IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2004-443-660

BETWEEN	WILLIAM KEITH ABBOTT Applicant
AND	CORONERS COURT OF NEW PLYMOUTH First Respondent
AND	COMMISSIONER OF POLICE Second Respondent
AND	JAMES WALLACE Third Respondent

Hearing: 17 February 2005
(Heard at Wellington)

Appearances: Ms S Hughes for Applicant
Ms W L Aldred for First Respondent
K P McDonald QC for Second Respondent
R Mansfield & J Cundy for Third Respondent

Judgment: 20 April 2005

RESERVED JUDGMENT OF RANDERSON J

This judgment was delivered by the Registrar
On 20 April 2005 at 3 pm pursuant to
Rule 540 of the High Court Rules

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Registrar

Solicitors: Govett Quilliam, Private Bag 2013, New Plymouth for Applicant
Crown Law Office, PO Box 2858, Wellington, for First Respondent
Dr A R Jack, PO Box 3017, Wellington for Second Respondent
Lee Salmon Long, PO Box 2026, Shortland Street, Auckland for Third Respondent

Introduction

[1] On 30 April 2000, Steven Wallace was shot by Senior Constable Abbott during an incident in the township of Waitara. Mr Wallace later died from his injuries. After an investigation conducted by the New Zealand Police and a review by the Deputy Solicitor General, a decision was made not to charge Constable Abbott. Later, James Wallace, representing the Wallace family swore an information charging Constable Abbott with murder. Constable Abbott was subsequently tried before Justice Chambers and a jury in this court in Wellington. Constable Abbott contended that he acted in self-defence and, after a trial occupying some 11 court sitting days, the jury acquitted him.

[2] Shortly after Steven Wallace's death an inquest was opened in the Coroner's Court at New Plymouth under the Coroners Act 1988. The Hamilton Coroner, Mr G Matenga, was asked to sit as Coroner due to a potential conflict of interest on the part of the New Plymouth Coroner. After opening the inquest, the Coroner adjourned it until the conclusion of the criminal trial. After hearing from counsel for the interested parties, the Coroner decided in a written decision dated 8 July 2003 to resume the inquiry but for limited purposes. These were:

a) To examine Police policy and procedure as it applies to general staff (excluding the Armed Offenders Squad - AOS) in dealing with violent offenders in circumstances such as those which applied in the case of Steven Wallace.

b) The provision of first-aid care including the actual care provided to Steven Wallace.

[3] As well, the Coroner ruled that it was unnecessary to hear oral evidence from any witnesses who had given evidence in the criminal trial. Rather, the Coroner decided he would receive the transcript of evidence and exhibits from the trial under s 26(5) of the Act. The Coroner also directed that the Wallace family provide a list

of witnesses they intended to call at the resumed inquest together with briefs of evidence if available.

[4] The Wallace family initially provided the names of three witnesses: Dr P S Johnston (a general surgeon), Dr I D S Civil (a vascular and trauma surgeon) and Mr B Rowe (a former police officer). Signed briefs were received from the two surgeons but Mr Rowe's brief was delayed.

[5] The Coroner issued a further decision on 10 September 2004 after hearing from counsel. He declined a request by counsel for Constable Abbott to review his earlier decision to resume the inquest. It had been submitted for Constable Abbott that no good purpose would be served by doing so. The Coroner also extended the time for filing Mr Rowe's brief and noted that the remaining issue was to determine the extent of the hearing by "directing which evidence, if any, will be heard viva voce at the resumed inquest hearing". A further telephone conference was to be arranged once Mr Rowe's brief was received.

[6] Mr Rowe's brief was later received as well as a fourth brief from a Mr P L Ward, another former police officer. The evidence of Messrs Rowe & Ward mainly addresses whether police policies and procedures were complied with at the time of the incident. Of the four witnesses whose briefs were tendered for the Wallace family, only Mr Rowe had given evidence at the criminal trial. He did so on behalf of the Wallace family.

[7] Prior to the Coroner's decision of 10 September 2004, both Constable Abbott and the Wallace family had given notice of their intention to bring proceedings to review the Coroner's decision as to the scope of the inquiry. This proceeding under the Judicature Amendment Act 1972 was filed by Constable Abbott on 9 December 2004. A statement of defence was filed by the Wallace family along with a cross-claim seeking alternative relief by way of judicial review.

