

IN THE MATTER OF a complaint by
Percy Smith pursuant to the Royal
Newfoundland Constabulary Public
Complaints Regulations

AND

IN THE MATTER OF a Public Complaint
Adjudication pursuant to the Royal
Newfoundland Constabulary Act,
S.N. 1992 c. R-17, as amended

BETWEEN:

**ROYAL NEWFOUNDLAND CONSTABULARY
PUBLIC COMPLAINTS COMMISSIONER**

AND:

CONSTABLE WILLIAM F. GOSSE

DECISION

A hearing has been conducted pursuant to the provisions of the Royal Newfoundland Constabulary Act, 1992 (the "Act") and the Royal Newfoundland Constabulary Public Complaints Regulations (the "Regulations"), into a complaint made by Percy Smith, son of Kevin Smith, against Constable William Gosse. The circumstances giving rise to the complaint, which was made on February 7th, 1996, occurred in the early morning of November 18th, 1995 at 7 Barnes Place, Topsail, Newfoundland. There are two charges against Constable Gosse, the particulars of which have been set out in the References to an Adjudicator. They can be summarized as follows:

1. That he did, without good and sufficient cause, under the authority of the Detention of Intoxicated Persons Act, R.S.N. 1990 c. D-21, as amended (the "D.I.P. Act"), arrest or detain Kevin Smith, contrary to Section 3 (1) (a) of the Regulations;

2. That he neglected or omitted to promptly and diligently perform his duties as a Police Officer by disregarding requests for medical attention from a person in his custody, namely, Kevin Smith, and further that he failed to transport Kevin Smith to the nearest hospital or treatment facility, instead of to the St. John's lock-up for detention, under the D.I.P. Act, contrary to Section 3 (1) (d) of the Regulations.

BACKGROUND FACTS

On November 18th, 1995 at approximately 3:19 a.m. Colleen Hawco called the RNC Communication Centre to report a disturbance at 7 Barnes Place, Topsail, Newfoundland. The complainant reported a fight upstairs. A woman could be heard screaming and yelling. Constable Gosse was patrolling the area and at 3:28 a.m. he was dispatched to the residence. Constable John Collins and Constable Karen Penney were dispatched to assist him. Following their investigation and the events as they transpired, Kevin Smith was detained under the D.I.P. Act and transported to the lock-up. The officers and Mr. Smith departed Barnes Place at approximately 4:26 a.m. and arrived at the lock-up at approximately 4:46 a.m. After processing the appropriate paper work, the officers left the lock-up at approximately 4:56 a.m. Tragically, Mr. Smith died at the lock-up from a heart attack at approximately 7:45 am on November 18th, 1995. The circumstances of the investigation and the detention of Mr. Smith have resulted in this complaint.

Much evidence has been heard at this Adjudication. I have heard and reviewed the audiotape and the written transcript of the communications at the RNC Communications Centre on the morning in question regarding the complaint of Colleen Hawco and the communications between the Communications Centre and the officers involved. I have seen the videotape of the admission of Kevin Smith to the lock-up and read the written transcript of the audio portion. I have heard from the two officers who assisted Constable Gosse, and indeed from Constable Gosse himself, as to the events that transpired in the early morning of November 18th, 1995 and from the two Correctional Officers,

Michael Barry Whitty and Owen Thomas Devereaux, who were on duty when they attended at the lock-up with Mr. Smith. I have heard as well from Correctional Officer Anthony Tobin who discovered Mr. Smith. I have heard from the officers who conducted the initial investigation into the sudden death, namely; Sergeant Eric Keating, Constable Marlene Jesso and Constable Wayne Maxwell James and from Constable Gary Crocker as to a conversation that took place between him and Constable Gosse. I have heard from Constable Junior Frederick Small as to certain policies and procedures of the RNC and former acting officer in charge at the lock-up, Keith Hickman, and Captain Gary Haire as to policies and procedures at the lock-up. I have heard from Dr. Charles Hutton who performed the autopsy and Dr. William Arthur McKim, a Behavioral Pharmacologist, regarding the blood-alcohol level of Mr. Smith and behavioral matters pertinent thereto. I have heard from Dr. James Fraser, Mr. Smith's general practitioner, from Tina Haggett, the victim, as regards the complaint of Colleen Hawco, and I have heard from the Commissioner's Investigator, David Tough.

