IN THE HIGH COURT OF THE COOK ISLANDS **CR NO: 378-380/15**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CROWN

v

MAHARA NICHOLAS[1]

Date of Hearing: 30 May 2016
Date of Judgment: 12 September 2016

Counsel: Ms A Mills and Ms A Herman for the Crown
Mr N George for the Defendant

RESERVED JUDGMENT OF HUGH WILLIAMS, J

Orders:

a) **That the certificate of analysis of the blood alcohol concentration in the blood of the accused, Mr Nicholas, is, for the reasons discussed in this judgment, ruled admissible; and**

b) **Mr Nicholas is directed to stand trial on a date and at a time to be fixed by the Registrar – presumably in the November/December 2016 sessions of this Court – and his attendance and call-overs in the meantime is excused.**

[1] Also variously named in the file as Mahara Te Otini Nicholas and Mahara Teotini Nicholas

Preliminary

[1] The accused, Mahara Nicholas, faces three charges of driving a motor vehicle – a motor cycle – on 23 July 2015 while under the influence of drink to such an extent as to be incapable of having proper control and thereby causing injury to two persons and the death of a third.

[2] Following the accident which gave rise to the charges, Mr Nicholas was admitted to hospital. A blood sample was taken from him there for evidential purposes but admittedly not in accordance with the scheme set out in the Transport Act 1966. The reading was 194 milligrams of alcohol per 100 millilitres of blood, well over the legal limit.

[3] The question with which this judgment deals is whether the certificate of analysis giving the proportion of alcohol in Mr Nicholas' blood should be admissible at his trial on the charges mentioned notwithstanding that it was not obtained in accordance with statutory scheme. In part, that requires a consideration of the factors discussed by the New Zealand Court of Appeal in *R v Shaheed* [2002] 2 NZLR 377][2].

Legislative framework

[4] Mr Nicholas is charged under s. 25(2) of the Transport Act 1966 which relevantly reads:

> *25(2). Every person commits an offence who, while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, is in charge of a motor vehicle and by an act or omission in relation thereto causes bodily injury to or the death of any person.*

[5] Section 25 and those sections of the Transport Act 1966 creating the blood regime with which this judgment is concerned were part of the Transport Amendment Act 2007 which refined the law relating to drink driving and to driving causing injury or death.

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[2] Applied in the Cook Islands by the decision of the Cook Islands' Court of Appeal in *Timoti v. Police Dept* CA7/15 20 November 2015

[6] The procedure to be followed in relation to the taking of blood specimens appears in ss 28C, 28D and 28E. As far as relevant to Mr Nicholas' case, those sections read:

> *28C. Who must give blood specimen - (1) A person shall permit a medical officer to take a blood specimen from the person when required to do so by a constable if –*
> *... ... ..*
> *(e) the person is under examination, care, or treatment in a hospital.*
>
> *(5) It is a defence to proceedings for an offence under this section if the court is satisfied, on the evidence of a registered medical practitioner, that the taking of a blood specimen from the defendant would have been prejudicial to the defendant's health.*
>
> *28D. How Blood specimen is to be taken - When a medical officer is required to take [a?] blood specimen from a person, the medical officer shall inform the person before taking the blood specimen... ... ...*
>
> *28E. Protection of patients - (1) Where a person is in a hospital for the purposes of examination, care or treatment, a breathalyser test may be administered or blood specimen taken under any provision of this Act only if the registered medical practitioner -*
>
> *(a) has examined the person and is satisfied that the administering of the breathalyser test or the taking of the blood specimen would not be prejudicial to the person's proper care or treatment; and*
>
> *... ... ...*
>
> *(c) informs the person (or a next-of-kin, where reasonably available, if the person is unconscious) that the blood specimen is being or was taken under this section for evidential purposes.*
>
> *(2) if a blood specimen is taken under this section from a person who is unconscious, the medical officer who took the specimen shall notify the person (or a next-of-kin, where reasonably available, if the person is still unconscious) in writing as soon as practicable that the specimen was taken under this section for evidential purposes.*

[7] It is relevant for the purposes of this application, to note that the 2007 Amendment defined "medical officer" in the following way

> *"Medical Officer" means –*
> *a) a registered medical practitioner, or*
> *b) a person acting in a hospital or doctor's surgery and who, in the normal course of the person's duties, takes blood specimens; or*
> *c) a nurse; or*
> *d) a medical laboratory technician*

Facts

[8] The accident which gave rise to the charges occurred in the early hours of 23 July 2015, during Te Maeva Nui, the Cook Islands' 50th Anniversary celebrations, when the population of Rarotonga virtually doubled.