[8] The two main issues are:

a) Whether there are any grounds to review the Coroner's decision to limit the scope of the inquiry to the two issues he identified.

b) Whether there are any grounds to review the Coroner's decision not to hear oral evidence from any of the witnesses who gave evidence in the High Court.

The relevant legislation

[9] The purpose of an inquest is set out in s 15(1) of the Act:

> **15 Purpose of inquests**
>
> (1) A coroner holds an inquest for the purpose of—
>
> (a) Establishing, so far as is possible,—
> (i) That a person has died; and
> (ii) The person's identity; and
> (iii) When and where the person died; and
> (iv) The causes of the death; and
> (v) The circumstances of the death; and
>
> (b) Making any recommendations or comments on the avoidance of circumstances similar to those in which the death occurred, or on the manner in which any persons should act in such circumstances, that, in the opinion of the coroner, may if drawn to public attention reduce the chances of the occurrence of other deaths in such circumstances.

[10] In the present case, it is common ground that the matters set out in s 15(1)(a)(i), (ii), (iii) and (iv) have been established. However, the parties are not in agreement as to whether the circumstances of the death under s 15(1)(a)(v) have been adequately established by the evidence at the criminal trial or otherwise. The issue is of some moment because, under s 26(6) of the Act, a Coroner is prohibited from admitting evidence at an inquest unless satisfied that its admission is necessary or desirable for the purpose of establishing any matters specified in s 15(1)(a) of the Act.

[11] As well, the Coroner may decide not to resume an inquest if satisfied that the s 15(1)(a) matters have been adequately established in a criminal trial. Section 28(6) provides:

> Notwithstanding section 17 of this Act, a coroner may decide not to open or resume an inquest postponed or adjourned under this section if satisfied that the matters specified in section 15(1)(a) of this Act have been adequately established in respect of the death concerned in the course of the criminal proceedings or inquiry concerned (whether finally concluded or not).

[12] The scope of the evidence which may be called at an inquest and some matters of procedure are covered by s 26 which provides:

> **26. Evidence**
>
> (1) Except as provided in this Act, at an inquest a coroner shall hear evidence from any person—
>
> (a) Who tenders, in respect of the death concerned, evidence relevant to any of the matters required by section 15(1)(a) of this Act to be established; or
>
> (b) Whom the coroner thinks it appropriate to examine.
>
> (2) Every person who gives evidence at an inquest shall do so on oath.
>
> (3) A coroner may cross-examine any person who gives evidence at an inquest.
>
> (4) Any person specified in section 23(2) of this Act, and any person with a sufficient interest in the subject or outcome of the inquest may, personally or by counsel, attend an inquest and cross-examine witnesses.
>
> (5) Subject to subsection (6) of this section, a coroner may admit at an inquest any evidence the coroner thinks fit, whether or not it would be admissible in a Court of law.
>
> (6) A coroner shall not admit any evidence at an inquest unless satisfied that its admission is necessary or desirable for the purpose of establishing any matter specified in section 15(1)(a) of this Act.
>
> (7) Notwithstanding subsection (1) of this section, a witness at an inquest may give any evidence by tendering a previously prepared written statement and confirming it on oath if—
>
> (a) The coroner is satisfied that there is no reason making it desirable for the witness to give the evidence orally; and
>
> (b) No person attending the inquest who is entitled to cross-examine the witness objects.
>
> (8) A witness who gives evidence at an inquest under subsection (7) of this section may be cross-examined as if it had been given orally; and the written statement concerned shall form part of the depositions of the inquest.

(9) The evidence given by each witness at an inquest and admitted by the coroner shall be put into writing by the coroner, read over by or to the witness, and signed by the witness and the coroner.