THE EVIDENCE AT 7 BARNES PLACE, TOPSAIL, NEWFOUNDLAND

The information, which Constable Gosse received from the Communications Centre, was that there had been a disturbance and that the complainant had heard a lady screaming and a male shouting. The evidence of Constable Gosse, Constable Collins and Constable Penney is consistent as regards to what happened when they attended at the scene. They arrived at the residence at about the same time. Constable Gosse was alone in his car and Constable Collins and Constable Penney were together. When all three approached the house, the front door was slightly ajar. Constable Collins and Constable Penney were standing together at the door. Constable Collins knocked on the door and spoke to identify the individuals as police officers. Constable Gosse was standing to the left of Constable Collins and Constable Penney. He was looking into a basement window. He saw a man inside who appeared to be either hiding or retrieving something under a sofa and who subsequently shut the blinds to the window. The house was a split-level entry with a set of steps going upstairs and a set steps going downstairs. Constable Collins descended and Constable Gosse ascended at which time they heard footsteps downstairs, a side door shut and a man, whom we now know to be Mr. Smith, ran into the

street and to rear of an adjacent home. He climbed over a fence or a barrier on a patio and down a steep embankment. Constable Gosse and Constable Collins gave chase on the street and Mr. Smith was apprehended after he slipped and lost his balance on the embankment. He was handcuffed, taken back to, and placed in the back seat of Constable Gosse's patrol car. While he identified himself to the officers, he, as he was entitled to do so, refused to give any information about what had transpired. In the meantime, Constable Penney contacted the Communications Centre seeking further details of the complaint.

The officers testified that they were very concerned with what happened. All three wondered whether this was a break and entry, whether there was domestic violence, and whether there was a victim. After the apprehension, Constable Gosse and Constable Penney searched the residence upstairs and downstairs. While there was no victim inside, there were signs of a disturbance. A chair was broken, a coffee table had been moved and ornaments were knocked over on a shelf and onto the floor. Constable Penney checked the backyard and wooded area behind the home. Meantime, Constable Collins went to the basement apartment to interview the complainant, Colleen Hawco. He then went to the patrol car to speak with Mr. Smith. Mr. Smith would not give any information although at that time Mr. Smith told Constable Collins that he had pneumonia and that he needed air. Constable Collins opened the back door for him and let him put his feet outside the door on the ground. Constable Collins then went inside to assist Constable Gosse and Constable Penney with the search.

At the time of the apprehension, Constable Collins stated that Mr. Smith looked intoxicated. He testified that he was "quite intoxicated". There was a strong smell of alcohol and he was staggering. He was slightly out of breath, though not laboring for breath, and Constable Collins thought he was out of shape.

Constable Penney observed that Mr. Smith was approximately 40 pounds overweight. His shirt was unbuttoned, his eyes were blurred, he was breathing heavy and his speech was slurred. He was sweating but she did not feel that he was in physical distress. She testified that in her opinion he was intoxicated.

Constable Gosse testified that at the time of the apprehension there was a strong smell of alcohol from Mr. Smith and his speech was slurred. After he was cuffed and walking to the patrol car, he was staggering and swaying. While he had difficulty breathing, Constable Gosse attributed this to the fact that there had been a foot chase and that he was overweight. He testified that there was no doubt in his mind that Mr. Smith was intoxicated.

After the search of the house and grounds, Constable Gosse testified that he contacted the Communications Centre to conduct a computer records search. He discovered that Mr. Smith was on probation for assaulting Bernice Petten.

Constable Gosse was the officer in charge as the incident happened in his patrol jurisdiction on the morning in question. He consulted with his colleagues, Constable Collins and Constable Penney, as to his options. At that time, they all believed that Kevin Smith was intoxicated. They had seen evidence of a disturbance. They could not find a victim. Mr. Smith attempted to flee from the scene and, as was his right, would not give any information as to what had transpired. Constable Gosse testified that he did not have reasonable and probable grounds to lay a charge under the Criminal Code, however, because of Mr. Smith's intoxication and Constable Gosse's concern for the victim, Mr. Smith was detained under the D.I.P. Act. Constable Gosse testified that Mr. Smith was given his rights and caution although it is noted that this was not mentioned in his report. He testified that it was noted in his personal notes.

