setting aside the order for payment of medical expenses of $102.60 and substituting an order that the appellant pay $93 towards those expenses.

[27] We were told by counsel for the appellant that the payments ordered by the District Court have not been made. Subject only to the slight reduction in the payment for medical expenses, they must now be made forthwith.

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