[9] At about 7pm the previous evening, according to his police statement, Mr Nicholas boarded a party bus and started drinking from a 1 litre bottle of bourbon whiskey. He continued drinking from the bottle as the party bus drove around the island. He was sufficiently affected by the liquor as to be unable to recall if he drank the whole of the 1 litre bottle but witnesses whom the Crown intends to call variously describe Mr Nicholas as being quite drunk, unable to walk, "wasted", and being unsteady on his feet, slurring his speech and being highly intoxicated and aggressive.

[10] Just prior to the accident he was seen driving his motor cycle erratically in the vicinity of the Punanga Nui Market with a pillion passenger on the back and being involved in a collision involving two other people where he veered into the lane of an oncoming motor cycle (at about 0114 hours).

[11] Sergeant Takai, called to the scene of the collision (about 0114 hours on 23 July 2015) found a number of bodies lying in the middle of the road. After doing what he could for those injured – including Mr Nicholas who was unconscious and breathing though seriously injured – the Sergeant called urgently for an ambulance (at 0125 hours) but, because there were a number of accidents that evening, the first of the two ambulances which attended the scene did not arrive until 0155 hours with the second eleven minutes later.

[12] Sergeant Takai then went to the Rarotonga Hospital (arriving about 0225 hours: though he also said he arrived at about 0325 hours) where he first tried to speak with the doctors and nurses. He was unable to gain admission to the

treatment room as it was locked while the medical staff were busy trying to stabilise and care for several patients under their care.

[13] It needs to be noted at this point that Rarotonga's sole hospital is of modest but, usually, of adequate capacity. However, on the night of 22-23 July 2015, the number of accident victims brought to the hospital necessitated the calling in of two response teams – the maximum number available – additional to those already on duty. About 20 staff in all were called onto duty to manage the number of injured. Long-serving staff could not recall a busier night at the hospital.

[14] When Sergeant Takai was unable to speak directly to the doctors or the nursing staff he spoke to Mrs Manavaroa, the receptionist on duty and, (at about 0325 hours), gave her the excess blood alcohol form then in use asking for it to be delivered to, and filled in by, the duty doctor and the victim's next-of-kin's consent obtained. Sergeant Takai then returned to the accident scene to continue the police investigation.

[15] The blood alcohol form then in use was put in evidence[3]. Headed "Taking of a blood specimen for evidential purposes", page 1 summarises the law. Three other forms, Forms A, B and C, were attached. Forms A and B were identical to the extent that both contained the statutory requirement by a named police officer for a named doctor to take a blood specimen for evidential purposes. The two forms then differed according to whether the person from whom the blood specimen was to be taken, or had been taken, was conscious or not at the time. The third paragraph of both contained a consent by the person from whom the blood specimen was taken, the consent either being contemporaneous with the taking of the specimen or given later because "although I was unconscious at the time the blood specimen was taken I permit such blood specimen to have been taken for evidential purposes". Both forms included spaces for the patient's and medical officer's signatures.

[16] Form C was for the next-of-kin of the patient. It said "I have been informed by doctor (blank) in writing that the blood specimen was required to be taken from (blank) for evidential purposes but because (blank) was unconscious at the time the

[3] Ms Mills for the Crown advised that that form has been modified since 23 July 2015

blood specimen was taken and remains unconscious I permit such blood specimen to be taken for evidential purposes". The form provided for signatures by the medical officer and the next-of-kin.

[17] It seems the blood specimen forms were held on the hospital computer. Sergeant Takai asked Mrs Manavaroa if she could print them out. She did so and gave the relevant one to him but he returned it to her to give to the doctor for completion when time and circumstances allowed.

[18] Mrs Manavaroa took the forms into the treatment room and gave them to Charge Nurse Manea.

