

Report on the death of Henry Bailey while being restrained by Police in Auckland on 5 February 2008

INDEPENDENT POLICE CONDUCT AUTHORITY

INTRODUCTION

1. At approximately 11am on 5 February 2008 Police were called to a domestic dispute between Henry Bailey and his flatmate. During attempts by two officers to restrain him, Mr Bailey, aged 42 years, stopped breathing and died.
2. As required under section 13 of the Independent Police Conduct Authority Act 1988, the Police notified the Authority of the death, and the Authority conducted an independent investigation. This report sets out the results of that investigation and the Authority's findings.

BACKGROUND

Summary of events

3. Mr Bailey had previously been diagnosed with schizophrenia and was taking medication, which was administered by a nurse each evening. He lived with two other persons.
4. On the morning of 5 February 2008 Mr Bailey assaulted one of his flatmates without provocation. The flatmate, suffering a bleeding nose, left and called the Police.
5. Officers A and B attended and initially went to the house from which the flatmate had telephoned and obtained details of the assault. They then went to Mr Bailey's address to investigate further.
6. The officers say that upon arrival they saw Mr Bailey outside the front of the house. As they approached, they saw him pacing back and forth and noticed that his fists were clenched, he had a glassy stare and sweat on his forehead.
7. The officers told Mr Bailey they wished to speak with him. He approached Officer B, who observed that his breathing appeared laboured and he seemed agitated. Without warning, Mr Bailey tried to punch Officer B.

8. In response, Officer A reached for his oleoresin capsicum (OC) spray and aimed it at Mr Bailey. Officer B took her ASP baton from her belt but did not initially extend it. Both officers say they were talking to Mr Bailey and trying to calm him down. Officer A shouted at Mr Bailey *"back off or I'll spray"* and both officers continued to talk with him until he turned and sat down on the front steps.
9. However, within seconds and without warning Mr Bailey charged towards the officers with his hands clenched. Officer A twice called on Mr Bailey to stop or he would be sprayed. Mr Bailey took no notice of these clear warnings and continued to advance. Officer A then directed spray into Mr Bailey's face and used the spray a second time as he continued advancing. At that stage Officer B called for back up.
10. The officers say that they then attempted to subdue Mr Bailey and restrain him with handcuffs. However, he resisted strongly and Officer A was knocked to the ground. Officer B responded by hitting Mr Bailey on the fleshy part of his right arm with her extended ASP baton. Mr Bailey continued to struggle and lash out at the officers.
11. Efforts to subdue Mr Bailey with OC spray and the ASP baton proved ineffective and he continued to fight violently. The officers said that they had feared for their safety as the struggle intensified. Officer A placed Mr Bailey in a form of headlock by putting his right arm over Mr Bailey's right shoulder and across his lower face. The officer later said:

"It wasn't a carotid hold. I made sure I was not applying any pressure to his throat. His chin was in the crook of my arm. I was very aware of that as I was concerned that he might bite my arm. My intention was to get control over his movement by controlling his head."
12. Officer B was then able to handcuff Mr Bailey, with his hands at the front, and he stopped struggling almost immediately.
13. Officer A then noticed that Mr Bailey appeared to be having trouble breathing and was frothing at the mouth.
14. By this time two other officers had arrived. Mr Bailey's handcuffs were removed and all officers assisted with CPR. An ambulance was called and arrived eight minutes later. Despite their efforts, Mr Bailey was pronounced dead at the scene.

Post mortem and toxicology

15. A post mortem concluded that Mr Bailey died as a result of a *"cardiac arrhythmia secondary to acute myocardial ischaemia caused by a severe narrowing of the right coronary artery"*.

16. The pathologist commented that Mr Bailey was at risk of suffering a heart attack at any time. She said that the risk would be greater at times of excitation or agitation or during exertion.
17. The pathologist concluded:

“It is a remote possibility that the restraint procedure contributed to death. I believe that during the restraint procedure the mouth of the deceased was occluded by the police officer who admitted to placing an arm across the mouth. I do not believe that a significant degree of pressure was applied to the sides of the neck or to the larynx. I believe that it is a remote possibility that the occlusion of the mouth contributed to death.”
18. Toxicology tests showed no evidence of alcohol in Mr Bailey’s blood. Traces of alcohol were found in his urine. The only drug identified was Clozapine which is an anti-psychotic. In the pathologist’s opinion, this drug, taken at a therapeutic level, would not have contributed to death.
19. The cause of death, as set out in paragraph 15, is clear. An inquest into Mr Bailey’s death has not been held.

