STATE
CORONER
VICTORIA

CORONERS REGULATIONS 1996

Form 1

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4th February, 2008
Case No: 1318/05

RECORD OF INVESTIGATION INTO DEATH[1]

I, **AUDREY JAMIESON**, Coroner,

having investigated the death of LEE ANDREW KENNEDY with Inquest held at Shepparton on 29 August to 31 August 2006 and final submissions held in Melbourne on 11 September 2006, **find that** the identity of the deceased was **LEE ANDREW KENNEDY** and that death occurred on **19 April 2005** at Goulburn Valley Base Hospital from:

1(a). HAEMORRHAGE
1(b). GUNSHOT WOUND TO CHEST

in the following circumstances:

Lee Andrew Kennedy was shot by a member of Victoria Police during a confrontation at his place of residence. He later died at Goulburn Valley Base Hospital.

Mr Kennedy died in *reportable*[2] circumstances.

An Inquest was held in accordance with section 17(1) and section 17(2) of the *Coroners Act 1985* (the Act)[3].

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1 The record of investigation/finding does not purport to refer to all aspects of the evidence received in the course of the investigation. Material relied upon was extensive and included statements and documents tendered in evidence, submissions of Counsel and the Transcript of Proceedings. The absence of reference to any particular piece of evidence either through a witness or tendered document does not infer that it has not been considered.

2 "reportable death" means a death-
(a) where the body is in Victoria; or
(b) that occurred in Victoria; or
(c) the cause of which occurred in Victoria; or
(d) of a person who ordinarily resided in Victoria at the time of death-
being a death-
(e) that appears to have been unexpected, unnatural or violent or to have resulted, directly or indirectly, from accident or injury; or
(f) that occurs during an anaesthetic; or
(g) that occurs as a result of an anaesthetic and is not due to natural causes; or
(i) of a person who immediately before death was a person held in care; or.....

3 s.17(1) A coroner who has jurisdiction to investigate a death must hold an inquest if the body is in Victoria or it appears to the coroner that the death, or the cause of death, occurred in Victoria and-

During the course of the Investigation issues identified as requiring exploration through the examination of witnesses included the medical management of Mr Kennedy's mental health, the actions of the Police, including Police communications prior to the shooting and their method of entry into residential premises. Police communications subsequent to the shooting and the response times of Police and Ambulance were not in issue.

The Role of the Coroner:

The role of the Coroner differs from the role most often associated with judicial officers. It is investigative and inquisitorial rather than adjudicative and adversarial. The primary function of a Coroner is to direct the investigation and make findings concerning the facts. In the case of death, Section 19 of the Act prescribes the role. If possible, a Coroner must determine the identity of the deceased, how the death occurred, and the cause of death and the particulars needed to register the death.

It is not the role of the Coroner to lay or apportion blame, but to establish cause.

The secondary role of a Coroner, if appropriate, is to comment on any other matter connected with the death including public health or safety or the administration of justice. A Coroner is not permitted to include in a finding any statement that a person is or may be guilty of an offence. Similarly, it is not the role of a Corner to make any specific findings on whether there has been any negligence giving rise to the death which is being investigated.

A Coroner may report to the Attorney-General on a death which has been investigated or make recommendations to any Minister or statutory body on any matter connected with or similar to the death, and a Coroner must report to the Director of Public Prosecutions if the Coroner has formed a belief that an indictable offence has been committed in connection with the death.

The limitations of a Coroner's investigative role has authoritative direction from the Supreme Court of Victoria. In *Harmsworth v State Coroner*[4], Justice Nathan broached the subject of the limits of a coroner's power and observed that the power of investigation is not *"free ranging"* and commented that unless restricted to pertinent issues, an Inquest could become wide, prolix and indeterminate. Significantly he stated:

> *Such an inquest would never end, but worse it could never arrive at the coherent, let alone concise, findings required by the Act, which are the causes of*

(a) the coroner suspects homicide; or
(b) the deceased was immediately before death a person held in care; or
(c) the identity of the deceased is not known; or
(d) the death occurred in prescribed circumstances; or
(e) the Attorney-General directs; or
(f) the State Coroner directs.

(2) A coroner who has jurisdiction to investigate a death may hold an inquest if the coroner believes it is desirable.

[4][1989] VR 989

death etc. Such an inquest could certainly provide material for much comment. Such discursive investigations are not envisaged nor empowered by the Act. They are not within jurisdictional power.

Background Circumstances:
Lee Andrew Kennedy was 40 years old at the time of his death. He lived at 6 Phillips Street, Shepparton with his wife, Melissa Kennedy and their 2 children, Declan aged 2 years and Kale, aged 4 years.

Lee Kennedy changed his surname from Wallace to Kennedy on his marriage to Melissa Kennedy. Family and friends referred to him as "Wal" or "Wally" .

Mr Kennedy had a medical history of migraines which were significantly debilitating and rendered him unable to work full-time. He was in receipt of a disability pension and worked on a casual basis at a motor mechanic workshop in Rowston Street, Shepparton.

