

**REPORT OF THE POLICE COMPLAINTS AUTHORITY
INTO THE DEATH OF KEVIN BRIAN WILSON
IN AN ACCIDENT NEAR ELTHAM ON 8 NOVEMBER 1998**

Introduction

On the morning of Sunday 8 November 1998 the Authority was notified by Police of the death of Mr Kevin Brian Wilson of Stratford. The death appeared to have been caused by a Police officer in the execution of his duty. This notification was in accordance with the requirement of the Police Complaints Authority Act 1988, Section 13.

It was reported that the death was the result of Mr Wilson, a pedestrian, being struck by a marked Police vehicle being driven by a Police Constable, Constable Barleyman. The collision occurred at approximately 1.05 am on 8 November 1998 on State Highway 3 north of Anderson Road, a short distance north of Eltham.

Original Information

The early information received indicated that Mr Wilson was walking to his home at Stratford after attending a birthday party at Eltham. He had consumed alcohol. Mr Wilson was said to have been walking in the centre of the left north bound lane, there being two lanes in the direction in which he and the Police vehicle were travelling.

Mr Wilson was struck in his left hip area causing a deep laceration. He had been cast or had fallen onto the windscreen of the Police vehicle before falling onto the road. Mr Wilson sustained injuries which were fatal.

Mr Wilson's next of kin were notified of the collision and his death. The Police immediately commenced an investigation into the circumstances surrounding the collision and death and

this Authority was notified pursuant to Section 13 of the Police Complaints Authority Act 1988.

Police Complaints Authority Response

The Authority advised the Commissioner of Police that a Police investigation of the circumstances surrounding the death was to be conducted with a report forwarded to the Authority for review.

Investigation - Background

The investigation made into the circumstances of this tragedy addressed the events preceding and surrounding the fatal collision.

It was established that on Saturday 7 November 1998 Mr Wilson had been a guest at a birthday party in Eltham. Amongst those also present were a man who in this report will be referred to as "M" and his de facto partner, who will be referred to as "N", with four of their children.

Immediately prior to leaving the party M is said to have assaulted his partner following a disagreement about which of them was going to drive N's vehicle. The assault by M on his partner was interrupted when another guest assaulted M.

N and seven children left the party on foot. M, with Mr Wilson, followed in N's vehicle, and at about 12.30 am they located N in High Street, Eltham. A confrontation evidently then ensued and an off duty Police Constable who was driving past saw M assault N. The officer stopped, separated the couple and telephoned from a nearby house for additional Police assistance.

Mr Wilson had meanwhile alighted from the vehicle and walked away in the direction of Stratford. Mr Wilson's gait caused the off-duty Constable to believe he was intoxicated. When other Police arrived the off-duty Constable continued his journey and some 50 metres south of the High Street and Clifton Road intersection he saw Mr Wilson apparently trying to thumb a lift from another car. Mr Wilson was said to have ventured into the roadway in so doing.

Four Police officers from Stratford had responded to the call from the off-duty Constable. They included Constable Barleyman. The other three were Constables Single, Balsom and Taylor. All were in uniform. When they arrived Mr Wilson had left the scene.

Police Action - Eltham

Constables Single and Balsom arrested M who was seen to be intoxicated. M was placed in a Police car driven by Constable Single. The two Constables with M in the Police car then set off for Stratford. On the way M is said to have asked if they could pick up *'his mate'*. By this he was referring to Mr Wilson but the two Constables were unaware of Mr Wilson having been with M and the request was not then understood by them .

However, Constable Single then saw Mr Wilson, walking backwards with his thumb out along the left hand side of the road, near the intersection of State Highway 3 and Anderson Road. Mr Wilson did not seem to Constable Single to be under any disability. He was wearing dark coloured clothing. M asked the officers to pick up Mr Wilson. However, with M an arrested person under escort, this was not seen as a permissible option.

Meanwhile Constables Taylor and Barleyman attended to N and the seven children. N showed signs of having been assaulted and it was necessary to take her to Stratford Police station for the Police to record a statement from her and to pursue enquiries into the apparent assault. Further, N and the children were all from Stratford and there was a need for them to return home.

It was decided to utilise the Police car and N's vehicle to do so. Constable Taylor was to drive N's vehicle back to Stratford with N and three of the children. As Constable Taylor left Eltham he saw Mr Wilson on the left-hand side of the road, off the seal. The Constable did not have to take any evasive action.

The remaining four children to be conveyed to Stratford were seated in the Police car driven by Constable Barleyman. Three of the children were boys of third form age; the fourth was a girl aged three.

