LOCAL COURT of NEW SOUTH WALES

Coronial Jurisdiction

Inquest:	**Inquest into the death of Jason Lee PLUM**
Hearing dates:	13 November 2012
Date of findings:	16 May 2013
Place of findings:	Wagga Wagga Courthouse
Coroner:	Deputy State Coroner H.C.B. Dillon
Findings:	I find that Jason Lee Plum died on14 August 2011 at Wagga Wagga Base Hospital as a result of a single gunshot wound deliberately self-inflicted while in police custody.
Recommendations:	**To the Commissioner of Police:**

(i) I recommend that the NSW Police Force should consider adopting a policy that, pursuant to their power under s 24 of the *Law Enforcement (Powers and Responsibilities) Act 2002* police officers should search all persons taken into police custody before placing those persons in police vehicles or transporting them to a place of custody, unless there are sound reasons not to do so.

(ii) I recommend that the Police Force should consider adopting a policy that if, pursuant to s 23 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, arresting police officers have reasonable grounds to suspect that it would be prudent to search arrested persons, they should do so unless there are sound reasons not to do so.

(iii) I recommend that the Police Commissioner review the policy or practice of police officers securing their firearms before unloading persons in custody from police vehicles at police stations. In particular, I recommend that consideration be given to situations in which police transport persons who have not been searched to police stations or other places of custody. In such cases, I recommend that the Commissioner consider issuing a guideline that one or more officers should, at a safe distance from the vehicle, retain their firearms to provide protection while unsearched prisoners are unloaded.

(iv) I recommend that the NSW Police Education and Training Command consider using this case and the *Caton* incident as case studies for training officers in appropriate search procedures including the desirability of ascertaining an arrested person's identity and considering COPS warnings if reasonably practicable.

(v) I recommend that the NSW Police Education and Training Command review its training curriculum in the light of these incidents.

(vi) I recommend that the roll-out of CCTV cameras in NSW Police Force caged vehicles be expedited as fast as resources, funding and competing priorities allow.

(vii) I recommend that in addition to and following the thorough investigation that follows a Critical Incident, I propose that the NSW Police Force conduct a policy and procedure analysis, similar to NSW Health's "Root Cause Analysis" process, to determine whether or not latent systems defects have been revealed by the incident and, if so, what measures ought be

taken to rectify them.

To the Attorney-General and Minister for Police:

(viii) I recommend that the Law Enforcement (Powers and Responsibilities) Act 2002 be amended so as to define with precision the meaning to be given to the phrase "lawful custody" in s 24 of the Act.

File number: **2011/00390317**

Representation:

Mr P Aitken (Counsel Assisting) instructed by Mr P Rankins (Crown Solicitor's Office)

Mr D. Barron for Mrs D. Plum (Next of Kin)

Mr P. Saidi instructed by Mr S. Robinson (Commissioner of Police and NSW Police Force)

Mr B. Haverfield instructed by Mr E Oates for Probationary Constable Earl and Constable Broomham

Mr M. Spartalis instructed by Mr K Madden for Senior Constable Parsons and Constable Astrup

REASONS FOR DECISION

Introduction

1. Jason Lee Plum died after shooting himself in the back of a police truck at the Wagga Wagga Police Station with a gun he had managed to conceal on his person shortly before he was arrested. He had not been searched before being placed in the rear of the van.

2. Under the *Coroner's Act 2009*, an inquest is mandatory when a death occurs as a result of, or in the course of, a police operation.

3. In a society in which the rule of law prevails, a police force is not a law unto itself. It is accountable to the society it serves to protect. It has been observed that:

> *"The purposes of a s.23 Inquest are to fully examine the circumstances of any death in which Police ...... have been involved, in order that the public, the relatives and the relevant agency can become aware of the circumstances. In the majority of cases there will be no grounds for criticism, but in all cases the conduct of involved officers and/or the relevant department will be thoroughly reviewed, including the quality of the post-death investigation. If appropriate and warranted in a particular case, the State or Deputy State Coroner will make recommendations pursuant to s.82."* (Waller's Coronial Law & Practice in New South Wales 4th Edition at para [23.7] (page 106))

4. This inquest, therefore, is not a quasi-criminal trial of either Mr Plum or the involved officers but an inquiry into the manner in which the police operation was conducted. NSW Police Force policies, procedures and training are intended to minimise the risk of harm to arrested persons and police officers, even in dangerous circumstances. The police officers involved in this incident acted with no malice towards Mr Plum.