Constable Gosse and Constable Penney escorted Mr. Smith to the lock-up. Constable Collins followed behind in his patrol car. They left the scene at approximately 4:26 a.m. Constable Gosse was driving and Constable Penney again unsuccessfully attempted to obtain information from Mr. Smith concerning the events that had transpired. During the ride the silent patrolman in the vehicle was open. The window was opened for Mr. Smith, who said he needed air, but closed when he said he was cold. Constable Penney testified that Mr. Smith was alternating between sitting up and lying down for a part of the trip. She thought he was uncomfortable because the space in the back seat was quite small. Mr. Smith had been handcuffed behind his back but his movement stopped, however, when she removed his handcuffs to make him more comfortable. It appears that Mr. Smith was quite loud. The record

shows that Constable Gosse could not hear a communication, unrelated to the matter under consideration, because Mr. Smith was "mouthin' off". Constable Penney felt he was loud because it was difficult to be heard from the backseat with the obstruction of the silent patrolman. Constable Gosse testified that he did not speak to Mr. Smith while on route to the lock-up. Constable Penney confirmed this. She testified that Mr. Smith informed her he had pleurisy pneumonia but she did not feel the need to inform Constable Gosse of this. Constable Gosse testified that he did not hear any of the conversation between Constable Penney and Mr. Smith. Constable Collins testified that at the scene Mr. Smith told him that he had pneumonia but that he did not feel that he needed to inform Constable Gosse of this. Constable Gosse testified that Mr. Smith did not complain to him of physical problems and he did not hear anything about Mr. Smith's medical condition. He had no sense that he was in distress. If he had, he would have taken Mr. Smith to the hospital. Constable Penney and Constable Collins testified that Mr. Smith did not ask to be taken to a doctor or to a hospital at the scene and Constable Penney's evidence was that he did not ask to be taken to a doctor or to the hospital while on route to the lock-up.

The officers and Mr. Smith arrived at the lock-up at about 4:46 a.m. Correctional Officer Michael Barry Whitty who was nearing the end of a 12-hour shift admitted them. On duty with him was Correctional Officer Owen Thomas Devereaux.

THE EVIDENCE AT THE LOCK-UP

Constable Gosse, Constable Penney and Constable Collins testified that Mr. Smith had no difficulty exiting from the back seat of the patrol car and that he walked, unassisted, to the door of the lock-up. Correctional Officer Whitty admitted the officers and Mr. Smith.

Correctional Officer Whitty has been employed with the Department of Justice for approximately 19 1/2 years and he has served 16 years at the lock-up. He testified generally as to the

procedure on admission and specifically as to the events surrounding the admission of Mr. Smith. There were two officers on charge and he was the officer who attended at the door to permit entry. Correctional Officer Devereaux stayed behind the desk. As he attended the door, he turned on the audio portion of the recording equipment and, having no concerns as to the health of Mr. Smith, admitted the officers and Mr. Smith. He testified that he has the authority to refuse admission to any detainee that he feels needs medical care. He has in the past refused admission to intended detainees. He testified that Mr. Smith walked in unassisted and when he opened the door to let him in, he smelled alcohol. Throughout the admission, he noted that he was staggering, that his eyes were bloodshot and that his speech was slurred. He did not, however, appear to have any difficulty answering questions and he was compliant with the removal of his property. He testified that Mr. Smith appeared to be drunk and that he did not look sick. He was short of breath but he did not place any significance on this, as he knew that he had been in a foot chase. At the time, he had erroneously assumed that the chase took place on Barnes Road in St. John's and not Barnes Place in Topsail. Notwithstanding this, he testified that Mr. Smith's breathing settled down after he was placed in the cell. He had occasion to check the cellblock as Mr. Smith had been standing on the toilet, attempting to reach the sprinkler, and rattling the bars. Correctional Officer Whitty was concerned that Mr. Smith would fall and he threatened to handcuff him if he didn't settle down.

During the admission he testified that he was outside the counter with Mr. Smith with a police officer and Constable Gosse and Constable Collins were inside the counter with Correctional Officer Devereaux. He did not know the position of Constable Gosse, or if in fact he was the officer in charge, but he testified that the counter top is approximately 18 inches wide. He also testified that it is common for detainees to say that they want to go to hospital to avoid being locked up. He testified that 80% or more of the inmates admitted to the lock-up are intoxicated or under the influence of drugs. Correctional Officer Whitty did not remember when he gave his original statement that Mr. Smith had asked to see a doctor, however, having reviewed the videotape he acknowledged that it was clear that he had.

