

**REPORT OF THE POLICE COMPLAINTS AUTHORITY
ON A COMPLAINT ABOUT POLICE CONDUCT IN RESPECT
OF INDUSTRIAL PROTEST ACTION ON THE WATERFRONT
AT LYTTTELTON ON 29 DECEMBER 1999 DURING WHICH
MS CHRISTINE CLARKE SUFFERED FATAL INJURIES
AFTER BEING STRUCK BY A MOTOR VEHICLE DRIVEN BY
MR DEREK POWELL**

INTRODUCTION

In late December 1999 a dispute arose between the Lyttelton Port Company Ltd and the local branch of the NZ Waterfront Workers Union over a decision by the Port Company to use labour from another source to load coal ships at Lyttelton. On 27 December 1999 Lyttelton Police were informed by Union officials that industrial protest action would commence the next day. An operations order was prepared by Police and staff were assigned to monitor the protest activity.

On the morning of 28 December Union organisers informed Officer 1 that they intended that day to form a picket across Gladstone Quay, a public road which leads to Port Company land. A gatehouse some 200 metres from the site of the picket marks the end of the public road.

Officer 1, after considering the law and the resources available to him, agreed to the proposed action provided that no intersections were blocked and motorists were not unduly delayed. This decision was communicated to the Area Controller who in turn obtained the approval of the Acting District Commander. The picket was formed with up to 140 people participating. Entry to and exit from the Port Company land was restricted and traffic was delayed.

On 29 December the picket again formed near the intersection of Gladstone Quay and Oxford Street. At about midday Mr Derek Powell drove up to the picket line. He had driven through the line earlier that day and some of the picketers felt he had driven too fast on leaving the Port. On the midday occasion a verbal and physical confrontation between Mr Powell and the picketers occurred. When he drove through the line Ms Christine Clarke, a supporter of the picket, was knocked to the ground. She suffered injuries from which she died in Christchurch Hospital two days later.

After the incident Mr Powell drove on to Cashin Quay within the Port area where his vehicle was damaged and he was assaulted by persons who had pursued him from the picket line.

COURT SEQUEL

On 30 December, after Police inquiries into the incident, Mr Powell was charged with dangerous driving causing injury, later amended to dangerous driving causing death. When the case went to trial in May 2001 Mr Powell faced a charge of manslaughter. He was found guilty by a jury. Following a successful appeal against conviction a new trial was ordered. At the second trial in August 2002 Mr Powell was acquitted.

NOTIFICATION OF THE INCIDENT TO THE AUTHORITY

In June 2001, following the first trial and some criticism by the Court of the Police handling of the picket, the Authority was notified of the incident by the Police pursuant to the provisions of section 13 of the Police Complaints Authority Act 1988. A Police investigation into the matter was commenced, but had not been completed by November 2001 when the Court of Appeal allowed Mr Powell's appeal, quashed his conviction and ordered a new trial.

COMPLAINT BY MR POWELL

On 19 August 2002, following Mr Powell's acquittal at the second trial, he made a complaint to the Authority against the Lyttelton Police detailed in 20 issues set out in a letter from his counsel. The complaint was later supplemented by a 14 page statement submitted by Mr Powell to the investigating officer in December 2002, along with several video tapes.

PARTICULARS OF COMPLAINT

The 20 points of complaint raised by Mr Powell were expressed as follows:

Allegations that

- (i) Police illegally permitted the picketers to stop and detain road users
- (ii) Police did not require protesters to obtain permission from the LTSA to stop road users
- (iii) Police failed to inform the public and road users of the situation
- (iv) Police failed to maintain adequate numbers of front line officers in strategic positions to control the situation
- (v) Police failed to respond to complaints from the public to be allowed free access on a public road
- (vi) Police failed to order the picket activity to stop after the incident in which Ms Clarke was injured
- (vii) Police failed to contain the accident scene and conduct a scene examination
- (viii) Police failed to reconstruct the scene/accident
- (ix) Police failed to investigate the alleged assault on Mr Powell at Gladstone Quay
- (x) Police failed to take statements from eye witnesses at the scene when there was time to do so
- (xi) Police failed to locate and interview a witness, S, the driver of a vehicle closest to the incident, until eight months after the incident

- (xii) Police failed to respond to Mr Powell's 111 call
- (xiii) Police failed to secure exhibits or gather evidence in relation to the assault on Mr Powell at Cashin Quay
- (xiv) Police failed to undertake an appropriate investigation prior to charging Mr Powell on 30 December
- (xv) Police failed to take statements from any Union official regarding the events prior to, and after, the incident
- (xvi) Police failed to charge all of Mr Powell's attackers appropriately
- (xvii) Police failed to disclose all relevant information to the defence
- (xviii) Police failed to adequately record or investigate Witness V's statement that he believed Ms Clarke had tripped on his placard
- (xix) Police failed to assign impartial staff to the investigation
- (xx) Police failed to investigate evidence of the possibility of collusion between witnesses or of any attempt by others to pervert the course of justice

INVESTIGATION BY DETECTIVE SUPERINTENDENT BURGESS

Detective Superintendent Malcolm Burgess was appointed by the Office of the Commissioner of Police to conduct an investigation into these allegations. His enquiries, which included the obtaining of legal advice, were completed on 28 May 2003 when he reported to the Office of the Commissioner. In turn the file generated by the investigation was examined by the Professional Standards section of the Office of the Commissioner before being referred to the Authority for independent review.