Constable Barleyman and the four children left Eltham in the Police car on the way to Stratford. The children were said by Constable Barleyman to have been calm and to have been initially talking to the Constable and amongst themselves about the evening's events. It was a dry, clear night.

Collision

Constable Barleyman when interviewed said that by the time he left the 50 kph zone the children had stopped talking. His speed increased to not more than 100 kph. The road was very familiar to the Constable who was a long time resident of the area. In his statement about the collision Constable Barleyman described the contour and line of the road as it

passed the junction with Anderson Road. This was that the road descends slightly and the carriageway divides into two north bound lanes, one a passing lane.

The Police car was travelling in the lane to the left at this point when Constable Barleyman saw something on the road that was blue. It was just to the left of the steering wheel from the driver's viewpoint, placing it therefore approximately in the centre of the left hand traffic lane in which the car was travelling. This proved to be Mr Wilson, but this was not immediately evident.

The Constable braked, but hit Mr Wilson who was thrown up and struck the car's windscreen, breaking it. Constable Barleyman braked to a stop and, after checking the children were unhurt, turned on the car's blue and red incident lights and called for an ambulance. He had realised the object the car had struck was a pedestrian.

Constable Barleyman also called up Constable Single and asked him to return to the scene of the collision. The Constable then went back along the road to where Mr Wilson's body had come to rest. It was immediately apparent to him that Mr Wilson was dead.

Mr Wilson was wearing dark blue jeans, a dark blue/grey woollen jersey and black boat shoes. An ESR analysis of Mr Wilson's blood resulted in a blood-alcohol reading of 246 milligrams of alcohol per 100 millilitres of breath.

Passenger's Account

The three third form boys, all aged 13, who had been passengers in the Police car when it struck Mr Wilson were spoken to during the investigation. From the accounts of two of the boys of their earlier observation of Mr Wilson at the birthday party it was evident that they each considered Mr Wilson to have been drunk: *'I had seen Kevin drinking at the house and I think he was drunk'*, one boy stated. The other said of Mr Wilson, *'He was drunk'*.

With regard to the collision, one of the boys, who was seated in the front passenger seat of the car estimated the speed of the Police car as less than 100 kph immediately prior to the collision. He saw Mr Wilson but stated *'I was looking out the front windscreen of the Police car. All of a sudden I saw a person in front of us. There was no time to stop. It would have been about a second from the time that I saw him to the time that the car hit him. It all happened so fast'*. This witness also said that: *'When I first saw Kevin he was about in the middle of the northbound lane. He had his back to us and was walking towards Stratford...I know that from when I saw Kevin [Constable Barleyman] would not have had any time to stop'*.

The boy, sitting behind the driver, had also seen Mr Wilson at the party. He said the car was travelling at *'normal speed'*. He saw Mr Wilson *'three dotted lines away'* in the car headlights adding *'the guy was right in the middle of the lane'*. The third boy, described seeing someone in the middle of the road: *'We saw someone standing in the middle of the road for a split second before we hit him. All I saw was his legs just as we hit him'*.

Constable Single

Constable Single, driving the Police car ahead of Constable Barleyman, told the investigator that he saw a man hitch-hiking, walking backwards with his left thumb out. He was on the edge of the seal on the left side of the roadway "walking on the fog line". He described the person as hard to see in the "pitch dark". Although the man's position was such that Constable Single did not have to take evasive action, he was of the view that it was foolish to be hitch-hiking in those circumstances.

Other Witnesses

Other drivers who had driven along the same stretch of road as the Police car shortly before the collision were seen. One motorist saw Mr Wilson attempting to hitchhike at the north end of Eltham still within the 50 kph area. Mr Wilson was said to have been unsteady on his feet and wearing dark clothing. The motorist was obliged to swerve to avoid hitting him.

A second motorist, driving towards Eltham, saw a person staggering along the white fog line on the other side of the road dressed in dark clothing.

A third driver, in a truck travelling north out of Eltham, saw a person walking in the middle of the left hand lane, just before the commencement of the 100 kph speed limit, staggering and waving his arms with his back to the traffic. He was hard to see.

A fourth member of the public subsequently approached the Police to report that whilst driving along that section of road some months earlier late at night he had encountered Mr Wilson. *'I almost ran him over out on the main highway by the Pioneer Village.....I had to swerve to avoid hitting him'*. The witness went on to describe that he was angered about what had happened to the degree that he stopped and returned to remonstrate with the person, but on recognising Mr Wilson decided against saying anything.