5. The arrest was a difficult one not only because he attempted to escape from the police and resisted arrest when caught but because he was a large, determined and powerful man.

6. Nevertheless, the ultimate questions are whether this operation could or should have been differently and better managed and whether Jason Plum's death could have been averted. For reasons that I will develop, I have concluded that it is likely that, had he been searched before being placed in the back of the truck, Mr Plum's death would probably have been prevented.

Jason Plum

7. Before considering these issues, however, it is important to focus on Jason Plum himself. He was a 37-year-old man who was well known in Wagga Wagga as a martial artist, a physical trainer and a rugby league identity.

8. His death has caused great pain to his mother, Debra Plum, to Natalie McLoon, and his family and friends. It has also affected the police officers, especially those immediately involved in his arrest, and those who saw him put his own gun to his head in the back of the police truck.

9. Mr Plum had a history of mental illness and had been diagnosed with bipolar disorder. He also had an extensive criminal history. This began in 1993 and included convictions for assaulting and resisting police, driving offences, detaining a person for advantage, possession of a prohibited weapon, stalking and intimidation. In 2004 he was sentenced to two years and seven months in prison. In 2011 he received a 12-month suspended sentence for driving whilst disqualified.

10. At the time of his arrest, the police computer system ("COPS") held several warnings in relation to him. First, it warned that he may resist police; second, that caution should be taken when dealing with him as he was highly trained in martial arts and had previously stated he would not return to jail; third, that he should be approached with caution because he may be in possession of a sawn-off shotgun, pistol or knives. The last warning also cautioned that he might carry items on his person or have them in his vehicle. Finally, the system contained a warning that he may be in possession of a stun-gun disguised as a mobile phone. The system

also held 43 intelligence reports relating to him including reports suggesting that he may have been involved in the supply of prohibited drugs, consorted with criminals and possessed weapons.

11. He had been treated by a psychiatrist and was prescribed medication for depression and substance abuse. There is some evidence that he suffered from suicidal ideation. Unfortunately, it appears that, at the time of his death, he had also stopped taking his medication.

12. These facts do not, however, sum him up. Despite his troubled life and his mental condition, he was a colourful character, much loved by his family and friends. Those who knew him best had great affection for him. This was evidenced at the inquest held at the Wagga Wagga Courthouse by the attendance of many of his relatives and friends.

Summary of facts

13. Mr Plum was involved in an on-and-off relationship with Ms Natalie McLoon. She was much younger than he was. The relationship was volatile and, on his part, was at times violent. It has been suggested that the violence may not have been always one way but certainly it appears that he was principally responsible for whatever physical aggression there was in the relationship.

14. Ms McLoon lived in Sydney. In August 2011 Mr Plum was living in Wagga Wagga with his parents. Ms McLoon came down to Wagga Wagga to see him and to attend a "hen's night". They booked into the Townhouse International Motel on 13 August 2011. Mr Plum used the name "Catlow" when booking in.

15. During the afternoon they parted in different directions. He met friends at the Victoria Hotel including his cousin Kylie McDonald and Mr Mark Cutler. Ms McLoon stayed at the motel preparing to go out with friends and later that afternoon attended the hen's night for a few hours.

16. After leaving the hen's night, she became agitated when she rang Mr Plum's phone and discovered that he was apparently out drinking with Kylie McDonald. On returning to the motel, she went through Mr Plum's possessions. In them Ms McLoon found a USB stick of his that apparently had a number of photographs of women on it. Hidden in a black beanie belonging to Mr Plum she also found a small revolver and a number of bullets.

