IN THE SUPREME COURT OF NEW ZEALAND SC 34/2009

LEROY JOHN BARR

Appellant

v

NEW ZEALAND POLICE

Respondent

Hearing:	08 October 2009
Court:	Blanchard J Tipping J McGrath J Wilson J Anderson J
Appearances:	K H Cook with A J Bailey for the Appellant A M Powell and B C L Charmley for the Respondent

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CRIMINAL APPEAL

MR COOK:

May it please the Court, counsel's name is Cook and I appear for Mr Bailey.

BLANCHARD J:

Yes Mr Cook.

MR POWELL:

May it please Your Honours, my name is Powell, I appear for Police together with Ms Charmley

BLANCHARD J:

Now counsel will have received a minute in the court yesterday. We thought the appropriate way to start would be to get both sides' reaction to that minute.

MR COOK:

Yes Sir, for the appellant we embrace the proposition that's put forward in that minute and that really alters our third submission considerably.

BLANCHARD J:

Yes.

MR COOK:

I think that's putting it fairly plainly. The taking of a blood specimen for analysis actually covers what is currently termed in the District Court as the "medical costs" and it's particularly apparent when one views the case on appeal at page 3 where the "medical expenses: taking blood" is outlined at $102.60 and pursuant to the Gazette notice that actually should be capped at $93 and then the other arguments follow on, whether the analyst's fee is recoverable under the Costs in Criminal Cases Act.

BLANCHARD J:

Well there is the technical difficulty that first of all you would get a refund of the difference between $93 and $102.60.

MR COOK:

Yes.

BLANCHARD J:

But technically you may not now be able to challenge the analyst's fee in this court because it's not being challenged below.

MR COOK:

Yes.

BLANCHARD J:

The issue would then be whether this Court should say anything for the guidance of other cases about the ability of the Crown to recover a blood analyst's fee.

MR COOK:

And then the complicating factor on that is the amendment that's going to –

BLANCHARD J:

Well we wouldn't be concerned with that. That would simply apply for the future. I haven't given any thought to transitionals which might be diabolical but that's something that the Ministry would simply have to wear. Presumably the issues would be the same ones which might encourage us to go ahead and say something about whether that kind of fee is recoverable because it's really the same propositions that would be being argued I guess.

MR COOK:

Yes. Does Your Honour wish to hear from my learned friend?

McGRATH J:

Yes, can I just ask you something Mr Cook? This idea of there's a difference. It doesn't seem to me it's important whether or not the fine has been paid but let's just assume it has been. The total expenses of $195.60 would have been paid so the analyst's fee would have been paid and the medical expenses would have been paid. Is that right at the moment?

MR COOK:

I'll just take some instructions. I don't think that Mr Barr's actually paid anything in –

TIPPING J:

That would seem intuitively correct.

BLANCHARD J:

But whether or not he has omitted to pay the blood analyst's fee, if that fee hasn't – if there's been no appeal from the District Court in relation to that, then I don't think we can get involved at this stage.

MR COOK:

I agree with that proposition.

TIPPING J:

Formally.

BLANCHARD J:

Formally, yes.

MR COOK:

Yes. The Court could, of course, as I think Your Honour put to me, comment on it, that's formally –

TIPPING J:

Because it is precisely the same issue, isn't it, simply transferred across to the other expense?

MR COOK:

It's where you're switching the names around.

TIPPING J:

Yes.

BLANCHARD J:

Yes. All right well perhaps, that's very helpful, perhaps we can hear briefly from Mr Powell. This is really so that we know where we're going with the appeal proper.

MR POWELL:

Thank you Your Honour. The respondent's answer to the preliminary point that you raised in a nutshell is that for the purpose of section 67 of the Land Transport Act, it is a case where the context otherwise requires so the definition of "blood test fee" does not incorporate the definition of "blood test." Now the explanation for that submission involves going back to the history of first the Transport Act from 1968 through the series of three significant amendments. The amendment in 1978 then in 1988 and then the reconsolidation into the new Land Transport Act. I did prepare a synopsis simply to provide an anchor for that submission. That's it in a nutshell Sir. It would take me about 20 minutes to go through it.

BLANCHARD J:

Yes. Is there a context to which the more natural meaning of the word "blood test" and therefore "blood test fee" could apply?

MR POWELL:

Yes Your Honour. If one takes the context to include as both Professor Burrows says in his book and as the Court of Appeal said in *Police v Thompson* the context to include the history of the legislation then the context does require it becomes, in my submission, clear what was intended and that the juxtaposition of those two concepts, the "blood test" and the "blood test fee" was, in essence, accidental.

TIPPING J:

Or just alphabetical.

MR POWELL:

Well that's true.

TIPPING J:

The fact that they're one after the other doesn't mean to say that "blood test" means what it means in the definition of "blood test" when it's conjoined with the word "fee."

MR POWELL:

That's in essence the point but the –

BLANCHARD J:

But does it have any operation other than in connection with "blood test fee"?

MR POWELL:

Yes.

BLANCHARD J:

Somewhere in the Act?

MR POWELL:

Yes for example under the Land Transport Act provision where a motorist can elect a "blood test", the election of a "blood test", if you would supply the definition of "blood test" as the taking of a blood sample for analysis, indicates what it is that the motorist is requesting.

BLANCHARD J:

Can you show us where you are referring to?

MR POWELL:

Sorry, the Land Transport Act was not included in the materials, or that part of it wasn't.

TIPPING J:

Those who crafted the amendment of 2009 presumably thought that context wasn't sufficient, it was necessary to make it doubly clear.

MR POWELL:

It was clarified after, by the select committee, it hadn't been a feature of the Bill before then. The select committee included a paragraph in the explanatory note as to why they'd done it. The catalyst for that, I believe I know what it was, but the answer lies in a submission or a report that was made to the select committee and I recall in previous cases the Court has indicated that that is not material, which constitutes the formal record of Parliament and it's not referred to by the select committee, it was sufficient precision to say, "We've been asked by the Ministry to do this, and that we will do," but –

BLANCHARD J:

Well, I think we probably could take it into account in this context, if I may use the word, because we're not interpreting the 2009 legislation, we're only trying to ascertain why particular words appear in it in the way in which they do.

MR POWELL:

Well, I have copies of it, if –

TIPPING J:

What is the essence of it, Mr Powell? Is it that they thought that it would be desirable to nail it down completely, particularly in the light of Mr Barr's apparent success in one court?

MR POWELL:

The sub-paragraphs C and D makes specific reference to the – well, it starts with, "The Court of Appeal is currently considering a complex legal challenge."

TIPPING J:

So they thought that it was to be an opportunity to nail it down beyond any doubt?

MR POWELL:

Well, it has an added significant, because the primary focus of this amendment is to introduce a process for compulsory blood testing for controlled drugs and prescription medicines and the medical expenses will change, as will the cost of analysing, given that there are many thousands of such drugs, whereas previously that has been a simple test just for the presence of alcohol. So it does seem that – well, it is explained in those two paragraphs, but it's clear that the emphasis was, there is some doubt about the ability to recover the medical expenses, and that is what the Select Committee referred to in that paragraph, then any associated medical expenses will be able to be recovered in the same way as the blood test fee, again indicating that at least as far as that Select Committee was concerned, there had been no doubt about the recoverability of the analyst's fee. But I am conscious that this argument may all sound a little – well, a little optimistic, without a sound basis for it. The basis for it lies in the history of the legislation and, as I say, I have set that out, I won't be going through each Act verbatim, but there are some significant provisions and perhaps the most significant of all is the definition of "blood test". Although "blood tests" became an issue in 1968 when –

BLANCHARD J:

Well, just before you get to that, I had asked earlier, before we got distracted, if you could show is where the word "blood test" –

MR POWELL:

I'm sorry.

BLANCHARD J:

– appears in a different context?

McGRATH J:

Is it section 70A that you have in mind?

MR POWELL:

I'm most obliged to Your Honour, yes, it is section 70A. This was a provision that previously was in section 77, where it says – well, Your Honours can read that short passage for yourselves.

BLANCHARD J:

So, your argument is, in 70A it must mean the actual taking of the blood –

MR POWELL:

Or analysis.

BLANCHARD J:

– and therefore that is, what I'll call "the ordinary context" and that when it's conjoined with "blood test fee" it's a different context and the words, unless the context otherwise requires, enable the Court to give it a different meaning –

MR POWELL:

Yes.

BLANCHARD J:

– in that separate context?

MR POWELL:

Yes. I am aware of course, Your Honour, that the Court's approach to stipulative definitions is that they are not lightly put aside, but nonetheless the context, when I go through it, in my submission, provides the basis for doing so.

McGRATH J:

Well, you've recognised that in your written submissions haven't you?

MR POWELL:

Yes.

TIPPING J:

Would you be prepared to go ahead on the alternative basis, that if you're right in this, the point that was foreshadowed in the minute doesn't arise. If we don't accept what you're saying, what would be your view of us expressing what might amount really just to an advisory opinion on –

BLANCHARD J:

You'd want to know what the opinion was.

TIPPING J:

Well, my brother is being suitably cynical, Mr Powell. But from the point of view of the public interest, we've got this far, wouldn't it be better to have it nailed down and get the answer one way or the other, or does the Crown prefer to kick for touch?

MR POWELL:

Well, the Treasury official on my shoulder would say probably it would be preferable to have the matter fully considered, only because, as the Court of Appeal accepted, an analyst's fee is incurred in every case where a blood test is taken. Medical costs are generally only incurred where you have to get a doctor out of bed, usually in a rural area or after hours. If there was a nurse in the booze bus, where a great many of these are taken, then there isn't any extra cost. But these analysts' fees have been collected since 1988 and, well, it hasn't always been $93, I don't know what the full extent of that would be. We would certainly wish to argue that if the specific regime in section 67 wasn't available, then it is a case par excellence for the use of section 4 of the Costs in Criminal Cases Act, because the production of the blood, the certificate of the blood analysis, is essential to the prosecution, you cannot proceed without out, so it is –

TIPPING J:

You're almost stronger actually, it might be thought.

MR POWELL:

It still faces some of the criticisms –

TIPPING J:

Yes.

MR POWELL:

– that my learned friend has set out in his submissions, but perhaps on, it's slightly further up the hill. But I accept Your Honour's comment that the issues are not significantly different, the problem is the underlying list, whether this was ever an issue in this proceeding, and if it was disconnected from that.