Melissa Kennedy worked as a chef at the Park Lake Motel and operated a therapeutic massage business from the family home. She worked 7 days per week. Mr Kennedy assumed primary responsibility for their children.

Mr Kennedy had attended the medical practice, Princess Park Clinic, Shepparton, since 1998. Since August 2000, he had been treated predominantly by Dr Alan Wallace.

On 14 February 2001, Mr Kennedy presented to Dr Wallace complaining of sleeping problems and mental health issues. He described sleeping for only about an hour each night and of experiencing *obsessive thoughts regarding routines at his place of work*[5]. Dr Wallace recalled Mr Kennedy's behaviour as *verbally forceful* on that day and of being *a little threatened by his demeanor*. Dr Wallace diagnosed *hypomania*[6] and commenced Mr Kennedy on the mood stabiliser Lithium, at 250mg twice per day. Dr Wallace reviewed Mr Kennedy on 21 February 2001, where he reported improvement in sleeping, mood and a lessening of racing thoughts. By June 2001, Mr Kennedy was noted to be *going really well.* His dosage of Lithium was now 2 x 250mg tablets, twice per day. Blood tests were performed to monitor Lithium levels.

Mr Kennedy next presented to Dr Wallace in February 2002, requesting a repeat prescription for Lithium. He reported that he was well. Blood tests revealed a low level of Lithium. He next presented on 28 October 2002, reporting increasing migraines and worsening mood swings. Blood levels of Lithium were in the therapeutic range. Dr Wallace commenced Mr Kennedy on the anti-migraine medication, Sandomigran.

Mr Kennedy presented to Dr Wallace next in May 2003, November 2003, March 2004 and November 2004. His predominate complaints during this period were of migraines and altered behaviour. Mr Kennedy did not routinely present for blood tests, he altered his

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[5] See Exhibit 7 - Statement of Dr Alan Robert Roland Wallace

[6] Dr Wallace defined "hypomania" as *an elevation of the mood and energy levels with grandiose thoughts in some people aggressive tendencies.* (See pp 48-49 Brief of Evidence)

medication levels without consultation with Dr Wallace and used additional medication, Imigran, to treat his migraines.

On 14 December 2004, Mr Kennedy presented to Dr Wallace *a little more sleepy and dazed than normal.* Dr Wallace reduced the dose of Sandomigran and commenced Mr Kennedy on an antidepressant, Dothep, as he *believed it would help with his sleep disorder.* On 23 December 2004, Mr Kennedy presented more relaxed and reported a lessening in frequency and severity of his migraines. Dr Wallace increased the dosage of Dothep.

On 4 February 2005, Dr Wallace formed the view that Mr Kennedy had become depressed based on his reports of increasing mood swings and self imposed social isolation. Dr Wallace recommended an assessment by the Goulburn Valley Area Mental Health Service (GVAMHS).

On 11 February 2005, Dr Wallace confirmed that Mr Kennedy had attended on Dr Dutta at GVAMHS who had recommended the cessation of Dothep and that the mood stabiliser, Epilim, be commenced. Dr Wallace saw Mr Kennedy on 14 February 2005, to make these changes to his medication.

On 20 February 2005, Mr Kennedy telephoned GVAMHS Triage advising that he had been suffering from a migraine, had argued with his wife and consequently, was feeling remorseful.

On 21 February 2005, Mr Kennedy returned to Dr Wallace. He complained of worsening mood swings and worsening headaches. He was noted to be *very distressed, teary, not sleeping.* He informed Dr Wallace that he was worried about his relationship, complaining that he was constantly arguing with his partner. Dr Wallace recommenced Dothep and arranged for GVAMHS to contact Mr Kennedy.

On 24 February 2005, Mr and Mrs Kennedy attended the medical clinic together. Dr Wallace noted that Mr Kennedy had a *flat affect, grossly effected concentration and short term memory.* Dr Wallace's entry in the medical notes also opines that Mr Kennedy was *clearly depressed today. No risk of self harm.*

On 24 February Mr Kennedy was assessed by Dr Prashanth Mayur, Staff Psychiatrist at GVAMHS. During the 1 hour consultation Dr Mayur found no evidence of an affective disorder. Dr Mayur referred Mr Kennedy back to Dr Wallace with the following treatment suggestions:

1. To investigate sleep quality with referral to a sleep clinic.
2. IQ testing.
3. Taper and cease Lithium carbonate, Sodium valporate and Dothiepin. Monitor drug free for 3-4 weeks.
4. Re-referral to a neurologist for migraine.

No follow-up appointment was arranged.

On 3 March 2005, Mr Kennedy returned to see Dr Wallace to discuss the assessment of Dr Mayur at GVAMHS. Dr Wallace spoke to Dr Mayur by telephone about Dr Mayur's opinion that Mr Kennedy was neither depressed nor suffering from a bi-polar disorder. Dr Wallace was concerned that Dr Mayur had recommended that Mr Kennedy cease all medication other than for migraines. Dr Wallace suggested to Dr Mayur that Lithium should be reduced slowly followed by a gradual reduction in the other medications, Dothep and Epilim. Dr Mayur did not object to this approach to the cessation of medication.