The Coroner's Decision of 8 July 2003

[13] After hearing from counsel for the affected parties, the Coroner issued a careful written decision. He accepted that the Court could be satisfied that there had been a death; that the deceased (Steven Wallace) was identified; and that the time and place of death as well as the cause of death, had been firmly established. Dealing with the issue of whether he should resume the inquest under s 28(6) of the Act, the Coroner relied particularly on the decision of Paterson J in *Hugel v Cooney* (HC TAU CP 17/98 9 April 1999) in which His Honour made the following observations about s 28(6):

> First, a coroner may only exercise the discretion not to resume the inquest "*if satisfied that the matters specified in s 15(1)(a) of this Act have been adequately established in respect of the death concerned in the course of the criminal proceedings ...*". Thus unless satisfied that the matters specified in s 15(1)(a) of the Act have been adequately established, the coroner is required, in my view, to continue with the inquest. In this case, unless the Coroner had satisfied himself that all the matters specified in s 15(1)(a) had been adequately established in the criminal proceedings, he was required to continue with the inquest. Secondly, the coroner "*may decide not to ... resume an inquest ...*". A coroner has a discretion whether or not to terminate the inquest. Even if a coroner were satisfied that the matters specified in s 15(1)(a) of the Act had been adequately established, he or she may still decide not to exercise the discretion not to resume as there may be other reasons which are relevant to a decision to continue with the inquest. One such reason may be to make recommendations to avoid similar circumstances arising in the future in accordance with the powers he has under s 15(1)(b) of the Act.

[14] The Coroner accepted that all the matters under s 20 of the Act (decision whether or not to hold an inquest) were relevant to a decision whether to resume the inquest under s 28(6). He then stated:

> [15] The Court however does not accept the submission that the trial of Constable Abbott was limited in its focus. Having read the entire transcript, the issues were thoroughly explored. There was certainly some emphasis on the time period when Constable Abbott left the Waitara Police Station to the time of the shooting but the actions of the other Police Officers involved including, Dombroski, Prestige, O'Keefe and Sandle were all fully explored. The use of OC spray and batons were examined. Training issues were examined as well as

> AOS training. Matters of Police policy such as the type of ammunition, the "double tap", shoot to incapacitate at centre body mass as opposed to shoot to wound, all these issues were closely scrutinised, and with good reason. All of this evidence was important for the jury to consider as they considered whether the force employed by Constable Abbott was justified.
>
> [16] The issue of Police training and instructions and whether other Police involved followed their training or instructions is certainly in the Courts view a live issue. It is a matter into which the Court is entitled to enquire as part of the circumstances surrounding the death of Mr Wallace. However, there is a limit to the matters that can truly be said to be part of the circumstances of the death. For example, the procedures followed by the Police in attendance fall for consideration. This would include any immediate first aid care or the lack of immediate first aid care provided to Mr Wallace. The administration of IV fluids if it can truly be shown is no longer considered best practice, is certainly something which fits squarely within the "circumstances which if brought to the public attention may avoid similar deaths in the future". I note Ms Hughes' submission that these issues would have made no difference in Mr Wallace's case. An inquest however is an opportunity to review current practices with a view to improvement so that death may be avoided. Therefore, the opportunity to look further at these issues should be taken.
>
> [17] In my view the question as to whether Constable Abbott should have continued in the AOS or be permitted to use firearms given psychological trauma, goes beyond the purview of this enquiry. As does the length of time that Police members should remain in AOS. This is not an AOS shooting. The Court accepts that Constable Abbott was AOS trained but to suggest that the opportunity can be taken to consider AOS procedures would be stretching s 15(1)(a)(v) and 15(1)(b) too far.

[15] The Coroner recognised that the High Court proceedings had involved great expense and placed substantial stress on all those involved. Nevertheless, the Coroner considered that issues of expense were subordinate to the public interest in the protection of life. He determined that it was necessary to resume the inquest but made it clear that it was not an opportunity to re-litigate the entire criminal proceedings. He stated that:

> The Court sees no reason to hear any further viva voce evidence from any of the witnesses called to give evidence in the High Court. The Court will receive the transcript and exhibits pursuant to s 26(5) of the Coroner's Act 1988.

[16] The Coroner then limited the scope of the resumed inquest to the two issues identified in [2] above. He rejected submissions that the matters at issue were within the province of the Police Complaints Authority (to whom a complaint has been

made which has been deferred until completion of the inquest). He also rejected a submission that the inquest should be adjourned pending the outcome of the complaint to the Authority.