He testified that in his opinion Mr. Smith was intoxicated to more than a minor degree, that he

did not have any concern at the counter as to his health and that Mr. Smith did not mention medical care after he had been placed in the cell. He was aware that Mr. Smith was to be held under the D.I.P. Act but that there could be further charges pending further investigation.

Correctional Officer Devereaux was on duty with Correctional Officer Whitty on the morning in question. He testified that he was inside the counter completing the paper work and that he was across from Correctional Officer Whitty. Constable Gosse was next to him inside the counter and he was across from Mr. Smith. He testified that from inside the counter you could touch the person on the outside of the counter.

He testified that he heard Constable Gosse say, "Can't breath there skipper" but, based on his observations, he placed no significance on the comment. Based on his observation of Mr. Smith, he did not feel that there was any need to send him to the hospital notwithstanding his request to go to the hospital or to see Dr. Fraser. There were signs of intoxication in that his clothing was in disarray, he was not walking straight, his eyes were glassy and there was a smell of alcohol. His only view of Mr. Smith occurred when Mr. Smith was at the counter and during the time that he assisted Correctional Officer Whitty in bringing Mr. Smith to the cell.

Correctional Officer Devereaux's report of the behavior of Mr. Smith following being placed in the cell is consistent with that of Correctional Officer Whitty. He added that Mr. Smith had removed his shirt and had been attempting to cover the sprinkler with his shirt.

A review of the videotape details the events that transpired from the time that Mr. Smith, together with the officers, arrived at the lock-up to the time that he was placed in the cell. Constable Gosse passes by the counter and instructs Mr. Smith to take everything out of his pocket. At this time, Constable Penney and Constable Collins are outside and Constable Penney passes something to Constable Collins. A voice, which is believed to be Constable Gosse says, "Can't breathe there skipper" and Correctional Officer Devereaux identifies Mr. Smith as somebody who had been there before approximately 5 years ago. When asked his name, Mr. Smith states his name and asks that they please

call a doctor. He repeats the request to have Dr. Fraser called and states he needs a hospital. He states he has pleurisy pneumonia. He cooperates by removing his property and once again requests that a call be placed to Dr. Fraser and states that he has to go to the hospital or that he has to go somewhere. He identifies his sister, Sheila Chafe, as his next of kin, provides her telephone number, his height and weight, the color of his eyes and he is compliant with removing his belt and boots. Once again he asks that Dr. Fraser be called and he says the he is supposed to be in the hospital. Correctional Officer Whitty comes with him, intending to take him to the cell. Mr. Smith comments that they don't believe him and when told to watch his step he says, "Please believe me man, I can't breathe".

EVENTS FOLLOWING ADMISSION TO THE LOCK-UP

Constable Gosse, Constable Collins and Constable Penney left the lock-up at approximately 4:56 a.m. Constable Gosse was returning to the RNC Headquarters to write his report and Constable Collins instructed him to write a good report. Constable Gosse conducted no further investigation and his shift ended. He was asked to give Constable Gary Crocker a ride to the station to commence his shift at 8:00 a.m. Constable Crocker testified that Constable Gosse discussed the events of the Smith detention with him while on route to headquarters. He testified that Constable Gosse informed him that Mr. Smith had complained of chest pains. At no time during his evidence did Constable Gosse state that he was aware at anytime that Mr. Smith complained of chest pains. While he did not deny that he said this to Constable Crocker, his evidence was that he had a problem believing that he said that to Constable Crocker.

Constable Gosse completed his shift having left his report for further follow-up and investigation by the day shift. At approximately 7:15 a.m. Correctional Officer Anthony Tobin arrived at the lock-up to commence his 8 a.m. shift on the morning of November 18th, 1995. He was in the process of releasing the detainees under the D.I.P. Act when it was determined shortly after 7:30 a.m. that Mr. Smith was not breathing. An ambulance was dispatched and it was later determined that Mr. Smith died of a heart attack.

