

## **Backgrounder: Barclay and Burton: Prosecution of Government Departments**

**13 April 2011**

Barclay killed Debbie Ashton on 6 December 2006 by driving recklessly and at high speed. At the time he was on parole and under the Witness Protection Programme. He was convicted of manslaughter. Now he is about to be released before he's served even the limited time of his sentence. He was only on parole because of mistakes by the Police and Corrections which meant a judge did not know Barclay's real identity or criminal record when he was convicted for a serious driving offence.

Karl Kuchenbecker was shot by a parolee, Graeme Burton in January 2007. If the Police had not failed to action two arrest warrants for Burton within reasonable time he would not have been still on parole. In June 2008 the Coroner, Gary Evans, found that the actions and inactions of members of Corrections and the NZ Police enabled Burton to remain at large in the community, despite him posing an undue risk to public safety.

Neither the Police nor Corrections have been held accountable for the consequences of their mistakes.

Judy Ashton, mother of Debbie Ashton, and Garth McVicar for Karl Kuchenbecker have been pursuing a private prosecution of the Police and Corrections under the Health and Safety in Employment Act since June 2009 and April 2009 respectively. Both were required to apply for an extension of time under the HSE Act. This was a simple procedural matter but 22 months later (and more than 4 years since the deaths) they are still waiting for an outcome. It has been bitterly fought on technical grounds. The matter has been to the District Court, to the High Court twice, and is now back with the District Court. The lawyers for the Police and Corrections have put up all the legal hoops they could find. This delay has held up the Coroner's report in Debbie Ashton's case which is very distressing.

The State is assiduous in holding ordinary people to account for mistakes. Millions will be poured into inquiries where it looks as if some business has failed to take all practical steps to avoid injury. This week saw the report of the Department of Labour's prosecution of Counties Automotive Diesel Repairs for failing to take all practical steps to ensure that the actions or inactions of an employee did not harm another person. An employee failed to tighten wheel nuts on a tyre. The wheel came off and killed a man in the front seat of a bus. They were fined \$5000 and ordered to pay reparations of \$68,582 by the District Court. A Department of Labour investigator, Craig White, said "this was a horrific accident in which a man lost his life while simply travelling on a bus on Auckland's motorway. The saddest thing is that the accident could very easily have been prevented"<sup>1</sup>.

The deaths of Debbie Ashton and Karl Kuchenbecker could also have been easily prevented. In 2003 after the Cave Creek disaster (caused by government employee carelessness), with much posturing and promising of a new era, the law was changed to ensure the Crown would be "accountable" like private individuals for carelessness causing injury.

But the proof is in the pudding. When it comes to Departments being prosecuted or even investigated for Health and Safety in Employment liability they have done everything in their power to block the proceedings. In the end the buck stops with the Ministers in charge of those Departments. Politicians hold out that they are morally responsible. Yet they allow their Departments to tangle victims and their families up in legal technicalities to prevent their accountability from being tested in court.

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<sup>1</sup> "Inaction over wheel 'proved fatal' (12 April 2011) The Dominion Post.

For both cases we had agreed to drop the prosecution against individuals and to only prosecute the Departments. Though personal accountability is important, for a test case, we thought it fair to only prosecute the Departments as a matter of principle.

Recently we suggested to Corrections and the Police a constructive way to avoid wasting more time. The offer recognised the huge cost and time of a trial. The Departments' underlying view seems to be that the clear words of the HSE Act apply to everyone else but them.

That seems to have been the Department of Labour's reason for not pursuing their fellow public servants even though they did tell Mrs Ashton "technically, the HSE Act may apply to the matters you raise".

So we suggested an agreement to get the Court to rule first on whether the HSE Act applies. For that purpose the Court could assume the facts found by the official inquiries. If the Court agrees with the Labour Department that the law did not apply, the prosecution would not proceed. If the Court said the law means what it says, then the Departments would still have all their rights to argue that the facts were not as the inquiries found, and that even if they are, they do not amount to criminal carelessness.

Through their QC the Police and Corrections declined this offer. The reason - "the two departments of state do not wish to be convicted of a criminal offence". This is fine for them. They have the taxpayers' money to pour into defending themselves.

The reality has proved that nothing has changed – and the current Ministers, just like earlier ones, seem happy to ensure neither they nor officials can be held accountable.

## CHRONOLOGY FOR ASHTON MATTER

Date	Event
December 2005	Jonathan Barclay is convicted of burglary and dishonesty offences and receives custodial sentence.
July 2006	Barclay is released on parole and relocated to Nelson with a new identity under the NZ Police's Witness Protection Programme.
11 October 2006	Barclay is convicted of serious driving offences under his real name. He is disqualified from driving for 18 months and receives "final warning".
7 November 2006	Barclay is convicted of EBA under new identity. Treated as a first offender, he receives a \$500 fine and is disqualified from driving for six months.
6 December 2006	Barclay drives recklessly and at high speed, causing a head-on collision which kills Debbie Marie Ashton.
May 2007	Barclay pleads guilty to manslaughter.
September 2007	Hon Annette King appoints Kristy McDonald QC to inquire into and report on matters relating to Debbie Ashton's death.
9 July 2008	Kristy McDonald QC's Ministerial Inquiry report is released. Ms McDonald finds and is highly critical of a series of individual errors and systems failures by both the NZ Police and Corrections, which enabled Jonathan Barclay to remain at large in the community when he ought not to have been.
9 January 2009	Date when six month time limit for laying informations expires, assuming the release of the Ministerial Inquiry report marked the earliest time when an inspector should reasonably have known about the incident, situation, or set of circumstances to which the offence relates.  <i>Expiry Date according to Mrs Ashton, Corrections and NZ Police</i>
Late March 2009	Mrs Ashton becomes aware of the Secretary of Labour's response to Mr McVicar's s.54(1) notice in relation to the Kuchenbecker matter. It had not previously occurred to her that the safe management and supervision of parolees may be matters that were regulated under the HSE Act. This prompts her to find out whether the DOL had investigated the management and supervision of Jonathan Barclay while he was on parole and in the witness protection programme.
7 April 2009	Mr and Mrs Ashton write to the Secretary of Labour, giving notice under s.54(1) of the HSE Act that they have an interest in knowing whether enforcement action had been or would be