Having completed an independent review of the Police file I am satisfied that a very thorough, professional investigation into Mr Powell's complaint was carried out by Detective Superintendent Burgess.

REVIEW BY AUTHORITY

Allegation 1

That Police illegally permitted the picketers to stop and detain road users.

The investigation established that when Police were confronted with the Union's intention to picket on the roadway near the Lyttelton waterfront they agreed to allow the action for the following reasons:

- Officer 1 was conscious of the number of staff required had Police elected to confront the protesters and have them move off the road.
- Officer 1 recognised that, if the picket were to be effective, some disruption to Port activities would be unavoidable.
- The picket was expected to be good natured and to intervene would have inflamed a peaceful protest.
- In Officer 1's view the proposed obstruction of the road would be a relatively minor offence.

Officer 1 does not accept a suggestion by Mr Powell that he was favourably disposed towards the Union as against the Port Company or road users. He states that he attended all meetings between Union officials and Port Company representatives at the request of both parties. In referring to the issue of Port disruption Officer 1 reached the view that a peaceful picket was a preferable alternative to other action that might have been taken by the Union. The Investigator reports that Officer 1's decision to allow the picketers to remain on the road was reported to his supervisors, and the Acting District Commander in turn approved that decision after visiting Lyttelton on 28 December and reaching the view that the parties were making progress toward a resolution of the dispute, and that any overt Police intervention at that point would have had the effect of stalling the negotiations, exacerbating the protest activity and effectively closing the Port.

The Acting District Commander noted that Officer 1 was playing a significant role in assisting the parties to reach a settlement which would cause the picket to be removed. He also noted that the officer appeared to have the confidence and respect of the Union, and was able to intervene to defuse potential conflict at the picket line. He seemed to be held in similar regard by the Port Company. Taking all those matters into account the Acting District Commander believed there was less likelihood of disorder and on-going Port disruption if the picket was allowed to remain in the interim.

During 28 December there was one incident when a driver went through the picket line without stopping, and some other incidents where Police intervened in verbal disputes between road users and picketers. Some vehicles went through with minimal delay, while others appear to have been unnecessarily delayed by the picketers. There were in excess of 300 vehicle movements to and from the Port that day. There was no injury to any person.

On the next day, following a review of the situation, Police adopted similar tactics, allowing the protesters to picket on the road. Police were aware of progress in the negotiations between the parties and the prospect that further discussions might bring a peaceful end to the picket. The Acting District Commander confirmed the decision to continue with the same tactics as had been adopted on the previous day.

It was against that background that the incident involving Mr Powell occurred. There appears to have been an increased number of vehicle movements to and from the Port on the morning of 29 December compared with the previous day. Mr Powell himself had entered and left the Port earlier on the day of the incident.

Legal Issue

While it can be argued that the Police failed to discharge a legal duty to prevent an obstruction of the roadway, or alternatively that they failed to act to prevent a breach of the peace, it is more difficult to establish the necessary element of knowledge that such failures would lead to danger.

The offence of criminal nuisance, as defined in section 145 of the Crimes Act 1961, is committed when any person “*does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual*”.

Police legal opinion obtained on this issue emphasised that to establish a breach of section 145 there must be proof that an accused knew that the act or omission (in this case the failure to remove the picketers from the roadway) would endanger the life or safety of any person. The legal adviser pointed out that the decision to allow the protesters to encroach on to the roadway in this case was not in itself a breach of the duty to prevent an obstruction of the roadway or the duty to preserve the peace, and he expressed the view that, in the circumstances as known to the Police at the time, there was insufficient evidence to show that the Police knew or should have known that danger to the public would arise because of their decision. He considered that the decision was reasonable given the following circumstances:

- An incident on 28 December when a female motorist drove through the picket line after a heated argument with the picketers was an isolated incident.
- Officer 1 maintained communication with the Union organisers throughout the protest action. On both days when traffic movement was delayed by the picket the officer spoke to the Union organisers and facilitated an orderly resumption of entry and egress to and from the Port.
- The Union organisers assured Officer 1 that they would not delay vehicles on the roadway “unreasonably”.
- During the course of the picket Officer 1 attended all meetings between Union officials and Port Company representatives, and the Acting District Commander attended a meeting between them on 28 December.
- In the view of both the Acting District Commander and Officer 1 there were clear indications that a settlement of the industrial dispute was in prospect, and that if Police had removed the picketers from the roadway this may well have escalated the protest activities and led to the possibility of violence and disorder resulting in total closure of the Port.

- 380 vehicle entries to the Port were made between 0600 hours on 28 December and 1400 hours on 29 December. Most of those vehicles also left the Port through the picket. No incidents other than the single event mentioned above indicated any potential for disorder.
- Until the Powell incident the mood between motorists and picketers was generally good.
- There is no evidence of any other event before the Powell incident that should have caused Officer 1 to reappraise the decision to allow the protest to continue on the roadway.
- Police had not observed, and were not aware of, the circumstances of Mr Powell's earlier exit from the Port that day, or of any resentment towards him by the picketers.
- There were limited Police resources available in the District at that time to prevent the protest activity on the roadway, arising from leave taken at that holiday period and the deployment of staff to other areas in connection with Millennium celebrations.