17. Ms McLoon was outraged by finding the pictures of women. She concluded that Mr Plum was being unfaithful to her and sent a number of text messages to him and Mr Cutler. The text messages to Mr Cutler included the following: " Well you better tell him his precious gun went walkabouts" and " You better tell him I just found pics of girls on his USB I know everything and I'm calling cops to hotel to pick up gun" and "Not kidding he's fucked I had enough". She also telephoned Mr Cutler and told him that she had had enough of Mr Plum.

18. Mr Cutler alerted Mr Plum to the text messages and the telephone call. Mr Plum then stormed out of the hotel and back to the Townhouse Motel. Mr Cutler followed. When Mr Plum left, Ms McDonald telephoned Debra Plum who came straight down to the Victoria Hotel with Mr Plum's stepfather, Trevor Marks. They then drove to the Townhouse motel.

19. By this time Mr Plum had reached the motel. The receptionist and two guests saw him assault and verbally abuse Ms McLoon. The staff member unsuccessfully attempted to intervene before calling the police.

20. At 8.11 pm, Senior Constable Parsons and Probationary Constable Swarbrick attended the motel in response to a radio call alleging that a domestic assault had taken place there. At the motel the police began preliminary enquiries including speaking to Mr Plum. They then arrested Mr Plum. He attempted to flee from the scene. As he did so he crashed into a glass window, was then chased by police and eventually caught, wrestled to the ground by two officers, handcuffed and placed into the rear of a caged police truck.

21. Mr Plum was a very large man. He was heavily built, weighed approximately 123 kg, and was 189 cm tall. The police officers found him very difficult to restrain and subdue. They were unable to handcuff his hands behind him due to his strength. During the struggle to restrain him both police officers had had contact with various parts of his body. He was wearing a tight grey top and loose jeans. Before putting him on the truck, the officers did not conduct any frisk search. They later gave evidence that, because they had been in close physical contact with him during the struggle and had not felt the gun on his person, they did not think it necessary to further search him at the scene.

22. During the course of the evidence one of the officers said that they had had such a great deal of difficulty in getting him under control that they had decided simply to put him in the back of the truck and to conduct a proper search back at the police station. It was only about three minutes drive away. Mr Plum was left under guard in the truck with another police officer, Probationary Constable Earl.

23. The police officers did not know, and were not told by anyone at the scene, that on his person Mr Plum may have secreted the small pistol that Ms McLoon had seen in the motel room. During the arrest of Mr Plum, Ms McLoon was unco-operative with police. She refused to give details of what had happened to cause the "000" call to be made by motel staff.

24. Shortly afterwards, Debra Plum, Mr Marks, Kylie McDonald and Mark Cutler turned up at the motel. Mrs Plum was very upset and demanded to see her son. She told one of the police officers that he had "problems." While the police were there, Ms McLoon demanded to see and speak with Mrs Plum. Initially Mrs Plum was dismissive of Ms McLoon but she ultimately agreed to speak to her away from the presence of the police.

25. Ms McLoon's evidence was that she had then told Mrs Plum that Jason had a gun somewhere in the motel room. In her evidence Mrs Plum denied this. It is common ground, however, that Natalie McLoon, Mrs Plum and Kylie McDonald went back to the motel room together shortly afterwards

and that Mrs Plum and Ms McLoon refused to allow police entry into the room while they were in there.

26. Mrs Plum's evidence is that all she did in the motel room was to pack up her son's belongings. She said that she had intended to do this because she knew that he would be taken to the police station and that she would not be allowed to see him for some little time. She said that this had taken only a few minutes.

27. Ms McLoon's version is that the three women searched the whole of the motel room including under the toilet seats for the pistol. They were unable to find it or the ammunition.

28. It is also common ground that none of them gave any warning to the police that Mr Plum may be armed with a gun or indeed any other weapon. I will discuss this issue further below.

29. Mr Plum, therefore, was sitting handcuffed in the back of the police truck with a gun somewhere on his person.

30. He was driven back to the Wagga Wagga police station where the truck drove into the dock. The two officers on board the truck then secured the vehicle and their firearms inside the police station. They returned to open the pod of the police truck and to get Mr Plum out. When they opened a side door of the pod, Mr Plum refused to get out. An argument ensued and Constable Astrup went to the other pod door and opened it. As this occurred Mr Plum then produced the pistol from somewhere in his clothing, placed the barrel of the gun under his jaw and fired a single round into his own head.

