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8 June 2017

Una Jagose QC
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MATTER NO: 1266
OUR CONTACT: Nikki Pender

Dear Madam Solicitor

DEATH OF STEPHEN DUDLEY – REVIEW OF CRIMINAL PROCESS

Summary

1. Stephen Dudley (Stephen) died in Auckland on 6 June 2013, aged 15 years. We acted for Stephen's family at the inquest into his death.

2. Coroner Gordon Matenga heard evidence over four days in June 2016 and on 15 May 2017, he released findings into the cause and circumstances of Stephen's death. The Coroner found a physical assault - consisting of a heavy blow to Stephen's neck by a 17 year young man (IM) and then a series of punches to Stephen's torso by IM and his 15 year old brother (LM) – to be the antecedent cause of a cardiac arrhythmia (described more fully in the accompanying report as "*the factor which precipitated*" and "*the most significant factor which led to*" the arrhythmia), in the context of a latent heart condition, described as "*cardiac sarcoid involving the cardiac conduction system*".

3. Following Stephen's death on 6 June 2013, IM and LM had been charged with manslaughter. These charges were later downgraded to the relatively minor offences of assault with intent to injure (IM) and common assault (LM). Both IM and LM pleaded guilty to the amended charges, were discharged without conviction and given permanent name suppression.

4. The Coroner's findings indicate that there was, and has always been, credible evidence to support a charge of manslaughter and a reasonable prospect of conviction. The Crown's decision not to pursue the manslaughter charges, at least as against IM, was therefore misguided. And the decision only to pursue minor assault charges is unfathomable.
The Dudley family request that, in light of the earlier evidence and the evidence which has since been produced during the inquest into Stephen's death, you review the prosecution process with a view to reinstating a charge (or charges) of manslaughter. They also ask that you review the decision not to substitute more serious charges.

Information Provided

5. In support of this request, we are providing a memory stick with electronic copies of:

   (a) the Coroner's findings and report dated 15 May 2017;

   (b) the Inquest Bundle;[1]

   (c) the transcript of evidence before the Coroner;

   (d) submissions to the Coroner on behalf of the Dudley family and IM;[2]

   (e) a redacted copy of the High Court criminal file against IM and LM which was provided to the Dudley family.

6. Please advise if there is any further information you require from us.

Jurisdiction to Re-open a Prosecution

7. Your own guidelines permit the reopening of a prosecution under limited circumstances.[3] They read:

> **7. REOPENING A PROSECUTION DECISION**
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> 7.1 People should be able to rely on decisions taken by prosecutors. Normally, if a prosecutor tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again.
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> 7.2 Occasionally there are special reasons where a prosecutor will restart the prosecution where that course is available under the applicable law, particularly if the case is serious.
>
> 7.3 These reasons include:
>
> > 7.3.1 Rare cases where a reassessment of the original decision shows that it was wrong and should not be allowed to stand;
> >
> > 7.3.2 Cases which are stopped so that more evidence which is likely to become available in the near future can be collected and prepared. In these cases, the prosecutor will tell the defendant that the prosecution may well start again; and

[1] The inquest bundle consists of paginated disclosure split into four electronic files.

[2] There were no written submissions filed on behalf of LM or the NZ Police. Submissions were filed on behalf of the school, but are not relevant to the criminal issues.

[3] Solicitor-General's Prosecution Guidelines as at 1 July 2013.

> 7.3.3 Cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

8. Here, the relevant questions are whether:

   (a) the decision to drop the manslaughter charge was wrong on the available evidence and should not be allowed to stand; and/or

   (b) more significant evidence supporting a manslaughter charge has become available as a result of the coronial inquest; and/or

   (c) the decision to lay the alternative charge of assault with intent to injure against IM was wrong on the available evidence; and/or

   (d) the decision to lay the alternative charge of common assault against LM was wrong on the available evidence.

9. A potential issue - whether a manslaughter prosecution could yet be avoided by a defence of double jeopardy, a special plea or on other estoppel grounds - is also addressed.

