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THE INTOXICATION DEFENCE

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Introduction

Anyone who has worked even one day in patrol is acutely aware that drunkenness, whether from drugs and/or alcohol, is a factor in many incidents and offences in which the police become involved. The question is, however, when does the intoxication of the accused become such a significant factor that it can impact the outcome of a case by becoming a valid defence at law? The intoxication defence goes to the issue of intent. Similar to an insanity defence, the question becomes, was the accused in such a state of mind due to intoxication that she or he was unable to form the required intent to carry out the act in question?

It is well established that a criminal offence cannot be proven unless someone possesses the required intent, or *mens rea*, to carry out the particular offence, or a lesser included offence, with which they have been charged. The "level" of intent to be proved, however, will vary depending on the particular offence involved. When dealing with the issue of intent there are two types of offences in our criminal law; those requiring the Crown to prove only a "general" intent and those requiring proof of a "specific" intent on the part of the accused.

Just as the *Criminal Code ("CC")* does not define intent, so too it does not specify which offences require proof of specific intent and which are offences requiring proof of only general intent. Without getting too caught up in how offences are categorized, suffice it to say that, generally speaking, offences that require proof of specific intent are the more serious offences. For example, murder under s. 229 of the *CC* requires that the accused meant to cause the death of a person or meant to cause that person bodily harm that was likely to cause death and is thus an offence of specific intent. Assault (s. 265), on the other hand, is an offence requiring only proof of general intent, in that the Crown simply proves that it was the force that was applied to the victim intentionally, not the intent to cause injury.

General Intent Offences

The defence of drunkenness in relation to general intent offences was considered by the Supreme Court of Canada in both *R. v. Leary*,[1] a pre-*Charter* case, and following the proclamation of the Charter, in *R. v. Bernard*.[2] In both cases it was held that the defence of drunkenness had no application to offences requiring proof of only general intent. Further, in *Bernard* it was held that this result did not offend the *Charter*. According to McIntyre J.:

> Criminal offences, as a general rule, must have as one of their elements the requirement of a blameworthy mental state. The morally innocent ought not to be convicted....The Leary rule recognizes that accused persons who have voluntarily consumed drugs or alcohol, thereby depriving themselves of self-control leading to the commission of a crime, are not morally innocent and are, indeed, criminally blameworthy.[3]

McIntyre J. was clearly aware of the effects of intoxication on crime in particular, and society in general, and felt that the public interest was satisfied by not having an intoxication defence open to accused persons in relation to general intent offences:

> As I have endeavoured to show, the exclusion of the drunkenness defence in general intent cases is not without logical underpinnings but, whatever the logical weaknesses may be, an overwhelming justification for the

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exclusion may rest on policy, policy so compelling that it possesses its own logic. Intoxication, whether by alcohol or drugs, lies at the root of many if not most violent assaults: intoxication is clearly a major cause of violent crime. What then is preferable, a recognition of this fact and the adoption of a policy aimed at curbing the problem, or the application of what is said to be logic by providing in law that he who voluntarily partakes of that which is the cause of the crime should for that reason be excused from the consequence of his crime? If that is logic, I prefer policy.[4]

More recently, in *R. v. Daviault*,[5] however, the SCC reconsidered the issue. In this case the accused, a chronic alcoholic, was charged with the sexual assault of a 65 year old partially paralyzed and wheelchair bound female. While not specifically overruling either *Leary* or *Bernard*, the majority found that the prior rules did offend the *Charter* and held that the defence of drunkenness should be available in general intent offences. According to Cory J., proof of intent is fundamental to our justice system and an accused should not be denied the requirement that the Crown prove all essential elements of an offence:

> In my view, the strict application of the *Leary* rule offends both ss. 7 and 11(d) of the Charter for a number of reasons. The mental aspect of an offence, or *mens rea*, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law. That element may be minimal in general intent offences; nonetheless, it exists. In this case, the requisite mental element is simply an intention to commit the sexual assault or recklessness as to whether the action will constitute an assault. The necessary mental element can ordinarily be inferred from the proof that the assault was committed by the accused. However, the substituted *mens rea* of an intention to become drunk cannot establish the *mens rea* to commit the assault.[6]