USE OF FORCE BY POLICE DURING ARREST

20. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrest and enforcement of warrants. Specifically, it provides that officers may use *“such force as may be necessary”* to overcome any force used in resisting the law enforcement process unless the process *can* be carried out *“by reasonable means in a less violent manner”*.
21. Section 48 of the Crimes Act states that: *“Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use”*.
22. Section 62 of the Crimes Act makes officers criminally responsible for any excess use of force.
23. The New Zealand Police *Manual of Best Practice* also provides officers with guidance on the use of force. Officers using force on any person are required to submit a tactical options report to their supervisors at the first opportunity.

TACTICAL OPTIONS

24. The Police have a range of tactical options available to help restrain a person or effect an arrest. These include handcuffs and OC spray.

25. Police recruits receive training on the use of handcuffs and refresher training is provided annually. The New Zealand Police *Manual of Best Practice* and General Instruction A265 provide guidance and direction on 'Means of Restraint' which includes the use of handcuffs.
26. Police recruits also receive training in the use of OC spray. Refresher training is provided annually. General Instruction A270 provides guidance and direction on the use of OC spray.
27. General Instruction A269(3) requires that an officer only use OC spray when it is "*lawful and reasonable i.e. necessary, proportionate to the situation, and with minimum risk to the public, police and the subject*". The policy states that OC spray may only be used on someone who is actively resisting and where the situation cannot be resolved by less forceful means. Active resistance includes physical actions such as pulling, pushing or running away — that is, "*more than verbal defiance*".

THE AUTHORITY'S FINDINGS

Arrest

28. Given the alleged assault and Mr Bailey's behaviour, the officers were justified in arresting him and had a duty to do so in order to prevent any further assault.

FINDING

The arrest of Mr Bailey was lawful and justified.

Use of force during arrest

29. Mr Bailey's flatmate did not return to his house and there were no independent witnesses to this incident. Both officers reported that Mr Bailey's behaviour was unpredictable and their statements are generally consistent in terms of his aggression and violence.
30. The assaults Mr Bailey committed against his flatmate and the officers were unprovoked. The officers reported that he was attacking them and they feared for their safety.
31. In response to his aggression and after warning Mr Bailey, Officer A was left with little choice but to use OC spray. Likewise, Officer B used her baton correctly on the fleshy part of Mr Bailey's arm. The force used by the officers during his arrest was not unreasonable.
32. During the arrest Officer A used a form of headlock on Mr Bailey, with Mr Bailey's chin in the crook of the officer's right arm. Officer A said he did not apply a carotid hold, which would have applied pressure to Mr Bailey's throat. The pathologist did not find any injury to Mr Bailey's neck, nor any other evidence of a carotid hold.

FINDING

The force used by Police was reasonable in the circumstances and therefore justified under section 48 of the Crimes Act.

Compliance with policy, practices and procedures around restraint

33. Officers A and B generally acted in accordance with General Instructions and policy in force at the time. Their certifications in relation to all related competencies were current.
34. The officers took sick leave after this incident and did not submit use of force and OC spray reports before doing so.

FINDING

Following the event, the officers omitted to submit use of force and OC spray reports as required under General Instructions. These breaches had no bearing on Mr Bailey's death, which was due to natural causes.

Medical assistance

35. When the officers realised Mr Bailey had lost consciousness, they removed the handcuffs and commenced CPR until the ambulance arrived.

FINDING

The medical assistance provided by the officers was immediate and appropriate.

CONCLUSIONS

36. The officers were justified in attempting to arrest Mr Bailey and in using sufficient force to overcome his resistance.
37. Officer A did not apply a carotid hold and, in view of the pathologist's finding that "*it is [only] a remote possibility that the occlusion of the mouth contributed to death*", the Authority is satisfied that Officer A occasioned no deliberate harm to Mr Bailey.
38. There is no evidence of misconduct or neglect of duty on the part of either of the officers involved.



Hon Justice L P Goddard

Chair

Independent Police Conduct Authority

July 2009

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is chaired by a High Court Judge and has two other members – one a former ombudsman and the other a former senior police officer.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority has two investigating teams, made up of highly experienced investigators who have worked in a range of law enforcement roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- Receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority may make findings and recommendations about Police conduct.



IPCA

Independent Police Conduct Authority
Whaia te pono, kia puawai ko te tika

PO Box 5025, Wellington 6145
Freephone 0800 503 728
www.ipca.govt.nz