[19] In cross-examination on his evidence on this application, Sergeant Takai acknowledged that at that stage of the police investigation he was unaware which of the persons he found lying on the road near the Punanga Nui Market were the drivers of, and which were passengers on, the motor cycles. The forms he gave to Mrs Manavaroa were therefore blank in that respect. He accepted that at no time during this visit to the hospital did he, in terms of s28C(1), actually say to anyone that he "required""any medical officer to take a blood specimen from Mr Nicholas (or any other patient).

[20] When Mrs Manavaroa entered the treatment room and gave the form to Nurse Manea, she asked her to get the doctor to fill them in. By that stage, the names of the patients were known to the hospital reception, in this case because the Nicholas family were called to the hospital and filled out the hospital registration form with the necessary particulars including the accused's name. She was almost sure she gave Sergeant Takai Mr Nicholas' name but was unsure why his name was not inserted on the blood specimen form. Mrs Manavaroa said reception staff never take blood specimen forms into the treatment room without the names being inserted.

[21] Nurse Manea was one of those called in to the hospital on this evening. There were already four patients in the Emergency Department before those involved in Mr Nicholas' accident were brought in. After that happened there were about seven casualties being treated at the hospital and four were later admitted. With so many

patients needing urgent treatment Nurse Manea was unable to recall Mrs Manavaroa handing over the blood specimen form and could not recall if she told the doctor of the police requirement for the forms to be completed. It was only later when all the patients had been stabilised, and those who required to be admitted had been admitted, that Mrs Manavaroa asked her for the forms and Nurse Manea noticed them sitting on the staff workstation in the treatment room.

[22] Doctor Teapa, the hospital's Chief Surgeon, was also one of those called to the hospital on the night of 23 July 2015 with the other members of the two trauma teams. He found those injured in an accident other than the one involving Mr Nicholas already at the hospital with one patient having suffered a severe brain injury.

[23] Those involved in Mr Nicholas' accident were then brought in, some with life-threatening injuries. While stabilising an aggressive and uncooperative Mr Nicholas, Dr Teapa noticed he smelt very strongly of alcohol. The medical tests undertaken indicated that he may have suffered a moderate head injury but he remained reactive to stimuli and was conscious, in the doctor's view, though drifting " in and out" of consciousness during stabilisation.

[24] Dr Teapa did not recall being handed the blood specimen form for Mr Nicholas but said it is routine for blood specimens to be taken from all patients in emergency cases. That is invariably done for diagnostic and treatment purposes and is also routinely done in motor vehicle accident cases. For accident matters, the blood alcohol analysis can affect billing patients.

[25] Dr Teapa did not take blood from Mr Nicholas but he treated him again some 4-6 hours after the crash and, during that conversation, told him a blood specimen had been taken from him for evidential purposes.

[26] Clarifying, during cross-examination, the routine taking of blood specimens, Dr Teapa said it was imperative such samples be taken from all casualties for treatment and diagnostic purposes and that a second sample, one for blood alcohol purposes, is always taken in all motor vehicle accident cases from everybody

involved. That is done at the time when lines have been inserted into the patient. The medical staff rely on the police to make the necessary statutory requirements, but no such request was made or relayed to him directly in Mr Nicholas' case. The doctor thought Mr Nicholas was coherent and oriented when he saw him about 4-6 hours after admission. Dr Teapa never saw the Nicholas family.

[27] It was Doctor Pau'u, the doctor on duty that evening, to whom was delegated by other medical staff the task of taking blood specimens from the patients and it was he who actually took the blood specimen from Mr Nicholas. Like Dr Teapa, Dr Pau'u found Mr Nicholas quite un-cooperative and thrashing around but he reached the conclusion he was conscious from his reaction to stimuli. He told Mr Nicholas that "we require blood investigations to be done, not only the evidence for the blood alcohol purposes, but also other base line bloods just to ensure that our clinical diagnosis and management was accurate". Asked to recall the words used, he said he told Mr Nicholas that "I need just to do some blood tests, this will be taken from a needle from your hand and you (we?) need to do that for evidence purposes as well as just to make sure you are fine". He was not then aware of any specific requirement from the police for an evidential blood specimen to be taken from Mr Nicholas nor was he given the forms Mrs Manavaroa had brought to the treatment room. One of the specimens was taken to ensure the patient's stability and to back up their observations concerning injuries and treatment.