TIPPING J:

Well, it wasn't, but in a case called *Livingstone*, I remember, to do with the blood alcohol regime, whether you could have, when you had it in front of a jury, when both my brother Blanchard and I were in the Court of Appeal and sat on that case, we ended up by giving an advisory opinion because for whatever reason it was there, technically the issue didn't arise. And it was on that occasion anyway, thought to be helpful. If it's not thought to be helpful here, well that's a different matter.

MR POWELL:

Well, I....

BLANCHARD J:

I think you're saying it would be thought to be helpful.

MR POWELL:

It could be from, again from another aspect of the public interest. On a rough calculation this week alone, another 30 or 40 such cases will come before the District Court.

TIPPING J:

But I would've thought with great respect, that the things, the point which should be nailed down one way or the other, and if, if it's nailed down the wrong way from the Crown, then the question of retrospective legislation may have to be considered. It's unsatisfactory, I would have thought, from several points of view to have the thing up in the air.

BLANCHARD J:

Yes, well I'm inclined to agree with that. We should certainly hear argument on it, but your preliminary point is that the argument foreshadowed in the minute isn't correct because of – there's a different context here –

MR POWELL:

Yes.

BLANCHARD J:

– and "blood test fee" doesn't mean the same. The "blood test" in "blood test fee" doesn't mean the same thing as "blood test", and you can demonstrate that from the history?

MR POWELL:

I can try.

BLANCHARD J:

All right, well I think perhaps the most convenient thing is for you to address that argument.

MR POWELL:

Okay Sir. If I may I will hand out – it was necessary to refer to two additional, three additional materials that weren't in the respondent's volume of materials so I've attached those to the back of the submissions. Only brief reference will be required during the course of the submissions. So if we begin with the Transport Amendment Act 1968 which is the first of the attachments or at

least the extract that inserted the provisions relating to the new offence of driving with excess blood alcohol concentration. Of course prior to that the offence was driving under the influence of alcohol and this amendment was the – it also introduced New Zealand to Dr Hawkinstone's breathalyser device and allowed for the two-stage process of breath screening tests followed by a "blood test" and there were, a section 59C which is the, is part of the – it's on the page at number 1277 from the Book of Statutes. It simply required – showed the requirement to submit a specimen of blood. There was a requirement that it be a registered medical practitioner who took the sample or took the specimen, that's referred to 59 – what has become 59C(1), so that was to take for the purpose of analysis a specimen of blood. And in subsection 5 the sample was to be sent to the Dominion analysts who was in effect the head of the Department of Scientific and Industrial Research at the time and had to be analysed, either by the Dominion analyst or one of the government analysts employed there and it there was provision for a certificate. Now although the "blood test" was introduced in that legislation, there was no definition of "blood test". These sections were relatively straightforward and it was apparent from section 59C what was required in terms of the involvement of a medical practitioner taking the sample and then –

TIPPING J:

Is your point that in this context, "blood tests" clearly meant analysis?

MR POWELL:

Yes, yes. But that in my submission accords with the natural meaning of the test which is to, is to conduct an examination to determine something about what you're testing and in this case obviously it's –

McGRATH J:

So at this stage the ordinary meaning of the text you say is just right with you and there's nothing else to displace it?

MR POWELL:

Yes. And then when I move on to the Transport Amendment Act (No 3) 1978, for some reason this has been revisited every, almost every 10 years. Now the significance of this amendment was it introduced the first evidential breath testing device which meant that there was now, essentially the three-stage process we have today of a breath screening test, followed by an evidential breath test and then the blood test was only there if the evidential breath test couldn't be conducted or –

TIPPING J:

Have we got the 70, is it something 78, I'm not sure I've been able to find it?

MR POWELL:

The 78 Act I'm sorry is in the respondent's bundle of authorities under tab 8. The – what was previously contained in those sections 59A to F which the 68 amendment had introduced, they were appealed and replaced by section 58 to 58J and that expanded and more complicated provision accounted for the more complex procedure involving an evidential breath test in between the breath screening test and the blood test.

BLANCHARD J:

Does the word "blood test" appear in the text and is it a defined term in this amendment?

MR POWELL:

Yes, this is the amendment that introduced the definition of "blood test" and it did that perhaps because of the complexity of what was now being inserted into the Act. Parliament enacted section 57A which was a specific definition to apply to the breath and blood alcohol testing regime and that is in the section of the Transport Amendment Act, that's in the volume of authorities.

McGRATH J:

So that's the definition at page 529?

MR POWELL:

Yes, “blood test” means the taking of a blood specimen for analysis.

BLANCHARD J:

And that’s the same definition we’ve still got?

MR POWELL:

Yes, well up until – and now I believe it’s the 1st of November.

BLANCHARD J:

Yes, still as of this moment?

ANDERSON J:

When it talks about breath screening test, it actually refers specifically to a test, not the taking of breath?

MR POWELL:

Yes but of course the nature of an evidential breath test is that the taking of the sample and the delivering of the result is part of the same transaction, whereas with a blood test you take the blood and it’s then sent for the analysis to be conducted by somebody else.

TIPPING J:

In section 58B of the 58 Act which is the one that deals with blood tests, though that’s the heading to it, the language is carried over from, take a blood specimen from, and so on. But in 58B(1)(c) the person advises an enforcement officer that he wishes to undergo a blood test so that’s the only place where the actual expression blood test appears to appear, doesn’t it? Unless I haven’t read on but so far that seems to be it.

MR POWELL:

Yes it does –

TIPPING J:

It doesn't appear anywhere else in section 58B does it – as the expression "blood test" because it goes on to talk about specimens of venous blood and so on, as to the actual thing that's taken. So are you saying that there undergo a "blood test" is simply they want to have the taking of a blood specimen for analysis with the emphasis perhaps more on the "for analysis" rather than the "taking" because the taking is a necessary prelude to analysis but what they really want is the analysis. The taking without the analysis isn't going to be of any moment at all.

MR POWELL:

No and I suppose also given the approach that defence counsel quickly took to this legislation there was the apprehension of a possible Merchant of Venice type argument that well it authorises the analysis of a sample, it doesn't say you can actually take it from me.

BLANCHARD J:

Yes.

MR POWELL:

So there does, one does see as this Transport legislation became progressively more complicated, it's almost defensive in the sense that it's responding to challenges that have been made to the Act and I'm not aware of any particular reason why "blood test" was given a definition when there is also reference to "hospital blood tests" further on.

TIPPING J:

Yes, it's a separate section isn't it?

MR POWELL:

Yes. Given that they're still described what is – what occurs if you either request or are required to undergo a blood test, it is the taking of a blood specimen by a medical practitioner and the subsequent analysis by the

government analyst. So what great purpose it served to actually define a blood test is not apparent.

BLANCHARD J:

The hospital blood test provision, does that have reference to the government analyst in it or is it just about the circumstances of taking?

MR POWELL:

It seems to replicate the same process.

BLANCHARD J:

Oh I see, it does it by cross-referencing.

MR POWELL:

Yes.

BLANCHARD J:

That dreaded technique which Courts deprecate.

McGRATH J:

Sorry is this, we're page 540 now are we?

MR POWELL:

Yes.

McGRATH J:

Thank you. Just identify that part for me, I'm not overly familiar with it.

TIPPING J:

It's sort of déjà vu, this stuff.

BLANCHARD J:

All over again.

MR POWELL:

If you look at the bottom of page 541, subsection (5), it says that subsection (3) to (11) of section 58B shall apply.

McGRATH J:

Thank you.

TIPPING J:

Mr Powell is your charmingly described Merchant of Venice point that they needed express statutory authority, both for the taking and the analysis?

MR POWELL:

Yes there was even for the time, although I haven't put it before the Court, the Hansard references in 1968 the Minister of Transport in his introduction speech, and in the third reading speech, referred to the concern that had obviously been voiced by the Law Society about the invasion of bodily integrity involved in compulsory blood testing and also the self-incrimination that was involved and also what they perceived as a wider public concern about police or, in those cases, traffic officers waiting outside hotels or randomly stopping people and testing them so they talk about the overlay of protections to cover what they were doing. So it does seem there was some care to describe exactly what it was that the motorist was required to do. Although, with all due respect to the drafters, a specific definition does appear to be surplus in that case because the legislation plainly set out what the blood test meant. But the important thing is there was no reference to a blood test fee at all.

That brings me to the next stage which was the Transport Amendment Act Number 2 of 1988 and that's under tab 9.

BLANCHARD J:

I suppose what you're really saying is that in it's context, in the 1978 legislation, the definition really should be read as if the word "for" were the word "and".

MR POWELL:

Yes I would like it to mean that. Whether I can say that it does. The only time this ever seemed to be considered was a case in the Court of Appeal called *R v Salmond* where perhaps the facts may prompt your memory a group of –

BLANCHARD J:

Yes I think we casted a doubt on aspects of it in a decision in *Nan*.

MR POWELL:

Yes this was the use of the – they used the blood sample –

TIPPING J:

For identification.

MR POWELL:

– to identify the driver by I think the blood type of blood that was found on a steering wheel and the question was whether the Act which permitted the taking of blood for analysis was restricted to analysis for its content of alcohol and I think the Crown got in by a whisker –

TIPPING J:

3/2.

MR POWELL:

Yes and by the sound we lost the away game, did we?

TIPPING J:

No, not quite.

BLANCHARD J:

No in fact it went the other way and suggested that it wouldn't be such a difficult case now, for the Crown.

MR POWELL:

Well that's reassuring.

McGRATH J:

What was the name of that case again?

MR POWELL:

Salmond was the first one.

McGRATH J:

Salmond, that's right, thank you.

TIPPING J:

It was a manslaughter was it?

MR POWELL:

I think so. It was a rather nasty accident but the Court did speak about this. This was an almost a self-contained part of the legislation and the, that changed in 1988 and that's what landed me in the trouble I'm in now.

BLANCHARD J:

I'm sorry, I interrupted you when you were moving to –

MR POWELL:

The 1988 legislation which is under tab 9. Now the principal effect of this amendment was because the infra-red breath testing devices that are now commonly used were introduced and Parliament had sufficient confidence to declare that the result of the evidential breath test could be conclusive if it was above a certain level and therefore no blood test would be required. Again I haven't put the Hansard reference in but there was mention of the concern at the pressure that was going on the government analyst to process all of the blood test results and so a blood test was only available if you were over the breath alcohol limit but beneath, I think it was 600 micrograms then, you could be required to undergo a blood test. But as far as this case is concerned the

significant – the sample of blood was still to be taken by a registered medical practitioner but there was a change to the definition. Instead of the Dominion analyst being the necessary recipient, the Act defined a new term of Ministry analyst and that's in the amendments to, or the new section 57(1), this dedicated interpretation section –

BLANCHARD J:

That's page 2603?