31. The police immediately initiated first aid and called an ambulance. Mr Plum was transported urgently to the Wagga Wagga Base Hospital where it was found that he had suffered significant brain damage. He was placed on life support. It became clear at the hospital, however, that the brain damage was fatal and the life support system was turned off.

The coroner's statutory role

32. The Coroners Act requires me, if possible, to identify the person whose death is the subject of the inquest, the date and place of death and the cause of death. None of these matters are controversial. I am also required to determine if possible what the Act describes as "the manner of death".

33. The focus of this inquest has been on the circumstances of Mr Plum's death and , in particular, on the actions of police officers who arrested him.

34. A coroner may also make recommendations relating to a death if it appears necessary or desirable to do so. I propose to make a number of recommendations at the conclusion of these findings.

The issues

35. As Counsel Assisting explained in his opening address, Mr Plum's death raised a number of issues:

    - What were the standard or appropriate procedures for arresting and searching Jason Plum?
    - Were those procedures followed and, if not, why not?
    - Was the fact that Jason Plum possessed or had access to a gun known to anyone at the time of his arrest?
    - Was this information made known to police or did police have independent sources of such information available (eg, previous COPS events, gun registration details, Crimestoppers reports, witness accounts, etc) prior to his arrest?
    - Did Jason Plum have a history of self-harm?

- If so, was information about this known to police or available to police in the COPS system or were they given this information by other means prior to his arrest?
- Did the arresting police suspect or ought they reasonably to have suspected that Jason Plum was at risk of self-harm when he was arrested? If so, what precautions ought they have taken to prevent it?
- As a result of this incident, have any changes been made to police procedures or training in the Local Area Command, the Regional Command or the NSW Police Force?

36. In a nutshell, the weightiest and most difficult issue explored during the inquest was whether, despite the evident difficulties the police had in controlling Mr Plum, they ought to have searched him before placing him in the back of the police truck to ensure that he had no weapons or implements on him that could be used to harm police officers or himself. This raised questions both of law and police policy.

37. The second cluster of issues can be distilled to the question of whether the police at the scene ought to have done more to familiarise themselves with the warnings concerning Mr Plum before driving him the short distance to the police station.

38. The third question is whether his death may have been averted if the police had been given information by those who knew Mr Plum that he may have an illegal gun.

39. I will deal with the last two issues first as they are relatively quickly resolved.

Should the police have checked the warnings on the COPS system?

40. In an ideal world, it is arguable that the police should have been able to confirm the identity of Mr Plum on arrival at the motel and then to check any warnings the COPS system held in relation to him.

41. Reality, however, is rarely ideal. In this case, the police officers responded to a direction from the police radio operator to attend what appeared to be a relatively typical, if unpleasant and difficult, domestic violence incident. It must have appeared to these General Duties officers to be the sort of event that constitutes much of their day-to-day work.

42. Before their arrival, the police did not know Mr Plum's true identity. He had used a false name at the motel. It is true that one of the officers who attended the scene recognised him but there was nothing to indicate to the officers that Mr Plum was contemplating suicide or was armed with a gun. Nothing that the police officers found at the scene gave rise to such a suspicion. The impetuosity of his actions at the motel in running away, and at the police station in shooting himself, suggests that he was not, in fact, thinking of suicide at the time of his arrest.

43. If he was contemplating self-harm, even those who knew him best – Ms McLoon and Mrs Plum – certainly saw no signs of this. He gave no hint or sign of suicidal ideation at the motel. It follows that, even if the police had been fully informed about his mental illness and other issues when they arrived at the motel, they had no basis on which to treat him as a person who was at genuine risk of self-harm.

44. Moreover, given that the police station was only three minutes away, it was reasonable for the officers to think that they could gather any relevant information about him once they had returned to the station and handed him over to the custody manager. One of a custody manager's duties is to explore issues such as a prisoner's potential for self-harm.