[28] The numbers of patients at the hospital that night and the seriousness of their injuries created an emergency and the evidential blood specimen forms were put to one side as a consequence. Dr Pau'u took the specimens using a non-alcohol swab and put them into two grey-topped tubes, labelled them and, with the necessary forms completed, handed them to Nurse Manea who gave them to the laboratory for processing. He took the blood specimens during the thirty minutes or so he was in the treatment room while Mr Nicholas and others were being stabilised and on the instructions of his team leader.

[29] Sergeant Takai and other police officers went back to the hospital from the accident scene (at about 0812 hours) to collect the evidential blood specimens and forms, but without avail as the investigation by then had been taken over by the CIB.

[30] In evidence on this application Mr Nicholas differed from the doctors' view that he was conscious when the blood specimens were taken. He did not recall any request from Dr Pau'u for an evidential sample, though, under cross-examination, he did recall Dr Teapa, in a later conversation, saying blood had been taken from him for evidential purposes.

[31] Mr Nicholas' father said he was at the hospital for about one and a half hours, having been taken there in the ambulance, and then sitting in the waiting room after completing the admission forms. He recalled a discussion with Dr Teapa concerning his son's condition but said nothing was mentioned concerning the evidential blood sample.

Submissions

[32] For Mr Nicholas, Mr George submitted that here, of the two purposes for taking blood samples – diagnostic and forensic – the former predominated. He stressed the lack of identification of the driver in the form Sergeant Takai gave Mrs Manavaroa and the lack of any express request or requirement under s 28C(1). Noting that Dr Pau'u was unaware of Sergeant Takai's request, Mr George said there was no advice given to the next-of-kin in the waiting room and, accordingly, in all the circumstances, the evidential blood specimen analysis form should be ruled inadmissible. In relation to the *R v. Shaheed* test, Mr George suggested that the Crown had other remedies available and the case was distinguishable from *Timoti*.

[33] Leading counsel for the Crown, Ms Mills, submitted that the certificate of analysis was probative and relevant to proof of whether Mr Nicholas was under the influence of drink when he was driving on the evening of 23 July. Accepting that the Crown had other evidence of Mr Nicholas being affected by alcohol – mostly at an earlier stage of the evening than the time of the accident – Ms Mills submitted that the certificate of analysis, if admitted, would give a better basis for an expert opinion on his driving capacity than the subjective impressions of lay witnesses, especially given the timing of their observations by contrast with the timing and circumstances of the taking of the blood alcohol specimen.

[34] As to the law, Ms Mills submitted that the effect of the Court of Appeal's decision in *Timoti* applying *Shaheed* in the Cook Islands was that, although Cook Islands' law does not have the "substantial compliance" provision which appears in the comparable New Zealand legislation, *Timoti* decided that the *prima facie* exclusionary rule for breach of a person's rights was to be replaced with the necessity to undertake the balancing exercise mandated in *Shaheed*. More specifically, she noted that, in *Timoti,* the Court of Appeal had rejected a submission that the failure to divide the blood specimen into two parts in that case was trivial because it related to a fundamental protection for an individual, namely to be able to challenge the Crown evidence, but that, applying *Shaheed*, the Court of Appeal concluded that the certificate was admissible because there was a little or no prejudice caused by the omission to divide the blood specimen.

[35] She took the Court through *Shaheed* but since that exercise needs to be undertaken later in this judgment, those submissions are part of that discussion.

[36] Ms Mills drew attention to the pre-*Timoti* decision of this Court in *Police v Vano*[4] where, although the police required the medical officer to take the blood specimen, the medical officer did not inform the accused the specimen was being taken for evidential purposes and the sample was not divided into two bottles. After holding that the certificate of analysis would have been inadmissible if the accused had been charged under ss 28 or 28A because the prescribed procedure had not been complied with, the Judge held the certificate was nonetheless admissible under Section 3 of the Evidence Act as it was relevant and its probative value outweighed any minimal prejudice to the accused. It could not be evidence of the accused's blood alcohol concentration at the time of the crash but was admissible as part of the chain of evidence and as a foundation for expert testimony[5].