Dr Wallace advised Mr Kennedy on how to reduce Lithium gradually over a 10 day period at which time he was to return to Dr Wallace for review.

On 8 March 2005, Mr Kennedy attended on Dr Raj at the Princess Park Clinic in relation to a migraine.

On 12 March 2005, Mr Kennedy's brother, Brett Wallace, committed suicide[7].

Melissa and Lee Kennedy had been experiencing relationship problems for a number of months. Mrs Kennedy was finding it increasingly difficult to cope with her husband's behaviour. On or about 18 April 2005, Mrs Kennedy requested that her husband find temporary alternative living arrangements by 24 April 2005.

Mr Kennedy had become aware that his wife was having a relationship with another man.

Contemporaneous Circumstances:
On 19 April 2005, Melissa Kennedy had massage appointments booked for 10.00am, 12.30pm, 2.00pm and 3.15pm. At approximately 11.50am she made lunch for her husband and Declan. Kale was at kindergarten. There was not much conversation between Mr and Mrs Kennedy that morning. Mrs Kennedy attributed this to the recent discussion regarding separation. She later reflected that her husband was having one of his *black days.*

At approximately 1.30pm, Mr Kennedy telephoned friend and neighbour, Mark Forrest, advising him about his wife's extra-marital relationship. Mr Forrest attended 6 Phillips Street shortly thereafter. He found Mr Kennedy in the lounge room, wearing sunglasses, a jacket and a beanie. The heater was on and the front door was open. Mr Forrest attempted to talk to Mr Kennedy but found him to be *sharp in his answers*. Mr Forrest considered that Mr Kennedy *definitely wasn't happy.*

At approximately 2.00pm, Mr Forrest left the Kennedy home to pick-up his daughter and Kale Kennedy from kindergarten. He returned with the children at approximately 2.20pm. Mr Forrest enquired with Mr Kennedy if he was okay, left some paperwork from the kindergarten on the kitchen bench, said hello to Melissa who had come out from the area where she performs massages; and left soon after. Before departing, Mr Forrest noticed a near empty bottle of vodka[8] on the kitchen bench.

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[7] See *Record of Investigation into Death* of Brett Anthony Wallace - Case No: 844/05

[8] This bottle was later identified as belonging to Brett Wallace. Mr Kennedy is believed to have written on the label of the bottle earlier in the day - the inscription reading : *LOVE you BRO YOUR BEST MATE WALLY*

At approximately 3.15pm, Nathan Findlay arrived for his appointment with Melissa Kennedy. Mr Findlay entered via the side of the house by walking down the driveway and through a raised roller door. He was permitted entry via the side door of the house by Lee Kennedy who directed Mr Findlay to a room off to the left of the entrance.

At approximately 3.30pm Mr Kennedy telephoned the Shepparton Police Station. He spoke to the watch house duties officer, Constable Scott Griffiths. He reported that a male customer was refusing to leave from his wife's massage business. He requested the attendance of police.

Constable Griffiths obtained Mr Kennedy's personal details including contact telephone numbers. He also enquired as to demeanor of the customer, specifically whether he was aggressive or violent. Mr Kennedy responded *"No, he just won't leave"*.

Constable Griffiths communicated Mr Kennedy's call and request for police assistance to Senior Constable Eames at Bendigo D24 as is required by the Shepparton Police Station Watch House Instructions.

Senior Constable (S/C) Simon Watts and Constable Erin Levay were working as a mobile patrol crew in a divisional van (Shepparton 303) out of Shepparton Police Station. S/C Eames allocated the job to Shepparton 303. The officers dispatched to 6 Phillips Street in response to Mr Kennedy's call for assistance.

On arrival, the officers noted a sign indicating entry via the side of the house but access was not possible by this route due to a roller door in the down position. A utility van was also parked in front of the door. Mr Kennedy came out of the front door onto the veranda and called out to the officers.

While walking towards the front door, S/C Watts confirmed Mr Kennedy's identity as the complainant of a male refusing to leave. As the officers approached the front door, Mr Kennedy held it open for them to enter.

S/C Watts entered the front door into the lounge room. He noted two young children, Kale and Declan. Constable Levay entered the house behind her partner. As she walked past Mr Kennedy, he grabbed her from behind placing his arm around her neck, upper body and arm (*a bear hug*). Mr Kennedy held a black coloured handgun to Constable Levay's chest.

Constable Levay struggled with Mr Kennedy in an attempt to deflect his firearm. Mr Kennedy dropped to his knees, pulling Constable Levay to the floor whilst retaining a firm hold of her. During the struggle Mr Kennedy grabbed one of his children whilst retaining a hold of Constable Levay. During the struggle Constable Levay was aware that Mr Kennedy was attempting to remove her gun from its holster.