45. It was also reasonable for them to think that any "issues" or "problems" Mr Plum had could be better managed at the police station, with reinforcements available if necessary, than in the foyer of the motel.

46. And, finally, given Mr Plum's behaviour, and the emotional reactions of his family and friends at the motel, as well as their lack of co-operation with the police, it was reasonable for the police officers to take urgent action to

remove him from the motel to minimise the chances of any further breaches of the peace there.

47. In my opinion, there is no material causal connection between Mr Plum's suicide and any omission by the arresting police officers to make a full check of COPS warnings and other intelligence about him.

Mr Plum's gun

48. The officers at the scene were at all times unaware that Mr Plum had a gun. They received no warning from anyone that he may have one on his person.

49. At the hotel, Ms McLoon spoke with Mrs Plum. Ms McLoon insisted that this conversation take place out of earshot of the police. Following that conversation, Ms McLoon, Mrs Plum and Ms McDonald immediately went to the room shared by Ms McLoon and Mr Plum. When police requested entry, they refused to allow the police in. Ms McLoon's evidence is that the three women searched the room for the gun and ammunition she had earlier seen in the black beanie. Mrs Plum and Ms McDonald disputed this.

50. Natalie McLoon knew he had a gun somewhere and, despite their denials, the irresistible inference from their behaviour at the motel is that Mrs Plum and Ms McDonald were informed by Ms McLoon that he had one in his room. Their conduct was much more consistent with an attempt to find the gun and ammunition and hide it from the police than with versions of events that they gave at the inquest. When questioned about these issues at the inquest, their evidence was, in my opinion, evasive, inconsistent and unreliable.

51. It is highly likely that Mrs Plum, Ms McLoon and Ms McDonald were all aware that if Mr Plum's gun was found that he would go back to gaol to serve out his suspended sentence and what would probably be a significant additional sentence for firearms offences. They probably did not suspect that Mr Plum in fact had the gun hidden on his person. They certainly did not suspect that shortly afterwards he would use it to take

his own life. In my opinion, their only concern at that time was to prevent Mr Plum from being incarcerated for a lengthy period. Even the outraged Ms McLoon did not wish this on Mr Plum.

52. This does not make the three women responsible for Mr Plum's death. They did not know what he had done with the gun and could not have foreseen what he would later do with it at the police station.

53. Nevertheless, had one of Mr Plum's supporters revealed to police that he had a gun hidden somewhere this incident probably would have played out very differently. He may have been searched by police and had the gun removed. On the other hand, when challenged about the gun, he may have pulled it out and used it on himself or on the police or Natalie McLoon or some other innocent person. He may have been shot by the police. Exactly what course it would have taken is impossible to say. The odds are, however, that he would have been kept safe and disarmed.

Should the police have searched Mr Plum at the motel?

54. When this issue was discussed during final submissions at the inquest, the proposition that the police ought to have searched Mr Plum before he was placed into the back of the police truck was strongly opposed by counsel for the Commissioner of Police and the involved officers.

55. Also during the course of closing addresses, and flowing from the facts of this case, a number of possible recommendations to the Commissioner of Police were canvassed by Counsel Assisting and myself. This led to an exchange of views concerning the law of arrest and search and its application to Mr Plum's case.

56. One suggested amendment to police procedure was to the effect that the NSW Police Force ought consider adopting a policy when persons are taken into police custody that the default procedure be that they be searched pursuant to the discretionary power under s.24 of the LEPR Act. To be clear, it was *not* suggested that the LEPR Act be amended or that police discretion to search be removed.

57. I heard lengthy oral submissions, which were followed by written submissions, from counsel for the Commissioner of Police. In the course of his oral submissions, Mr Saidi argued, among other things, that the arresting officers had not been lawfully empowered to frisk search Mr Plum after they had detained him at the motel. His argument, in essence, was that, in the circumstances that obtained at the motel, any body search by the arresting officers at the motel would have been unlawful He also argued that it was not open to police officers other than the arresting officers to conduct a search of Mr Plum at the motel.