MR POWELL:

Yes. So it allowed for the Minister to give notice in the Gazette essentially to approve another analytical laboratory to undertake the blood tests. Now as the Court of Appeal could not see why the concept of a blood test fee was introduced, I'm not sure if the connection is strong enough, based on that, but it does, the involvement of anyone other than a public servant conducting a test does raise the issue of a cost being incurred and of course 1988 was around the time the public servants started sending each other invoices anyway to pay for those sorts of things. The ESR, as it now is, or ESR Limited, the Crown Research Institutes Act didn't come in until 1993 and the only Gazette notice I could find was the Gazette notice, the earliest one was 1992 which said that ESR Limited was an approved laboratory. So there was no evidence that any other organisation began the blood testing.

BLANCHARD J:

You're not suggesting that the expression "blood test" changed its meaning in 1988?

MR POWELL:

No, because the introduction of the blood test fee, which also occurs in that amendment, is in section 30AB. This is the penalties, because one of the criticisms of the Transport Act that was addressed in the Land Transport Act was that the drink driving offences and the penalties for those offences were found in different parts of the Act. Section 30AB(4) –

McGRATH J:

Page?

MR POWELL:

Page 2597 of that Amendment Act. That is the section which said that the motorist who was convicted of certain offences involving excess blood was liable to pay the blood test fee as Gazetted by the Minister.

ANDERSON J:

Bit surprising it didn't say the blood test analysis fee.

MR POWELL:

That would have been nice.

ANDERSON J:

You see, at that time, there was still potential for incurring two fees, so why didn't they cover the cost of taking the blood? Which would normally not be done by a government employee.

MR POWELL:

No, and even in the 1970s, I can't imagine that doctors got out of bed for nothing to do it, there would have been a cost. There was the Costs in Criminal Cases Act, of course but I don't think it was ever referred to and I certainly couldn't find any cases where this issue ever arose so there's no discussion of why. But the important point is that although the definition of "blood test" is still there in section 57A, the section 57A begins with "In this section, and in sections 58 to 58J and section 63 these interpretation provisions apply…". In other words, that didn't apply to section 30AB.

ANDERSON J:

Sorry, could you just say that again please?

MR POWELL:

If you look on page 2601 of the Amendment Act, the reincarnation of section 57A, which is the specific definition section for the breath and blood alcohol procedures, begins by saying "In this section, and in sections 58 to 58J and section 63 of this Act, unless the context otherwise requires." So the definition of "blood test" applied to sections 58 to 58J and section 63. Parliament did not purport to apply it to section 30AB.

TIPPING J:

Was there, in the `88 legislation, any definition of "blood test fee"?

MR POWELL:

There was never any definition of 'blood test fee" in the Transport Act.

TIPPING J:

None at all?

MR POWELL:

No, that definition –

TIPPING J:

Just drove itself, apparently, off blood test?

MR POWELL:

Well, it came, the definition of the "blood test fee", if you look at section 30AB, it says, "The blood test fee prescribed by the Minister by notice in the Gazette and in force on the day in which the offence was committed."

BLANCHARD J:

So you're saying it can have its more natural meaning in section 30AB and its more natural meaning is directed to analysis?

MR POWELL:

Yes.

BLANCHARD J:

Because there will always be an analysis and it's possible to prescribe a standard fee, whereas you don't know whether there'll be medical expenses?

MR POWELL:

No.

BLANCHARD J:

And the range of variability for medical expenses is much greater, is that the argument?

MR POWELL:

Yes. But that takes me to the next step, which was the Land Transport Act 1998. And this is, in essence, where the problem that I now have to address was created. So the previous regime had applied for 10 years, where blood test fees were recovered, and in my respectful submission, there would have been no doubt at the time as to what the blood test fee referred to. But in 1998, the structure of the Act changed and the two interpretation sections, that is there was the general set of definitions in section 2 of the Transport Act, and the specific definitions for breath and blood alcohol offences in section 57A were consolidated into a single –

TIPPING J:

Sorry, I just got a bit lost, where do we find the `98?

MR POWELL:

I'm sorry, the `98 Act isn't in the materials.

TIPPING J:

In your supplementary?

MR POWELL:

In my supplementary submissions, I have included the second and third attachments, the explanatory notes, first from the Land Transport Bill as it was introduced, and then as it was reported from, back from the Transport and Environment select committee.

BLANCHARD J:

Professor Burrows doesn't like us using those. He ticked off Justice Thomas and me for getting too enthusiastic about an explanatory note in one case.

TIPPING J:

That was not all that was the problem with –

MR POWELL:

Well, the approach then seems to be that as long as their servants are not masters, if they actually assist the process of interpretation and you can be confident that they do so, then there doesn't seem to be an objection.

McGRATH J:

You realise sometimes they're written in quite a hurry?

MR POWELL:

Yes. The Transport legislation is one area where there is quite often cross-party support or co-operation in the select committee, so they can be a little more reliable in that circumstance, but the important point, looking at the clause by clause analysis on page iii, it says, "Clause 2 defines terms used in the Bill, the clause groups together definitions contained in sections 2 and 57A of the Transport Act," and there's no other explanation as to what they were doing with that interpretation section. But of course, because the interpretation section, like all interpretation sections, says, "In this Act, unless the context otherwise requires…" it made that definition of "blood test" available to section 57 which was the blood test fee section.

TIPPING J:

Wasn't the definition of "blood test" equally apt to inform the blood test fee in the `88 legislation? What was different? I'm probably missing a cog here, Mr Powell.

BLANCHARD J:

The argument I think is that section 30, I may be getting the numbers wrong now, 30AB, it did not apply to, so that there was an ability to say it had a different meaning?

TIPPING J:

Oh, you mean it was confined to a different part of the Act?

BLANCHARD J:

Yes, here in 1998 they'd have actually applied it to everything else.

TIPPING J:

I'm sorry, that's the step I missed.

BLANCHARD J:

And the question would then be if it had a different meaning first, has it changed its meaning?

TIPPING J:

I'm on board Mr Powell, it was a slow process, but I'm on board.

BLANCHARD J:

I'm just thinking out loud.

ANDERSON J:

Perhaps the blood test fee is meant to cover both the taking and the analysis?

MR POWELL:

That's the point that my friends have made in their final submission.

ANDERSON J:

Because the notices don't say what they're for. They just say that they're pursuant to section 67.

MR POWELL:

Yes. But there has never been any reference to the medical expenses in the legislation. The only reference has ever been to the blood test fee.

ANDERSON J:

That tends to support the appellant's argument on the issue. It's meant to cover the whole process, which then reconciles the definitions as well.

MR POWELL:

If I may, I do deal with that in the course of my response to the main appeal. But the other point, just to continue, the other commentary from the Bill as reported back, on page XV, under the heading "Structure of the Bill", there were concerns expressed by the Chief District Court Judge about the centrifugal nature of the Act, which made it difficult to follow because the blood alcohol offence provisions and the processes for taking the samples were in one part of the Act and the penalties were in another.

McGRATH J:

So what Roman page number?

MR POWELL:

Page 15, XV.

McGRATH J:

Thanks, right.

MR POWELL:

So, in essence, the relocation or re-housing of the definition of "blood test" into the main interpretation section and the reorganisation of the sections dealing

with breath and blood alcohol offending into a single part of the Act were done in order to make the Act easier to follow, it wasn't intended to create any different definition of what the "blood test fee" related to, which to that point –

BLANCHARD J:

But when the Bill was introduced was the definition of "blood test" available to the section that has become section 67?

MR POWELL:

Yes, it became available.

BLANCHARD J:

So really the restructuring didn't change that?

MR POWELL:

Oh, no, I'm sorry, under the – up until the Land Transport Act, no, it only applied section 58 –

BLANCHARD J:

No, I understand that, but when this Bill got introduced, did the definition of "blood test" appear in the definition provision generally, or did it only get general application when they re-jigged the order of the sections?

MR POWELL:

I don't have the Bill, I simply extracted the commentary, I don't have with me the actual Bill that would show the presentation of the sections. My understanding was that all of the definitions were consolidated into section 2 when the Land Transport Act was redrafted, so it would have had that appearance –

BLANCHARD J:

So the re-jigging really made no difference?

MR POWELL:

Well, the re-housing of the interpretation section certainly did, because it made that definition available.

BLANCHARD J:

Yes, but that happened at the Bill stage, not at the select committee stage.

MR POWELL:

Yes, yes, no, I'm sorry, I see the, yes, the significant.

TIPPING J:

If it was already there, general, then the re-jigging made no difference?

MR POWELL:

No, no, that's correct, but perhaps the –

BLANCHARD J:

It would support your argument if it was not generally available when the Bill when in, and then they had to do some re-jigging, and in the course of that the definitions became generally available.

MR POWELL:

No, I – it's obvious that I've put that submission too highly. All I was endeavouring to say is that the fact that all of those provisions, what was in section 30AB, which was previously in a completely different section of the Act, is now in the same part as the other sections, makes it more confusing, but the idea was simply to simplify the structure of the Act. If you look back into the Transport Act, which didn't operate in any particularly different way, it was quite clear that the two things were separate, and –

TIPPING J:

I think your best point, quite frankly, in relation to context, is not so much a historical one, but the one that my brother Blanchard synthesised for you a

few moments ago when it was suggested that the analyst's fee was an invariable and fixed cost –

MR POWELL:

Yes.

TIPPING J:

– whereas the medical costs were uncertain and, presumably, variable in amount.

MR POWELL:

Yes.

TIPPING J:

Therefore that context quite strongly suggests that a standard fee must have been intended to relate to a standard procedure.

MR POWELL:

Yes, that would be incurred in every case.

TIPPING J:

Yes.

MR POWELL:

That point is also apparent from the amendment to the, the 2009 amendment, which is to take effect, because it refers –

TIPPING J:

And it's that aspect of context, frankly, perhaps rather – although maybe slightly assisted by the historical context that might, might enable you to shrug off the prima facie position.

MR POWELL:

Yes. Well, I would certainly adopt that as the respondent's position, and then if it be a stronger argument then of course I would put my weight behind that.