Daviault dealt with a chronic alcoholic accused whose defence was that his extreme intoxication put him into a state where he was no longer capable of forming any intent whatsoever, be it specific or general. The SCC felt that this argument and, thus this defence, would only be available in the *rarest of cases*. Cory J. stated:

> In summary, I am of the view that to deny that even a very minimal mental element is required for sexual assault offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*. The experience of other jurisdictions which have completely abandoned the *Leary* rule, coupled with the fact that under the proposed approach, the defence would be available only in the rarest of cases, demonstrate that there is no urgent policy or pressing objective which need to be addressed. Studies on the relationship between intoxication and crime do not establish any rational link. Finally, as the *Leary* rule applies to all crimes of general intent, it cannot be said to be well tailored to address a particular objective and it would not meet either the proportionality or the minimum impairment requirements [in order to justify its continued support in relation to the *Charter*][7].

Following the release of *Daviault*, Parliament enacted s. 33.1 of the *CC* to deal with the defence of self-induced intoxication.[8] The intoxication defence, in certain circumstances, is now limited; moreover, it is unavailable to an accused charged with certain types of offences. For the section to be operative the offence must include, as an element of the offence, an

assault or any other interference or threat of interference by the accused with the bodily integrity of another person. If, during the commission of the offence, the accused lacked the general intent or the voluntariness required to commit the offence by reason of self-induced intoxication, the intoxication defence is negated. A further requirement is that during the commission of the offence the accused must depart markedly from a noted standard of care. That standard of care, noted in ss. (2), is defined as:

> A person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

While it is, as yet, unknown, how the courts will deal with this section in relation to all of the general intent type offences, the enactment makes it clear that the defence will no longer be available in cases of sexual assault like that in *Daviault*.

Specific Intent Offences

In cases where the Crown must establish a specific intent on the part of the accused to have done the charged act, the burden on the Crown is somewhat greater than for general intent offences. When dealing with the issue of intoxication in specific intent offences, the courts in Canada, since the early part of this century, have followed English precedent and held that intoxication was irrelevant save where it could be shown that the intoxicant had removed the accused's capacity to form the necessary intent.[9] The question, until recently, was whether the accused, given his or her state of intoxication, was capable of forming the specific intent required for the offence? That issue was revisited by the SCC in 1996 in *R. v. Robinson*.[10]

In determining in *Robinson* that the prior rules offended the *Charter* the SCC firmly established new guidelines when dealing with the issue of intoxication. First, it must be established that there is some basis for a defence based on intoxication:

> [B]efore a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect *might* have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt. Once a judge is satisfied that this threshold is met, he or she must then make it clear to the jury that the issue before them is whether the Crown has satisfied them beyond a reasonable doubt that the accused had the requisite intent. In the case of murder the issue is whether the accused intended to kill or cause bodily hard with the foresight that the likely consequence was death.[11] (emphasis in original)

In other words, before the defence can even be put to a jury there must be an air of reality to the defence. If that is the case, then the issue of intent becomes one of fact; has the Crown established beyond a reasonable doubt that the accused committed the offence with the required intent. As Lamer C.J.C. noted, "it is my opinion that intoxication short of incapacity will in most cases rarely raise a reasonable doubt in the minds of jurors".[12]

When the defence of intoxication is employed by an accused in an indictment requiring proof of specific intent it is particularly important the trial judge properly instruct on that issue. In particular, care must be taken that the jury does not ignore the intoxication defence and over-emphasize the idea that a "sober and sane person" usually intends the natural and probable consequences of her or his actions.

That matter was made very clear in two recent B.C. cases on this issue, *R. v. Henry and Riley*[13] and *R. v. Frechette*.[14] In *Henry* and *Riley* the BCCA ordered a new first degree murder trial where the trial judge failed to properly instruct the jury on the issue of intoxication. In *Frechette*, released within days of the *Henry and Riley* decision, a separate three judge BCCA came to a similar conclusion when dealing with a charge of second degree murder. As the Court noted:

> ...the trial judge did not expressly draw a link between the common sense inference and the effect of intoxication on that inference. In other words, he did not instruct the jury that evidence of intoxication could rebut the common sense inference [that a sober and sane person could not have committed the act in question without the required intent].[15]

Conclusion

The issue of intoxication cannot be dismissed during the investigative stage of any offence. Investigating officers must thoroughly document any evidence or observation that may relate to an accused's state of intoxication. Consideration should also be given to the use of other investigative aids (e.g. breathalyzer).