58. Section 23(1) of the LEPR Act empowers a police officer who has arrested a person for an offence or under warrant, or an officer present at the arrest, to search that person "if the officer suspects on reasonable grounds that ***it is prudent to do*** so in order ***to ascertain whether*** the person is carrying anything" which, among other things, could be dangerous to any person including him- or herself.

59. Section 23(2) applies in a situation where a person is arrested for the purpose of taking person into custody. It also provides for a discretionary power, enabling an arresting officer, or another officer present at the arrest, to search the arrested person if the officers have reasonable grounds to suspect that is prudent to do so to ascertain whether the person is carrying anything that could be dangerous to a person (including him- or herself) or could be used to assist in escaping lawful custody.

60. In each case, the test is objective and relates not to the question whether the officer has reasonable cause to suspect that the arrested person **is** *carrying* something dangerous but to the *prudence* of the search to ascertain whether or not this is so. The search power is discretionary.

61. Mr Saidi's argument in oral submissions was that the police had had no information and no reason to suspect that Mr Plum may have been armed and that therefore none of the grounds giving rise to a discretion to search

under s.23 of the *Law Enforcement (Powers and Responsibilities) Act 2002* were available to the arresting police officers or other police at the motel.

62. If this was what Mr Saidi intended to submit, the argument overstates the restriction on police and raises the threshold for a search too high. It implies that police officers arresting a large, agitated, violent man in a public place, a man who has caused such a disturbance in a motel that staff had called the police to deal with him, a man who had resisted arrest and attempted to escape, would have been acting unlawfully in searching that person before placing him in a police truck unless they had reasonable cause to suspect he had something dangerous on him.

63. If that argument is correct, I suspect that police officers all over NSW are, inadvertently and in good faith, daily breaching the LEPR Act. If so, the Act may need urgent amendment or an authoritative statement of statutory interpretation from a superior court. In my view, however, the argument is incorrect. It is true that the arresting police did not have any information or grounds to suspect that Mr Plum was armed. But that is not the issue. The question is whether they had reasonable grounds to suspect that it would be prudent to search him.

64. Before I explain why, in my opinion, Mr Saidi's ultimate submission opposing the suggested recommendation is incorrect, it is important to lay out his argument more fully.

65. Because of his experience in other jurisdictions where he has appeared for the Commissioner in civil cases concerning claims of unlawful arrest, trespass to the person and false imprisonment, Mr Saidi was understandably concerned not to accept a proposed recommendation that he thought may expose the Commissioner to future civil proceedings if adopted.

66. One of the points of discussion was whether, if Mr Saidi's submissions concerning s 23 were correct, s 24 of the LEPR Act would have applied, enabling the arresting officers or officers at the motel to search Mr Plum.

67. In both his oral and written submissions, Mr Saidi argued that s 24 could not be used to skirt around the restrictions placed on the search powers of arresting officers. He argued that s 24 is a general provision whereas s23 is a specific provision and that therefore, according to standard canons of statutory construction, s 24 cannot override s 23.

68. While, of course, I accept the maxim that, where there is an apparent inconsistency between two statutory provisions, a general provision gives way to a specific provision, this argument, with respect, is irrelevant: ss 23 and 24 are not inconsistent. Both are specific provisions -- they address different situations. Furthermore, s 23 (4) specifically provides that nothing in s 23 limits s 24. That is, s 24 is not to be read down to conform to the test in s 23.

69. The purposes of the two sections are distinct. The first grants a power of search to *arresting officers* provided a test is met. The second empowers any police officer (including, in my view, officers who have effected an arrest and taken a person into custody but also others, such as custody managers at police stations) to search a person who is (lawfully) in police custody. The two sections are intended and designed to meet different situations although, obviously, arrest may be very shortly followed by the arrested person being taken into custody.

70. Mr Saidi argues that "the mere act of arrest leads to a person being detained in lawful custody" and then goes onto argue that if s 24 applied, ss 23 and 23A would have no work to do.

71. This, it seems to me, is where the fundamental flaws in Mr Saidi's argument emerge because he effectively conflates the concepts of arrest and lawful custody; secondly, he appears to me to have interpreted the test in s 23 too narrowly; and, thirdly, he also appears to have read into s24 limits on the application of the powers available to police officers which the statute itself does not impose.