McGRATH J:

Is another aspect of the context possibly how ESR was financed to do these tests? You know, if it wasn't charging, you said departments were invoicing by 1988 each other, but if it was just funded separately as one of it's outputs of the particular Ministry?

MR POWELL:

My attempts to investigate that got down to the level of speaking to two scientists who had been at the ESR since the 1970s, but as far as interpreting statutes goes I thought that was about as unreliable as you could get, and they didn't know anyway.

McGRATH J:

Thank you.

MR POWELL:

The ESR was, ESR Limited was clearly operating as a laboratory under that name by 1992, because there was a Gazette notice to that effect, but it wasn't a state-owned enterprise and the Crown Research Institutes Act, which essentially changed it to its current form, wasn't until later.

McGRATH J:

I think we'll let it go, Mr Powell.

ANDERSON J:

The counter argument to the proposition addressed by Justice Tipping was that the state was used to carrying its own costs, but would be less keen on paying disbursements to private people without reimbursement.

MR POWELL:

Yes, it all comes down to whether the funding is made available from the Crown accounts for a particular activity, and certainly at the time of the 1978 Act the police would have received funding for whatever functions they were undertaking and the government analysts would as well. But as to when they were each put on a more commercial footing, it's not clear, although I do say that the redefinition of who was to conduct the analysis, involving at least the possible involvement of somebody other than the dominion analyst, would have raised the prospect of disbursements being incurred. But as Your Honour noted, the notices setting the "blood test fee" have never done anything other than simply say, "this is the amount," without reference to how it's been struck.

ANDERSON J:

I've often wondered whether it's Immigration Acts or the Transport Acts which are the most obscure of all our legislation.

BLANCHARD J:

Well, the Fisheries Act.

ANDERSON J:

I don't want to set that here.

MR POWELL:

Yes, unfortunately, for various reasons, the path of legislating road safety has been particularly tortured. There are instances where the Act has been altered to either cope with different technology, such as the introduction of more precise testing devices, or often to counteract the effect of arguments that have been raised –

ANDERSON J:

Has it been drafted in-house, within the department, over the years?

MR POWELL:

I'm not sure whether that – Justice McGrath will know far better than I, the Parliamentary council had a much firmer grip on that process in the 1970s and 1980s.

ANDERSON J:

It's not relevant, I've just been curious because of the way that it's developed year in and year out in such a sort of ad hoc way really.

MR POWELL:

Yes, well, it does, and of course that process continues with the new Act, trying to address what is obviously a matter of grave concern, that is, motorists have consumed drugs, and in particular what can be done to prove that they have consumed drugs. But it does involve an additional layer of complexity and the Act become again more difficult to follow.

TIPPING J:

Has that brought the historical aspect of it right up to date now –

MR POWELL:

Yes.

TIPPING J:

– or is there another step?

MR POWELL:

I only wanted to address the 2009 amendment, which the Court also referred to. In part, if I refer you to tab 4, I beg your pardon tab 3, where the amendment that's taking, come into effect is set out in full. On section 14 of that Amendment Act.

ANDERSON J:

It's actually at tab 4 isn't it, not tab 3?

MR POWELL:

On my one it's tab 3.

BLANCHARD J:

We've got two versions.

MR POWELL:

Well that's helpful. And if I can adopt the proposition that Your Honours Justice Blanchard and Tipping have drawn my attention to, that importantly it – Parliament clearly recognised the variability of medical costs because the way section 67 is to be amended is to insert the words, "and any associated medical expenses." And the -

TIPPING J:

That seems to suggest that whatever the doctor charges, within the realms of reason it's presumed, is to be passed onto the convicted motorist?

MR POWELL:

Yes that removes it from where the Crown would say is now in a discretionary regime through to an automatic incidence of conviction. So in the extreme case where if you're in Fairlie in the middle of winter and the roads are all out and the doctor comes in by helicopter by Christchurch, the fee might be a couple of thousand dollars but while there is always, while there is capacity for the Court to consider what is reasonable, then there is capacity to ensure that the burden that's inflicted on the motorist is fair in the circumstances. But that is the danger of putting it into the section that makes recovery automatic rather than leaving it as matter for the discretion of the Court as to whether the costs should be –

TIPPING J:

And the value of so, how much?

MR POWELL:

Yes, so it's a question of how much a reasonable fee – now that still does predispose an argument from the police that, well it was reasonable to fly the doctor in, you insisted on a blood test, we had no other way of doing it, we can't prosecute you because you requested one and because of the rate of elimination of alcohol from the body, if it took four hours, by that stage you may well have passed the blood test, so we had to get the doctor there quickly. The only way we could do it was by using an air service. Now that's an extreme example, but that is a consequence of Parliament's decision –

ANDERSON J:

It's not very likely is it, I mean there will be a nurse in Fairlie?

MR POWELL:

Yes one hopes even a doctor, but…

WILSON J:

Mr Powell, as a matter of law, can the 2009 amendment be used to interpret the Act as it read prior to that amendment?

MR POWELL:

In my submission if it gave sufficiently clear indication of what was intended previously, so if the law, if Parliament made it clear that they were changing the law, yes.

WILSON J:

I do have a recollection there are some authorities to the contrary. I think *Databank v Commissioner of Inland Revenue* maybe one where, to my disadvantage, the Privy Council accepted the Commissioner's argument that a subsequent amendment couldn't be used to interpret an Act.

MR POWELL:

Well...

BLANCHARD J:

I think the real problem is that the 2009 amendment is against you rather than for you, if it's taken into account as a matter of interpretation. That's certainly the way I saw it at the time we were preparing the minute. You've drawn our attention to section 70A, the right to elect a blood test in order to argue that "blood test" in that section had a different meaning from what it has in "blood test fee" where the Act presently is but interestingly in this 2009 amendment, they haven't – they're not amending section 70A –

MR POWELL:

No.

BLANCHARD J:

– they're giving "blood test" the same meaning throughout the legislation and it's obvious, because they didn't have to amend section 70A, it's obviously quite clear that it could easily mean the analysis.

TIPPING J:

I don't think this later Act has got sufficient clarity to enable it to be used to interpret the earlier Act myself. I think that one's just punching randomly quite honestly. It's not one of those exceptional cases where I think there is an exception, that it's sort of almost says what, you know, self defining so to speak, so I would myself be inclined to the view that (a) we shouldn't look at it and (b) if we do, we're not going – it's the same point really – we're not really going to get any help from it.

BLANCHARD J:

I agree with my brother, and I don't think he meant to criticise the drafting of the new Act.

TIPPING J:

No, not at all, I just say as a matter of principle.

BLANCHARD J:

In saying the clarity is not, the clarity that he was referring too is clarity as a means of explaining the existing position.

TIPPING J:

Because you can always say, well you can either argue, well this is recognising the previous law had a gap in it or you can argue this is recognised – this is just putting in something expressly that was clearly there implicitly but just sort of belt and braces, so – but it doesn't give any real guidance as to which of those two it is.

MR POWELL:

Yes well on that basis Sir, the explanatory note is even further away and the thing I was going to produce to you was –

TIPPING J:

Anyway I'm inclined to agree with my brother Blanchard that you may be better off without it.

MR POWELL:

Well on that basis Sir, that's as far as I can take the submission on the preliminary issue that you raised. I, except to say as I said at the end of my supplementary memo, I accept of course that if you have a specific provision in the Land Transport Act which is inconsistent with the more general provision in the Costs in Criminal Cases Act 1967, there does not appear to be any room for that general discretionary provision to apply because the, what the Act does is not only define the "blood test" but also provide for it to be capped at a certain figure and one couldn't invoke the discretion to change that. So it would mean that the answer to this Appeal if, if the Court were of the view that the definition of "blood test fee" referred to the medical expenses, then if one goes back to the question posed on this Appeal as to the Costs in Criminal Cases Act can be used, the answer would have to be no, but of course it does beg the other question which the Court raised which is, would nonetheless that just shift the focus the fee for analysis.

BLANCHARD J:

Thank you that's been very helpful and a very clear explanation of the statutory history. Now Mr Cook I think, I suggest that unless you strongly think otherwise, you should simply pursue the arguments as you had originally intended to argue them because they're pretty much the same if we start addressing the analysis.

MR COOK:

Yes Sir.

BLANCHARD J:

The analysis fee. The only difference being that it comes perhaps at a slightly later point but I'm not sure that would make too much difference.

MR COOK:

Yes Sir, and I'm happy to proceed on that basis. There's a division of labour on the appellant's side and that I will be dealing with the argument that my learned friend's just dealt with, the preliminary point, and then Mr Bailey will be dealing with the rest. I think that I can be rather quick because the Court's really teased out all the alternative propositions so I imagine, against myself, I'm probably going to be less than 10 minutes and then move to Mr Bailey.

BLANCHARD J:

Is that the hospital pass?

MR COOK:

Deftly done. If I could just outline the broad proposition and that's really taken from the minute that the only cost that the appellant should pay under the Land Transport Act are the costs incurred in the taking of a blood specimen for analysis and then that's capped at $93 and that's the limit of Mr Barr's liability under that Act. The choreography or the steps required in the statute through the specific sections is that one starts with section 67 which the Court

has gone through, and then to section 2(1) and the words which have attained some prominence here, “unless the context otherwise requires” and then the definition of “blood test” which means the taking of a blood specimen for analysis. Now in tab 29 of the Crown’s – sorry the respondent’s bundle, a section is taken from Professor Burrows’ book. The preceding page, page 421, is also relevant but that just makes the point that a great majority of New Zealand statutes use that phrase at the beginning of an interpretation sections and even though that’s been criticised recently by the New Zealand Law Commission in the legislation manual which was report 35, because careful checking should avoid inconsistent usage. Now the Court, and this is why I can definitely cut down my submissions, has teased out the alternative propositions about what the context is here and whether that context displaces the presumption that it really should be the definition section. In that discussion between my learned friend Mr Powell and the Court Justice Tipping said that, “In this context a blood test clearly meant the analysis,” and that’s really the proposition that’s put forward from the appellant is it’s that definition is not displaced by any other context here. If one looks at –

TIPPING J:

Sorry, just say that again? You say that the context is that the blood test fee is confined to the analysis?

MR COOK:

Sorry Sir, I think I put it wrong.

TIPPING J:

I rather thought you might have.

MR COOK:

I did. My proposition is that it’s the definition and there’s nothing to displace that and we’ve had the arguments for and against –

TIPPING J:

So the expression “blood test” in the expression “blood test fee” –

MR COOK:

Yes.