Crash Analysis - Reconstruction

A reconstruction of the conditions pertaining at the time of the collision was effected in a specialist Police crash analysis. Allied to this analysis a similar model car to that driven by

Constable Barleyman at the time of the collision was driven along the same stretch of road after dark. It was noted that the area where the collision occurred and the approach thereto was *'an extremely dark stretch of road'*. The dark coloured sealed road dipped slightly with a small earth bank on either side.

It was established that the headlights of the car were in dipped mode at the time of the collision.

Calculations showed that Mr Wilson's presence in the lane being traversed by the car would not have been evident to the driver until the car was a distance of 46 metres from him. For the driver of a car travelling at a speed of 100 kph, and applying proven time and distance driver reaction times, this meant that the driver of a car in such a position would not apply the brakes until the car was at a distance of about 4 metres from the object sighted.

With the Police car travelling at a speed which witnesses have put in the region of 100 kph the driver had a period of 1.65 seconds in which to react on seeing Mr Wilson. The conclusion arrived at after the examination of the scene of the collision by a Police specialist crash analyst was that the Police car at the time of the impact was travelling at a speed of not less than 72 kph.

Serviceability of the Police Car

An independent vehicle crash investigative report from Vehicle Testing New Zealand reported on the mechanical condition of the Police car concerned. The car was deemed serviceable and roadworthy in all respects with only a minor imbalance between the braking capacity of the front brakes. This would not have been a factor in the collision.

Inquest

An inquest into the death of Mr Wilson was held in the New Plymouth Coroners Court on 13,14 and 15 April 1999 before Mr A Butler. Mr Grant Vosseler represented the deceased's family. A total of 16 witnesses gave evidence. Ten were called by the Coroner and six by Mr Vosseler.

Submissions of Counsel for the Wilson Family

Mr Vosseler made a number of submissions that sought to attribute blame for Mr Wilson's death to the Police, in particular Constable Barleyman.

It was submitted that road and weather conditions on the night of the collision were such that Constable Barleyman could have been expected to have seen Mr Wilson. Other motorists

who had also travelled along the road shortly before the fatal collision had taken evasive action on sighting Mr Wilson. The inference was that Constable Barleyman had been careless with the excessive speed at which the Police car was being driven relative to the limited visibility provided by the dipped headlights. Mr Vosseler submitted that Constable Barleyman should be charged with careless driving causing death.

Mr Vosseler also referred to Constable Single, the driver of the car which preceded that driven by Constable Barleyman by a few minutes along the road, having seen Mr Wilson. Counsel contended that Constable Single should have appreciated that Mr Wilson was a danger to himself and to motorists and that the Constable should have taken some action by either stopping and picking him up or by warning Mr Wilson to take care or by passing a warning by radio to Constable Barleyman.

Coroners Findings and Verdict

The Coroner identified four major contributory factors that led to Mr Wilson being struck by the Police car.

These were: Mr Wilson's level of intoxication (upon analysis his blood was found to contain 246 milligrams of alcohol per 100 millilitres of blood), the fact that he was wearing dark clothing on an unlighted section of the highway, the fact that Mr Wilson was walking or standing in or near to the middle of the left hand lane of the highway and, fourthly, that the headlights of the Police car were on low beam.

The Coroner added that the reason why the car headlights were on low beam could not be established. Had they been on high beam Mr Wilson would have been visible from a greater distance.

Other issues raised by counsel (and in respect of which evidence was called) that were addressed, discussed and discounted by the Coroner related to the eyesight and level of driving concentration of Constable Barleyman, the configuration of the road and its bearing on the collision, the speed of the Police car and the suggestion that Constable Barleyman was in a hurry to go and meet his girlfriend in New Plymouth.

The Coroner expressed the belief that Constable Single could not be criticised for not stopping and either warning Mr Wilson or giving him a lift.

The Coroner found that the cause of Mr Wilson's death was *'extensive injuries including a broken neck and transection of the spinal cord as a result of him being struck by a motor*

vehicle. Apart from the statement I have made expressing the dangers of hitch-hiking at night, I do not consider it necessary in this case to make any other recommendations'.

Criminal Culpability

In instances where a death occurs as a result of Police operations the question of criminal culpability arises. Such was the case here, and in order to establish whether the circumstances were such as to indicate criminal culpability on the part of Constable Barleyman, a legal opinion on the issue was sought by the Police.

Legal Opinion

The Crown Solicitor was accordingly asked to consider whether any criminal charge should be laid against Constable Barleyman for his involvement in this fatal accident.

The resultant legal opinion noted the Coroner's report and was formulated with full access to the evidence given at the Inquest and to material generated during the Police investigation of the accident.