S/C Watts had drawn his firearm and called for urgent assistance utilising the police distress signal of "Code 9"[9] over his police radio. S/C Watts called several times for Mr Kennedy to

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[9] This is a "police in trouble" call. S/C Watt's call was received at approximately 3.35pm.

drop his weapon. Mr Kennedy similarly called on S/C Watts to drop his weapon. Mr Kennedy continued to point his firearm between Constable Levay and S/C Watts.[10]

Constable Levay broke free from Mr Kennedy's grip. S/C Watts continued to call on Mr Kennedy to surrender his firearm. He moved towards Mr Kennedy. They became engaged in a physical struggle, wrestling over the firearm. Mr Kennedy broke free from S/C Watts. S/C Watts approached Mr Kennedy and hit him on the back of the head with the butt of his firearm, with no apparent effect.

Mr Kennedy was standing in the lounge room holding his firearm when Constable Levay fired a shot from her police revolver. She was standing near the bathroom door at the time. The shot missed Mr Kennedy and embedded in the lounge room wall, near the front door. Mr Kennedy moved towards Constable Levay wherein she fired a second shot, striking Mr Kennedy in the chest. Mr Kennedy fell to the floor in the bathroom. Constable Levay removed Mr Kennedy's firearm and threw it into the lounge-room.

A number of police units arrived at the Phillips Street home a short time later. First aid was rendered to Mr Kennedy initially by attending police officers and subsequently by ambulance paramedics. He was transported to the Goulburn Valley Base Hospital in Shepparton but he was unable to be resuscitated. Resuscitation attempts ceased 4.15pm.

Mr Kennedy died in the Accident & Emergency Department at the Goulburn Valley Base Hospital. His death occurrd approximately 45 minutes after he telephoned Shepparton Police Station seeking Police assistance.

Investigations:

(a) Professor Stephen Cordner, Forensic Pathologist, at the Victorian Institute of Forensic Medicine, performed **an autopsy**. No natural disease which would have caused or contributed to death was identified. A single projectile was extracted from Lee Kennedy's body. Professor Cordner attributed the cause of death to haemorrahage and gunshot wound to the chest, commenting:

> *He has sustained a gunshot wound to the front of the chest, just to the right of the midline, which has pursued a somewhat upward course through the right upper chest. The projectile came to rest just beneath the skin of the right upper back. The course through the body is more or less parallel to the midline plane of the body.*

The consequential damage to bone, major blood vessels and the lung resulted in bleeding and death.

Other recent injuries identified by Professor Cordner included a 2cm bruise to the top of the head and a graze to the right knee.

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[10] The statements of Melissa Kennedy (Exhibits 4,5 & 6) and Nathan Findlay (Exhibit 13) detail what they could hear from the rear of the house and how Melissa Kennedy removed her children from the lounge-room during the course of the critical incident.

(b) **Toxicological** analysis did not detect alcohol or any common drugs or poisons.

(c) Senior Constable (S/C) Wayne Kohlmann of the Forensic Services Department at the **Victoria Police Forensic Services Centre** (VPFSC) received the bullet[11] retrieved from Mr Kennedy's body from Professor Cordner. He subsequently lodged it and 2 other items, at the VPFSC Forensic Exhibit Management Unit (FEMU).

S/C Alan Pringle, Firearm and Toolmark examiner at VPFSC received the bullet from S/C Kohlmann.

On 19 April 2005, S/C Pringle received two Victoria Police regulation firearms from Sergeant Trebilcock at the scene. Both firearms were .38 Special calibre Smith & Wesson brand Model 10-10 selective double action revolvers, with serial numbers BKN4705[12] and CAR9258[13]. He also retrieved a number of other items of evidence from the scene including a bullet located inside a wall cavity near the front door[14] and a pistol on the floor near the front door against a cabinet[15].

S/C Pringle examined revolver BKN4705 and found:

> *....a deposit of partly burnt grains of powder in the bore and two chambers of the cylinder containing fired cartridge cases. The two chambers containing the fired cartridge cases also had discharge flares on the face of the cylinder.*

Examination of revolver CAR9258 disclosed that the bore was clean.

S/C Pringle found that both guns operated normally and that trigger pressures were within normal range. Once loaded, discharge could have only occurred by the application of pressure to the trigger. The revolver discharging the bullets found in Mr Kennedy and the wall belonged to Constable Levay.

The firearm located near the front door of the premises was identified as a .177 calibre repeating air pistol. It was not capable of discharge *due to the absence of both a CO2 cylinder and air pistol/rifle pellets.* S/C Pringle stated that the air pistol had *the design appearance to that of a .45 Automatic calibre U.S. Government* Model 19911-A1 self-loading pistol.

(c) **The Office of Police Integrity** published a report in November 2005 titled *Review of Fatal Shootings by Victoria Police.* In relation to the death of Lee Kennedy the report was critical of the officers turning their backs on Mr Kennedy as they entered the house but only

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[11] Referred to as Item 3 - see pp 22-24 of the Brief of Evidence - Statement of S/C Kohlmann.