The legal adviser considered that there was no evidence to indicate that the Police should have anticipated that a breach of the peace was a likely consequence of the decision to allow the picket to proceed in the manner that it did.

After consideration of all the information available to the Authority I do not consider that the Police acted unlawfully in this case. I do, however, consider that in hindsight, and notwithstanding the circumstances identified by the legal adviser, the Police decision to allow the picket to proceed as it did was inappropriate, having regard to the near certainty of some disruption to traffic. In this respect Allegation 1 is partially upheld.

For completeness I add that the Investigator reported that the parties to the dispute, namely the Union and the Port Company, as well as the Police, all acknowledge that any such protest action in future will not result in Police acceptance of an obstruction of the roadway.

Allegation 2**That Police did not require protesters to apply to the Land Transport Safety Authority for permission to stop road users.**

The approval of the Land Transport Safety Authority pursuant to rules under Part 11 of the Land Transport Act 1998 was not required in the circumstances of this case. Where interference with the normal traffic flow on a road is contemplated the organiser of the activity should apply to the road controlling authority for permission to hold the event. In the present case Transit New Zealand was the relevant authority. Road closure is required to be advertised in advance and objections considered before approval is given for an event to proceed.

In the circumstances of an intended industrial protest where there is little forewarning of the event the approval process is unlikely to be followed. In the present case no such application for approval was made to Transit New Zealand. The Police did not consider asking the Union to seek approval, nor ask whether such approval had been sought. The Union officials had not considered seeking such approval. In any event the Investigator reports, following discussion with Transit New Zealand, that it is extremely unlikely that it would have given approval for a road closure.

I accept the Investigator's view that the obligation to obtain permission to close a road for an event rests with the organisers of the event. It is not for Police to require groups planning such an event to obtain that permission.

Allegation 3**That Police failed to inform the public and road users of the situation.**

The Police involved in monitoring the picket did not consider issuing a media release to inform the public of possible delays. The industrial action at the Port received wide publicity in both local and national print and electronic media, so that most motorists intending to drive to the Port area on 29 December would have been aware of the picket.

It is, however, accepted by Police, and the Authority agrees, that as a matter of good practice Police should have issued a media release to advise the public of potential delays in access to and egress from the Port area.

This point of complaint is upheld.

Allegation 4

That Police failed to maintain adequate numbers of front line officers in strategic positions to control the situation.

It is reported that the number of Police officers near the main group of picketers fluctuated. On most occasions there were two officers in the vicinity of the picket lines. At other times, including the time of the Powell incident, there was only one officer in the vicinity of the picket. This occurred while Officer 1 was in attendance at mediation discussions between the Union and Port Company officials. As earlier noted, it was the view of Officer 1, supported by his supervisors, that a minimal Police presence was the appropriate response to the protest action. The officers believed that despite some incidents on 28 December the picket was generally good natured and unlikely to lead to confrontation requiring Police intervention.

Police staff were stationed between the intersection of Gladstone Quay and Oxford Street and the main picket line. There was no Police officer in the immediate vicinity of the altercation involving Mr Powell. It is arguable that additional Police staff stationed at the picket might have reduced the potential for conflict between motorists and picketers. On the other hand, on almost all other occasions the low-key Police response had been effective in maintaining order without a more substantial Police presence. The Investigator found that at the time of the incident there were less staff on duty in the vicinity of the picket than was desirable. There were in fact four officers available in the area, although only one was in the vicinity of the picket when the incident took place.

I consider that it would have been desirable to have had more staff available in the vicinity of the picket line at the time of the incident, and in this respect this point of complaint is upheld.

Allegation 5

That Police failed to respond to complaints from the public to be allowed free access on a public road.

Officer 1 acknowledged that there were incidents when some motorists became annoyed at being delayed. He said those reactions were in the minority and that most motorists, once the situation was explained to them, tolerated the delays. He said the Police response to such complaints was to intervene and explain the situation to aggrieved motorists, and on some occasions to speak to Union organisers, in order to facilitate traffic movement and in order to prevent breaches of the peace. He stated that no formal complaints about lack of access were made known to him, but he accepted that some motorists were annoyed by the picket and the consequent delay in their travel.

I find that there was a Police response to complaints of delay or restricted access to the Port area. Mr Powell contends that the Police response was ineffective, while the Police involved believe that their response was appropriate in the circumstances.

I am unable to uphold this point of complaint.

Allegation 6

That Police failed to order the picket activity to cease after the incident in which Ms Clarke was injured.

After the incident the picket remained intact for some time until it was disbanded in mid-afternoon, largely as a result of agreement being reached between the Port Company and the Union. All Police available in Lyttelton at the time were involved in attending to the incident and its immediate aftermath. Mr Powell was transported

from the Port area by ambulance at about 12.50pm. The picket was still in place when a Constable returned to conduct a scene examination at 2.30pm.

It is clear that after the incident there could be no doubt that the picket across the roadway was potentially dangerous. Despite the fact that the mood of the protesters was inflamed by the incident, Police now accept, and the Authority agrees, that there should at least have been negotiation with the Union to move the picket to the side of the road.