Submissions

[17] The case for Constable Abbott as applicant was presented by Ms Hughes. In general terms, Constable Abbott's case was supported by the Commissioner of Police, represented by Ms McDonald QC. Ms Aldred, representing the Coroner, informed me that the Coroner would abide the decision of the Court.

[18] Ms Hughes did not dispute that the Coroner was entitled to direct the resumption of the inquest under s 28(6) of the Act. But she submitted that the Coroner had no jurisdiction to admit evidence beyond that which was necessary to establish the circumstances of the death for the purposes of s 15(1)(a)(v). She further submitted that the circumstances of the death were clearly established in the criminal trial and that the inquiry should therefore be limited to any recommendations or comments the Coroner might wish to make under s 15(1)(b). She submitted that any such recommendations could and should be made on the basis of the transcript of evidence from the criminal trial, considered in the light of any submissions counsel for the parties might make at the resumed inquest. By consent, the statement of claim was amended to reflect the submission that there was no authority for the Coroner to hear further evidence because all the matters under s 15(1)(a) were adequately established.

[19] To the contrary, Mr Mansfield, on behalf of the Wallace family, submitted that the circumstances of the death were not adequately established in the criminal trial and that issues remained at large under both s 15(1)(a)(v) and 15(1)(b). Mr Mansfield submitted that the Coroner was obliged to resume the inquiry to deal with issues under the first of those provisions and had a discretion to consider making recommendations under the second of them. It followed, Mr Mansfield submitted, that the Coroner had no jurisdiction to limit the scope of the inquest in the way he did and that he was obliged to conduct an inquest which considered all matters relevant to the circumstances of the death.

[20] It was also submitted for the Wallace family that the Coroner had no jurisdiction to admit the evidence from the criminal trial under s 26(5) nor to direct that there should be no further oral evidence from witnesses called at the criminal trial. Rather, it was submitted, the Coroner was obliged to call any witnesses who gave evidence at the trial relevant to the circumstances of the death and to permit cross-examination by the parties. Specifically, it was submitted that nine identified witnesses who gave evidence at the criminal trial should be called by the Coroner to give evidence and made available for cross-examination. As well, the Wallace family would seek to tender evidence from the four witnesses whose briefs were delivered to the Coroner.

Are there any grounds to review the Coroner's decision to limit the scope of the inquiry to the two issues he identified?

[21] A central point in Ms Hughes' submission was that the Coroner was satisfied, as a matter of fact, that all of the matters specified in s 15(1)(a) of the Act were adequately established during the criminal proceedings. She pointed to s 28(6) and to the prohibition in s 26(6) against the admission of any evidence at an inquest which does not address s 15(1)(a) matters. Ms Hughes relied on an affidavit sworn by the Coroner and filed in this proceeding in which he stated that the resumption of the inquest was necessary to allow further inquiry to be made in terms of s 15(1)(b) of the Act. The Coroner went on to state in his affidavit that he accepted that all the matters listed in s 15(1)(a) had been established during the criminal trial.

[22] During the hearing before me, I expressed some concerns about the Coroner's affidavit. It is well established that judicial review proceedings generally proceed on the basis of the evidence before the decision-maker at the time of the decision (*Roussel Uclaf Australia Pty Limited v Pharmaceutical Management Agency Limited* [1997] 1 NZLR 650, 658 CA). It is not appropriate for the decision-maker to file an affidavit after the event seeking to offer further explanations for the decision made. While I accept that the Coroner acted in good faith in an attempt to assist the Court, material of this kind should not have been filed. I intend to ignore it.

[23] My inquiry on judicial review must be limited to the terms of the Coroner's decisions. I accept the submission made on behalf of the Wallace family that the Coroner's decision of 8 July 2003 made it clear that, while he was satisfied that the matters in s 15(1)(a)(i) to (iv) were established, he was not satisfied that all the circumstances of the death in terms of s 15(1)(a)(v) were established. That is clear from his express finding that the matters in s 15(1)(a)(i) to (iv) were established and from his statement in [16] of his decision that police training and instructions remained a live issue into which the Court was entitled to inquire as part of the circumstances of the death of Mr Wallace. In reaching that conclusion however, the Coroner considered there was a limit to the matters which could properly be said to be part of the circumstances of the death and identified the two specific issues to which the resumed inquest was to be confined.