72. It may be that the NSW Police Force interprets s 24 as having application only once a person is in custody at a police station or some other place with a custody manager. That may even have been what the legislature was intending to achieve. Those, however, are not the terms of the provision itself.

73. A person is arrested by a police officer when that officer stops and holds him or her with a view to detaining him or her. Under the common law, it is necessary for the officer to touch or hold the arrested person unless he or she immediately submits. Words, without physical restraint, may, in some circumstances suffice.[1] In short, arrest is the stopping and apprehension of a person suspected of committing an offence.

74. *Halsbury's Laws of Australia* defines "arrest" as follows:

> 'Arrest' has been given a broad definition at common law, and this definition has, in large part, survived in Australian law without substantial statutory modification. Arrest need not require any physical force, provided there is acceptance of the situation by the person arrested. The concept of arrest may cover both the stages leading to action not involving physical restraint, provided there is submission, including in particular interrogation of a suspect, and it covers actual physical restraint, which need not involve physical force. There will not be an arrest if the subject believes he or she must merely accompany the officer. The arrest may lead to detention or custody, in relation to which further rights inhere in the detained person.[2]

75. A lawfully arrested person is sometimes not taken into custody. It is quite common for arrests to be discontinued. For example, a person who is lawfully arrested may be released having been cautioned; a suspect may provide the arresting officer with an explanation that extinguishes the officer's reasonable suspicions; or the officer may decide that the matter can be dealt with by way of an on-the-spot fine or the issuing of a Field Court Attendance Notice: see s 105 LEPR Act.

76. Police custody is a different, though allied, concept. It is "the *keeping*, by police, of a person under lawful restraint *following* arrest and before the

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[1] See, for example, *Lewis v Norman* [1982] 2 NSWLR 649 at 655 per Enderby J.
[2] [80-1020] online edition http://www.lexisnexis.com/au/legal/auth/checkbrowser.do?rand=0.7716673357359612&cookieState=0&ipcounter=1#80-1020.2 visited 03 April 2013.

person is granted police bail or appears before a court."[3] (Emphasis added.)

77. A police officer takes someone into custody by exercising physical control and restraint of that person *and maintaining it.* This may mean handcuffing the person, it may mean consigning the person to a cell, it may mean placing him or her in the back of a police van. Provided that the police have lawful grounds to arrest, custody will generally be lawful.

78. It follows that Mr Plum, who had been held, handcuffed and restrained, was *ipso facto* in custody. Mr Saidi agreed that once a person was arrested and handcuffed he or she was "in custody" but nevertheless maintained the view that the test in s 23 applied at the motel and that s 24 had no application there.

79. If a person is taken into lawful custody, a police officer may search him or her: s 24 LEPR Act. Once an arrested person is taken into custody – and this may happen within a very short time – s 24 does not require that a police officer have reasonable grounds to suspect that it may be prudent to search the person. A search may be conducted without reference to such a test. Any such search, however, must comply with the requirements of Division 4 of Part 4, and Part 15 of the Act (which deal with the type of search, the manner of the search, the places searches may take place, safeguards for privacy during searches, identification of the reasons for the search and of the officer who is to conduct it, and other such matters).

80. And, of course, the *purposes* of any such search must be lawful: see s 30(1). Although the Act does not define all the lawful purposes of a proper search, the test in s 23 provides some guidance. Lawful purposes include searching for items that may harm a person; that may aid escape from lawful custody; or that may have been used in or be evidence of the

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[3] *Encyclopaedic Australian Legal Dictionary* online edition: http://www.lexisnexis.com/au/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T17066850297&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T17066853013&backKey=20_T17066853014&csi=267785&docNo=5&scrollToPosition=200 visited 03 April 2013.

commission of an offence or intention to commit an offence or be ill-gotten gains resulting from the commission of an offence.

81. In the course of submissions, I have been referred to a decision of Toner DCJ in which, in a judgment delivered, I assume ex tempore in the middle of a busy list, His Honour considered s 24.[4] This was a judgment in an appeal from the Local Court.

