



POLICE COMPLAINTS AUTHORITY

**Further Report of the Police Complaints Authority
following Notification of the Death of Matthew Francis Innes
and the Complaints Lodged by the Innes Family**



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FURTHER REPORT OF THE POLICE COMPLAINTS AUTHORITY
FOLLOWING NOTIFICATION OF THE DEATH OF
MATTHEW FRANCIS INNES AND THE
COMPLAINTS LODGED BY THE INNES FAMILY

On the morning of 19 May 1994 I was contacted by Detective Inspector Kelvin McMinn and informed he had very recently become aware that there was a fourth Police officer at Kingseat Hospital, Auckland, after Matthew Innes's admission around midnight on 3/4 January 1994.

Detective McMinn, who had been the investigating officer from the Police assigned to carry out the Innes' investigation, told me he knew nothing of the existence of a fourth officer at Kingseat that night during the course of his investigation resulting in the Commissioner's Report and recommendations to me. The officer in question had been in the vehicle with Sergeant MacGibbon when the Sergeant was suddenly called to Kingseat, but the officer had had no involvement in the events earlier in the evening. Sergeant MacGibbon had earlier attended the Howick residence with two other officers when Matthew Innes had been taken from there to Kingseat. I give further details hereafter.

I regarded this as a material development because the fourth Police officer may have been able to provide relevant information in the enquiry. That this officer's presence had only just been revealed required me to act promptly.

On 19 May 1994 on becoming aware of this new information I consulted the Commissioner of Police Richard Macdonald and the Solicitor General, Mr J J McGrath QC.

After consultation with the Commissioner and Mr McGrath it was decided to appoint Assistant Commissioner Mervyn Derecourt, Region Commander of Christchurch, to travel immediately to Auckland and to take full charge of the investigation into this latest development.

Up to that time Mr Derecourt had had no involvement with the Innes inquiry at all, and provided the opportunity of a fresh examination of the case. This, furthermore, was appropriate in view of the new development.

Mr Derecourt travelled immediately to Auckland to undertake the investigation. The essentials of Mr Derecourt's task were:

1. To establish why the presence of Constable Webb at Kingseat Hospital had not been revealed by the previous investigation, but must have been known to the other three Police officers at Kingseat.
2. To establish why Constable Webb had not previously come forward.
3. To establish whether his evidence was new to the enquiry and result, or whether it had been considered during the previous investigation.

It is appropriate here to state explicitly Constable Webb's involvement in this case. The three officers who responded to the call of the Duly Authorised Officer, Mr Gunderson, to attend Howick were Sergeant McGibbon, Constables Vincent and Schmidt. Constable Webb never attended Mr Craig Innes's property at Howick and had no involvement whatsoever with Matthew Innes's apprehension and transportation from Howick to Kingseat Hospital. After the Police car driven by Constable Vincent containing Matthew Innes and Constable Schmidt left Howick Sergeant McGibbon returned to his duties and picked up Constable Webb from Otara to carry out with him ordinary patrol duties. Whilst Constable Webb was with him in the car he overheard on the radio Constable Schmidt's request for an ambulance to attend Kingseat. Sergeant MacGibbon regarded it

his duty as NCO to attend at Kingseat and Constable Webb happened to be with him.

The relevance of Constable Webb's evidence is a conversation he had with Constable Schmidt at Kingseat after Matthew Innes had been delivered into the care of the medical personnel there. Constable Webb's evidence is about what he recalled when interviewed on 17 May 1994 of what he was told by Constable Schmidt probably after midnight on 3/4 January 1994. I will return to that evidence which is the most important aspect as is referred to in paragraph 3 above.

The matters referred to in paragraphs 1 and 2 above are really two aspects of the one issue and that is why Constable Webb was not interviewed and his evidence obtained at the time of the original investigation.

I will record briefly the reasons and explanation revealed by Mr Derecourt's investigation, but say immediately Constable Webb should have been interviewed as part of the original investigation, and that he was not is a regrettable oversight in the investigation.

Mr Derecourt's investigation into the failure to interview did not disclose anything other than a regrettable oversight. On the Police file of the investigation there were two references to Constable Webb. This first reference in time is a copy of the transcript log of Control Room for 4 January 1994 which states as follows:

"Sergeant MacGibbon advises 'H11 (this is a reference to the occupants of that car - Constables Schmidt and Vincent) has gone in an escort in the ambulance with him (Innes). My offsider (reference to Webb) the crewman has driven their car back and I am still at Kingseat tidying up. I will then be heading to Middlemore'."

There is a further reference on the file in the form of a note by Acting Senior Sergeant, Otahuhu, dated 16 January which confirms the log reference above:

"Constable Webb, who was now with OES (Otara Sergeant MacGibbon) was sent to follow ambulance to Middlemore in H11 car."