Sergeant Eric Keating is a 22-year veteran with the RNC. He was the supervisor on duty on November 18th, 1995 and he was assigned to supervise the investigation into the sudden death of Kevin Smith at the lock-up. He attended at the lock-up at 8:20 a.m. Constable Marlene Jesso and Constable Wayne James were dispatched to assist him. Sergeant Keating had a conversation with Constable Gary Crocker at the beginning of his shift, prior to going to the lock-up, wherein Constable Crocker informed him that Constable Gosse had told Constable Crocker that Mr. Smith had complained of pain. Sergeant Keating testified that he was not told that this was specifically chest pain. At the lock-up, Sergeant Keating was briefing Constable Jesso and Constable James. They testified that Constable Crocker either came into the room or stuck his head into the room, uninvited, and repeated his earlier comment to Sergeant Keating. Constable Jesso recalled that he had indicated that Mr. Smith complained of chest pain. She testified that, as part of her investigation, this would be something that would be looked into. As part of his role in the investigation, Constable James went to 7 Barnes Place to attempt to contact Mr. Smith's family and to endeavor to locate his girlfriend. As a result of his efforts, the family was notified, Percy Smith identified the photograph of his father, and an autopsy order was obtained from Judge Orr. Dr. Hutton was contacted regarding the autopsy and Constable James attended at the autopsy. Dr. Hutton confirmed death by heart attack although the autopsy signed at 6:02 p.m. stated that the cause of death was "pending". At the request of Dr. Hutton, Constable James together with Constable Jesso and Percy Smith attended at Kevin Smith's home. They seized prescription drugs, namely; Atasol 30, a bronchial inhaler and Apoclorozipate.

OTHER EVIDENCE

Dr. Charles J. Hutton, Deputy Chief Forensic Pathologist for the Province of Newfoundland and Labrador, conducted the autopsy on Mr. Kevin Smith. His evidence and his autopsy report confirm that Mr. Smith died of acute coronary thrombosis. At the time of his death, his blood- alcohol level was 106 milligrams of alcohol per 100 milliliters of blood. The drug screen detected Nordiazepam at a concentration of 0.12 mg/l, which was stated to be in the therapeutic range.

Dr. William Arthur McKim, a Psychology Professor at Memorial University and an expert in

behavioral pharmacology, gave opinion evidence respecting drug use, alcohol consumption and absorption and the effect on human beings. Mr. Smith was pronounced clinically dead at 7:45 a.m. He was apprehended approximately 4 hours earlier. At the time of death his blood-alcohol level was 106 milligrams of alcohol per 100 milliliters of blood. Dr. McKim was of the opinion that, at the time of apprehension, the range of his blood-alcohol level was 146 milligrams of alcohol per 100 milliliters of blood to 186 milligrams of alcohol per 100 milliliters of blood.

He testified that drug use does not affect alcohol absorption, however, alcohol consumption does slow down the metabolism of Diazepam.

Dr. McKim testified that he had viewed the videotape of Mr. Smith's admission to the lock-up. From the tape, during his evidence, he indicated that it was not easy to determine a degree of intoxication. Speech was slurred but the quality of the tape was not good. The fact that Mr. Smith recalled numbers and addresses readily was not conclusive. He appeared to have no difficulty with his balance as he could stand on one foot to remove his boot and he was able to remove his belt. He testified that when he first viewed the tape, the thought of alcohol did not enter his mind. On cross-examination, however, he did agree that the range of 146 to 186 milligrams of alcohol per 100 milliliters of blood indicated a significant degree of intoxication. His opinion was that, based on what he had seen in the video, he did not believe that Mr. Smith was a danger to himself or others. He stated that the blood- alcohol level, by itself, would not indicate that he was likely to be dangerous. He did, however, agree that the best indicator of future behavior is past behavior.

Dr. James Fraser testified that he had been Mr. Smith's general practitioner since 1973. At the time of his apprehension and detention, Mr. Smith knew he did not have pleurisy pneumonia. Mr. Smith had attended Dr. Fraser's clinic on the 3rd, 5th, 8th and 16th of November for investigation. On the 16th, he complained of being short of breath. Previously he was treated for flu like symptoms. He was subject to anxiety for which he was prescribed anti-anxiety medication.

Tina Hagggett confirmed the events at the home before the officers arrived. David Tough

investigated for the Commissioner gathering evidence that is not before me. This testimony does not assist me in my deliberations.