The opinion addressed the issue of whether Constable Barleyman should (as counsel had suggested at the Inquest) be charged under Section 56(1) of the Transport Act 1962, which provides that:

'Every person commits an offence who causes bodily injury to or the death of any person by carelessly using a motor vehicle'

The elements of such an offence requiring proof are that the defendant *'used'* a motor vehicle, that the defendant was *'careless'* and that the careless use *'caused'* the death or bodily injury. In order to be found to have used a motor vehicle "carelessly" the defendant's driving must fall below the standard of "a reasonable and prudent driver".

The opinion identified three potential acts or omissions on the part of Constable Barleyman that might have established carelessness. These were the Constable's choice to have the Police car's headlights in the low beam or dipped position, the suggestion that the Constable's vision was impaired through his choice not to wear corrective lenses and the further suggestion of his being in a hurry to meet his girlfriend later that morning.

The opinion held there was insufficient evidence of any impairment to the Constable's eyesight below that normally expected of the reasonable or competent driver. Similarly the opinion held that there was insufficient evidence to prove that Constable Barleyman was in a

hurry or that he was travelling in excess of the 100 kph limit applicable at the point at which the collision occurred.

Concerning the matter of the headlights being on low beam and noting that the Coroner had found that to be one of the contributing factors which led to the fatal collision, the opinion held that there was sufficient evidence to prove that the lights being on low beam was a material cause of the collision sufficient for the purposes of Section 56 of the Transport Act, 1962.

However, the opinion also stated that there was insufficient evidence to indicate that in having the headlights of the Police car on low beam, or dipped, Constable Barleyman fell below the standard of a reasonable and prudent driver.

The Crown Solicitor said that he was "*firmly of the view that the fact that the headlights of the patrol car were on low beam is insufficient to prove that Constable Barleyman acted carelessly for the purposes of Section 56. It is highly unlikely that a trier of fact (either Judge or Jury) would find carelessness proved beyond reasonable doubt.*" His advice was that a prosecution should not be commenced.

Police Decision

On the basis of the legal opinion referred to in the preceding paragraphs it was decided by Police that Constable Barleyman was not criminally liable for the death of Mr Wilson.

Conclusions of Police Complaints Authority

To observe that the death of Mr Wilson was a tragedy is to understate the enormity of the loss suffered by relatives and friends closest to him. The fact that the death was sudden and occurred in the circumstances that have been described in this report is grievous. I extend to the family of Mr Wilson my sincere condolences.

The event has also undoubtedly had a significant effect on the Police officers particularly the one at the centre of the matter.

The circumstances have accordingly been scrutinised with meticulous attention. This scrutiny has taken several forms. First there was the Police investigation of the collision itself and peripheral contributory factors as well as the interview of witnesses and the compilation of a comprehensive report on the incident. Then there was the Coroner's Inquest, extending over a three day period, during which attention was directed by the Coroner to the serious concerns of the family of the deceased presented by counsel and considered in light of the

evidence. Thirdly, there was the independent legal opinion obtained by the Police in order to ascertain any level of culpability on the part of Constable Barleyman.

None of these separate examinations of the circumstances surrounding and leading to the death of Mr Wilson concluded that any criminal culpability attaches to the conduct of Constable Barleyman or any other Police officer in relation to these events.

In looking first at the actions of Constable Barleyman the Authority can well understand why counsel acting for members of Mr Wilson's family made the submission that Constable Barleyman should face a charge of careless driving causing death. However the decision whether to prosecute is a discretion that is vested in the Police and not this Authority. The Authority finds that the Police decision not to prosecute was made after an extensive investigation and the acceptance of independent legal advice.

At this point the Authority makes the observation that Constable Barleyman was driving within the speed limit and on his correct side of the road. Although other drivers had passed and evaded Mr Wilson they had done so when he was in a different position on the road to that which confronted Constable Barleyman.

As recorded earlier, criticism of Constable Single was also made by counsel for the family at the inquest. It was suggested that upon seeing Mr Wilson Constable Single should have picked up Mr Wilson, or stopped and warned him to take care or warned Constable Barleyman of Mr Wilson's presence on the road.

With the benefit of hindsight such actions may have avoided the subsequent collision. However at the time Constable Single was conveying an arrested prisoner and when he observed Mr Wilson he was further to the left edge of the roadway on the "edge of the seal" and "walking on the fog line". Mr Wilson was therefore not in the position of greater danger that he was in when subsequently struck by Constable Barleyman's vehicle. Constable Single did not have to take evasive action to avoid hitting Mr Wilson.

After reviewing the incident and examining the evidence relating to the collision and the preceding and surrounding circumstances I am not led to the conclusion that the tragic death of Mr Wilson was caused by any culpable act on the part of a Police officer.