[24] In these circumstances, I agree with the view expressed by Paterson J in *Hugel* that the Coroner was obliged to resume the inquest under s 28(6) of the Act for the purpose of establishing any remaining issues about the circumstances of the death under s 15(1)(a)(v) and for the purpose of considering whether to make recommendations under s 15(1)(b). However, I do not accept the submission made on behalf of the Wallace family that the Coroner is obliged to hear all relevant evidence relating to the circumstances of the death on an open-ended basis. In my view, he has a discretion under s 28(6) to confine the inquest to those aspects of the circumstances of the death which he does not consider to have been adequately established in criminal proceedings.

[25] There is nothing in the language of s 28(6) or any other parts of the Act to suggest that the Coroner does not have a discretion to limit the scope of the inquest so long as he complies with the Act. It is not for the parties to an inquest to determine the scope of the inquiry. The nature of the inquiry is prescribed by the Act and it is well established that an inquest is a fact finding exercise, not a method of apportioning guilt: *R v West London Coroner, ex parte Gray & Others* [1987] 2 All ER 129, 133 citing a passage from the judgment of Lord Lane CJ in *R v South London Coroner, ex parte Ruddock* (8 July 1982, unreported). The essence of these observations is captured in the following passage from Laws of New Zealand, *Coroners* at 25:

25 **General.**

A Coroner's Court is a Court of record. A Coroner's inquest is a judicial hearing presided over by a warranted judicial officer, who has most of the ancillary powers of a District Court Judge. An inquest is a fact-finding exercise rather than a method of apportioning guilt. The procedures and rules of evidence that are suitable for one exercise are unsuitable for the other. In an inquest there are no parties, there is no indictment, and there is no trial. There is simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial. The fact that cross examination by counsel for permitted interested parties is allowed does not detract from the inquisitorial nature of the inquiry, nor from the fact that the findings are not conclusive as to the civil or criminal liability of any person.

[26] Where an inquest has been adjourned until the conclusion of criminal proceedings associated with the death, it is entirely within the discretion of a Coroner to determine whether, and to what extent, the matters in s 15(1)(a) of the Act have been established. The Coroner may decide they have been fully or only partly established by the evidence given at the criminal trial. In the latter case the Coroner may direct that the resumed inquest be limited to identified issues as the Coroner did here.

[27] It is for the Coroner to weigh the public interest considerations bearing upon the inquest. As Heron J pointed out in *Matthews v Hunter* [1993] 2 NZLR 683 at 687-688, while a Coroner is confined to the purposes set out in s 15, when making recommendations under s 15(1)(b), the Coroner has a "useful public voice" and that "the wider public interest involved in the prevention of further loss of life requires a not too limiting interpretation of s 15(1)(b)".

[28] However, there are other public interest considerations to weigh as well. Here, there has been a criminal jury trial which canvassed extensively the circumstances of the death, including police policies and procedures and whether or not they were complied with by Constable Abbott and other officers in the circumstances of the case. It is not in the public interest that issues already adequately canvassed at the criminal trial be re-litigated at the resumed inquest except to the extent that the Coroner determines that the circumstances of the death were not adequately established at the trial or that they might be helpful when considering recommendations under s 15(1)(b). It is entirely open for the Coroner to

determine, as he did, that he could assess that material at the inquest on the basis of the notes of evidence and the exhibits produced, assisted as necessary by the submissions of counsel for the parties.

[29] I do not accept the submission made on behalf of Constable Abbott that the resumed inquest must be confined to considering the making of recommendations under s 15(1)(b). But neither do I accept the submission made on behalf of the Wallace family that the Coroner was obliged to consider all matters relevant to the circumstances of the death without limitation.

[30] I reach these conclusions for the reasons already given. But it is also necessary to deal with a further argument advanced on behalf of the Wallace family to the effect that the criminal trial had a narrow focus on the issue of self-defence and that the Coroner's brief under s 15 is wider than the issues relevant to the criminal trial. That submission was coupled with the further point that conflicts of evidence were not publicly resolved in the criminal trial and that the presiding Judge was not called upon to deliver a judgment. The jury simply determined by verdict that Constable Abbott was not guilty of murder or manslaughter.