Date	Event
	taken in relation to the death of their daughter, Debbie Ashton.
15 May 2009	The Secretary of Labour notifies Mr and Mrs Ashton under ss 54(2) and 54A(2)(c) of the HSE Act that an inspector would not be taking enforcement action against any possible defendant.
15 June 2009	Mrs Ashton files an application for an extension of time to lay informations.  Mrs Ashton swears an affidavit in support of the application, and annexes draft, fully particularised informations.
7 October 2009	Date when six-month time limit for laying informations expires, assuming Mr and Mrs Ashton's letter to Secretary of Labour marked the earliest time when an inspector should reasonably have known about the incident, situation, or set of circumstances to which the offence relates  <i>Expiry Date according to District Court</i>
15 & 22 March 2010	Hearing of District Court application
4 May 2010	Reserved judgment of Judge IG Mill dismissing application
27 May 2010	Appeal filed against dismissal of application
17 August 2010	Appeal withdrawn due to lack of jurisdiction
3 February 2011	Decision by Miller J, High Court. Application for review succeeds, directs the District Court to reconsider the applications for extension.
11 March 2011	Stephen Franks, lawyer for Garth McVicar and Judy Ashton, writes to lawyers for the Corrections and the Police offering a constructive way forward, and to produce a judgment which would guide the Department of Labour on what their law means.
24 March 2011	Robert Lithgow, QC, replies declining the offer.
<i>15 April 2011</i>	<i>Stephen Franks sends a memorandum to the District Court seeking a reconsideration of the applications for an extension of time. Assuming application granted as is likely after the High Court judgment.</i>
<i>Tbc.</i>	<i>Assuming application granted, as is likely after the High Court judgment, laying informations for prosecutions of Police and Corrections for offences under sections 15 and 50(1)(a) of the Health and Safety in Employment Act 1992.</i>

## CHRONOLOGY FOR KUCHENBECKER MATTER

Date	Event
10 July 2006	Graeme Burton, is released on parole after serving 14 years of a life sentence for murder
6 January 2007	Burton kills Karl Kuchenbecker and injures four others while at large in the community
2 February 2007	Burton pleads guilty to murder and other offences.
25 February 2008	Independent Police Conduct Authority Report into the shooting of Graeme Burton is released. The report includes findings critical of the inter-agency relationship between Corrections and the NZ Police and the latter's failure to action two arrest warrants for Burton within a reasonable time.
18 June 2008 <sup>2</sup>	Coroner Garry Evans releases his reserved decision after an inquest into the death of Mr Kuchenbecker. The Coroner finds that the actions and inactions of members of Corrections and the NZ Police enabled Burton to remain at large in the community, despite him posing an undue risk to public safety.
25 August 2008	Date when six month time limit for laying informations expires, assuming the release of the IPCA's report marked the earliest time when an inspector should reasonably have known about the incident, situation, or set of circumstances to which the offence relates.  <i>Expiry Date according to Corrections and NZ Police</i>
18 December 2008	Date when six month time limit for laying informations expires, assuming the release of the Coroner's report marked the earliest time when an inspector should reasonably have known about the incident, situation, or set of circumstances to which the offence relates.  <i>Expiry Date according to Mr McVicar</i>
Late 2008	Mr McVicar becomes aware that the Department of Labour intends to prosecute the Sir Edmund Hillary Outdoor Pursuits Centre of New Zealand ("OPC") under s 15 of the the HSE Act, for systemic failings after the death of six students and one teacher from Auckland's Elim Christian College in a flash flood in the Mangatepopo Gorge while under the supervision of an OPC employee. He sees parallels with the systemic failings identified

<sup>2</sup> The decision was dated 16 May 2008, but embargoed for publication until 18 June 2008

Date	Event
	by the Coroner in the Kuchenbecker matter.
12 January 2009	Mr McVicar's solicitors write to the Secretary of Labour, giving notice under s.54(1) of the HSE Act that he has an interest in knowing whether enforcement action had been or would be taken in relation to the death of Mr Kuchenbecker and the injuring of four other people.
February 2009	The Controller and Auditor-General releases a report entitled " <i>Department of Corrections: Managing Offenders on Parole</i> " which finds that despite changes implemented since the Graeme Burton incident, probation officers were still failing to properly manage and supervise high-risk parolees.
19 March 2009	The Secretary of Labour notifies Mr McVicar's solicitors under ss 54(2) and 54A(2)(c) of the HSE Act that an inspector would not be taking enforcement action against any possible defendant.
17 April 2009	Mr McVicar files an application for an extension of time to lay informations.
20 April 2009	Mr McVicar swears an affidavit in support of the application, and annexes draft, fully particularised informations
12 July 2009	Date when six-month time limit for laying informations expires, assuming Mr McVicar's letter to Secretary of Labour marked the earliest time when an inspector should reasonably have known about the incident, situation, or set of circumstances to which the offence relates  <i>Expiry Date according to District Court</i>
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