Endnotes:

1. *R. v. Leary* (1978), 33 C.C.C. (2d) 473 (S.C.C.).
2. *R. v. Bernard* (1988), 45 C.C.C. (3d) 1 (S.C.C.).
3. *Ibid.*, at 37.
4. *Ibid.*, at 36.
5. *R. v. Daviault*, [1994] 3 S.C.R. 63.
6. *Ibid.*, at approx. 79.
7. *Ibid.*, at approx. 80.
8. S.C. 1995, c. 32, s. 1.
9. *MacAskill v. The King*, [1931] S.C.R. 330.
10. *R. v. Robinson*, [1996] S.C.R. 683.
11. *Ibid.*, at para. 48.
12. *Ibid.*, at para. 52.
13. *R. v. Henry and Riley* (19 January 1999), Van Reg. 0022.99 (B.C.C.A.).
14. *R. v. Frechette* (27 January 1999), Vic. Reg. 0046.00 (B.C.C.A.).
15. *Ibid.*, at para. 20.

CONSENT SEARCHES

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Introduction

It is not uncommon for police officers in the course of their duties to rely on the consent of an individual to conduct a search. Such consent is often routinely relied upon by police officers to search individuals (i.e. asking an individual to empty out his or her pockets), to search an automobile (i.e. asking an individual to open the trunk), or even to search a residence or room. While reliance on the consent of an individual may have certain practical advantages, it is not without its pitfalls for the unwary police officer. The purpose of this paper is to canvas the factors considered by the courts when considering whether or not the investigating officer has obtained valid and proper consent to conduct a search.

Two Approaches

A review of the case law reveals two divergent views concerning what constitutes valid and effective consent to a police search. The first approach focuses on the *voluntariness* of the decision to consent to the search. According to this narrow view, consent simply means that the individual "made a conscious and voluntary choice, free from threats, inducements or intimidation."[1] This test for determining whether a person has consented to a police search is analogous to that applied when determining the admissibility of a confession. The second approach posits that mere voluntariness is not sufficient to establish valid consent to a police search. Rather, the individual must also have some *appreciation of the potential consequences* of giving the consent so that he or she might make a meaningful decision to give consent or not.[2] This latter approach clearly places a more onerous burden on police officers when they seek to rely on consent to conduct a search.

Photograph by Justice Institute of BC - Media Centre

In Search and Seizure Law in Canada, the authors describe these two divergent views of consent as follows:

> Consent to a search may mean that the consenter made a free choice, unrestrained by threats or inducements, and voluntarily allowed the search to occur. On the other hand, consent to a search may mean that the consenter, in full knowledge of the legal right to refuse and knowing the consequences of consent, voluntarily waives the right not to be searched.[3]

The balance of this article will discuss the cases of *R. v. Wills*[4] and *R. v. Borden*[5], two leading decisions on consent searches. It is clear from a review of these two decisions that the courts in Canada have rejected the narrow "voluntariness" test in favour of the broader "waiver" test when dealing with the issue of consent searches.

Wills and *Borden*

At issue in *R. v. Wills*, was whether or not a breath sample obtained "voluntarily" from the driver of a motor vehicle could be admitted at trial. Mr. Wills was the driver of a motor vehicle involved in a fatal motor vehicle accident. Though the investigating officer smelled alcohol on Mr. Wills' breath, he did not have any reason to believe that he was impaired. When Mr. Wills' admitted that he may have had something to drink earlier that evening, one of the investigating officers demanded that he provide a breath sample for an approved roadside screening device. The roadside screening device registered a "warn", indicating that Mr. Wills had a blood alcohol concentration of between .05 and .1 milligrams of alcohol. Based on the test result and his observations, the investigating officer concluded that Mr. Wills was likely not over the legal limit when the accident occurred. He decided that he would not be laying any drinking/driving related charges, but had not ruled out laying other motor vehicle related charges.