[12] Referred to as Item 4 - see Exhibit 21 (pp25 - 30) Statement of S/C Alan Pringle

[13] Referred to as Item 7 - ibid @ p. 25

[14] Referred to as Item 12- ibid @ p.26

[15] Referred to Item 9 - ibid @ p.25

to the extent that the case *illustrates the vulnerability of officers when they have their backs turned to members of the public.* It otherwise concluded that the officers had drawn on *their OST training throughout the incident.*

The report also concluded that the call received at Shepparton Police Station from Mr Kennedy *was not dealt with as well as it might have been,* in that *only scant details were taken and recorded and there was initial confusion with radio communications.*

Other matters included in the report which were critical of Victoria Police handling of the incident included the response for request for urgent assistance and the failure to provide ongoing counselling and support to Mr Kennedy's family.

The Inquest:
Viva voce evidence was obtained from Mark Anthony Forrest, Melissa Wallace, Melissa Jane Kennedy, Dr Alan Wallace, Dr Prashanth Mayur, Dr John Guymer, Kevin John Wallace, Lawrence Kennedy, Nathan Findlay, Sergeant JohnTrebilcock, Constable Scott Griffiths, Senior Constable Peter Eames, S/C Alan Pringle, Senior Sergeant Andrew Miles, and Detective Timothy Argall.

Senior Constable Simon Watts and Constable Levay sought to be excused from giving evidence on the grounds of self incrimination. A witness is entitled to invoke this privilege if there are reasonable grounds for the witness' belief that the witness may be in peril of incriminating himself/herself as to the commission of an indictable offence if an answer to a question(s) is given. In *R. v. The Coroner; Ex parte Alexander [1982] V. R. 731*, Justice Gray ruled that the privilege against self-incrimination applies in proceedings in a Coroner's Court[16].

I formed the view that their objections were *bona fide* and had substance. S/C Watts and Constable Levay were excused from giving evidence. The officers' statements were tendered into evidence with the Police Brief of Evidence.

Comment:
The effectiveness of the coronial process is in part dependant on the ability of a coroner to hear directly from witnesses to a critical incident and for those witnesses to be subject to cross examination. In the absence of protection from potential criminal or civil proceedings arising from the giving of evidence in the coronial process, an Inquest lacks the ability to discern the truth of the circumstances. In the absence of full, frank and public disclosure of the circumstances surrounding the death the fact finding role of the coronial process is diminished.

The investigation into Lee Kennedy's death is an example of the unsatisfactory consequences of the lack of a statutory protection. Critical witness accounts are missing save for the tendering of written statements. S/C Watts and Constable Levay were not cross examined. There were no other competent witnesses to the actual events. The officers statements contain some slight differences but are consistent on the critical issue of which

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16 Justice Gray followed Madden CJ in *Re O'Callaghan (1899) 24 VLR 957*

officer fired the fatal shot - Constable Levay. The forensic evidence supports their accounts. Constable Levay's gun had been discharged.

Kale Kennedy was aged 4 years at the time of his father's death. He was not cross examined and I am satisfied that he could not give sworn evidence. His limited response to questions put to him by investigating police did not contradict Constable Levay's account.

There has been much debate about the invoking of the privilege against self-incrimination in the coroners jurisdiction.[17] Legislative reform has occurred in most jurisdictions in Australia where protection is provided to a witness from the evidence given to a coroner subsequently being admissible in evidence in criminal proceedings and in some jurisdictions, civil proceedings also. The protection to the witness is usually provided through the issuing of a certificate by the coroner conducting the Inquest[18].

The privilege against self-incrimination was recently considered by the Victorian Parliament Law Reform Committee into the *Coroners Act 1985*. In the Committee's Final Report[19] a number of recommendations[20] were made for amendments to the Act including conformity with the *Uniform Evidence Law Report 2005,* and for the provision of a certificate preventing the use of the evidence against the person claiming the privilege, in other proceedings. The Committee's Report is still under consideration by the State Government.

I endorse the recommendations for amendments to the *Coroners Act 1985* in this regard. Uniformity across Australian jurisdictions is appropriate.

Comments in relation to the medical management of Mr Kennedy:

The medical management of Mr Kennedy's mental health is perplexing. The differing diagnoses and hence approach to treatment, between Dr Wallace and the specialist psychiatric services at GVAMHS are difficult to reconcile. The critical issue for my consideration however is whether an act or omission in relation to Mr Kennedy's medical management was an actual cause, or one of several causes of his death.