ANALYSIS

IMPROPER DETENTION ALLEGATION

Sections 4 and 5 (1) of the Detention of Intoxicated Persons Act provide as follows:

Intoxicated person in custody

4. (1) Where a peace officer finds in a place to which the public has access a person who is in an intoxicated condition, he or she may, where that peace officer is of the opinion that the person may

- (a) be a danger to himself or herself;
- (b) be a danger to others; or
- (c) cause a nuisance.

take that person into custody.

(2) Where a peace officer takes a person into custody under subsection (1), the peace officer may escort that person to a detoxification centre.

Release from custody

5. (1) Where a person is taken into custody under section 4, the person having custody of him or her shall release that person

- (a) on his or her recovering sufficient capacity to remove himself or herself without danger to himself or herself or others and without causing a nuisance; or
- (b) where an application is made sooner by
 - (i) a member of his or her family, or
 - (ii) a person of the age of majority

who appears to be suitable and capable of taking charge of the person, into the charge of that applicant.

- (2) A person shall not remain in custody under paragraph (1) (a) longer than 48 hours unless 2 qualified medical practitioners view his or her condition and furnish a written certificate in duplicate, signed by both practitioners, that in their opinion the person has not recovered the capacity referred to in that paragraph, but he or she shall be released immediately upon recovering that capacity.
- (3) The person having custody of the person who is the subject of the certificate referred to in subsection (2) shall, as soon as reasonably possible, transmit 1 of the duplicate certificates to the Minister of Justice.
- (4) Immediately after a person has been escorted to a detoxification centre under section 4, that person is no longer in custody for the purposes of this section.

As adjudicator David Eaton said in the Nolan decision, filed August 30th, 1994 at page 27, *"These provisions do not provide police officers with broad and unfettered powers to*

arrest persons who are under the influence of alcohol. It is implicit in the wording that not only must the person be intoxicated, but that there must be also some immediate safety concern (for that person or others), or some concern for the public order. The requirement that the police officer form an opinion is no different than many other statutory provisions. The opinion must be based on evidence sufficient to justify the formation of that opinion. There must be reasonable grounds".

Mr. Justice LeBlanc, (sitting as a Judge of the Newfoundland Provincial Court), in the case of R. v. Sheppard (P.L.) examined the Detention of Intoxicated Persons Act. He was asked to make a ruling as to whether the accused was arbitrarily detained and whether his charter rights were violated.

Justice LeBlanc stated that the result of a detention under the D.I.P. Act is the loss of the liberty of the accused. At paragraph 19 of his decision, reported at 107 Newfoundland P.E.I. Reports at page 261, he stated:

"The question of whether the detention in this case is arbitrary depends on whether or not the detention was capricious, unreasonable or unjustified.... The Act requires that the officer must have been of the opinion that the accused was a danger to himself, a danger to others or that he may cause a nuisance".

In the matter before me, at the time that Mr. Smith was detained, Constable Gosse had formed the reasonable opinion that Mr. Smith was intoxicated. His fellow officers, Constable Collins and Constable Penney, were of the same opinion. The Correctional Officers at the lock-up were also of the opinion that Mr. Smith was intoxicated. The fact that he was intoxicated, to a level either slightly less or slightly greater than twice the legal standard to operate a motor vehicle, is also evidence that is before me.

Constable Gosse knew that a domestic disturbance had taken place and he was unable to locate the victim. Mr. Smith had attempted to flee from the scene and, as was his right to do so, would not give any details as to what had happened or the whereabouts of the victim whom we now know to

be Tina Haggett.

Constable Gosse quite candidly stated that he was of the opinion that this was more than a D.I.P. situation. He did not have reasonable and probable grounds to lay a charge under the Criminal Code, as he could not locate the victim, however, given the intoxication of Mr. Smith and his heightened concern for the safety of the victim, he felt that he did his job properly when he detained Mr. Smith under the D.I.P. Act.

Given Constable Gosse's heightened concern for the safety of the victim, I believe that the facts of this case are distinguishable from the facts of the Nolan complaint or the Sheppard case. I find that Constable Gosse was of the honest and reasonable belief that Mr. Smith was intoxicated and that there was objective evidence supporting his concern for the safety of another person. I find he made appropriate inquiries and acted accordingly. I conclude, therefore, that Mr. Smith was detained with good and sufficient cause with Constable Gosse appropriately exercising his legislative discretion.