[31] While acknowledging these points, my own examination of the transcript shows there was extensive examination of police policies and procedures with evidence called by James Wallace as informant and the opportunity to cross-examine Constable Abbott and the witnesses he called. In that respect, the trial was unusual because the victim's family were directly involved as a party to the private prosecution. That may be compared with trials prosecuted by the state where the victim's family is not a party and is not entitled to lead evidence or cross-examine witnesses.

[32] The prosecution called some 19 witnesses while the defence called a further nine. The transcript of evidence runs to over 300 pages and, in addition, the evidence of some 20 witnesses was read by consent. There were three police officers directly involved in the incident. One of these (Detective Constable Dombroski) gave evidence for the prosecution, while the other two, (Constables Abbott and Herbert) were called for the defence and were cross-examined at length.

A number of other police officers with relevant evidence were called for the prosecution and the defence. Similarly with lay witnesses who were at or near the scene at the time.

[33] The prosecution called a forensic scientist and a forensic pathologist. The defence also called a forensic pathologist. The evidence of these witnesses covered the cause of death, the severity and survivability of the wound sustained by the deceased, as well as evidence about the sequence of the shots and the relative movements of Constable Abbott and the deceased at that time.

[34] A number of witnesses gave evidence for the prosecution and the defence in relation to police policies and procedures in confrontational situations and the use of firearms. There was also extensive evidence on other options which might have been available to the police officers on the night in question. These included the use of pepper spray, batons, police dogs, the option of retreating and waiting for further backup, and the techniques needed to "cordon and contain" a suspect. There was extensive questioning of the officers directly involved on these subjects as well as evidence from experienced serving or former police officers. For example, the prosecution called Mr Rowe and another former police officer a Mr Maubach. The defence called Superintendent Matthews and several other serving or former police officers with experience on issues such as the use of firearms and other options which might have been employed on the night in question. Again, these witnesses were extensively cross-examined on behalf of the Wallace family.

[35] Reference should also be made to the exhibits produced at the criminal trial. These included the police weapon involved in the shooting as well as a golf club which was in the possession of the deceased. Exhibits also included records of police communications during the incident. I also note that both the prosecution and the defence made extensive admissions of fact on a variety of issues to avoid the need to call evidence on those subjects.

[36] Finally on this issue, I do not accept Ms Hughes' submission that there was no evidential foundation for the Coroner's finding that some issues under s 15(1)(a) and (b) were still 'live' as he put it. It was within the Coroner's discretion to

determine that question which essentially came down to an evaluation of the large volume of evidence from the trial assessed in the light of the statutory purposes of an inquest as defined by s 15. No grounds were established which would enable this Court to interfere with the Coroner's decision.

Are there grounds to review the Coroner's decision not to hear any viva voce evidence from any of the witnesses who gave evidence in the High Court?

[37] The resolution of the second main issue depends substantially on the proper construction of s 26 of the Act. Except as provided elsewhere in the Act, s 26(1) obliges the Coroner to hear evidence from any person who tenders evidence relevant to any of the matters required to be established by s 15(1)(a) and obliges him to hear evidence from any other person whom the Coroner "thinks it appropriate to examine".

[38] Pausing at that point, it is clear that, subject to s 26(6), the Coroner is obliged by s 26(1)(a) to hear evidence from the witnesses tendered by the Wallace family so long as he considers the evidence to be relevant to any of the matters required by s 15(1)(a) to be established. As the Coroner has determined to limit the resumed inquiry to the two identified aspects, it follows that he is entitled to determine whether the evidence called by the Wallace family (or indeed any other party) is relevant to those identified issues.

[39] Apart from determining relevance, the Coroner must also observe s 26(6) and shall not admit any evidence at the inquest unless he is satisfied that its admission is necessary or desirable for the purpose of establishing any matter specified in s 15(1)(a).

[40] In combination, these provisions mean that it is for the Coroner to determine both the relevance of the evidence tendered under s 26(1)(a) and also to determine under s 26(6) whether it is necessary or desirable for that evidence to be admitted.