Though he did not have any grounds to demand that Mr. Wills submit to a breathalyser test, the investigating officer suggested that

Mr. Wills take a breathalyser test to provide evidence in the event of a civil action. He advised Mr. Wills that the breathalyser test would allow Mr. Wills to establish his exact blood alcohol level. Before Mr. Wills took the breathalyser test, the investigating officer said "Tim, you understand that you don't have to provide this sample and you are doing this of your own free will." Mr. Wills replied that he understood. Mr. Wills provided the breath sample for the breathalyser test, and a reading of 1.28 milligrams of alcohol was registered. It was subsequently determined that the roadside screening device used in the initial test was not functioning properly because of inaccurate calibration.

The issue before the Ontario Court of Appeal was whether or not Mr. Wills had validly consented to the taking of a breath sample. Doherty J.A. stated the issue as follows: "There is no doubt that Mr. Wills agreed to the taking of the sample. The question is, was his consent an effective one or was it vitiated by non-disclosure or innocent misrepresentation of the material facts?"[6]

If the test to be applied was simply that of voluntariness, it was clear on the evidence that the Crown had discharged the burden of establishing that Mr. Wills had given valid consent to provide a breath sample: Mr. Wills was aware that he was under no obligation to provide a breath sample; he made the decision to provide a breath sample freely, and after consulting with his father; and the police conduct did not amount to inducement, coercion or oppression. However, Doherty, J.A. rejected the narrow test of voluntariness, stating:

> In my opinion, the requirements established by the Supreme Court of Canada for a valid waiver of a constitutional right, are applicable to the determination of whether an effective consent was given to an alleged seizure by police. The fairness principal which has defined the requirements of a valid waiver as they relate to the right to a trial within a reasonable time, or the right to counsel, has equal application to the right protected by s. 8. In each instance, the authorities seek an individual's permission to do something which, without that permission, they are not entitled to do. In such cases, fairness demands that the individual make a voluntary and informed decision to permit the intrusion of the investigative process upon his or her constitutionally protected rights.[7]

When the police rely on the consent of an individual as their basis for a search and seizure, Doherty, J.A. held that the Crown must establish, on the balance of probabilities, that:

1. There was consent, expressed or implied;
2. The giver of the consent had the authority to give the consent in question;
3. The consent was voluntary in the sense that it was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
4. The giver of the consent was aware of the nature of the police conduct he or she was being asked to consent to;
5. The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and
6. The giver of the consent was aware of the potential consequences of giving that consent.[8]

It was clear on the facts of the case that the Crown had established that the first five requirements had been met. However, Doherty, J.A. held that the Crown had failed to establish that Mr. Wills was sufficiently aware of the potential consequences of consenting to provide a breath sample. Specifically, Mr. Wills was not informed that the breathalyser test results would be used to assist the investigating officer in his ongoing investigation into the accident, nor was he aware that one of his passengers had died and another was seriously injured. Further, Mr. Wills was misled as to the potential criminal consequences of taking a breathalyser test by the results of the roadside screening device. Thus, Mr. Wills' lack of appreciation of the consequences of providing a breath sample vitiated his consent.

In *Borden*, the SCC considered the test adopted by Doherty J.A. in *Wills*. The accused was arrested pursuant to a warrant issued in connection with a sexual assault on a woman at a motel ("December Assault"). No sexual intercourse or ejaculation occurred in the December Assault, but the police seized a number of items from the motel room, including two strands of hair. The complainant had seen Mr. Borden on previous occasions, and was able to identify him in a photo line-up as her assailant. At the time of his arrest, Mr. Borden was also a suspect in a sexual assault of an elderly woman in her home ("October Assault"). In that case, the complainant was unable to identify her assailant. However, the police seized a comforter stained with semen.