[37] Noting that the effect of s 28C is that a medical officer may only take an evidential blood specimen if required so to do by a police officer if the person is in hospital for treatment purposes and after the person, if conscious, has been told

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[4] CR 325-330/2013 24 July 2014 Doherty, J.
[5] At para [32] see also R v. R Chong HCNZ Auckland CRI 2004-4-10735 12 September 2006 Stevens J.

blood is to be taken for evidential purposes (or the next-of-kin consent if the person is unconscious), Ms Mills submitted that any non-compliance in this case was trivial. She accepted that Sergeant Takai did not expressly require the blood specimen to be taken. Although his request was to Mrs Manavaroa to be passed on, both doctors advised Mr Nicholas blood had been taken for evidential purposes even though the accused may not have recalled the information. The Crown accepted that Mr Nicholas Snr was not notified nor was his consent obtained, but Mr Nicholas Jnr was conscious at the time the specimen was taken in the sense that a "person is unconscious if the person's mental faculties are incapable of processing information given in a cognitive way" and conscious when the person's "mental faculties [are] awake and active and receptive to any stimuli and be capable of experiencing or performing any controlled functions"[6].

R v. Shaheed

[38] The decision of the majority of a seven Judge Court of Appeal in New Zealand in *R v Shaheed* is factually distinct from this case in that there the decision centred round whether compulsorily taking a blood sample breached the accused's right to be free from unreasonable search and seizure under the New Zealand Bill of Rights Act 1990. Although the decision of the majority was to exclude the evidence, all Judges agreed that the rule that breaches of a person's rights which, *prima facie*, resulted in exclusion of the evidence should be jettisoned in favour of a balancing exercise which took account of all relevant circumstances. The Court's checklist of the factors relevant to the balancing exercise leading to admission or exclusion includes, as a starting point, the nature of the right and the breach; admission of the evidence when the breach is obviously trivial; the connection between the evidence and the breach; whether the evidence was bound to have been obtained in any case; whether the breach was waived; exclusion when the breach involves a substantial invasion of privacy; whether the breach of the right was excusable by reason of emergency; whether breach of the right was deliberate, reckless, grossly careless or arose out of bad faith; whether other remedies are available to the accused; whether other investigatory techniques were available but not used; the

[6] De Thierry v. Police HCNZ Hamilton AP104/00 22 February 2001 Paterson,J at [11] P67.

degree to which the probative nature and quality of the evidence and its reliability is of importance to securing a trial; public safety and the seriousness of the Crown charge; whether the response of excluding the evidence was proportionate to the character of the breach; and with the overall result being that there was "a balancing process in which the starting point is to give appropriate and significant weight to the existence of that breach but which also takes proper account of the need for an effective and credible system of justice[7]".

[39] While that list is wide-ranging and will arise in most cases, the judgments make clear that the list is indicative rather than definitive: not all will be relevant to the balancing exercise in every case and in some cases other factors will be relevant to the balancing.

Discussion and Decision

[40] Everybody is entitled to the protection of the privilege against self-incrimination, the right to personal autonomy of the integrity of their bodies and thus the right to be free from non-consensual incursion into their bodies and the abstraction of any part thereof. Compelling a person to submit to withdrawal of their blood by needle so an analysis of its alcohol component can be put in evidence against that person would clearly infringe those rights unless the scheme for so doing is properly regulated and properly implemented.

[41] Whilst those rights are – or should be – universally recognised, around the world the road toll is such that Legislatures have decided that the rights can justifiably be curtailed as a matter of public safety. The Transport Amendment Act 2007 is the Cook Islands' Parliament's response. Giving full recognition to the rights, however, means that, for the Crown to be able to rely on evidence such as is in issue in this case, requiring full compliance with the regime set in place by the Act should be the starting point for permitting the admission of that evidence, and any

[7] Shaheed at 146-156; paras [419] – [422].

departures from strict compliance should impact as little as possible on the rights under discussion.