The Investigator concluded that while it may be argued that initially a lack of resources prevented Police taking action, consideration should have been given after the incident to obtaining additional resources so that action could be taken to have the picket move to the side of the road or to disband.

I agree with that finding. This point of complaint is upheld.

Allegation 7

That Police failed to contain the accident scene and conduct a scene examination.

The Police staff who attended the incident did not at first appreciate that it was a serious or possibly fatal accident with the need to conduct the level of scene inquiry that later became necessary. Resources to contain the scene and conduct a search of it were not immediately available. Three of the four officers available were despatched to locate and assist Mr Powell. By the time Police staff came back to the scene it was contaminated. A subsequent scene examination was not helpful in determining what had taken place.

The Investigator commented that with the benefit of hindsight it would have been helpful to have cleared the scene and conducted a thorough scene examination. That this did not occur, in the circumstances as Police then understood them to be, was not in his view surprising. While the failure to do so showed a lack of appreciation of the seriousness of the incident, the Investigator found that it did not amount to neglect of duty.

In examining the finding that the Police who attended the incident did not at first appreciate the seriousness of the incident, the following factors must be taken into consideration:

- No Police officer had witnessed the incident when Mr Powell drove forward and knocked Ms Clarke to the roadway.
- The ambulance staff who attended to Ms Clarke at the scene told Officer 1 that her most serious injury was a broken leg causing him to believe that her injuries were not life threatening
- The subsequent incident involving Mr Powell at Cashin Quay caused the available staff to be diverted to assist Mr Powell.

It is also noted that Justice Panckhurst, the Judge in the first trial, in his decision on a subsequent application by Mr Powell for costs (referred to below), commented that the accident scene was contaminated from the outset and that in any event, given the nature of the impact, *“it is most unlikely that a scene examination would have rendered much of any evidential value”*.

Having examined the media footage showing Mr Powell’s vehicle at the picket line before the incident and the scene shortly after the incident, and the other information available to the Authority as to the circumstances attending the incident, I find that the failures alleged under this heading did not constitute neglect of duty by any member of the Police.

I am unable to uphold this point of complaint.

Allegation 8

That the Police failed to reconstruct the scene/accident.

The Police staff involved in the investigation of the incident did undertake a reconstruction of the activity at the scene. It was on the basis of that reconstruction that the decision to charge Mr Powell was reached. The Police reconstruction, and its subsequent refinements, was at odds with the reconstruction submitted by Mr Powell’s defence.

The defence reconstruction relied on photographic evidence before and after the incident, and a series of assumptions about where people and things such as vehicles, road markings, placards and other objects were located. In the Police view some of those assumptions were flawed. The Police consider that the defence reconstruction was no more reliable than the accounts of the eye witnesses relied on by the prosecution.

Following discussion of this issue with the Investigator Mr Powell accepted that there could be more than one reconstruction of the activity at the scene, and that those of the Crown and the defence might differ.

The Authority for its part is unable to advance this issue further.

This point of complaint is not upheld.

Allegation 9

That the Police failed to investigate the alleged assault on Mr Powell at Gladstone Quay.

Police first became aware of the alleged assault on Mr Powell at Gladstone Quay when they interviewed him the following day. As part of the investigation into Ms Clarke's death Police enquired into Mr Powell's allegation.

Witnesses from the picket line were interviewed. Independent witnesses were also located and interviewed about what they had seen at the picket. One described some activity that might be consistent with an assault on Mr Powell at the picket line. Others described a verbal exchange but no physical confrontation. Medical evidence of injury to Mr Powell's forehead did not corroborate his claim because the subsequent assault on Cashin Quay may have caused that injury. Mr Powell initially told Police he had limited knowledge of his assailants. A statement by him in March 2000 gave general descriptions of the alleged offenders and their actions, referring to them by an identifying letter. Later again Mr Powell identified his alleged assailants after viewing media footage.

The Investigator reports that in the circumstances it was not possible for Police to pursue the complaint of assault on Mr Powell at Gladstone Quay given that there was insufficient evidence of any such assault.

I find that the Police did investigate the alleged assault on Gladstone Quay.

This point of complaint is not upheld.

Allegation 10

That Police failed to take statements from eye witnesses at the scene when there was time to do so.

There is a dispute over Mr Powell's concern that statements were not taken from witnesses immediately after the incident when he asserts there was time to do so. Most of the available Police staff were attending to Mr Powell at Cashin Quay for the first hour after the event until he was removed by ambulance. At best they were in a position after 1.00pm to consider what investigative action should be taken. An officer returned to the scene at 2.30pm to conduct a scene examination and locate witnesses. The Police response was consistent with that normally associated with less serious crashes. With the benefit of hindsight it would have been helpful to obtain statements from as many witnesses as possible. It is reported that this did not occur because the Police staff did not appreciate at that stage how serious the injuries to Ms Clarke were.

The investigation of this complaint has demonstrated that the ability of the Police to conduct immediate inquiries into the incident was constrained by continuing demands on them to police the industrial activity as well as investigate the incidents involving Ms Clarke and Mr Powell and perform other Police work in the Lyttelton/Banks Peninsula area.

This point of complaint is not upheld.