Both those references were read by the investigating officer at the time of the original investigation to which he attached no great importance. To be fair to the investigating officer, neither reference suggests Constable Webb could give any relevant or material information but, of course, he should have been checked by interview.

I turn to examine the issue raised in paragraph 1: why the presence of Constable Webb had not been revealed by the previous investigation but must have been known to the other three Police officers at Kingseat. Each of the three officers were interviewed by Mr Derecourt on this point. Mr Derecourt said to the question why they had not particularly mentioned Constable Webb's presence each of them had a different response as follows:

Sergeant MacGIBBON, now Senior Sergeant MacGIBBON, after the question was put to him said, "The reasons that I never previously mentioned it was that the question asked of me referred to the actual incident itself. At North Park Avenue, Howick, Steven WEBB was not actually working with me When I returned to Otara I uplifted Steven WEBB purely to carry out patrol duties. It was while he was with me that I heard the call on the radio from Constable Mike SCHMIDT, when he requested an ambulance to attend at Kingseat Hospital. I believed it was my duty as NCO to attend. It so happened that Steven WEBB was with me".

Constable SCHMIDT responded "that he (Constable Webb) played such a minor role, if you like, I never had anything to do with him. The statements that I gave included a

specific course of action that I was involved in, and I never remember having anything to do with Constable WEBB at the hospital. Constable WEBB was not involved in any critical part of it".

Constable VINCENT responded, "In my statement I answered per written questions, and there was no question as to who else or who was at Kingseat Hospital. It was common knowledge that Constable WEBB arrived at Kingseat with Sgt MacGIBBON, but with all the stress, the confusion of the investigation, I omitted that particular detail and it was unintentional."

After assessing the results of the interviews of these three officers Mr Derecourt reached the conclusion there was no sinister or ulterior motive by those officers in relation to their not identifying Constable Webb as being at Kingseat Hospital. In short this was understandable because Constable Webb had had no involvement whatsoever in the earlier part of the evening and did not arrive on the scene until Matthew Innes was inside the hospital at Kingseat.

On 17 May 1994, through an intermediary, it was revealed to the investigating officer that a fourth constable, namely Constable Webb, had been at Kingseat Hospital that night and he was immediately interviewed with the results set out hereafter. It seems I cannot fail to comment adversely on Constable Webb's failure to come forward before 17 May, for it was he who was in possession of evidence that might have been relevant to the enquiry. It is for the Commissioner of Police to decide on disciplinary action in respect of Constable Webb's conduct on this aspect and I anticipate he will report to me in due course.

Mr Derecourt's report following his re-investigation as to whether the evidence of Constable Webb was new to the enquiry and result, or whether it had been considered during the previous investigation is the substance of para.3 above and is now addressed.

In his statement on the re-investigation Constable Webb says he had at the hospital spoken to Constable Schmidt and asked him what happened. Constable Webb said Constable Schmidt had replied:

"That the guy was struggling in the car and that he had to sit on him to restrain him and that he was spitting blood on him, so he pulled his jacket over his face to stop him spitting at him. Mike said that he thought the guy was alright because he was struggling up until they were about 500 metres away from Kingseat."

In the course of assessing that information Mr Derecourt then compared it with evidence of other witnesses from whom statements had been taken in the original enquiry. I now reproduce the results of the comparisons.

"Because of the weight that has now been placed on this information I will take the time to refer to previous statements made by Constable SCHMIDT in relation to the jacket. In a statement made by Gregory Maurice HARRINGTON on 6 January 1994, the Ambulance driver, to Police, he said this about Constable SCHMIDT, '... during the transport to Kingseat the patient had tried to kick the driver and was also violent and spat at both of them. To stop this he said they placed a jacket slightly over the patient's head and held him by the legs to try and stop him moving. He said he was in the back seat with the patient and was having problems.'

After arriving at the hospital, and following the medical staff being involved, when it was found INNES was not breathing, Fiona Mary WILSON, House Surgeon at Kingseat, in her statement of 7 January said, 'I was told by the Police that accompanied Matthew INNES that:

1. The patient was struggling on the journey to Kingseat Hospital but stopped moving when they reached the shop outside Kingseat Hospital.

2. That the patient's jacket had been placed over his head because he had been spitting at the Police officers.'

Dr Christine Mary WARLOW, Psychiatric Registrar at Kingseat, describes the handcuffing consistent with that described previously by Police. In examination of INNES she found the jacket rucked up around the neck area but not constricting at that time. 'I also heard from one of the police officers that Mr Innes' face had been covered with his jacket in the car as he had been spitting at the Police in the car and was told by a Police officer that Mr Innes had been physically violent such that he was requiring restraint in the car'. (Statement 7 January 1994)

It has been clearly established to my satisfaction, the statement made by Constable SCHMIDT to Constable WEBB, while it had not previously been recorded as part of the Police investigation, was known to Det. Insp. McMINN. As a result of the other enquiries that had been completed, at the time he put this written question to Constable SCHMIDT: a specific question 51 which said 'You have described Mr INNES spitting and trying to bite you, and that you pulled his jacket over his head. Please describe where you were on the journey when this occurred, and also describe in detail what part of the jacket was used and how much of the head was covered.'