TIPPING J:

– incorporates the definition?

MR COOK:

Yes.

TIPPING J:

Yes, that’s what I thought your argument was.

MR COOK:

That’s what I did mean to say and I did get it wrong and the transcript will prove that I got it wrong.

TIPPING J:

So the context doesn’t displace the applicability of the definition?

MR COOK:

No that’s right Sir.

TIPPING J:

That’s it in a –

MR COOK:

And the only two further points that I wish to make on this preliminary point, and it’s at tab 24 of the respondent’s bundle, and it’s a case, Court of Appeal of *Police v Thompson* and it’s just to highlight two presumptions of statutory interpretation that are well known. I was also interested to see the counsel involved in that case, *Police v Thompson*. Page 818 of the report, which is

the President's judgment, beginning at line 13 and it's, "The view I take is this…" right through to line 20. And then if we flick forward to page 823 of the report, which is Justice Turner's judgment at line 11 the, "Take first the matter of context…" right through until the case in which Viscount Symonds spoke and – other than the matters that went between I can really add nothing to the arguments that were put forward and I embrace Justice Anderson's point as well, about the wanting to reimburse a public person rather than from an individual that's already employed by the government. That's all that can be said on that proposition in terms of the ability under the Land Transport Act to recover these costs. Unless there are any questions on that preliminary point I'll hand over to Mr Bailey to deal with the issues that really focus the Courts below.

BLANCHARD J:

Thank you Mr Cook.

MR BAILEY:

May it please the Court. I don't anticipate I'll be too much longer. I think it might take about half an hour and that should cut it out. I'm just going to deal with submissions 1 and 2 in the order as set out in the appellant's written submissions. Just to clarify the terms we've used in our written submissions, when we've referred to court related costs that's strictly limited to court costs that are normally awarded, I think currently $130, witness expenses and solicitor's fees. Investigation costs are really as it sounds, costs relating to investigations, but anything other than court related costs we'd term investigation costs. I really need, given the discussion to date, to proceed on the basis that if the Court was to accept the Crown's argument that the blood test fee was the analyst's fee, or that's what was intended, and that would lead the question of whether medical expenses are recoverable under the Costs in Criminal Cases Act. Submission 1 is all to do, of course, with the interpretation of section 2 and 4 of the Costs in Criminal Cases Act. We have set out seven reasons or submissions which we say support the Court restricting that and adopting a narrow interpretation and if I can just work through those relatively quickly. Plain wording of the statute, this is at page 5

of our submissions, in my submission there are two indications that section 4 and 2 are meant to restrict costs narrowly, in terms of what's recoverable, and that's the word of the, in section 4, "prosecution", specifically "prosecution costs" and further added to, or restricted in our submission, by the phrase in section 2 "in carrying out". In my submission, the starting point for section 2 has to be that it has been included for a reason, therefore "in carrying out" has been included for a reason, otherwise the definition of section 4 wouldn't change, and that can't have been the legislative intent.

WILSON J:

Mr Bailey, why can't the cost of obtaining evidence, which will be required for a prosecution if a decision is made to prosecute, be said to be an expense incurred in carrying out the prosecution?

MR BAILEY:

In my submission, prosecution really relates to legal proceedings and that's further confirmed by the phrase "in carrying out", and particularly, which I'll come to, the legislative history.

TIPPING J:

Isn't the more important phrase, "carrying on"? I mean, if it's got nothing to do with the prosecution, you know, you're out, but the more difficult phrase is "carrying on". Does that have a strict temporal connotation, as your client would suggest, or does it have a more purposive, if you like, connotation, assisting in carrying out, or undertaking the prosecution?

MR BAILEY:

The previous UK legislation that has now been repealed was nearly identical in the Crown Courts to the phrase that we now have, and of course, and I might hand out just one hand out that I propose to hand up.

TIPPING J:

Do you accept, Mr Bailey, that it's capable of the two competing contentions, or do you say it's incapable of bearing the wider contention?

MR BAILEY:

Incapable once the previous history is looked at.

TIPPING J:

Incapable in light of previous history, thank you.

WILSON J:

Putting aside previous history?

MR BAILEY:

It's not clear. The Magistrates Courts in the United Kingdom, as can be seen, they're on the left-hand side, they've always had the widest ambit, if you like, for costs, there's been no mention in those sections of prosecution costs, and there's been no further restriction in carrying out. That contrasts to the 1973 Crown Court situation, section 4(1).

TIPPING J:

"In or about", well there wouldn't be too much trouble if it said that.

MR BAILEY:

Yes Sir, in my submission that's similar to what we have in section 2 in the Costs in Criminal Cases Act.

BLANCHARD J:

When you say previous history, this is UK legislative history, but what's it got to do with our Act?

MR BAILEY:

Basically, section 4(1) of the 1973 UK Act was, or is, identical to our Act now and the case of *Maher* explains, and the subsequent cases, why investigation costs were recoverable under some of the previous Acts, but not that in the Crown Court.

BLANCHARD J:

So you say we drew our section from the UK?

MR BAILEY:

Probably not, looking at the years that it was, in 1973 passed, so that Act was passed after our Act. But it helps in terms of interpretation.

McGRATH J:

Well these arguments by comparison, you can get a bit carried away with them. Someone once described them as mystical. That can be even so when you're comparing successor legislation in the same jurisdiction, but I think you're drawing a long bow unless you've got something really clear to point to English legislation as a model, and I don't see that in your written submissions.

MR BAILEY:

No Sir. All I'm trying to say is there has been a distinction between the various forms of costs –

McGRATH J:

We're using different words, I can understand that and you can say our words, that that may help you explain the point you're making as to what the words mean, but is the prior legislation in England really a legitimate comparison?

MR BAILEY:

Well I would have said it was, but perhaps not in light of the Court's view.

TIPPING J:

I think the only point that is available to you, and I'm not suggesting it's a particularly strong one, but I don't know, is that when you contrast "in or about the prosecution and conviction" with "in carrying out a prosecution", it could be said that there was a studied decision in New Zealand to make it narrower. But like my brothers, I'm not a great fan of this looking elsewhere unless there's something of a king hit.

MR BAILEY:

Certainly Sir.

TIPPING J:

But I take it you do rely on that proposition for what it can do for you.

MR BAILEY:

Yes, and there's good discussion in those cases particularly *Associated Octel* and the recent case of why the Courts took a different view under the 1973 legislation to the current legislation in the United Kingdom.

ANDERSON J:

What it amounts to is that any English authority which you can point to and rely on is an extemporary judgment of a divisional Court. This was the only New Zealand authority you can point to is an extemporary judgment of the High Court, in *Lovell*. So one really needs to get back to the words themselves.

MR BAILEY:

Yes.

ANDERSON J:

And do you think there might be some significance in the reference to carrying on a defence? What's good for the goose is good for the gander, and if the defence can't claim pre-prosecution investigatory costs, then nor should the Crown be able to, and one would not normally talk about someone preparing to be prosecuted, that they are carrying on a defence.

MR BAILEY:

Sir, in my submission, and the Crown's raised this, that if the Court took in our interpretation, it would mean defence costs that are in the form of investigations couldn't be recoverable. I see it slightly differently and my submission would be that would be recoverable, those costs, under solicitors'

fees, because whilst the solicitor might not be doing all the investigations, the solicitor is the person that is going to be billing the defendant for that work.

ANDERSON J:

But we're really concerned here with pre-prosecution costs, whether they're for the prosecution or incurred for the prosecution or for the defence.

MR BAILEY:

Yes.

ANDERSON J:

The costs incurred before the information is sworn, or a complaint laid under the Summary Proceedings Act.

BLANCHARD J:

Do solicitors' costs have some special standing?

MR BAILEY:

No, they were just mentioned specifically in the section 72 Summary Proceedings Act as being recoverable, was one of the three things that I outlined at the beginning.

BLANCHARD J:

Yes, well we've, of course, got to think about more widely than just summary prosecutions.

MR BAILEY:

The second indication to whether, in our interpretation should be taken is in page 6 to 7 of our written submissions and that's simply the heading of section 4, which is "Costs of the Prosecutor", not even "Costs of the Prosecution", and of course in many cases, the prosecutor will be separate from the investigating authority, so it would seem an anomaly if, in that case, investigation costs weren't recoverable, because they're not the costs of the prosecutor.

TIPPING J:

With great respect, I would have thought, if anything, that heading was against you because it suggests a much wider ambit. "The prosecutor" is a generic term, whereas it can be argued that "the prosecution" is focused on a particular temporal period, so I'm not sure that I'd be hammering this one too hard.

MR BAILEY:

Right, Sir.

TIPPING J:

Well, it's over to you, but it's just an initial reaction, Mr Bailey.

MR BAILEY:

I think the point is, the prosecutor will be in Court and his costs will be related to –

TIPPING J:

Well the Crown prosecutor isn't always in Court.

MR BAILEY:

No Sir.

TIPPING J:

It's getting very literalistic, this.

BLANCHARD J:

The emphasis seems to have been a lot on the word "in". Now, curiously, it appears in relation to a prosecution and it appears in relation to an appeal, but it doesn't appear in relation to a defence. What do we make of that? That there's less restriction in relation to claims by the defence?

MR BAILEY:

I think it just simply recognises that everything that a lawyer for the defendant does, will be in relation to the Court proceedings, whether it's investigation or not, it will be trying to get the person acquitted.

BLANCHARD J:

Well what about if it's something done before the prosecution is actually launched, in order to try and head it off? In other words, they incur a cost of briefing a witness, for example, hoping that what that witness has to say will persuade the police that there's no point in prosecuting.

MR BAILEY:

If they weren't charged, they wouldn't escape conviction so there wouldn't be costs recoverable.

BLANCHARD J:

Yes but in my scenario obviously they were charged.

MR BAILEY:

And that would, in my submission, be encompassed in carrying on an offence.

BLANCHARD J:

But the same thing doesn't apply to the prosecution because of the word "in" or is it because the word "on" is used rather than "out"? It all seems to me to be rather diffuse.

MR BAILEY:

It's not clear, no.

TIPPING J:

I think "in" is understood before "carry" and it's just linguistically chosen not to repeat.

BLANCHARD J:

Although it's strange that they then repeated it in relation to an appeal. I don't think this is drafted with the kind of precision that has been attributed to it.