[41] In relation to s 26(1)(b), the Coroner has a discretion to determine whether it is appropriate to examine the evidence of any other person (i.e. any person other than

one whose evidence is tendered under s 26(1)(a)). This provision enables the Coroner to examine any other witness if he considers it appropriate to do so. Just as in the case of evidence tendered from any person under s 26(1)(a), the Coroner must not admit any evidence from any person under s 26(1)(b) unless satisfied that its admission is necessary or desirable for the purpose of establishing any of the s 15(1)(a) matters. Subject to that restriction, a Coroner may admit at the inquest any evidence the Coroner thinks fit, whether or not it would be admissible in a Court of law: s 26(5).

[42] A witness who gives evidence at an inquest must do so on oath and may be cross-examined by the Coroner: s 26(2) and (3). As well, any person specified in s 23(2) and any other person with a sufficient interest in the outcome of an inquest may, whether personally or by counsel, attend an inquest and cross-examine witnesses: s 26(3). There is no doubt that the Wallace family is entitled to be represented in this way under s 23(2)(a) as immediate family members.

[43] It was submitted on behalf of the Wallace family that the Coroner was not entitled to rely on s 26(5) in order to admit as evidence at the resumed inquest the transcript of evidence and exhibits from the criminal trial without calling the witnesses for examination at the inquest. Reliance was placed on s 26(7) to (9). Those subsections make relatively elaborate provision enabling a witness at an inquest to give evidence by tendering a previously prepared written statement and confirming it on oath. That course is only permissible if the Coroner is satisfied that there is no reason making it desirable for the witness to give the evidence orally and there is no objection to that course from any person attending the inquest who is entitled to cross-examine. If that course is followed, then the witness may still be cross-examined as if the material in the written statement had been given orally. The written statement then forms part of the depositions of the inquest. The evidence given by each witness at the inquest must be put into writing by the Coroner, read to the witness and signed both by the witness and the Coroner.

[44] I do not entertain any doubt that the Coroner has a discretion to decide whether it is appropriate to examine any of the witnesses from the criminal trial. That follows from the inquisitorial nature of the inquiry and the wording of the

statute: *McKerr v Armagh Coroner & Ors* (1990) 1 All ER 865, 868-870 (HL). But the more difficult question is whether the Coroner may rely on s 26(5) to admit evidence at the inquest from the criminal trial without the witness being called and the formal processes under ss 26(2), (3) and (7) to (9) being followed.

[45] It is evident that, where a witness is called, the process required to be followed under s 26 is a formal one. In the end however I accept the submission made on behalf of Constable Abbott and the Commissioner of Police that, read as a whole, s 26(5) does permit the Coroner to admit evidence from the criminal trial at the resumed inquest without calling the witnesses.

[46] Strictly speaking, the evidence from the criminal trial is hearsay so far as it is sought to rely on it as evidence at the resumed inquest. But it is for the Coroner to determine under s 26(1)(b) whether it is appropriate to examine the witness in question. If he determines that it is not appropriate to examine the witness, then the Coroner may admit the evidence from the criminal trial without calling the witness even though it would not be admissible in a Court of law. If it were otherwise, then, in the absence of consent from the parties, the Coroner could not admit as evidence, material such as medical, hospital or other records without calling the maker of those records or someone with sufficient knowledge of them to produce them and be questioned. Similarly with statements made to the police or evidence produced in the form of an affidavit.

[47] That would severely constrain the Coroner in carrying out his inquisitorial role. It would also be inconsistent with the plain and unqualified language of s 26(5) and the Coroner's discretion to decide under s 26(1)(b) whether it is appropriate to examine a witness. Under that provision a Coroner could decide, for example, that the maker of a statement to the police did not give evidence of sufficient importance to warrant examining the witness, or conversely, that for fairness or other reasons the witness should be called and made available for cross-examination.

[48] Here, of the nine witnesses identified by the Wallace family from the criminal trial, four of them were called by the Wallace family and five by the defence. The named witnesses included Constable Abbott and other senior police

officers called in his defence. The family has had the opportunity to participate fully in the criminal trial, to lead evidence, and to cross-examine Constable Abbott and his witnesses. It was within the Coroner's discretion in these unusual circumstances to determine that it was not appropriate to examine those witnesses at the inquest and to admit the evidence from the criminal trial under s 26(5).