'I did not describe pulling Mr Innes's jacket over his head. The spitting occurred before the comment I am going to die on you. I had bent down to him and asked if he was hot or thirsty or needed a drink. At that stage he spat at me. At that time his jacket had ridden up. The bottom edge of the jacket was partly over the right hand side of his face but was not in any way obstructing his breathing. The jacket edge was loose; it was just sitting over the right hand side of his face.'

All those statements were again put to Constable Schmidt by Mr Derecourt to test his recollection of what happened in the car,

particularly in relation to the jacket. It was Mr Derecourt's opinion that throughout his interview with Constable Schmidt he was consistent in his responses, and with what he had earlier given in his written answers to written questions. Mr Derecourt was of the opinion that the Webb information was not new and did not affect the previous investigation and its findings. That is my view also.

The result of Mr Derecourt's re-investigation was that Constable Webb's contribution to the evidence in which he recounted on 17 May 1994 his recollection of his conversation with Constable Schmidt at Kingseat Hospital probably in the very early hours of 4 January 1994 was in its essentials known to the investigation at the original investigation, was not new and did not affect the previous investigation and its findings. It should be stated that Constable Webb in May was recalling the conversation of 4 January and he conceded he had never made a written record of it at any time prior to the May interview.

I now describe what action I took as a continuation of my role in reviewing the investigation.

I was satisfied that the evidence of Constable Webb about the jacket worn by Matthew Innes as he heard it from Constable Schmidt did not add anything that had not been known before my first report dated 15 April 1994 and taken into account by me. It is true that Constable Webb's recall was that Constable Schmidt had used the words "... he pulled the jacket over his face to stop him spitting at him". In his original statement Constable Schmidt had not used the word "pulled" but rather he denied it as stated above. In other words I agreed with the conclusions reached by Assistant Commissioner Derecourt.

By the time this new development occurred my first report had been public for over a month and had been the subject of wide comment, especially as I had said I accepted the opinion of the then Crown Solicitor at Auckland, Mr David S. Morris, that no criminal proceedings be commenced against any Police

officers/or other persons involved in the restraint of Matthew Innes. Mr Morris has since been appointed to the High Court Bench and is no longer available to assess the relevance of this new evidence following Mr Derecourt's investigations. Throughout his report I will continue to use the title Mr Morris then had.

From the very beginning of the enquiry following the death of Matthew Innes it was, inter alia, a homicide enquiry for which consideration had to be given to possible criminal proceedings. This was acknowledged in my report and I adopted the course of obtaining an independent opinion on this aspect from Mr D S Morris.

I reached the view I should follow the scheme of my report and have this new evidence independently evaluated by another counsel to provide an opinion whether the new evidence required alteration to the Morris opinion that no criminal proceedings be commenced against any Police officers/or other persons involved in the restraint of Matthew Innes.

I accordingly advised the Commissioner of the course of action I required and he accepted that and Mr J A Laurenson QC, a widely experienced senior counsel in criminal law, was instructed.

In the course of his opinion Mr Laurenson analysed the evidence in considerable detail as it related to the issue raised by Constable Webb's evidence. Needless to say I have carefully perused Mr Laurenson's opinion and accept its conclusion which confirms Mr Derecourt's that the findings of the original investigation were unaffected because the substance of the evidence was known and accounted for in the original investigation.

Soon after the publication of my report, which contained only an essential extract of Mr Morris' opinion, there had been some agitation for that opinion to be made public. I felt constrained by the statutory obligations imposed on me by s.32 (Authority and staff to maintain secrecy) but in particular

s.32(2) that I could disclose such matters as in my opinion ought to be disclosed in order to establish grounds for my conclusions and recommendations which I interpreted restrictively by publishing only the essential recommendation from the opinion.

There have since been applications to the Police to disclose all statements and other material assembled in the course of the enquiry under the authority of the Official Information Act. That Act does not apply to the Police Complaints Authority and I am therefore unable to comply with requests for information.

I have conferred with Mr John McGrath QC, Solicitor General, who is handling the request for disclosure under the Official Information Act on behalf of the Commissioner of Police and he advises me that in his view the Official Information Act requires the release by the Police of both the Morris and Laurenson opinions. Needless to say I have no objection to publication and declined a request in regard to the Morris opinion only on the grounds of the statutory restraints I considered my staff and myself to be under.