Sufficient Evidence to Put a Manslaughter Charge to the Jury

Manslaughter Generally

10. Section 164 of the Crimes Act 1961 reads:

> **Acceleration of death**
>
> Every one who by any act or omission causes the death of another person kills that person, although the effect of the bodily injury caused to that person was merely to hasten his death while labouring under some disorder or disease arising from some other cause.

11. According to the authors of Adams on Criminal Law, s 164 imports the common law principle (often referred to as the "eggshell skull" principle) that people must take their victims as they find them. Thus, where the act has had a substantial effect in hastening death, there is causal responsibility for death even when the victim suffered from some condition that rendered him or her more susceptible to death.[4]

12. The act or omission must be a substantial and operative cause of death,[5] but, it need not be the sole or main cause of death.[6]

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[4] Adams on Criminal Law, CA 164.01.

[5] *R* v *Myatt* [1991] 1 NZLR 674

[6] *R* v *McKinnon* [1980] 2 NZLR 31

13. As, under s 164, an act which hastens death is deemed to have killed that, it would therefore amount to homicide.[7] When that act is an unlawful one, such as an assault, the homicide is culpable.[8] Except for one unrelated exception,[9] an offence of culpable homicide is only ever murder or manslaughter.[10] As has been said:[11]

> Culpable homicide — that is, murder and manslaughter — is distinguished from other violent offences by the loss of human life, and it occupies a special place in the criminal law.

Evidence of Manslaughter

14. Here, the Crown had unequivocal evidence of a physical assault: a violent assault, the stress of which - according to eye witness accounts and reinforced by expert medical evidence - was a significant trigger of the cardiac arrhythmia which killed Stephen.
Stephen's underlying heart condition probably meant that a charge of murder could not be supported. Therefore, consistent with the law outlined above and the approach taken in similar cases,[12] the offence which most accurately reflects the evidence in this case, is that of manslaughter.

15. The defence would likely argue that there is reasonable doubt as to whether the stress of the physical assault was a substantive and operative cause. They would suggest that other stress factors - such as the rugby training or verbal altercations - were just as likely to have triggered the arrhythmia. This argument primarily raises issues of fact for a jury to determine, based on eye witness evidence and informed by medical expert evidence.
The same argument did not carry weight before the Coroner. Even though he applied a lower standard of proof than the criminal one,[13] Coroner Matenga's findings reveal little doubt that, irrespective of other factors, he considered the stress of the physical assault to be a substantial and operative trigger of the arrhythmia. He said:

> [33] I agree with Professor Thomas that it is the function of this Court to determine the cause and circumstances of death based on the evidence adduced in the course of this inquiry. Determining the cause of death requires that I consider the medical evidence, the expert opinions and all of the circumstances. In doing so, I am persuaded by the evidence of Dr Morrow that there is an association in time between the cardiac arrhythmia and the assault. That is not to say that other factors did not

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[7] Section 158 of the Crimes Act reads "*Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever*".

[8] Section 160(2)(a) of the Crimes Act.

[9] Section 178 of the Crimes Act, which applies to infanticide.

[10] Section 160(3) of the Crimes Act.

[11] *R* v *Waipuku* [2013] NZHC 221, per Miller J at [26].

[12] See for example: *R* v *Waipuka* [2013] NZHC 221; *R* v *Tafutu* [2014] NZHC 657

[13] The Coroner also heard evidence from LM and IM which would not necessarily be available in a criminal trial. However, as they simply reinforced the veracity of the other eye witness accounts, this evidence was not essential.

> contribute to the stress which was the catalyst for the arrhythmic event. Dr Morrow could not disentangle the contributory role emotional or psychological stress factors may have played, but the main factor, he opined, was the physical assault. If the sarcoid was the underlying cause of the arrhythmia, why did it not cause an arrhythmia earlier that day, or during the pre-training argument between LM and Stephen where there was emotional and psychological stress, or during training with the physical stress that placed on Stephen? The assault, consisting of a heavy blow to the neck and then a series of punches to the torso, must have been the factor which precipitated the arrhythmia. Following the assault there was evidence of the acute event, being a loss of consciousness and the bulging veins. The physical assault preceded these events and as I understand Dr Morrow's evidence, is the reason he concluded that the physical assault was the most significant factor which lead to the arrhythmia. For these reasons I prefer the opinion of Dr Morrow and find that the cause of death was cardiac arrhythmia due to stress associated with a physical assault in the context of cardiac sarcoid involving the cardiac conduction system.