Allegation 11

That Police failed to locate and interview S, the driver of a vehicle closest to the incident, until 8 months after the incident.

Police acknowledge that there was some delay in their locating and interviewing S, brought about by several factors. The detective in charge of the case was on leave for a period. S was not among those on foot at the scene whom it was intended to identify and interview first. When Police did locate S he was about to go to sea. On his return he failed to keep an appointment and this further delayed Police in obtaining a statement from him.

A defence investigator interviewed S before Police did so. His statement to the defence was not made available to the Police, nor did it have to be. S's statement to Police did not cause them to alter the decision to prosecute Mr Powell. The investigation established that the delay in interviewing this witness was of no significance in the Police investigation of the incident and the prosecution of Mr Powell.

This point of complaint is not upheld.

Allegation 12

That Police failed to respond to Mr Powell's 111 call.

During the incident on Cashin Quay, Mr Powell made a 111 call to Police. Three officers attended. One went there as a result of information from a Union official that Mr Powell could be found there. Two others attended as a result of receiving a radio message from the Police Communications Centre, following the 111 call.

It is established that Police did respond to Mr Powell's call.

Allegation 13**That Police failed to secure any exhibits or gather evidence in relation to the assault on Mr Powell at Cashin Quay.**

Mr Powell alleged that after he drove to Cashin Quay he was assaulted by a group of men, at least one of whom was armed with an iron bar. Police responded to a call from Mr Powell and arranged for an ambulance to attend, following which he was taken to hospital. Two Police officers conducted a basic scene examination noting damage to Mr Powell's vehicle, some glass from a broken pair of sunglasses, and a torn shirt. Mr Powell's vehicle was towed to a secure location where it was examined to locate any fingerprints on the bonnet and on some of the pieces of lens from the broken sunglasses. The vehicle was photographed. The shirt and pieces of lens were not photographed as they should have been. The Police had not received any information at that point to suggest any weapon had been used against Mr Powell. The Investigator pointed out that there were many items on the wharf that could have been used as a weapon, but no evidence to establish that any such item had been used for that purpose. There are no photographs of any such potential weapons.

Officer 2 considered that the items found near or in the vehicle had limited probative value as evidence of assault.

In fact three persons were prosecuted under the Crimes Act for common assault on Mr Powell, one of whom was also prosecuted for damaging Mr Powell's vehicle, although that charge was not able to be pursued as it was outside a time limitation.

I agree with the Investigator's finding that although Police secured Mr Powell's vehicle and items of his property found adjacent to it, the shirt and glass from the sunglasses were not photographed at the scene.

In this respect this point of complaint is partially upheld.

Allegation 14**That Police failed to undertake an appropriate investigation prior to charging Mr Powell on 30 December.**

The allegation that the decision to prosecute Mr Powell was premature is not accepted by Police. Statements taken from witnesses indicated that Mr Powell's vehicle had driven through the picket line, struck Ms Clarke and knocked her to the ground. Mr Powell was interviewed on the evening of 30 December. Legal advice was sought by Officer 2 on the appropriate charge should a prosecution be commenced. The officer rejected the allegation that his investigation lacked objectivity, and stated that he was aware of the need to be fair in his dealings with Mr Powell.

The Authority is informed that Mr Powell, in discussion with the Investigator, appeared to accept that there was evidence of careless use of a motor vehicle.

This point of complaint is not upheld.

Allegation 15**That Police failed to take statements from any Union official in relation to events prior to, and after, the incident despite the fact they were clearly involved.**

It is established that at the time of the incident the Union officials were at a meeting. Any statement from them about the incident, and any information they might have received about it, would necessarily have been hearsay and of limited value. Officer 2 was more concerned in the initial stage of his enquiries to obtain statements from persons who had witnessed the events. He did have continuing liaison with the President of the Union, Mr Wells, who assisted in identifying witnesses in the picket line.

Reference was made by Mr Powell to the possible evidential value of a telephone call made by Mr Wells to a third party on the day of the incident. When spoken to for the purpose of this investigation Mr Wells explained that a telephone call he made on the

day of the incident was to a tally clerk who had witnessed the subsequent incident on Cashin Quay. Police spoke to the tally clerk who did not provide any information useful to the assault inquiry.

I consider that the reasons why statements were not taken from Union officials has been adequately explained by the Police.

This point of complaint is not upheld.

Allegation 16

That Police failed to charge all of Mr Powell's attackers appropriately.

As developed by Mr Powell this ground of complaint was that some of his assailants were not charged at all, and that those who were charged did not face the appropriate charges.

A group of up to 12 men pursued Mr Powell on to Cashin Quay where he was assaulted by some of them. He claims that the persons who admitted their part in the assault should have been charged with aggravated assault or some other offence more serious than common assault.

Police were able to obtain statements from two offenders who admitted attacking Mr Powell, one admitting the use of fists, and the other admitting holding the vehicle door open so that others could get to him. A third person admitted being present. These persons did not identify their co-offenders. They were charged with common assault under the Crimes Act. The decisions to prosecute were made after Officer 2 consulted a senior officer who reviewed the file and the appropriateness of the charges.

Two of those charged pleaded guilty, and the charge against the third, who had only witnessed the assault, was withdrawn.