I therefore attach both opinions to this report. The Laurenson opinion very carefully analyses the further evidence of Constable Webb and I record my full acceptance of his analysis and the conclusion he reaches. In short Mr Laurenson stated that in his opinion the conclusion reached by Mr David Morris in his opinion remained valid.

The situation in regard to criminal prosecutions is that two independent, experienced senior counsel have given opinions that there is no evidence to found criminal charges against any person. With that I agree.



Sir John Jeffries

POLICE COMPLAINTS AUTHORITY

22 August 1994

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OUR REF D S Morris

YOUR REF

14 February 1994

District Commander
New Zealand Police
Manukau District
P O Box 22015
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Attention: Mr Hartley

Dear Sir

Re: MATHEW FRANCIS INNES DECEASED

- 1 On 25th January 1994 I advised you of my view that the material available to you as a result of your investigations into the death of Mr Innes did not establish criminal liability on the part of any person arising from his death. I undertook to confirm this view in writing should you so wish and I now have your letter of the 9th instant.

I have considered all of the material contained in the two Eastlight folders supplied to me. My opinion and the reasons for it are detailed below.

- 2 Mr Innes died in Middlemore Hospital from irreversible brain damage which had been caused when insufficient oxygen reached his brain. He had been in the intensive care unit at Middlemore since 3rd January, having been transferred from Kingseat Hospital when on his admission to that hospital staff noted he had stopped breathing. He had been brought to Kingseat Hospital in a police car and it is the view of Dr Vuletich, the pathologist who carried out the postmortem on the body of Mr Innes that the position and manner in which Mr Innes was carried in the police vehicle interfered with his respiratory system thereby causing asphyxiation and the subsequent damage to his brain. In expressing

my views I have accepted Dr Vuletich's findings as to the cause of Mr Innes' death.

- 3 Mr Innes had been placed in the rear of the police car as a result of police personnel being called to the home of Mr C C Innes, a brother of Mr Innes, by Mr A Gundesen. Mr Gundesen was a duly authorised officer under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (hereinafter referred to as the Act) and had gone to this house as a result of Kingseat Hospital being contacted by Mr C C Innes who was expressing concern at his brother's irrational behaviour. The sequence of events prior to the arrival of Mr Gundesen at the Innes home and the reasons for his being called and the steps taken by Kingseat medical staff as a result of the information given to them are fully documented in the papers attached to your file.
- 4 Having observed Mr Innes' behaviour consequent to his arrival at the Innes home and having discussed the matter with the Innes family, Mr Gundesen acting under section 38(2)(b)(i) of the Act decided the family's fears were justified and that Mr Innes should be examined by a doctor at Kingseat immediately. Clearly, he was intending that such a doctor would issue a certificate for the purposes of section 8(3) of the Act. The sequence of events as to the happenings in the Innes house are again fully detailed in the material on your files and in my view, perfectly justifiably Mr Gundesen decided the situation was such he would require police assistance to get Mr Innes to Kingseat and he accordingly contacted the Otahuhu Police. This resulted in Sergeant B R MacGibbon and Constables Schmidt and Vincent being despatched to the Innes house.
- 5 Upon the arrival of the police at the Innes home Mr Gundesen and Mr C C Innes attempted to remove Mr Innes from the house for transportation to Kingseat. He indicated he would not go and a violent struggle eventually ensued in which all three police officers, Mr Gundesen, Mr C C Innes and at least one of the Innes family friends became involved before Mr Innes was eventually subdued sufficiently for him to be handcuffed and placed in the rear of the police car. Because of his continued struggling Constable Schmidt found it necessary to sit on Mr Innes throughout the journey to Kingseat and I note from his statement he accepts he in fact sat on Innes' stomach, having first climbed into the car through the rear driver's door after Mr Innes had been placed in the car. Constable Vincent drove the police car to Kingseat.

Mr Gundesen and Sergeant MacGibbon had nothing further to do with Mr Innes from the time he was placed in the rear of the police car both travelling to Kingseat in their own motor vehicles.

- 4 Mr Innes' actions and behaviour in the police car from the time he left the Innes house until the car reached Kingseat are fully detailed in the reports obtained from the two constables. I do not feel anything is to be gained in traversing their reports in detail, but it is plain that throughout the journey Mr Innes struggled violently and attempted to strike, abuse and spit upon the police officers. There is no evidence whatsoever to suggest that either of the constables used excessive force against Mr Innes while in the car, nor is there any evidence to suggest that they took any steps other than those necessary to protect themselves from being assaulted or spat upon and to subdue Mr Innes. I note the confusion amongst the various witnesses as to the position of the handcuffs; this confusion is understandable. Mr Innes was certainly in handcuffs when placed in the rear of the car and these handcuffs were still on him when he was admitted to Kingseat. It is mere conjecture to suggest that at some stage on the journey from the Innes' house to Kingseat the position of the handcuffs has in some way been altered. I am strengthened in my view there has been no unnecessary force used upon Mr Innes by either of the constables by the post mortem findings of Dr Vuletich which are entirely consistent with the description of what occurred in the car as given by the constables and do not support any claim that Mr Innes was manhandled or set upon by either officer.
- 5 In my opinion the sole question to be determined is whether the death of Mr Innes was brought about by the unlawful act of any person, or by the failure of some person to perform a duty which was imposed upon him by law and which he owed to Mr Innes.
- 6 Mr Gundesen was acting under section 38(2) when he called for police assistance. All police personnel answering that call clearly considered they were bound to do so and did do so under the provisions of section 41(2)(b)(ii) which provides:

"Any member of the police called to the assistance of a duly authorised officer for the purposes described in section 38(2)(b) of this Act may ... (b) either (ii) take the person to some other place nominated by the duty officer for the purpose of an assessment examination and

detain the person at that other place until the assessment examination has been conducted."

In my opinion, this section enables a constable to use reasonable force to take such a person as Mr Innes to Kingseat for the purpose of the assessment examination envisaged by the Mental Health Act. Likewise, in my opinion, it entitles a constable to use reasonable force to detain a person under subsection (2)(b)(i) of section 41. Any other interpretation is, in my view, totally contrary to the intention of the legislation which is to enable immediate steps to be taken to have persons requiring medical treatment given that treatment at an early date. In this regard the procedures discussed in Part III should be compared with the somewhat more leisurely procedures which are available under other parts of the Act.

I am aware this opinion is contrary to the view expressed by Mr Gibb in his recent memorandum which I see is attached to your file, but I cannot accept his basic premise that because this sub section does not expressly authorise the use of force, it follows that reasonable force cannot be used by police personnel when they are carrying out and responding to a request made of them pursuant to the provisions of this Act. I repeat that in my view, to be unable to use reasonable force to effectively render assistance and be left in the position where having been called upon to assist, a police officer can do nothing unless the patient agrees, makes these Sections of the Act virtually unworkable. An interpretation of the section which leads to such a result should be avoided where an alternative and reasonable interpretation is an option.

- 7 Quite apart from the foregoing comments, it is abundantly clear and indeed no one contends otherwise, that Mr Gundesen and all officers and other persons involved in this unfortunate affair acted throughout honestly and without malice towards Mr Innes. Mr Gundesen and all three police officers clearly believed they were acting within the powers given to them under the Mental Health Act and neither intended nor had any knowledge whatsoever that they could possibly be committing a criminal assault on Mr Innes.
- 8 In these circumstances and for the reasons that I have expressed in the foregoing paragraphs hereof, I am of the opinion that there is no evidence to justify a finding that any unlawful act by any person or any failure to perform any legal duty has

resulted in the death of Mr Innes, and there is no basis for the laying of any criminal charges against any person.

Yours faithfully
D.S. MORRIS
CROWN SOLICITOR

Per: 

Enc

81e/1-5/PD

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OPINION FOR NEW ZEALAND POLICE

re : MATHEW FRANCIS INNES : DECEASED

1. INTRODUCTION

- 1.1 On 3.1.94 members of the Police were requested to restrain Mr Matthew Innes and convey him to Kingseat Hospital from his brother's home in Howick.
- 1.2 On arrival at the Hospital he was found to be unconscious. He was then taken to Middlemore Hospital where he died on 10.1.94.
- 1.3 A post mortem examination indicated that during the journey to Kingseat his breathing had been constricted which caused a lack of oxygen to the brain resulting in him becoming unconscious.
- 1.4 The matter has been considered by the Police Complaints Authority, Sir John Jeffries, who had requested that an opinion be obtained from Justice DS Morris who was, at that time, the Crown Solicitor in Auckland. Justice Morris concluded there was no evidence of any unlawful act or omission to provide a basis for a criminal charge against any person.
- 1.5 Subsequently, evidence became available from a Constable Webb relating to a conversation on 3.1.94 between himself and Constable Schmidt, one of the officers who had accompanied Mr Innes to Kingseat.
- 1.6 This evidence was considered by Assistant Commissioner ME Derecourt who concluded that the substance of Constable Webb's evidence had already been available from other witnesses at the time Justice Morris made his report.
- 1.7 The Police Complaints Authority has requested that a further opinion be obtained on the question whether the further evidence from Constable Webb could have affected Justice Morris' opinion.
- 1.8 On 16.7.94 I received instructions from Deputy Commissioner IN Bird "To examine the Derecourt investigation and to determine whether or not it affects the validity of the original legal opinion as to Police liability on the death of Mr Innes".

2. PRELIMINARY COMMENTS

- 2.1 Mr Derecourt's investigations included an inquiry into whether the evidence provided by Constable Webb was new to the inquiry and result, or whether that evidence had been considered during the previous investigation.