[42] As far as relevant to this case, the statutory scheme in the Transport Amendment Act 2007 for the taking of blood specimens is not a complicated one:

> Step 1: A Police officer requires a "medical officer" to take a blood specimen from a person under examination, care or treatment in a hospital (s28C(1));
>
> Step 2: After deciding that the taking of the blood specimen will not be prejudicial to the person's proper care or treatment (s28E(1)) and informing the person that the blood specimen to be taken from them is for evidential purposes (ss28D(1) and 28E(1)(c)), the registered medical practitioner takes the specimen and deals with it in accordance with the statutory requirements.

[43] Glosses on that regime are, first, that under s28E(1)(c) informing the person that the blood specimen is for evidential purposes can be contemporaneous with, or subsequent to, the taking of the specimen, but, if the person is unconscious, s 28E(2) requires the information to be in writing and given as soon as practicable. A second gloss substitutes the person's next-of-kin for the person, where the person is, or remains, unconscious (s28E(c)(2)).

[44] Some further observations on that statutory scheme are warranted:

a) How the Police officer's "requirement" is to be made is not prescribed. Section 28C(1) implies that a separate requirement must be made for each blood specimen but, apart from that, an oral statement or a requirement in a form would appear to comply with the scheme, particularly when a patient's needs at the time are such as to relegate Police investigations.

b) The "requirement" must be to a "medical officer", but there is no statutory necessity for it to be to a named "medical officer". A generally phrased requirement would appear to be enough. As noted,

the phrase “medical officer” is widely defined, so the requirement need not be to a “registered medical practitioner”.

c) The Act may be seen as contradictory in that s28E(2) appears to contemplate that a “medical officer” will take the specimen, but the obligation to satisfy him – or her – self that taking the specimen is not prejudicial to the person’s treatment and to inform the patient is either that of a “medical officer” (s 28D(1)) or the narrower one of a “registered medical practitioner” (s 28E(1)(c)).

[45] To turn from those general remarks to this case, here there was no specific or direct oral request made by Sergeant Takai to any “medical officer” as that term is defined: he gave the form containing the requirement not directly to a medical practitioner or to Nurse Manea – either of whom would have come within the definition of a “medical officer” –, but to the hospital receptionist for transmission to, and completion by, a doctor. Here, the obligation, under ss 28C and 28D, for Mr Nicholas to permit a “medical officer” to take the blood specimen when the “medical officer” was “required to do so by a constable” was argued to be breached in that the form’s requirement from Sergeant Takai to a “medical officer” was indirect. Is that within the statute?

[46] The evidential blood specimen form printed out by Mrs Manavaroa, given to Sergeant Takai and then returned to him by Mrs Manavaroa and handed on to Nurse Manea included a requirement for the taking of an evidential blood specimen. As noted, there is nothing in s 28C(1) saying the requirement must be made in any particular way and, given that police requests for the taking of evidential blood specimens are invariable for all those involved in motor vehicle accidents either as drivers, passengers or third parties all those involved in the process – police, doctors and nurses – know a form for completion containing a “requirement” will be furnished in every such case. In view of that, the phrase “when required” in s 28C(1) should be interpreted to mean when a request is conveyed to a “medical officer” by any means. Conveyance of the request by means of a form accords with police and medical practice and a specific identified requirement does not need to be made on each occasion. In addition, while identification of the persons from and by

whom the blood specimen is obtained is, of course, important for Court purposes, s 28C does not specify that the persons' names be written into the form before the specimen is withdrawn.

[47] Pertinent to this aspect of the application is that hospital patients, especially those suffering from serious injuries, if able to do so, for treatment purposes almost invariably consent[8] to significant invasions on their privacy and the integrity or autonomy of their persons. The taking of a blood sample for diagnostic and treatment purposes is part of invariable and standard clinical practice, so the taking of a small amount of additional blood for evidential purposes does not significantly add to the invasion of the person's rights to privacy and integrity.

[48] As noted, blood samples for clinical purposes are taken from all hospital patients, not just drivers, and while it would be preferable for the names of drivers, if known, to be inserted in the evidential blood specimen form for Court purposes, there is no statutory requirement for such before the sample is taken and the invariability of the request for evidential blood specimens to be taken from persons in hospital following motor vehicle accidents, especially in emergencies such as obtained at the Rarotonga hospital on the night of 22-23 July 2015, meant identification of Mr Nicholas in the evidential blood specimen form was neither required by statute nor practicable in the circumstances which prevailed where access to the treatment room by Sergeant Takai was not permitted for clinical reasons.