Flaws in the Prosecution Process

Chronology of Criminal Proceedings

6 June 2013	IM and his younger brother, LM, are each charged with manslaughter
23 July 2013	Judge L Tremewen in the Youth Court grants interim name suppression to LM and IM and suppresses publication of the fact that they are brothers.
16 October 2013	LM and IM enter not guilty pleas in High Court
20 December 2013	Indictment against LM amended from manslaughter to a charge of common assault. The Crown's application to amend this indictment noted: "*The application does not alter the charge faced by the respondent's co-accused*."
10 February 2014	LM pleads guilty to assault; no conviction entered.
21 March 2014	Winkelmann J discharges LM without conviction and grants him permanent name suppression due to his youth. IM also granted permanent name suppression on back of LM's suppression (despite Judge Tremewen's earlier suppression of LM and IM's relationship).
13 June 2014	Indictment against IM amended from manslaughter to assault with intent to injure. IM pleads guilty to amended charge. No conviction is entered.

7 August 2014	Winkelmann J discharges IM without conviction.
8 August 2014	Winkelmann J lifts suppression of fact that LM and IM are brothers.

Expert Evidence Did not Justify Downgrading of the Charge

16. According to its application to amend the indictment against IM, the main reason for the Crown substituting a charge of assault with intent to injure was the weight of expert evidence it had received. The application read:

> Following receipt of a report from an overseas expert specialising in cardiac pathology and more recently, receipt of a report from a panel of experts specialising in cardiac arrhythmia, the applicant has formed the view that it no longer has a reasonable prospect of establishing beyond reasonable doubt that the alleged assault by IM was a substantial and operative cause of the death of the deceased.

17. This reasoning does not hold up to scrutiny as the available expert evidence did, in fact, support a manslaughter charge.

18. The autopsy report of pathologist, Dr Paul Morrow, was dated 22 July 2013. Dr Morrow found the cause of Stephen's death to be cardiac arrhythmia due to the stress associated with physical assault. Dr Morrow also found a significant contributing condition to be "*cardiac sarcoid involving cardiac conduction system*".

19. The lawyer for IM commissioned a report from Australian pathologist, Professor Anthony Thomas. Professor Thomas said, in a preliminary report dated 16 December 2013, that he would have reversed the order and found that the cardiac arrhythmia was due to cardiac sarcoidosis in the presence of stress related to physical assault; the latter being described as "**other significant condition contributing to the death**"**.** Professor Thomas hypothesised on other potential stress factors, but gave no opinion as to their materiality on the facts of this case.[14]

20. In January 2014, Dr Morrow obtained a report from Dr Jon Skinner of the Cardiac Inherited Disease Group. Dr Skinner, like Dr Morrow, considered the physical assault to be significant but he was not willing to attribute any weight to the underlying cardiac sarodiosis without ruling out the possibility that the cardiac arrhythmia was the result of either "*commotio cordis*" (ventricular fibrillation resulting from a direct low to the chest) or an underlying predisposition to a sudden arrhythmia (hastened by the physical assault).[15] In a statement to

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[14] Professor Thomas also took into account two Police job sheets which gave inaccurate information about Stephen Dudley's medical history and recent health.

[15] The Coroner was satisfied that there was no evidence that either of these conditions played a part in Stephen's death.

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the Court dated 31 January 2014, Dr Morrow said that the results of these further inquiries "*would not change my diagnosis of the cause of death as 'cardiac arrhythmia due to stress associated with physical assault' but might change my view as to whether the cardiac sarcoid was a contributing factor*".[16]

21. In other words, the Crown Prosecutor decided to downgrade the charge against IM despite having a consensus of expert medical evidence that the stress associated with the physical assault would have been a significant trigger for the cardiac arrhythmia which resulted in Stephen's death. The only real "expert" question was the relevance of the cardiac sarcoidosis – whether it also played a contributing part (Dr Morrow and Professor Thomas) or may have been a mere "*bystander finding rather than the cause*" (Dr Skinner). Put another way, was the stress of the physical assault a direct or indirect, but still substantial, cause of death? This difference in expert opinion would be relevant in deciding between a charge of murder or manslaughter; but it did not affect the strength of the evidence of manslaughter, which – as outlined in the quote from Coroner Matenga at [15] above – was, and is, fact-dependent.