It is this aspect of Mr Derecourt's investigation which is the subject of my brief. I have not considered any of the other matters referred to by Mr Derecourt in his report.

2.2 In order to provide this opinion I have -

- a)' Considered Justice Morris' opinion and conclusions and the evidence provided to him at the time.
- b) I have then considered the evidence from Constable Webb with a view to determining whether -
 - i) The essential elements of that evidence were available to Justice Morris; and
 - ii) Whether, for any reason, his opinion should be reviewed in the light of that evidence.

2.3 In my opinion, the effect of Constable Webb's evidence was to highlight three issues -

- a) The positioning of the jacket worn by Mr Innes during the journey in the Police car to Kingseat; and
- b) The actions or lack of action, in relation to the jacket by Constables Vincent and Schmidt, they being the officers who accompanied Mr Innes; and
- c) Allied to b) above, whether it was appropriate to have only one person accompanying Mr Innes in the back of the Police car.

2.4 In coming to my conclusions in relation to the issue which is the subject of this opinion, I spent some time considering these three issues. Because they were not specifically referred to in Justice Morris' report, I felt that it would be desirable to set out my review of these issues in some detail in this opinion.

2.5 The remainder of the opinion is therefore presented under the following headings :

- 3. JUSTICE MORRIS' OPINION
- 4. CONSTABLE WEBB'S EVIDENCE
- 5. WAS OTHER EVIDENCE AVAILABLE TO JUSTICE MORRIS WHICH COVERED THE SUBSTANCE OF CONSTABLE WEBB'S EVIDENCE
- 6. ISSUES RAISED IN RELATION TO THE POSITIONING OF THE JACKET
- 7. EVIDENCE OF THE TWO CONSTABLES
- 8. ACTION OR LACK OF ACTION IN RELATION TO THE JACKET
- 9. NUMBER OF PERSONS ACCOMPANYING MR INNES IN THE BACK SEAT
- 10. SUMMARY AND CONCLUSIONS

3. JUSTICE MORRIS' OPINION

3.1 The Pathologist Dr Vuletic considered that the circumstances surrounding the transportation of Mr Innes to Kingseat for treatment and the post mortem findings supported a finding of positional asphyxia occurring during transportation as the event which lead to the development of hypoxic encephalopathy.

3.2 Justice Morris concluded (paragraph 8) that there was -

"No evidence to justify a finding that any unlawful act by any person or any failure to perform any legal duty has resulted in the death of Mr Innes and there is no basis for the laying of any criminal charges against any person."

3.3 The first question to be determined is, therefore, whether, when coming to the above conclusion, there was evidence available which was in substance the same as that which was later provided by Constable Webb.

4. CONSTABLE WEBB'S EVIDENCE

4.1 Constable Webb stated that he had had a conversation with Constable Schmidt at Kingseat where he was told -

"The guy was struggling in the car and he had to sit on him to restrain him and he was spitting blood on him so he pulled his jacket over his face to stop him spitting at him."

and -

"He thought the guy was alright because he was struggling up until they were about 500 yards away from Kingseat."

4.2 In my opinion, the significant element of this evidence is the reference to the jacket being pulled over Mr Innes' face by Constable Schmidt.

5. WAS OTHER EVIDENCE AVAILABLE TO JUSTICE MORRIS WHICH COVERED THE SUBSTANCE OF CONSTABLE WEBB'S EVIDENCE

5.1 Mr Derecourt, in his report, concluded (paragraph 17) -

"After reviewing this file and the question put to Constable Schmidt, it was clear to me that while Constable Webb's information reinforced that of the three other witnesses (Harrigan (Harrington), Wilson and Warlow), it was not new in terms of the overall investigation"

and (paragraph 30) -

"The Webb information is not new and does not progress the previous investigation and its findings."

5.2 In the final analysis I agree with this conclusion but I think it is desirable to examine the position in more detail.

5.3 Constable Webb referred to the jacket being pulled over Mr Innes' face.

5.4 None of the three witnesses, Harrington, Wilson and Warlow, referred to the jacket being pulled over the face, ie -

i) The Ambulance Driver Mr GM Harrington said -

"They placed a jacket slightly over the patient's face."

ii) The Registration, Fiona Wilson, said -

"The patient's jacket had been placed over his face."

iii) Dr Warlow said -

"Mr Innes' face had been covered by his jacket."

5.5 In addition, a further witness, namely another Ambulance driver, Mr Gibson, said -

"He also told me that they had covered his head with a jacket because he had continued to spit at them."

5.6 As I see it, these references raise the question whether the reference by Constable Webb to pulling the jacket over Mr Innes' face imports a further element, namely that of force or disregard on the part of the Constable which is not apparent from the statements of the four witnesses referred to above.

5.7 Put another way, would the fact (if proved) that the jacket had been pulled rather than placed over or used to cover the face, raise an additional element which might affect the validity of Justice Morris' opinion.