The Supreme Court of Victoria has, on repeated occasions, emphasised that the test expounded in the matter of *Briginshaw v Briginshaw*[21] should apply to findings of causation and contribution where the questions relate to individuals or other entities *acting in their professional capacity.*[22] In *Briginshaw* Justice Dixon stated:

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17 See Freckleton I. & Ranson D., *Death Investigation and the Coroner's Inquest, Oxford University Press,* 2006 @ pp 578 -585 for a summary of the relevant authorities

18 In Tasmania and the ACT the certificate is granted under the *Evidence Act*, not the relevant Coroners Act.

19 printed in September 2006

20 See Recommendations 61 - 65 of the Committee's Final Report.

21 (1938) 60 CLR 336

22 See also *Anderson v Blashki* (1993) 2 VR 89 *; Health and Community Services v Gurvich* (1995) 2 VR 69 and *Chief Commissioner of Police v Hallenstein* (1996) 2 VR 1

> *The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matter 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect references...*[23]

The principle is applicable where the performance of a medical practitioner and other specialist healthcare providers is under scrutiny. The standard of proof applicable may appear considerably high but it remains the civil standard, on the balance of probabilities. In the recent Victorian Court of Appeal matter of *Clark v Stingel*[24], their Honours Warren CJ, Chernov and Kellam JJA stated that:

> *...the matters to be considered by the tribunal of fact may be of such seriousness that strong evidence - clear and cogent - may be required before reasonable satisfaction that the allegations have been made out can be attained on the balance of probabilities.*

Their Honours bring clarity to the principles enunciated in *Briginshaw*. Findings of causation cannot be made on inexact proofs, indefinite testimony or indirect inferences, but only on cogent and persuasive proofs; a comfortable degree of satisfaction must be reached to conclude an act or omission caused a death.

In *Chief Commission of Police v Hallenstein*[25] Justice Hedigan concluded that the principle in relation to causation in cases of negligence are applicable to the concept of death in coronial proceedings where he stated:

> *For an act or omission to be the cause, or one of several causes, of a death the logical connection between the act and/or omission and death must be logical, proximate, and readily understandable; not illogical, strained or artificial. In theory it is a difficult, complex concept, but one which in my view is manageable in practice.*

Dr Wallace had been treating Mr Kennedy for 4 years for presumed mental health problems. He prescribed mood stabilizing medication and later, anti-depressant medication. Dr Mayur dismissed the presumptive diagnoses of Dr Wallace following a 1 hour consultation with Mr Kennedy.

The family, through Mr Dickinson questioned whether Dr Mayur could have been sufficiently availed of all the relevant information of Mr Kennedy's presentations over the preceding 4 years or sufficiently availed of Mr Kennedy's myriad of complaints to justify

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[23] See pp362-3 of the judgement.

[24] [2007] VSCA 292

[25] (1996) 2 VR 1

his conclusions and recommendations for significant changes to Mr Kennedy's medication regime, following a 1 hour consultation. The questioning was warranted.

Dr Mayur's qualifications were not however called into question. He worked as a staff psychiatrist at GVAMHS between March and September 2005. He is currently a staff psychiatrist, specialising in mood disorders, at the Cumberland Hospital, Sydney West Area Health Service, New South Wales. It is the only psychiatric clinic in the public health system in NSW specialising in mood disorders.

No other expert specialising in psychiatry was called to contradict Dr Mayur's assessment of Mr Kennedy. Despite cross-examination about the accuracy of his assessment, Dr Mayur maintained his opinion that Mr Kennedy did not have Bi-polar Affective Disorder. He did not have depression. He was more likely to be suffering the effects of a sleep disorder, migraines and had problems with anger management. According to Dr Mayur, the beneficial effects experienced with the use of Lithium Carbonate, as observed by Dr Wallace, were more likely because the drug can also be prescribed for the treatment of anger management problems although it is more commonly used in the treatment of Bi-polar disorders. Dr Mayur was thus amenable to Dr Wallace's proposal to continue with the Lithium as long as it was acknowledged that it was for anger management and not for the treatment of Bi-polar Affective Disorder. Dr Mayur maintained his recommendations for the cessation of antidepressant medication despite noted improvement with its use, as Mr Kennedy did not have depression and use of the drugs unnecessarily carried the risk of deleterious side-effects.

Dr Mayur saw no basis on which a follow-up review by GVAMHS of Mr Kennedy was warranted. He did not have a condition which warranted the intervention of mental health services. He did concede that more intense follow-up is warranted particularly when medication is being tapered down and/or ceased. Dr Mayur deferred to the GP to do this follow-up. Dr Mayur made himself available to speak to Dr Wallace by telephone. A letter including his recommendations for treatment was also sent to Dr Wallace.

Significant events occurred in Mr Kennedy's life after he was assessed and released by GVAMHS.

In the circumstances I make **no adverse findings** in relation to GVAMHS.

Mr Kennedy returned to Dr Wallace on 3 March 2005. Changes to his treatment plan were discussed and instigated**.** Lithium was to be tapered down and ceased over a 10 day period. Dr Wallace asked Mr Kennedy to return for review at the end of that period.

Mr Kennedy did not return to see Dr Wallace. Apart for his attendance on Dr Raj on 8 March 2005, with complaints of a migraine, no further contact was made with Mr Kennedy by Dr Wallace or mental health services.