Mr. Borden was cooperative with the investigating officers throughout their investigation. He made an oral exculpatory statement in connection with the December Assault. Contrary to his counsel's advice, he subsequently agreed to reduce his oral statement to writing. He also cooperated in providing samples of scalp and pubic hair. The officers then debated amongst themselves whether to request a blood sample from Mr. Borden. Iacobucci J. noted that "[t]he officers testified that, while the sample had some utility in the investigation of the motel offence, they wanted it "mainly" or "mostly" for the investigation of the October assault of the elderly woman, in order to compare the blood with the semen found on her comforter."[9]

Mr. Borden complied with the investigating officers' request to provide a blood sample. He signed a written consent form permitting the officers "to take a sample of my blood for purposes relating to their investigations". Apart from the use of the plural

"investigations", Mr. Borden was given no indication that the blood sample was being sought for use in the investigation of the October Assault, nor was he ever informed by the investigating officers that he was a suspect in the October Assault. The blood sample was analyzed and found to match the semen found on the comforter, and Mr. Borden was charged with the sexual assault of the elderly woman.

The principal issue before the SCC was whether or not Mr. Borden had validly consented to the seizure of his blood in relation to the police investigation of the October Assault. The Crown, relying on the decision of the SCC in *R. v. Mellenthin*[10], submitted that the proper (i.e. narrow) test to apply in assessing whether an individual has consented to a police search was one of voluntariness.

In *Mellenthin* the SCC considered a search conducted during a road block set up as part of a program to check motor vehicles. Although the police officer saw neither liquor or drugs inside the vehicle, he saw an open gym bag on the front seat beside Mr. Mellenthin. Inside the gym bag was a small brown bag with a plastic sandwich bag in it. In response to the police officer's questioning, Mr. Mellenthin opened the bag. The officer saw that the bag contained glass viles which he testified were commonly used to store cannabis resin. As a result, the officer believed he had reasonable probable grounds to believe that narcotics were present in the vehicle. He conducted a further search of the vehicle and found viles of hash oil and marijuana joints.

In considering whether the opening of the gym bag by Mr. Mellenthin amounted to consenting to a search, Cory J. stated:

> It has been seen that as a result of the check stop the appellant was detained. The arbitrary detention was imposed as soon as he was pulled over. As a result of that detention, it can reasonably be inferred that the appellant felt compelled to respond to questions put to him by the officer. *In those circumstances, it is incumbent upon the Crown to address that the person detained had indeed made an informed consent to the search based on an awareness of his rights to refuse to respond to the questions or to consent to the search.* There is no such evidence in this case. In my view, the judge was correct in her conclusion that the defendant felt compelled to respond to the police questions. In the circumstances, it cannot be said that the search was consensual.[11] (emphasis added)

In *Borden*, Iacobucci, J. rejected the Crown's submission that the highlighted portion of this passage from *Mellenthin* supported the adoption of the narrow "voluntariness" test:

> With regard to the test to be applied, I cannot find that the decision of this court in Mellenthin, supra, is of assistance to the appellant. While it is true that Cory, J. in that case stated at page 624 that it was, "...incumbent upon the Crown to deduce evidence that the person detained had indeed made an informed consent to the search based upon awareness of his rights to refuse to respond to the questions or to consent to the search", I cannot interpret this assertion as purporting to set out an exhaustive state of a general test for the requirements for a valid consent to a police search.[12]

Iacobucci, J. noted that it was not necessary in Mellenthin to consider whether the accused needed to be aware of the consequences of his consent, as the real issue was simply whether or not the accused knew whether or not he was required to show the officer the contents of his bag. Iacobucci, J. favoured the broad approach adopted in *Wills*:

> In order for a waiver of the right to be secure against unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over the other, but also sufficient available information to make the preference meaningful. This is equally true whether the individual is choosing to forgo consultation with counsel, or choosing to relinquish to the police something which they otherwise have no right to take.[13]

Iacobucci, J. went on to consider the Crown's alternative argument that, even if the Court adopted the more broader "waiver" test of *Wills*, the Crown had nonetheless established that Mr. Borden was sufficiently aware of the consequences of consenting to provide a blood sample. Specifically, the Crown submitted that it was reasonable to infer that Mr. Borden knew that the police had an open investigation concerning the October Assault, since he committed the assault, that he had left semen at the scene, and that he was aware that it was possible to compare his blood sample to semen samples. Iacobucci J. rejected this argument, noting that "the logical extension of this argument would be that the protections afforded by the *Charter* no longer apply whenever the person arrested is guilty of the offence for which he or she has been detained."[14]