5.8 For reasons which I will refer to later, I do not consider that this evidence does support a conclusion that the jacket was in fact pulled over the face. Putting this aside for the moment, I also consider that even if some additional element was imported by the reference to pulling, this does not affect the essential question whether the positioning of the jacket interfered with Mr Innes' ability to breathe. This question was open for consideration regardless whether the jacket was pulled over, placed over or used to cover Mr Innes' face. It was open for consideration on any of these bases either as an unlawful fact, or as an indication of a failure to exercise reasonable skill and care.

5.9 For this reason I agree with the conclusion reached by Mr Derecourt that the evidence from Constable Webb did not, in substance, raise any new matter which had not been available to Justice Morris. In particular, the statements of the witnesses Harrington, Wilson, Warlow and Gibsen, were included in the material provided. I also note that the briefing notes specifically raise the issue of the positioning of the jacket in the references to the witnesses Harrington (8.11), Gibson (8.13) and Warlow (8.17).

6. ISSUES RAISED IN RELATION TO THE POSITIONING OF THE JACKET

- 6.1 As previously indicated I feel that it is appropriate for the sake of completeness to record how I see the relevance of this issue to the wider issue of possible criminal action.
- 6.2 The issues which, in my opinion, are relevant are -
- a) The significance, if any, of the evidence of Constables Vincent and Schmidt on the question of the positioning of the jacket.
 - b) The action or lack of action by them in relation to the jacket.
 - c) The significance of there being only one person in the back of the Police car on the way to Kingseat.
- 6.3 I now deal with each of these matters in turn.

7. EVIDENCE OF THE TWO CONSTABLES

- 7.1 Neither Constable Vincent nor Schmidt made any reference to either of them touching the jacket in their Use of Force Reports, but both referred to Mr Innes spitting.

Constable Schmidt did say -

"His jacket had ridden up and was partially covering his face. I bent down and asked him whether he was alright and he spat in my face."

- 7.2 A written question was submitted to both the Constables on the question of whether the jacket had been pulled over Mr Innes' face.

- a) It was put to Constable Vincent that he had pulled Mr Innes' jacket over his head (question 47). He replied that he believed that this question related to Constable Schmidt.
- b) It was also put to Constable Schmidt that he had pulled Mr Innes' jacket over his head (question 51). He replied -

"I did not describe pulling Mr Innes' jacket over his head. The spitting occurred before the comment 'I am going to die on you'. I had bent down to him and asked him if he was hot or thirsty or needed a drink. At that stage he spat at me. At that time his jacket had ridden up. The bottom edge of the jacket was partly over the right hand side of his face but was not in any way obstructing his breathing. The jacket edge was loose; it was just sitting over the right hand side of his face."

- 7.3 Constable Webb's evidence was later put to Constable Schmidt on 23.5.94. He said -

"The point with the jacket, if we take that one first, it seems to be a matter of interpretation. I never pulled the jacket over Matthew Innes' head. When you say Constable Schmidt pulled the jacket over his head, you make it sound like it was grabbed by one of my hands and physically lifted over his head, that is not the case, it never happened. The jacket had ridden up by itself as a result of him struggling and Matthew's position was such that he was on his back, at this stage he was lying underneath my thighs and I turned his head towards the rear of the front left passenger seat so that the palm of my hand was on his temple area, holding his head away. The jacket had ridden up. I made use of it while it was there, I never pulled it up over his head. The way the jacket was, I have a piece of paper here, his head was on the side facing the rear of the front passenger seat. The jacket was lying loosely over his face like that (demonstrates), I could pull it down with my wrist, I could move it down would be better, to see if he was alright so I could talk to him, just to see if he was okay. The point is I could slide that part of the jacket down his face and back up again if he was going to continue spitting."

and -

Question - "Was the jacket tight around the front of his face."

Answer -

"No, not, it wasn't because I could move it."

7.4 There are two matters which, in my opinion, can be taken into account when considering Constable Schmidt's clarification of the position :

- a) His explanation is consistent with the description given by the witnesses Harrington, Wilson, Warlow and Gibson, all of whom recount what was said to them by one or other of the two Constables at Kingseat.
- b) There is evidence from another witness Mr Denis Kirkwood, one of the Health Assistants at Kingseat, who was in a position to observe two others remove Mr Innes from within the car. He said (page 6 of his statement) -

"So he (Mr Innes) was pulled out face down, I noticed that the patient's jacket appeared to have ridden up and was covering his head but hanging freely over the front of his face."

Other persons present refer to the position of the jacket but not whether it was tight or loose about the face or head.

Whilst this evidence could not be regarded as being conclusive it does, in my opinion, go some way to confirming Constable Schmidt's account. The significant point being that if the jacket was loose about the head/face, that it would not have been necessary for it to be pulled up to prevent Mr Innes spitting at Constable Schmidt.