The Investigator observed that the evidence of the attack on Mr Powell at Cashin Quay is largely reliant on his account of that incident, and the admissions made by those charged. There is no independent evidence to support either version of the incident, and in the circumstances the Investigator found that the charges laid were appropriate, notwithstanding that Mr Powell continued to hold the view that more serious charges should have been laid.

The decision as to the appropriate charge to lay in any particular case is a matter within the discretion of Police. The Authority will not review such a decision unless there is evidence of bias, bad faith, failure to carry out an adequate investigation which might have affected the exercise of the discretion, or some other convincing reason giving rise to possible misconduct or neglect of duty.

I have found no such circumstances in the present case.

Regarding Mr Powell's claim that others should have been charged, the Police analysis of the evidence available did not disclose sufficient evidence to charge any other person.

After consideration of all the information available to the Authority I am unable to uphold either aspect of this complaint.

Allegation 17

That Police failed to disclose all relevant information to the defence.

Officer 2 attended to disclosure prior to the matter being referred to the Crown Solicitor. After depositions the Crown dealt with disclosure issues, including requests by the defence for material from files they believed were related and relevant.

Four matters which Mr Powell alleged were either not disclosed by Police, or only disclosed after delay, were:

- A conversation between a Constable and a woman who had been present at the incident and who gave details of another witness. The Constable did not record the conversation, which was referred to in a later job sheet that was disclosed to the defence.
- A statement by a witness in respect of the Cashin Quay incident. Officer 2 states that if it was not originally disclosed it was an oversight. The statement appears listed in the disclosure documents suggesting that it was being disclosed. In any event the Crown later disclosed it.
- Information from Officer 1 relating to a conversation with Witness V. A job sheet prepared by Officer 2 in April 2000 outlined the information which Officer 1 had obtained, and this was disclosed to the defence in a package of documents on 12 April 2000. The witness's details and an invitation to make enquiries of him were included in a letter to the defence on 2 May 2000. Officer 1 had not recorded his conversation with this witness.
- Photographs of a drawing by Witness S on a whiteboard were not discovered until some time before the second trial. Officer 2 acknowledged that there could have been some confusion about disclosure of those photographs as a result of the Crown Solicitor conducting disclosure matters after depositions, but denies any deliberate attempt to avoid disclosure.

The Investigator reports that three Eastlight folders of documents were disclosed to the defence, and he found no evidence that any recorded material was deliberately withheld. There were two instances where conversations had not been recorded and for that reason were not disclosed to the defence. This issue is discussed further in connection with Allegation 18 below. Mr Powell continued to hold the view that delayed disclosure concerning witness P was a deliberate ploy by Police to frustrate the defence enquiries, but this investigation has produced no evidence to suggest that this was the case.

I am unable to uphold this point of complaint.

Allegation 18

That Police failed to adequately record or investigate a witness's statement that he believed Ms Clarke had tripped on his placard.

Witness V called at the Lyttelton Police Station some time after the incident and had a conversation with Officer 1. He was upset and appeared to blame himself for the death of Ms Clarke. According to Officer 1 the witness felt that if he had remained in the picket line he could have prevented the injury to Ms Clarke. There is no suggestion that the witness told the officer that Ms Clarke tripped on his placard. Officer 1 did not record this conversation. The Investigator says he should have done so given its relevance to the investigation.

In a job sheet later disclosed to the defence there is a suggestion that Witness V had claimed in a conversation with another witness, B, that Ms Clarke tripped on his placard. This information was related to a Constable who did not record the conversation. The Investigator says that he should have done so.

It is reported that Officer 2 attempted to clarify these conversations with Witness V without success. The witness eventually told Police that he had left the picket line immediately before Mr Powell drove through it. He said he had no memory of the events relating to Mr Powell's driving. His details and his statement were provided to the defence to enable them to interview him if they wished. Mr Powell informed the Investigator that Witness V was subpoenaed to attend the first trial as a defence witness, but was not called to give evidence.

Officer 2 did not interview Witness B regarding the alleged comments by Witness V about the placard. An interview would have helped to clarify this issue and may have eliminated it as a cause for complaint. Witness B was interviewed in the course of this investigation. She said that Witness V came to her house shortly after the incident. He was distressed. He told her that he believed that he might have been near Ms Clarke at the time of the incident and that she might have tripped on the placard he had been holding. Witness B, who was near Ms Clarke on the picket line,

assured him over a period of some hours that he was not anywhere near Ms Clarke, and that it was therefore unlikely that she had tripped on his placard. This assurance is consistent with photographs of the scene and Mr Powell's own reconstruction of the incident.

Police staff failed to record information about the conversations with Witness V, and I consider that they should have done so.

This point of complaint is partially upheld in this respect.

Allegation 19

That Police failed to assign impartial staff to the investigation.

In submissions to the Investigator Mr Powell made a further allegation that Police should have consulted expert witnesses, such as the defence did. He also suggested that Police did not base the prosecution on factual evidence, but rather on the emotive accounts of witnesses who were involved in the picket. He alleged that if the investigation had been conducted impartially the matter might not have gone before the Court.