McGRATH J:

I think that's, for my part I agree with Justice Tipping that it's not quite "in" isn't, to my mind, your problem because I can accept that "in" is looking towards something that has boundaries. But I'm not, at the present time, clear on why we should be reading "carrying out a prosecution" in terms of require the prosecution formally to be initiated as opposed to, if you like, being expected. And in most cases, I know not all, but in most cases by the time that we get to the taking of blood there is an evidential breath test available that is signalling likelihood of prosecution and I don't – it seems to me that what you really have to meet is the argument that that is, on proper purpose of principles of interpretation, an appropriate place to say when the prosecution's underway or being carried out, that's what I'd like some help on perhaps after the break.

MR BAILEY:

Yes Sir.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MR BAILEY:

So now I'm onto point 3 of our submission 1, which is the history and this is probably in my submission, the best indications. You had the Crimes Act 1961 section 402 which didn't specify in detail which costs were recoverable but section 72 Summary Proceedings Act did. The purpose of that Act as far as costs being awarded against convicted persons is set out at paragraph 30 of our submissions on page 7 and that was simply to re-enact those previous provisions. If there was a difference in the intended interpretation or

application of those different sections, then the Act couldn't re-enact them into one Act. Therefore in my submission, section 72 provides the clearest guidance as to how section 4 and section 2 of the current Act should be interpreted.

TIPPING J:

I'm not sure that I quite follow that Mr Bailey, because it seems to me that if you're saying that there's no intention when consolidating for change, that suggests that the section 402 regime which was pretty broad was carried forward into the CCA regime?

MR BAILEY:

It was Sir and –

TIPPING J:

So you say towards, just towards the cost of the prosecution that that would have not allowed – it's either the same, it's – I would have thought that was a wider approach than arguably than the one that is in the new Act?

MR BAILEY:

Well it's certainly not as clear as section 72 which sets –

TIPPING J:

Yes, but they've eschewed any such precision. They've gone for the wider –

MR BAILEY:

Yes.

TIPPING J:

– not the narrower.

MR BAILEY:

But in the passage of the Act being passed there was no suggestion and there's been no case law to suggest that there was a distinction between those two Acts and its application.

BLANCHARD J:

When you say, as set out in the CCA Bill, what are you referring to?

MR BAILEY:

That was an explanatory, explanatory notes.

BLANCHARD J:

Have we got that?

MR BAILEY:

It's not in our materials and I apologise for that but it's accurately stated.

BLANCHARD J:

Yeah, but it's only the explanatory note?

MR BAILEY:

Yes.

BLANCHARD J:

So if I take to heart Professor Burrows' chastisement, I ignore that? I may say that his chastisement was the same as that of the dissenting Judge in the case to which I refer.

MR BAILEY:

Right, well I haven't read that decision Sir.

TIPPING J:

Well anyway I understand, I understand your point, I'm not sure whether it takes you very far but…

MR BAILEY:

Onto policy and principle, I don't need to spend too much time on that, it's simply really that the police typically for all investigations and prosecutions incur their own costs and things like burglaries, the time spent or trying to capture someone or taking fingerprints aren't awarded against a person following conviction. Then there's the argument about and it's sort of watered down now slightly, because of the new amendment and Parliament's obviously seen fit to impose medical expenses, but there is a large variance in between the amount of costs people have to pay for giving a sample of blood which they won't know at that time and I, we've noted in our submission section 8, subsection (e) that the principle of sentencing is consistency. If medical expenses aren't awarded then sentencing's more consistent because people just have to pay the $93 only. I accept as the Crown's pointed out, there's no trump cards in terms of sentencing principles and purposes but in this case it's not like the case the Crown have referred to in *R v Ahomiro* where if one principle was to take – put before all others it would effect another one, this case simply consistency is promoted and nothing else suffers.

There's also in our submissions mention of, effectively someone being deterred from electing to give a sample of blood which is recognised as being a more accurate measure. It's interesting that under the previous legislation you can only elect a sample of blood if your breath reading was below a certain limit, which was surely to recognise that blood is more accurate, and in case of a borderline case, someone might give a breath, evidential breath test which is over the limit but subsequently shown to be below the limit when the blood's analysed.

Page 10 of the appellant's written submissions contrast with other statutes. We've quote two or three, the Forest and Rural Fires Act 1977, Walking Access Act 2008 in particular, both Acts of course passed after the Costs in Criminal Cases Act.

McGRATH J:

Mr Powell of course says that these are just fixed liabilities – no discretion. The statute actually sets the legal obligation so you can understand that being, if that's right, you can understand it being spelt out in a bit more detail if there's a statutory liability as opposed to a judicial discretion imposing the obligation.

MR BAILEY:

Yes Sir, but in terms of the Walking Access Act 2008 which is at tab 8 of our submissions.

McGRATH J:

Sorry tab?

MR BAILEY:

Tab 8.

McGRATH J:

Yes.

MR BAILEY:

Section 64 subsection (2) mentions, specifically mentions effectively that, expenses relating to salaries of staff that undertake an investigation at least to a prosecution can be recovered. So notwithstanding that they vary, Parliament has specified that they are recoverable and in my submission doesn't really matter whether a cost varies or not, there's got to be some jurisdiction to award, allow the Court to award those costs. The other utility comparing those statutes and it just shows if Parliament does want to make it clear, that investigation costs, how clearly they do do it or can do it and therefore in my submission that at section 4 of the Cost in Criminal Cases Act wasn't designed to cover such costs as the Walking Access Act allows.

The next heading was comparison with equivalent English legislation, which I don't need to go, I've already touched on so far. Similarly the last heading

which is on page 13 of our submissions has already been discussed in some detail. Basically section 7, 67 would become redundant if those costs were recoverable under the Cost in Criminal Cases Act, therefore the inference being Parliament thought it was necessary to legislate to say the certain costs, whatever they are whether it's the analyst's fee or medical costs, they had to legislate to say that was recoverable otherwise they would not have been.

I think that brings me onto submission 2 which is probably going to be a little bit briefer and this is all about the timing of these medical costs. This is obviously something that was raised in the High Court but particularly the Court of Appeal and they were of the view that the costs had been incurred prior, or after the decision to prosecute. It seems to be accepted and I think the starting point's got to is section 77 which says, once someone elects to give a blood sample in effect their previous breath test goes away and it can never be brought back up – it can't be used in evidence against them. Therefore in my submission it's quite simple, at that point in time the police don't know, they might suspect that the blood test is going to be over the limit but they don't know what it's going to be and they have to, and by law, wait before they can charge someone for being over the limit for blood.

TIPPING J:

This argument is all pre-supposed on the basis that the, there is a temporal line?

MR BAILEY:

Yes.

TIPPING J:

You know I think you're harder argument is to justify the fact that there needs to be a temporal line or there is intended to be a temporal line. If there has to be a temporal line, then maybe this is the right place to put it, I don't know but quite honestly I'm far from persuaded at the moment that the legislation implicitly involves a temporal line.

MR BAILEY:

That's why it's our submission too Sir, and it's really a backup really.

TIPPING J:

What is it about the way the legislation is framed that you argue, involves there being a temporal line?

MR BAILEY:

I guess it's the phrase, "in carrying out a prosecution" and therefore the stage switches from investigation to prosecution even though it might effectively be an investigation cost it incurs after prosecution's commenced. That was the view taken in *Lovell*. Of course and my friend's taken some issue with this, we have said in our submission the motorist doesn't have to give an evidential breath test and there's no offence not to. In my submission all that allows the police to do is to require a blood test.

TIPPING J:

So in carrying out necessarily involves a temporal line, is that the submission?

MR BAILEY:

Yes, it's not our primary submission. If any investigation costs are recoverable, they are on recoverable after the decision to prosecute has been made or commenced.

McGRATH J:

A decision made or prosecution formally initiated, by laying an information?

MR BAILEY:

I don't know.

McGRATH J:

I think you're probably – what I'm suggesting is, you probably have to go to the latter, because decision might well be made after this positive breath test.

MR BAILEY:

Yes.

McGRATH J:

Knowing the people concerned in this game.

MR BAILEY:

And it would be hard to establish exactly when the police had decided –

TIPPING J:

When you get into questions like contingent decisions –

MR BAILEY:

Yes.

TIPPING J:

With great respect, I think the decision thing is unsound. If it's to be a temporal line it's got to have a brightness about it, that everyone knows where they stand.

MR BAILEY:

Yes, and if there was I would say it's once the information's filed in court.

ANDERSON J:

The Summary Proceedings Act says that the proceedings commence with the information, or complaint.

MR BAILEY:

Right.

ANDERSON J:

I'm not aware of any authority that would have led Justice Ellis to posit a point in time which no one could prove except the person that made the decision.

MR BAILEY:

Mmm.

ANDERSON J:

I think it's just the product of an extemporary judgment, where the point wasn't in issue. Just loosely, he meant, prosecuted I think.

MR BAILEY:

If Mr Barr didn't give the breath test, which I'm saying is lawful, because it's not an offence not to, he couldn't have been charged with anything therefore it's not unlawful, the police wouldn't have known, they may have suspected he's had too much to drink, they certainly wouldn't be able to say they had decided to prosecute him at that time, when he had failed to give an evidential breath test. The anomaly would result if the interpretation of the respondent was preferred. And, in certain circumstances, if there's no evidential breath test available, the police can simply require a blood test without the prior evidential breath test, in which case that person would avoid having to pay the medical expenses, because they hadn't failed an earlier evidential breath test, and again it wouldn't seem to be right on principle. Unless the Court has any further questions, those are my submissions.

BLANCHARD J:

Thank you, Mr Bailey. Mr Powell.

MR POWELL:

The starting point for the respondent's submission is that the text of section 4 read with section 2 is capable of supporting either the narrow or the broader formulation. So it comes down to which best suits the purpose of the Act. As I said in my submissions, the legislative history in New Zealand is not particularly helpful in that regard, although there is reference in the Minister of Justice's introductory speech about the width or the breadth of the concept that they were instituting, also the discretion is kept relatively broad under both section 4 and section 5. But there is certainly no basis for reintroducing the limitations that existed for the Magistrate's Court into the

new Act because, as I said in my written synopsis, section 4 of the Costs in Criminal Cases Act is more a modified version of what was section 402 of the Crimes Act and was previously section 448 of the Crimes Act 1908.