[49] That reading of s 28C(1) – that a requirement in a blood specimen form without the requirement being directly conveyed to a "medical officer" complies with statute – also accords with the New Zealand Court of Appeal decision in *R v. Cameron* where the police request for an evidential blood sample was made to a nurse and the question was whether the request could be validly made by another person to be conveyed to the doctor in charge. The Court of Appeal held it was a valid request in terms of the New Zealand statute holding[9] ;

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[8] Perhaps with religious or similar exceptions, not relevant to this case
[9] See also H v. New Zealand Police HCNZ Wellington 210/02 16 December 2002 Goddard, J.

> *"As a matter of practicability, this may often be difficult, or at least inconvenient. Let us assume that the enforcement officer makes a written request of the doctor which he hands to a nurse for transmission to the doctor. It cannot matter that the request is conveyed in this way, rather than being put into the doctor's hands by the enforcement officer. The same must apply to a verbal request. What matters is that the enforcement officer must make a request to the registered medical practitioner. It cannot matter how that request is conveyed to the doctor. In this case the request via the nurse was nonetheless a request validly made by the enforcement officer to the doctor.*[10]

[50] The decision in *Cameron* is one which should be adopted in the Cook Islands, though the passage cited needs to be broadened to include all those within the definition of "medical officer". That accords with the realities of medical and surgical practice where the focus is primarily on alleviating suffering and saving lives, rather than being distracted, if the person being treated turns out to have been a driver, by police officers being admitted to the sterility of a treatment room to convey their requirement orally and directly to a doctor or nurse. The form is a continuing "requirement".

[51] The Court's conclusion, in light of that, is that the handing, to hospital personnel, of the form for eventual completion by a "medical officer" which contained a "requirement" for the taking of a blood specimen from Mr Nicholas complied with s 28C(1).

[52] The next question, is whether the manner and timing of the taking of the evidential blood specimen from Mr Nicholas complied with s 28D(1) which requires the intention to take an evidential blood specimen to be given before the specimen is taken if the person from whom it is to be taken is conscious.

[53] It is clear that Dr Teapa did not advise Mr Nicholas that an evidential blood specimen had been taken until his conversation to that effect with the accused several hours after the taking. On the evidence, it may have been the case that

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[10] NZCA CA 46/98 15 June 1998 P4

Doctor Pau'u did not advise Mr Nicholas, in exactly those terms, that a blood sample was being taken for evidential purposes, and it was argued that, even if he did, Mr Nicholas did not fully comprehend what he was told.

[54] However, the Court takes the view that when, in a conversation which occurred before the blood was actually withdrawn, Dr Pau'u told Mr Nicholas that blood investigations were to be done, not just for the base line analysis of his condition but also for blood alcohol reasons, that sufficiently complied with Section 28(1). All drivers can be taken to have at least a general understanding of what "blood alcohol" and "evidence purposes" mean in relation to the drinking of alcohol, the driving of motor vehicles and possible Court action. Mr Nicholas would have understood at least the gist of what Dr Pau'u told him just before the specimen was taken and his understanding would have been confirmed when he spoke with Dr Teapa later that morning.

[55] The Court also holds that Mr Nicholas was conscious at the time within the meaning set out *de Thierry*. Even though Mr Nicholas may have been un-cooperative and agitated at that point, his response to stimuli showed that he was conscious in accordance with the definition of that term adopted in that case. The decision should also be adopted in the Cook Islands.

[56] The Court accordingly concludes that the manner of the taking of the evidential blood specimen from Mr Nicholas in this case sufficiently complied with s 28D(1) and that, if it did not, the infraction of Mr Nicholas' rights and the invasion of his privacy and integrity of the person were not, given the serious injuries for which he was being treated and his condition at the time, of great substance. That view is fortified by the fact that Mr Nicholas made no objection to what had taken place when advised some hours later by Dr Teapa that two blood samples had been taken, one for evidential purposes.