22. The expert evidence given at the inquest made the manslaughter case even stronger. Both Dr Morrow and Dr Skinner gave evidence before the Coroner. Dr Morrow remained firmly of the view that stress associated with the physical assault was the antecedent cause of Stephen's death.[17] Dr Skinner confirmed that tests did not show any genetic disposition that may have caused Stephen's death. When advised that there was no evidence of any blow to Stephen's chest, consistent with *commotio cordis*, Dr Skinner agreed that this increased the likelihood that the sarcoidosis played some part in Stephen's death.

23. Then, under cross examination, Professor Thomas qualified the weight that he himself placed on the cardio sarcoidosis:

    (a) Like Drs Morrow and Skinner, Professor Thomas considered "*stress associated with physical assault*" to be a "*significant condition contributing to the death, but not related to the disease or condition causing it*".

    (b) He accepted that, even though a person could hypothetically suffer from a fatal arrhythmia while in a resting position, such a hypothesis did not arise on the facts surrounding Stephens' death.

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[16] Dr Morrow's statement was not in evidence before the Coroner, but is part of the High Court file.

[17] Antecedent cause of death is defined as "*the condition(s) that led to or precipitated the immediate cause of death, as recorded on a death certificate*."

(c) He agreed that it was not a mere coincidence that Stephen collapsed immediately after being physically assaulted.

(d) He also accepted that even if the sarcoidosis, in its latency, was something of a ticking time bomb for Stephen, the physical assault would have brought it to a head that day.

Manslaughter Case Against IM

24. This decision not to pursue a manslaughter charge against IM is difficult enough to understand on the basis of the expert evidence that was available at the time; but, in light of the examination of that evidence during the inquest hearing, that decision is now insupportable.

Manslaughter Case Against LM

25. Unlike IM, the application to downgrade the manslaughter charge against LM does not appear to have been materially influenced by the expert medical evidence. Rather, due to the weight of evidence against IM, there was doubt as to whether LM's own subsequent assault of Stephen contributed substantially to Stephen's death. The Crown may still wish to review this decision in light of the evidence before the Coroner and the Coroner's findings. However, it is accepted that the case against LM was different from the one against IM.

Choice of Alternative Charges Failed to Reflect the Gravity of the Offending

26. Separate to the decision not to prosecute for manslaughter, the Dudley family would also ask that you review the decision to substitute charges of common assault (for LM) and assault with intent to injure (for IM). Based on the evidence available at the time, any of the following offences would have been more appropriate :

(a) Section 188 – wounding with intent

(b) Section 189 – injuring with intent to cause grievous bodily harm

(c) Section 191 – aggravated wounding or injury

27. The decision not to lay more serious charges is likely to have misled Winkelmann J into believing that the physical assault was relatively inconsequential and/or that it was simply a "school yard fight" with Stephen being equally at fault. (In fact, IM was two years older, 3 cms taller and 31kgs heavier than Stephen. And there was no evidence of Stephen retaliating or even having thrown a punch against IM or LM) That Her Honour suffered from this misperception is evident in the extracts from her notes when sentencing IM on 7 August 2014.

> [8] You have pleaded guilty to assault with intent to injure. You had earlier faced a count of manslaughter. However, when Stephen's underlying heart