The big difference and really what led to the introduction of this Act, was the introduction of the notion that an accused could recover costs of the prosecution, and as I think I referred to, there was reference in the decision of *Goffe*, where Justice Hutchinson had said that the Chief Justice had had to issue almost a public statement that this did not mean that defendants were going to be awarded costs routinely, and that's what led the Honourable J R Hanan to introduce – or he referred it to what was really a forerunner of the Law Commission, to come up with a proposal which led to the Act. The United Kingdom legislation is significantly different, because of the way in which costs are awarded in that jurisdiction. They are primarily awarded out of a central fund, and in 1985 with the introduction of the CPS in the United Kingdom, the institution prosecutions brought by the police or the CPS were complete removed from that regime. There simply isn't enough assistance to get you past the fact that there are two possible ways of reading that Act, to either confine it with a temporal restriction, as Justice Ellis suggested in *Lovell*, or simply to require that there is a degree of connection with the prosecution, which is the essence of the Court of Appeal's approach in the case under appeal.

So, completely disproportionately to the amount of time that was spent preparing them, the first part of my submission is not really going to help you very much. It really comes down to applying section 5 of the Interpretation Act. As to whether there is a temporal limit so that costs after a particular point may be recovered and costs that are incurred before it cannot, in my submission it's not clear that that would serve any purpose of the Act. The Act is there to confer on the Judge a discretion to award costs where it is fair and reasonable to do so. I draw the Court's attention to the submission I made at paragraph 66, that it's difficult in these circumstances to see what advantage there could be in providing such a limit, because for it to be

meaningful there must be a category of expenses that are properly incurred, covered by the heads of costs that are approved by regulations, integral to the prosecution or defence, into which a Judge may think it is fair and reasonable for the other party to contribute, but which should nonetheless be excluded.

BLANCHARD J:

It's very hard to know how you'd draw that line. Mr Bailey made the very good point about the distinction between the person who has the breath test and fails and the person who elects not to have a breath test.

MR POWELL:

Subject to –

BLANCHARD J:

A line would have to be different.

MR POWELL:

Well, looked at in terms of proof of course he's right. One's suspicion on the part of the enforcement officer is probably increased by the refusal to undergo an evidential breath test, but you certainly couldn't make a prosecution decision for in respect of an offence that involves proof that the proportion of alcohol in that person's blood exceeded a certain level, without the result of the blood test. So in that case, yes, the decision to prosecute, and of course the laying of the information, is deferred until the analyst supplies the certified result. But, in my submission, that simply underlines why using a temporal limit is not warranted. A degree of connection to the prosecution is more helpful, because what the Act certainly is not intended to do is to shift responsibility for the costs associated with the detection of offending and the enforcement of the law onto individuals. It must be linked, before it is even eligible under this Act, it must be linked to a particular prosecution.

WILSON J:

Mr Powell, what degree of connection do you say is required?

MR POWELL:

Well Sir, it's the difference between detecting an offence and proving one. To use an analogy from *Commercial Fishing*, the state may have an Air Force Orion routinely deployed to patrol the coastline at whatever hideous expense is involved in doing that. That would not be recoverable against a fisherman who was detected fishing inside New Zealand's commercial economic limit without a permit, but if a fisherman is under investigation by the Ministry of Fisheries, and in order to prove their offending, they ask the Air Force to deploy the Orion to go and take pictures, then it could. That would be the difference in a practical sense.

WILSON J:

To apply that to the type of offending we're looking at here, it wouldn't be open to the police to claim, as costs, any costs of the salaries of the constables who are manning the checkpoint.

MR POWELL:

Or the quite substantial cost of petrol for the police in maintaining policing of the road network.

BLANCHARD J:

That would explain why they had to put the subsection (2) into the Walking Access Act section, because they were making a true exception to that rule.

MR POWELL:

Yes, that can only be consistent with a notion of user pays.

TIPPING J:

The way you've put it is very neat between detection and prosecution. It's the difference between the general law enforcement activities of the people concerned and those that are specific to the particular individual concerned, isn't it, really, is another way of looking at it, but broadly the same effect because there has to be some jurisdictional limit, doesn't there?

MR POWELL:

Yes.

TIPPING J:

And I don't know whether one would be wise to try and make it too precise, but on the other hand, we have to give some sort of guidance as to conceptually, you know, where the boundaries lie.

BLANCHARD J:

Yes, even, I suppose one could think of a situation where the police, in the course of an investigation, get blood from a number of people in order to do an elimination. On the test you're proposing, I think the cost of that could not be claimed probably, although I suppose it's arguable, the cost of the blood test from the person who is eventually arrested and convicted, because at that point, they were still only at the detection stage.

MR POWELL:

Yes.

ANDERSON J:

There's a fusion of jurisdiction and discretion, isn't there, really, that one has to try and grapple with.

MR POWELL:

Well the discretion is a cushion because the result of bringing a cost within the sphere is simply to arm the Judge with a discretion to say, in the circumstances of this case, it is fair and reasonable for you to contribute to that. A good example would be a defendant who offers an elaborate alibi saying that there are three witnesses now currently in the outback of Canada who can verify that I wasn't there, and the police go to some considerable expense engaging the RCMP and it turns out to be complete nonsense, those people had never met the person and the police have a bill for a few thousand dollars. Now, when the person is subsequently convicted, if that's the result, the police may say, well, that may be an investigation cost, but it was related

to our proof of the case against you, indeed it was to disprove an alibi or a defence that you suggested you had. Now, the Court might still say it's not fair and reasonable to require the defendant to pay it, and of course, the practical reality is that the Crown very rarely seeks costs against a defendant, certainly in an indictable matter.

BLANCHARD J:

But if it was the wealthiest individual in New Zealand who was a defendant, they might break that rule.

MR POWELL:

Well we have, of course, a unique connection with the case of *Maher*, which we won't be particularly proud of, that was of course the Mr Asia trial in the UK, and the defendant who was to pay these costs was Terrance Alexander Sinclair, and the whole basis of the Court ordering the costs was that he had professed that he was worth many millions of dollars, and the Crown looked askance at the many millions of dollars they had spent over a six month trial in the Crown Court and said well if he's got that money, he can pay for a portion of the trial. That may be considered to be a circumstance where a defendant has been convicted and sentenced in that case to life imprisonment, where he should nonetheless also pay for the cost of prosecuting but that would be an extremely rare instance.

McGRATH J:

Mr Powell, you started off with the notion of a degree of connection to the prosecution. I'm a little concerned that you're moving back from that test where you start talking about evidence to exclude a possible alibi, and you're coming back to, it seems to be, into concepts of detection. Just for my part, while I'm not at the moment attracted to Mr Bailey's argument that the prosecution has to be initiated, I would have thought a degree of proximity to the point of initiation, a decision that, well, clearly this is a case that's going to be prosecuted would be an appropriate point, to give effect to the legislation, those words "carrying out" of a prosecution. I'd just like you to comment on that, because I do feel you're moving backwards a bit to the *Maher* case, the

background to that might give a bit of colour to what you're saying, but this principle be applied in a lot of other cases.

MR POWELL:

Well, in the example of the disproving of an alibi, I suppose it would depend on the stage the prosecution was at, if the police had a number of suspects that they were investigating, you could say it was still detection, but if the police had said well we believe we have evidence to prosecute you, we've got forensic evidence linking you to the crime, and so forth, but the suspect says, well I can prove I wasn't there, now the police may say, well there's no point in going to the extent of prosecuting this person, if indeed that is the case and it's not in the public interest that the police should not chase that down.

McGRATH J:

I can see that alibi investigation can, in different circumstances, be close to the point where there's an expectation there'll be a prosecution or distant from it, as long as on the facts you've got that proximity element firmly in mind, I suppose I don't have that much trouble with your test, but we want to be careful here, and the reason the Crown may not have gone after the idea of the defendants is they weren't sure of the law and if we clarify the law, the Crown may be tempted to go after a lot more defendants and if so, we want to get the test right.

MR POWELL:

Well, a case on the other side of the line would be the facts that were before the High Court in *Lovell*, where the department or the ACC were obviously concerned about declarations he had made, but whether or not he had committed any offence depended on an investigation into his financial affairs. Now, at that stage, at least as far as His Honour Justice Ellis described it, they hadn't moved to the stage of saying, we're going to prosecute Mr Lovell, they were investigating whether or not an offence had been committed. That, in my submission, is the difference, when you have gone beyond the stage of asking whether an offence has been committed to proving or building a case against the person that you have decided to prosecute. So in most instances,

the general investigative costs wouldn't be recoverable, there would have to have been a prosecution in mind and the point made by the Court of Appeal below was valid in that it would not be in the public interest if the prosecution decision or the laying of the information was artificially brought forward, simply to ensure that it brought into at least under section 4, the costs that were being incurred. In fact, the public interest is served by the prosecutor weighing more carefully their decision to prosecute before they initiate proceedings. So it must have, there must be a dividing line to, so that the Act doesn't operate as simply a means of shifting responsibility for the general cost of law enforcement, but there is no need or advance in confining it to a particular point in time because it may be that the costs that are crucial to the prosecution or the forensic costs are incurred as late as the trial if a point emerges during the trial that has to be investigated, but equally it could happen in the later stages of the investigation and the same for the defence.

TIPPING J:

Mr Powell, I think we have to recognise, and this is not antithetical to your argument, that when you're talking about jurisdiction in a situation like this, without, if you like, a bright line factor in the equation, there are bound to be difficult cases at the margins. But what we've really got to strive for is a conceptually, this is how I see it anyway, a conceptually sufficiently precise test conceptually, to allow people to say, well is it on, which side of the line. And I must say the general law enforcement on one side of the equation and what you might call targeted activity against a particular individual, and I'm not suggesting those very words, for me subject to further discussion, would be about as clear as you're likely to get –

MR POWELL:

Yes.

TIPPING J:

– while serving the, reconciling the two conflicting policies if you like, not shifting the general burden but making sure that in appropriate places people

can, should cough up or, a defendant should be able to recover – because it does work both ways –

MR POWELL:

Yes they must.

TIPPING J:

– appropriate, it's not like it would be nearly so difficult on the defence side of course –

BLANCHARD J:

The defence won't be doing any general law enforcement.

TIPPING J:

– because they won't be doing any general law enforcement.

MR POWELL:

No, but a defendant may anticipate that they will be prosecuted and quite justifiably look at the cost of defending a prosecution, the opprobrium of being publicly accused of a crime and decide –

BLANCHARD J:

Well the cost of establishing an alibi, assuming they were able to establish it, it would seem strange if it was claimable against the Crown if they established it after the prosecution commenced but not if they did it as a, in an attempted pre-emptive strike.