7.5 On the basis of the above matters, I conclude -

- a) Apart from Constable Webb's evidence, there is no evidence to support a finding that Constable Schmidt pulled the jacket up over Mr Innes' head.
- b) Other evidence supports Constable Schmidt's account, namely that the jacket had ridden up and was loose about Mr Innes' head or face.
- c) I do not consider that any weight can be put on the fact that neither Constable initially made any reference to the jacket being placed so that Mr Innes could not spit at Constable Schmidt. When the position was clarified and put directly to Constable Schmidt, his explanation appears to me to be both credible and consistent.

8. ACTION OR LACK OF ACTION BY THE CONSTABLES IN RELATION TO THE JACKET

8.1 If, as I have suggested above, Constable Schmidt's explanation should be accepted as to what he did with the jacket to prevent Mr Innes spitting, then, in my view, what he did did not amount to an unlawful act. Furthermore, there is nothing to suggest that the placement of the jacket as described by Constable Schmidt impeded Mr Innes' breathing.

8.2 The further question remains as to whether, having observed that the jacket had ridden up, either or both of the Constables should have taken steps to ensure that the jacket was not impeding Mr Innes' breathing by compressing his neck.

8.3 My conclusions in relation to this are -

- a) Any finding as to whether or not the jacket had compressed the neck would be no more than conjecture.
- b) There are other mechanisms referred to in the literature provided by Dr Vuletic which could equally well explain why Mr Innes suffered a lack of oxygen.
- c) The behaviour exhibited in the car by Mr Innes would not seem to have indicated (at least until near the very end of the journey) that his breathing might have been inhibited in any way, ie he was able to express himself verbally in a number of ways from shouting to talking.
- d) When he did become quiet near the end of the journey, Constable Schmidt interpreted this as just another lull in Mr Innes' behaviour.
- e) Based on the foregoing I do not see how it would be possible to prove that either Constable should have realised anything was amiss with Mr Innes' breathing.

9. THE NUMBER OF PERSONS ACCOMPANYING MR INNES IN THE BACK SEAT

- 9.1 The Police and Hospital Authorities had earlier identified that two persons, should accompany a mentally disturbed person in the back seat of a car and that those persons should sit on either side of the patient, who should be in an upright seated position.

It is implicit in this that if it was possible to adopt this procedure, then there would be far less likelihood that the patient's breathing would be affected.

- 9.2 It seems to be clear that none of the Police members were aware of Chief Inspector Beattie's direction covering this procedure.

- 9.3 Similarly, there is a suggestion that it would be preferable to transfer a very excited patient in an Ambulance. In this case, there would have been more room available for restraining the patient in a more controlled manner which, in turn, would also lessen the chance of breathing being inhibited.

- 9.4 The issue which arises is whether any person failed to exercise reasonable skill and care in the present case by not adopting one or other of the two alternatives, when the potentially dangerous task of transporting Mr Innes was undertaken.

- 9.5 In my opinion, and in the circumstances of the particular case, the failure to do so could not be proved on the evidence of a lack of reasonable skill and care.

- 9.6 My reasons are :

- a) Because the violent aspect of the incident erupted to a serious level very quickly, it would not, in my opinion, have been practicable to await the arrival of an ambulance, given the degree and difficulty which was experienced by all concerned in restraining Mr Innes.
- b) A Police car was immediately available and it was not unreasonable for those concerned to use this to get Mr Innes to the Hospital as soon as possible.
- c) The extent of Mr Innes' disturbance was such that it is debatable whether he could have been effectively restrained in an upright position with a person on either side, even though he was hand and ankle cuffed.
- d) What seems to be clear is that it was only by laying him prone and having the Constable lie on him that it was possible to effectively restrain him at all.

- 9.7 There is one other matter which stands out from the evidence on the file. That is, that there is nothing to indicate that the actions of any of the persons (and particularly, Constable Schmidt) were dictated by anything other than a concern for Mr Innes' welfare.

In my opinion, this factor can properly be taken into account when examining the actions or lack of action by the persons concerned, particularly when these issues are being considered from the point of view of possible criminal liability.

10. SUMMARY AND CONCLUSIONS

- 10.1 In my opinion, the substance of the matters covered in the evidence of Constable Webb was available on the file for consideration by Justice Morris.
- 10.2 The significant element of Constable Webb's evidence was the reference to Constable Schmidt having pulled the jacket over Mr Innes' face while on the way to Kingseat.
- 10.3 Having analysed the evidence in relation to the positioning of the jacket and the actions (or lack of action) taken in relation to the jacket, I consider that there is no evidence to found a criminal charge against any person.
- 10.4 It follows that, in my opinion, the conclusions reached by Justice Morris in his opinion remain valid.



JA LAURENSEN QC
29 July 1994