As to the staff assigned to the investigation, Officer 2 was the primary investigator. He had had only limited involvement in policing the picket line. He gathered statements from witnesses. He considered obtaining, and where appropriate sought, the assistance of experts. A senior officer supervised him in aspects of the inquiry. Officer 2 made enquiries of Witness S whose account of events provided some support for Mr Powell. He said he carried out further enquiries as he was concerned that the account of Witness S was contrary to the accounts of other witnesses, including independent witnesses.

The Crown did not call Witness S. During the first trial Officer 2 was cross-examined about his enquiries. He stated that he had received unsolicited information indicating that Mr Powell was easily angered. He investigated that information as it was

relevant to Mr Powell's response when confronted at the picket line. Nothing of evidential value was revealed in those enquiries.

The Investigator commented that given the potential for criticism of the Police response to the picket, it might be contended that an independent team of investigators should have been assigned to the inquiry. That option does not appear to have been considered by the Police District management. However, despite the fact that local staff carried out the investigation, the Investigator concluded that there is no basis for the suggestion that the investigation was biased.

In regard to the allegation that Police failed to consult experts, I am satisfied that the Police did seek expert opinion from various specialists, including internal Police experts (for example, crash investigators) and external experts (for example, the pathologist). In relation to the crash sequence the Police, through the Crown Solicitor, consulted an engineering expert regarding the vehicle's movement and impact.

I find that the Police did consult, and call evidence from, appropriate expert witnesses.

After consideration of the evidence available to the Authority I am unable to uphold either aspect of this complaint.

Allegation 20

That Police failed to investigate evidence of possible collusion between witnesses or of any attempt by others to pervert the course of justice.

Mr Powell referred to a meeting on the roadway at Gladstone Quay about 1.50pm on 29 December. The meeting involved a number of the picketers, some Union officials and a group of people directly involved in the incident. Mr Powell suggested that this meeting was held to direct witnesses on what they should say regarding incidents at the picket line and the assault on Cashin Quay. This allegation was not made known to Police until it was raised at Mr Powell's first trial. Officer 2 had no prior knowledge

of the allegation and strongly disagreed with the suggestion of possible collusion. He pointed out to the Investigator that the accounts of witnesses were not wholly consistent, some having different recollections of the meeting. The President of the Waterfront Workers Union was at the meeting. He rejected the suggestion that witnesses were directed on what to say. He stated that the meeting was held to update the picketers on the progress of talks with the Port Company representatives. At that point, he said, no-one knew the extent or seriousness of Ms Clarke's injuries or the potential scope of the Police inquiry.

Witness B, who witnessed the incident and was present at the meeting, has been interviewed. She denied any suggestion that the meeting was about the incident. Her recollection is that the meeting was to update people on the industrial issues. She did not recall any mention of Ms Clarke at any meeting prior to a meeting at a Rugby club later that day at which Union delegates pledged support for Ms Clarke and her family, but there was no discussion of the evidence to be given. Witness B pointed out that there was a large media contingent on Gladstone Quay at the time of the meeting there, and said it would have been foolish of anyone to attempt in that environment to direct witnesses what to say.

Officer 2 did not consider the issue of possible collusion, or any attempt to pervert the course of justice, in relation to the charges brought against Mr Powell, as no evidence of any such offending came to his notice.

On the other hand the Investigator reported that there appeared to have been some collusion regarding the identity of Mr Powell's assailants on Cashin Quay. He said that the persons who were prosecuted must have known their co-offenders, but they declined to identify them. Officer 2 accepted that his efforts to identify other offenders for the assault on Mr Powell were frustrated by a lack of frankness on the part of those involved, but without their co-operation he was unable to advance that inquiry.

This complaint is not upheld.

MEETING WITH MR POWELL

After his investigation of the complaint, Detective Superintendent Burgess met with Mr Powell to discuss the conclusions he had reached. While Mr Powell did not agree with all of the conclusions, he indicated that he accepted that his complaints had been properly investigated. He also indicated that he was satisfied that Police would take action to prevent such a situation recurring, and that the Union appreciated that they would not again be able with Police agreement to picket in such a manner.

JUDICIAL COMMENTS FOLLOWING FIRST TRIAL

On 15 June 2001, in the course of sentencing Mr Powell in respect of his conviction for manslaughter at his first trial, Justice Panckhurst made the following comments regarding the picket, the Police conduct in respect of the picket, the conduct of some of the picketers, and Mr Powell's action in driving through the picket. The comments are relevant to some of the issues raised in Mr Powell's complaint.

"As you drove along you were confronted by an industrial picket line. As a result you had to stop. You were detained for a period of minutes during which a confrontation with at least some of the picketers occurred. You then accelerated forward in your vehicle and as a result Christine Clarke was run over."

Para [2]

"... you were confronted by a highly unusual and difficult situation on that day. Frankly I was surprised at the evidence given by members of the Police concerning their approach to the picket line. Freedom of movement on the highways is a fundamental right. To empower a group of persons to stop traffic even temporarily for their own purposes, was, in my view, to court danger. Even if the Police decision was understandable at the beginning I struggle to comprehend why it was not reviewed after the experience of the first day of the picket line. TV coverage of events on that day captured incidents, no doubt isolated, which in my view proved the folly of the approach which the Police had adopted. Nothing different however was done on the second day."