MR POWELL:

Yes.

BLANCHARD J:

Of course in most of those instances the person would get acquitted but –

MR POWELL:

Yes but they would still be entitled to seek the costs.

BLANCHARD J:

It would still be very strange if they couldn’t claim it.

TIPPING J:

Well having been convicted, sorry having been acquitted, it would be strange if you couldn't recover, simply because of the timing of the work you did to make sure you didn’t get convicted.

MR POWELL:

If you have a look at the case of *Maher*, that was the decision of Justice Chisholm which is in the bundle of authorities.

BLANCHARD J:

Your bundle?

MR POWELL:

Yes, or is it. Twenty nine, 21. In this case, the defendants facing quite serious allegations had gone to the expense of engaging a private investigator. Now all of this happened after the decision to prosecute, but there is no reason in principle why it couldn’t have been incurred before Mr Maher was charged.

TIPPING J:

Well it would become very arbitrary?

MR POWELL:

Yes.

TIPPING J:

That was one of the things that was weighing with me a bit when listening to the very, you know well-focused argument against it. It just would have the capacity to be very arbitrary.

MR POWELL:

Arbitrary and also it's probably not drawing too long a bow to say that the institutional response to might be to artificially alter the manner of prosecutions so as to at least make those costs recoverable. I doubt that that is the case because it's unusual and extremely unusual for costs to be sought in a criminal prosecution. I believe it was early last century it was said that it was beneath the Sovereign's dignity to seek them and nobody could countenance the idea of the Sovereign been asked to pay them.

TIPPING J:

I don't think Queen Victoria would have been very impressed.

MR POWELL:

Yes, I won't, I suppose there's a lot less beneath our dignity now but it wouldn't, it wouldn't occur that often, but in the case of it, a particular prosecution that occurs over and over again, then a change in the pattern of behaviour could be, it could be caused and it wouldn't necessarily be advantageous. As I say it's generally in the public interest for an important decision such as prosecution which itself, quite apart from any resulting conviction, carries with it, as I say public opprobrium the cost of defending an action – that shouldn't be done unless the prosecutor is satisfied that they have the evidence. So anything which encourages that decision to be made at an earlier time than the investigation has commenced, wouldn't be in the public interest. But because it is essentially only a – all it does is bring it within the Court's discretion, in my submission it can be that there's no need for a temporal limit because the costs will never be awarded unless the Judge who is in the best position to know, considers that on the facts of the case before him or her, it's fair and reasonable that either the prosecutor is reimbursed or that the defendant is.

TIPPING J:

There's really two filters aren't there? One, ground's got to show jurisdiction, sufficient proximity and two, that it's appropriate?

MR POWELL:

Yes.

TIPPING J:

So there's no need to strive as you're suggest – as – to make the jurisdictional thing that the sort of sole protector?

MR POWELL:

No. But there is as the Court has recognised, an important boundary and that this can't become a channel through which the general costs of law enforcement are shifted to defendants. If that is considered appropriate perhaps in a heavily invigilated commercial activity such as, as commercial fishing, then there may be a justification for doing that, but as a general proposition that the Costs in Criminal Cases Act is not intended to serve that purpose, so it would have to be confined, however it is defined to a particular prosecution.

And that, in the case of a prosecution under this legislation, the Land Transport Act, it demonstrates albeit, in what are wholly unique circumstances, how the actual timing of the decision to prosecute can change because the evidential breath test, up until the point that the – well once the result has printed out from the machine and it says the reading is above the legal limit, as night follows day, the motorists is going to be prosecuted by the police. If they make an election to have a blood test, then they are in the unusual position of being able to choose what they get prosecuted for, because the prosecution for an evidential – breach of the section that provides driving with excess breath alcohol can no longer be bought. The only thing they can be charged with is driving while the proportion of alcohol in their blood exceeds 80 milligrams. So the more, the more sensible way of looking

at is, is that a prosecution decision has been made, but that circumstances may occur which require that decision to be rescinded. I'm sure that the Court is not interested in the factual niceties of proof of breath and blood alcohol offences, but the reliability of the blood test, as against the breath test, is, it's not quite as my friend has put it. The blood test takes place some time after the driving, at least 10 minutes and more likely –

BLANCHARD J:

Do we need to get into this?

MR POWELL:

No Sir, other than that, things that my friend has said are not entirely correct –

BLANCHARD J:

Well, we'll take them with a grain of salt then.

MR POWELL:

Yes, all right, well, I'll say nothing further about that. The next issue I wanted to address is the, what I've called "the issue of consistency". I see Professor Burrows refers to "The application of fundamental values of the legal system." I've dealt with the New Zealand Bill of Rights Act which, in my submission, is not engaged, "Provided the discretion exists only to impose costs that are fair and reasonable." The question really is whether the Act works coherently with the Sentencing Act and the Land Transport Act and in my submission it does, precisely because, once engaged, it is discretionary and the discretion is only to be applied where it is fair and reasonable to impose the cost. And sentencing itself is also inherently discretionary, so the Judge is put in the position of being able to impose a financial burden, if that is what is required, on a convicted defendant, that is fair and reasonable, having regard to their circumstances. It is far more difficult when Parliament creates a direct statutory liability, such as in the fishing context, where it requires automatic forfeiture of a vessel. The Judge cannot moderate that if the Act says that it must be done. But the two Acts work perfectly well together. As for the Land Transport Act, if the motorist is convicted – sorry, if the motorist is

made liable to the cost of the blood test, or the medical expenses, my friend makes the point that that might discourage a person from making the election which, following this Court's decision in *Aylwin* is pretty much the only avenue that's left available to them to escape conviction. While I accept that to a person whose financial circumstances make cost an issue, it has the potential to have that effect –

BLANCHARD J:

Well, the argument that it's totally inappropriate, in those terms, is surely swept away by the fact that Parliament has recently decided that it's going to be mandatory in the future.

MR POWELL:

Yes, well, if that's –

BLANCHARD J:

And treated it as a fine. So there can't be anything wrong with it in principle.

MR POWELL:

No, no, and –

BLANCHARD J:

Subject of course to the discretion order, that there won't be discretion in future.

MR POWELL:

No, it's a question of what's reasonable, although while sentencing is discretionary, if the Judge has had to impose a significant cost in terms of the blood test fee and a medical fee on an indigent defendant, there is the capacity to reduce the fine, so that the overall impact on them is as fair as the circumstances allow. But, as Your Honour says –

BLANCHARD J:

But under the new legislation, there won't be that discretion, will there?

MR POWELL:

No, it still says "reasonable medical expenses" and, because we are in a discretionary sphere, the ability to appeal –

TIPPING J:

Well, because the jurisdictional fault at point is followed by a discretion, I don't see that the Bill of Rights issue weighs very significantly on the jurisdictional interpretation.

MR POWELL:

Well I –

TIPPING J:

That's my provision view anyway, if that's of any assistance, and it can be challenged no doubt but…

MR POWELL:

No, well, my submission is obviously understood –

TIPPING J:

Yes.

MR POWELL:

– I don't need to press that. The only other point – I take Your Honour's comment that the submission too, which is essentially when was the decision to prosecute made, is not the most fruitful point.

TIPPING J:

Well, it presupposes that it matters.

MR POWELL:

It matters, yes. But if it does, are you talking about the commencement of the actual prosecution by the summons –

TIPPING J:

Well, whatever the – unless it's filing of information, which I'll make no secret of the fact I'm not attracted to – whatever other temporal line you might choose must be met here.

MR POWELL:

Yes. Well, again, I won't press that. And that leads me to the one, the remaining points, answering submission 3 and returning at last to the point that Your Honour Justice Anderson made during the course of my submissions on the preliminary point. Could it be argued that in reference to "blood test fee", since that term has been defined, encompasses the cost of taking and analysis, the only argument I have against that is the one that I presented during the response to the preliminary matter. That is that there was no significant change in the purpose or effect of the legislation from the Transport Act to the Land Transport Act at the time that definition was introduced. The Act didn't perform any different function and so the context does require that up until 1998 the blood test fee, on my argument, referred to the fee charged by the analyst and that nothing changed after that. So to say that from the time that it has had this definition it was intended to encompass both, that would have constituted a change, and there is no basis for that. It was simply, the only reason the issue has arisen, is because there was a reorganisation of the definition sections. So, it seems that little assistance is going to be found by exploring the 2009 Act in any further detail, and I have nothing else that I wish to deal with in my oral submissions, unless Your Honours have any further questions.

McGRATH J:

Mr Powell, can I just ask you this, when you say that if the blood test comes back positive or, for that matter, the breath test is positive and there's blood

test, prosecution follows as night follows day, it's still a matter of a discretion to prosecute is it, there's nothing in the legislation that compels prosecution?

MR POWELL:

Oh, no, no.

McGRATH J:

There is a time limit, but that's all, is that the position?

MR POWELL:

Yes, of – I mean, there is a discretion to prosecute, but –

McGRATH J:

Have to be unusual circumstances that would lead to there not being a prosecution?

MR POWELL:

More questions would be asked by a decision not to prosecute somebody, particularly as to whether their status or connection with the police had caused that. But, yes, as a matter of strict law, there are prosecution guidelines that have to be applied to every offence, but it's one that –

McGRATH J:

Yes, you're not saying there's any sort of absolute duty, it's –

MR POWELL:

No.

McGRATH J:

– just the circumstances are not propitious for decisions not to prosecute?

MR POWELL:

Yes.

McGRATH J:

Thank you.

BLANCHARD J:

Thank you, Mr Powell. Mr Cook.

MR COOK:

There's only one matter, Sir, and that's, in the discussions – and it really flows from what was discussed at the beginning about the ambit of this appeal. It really has come about that the conceptually sufficiently precise that Your Honour Justice Tipping talked about, along the spectrum from, if I can put it, general detection at one end through to a specific apprehension at the other, is going to have a wide, it's going to be applied widely to more than obviously just the case at the bar, and that was the only issue I had at the beginning and I probably didn't voice it, whether this is a case that calls for an amicus brief from potentially someone, a group like the New Zealand Bar Association, and that was the only issue that I had generally feeling a bit of disquiet at the start, and we talked about the Court's advisory opinion, and that's all that I wish to raise, so unless there are any specific questions.

BLANCHARD J:

Thank you Mr Cook. We're grateful to counsel for their arguments, and we'll take time to consider our decision.

COURT ADJOURNS: 12.40 PM