[57] The third factual breach of the statutory regime was that it seems clear that Mr Nicholas Snr and the family members present were not advised that an evidential blood sample was about to be taken, or had been taken, from the accused as required by s 28E.

[58] As discussed with counsel during the hearing, it is a little difficult to comprehend the reasons for Parliament enacting s 28E. While it is easy to understand the humanitarian reasons behind the section, as encapsulated in its heading “Protection of Patients”, where a patient is unconscious it is a little difficult to discern the legal or medical rationale behind the section, especially given that the wording of s 28E(1)(c)()2) makes clear that the next-of-kin of an unconscious patient need not be informed of the taking of an evidential blood specimen until after the specimen has been withdrawn.

[59] However, s 28E must be complied with if, in the circumstances, it is applicable. But, here, the Court’s view is that Mr Nicholas, the accused, was not unconscious at the time he was advised that the evidential blood sample was to be withdrawn. Accordingly s 28E is inapplicable.

[60] While, in light of the findings to date, it may be unnecessary to undertake a discussion of the *Shaheed* balancing principles this Court is of the view, after a balancing of all the circumstances, both pro and con, of the situation surrounding the taking of the blood specimen from him, that the certificate of analysis of blood alcohol concentration in Mr Nicholas’ blood should be held admissible at his trial. The nature of the rights involved and the relatively minimal intrusion constituting the breaches would make exclusion a disproportionate remedy. Amongst the matters that weighed in reaching a conclusion are the following:

a) “The taking of the evidential breath specimen was not an obviously trivial infraction of Mr Nicholas’ rights to privacy, integrity of his person and the privilege against self-incrimination but he was in hospital being treated for serious injuries and when the taking of one blood sample was an intrusive aspect of his clinical management, the taking of a second sample in that situation was not a major additional infraction of his rights. As the New Zealand Court of Appeal put it in *Shaheed*[11]. “*If... an unlawful search or seizure involves a substantial invasion of privacy, like the taking of a blood sample, that will count heavily against admissibility... but where the breach of*

[11] At 147 P 419

rights is readily excusable... in circumstances of urgency... it will require rather less in the way of vindication. The breach will be accorded less weight."

b) Although, in the circumstance of emergency prevailing in the Rarotonga hospital on the morning of 23 July 2015, the police actions may not have strictly accorded with the statutory scheme for the taking of evidential blood samples, in part their actions are excused by the decisions in *Vano* and *De Thierry* and, in any event, the departures from statute were occasioned by circumstances and were not overly significant or prejudicial to the accused.

c) While the Crown has other evidence available which might convince a jury that, by reason of Mr Nicholas' drinking of alcohol before the accident, he was not in proper control of his motor cycle on the night in question, especially at the time of the accident, the certificate of analysis provides a much surer basis for an expert to give the jury evidence as to the likelihood of his capacity for control being impaired by alcohol at the time of his driving. That is the case even though the specimen was taken some time after the collision, if it is coupled with evidence of the likely rate of decay in his blood alcohol level between the collision and the withdrawal of the sample. The certificate of analysis is therefore not vital to the Crown case but is likely to be of significant assistance to the jury in deciding whether the Crown has proved that Mr Nicholas, by reason of drink, was incapable of having proper control of his motor cycle when driving the machine that night, particularly at the time of the accident. The certificate is therefore highly probative on that aspect.

d) Driving motor vehicles when under the influence of drink or with excessive blood alcohol concentrations, resulting in death or injury, is a major problem in the Cook Islands. The charges must be considered as serious and a matter of public safety.

e) In the emergency circumstances which obtained in the Rarotonga hospital in the early morning on 23 July, the breaches that are alleged to have occurred of Mr Nicholas' rights are, in this Court's view, are either excused or excusable and do not undermine the effective and credible system of justice operative in the Cook Islands. Indeed exclusion of the blood specimen analysis might tend to do so.

[61] For all those reasons, the Court's formal orders are:

a) That the certificate of analysis of the blood alcohol concentration in the blood of the accused, Mr Nicholas, is ruled admissible at his trial; and

b) Mr Nicholas is directed to stand trial on a date and at a time to be fixed by the Registrar – probably in the November/December 2016 sessions of this Court – and his attendance at call-overs in the meantime is excused.

H Williams, J