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SUPREME COURT OF VICTORIA

ROSS v HUXTABLE

Ashley J

16 October 1990; 1 March 1991

CRIMINAL LAW – HEALTH INSURANCE – RADIOLOGICAL SERVICE – MEDICAL ACCOUNT ISSUED – FALSE OR MISLEADING IN A MATERIAL PARTICULAR – "AND IS CAPABLE" – INGREDIENTS OF OFFENCE – WHETHER NECESSARY THAT APPLICATION FOR PAYMENT BE SUCCESSFUL: *HEALTH INSURANCE ACT* 1973, S129.

Section 129(1) of the *Health Insurance Act* 1973 ('Act') read:
"A person shall not make a statement, either orally or in writing, or issue or present a document, that is false or misleading in a material particular and is capable of being used in, in connexion with or in support of an application for approval for the purposes of this Act or for payment of an amount under this Act."

HELD: The words "and is capable" in s129(1) of the Act are descriptive of the statement or document referred to in the opening portion of the section. It is not necessary for an offence under s129(1) of the Act that an application for payment of an amount be successful. The offence lies in the making of a statement or the issuing or presentation of a document by a person even though an application, if made, would be doomed to failure.

ASHLEY J: [*After setting out the terms of s129(1) of the Act and aspects of a case stated by a judge of the County Court, His Honour continued*] ... **[3]** I should add that Mr Guest QC who with Mr Pirrie appeared for the informant, explained (referable to finding (d)), that if a patient was not a member of a fund no application, as the system then existed, could be made whereby the Commonwealth would be called upon to provide a rebate for the service rendered to the patient. The patient could authorize bulk billing by the service provider. Whether he did or did not do so, the patient had no direct access to a Medicare rebate. Rather, if, and only if the patient was a member of a private health fund could the fund, not the patient, seek partial reimbursement for its outlay from Medicare where there was no authorization by the patient for bulk billing of fees due.

His Honour ruled, in the absence of evidence falling within matter (e) above, that:-

> "the medical account in each case was not proved to be capable of being used in, in connection with or in support of an **[4]** application for payment of an amount under the said Act."

and allowed the eleven appeals on that ground alone. At the behest of the informant, David Huxtable, a case was stated in respect of those eleven successful appeals to which I have referred. The question submitted for my determination, in each instance, is in the following terms:-

> "Is a medical account issued to a patient "capable of being issued in, in connection with, or in support of an application for payment of an amount under the *Health Insurance Act* 1973" when there is no evidence that the patient was or was not a member of a private health fund, and when the evidence showed that at the relevant time a system existed whereby it was necessary for the patient to be a member of a private health fund before amounts under the said Act became payable?"

I should immediately say that the question, insofar as it contains the phrase "when there is no evidence that the patient was or was not a member of a private health fund" appears to me to misstate the issue as it arose in fact. Para. 3(e) of the case stated shows that there was no evidence that any of the patients relevant to the eleven informations had held private health insurance at the critical time. The finding must have been, as I have earlier said, that the informant must have failed to satisfy the Court of the existence of such insurance. I approach my consideration of the case stated upon that factual basis. In my opinion the answer to the question thus raised by the case stated is 'yes'.

[5] The words in s129(1) commencing "and is capable" are descriptive of the statement

or document referred to in the opening portion of the section. Were it not for these words, the statement or document contemplated by the section would be without limitation, save for the requirement of material falsity. In particular, the section would not directly address the presumed vice of statements being made or documents issued which support false claims upon public moneys. So, the words commencing "and is capable" add a conjunctive and limiting description to the statement or document.

In my opinion, apart from authority, a statement or document may clearly be described as being 'capable of being used ... in support of an application for payment of an amount under this Act' even though no application were made. The application might not be made for any one of a number of reasons – the patient might forget to take the account (taking an account as the example) to his private Health Fund, or it might be lost by the patient; or the private Health Fund, having received it, might misplace it, or for some other reason fail to seek reimbursement from Medicare. That is not to suggest that any of these courses would be likely, but rather to illustrate that the offence could be made out even where there was no application for payment from Medicare at all.

The argument pursued on behalf of Dr Ross was, in effect, that a document was not capable of **[6]** supporting an application for payment unless, if application were made, it would succeed. Thus, if the recipient of an account was not a member of a private health fund, it was almost inevitable that an application would not be made. If such a recipient did attend at a health fund office, the account would almost certainly not be accepted by it, and it could not, therefore, become the vehicle for a successful application for payment from Medicare. If, improbably, the Health Fund were to accept it in error, its application for reimbursement by Medicare would founder for want of showing that the patient was a member of the Fund. That argument, if correct, would have a consequence that, depending upon why payment would not have been made, prosecutions might succeed or fail where in each event there were the common denominators of issue of a materially false document, no claim for payment made, and absence of payment in fact. Moreover, a prosecution would fail (where no application was made) because, had application been made it would not have resulted in the making of a payment by reason of facts which may well have been unknown to the maker of the statement when he made it.

These would, in my opinion, be strange consequences, and they contraindicate the interpretation of s129(1) urged on me by Mr Nolan, counsel for Dr Ross. It may be said that there is nothing strange in a prosecution succeeding or failing, where no **[7]** application for payment was made in fact, depending upon what would have happened if an application had been made. Thus, it may be said, in the one case, if application had been made, it would have succeeded as a vehicle for payment; whilst, in the other, an application must have failed. But, in my opinion, the example of the 'no claim made' situation assists a conclusion that the offence lies in the making of the statement or the issue or presentation of a document by a person. It appears to me that to determine criminality by reference to a matter that may well be unknown to the person, for example, issuing the document when he issues it would run counter to what must be an object of the section – to deter the issue of documents which might support false claims upon the public purse; because it would shift the emphasis away from the conduct of the person issuing the document and assess criminality not by the design of the author but by reference to facts of which he might well be unaware.

It appears to me that the provision does not require a reading, in effect, as follows "and is capable of being successfully used ... in support of an application for ... payment of an amount under the Act". Rather, such a reading would, for reasons I have given, wrongly shift the emphasis away from the conduct of the person making the statement or issuing the document. A document would, in my opinion, be "capable of being used in support of an application" even where the application, if made, would be doomed to failure. **[8]** In my opinion, the conclusion I have reached is supported by authority, although it must be said that there is no case to which I have been referred that is precisely in point.

[*His Honour then referred to decided cases and answered the question posed by the case stated "yes".*]

APPEARANCES: For the appellant Ross: Mr AA Nolan, counsel. Kenna Croxford & Co, solicitors. For the respondent Huxtable: Mr PM Guest QC with Mr RF Pirie, counsel. Director of Public Prosecutions (Commonwealth).