DISREGARDING REQUEST FOR MEDICAL ATTENTION AND FAILURE TO TRANSPORT TO THE NEAREST HOSPITAL OR TREATMENT FACILITY ALLEGATION

At issue here is whether or not Constable Gosse neglected or omitted to promptly and diligently perform his duties as a police officer by disregarding a request for medical attention by Kevin Smith and by failing to transport Kevin Smith to a hospital or treatment facility instead of to the lock-up. It is necessary to analyze what Constable Gosse either knew or should have known about Kevin Smith in the hour between the time he was apprehended and the time that Constable Gosse left the lock-up. In this context it is necessary to examine what Constable Gosse knew while at Barnes Place, while transporting Mr. Smith to the lock-up and while at the lock-up.

Following the apprehension, Constable Gosse had personal knowledge that Mr. Smith was short of breath following the foot chase and upon being placed in the back of his patrol car. Mr. Smith did not at that time complain to him of physical difficulties and neither Constable Penney nor Constable Collins informed Constable Gosse that Mr. Smith has stated that he had pleurisy pneumonia. During the 40 minutes or so that Mr. Smith remained in the back seat of the car while the officers continued the investigation, Constable Collins discovered that Mr. Smith was uncomfortable whereupon Constable Collins opened the door and permitted him to put his feet out on the ground. The officers testifying before me stated that they have very limited medical training. The most that can be said is that they completed a one or two day basic first aid course at the time of training at Holland College. Constable Gosse and Constable Collins trained 13 and 10 years respectively prior to the occurrence and Constable Penney trained 1 year before. Perhaps of all three, notwithstanding that at the time of the investigation she was a junior officer, Constable Penney had the most training as she was an aerobics and physical fitness instructor.

All three officers testified that they had no concern for Mr. Smith's health. I accept their evidence.

On route to the lock-up Constable Gosse was driving and was not paying any attention to the conversation between Mr. Smith and Constable Penney. As stated above, Mr. Smith was somewhat agitated and uncomfortable. The window was opened to give him air and the window was closed when he became cold. He was sitting up in the seat and lying down on the seat as a result of which Constable Penney asked Constable Gosse if the handcuffs could be removed. With his permission, they were removed and Constable Penney testified that the movement stopped. Constable Penney testified that Mr. Smith did not ask to go to a doctor or to hospital while on route to the lock-up. Notwithstanding that he told her that he had pleurisy pneumonia, she did not feel it was necessary to communicate this to Constable Gosse. Constable Gosse acknowledged his comment on the radio to Constable Beck that he could not hear because Mr. Smith was "mouthin' off". He testified that he "tuned him out" during the ride, but, at no time did he have a concern for his health.

Constable Collins was driving in a separate car and, apart from contacting Constable Gosse on the radio when the handcuffs were removed from Mr. Smith, he could offer no evidence as to what happened on route to the lock-up.

While at the lock-up, all three officers testified that, in their opinion, Mr. Smith was having no apparent physical difficulties. He exited the car and attended at the door of the lock-up without assistance. While he was still short of breath, Constable Collins and Constable Penney did not have any concern for his health. While Constable Gosse was cross-examined concerning his comment "can't breathe there skipper", Constable Gosse testified that he had no meaning for this. He had no reason to be concerned for Mr. Smith's health and at no time did he feel that he should take him to a doctor or to a hospital. It is impossible to reconcile the evidence of Constable Crocker as to what he says Constable Gosse told him about Mr. Smith having chest pains with the evidence of Constables Gosse, Collins and Penney. Their evidence is that there was no complaint of chest pain. I accept this evidence. On the tape, at the lock-up, Mr. Smith does not complain of chest pain. Why, then, would Constable Gosse say Mr. Smith complained of chest pain? On balance, I can only conclude that Constable Crocker must have been mistaken. Having listened to and viewed the videotape Constable Gosse acknowledges that Mr. Smith asked to see a doctor, however, after viewing the tape he was of the opinion that Mr. Smith was intoxicated. He testified that if he did not know what he now knows relative to the final outcome of this matter, he would view the tape and still not think that Mr. Smith was in physical distress. I accept his evidence.