Para [12]

Secondly, there is the conduct of some of the picketers as well..... But among the male picketers were some elements who were guilty of bad behaviour, whose conduct was aggressive and inflammatory. Again this emerged from the TV coverage which was taken of the picket line and shown in the course of the trial.”

Para [13]

“Although I will bring to account those two matters, Mr Powell, the fact remains that your driving was the final and decisive act which led to the death. I am satisfied that you were impatient when confronted by the picketers. That to my mind emerged most clearly from the evidence of the witness who had endeavoured to engage you in conversation after your first trip through the picket line that morning. He found you to be irritable to the point where he could not converse with you. I am satisfied that your attitude, when you approached the picket line on the second occasion, would have inflamed passions amongst picketers.”

Para [14]

The comment made by the Court (para. 12) on the Police approach to the picket, and on the continuation of that approach on the second day, was the subject of investigation by Detective Superintendent Burgess. The Authority is informed, as noted on page 6 of this report, that the situation was reviewed at a senior level on the morning of the second day and that a decision was made to continue with the same approach.

The Police now accept that in retrospect the decisions taken by them at the outset of the picket, and on the morning of the second day, were inappropriate. The Authority agrees.

JUDICIAL COMMENTS IN COSTS AWARD

I refer also to comments made by Justice Panckhurst in the course of his reserved decision, delivered on 17 April 2003, on the application by Mr Powell for costs. The Judge had presided over Mr Powell’s first trial, and the application related to his costs incurred in respect of that trial. After considering counsel’s submissions and the criteria set out in s.5 of the Costs in Criminal Cases Act 1967, the Judge made the following comments which are relevant to some of the issues raised in Mr Powell’s complaint to the Authority:

“Was the prosecution properly brought and pursued? To my mind it was.”

Para [30]

“It follows that Mr Powell was bound to be charged with a serious driving offence upon the victim’s subsequent death in hospital.”

Para [31]

“... the fatality occurred as a result of a relatively low speed contact and in the immediate presence of numerous witnesses. The accident scene therefore was contaminated from the outset. In any event given the nature of the impact it is most unlikely that a scene examination would have rendered much of any evidential value.”

Para [32]

“Likewise I do not consider that there was any failure on the part of the Police arising from the circumstances that witness S was identified and located by a private investigator rather than one of the officers involved in the investigation. It may well be that the steps taken with reference to the search and security of Mr Powell’s vehicle could have been improved upon. However, I do not accept that any such failure affected the course of the proceeding such as to be material in the present context.”

Para [33]

“... is this a case where the accused brought the charge on his own head? The evidence suggested to me that he was at least impatient, if not provocative, in his reaction to the picketers. Hence I suspect his conduct on the day was instrumental in relation to the events which unfolded.”

Para [34]

DISCUSSION

It must be emphasised that the Authority’s role differs from the role of the Courts in their consideration of criminal prosecutions. The primary function of the Authority is to determine complaints alleging misconduct or neglect of duty by any member of the Police, or concerning any practice, policy or procedure of the Police affecting the person making the complaint.

In the present case the first five allegations are directed to the Lyttelton Police who were responsible for policing the industrial picket, and to Police management who approved the decisions of Officer 1 to allow the picket to proceed as it did on 28 and

29 December. Allegations (vi) to (xi) are directed at police actions after the incident on Gladstone Quay in which Ms Clarke was fatally injured. Allegations (xii) and (xiii) relate to the assault incident on Cashin Quay, and the remaining allegations concern the investigation of both incidents and the conduct of the prosecutions that followed.

Points of Complaint Upheld or Partially Upheld

A central allegation against Police is that they unlawfully permitted the picket to stop and detain road users. I consider that the Police did not act unlawfully but that the decisions made by them in respect of the picket were, in hindsight, inappropriate.

The second point of complaint upheld relates to Police, as a matter of good practice, informing the public of possible inconvenience to motorists arising from industrial or protest action such as occurred on this occasion.

Thirdly, I consider, as is now accepted by Police, that it would have been desirable to have had more than one officer in the vicinity of the picket line at the time of the incident.

Fourthly, additional Police resources should have been obtained as soon as practicable after the incidents on Gladstone and Cashin Quays to enable prompt action to have been taken to investigate those incidents and to have the picket move or disband.

Fifthly, action to seek and record additional evidence from the scene of the damage to Mr Powell's vehicle at Cashin Quay should have been taken.

Finally, there was a failure to record conversations with one witness.

None of the remaining points of complaint are sustained.

CONCLUSION

There is an important lesson which emerges from the circumstances of this tragic accident in which Ms Clarke suffered fatal injuries. In considering their responsibilities in dealing with demonstrations or industrial action likely to interfere with members of the public going about their lawful activities Police must not sanction actions which involve a breach of the law.

I accept that when Police were first notified of the intended picket they believed, on what I consider to have been reasonable grounds, that a low key response to the proposed industrial action was appropriate.

I find that prior to the incident involving Ms Clarke the picket was largely peaceful other than on a few occasions when motorists and passengers became frustrated or angry at being delayed in gaining access to the waterfront.

In closing I record that the conclusions reached in this report are made with the advantage of hindsight.

The Authority extends to the family and friends of Christine Clarke its sympathy in their loss.

Judge I A Borrin
POLICE COMPLAINTS AUTHORITY

29 April 2004