[49] Mr Rowe is in a different category from the other witnesses from the trial identified by the Wallace family because his brief has been tendered as the Coroner directed. He was a witness at the criminal trial but I find that, subject to the issue of relevance to the identified issues and the application of s 26(6), the Coroner is obliged to hear his evidence if tendered by the Wallace family under s 26(1)(a).

Evidence of matters under s 15(1)(b)

[50] A subsidary submission made on behalf of Constable Abbott was that if the Coroner was already satisfied that all of the matters under s 15(1)(a) had been adequately established by evidence at the criminal trial, then s 26(6) prohibited the calling of any further evidence. It was submitted in particular, that s 26(6) meant that the Coroner was not permitted to hear evidence in relation to section 15(1)(b) but was limited to making any recommendations or comments under that provision designed to avoid deaths occurring from similar circumstances in the future.

[51] It is not strictly necessary for me to determine this issue because I am satisfied the Coroner is entitled to consider further evidence in relation to the identified issues under s 15(1)(a) and that the admission of evidence on those matters, coupled with the hearing of counsel's submissions, is likely to provide a sufficient evidential foundation for the Coroner to make comments or recommendations under s 15(1)(b) if he sees fit to do so.

[52] I am also satisfied that the phrase "the circumstances of the death" under s 15(1)(a)(v) is sufficiently wide to include evidence which bears upon s 15(1)(b) matters. If it were otherwise, one of the evident purposes of the Act would be frustrated. Coroners would be unnecessarily constrained from bringing matters to

public attention which could lead to the avoidance or reduction of deaths in similar circumstances in the future. That cannot have been the statutory intention.

[53] To put the matter beyond doubt, I endorse the recommendation of the Law Commission in its report *Coroners* (NZLC, R62, 2000) at [125] that s 26(6) be extended to cover s 15(1)(b) issues as well.

Scope of the evidence to be called by the Wallace family

[54] Ms Hughes submitted on behalf of Constable Abbott that the evidence of the four witnesses, whose briefs have been delivered to the Coroner by the Wallace family, was either outside the scope of the two issues under s 15(1)(a)(v) which the Coroner identified or would not assist the Coroner in view of evidence given at the criminal trial. In particular it was submitted that the injuries sustained as a result of the shooting were extremely serious and that it was unlikely Steven Wallace would have survived even if medical assistance had been received earlier. Secondly, she submitted that the evidence to be called from the two former police officers was outside the scope of the Coroner's direction because the witnesses accept the appropriateness of the police policy and procedures in cases such as this. She submitted that these witnesses simply challenged whether police policy and procedures were complied with in the present case.

[55] I do not intend to enter this debate. It is entirely a matter for the Coroner to determine the issue of relevance to the identified issues and it is a matter for him to rule on that issue in relation to the Wallace family briefs of evidence. In the absence of any such ruling, it is premature for this issue to be raised.

Summary

[56] I find in summary:

a) There are no grounds established to review the Coroner's decision to resume the inquest and to limit it to a consideration of the two issues he has identified.

b) Except in the case of the witness Mr Rowe, there are no grounds established to review the Coroner's decision not to hear oral evidence from any of the witnesses who gave evidence in the High Court and to admit that evidence under s 26(5) of the Act.

c) The Coroner is obliged to hear the evidence tendered by the Wallace family under s 26(1)(a) of the Act but only to the extent that the Coroner considers that the evidence is relevant to the two identified issues and that its admission in evidence is necessary or desirable for the purpose of establishing those issues.

d) It will be a matter for the Coroner to determine the issue of relevance and the necessity or desirability of the admission of the tendered evidence either at or prior to the inquest.

[57] I acknowledge the anguish and distress this tragic incident has occasioned to the Wallace family as well as to Constable Abbott and the other police officers involved. The Coroner must now be permitted to fulfil his statutory duty and to bring this matter to a conclusion as promptly as the circumstances will allow.

[58] I reserve for further consideration whether any formal orders are required.

[59] I also reserve the issue of costs. But the parties may consider this is a case where costs should lie where they fall given that, except in one limited respect, neither side has been successful on review. If there is no agreement I will receive submissions from the applicant within 14 days of this decision and from the respondents within 14 days after receipt of the applicant's submissions.

A P Randerson J

Chief High Court Judge