In addition to the above, the evidence is such that none of the police officers or correctional officers that came into contact with Mr. Smith on the morning in question felt that he needed medical attention. There is videotape evidence that Mr. Smith asked for medical attention at the lock-up, but the police and correctional officers who testified stated that the majority of detainees request to be taken to the hospital for medical attention to avoid being detained at the lock-up. While it is most unfortunate that events after the fact show that Mr. Smith required medical attention, I am not persuaded that Constable Gosse was aware or should have been aware of this.

Much evidence has been heard regarding the transfer of prisoners and the time when the responsibility of the escorting agency ceases and the responsibility of the correctional officers commences. There is no need for me to review this evidence in reaching my decision as it is conceded that, in practical terms and using common sense, Constable Gosse would have a professional obligation to ensure that any detainee in his presence requiring medical attention should be given this attention.

On the basis of the above I find that Constable Gosse made a reasonable judgment and assessment of Mr. Smith based on what was known to him and what he observed. He did not have any concern regarding Mr. Smith's health. As the officer in charge, he could reasonably rely on his fellow officers to bring any concerns that they may have had concerning the health of Mr. Smith to his attention. They did not do so as they themselves did not have concerns about his health.

Accordingly, I find the allegation against Constable Gosse with respect to disregarding requests for medical attention and failure to transport Kevin Smith to the nearest hospital or treatment facility to be unfounded.

CONCLUSION

It is tragic that Mr. Smith died. It may well be that, had his liberty not been curtailed, he would have sought treatment and he may not have died. We will never know. However, based on the above, I am not satisfied that the Commissioner has proven his case on a balance of probabilities. The charges against Constable Gosse are dismissed.

RECOMMENDATION

Section 35 of the Royal Newfoundland Constabulary Act gives me authority as an adjudicator

to make recommendations with respect to matters of concern or interest to the public relating to police services.

Constable Junior Frederick Small, a member of the Research and Planning Division of the RNC, testified at length concerning the policies and procedures of the Royal Newfoundland Constabulary. For purposes of this decision I do not need to set out the policy details. However, I feel compelled to make recommendations concerning the policy and procedures manual of the RNC and the manner in which the policy and procedures are communicated to the members.

From what I have heard, there is a clear misapprehension with regards to the transfer of prisoners. Policy in place on November 18th, 1995 was such that the escorting agency had responsibility for the care, custody and control of all prisoners until they were handed, with complete documentation, to the lock-up or other detention facility. This policy, which Constable Gosse says he had not read prior to November 18th, 1995, was clarified by a routine order dated April 19th, 1995. Constable Small testified that a routine order clarifies and expands on the policy but does not have the effect of amending the policy. The routine order clarified the policy by stating that formal documentation ending the member's responsibility at the lock-up would be the prisoners record. Constable Gosse testified that he did not see or receive a copy of this routine order prior to the date in question. As result of an ambiguity between the protocol of adult corrections and the RNC, General Order, revision number 69, dated December 1st, 1995 was generated. General orders amend the policy manual. General Order 69 provided that the members responsibility continued inside the lock-up where members will adhere to the policy of the adult corrections division.

The majority of police officers who testified before me felt that their responsibility ended at the door of the lock-up. The correctional officers felt that their responsibility ended when the prisoner was placed in the cell. While the resolution of the issue may well lie in the failure to distinguish between jurisdiction and custody, professional responsibility would ordinarily dictate that responsibility for the detainee would continue while the detainee was in the presence of the police officer. This position was echoed by Sergeant Keating and, as previously stated, not contested by Constable Gosse. I agree with

counsel for the Chief of Police that it is a daunting challenge to produce a policy and procedure manual. The advent of the Charter has made matters more complex and technical and the goal is to try to achieve a balance of providing this knowledge with practical and pragmatic procedures to assist police officers working at the ground level. At present, I understand that there are no hard copies of the manual but that policies are accessible through the use of computers. Hard copies of the manual and field versions have been recalled and destroyed. There is no mechanism in place to follow-up with members to ensure that all members are aware of policy changes.

It is apparent to me, having heard the evidence, that members' accessibility to policies and procedures and, more importantly, to the operations policies and procedures, needs to be improved. I understand that Constable Small has prepared such a manual to assist members during operational situations, however, at the present time there are no dedicated resources to follow through with this endeavor. Based on what I have heard, I believe that his endeavor should be given immediate attention.

DATED AT St. John's, Newfoundland this 7TH day of SEPTEMBER, A. D. 2001.

LINDA M. ROSE, Q.C.,
ADJUDICATOR