In considering the degree of awareness of the consequences that the Crown must establish, Iacobucci J. noted:

> The degree of awareness of consequences of a waiver of the s. 8 right required of an accused in a given case will depend on the particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also

planning to use the product of the seizure in a different investigation from the one for which he or she is detained. Such was not the case here. Therefore, I conclude that the police seized the respondent's blood in relation to offence forming the subject matter of this charge.[15]

In applying this test to the facts of the case, Iacobucci J. also commented critically on the failure of the investigators to specifically disclose to Mr. Borden their intention to use the blood sample in their investigation of the October Assault. Given the circumstances in the case, Iacobucci, J. held that "it was incumbent upon the police, at a minimum, to make it clear to the respondent that they were treating his consent as a blanket consent to the use of the sample in relation to other offences in which he might be a suspect."[16] Because of the police failure to advise Mr. Borden of their intentions, Iacobucci J. held that the police could not rely on Mr. Borden's consent to provide a blood sample as he was not sufficiently aware of the consequences of consenting to the procedure.

Conclusion

In conclusion, in *Wills* and *Borden*, the courts clearly rejected the narrow "voluntariness" approach to consent in favour of the broader "waiver" test. Thus, when police officers seek to rely on the consent of an individual to conduct a search, they must go further than simply satisfying themselves that the individual is acting freely and voluntarily. Rather, they must also establish the individual was aware of the consequences of consenting to the search. Although Iacobucci, J. did not specifically adopt the six point test set out by Doherty J.A. in *Wills*, a police officer who seeks to rely on the consent of an individual as the basis for a search ought to ensure that these criteria are met.

Endnotes

1. *Scott C. Hutchinson et al., Search & Seizure Law in Canada* (Toronto: Carswell) 1993 (Looseleaf) at 7-1.
2. *Ibid.*
3. I*bid.*
4. (1992), 12 C.R. 458 (Ont.C.A.).
5. (1994), 33 C.R. (4th) 14 (S.C.C.).
6. *Supra*, note 4 at 71.
7. *Ibid.*, at 74.
8. *Ibid.*, at 77-78.
9. *Supra*, note 5 at 154 - 55.
10. (1992), 16 C.R. (4th) 273.
11. *Ibid.*, at 280-81.
12. *Supra*, note 5 at 157.
13. *Ibid.*, at 158.
14. *Ibid.*, at 158 - 59.
15. *Ibid.*, at 159-60.
16. *Ibid.*, at 159.

If You Call 911, They Can Come: Entering Residences in Response to 911 Calls

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Introduction

Recently, in *R. v. Godoy*,[1] the Supreme Court of Canada provided some important instruction to the police when entering residences in response to 911 calls. The following is a brief overview of *Godoy* and its application to 911 calls.

Facts

Police responded to a radio call of 911 "unknown trouble" (i.e. phone call terminated before anyone spoke) at an apartment. Such calls were deemed by the police agency to be second in priority behind officer in distress calls. Based on the 911 trace, officers were dispatched to the originating address of the call. Due to the unknown feature of such calls, two primary and two back-up officers were assigned to the call. The police arrived at the apartment and knocked on the door. The door was opened partially by the accused and when asked about the call, he stated there was no problem. When asked by one officer if they could enter to investigate, the accused attempted to close the door. One officer stopped the door from being closed and they forcibly entered the apartment. Once inside, the police could hear a woman crying and found the common law spouse of the accused in a bedroom in a fetal position, sobbing. Swelling was observed over the left eye of the woman and she stated that the accused had hit her. Based on the circumstances, the police arrested the accused for assault. The accused resisted arrest and a finger of one officer was broken during the subsequent struggle. The accused was also charged with assaulting the police officer. At trial, the judge dismissed the assault police officer charge asserting that the entry by the police into the apartment was not authorized, and as a result, the police action and arrest were illegal.