The delivery of most health services rely on the patient to follow through with the advice of the doctor to return for further consultation. This self referral system presumes a degree of incite that a return to the doctor is still necessary. Seldom is the appointment initiated by the medical practitioner. In the absence of a statutory monitoring system such as imposed on

people who are the subject of Community Treatment Orders, people are not compelled to return for monitoring by their medial practitioner. Reminder letters and notification of appointments are a regular practice of the dental profession. They occur to a more limited extent in the setting of busy general medical practices. Allocating appointment times is possibly too risky a practice to adopt when demand for doctor availability generally exceeds actual capacity of the practice. Reminding patients of the need to make an appointment for a review by a doctor is a proactive approach. Ultimately it is the responsibility of the individual to follow it through.

On the available evidence I only know that Mr Kennedy did not return to Dr Wallace to review the effects of the cessation of the mood stabilising and anti-depressant medication. I am not able to determine whether he lacked the necessary incite to return. I am not able to determine whether he just chose not to return. I am not able to determine whether Mr Kennedy would have responded to any such follow-up from Dr Wallace's clinic. Ultimately,I am not able to determine whether it would have made any difference to the outcome.

Significant events occurred in Mr Kennedy's life after his last attendance on Dr Wallace and his colleague at Princess Hill Clinic, Dr Raj.

In the circumstances, I make **no adverse findings** in relation to Dr Wallace's medical management of Mr Kennedy.

Police Procedural Issues:

Constable Scott Griffiths has significant experience in call taking as a police officer and through his volunteer work with the Country Fire Authority (CFA). He described the call with Mr Kennedy as a "normal conversation", nothing about it that "roused suspicion" and agreed that the word "innocuous" described the call. The benefit of hindsight did not assist him. He was not able to postulate an alternative way to have dealt with Mr Kennedy's call that could have elicited additional information from Mr Kennedy that, in turn, may have altered how the call was communicated to Senior Constable Eames at Bendigo D24. The Telephone Message Sheet[26] contains prompts for the call receiver but they are prompts directed towards eliciting information about a suspect, not the complainant.

Senior Sergeant Andrew Miles has been involved in training police for 14 years of his 27 year career as a Police Officer. Both S/C Watts and Constable Levay had undertaken Operational Safety Tactics Training (OSTT) in February 2005. All operational police officers undertake 2 days of OSTT every 6 months. Firearms training does not revolve around a "shoot-to-kill" policy but *to shoot at the middle of the visible mass and that is to stop the threat that is requiring them to use the firearm and once the threat ceases then they stop firing.* When it is deemed necessary for the firearm to be used from the range of equipment available to officers, S/S Miles stated:

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[26] See Exhibit 16

...then there is - must be an immediate threat to life which needs to be ceased immediately. There would be no opportunity to take time to put a shot somewhere else on the chance that it might stop that immediacy - of that threat.

Senior Sergeant Miles had read the statements of S/C Watts and Constable Levay - *in general terms.* He considered that the actions taken by the officers had essentially complied with what they are taught at OSTT. In relation to Constable Levay discharging her firearm, S/S Miles stated:

...in my opinion I couldn't see any other option available to her at the time..

Comments:
At the time Lee Kennedy requested the Police to attend his house to remove a fictitious person he was grieving the death of his brother, upset at the discovery of his wife's extra marital relationship and aggrieved at his pending departure from the family home. The weight of the evidence indicates that Mr Kennedy was depressed by his personal circumstances. There was not however, a clinical diagnosis of such a condition at the time of his death. The evidence of the effect of the sudden cessation of antidepressant and mood stabilizing medication is a matter of conjecture. It represents an additional possible contributing element in attempting to understand Mr Kennedy's actions on 19 April 2005. However, in light of Dr Wallace's presumptive diagnosis and his deferment to the expertise of GVAMHS, that possibility is speculative only. Consequently, I attach more weight to the personal upheavals as the significant motivating factors to Mr Kennedy's behaviour on 19 April 2005.

The weight of the evidence is indicative that Lee Kennedy planned his own demise. I am satisfied that Constable Griffiths obtained sufficient information to respond to a request for Police assistance. I am not convinced that Constable Griffiths could have elicited additional information from Mr Kennedy which would have raised enough suspicion so as to warrant an alternative course of action. Similarly, I am satisfied that Constable Griffiths communicated sufficient information regarding Mr Kennedy's call to D24 at Bendigo.

Mr Kennedy lured Police into an innocuous residential home, courteously holding the front door open for them, their guard was down, their backs were turned. Mr Kennedy ambushed Police in circumstances where they had no option but to defend themselves. He restrained one of them, pointed a gun at them and attempted to get hold of a Police pistol. The officers defended themselves. The threat to the officers was real. The threat to Kale and Declan Kennedy was real.

The officers had no means available to them to make an assessment on the authenticity of the gun. It had all the appearances of a real firearm[27] - one capable of inflicting serious injury or causing death. The officers defended themselves in a manner in which they were trained. Firing upon Mr Kennedy was not the first line of defence. They provided Mr Kennedy with a number of opportunities to surrender his weapon. S/C Watts attempted to disarm Mr Kennedy by striking him to the head. Constable Levay feared for her life and that

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[27] See Exhibit 21 - Statement of S/C Franklyn Pringle @ p.28 of the Brief Of Evidence.

of her partner. The situation was serious, urgent and unfolding at a rapid rate. It required immediate and decisive action.