> condition came to light the Crown came to the conclusion that it could not safely be determined as a matter of fact that your actions caused Stephen's death. As a result, the Crown amended the charge brought against you to assault with intent to injure.
>
> [9] For this reason, the fact that Stephen died after the fight is not to be weighed by me in determining the sentence I impose. Both your counsel and the Crown are agreed that this is the approach that I must take.
>
> [10] I acknowledge that Stephen's family were previously present in Court today and in determining your sentence I have taken into account, to the extent that I may, the statements made by Stephens's family. I say to the extent that I may because those statements naturally focused upon Stephen's death…
>
> [27] [I] do not accept the Crown's submission that your actions can be described as moderate violent offending "at least". In so saying, I repeat that I do not take into account the fact that Stephen died after the fight. There is no suggestion that any of the blows struck caused injury in and of themselves. Assessed in that light these were punches thrown in the context of a schoolyard fight. If Stephen had not died because of his undiagnosed heart condition there would be nothing to distinguish this from numerous schoolyard fights. You were all schoolboys, even if you were the oldest.[18]
>
> ... [36] The Crown submits that the gravity of your offending is of such a high level that a discharge without conviction should not be granted because a greater deterrent both to you and to the community at large Is required. I do not accept that submission because of my assessment of the gravity of your offending and because you are assessed as unlikely to reoffend. I bear in mind that you are not here today to be called to account for the death of Stephen, but rather for your assault on him.

28. The Dudley's concern is that a non-transparent bargain was struck between the prosecution and defence, whereby the defendants would plead guilty to minor charges, neither of which constituted a "serious violent offence" under s 86A of the Sentencing Act, and then be free to apply for discharges without conviction (an option that was highly unlikely to be available with more serious charges).

29. Contrary to clause 8.1 and 18.6 of the Prosecution Guidelines, the nature of the substituted charges failed to "*adequately reflect the criminality of the defendant's conduct as disclosed by the facts to be alleged at trial*". And, inconsistent with clause 18.5, those decisions were presented to the Dudleys as a "fait accompli", with no opportunity for them to have any meaningful input.

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[18] The comments at [27] of these sentencing notes can be contrasted with Her Honour's comments in her notes when sentencing LM on 21 March 2014. At that time, the indictment against LM had been amended to common assault, but IM was still faced a manslaughter charge. Her Honour said at [5] "*Stephen did not throw a punch. I say that because we have referred to it as a school yard fight, but the reality is that Stephen did not throw a punch*".

No Double Jeopardy or Estoppel

30. Section 26(2) of the New Zealand Bill of Rights Act 1990 offers protection against double jeopardy. It reads:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

31. The primary danger that the double jeopardy rule guards against is second punishment.[19] However, there is no such danger here. LM and IM have not been finally acquitted or convicted of an offence in connection with Stephen's death. And, once the indictments were amended, neither of them was, nor was in peril of being, acquitted or convicted in connection with his death. They each pleaded guilty to assault with intent to injure and common assault, respectively. Both were discharged without conviction under s.106 of the Sentencing Act on the basis that "*the direct and indirect consequences of conviction was out of proportion to the offending*".[20] That offending was confined to the assault alone, with the fact of Stephen's death being deemed to be an irrelevant consideration.[21] Had the scope of the substitute charges included the fact of Stephen's death, a discharge without conviction would not have been a serious option. The resulting discharges also mean that there has been no "first" punishment.

32. A related question is whether IM and LM would be able to avoid manslaughter charges through a special plea. As Stephen's death predated the Criminal Procedure Act[22]; the special pleas provisions in ss 357-359 of the Crimes Act would apply. Those provisions read:

> **357 Special pleas**
>
> (1) The following special pleas, and no others, may be pleaded according to the provisions hereinafter contained—that is to say, a plea of previous acquittal, a plea of previous conviction, and a plea of pardon.
>
> (2) All other grounds of defence may be relied on under the plea of not guilty.
>
> (3) The pleas of previous acquittal, or previous conviction, and pardon may be pleaded together, and if pleaded shall be disposed of by the Judge, without a jury, before the accused is called on to plead further; and, if

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[19] US Supreme Court in *Ex parte Lange* 85 US (18 Wall) (1873), discussed in Rishworth & others, *The New Zealand Bill of Rights Act,* Oxford University Press at 746.

[20] This criteria is set down in s 107 of the Sentencing Act, and must be applied by a sentencing judge when considering an application to discharge without conviction.

[21] *R* v *Q* (being LM) [2014] NZHC 550 at [6], [25], [28]; *R* v *M* (being IM) [2014] NZHC 1848 at [9], [10], [27] and [36]

[22] Your office has previously acknowledged that the Criminal Procedure Act does not apply when it determined that there was no ability to appeal against the High Court's decision to discharge IM without conviction (the relevant media statement is at pages 403-405 of the Inquest Bundle).

every such plea is disposed of against the accused, he shall be allowed to plead not guilty.