Analysis

The SCC noted public policy requires that the police have the authority to investigate 911 calls, but the circumstances of each case will determine whether the police can enter a private dwelling house in response to such calls. If the conduct of the police constitutes a *prima facie* interference with a person's liberty or property, two questions arise for determination under the Waterfield Test[2]: 1) did the police

"conduct fall within the general scope of any duty imposed by statute or recognized at common law"; and 2) did the police "conduct, albeit within the scope such a duty, involve an unjustifiable use of powers associated with the duty."[3]

On the facts of this case, there was no question the police conduct constituted an interference with the accused's liberty and property. The first question then is whether or not the police had statutory or common law authority to enter the apartment? The SCC examined the provincial legislation governing the police, and found that it explicitly stated "A police officer has the powers and duties ascribed to a constable at common law."[4] Further, the SCC has previously held that 1) preservation of the peace, 2) prevention of crime, and 3) the *protection of life* and property are duties that the police have at common law.[5]

The SCC observed that:

> The point of the 911 emergency response system is to provide whatever assistance is required in the circumstances of the call. In the context of a disconnected 911 call, the nature of the distress is unknown. ...[I]t is reasonable, indeed imperative, that the police assume that the caller is in some distress and requires immediate assistance. To act otherwise would seriously impair the effectiveness of the system and undermine its very purpose. The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.[6]

The next question, of course, is whether the conduct of the police in the circumstances of this case constituted an unjustifiable use of police powers? The SCC accepted that the justifiability of a police officer's conduct will depend on a number of factors, including 1) the duty being performed, 2) the extent to which some interference with individual liberty is necessitated in order to perform the duty, 3) the importance of the performance of that duty to the public good, 4) the liberty interfered with, and 5) the nature and extent of the interference.[7]

In the circumstances of this case, the SCC found there was no other reasonable alternative to ensure that the disconnected caller received assistance in a timely manner, and rejected as "impractical" and "dangerous" the submission of the accused that the officers could have questioned neighbours or waited in the corridor for signs of further distress.[8] As the Court rightly observed, "If a 911 caller is in serious danger and is unable either to communicate with the 911 dispatcher or answer the door upon police arrival, the caller's only hope is that the police physically locate him or her within the apartment and come to his or her aid."[9]

While there is an unquestionable right to privacy in a residence, the interests of "dignity, integrity and autonomy" of the caller under the *Charter* are also at stake when a 911 call is made. As such, the interest of a person who makes a 911 call is "closer to the core of the values of dignity, integrity and autonomy than the interest of the person who seeks to deny entry to police who arrive in response to the call for help."[10] The Court concluded that the public interest in maintaining an effective emergency response system is obvious, which permits some limited intrusion to protect life and safety: the police have authority to be on private property to investigate the 911 calls, locate the caller (which may require a limited search), determine the reasons for making the call, and provide any assistance that may be required, but they do not have permission to generally search premises or otherwise intrude on privacy or property.[11]

In this case, the police had a duty to respond to the 911 call, which extended to finding out the reason for the call. To meet the duty, the police could not accept the accused's assertion that there was no problem, and the police had the power to enter at common law to verify if there was an emergency. The attempt to close the door by the accused and deny the police entry contributed to the appropriateness of the forced entry. Once entry had been obtained, the police heard crying and they had a duty to search the apartment to find the source.

Conclusion

It is refreshing to have the SCC provide a relatively clear, concise and realistic judgement on the authority of the police to respond to emergency situations. Instead of circumscribing the police authority to respond to emergency situations, the SCC has unequivocally endorsed the authority of the police to enter residences in response to 911 calls where the circumstances dictate such a course of action. However, as the SCC cautioned, this is not an unfettered authority and *the interference with liberty and property by the police must be necessary for carrying out the police duty and it must be reasonable.*

Endnotes:

1. (4 February 1999) No. 26078 (S.C.C.).
2. *R. v. Waterfield*, [1963] 3 All E.R. 659.
3. *Supra*, note 1 at para. 12.
4. *Police Services Act*, R.S.O. 1990, c. P 15, s. 42(3).
5. *Supra*, note 1 at para. 15.
6. *Ibid.*, at para. 16.
7. *Ibid.*, at para. 18 citing Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (O.C.A.) at 499.
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*, at para. 19.
11. *Ibid.*, at para. 22.