The very nature of the coronial process requires retrospection. Findings as to cause of death must however be made in the absence of the benefit of retrospection due to the far reaching ramifications to individuals directly affected by an adverse finding. Retrospect comes about by knowledge gained by past events. It is thus not knowledge or information necessarily available or apparent at the time of the circumstances leading to the death.

The issue on point in this Inquest was the manner in which officers Watts and Levay entered the Kennedy home. Arguably, they were caught unaware because they turned their backs on Mr Kennedy; the scenario would not have unfolded in the way that it did if they had kept Mr Kennedy in front of them, or between them. Kept him in full view. Treated the situation as threatening from the outset. Treated Mr Kennedy with suspicion and as a threat from the outset.

Mr Kennedy was armed and had a plan. It was opportunistic that the officers entered his home with their backs turned but his plan was already in motion. It seems probable that he would have carried it through regardless of how the officers entered the premises.

The public expects its police officers to treat them with respect. The public does not expect to be treated with suspicion in circumstances where they seek the assistance of the Police.

The manner in which Officers Watts and Levay entered 6 Phillips Street, is part of the background circumstances. It was not a component as to the cause of Mr Kennedy's death.

Consequently, it would not be appropriate to use this investigation as a vehicle to make comment or recommendation about training for Police on appropriate methods of entry. Mr Gyorffy of Counsel, submitted that the situation perhaps *should have called for a little bit more caution*. I interpret this comment as directed at the individual officers rather than a general training or procedural problem within Victoria Police. It seems likely that these particular officers will be more cautious when entering premises throughout the remainder of their respective careers.

For similar reasons, I decline to comment extensively on Mr Dickinson's submissions that the police training to shoot at the largest body mass equates to a policy to *shoot to kill.* The fatality is undoubtable the consequence but is not necessarily the primary intention. In these particular circumstances, including the confined space in which the events unfolded provided no scope for the officers to deviate from their training. No submissions were made as to what might have constituted a reasonable alternative course of action in the circumstances and hence I do not intend to speculate on this issue in this inquiry. An investigation into the circumstances of another "fatal police shooting" may lend itself to a more thorough examination of this aspect of police training.

The particular circumstances of Mr Kennedy's death do not justify the use of my statutory powers to comment or make recommendations in relation to Victoria Police OST training.

For like reasons I make no comment on the type of ammunition used by Victoria Police in relation to Mr Kennedy's death. In the absence of forensic evidence I do not propose to speculate on whether the use of a more solid projectile would have made a difference to the outcome.

Findings:

I find that **Lee Andrew Kennedy** died from haemorrahage as a consequence of a gunshot wound to the chest. The fatal injury was inflicted by Constable Erin Levay who discharged her Police standard-issue pistol.

I find that the circumstances in which Constable Levay discharged her firearm, were analogous to self defence.

I make no adverse finding in relation to the manner in which S/C Watts and Constable Levay conducted themselves in their professional capacity. Their actions promptly contained a critical situation. Tragically, the loss of a life occurred but the situation posed a real risk to other lives, including the lives of two children.

Other Matters/Comments:

The inevitable grief that people experience at the loss of a loved one is compounded when the circumstances surrounding the death are violent and involve third parties. Many are affected, in particular, but not restricted to, the family.

In this regard, the issue of the provision of adequate counselling and support services was raised in course of this investigation and in the investigation conducted by the Office of Police Integrity. I have noted earlier in my Finding that the 2005 Office of Police Integrity Report was critical of the lack of counselling and follow-up provided to the Kennedy family by Victoria Police.

It is arguably outside my statutory role to comment on the availability of counselling services but I do consider it appropriate to acknowledge that such services are essential particularly for those affected by non-natural deaths. The source of such support services can be varied and I suspect an offer by Victoria Police to provide counselling would not always be welcomed. This should not however derogate from the responsibility of Victoria Police to take steps to provide access to services to families affected by the actions of its Officers. The comments made in the Office of Police Integrity Report are thus endorsed.

It was not made clear to me whether the Kennedy family were aggrieved about the counselling services at the Coronial Services Centre but what I can confidently say that improvements have occurred at the Coronial Services Centre regarding access to counselling services since the time of Mr Kennedy's death.

The Kennedy family remain entitled to access this service.

AUDREY JAMIESON
CORONER
25 January 2008

Appearances:
Mr T Gyorffy of Counsel - Assisting the Coroner
Mr M Dickinson of Counsel on behalf of the family
Ms E Gardner of Counsel on behalf of the Chief Commissioner of Police & Ors
Mr S Cash of Counsel on behalf of Goulburn Valley Area Mental Health Service
Mr Martin Grinberg of Counsel on behalf of Senior ConstableWatts and Constable Levay

Distribution of Finding:
Melissa Kennedy
Counsel Assisting and Counsel representing the interested parties.
Chief Commissioner of Police
Goulburn Valley Mental Health Service