(4) In any plea of previous acquittal or previous conviction it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which that plea is pleaded.

358 Pleas of previous acquittal and conviction

(1) On the trial of an issue on a plea of previous acquittal or conviction to any count, if it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made, have been convicted of all the offences of which he may be convicted on any count to which that plea is pleaded, the Court shall give judgment that he be discharged from that count.

(2) If it appears that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count to which that plea is pleaded, but that he may be convicted on that count of some offence of which he could not have been convicted on the former trial, the Court shall direct that he shall not be convicted on that count of any offence of which he might have been convicted on the former trial, but that he shall plead over as to any other offence charged.

359 Second accusation

(1) Where an indictment charges substantially the same offence as that with which the accused was formerly charged, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to the indictment.

(2) A previous conviction or acquittal on an indictment for murder or manslaughter or infanticide shall be a bar to a second indictment for the same homicide charging it as any one of those crimes.

(3) If on the trial of an issue on a plea of previous acquittal or conviction to an indictment for murder or manslaughter or infanticide it appears that the former trial was for an offence against the person alleged to have been now killed, and that the death of that person is now alleged to have been caused by the offence previously charged, but that the death happened after the trial on which the accused was acquitted or convicted, as the case may be, then, if it appears that on the former trial the accused might if convicted have been sentenced to imprisonment for 3 years or upwards, the Court shall direct that the accused be discharged from the indictment before it. If it does not so appear the Court shall direct that he plead over.

33. A discharge without conviction under s 106 of the Sentencing Act is deemed to be an acquittal. The Court of Appeal has previously found deemed acquittals to fit uncomfortably with the special plea provisions in the Crimes Act, as the latter evolved from a time when accused persons could only be "acquitted" at trial.[23] A discharge under s.106 proceeds after a guilty verdict and in that way differs from discharges under s 47 of the Criminal Procedure Act 2011;[24] however, deemed acquittals under s.106 are markedly different from acquittals which result from a judge or jury being unsatisfied by the Crown's case.

34. But, in any event, the facts of this case would not justify a special plea. Under s 358, the manslaughter charge would in part cover the same ground as the assault charge, but, as with the double jeopardy rule, neither LM nor IM were in peril of being convicted of manslaughter once the indictments had been amended to charges of assault.[25]
The situation is also not covered by s 359 as the linkage of the assault to Stephen's death (missing from the assault charges), is such an essential element of the manslaughter charge, that the two sets of charges could not be construed as "*substantially the same*".[26]

35. There is also no serious argument of an abuse of process. Had a key element of the manslaughter offence (the assault) not been established beyond reasonable grounds at an earlier trial, there would be public policy grounds for estopping a subsequent manslaughter charge.[27] However, here, the acquittals followed guilty pleas on the assault charges.
Those pleas would not affect any plea that the defendants might enter on a new charge, but they cannot be ignored when deciding whether a manslaughter charge ought now to be laid.

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[23] *R* v *Taylor* [2009] 1 NLZR 17 at [38]

[24] Formerly s 347 of the Crimes Act, the provision considered by the Court of Appeal in *R* v *Taylor* (*ibid*)

[25] *R* v *Skelton* HC Wellington T44/89, 18 September 1990, Neazor J at p 4

[26] Contrasted with the situation where, for instance, a person acquitted of assault was then charged with assault with intent to injure on substantially the same set of facts.

[27] Mahoney, *Previous Acquittal and Previous Conviction in New Zealand: Another Kick at the Cheshire Cat* (1990) 7 Otago Law Review 222

Summary

36. The Coroner's inquiry was not concerned with apportioning blame or with criminal responsibility. However, the evidence before the Coroner strongly suggests that the criminal justice system has, to date, failed to reflect the seriousness of the offending which led to Stephen's death. This miscarriage of justice has let down not just Stephen's family but all those who witnessed and were affected by his death. Brent and Mona Dudley, and their surviving children, would be grateful if you would now conduct a thorough review of the earlier prosecution process and right any wrongs.

Yours faithfully
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