82. Relying on the decision of the Full Court of the Supreme Court of NSW in *Clarke v Bailey*[5], he stated that, in his view, it was necessary at common law for a police officer holding a person in custody to justify a search. He went on to say, without further reference to authority, "It seems to me... there remains a requirement that police have to have at least a reasonable suspicion before they are entitled to exercise that power. It is not and cannot be unfettered." (at [94]).

83. His Honour (at [99]) went on to pose the question, "Can such a common law restriction be placed upon the statutory capacity of police to search vested pursuant to s 24 of the [LEPR] Act?" and to decide that it could. He did so by relying on a decision of the Court of Appeal relating to powers of arrest without warrant under s 352 and 353A of the Crimes Act 1900.[6] He did not refer to principles of statutory interpretation.

84. I am not bound by decisions of District Court judges and, in any event, with the greatest of respect to His Honour, I do not regard this judgment as pertinent to the issues at hand. Even if it was relevant, I am not persuaded by His Honour's reasoning that common law interpolations ought be read into the construction of s 24, or that he has correctly interpreted *Clarke v Bailey.*

85. His Honour is correct in stating the power under s 24 is not unfettered. As I have stated above, the purposes of a search conducted under s 24 must be lawful. Conducting a search for an unlawful purpose, for

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[4] *R v Janel Anne Boekeman* [2011] NSWDC 126.
[5] [1933] 33 SR (NSW) 303 at 310.
[6] *Clarke v Bailey*[1933] SR Vol 33 303

example, to humiliate a person or to indecently or sexually assault him or her would never be authorised by s 24. It does not follow from this, however, that the Parliament intended to place further limitations on police powers under s 24. It is here that I part ways with His Honour.

86. The LEPR Act is a code. In his Second Reading Speech introducing the LEPR Bill, the Attorney-General, the Hon Bob Debus, stated[7]:

> This bill constitutes significant law reform. It radically simplifies the law in relation to law enforcement powers, setting out in one document the most commonly used criminal law enforcement powers and their safeguards. Previously complex and diverse law enforcement powers and responsibilities once buried in numerous statutes and casebooks have been consolidated into the bill so that the law is now easily accessible to all members of the community.
>
> Matters included in the bill represent a *codification of the common law*, a consolidation of existing statute law, a clarification of police powers, or a combination of these. (Emphasis added).

87. By enacting a code, the legislature seeks to consolidate and clarify the law on a given topic so as to make it a complete and unambiguous statement of the law. Orthodox canons of statutory interpretation require that the code be construed in its own terms, not by reference to previous law.[8] As Professors Pearce and Geddes have put it, "... an ambiguity in the code will justify resort to the common law... [b]ut the ambiguity must appear from the provisions of the code; it is not permissible to resort to antecedent common law in order to create an ambiguity: *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 309."[9]

88. Section 24 of the LEPR Act does not appear to be ambiguous in its terms. If there is no ambiguity, it is impermissible, under standard rules of statutory interpretation, to read a common law gloss of the type referred to by Toner DCJ into it.

89. In the absence of clear expression or necessary implication, legislation will be presumed not to abrogate fundamental common law rights.

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[7] Hansard, NSW Legislative Assembly 17 September 2002 p.4846

[8] See Pearce & Geddes *Statutory Interpretation in Australia* 6th ed Sydney, 2006 pp 272ff; *Brennan v The King* (1936) 55 CLR 253 per Dixon and Evatt JJ.

[9] *Statutory Interpretation* (2006) p.275.

Section 9 of the Act emphasises this point and also that the common law functions, obligations and liabilities of constables are not abrogated or restricted except by clear expression or necessary implication. Section 24 neither abrogates common law rights nor derogates from the functions, obligations and liabilities of police officers as constables. Indeed, new protections for citizens are provided for in Division 4 of Part 4, ss 29-34 and Part 15 of the Act.

90. In my opinion, the officers who were present at the arrest of Mr Plum had reasonable grounds to suspect that it would have been prudent to search him. The reports of a serious disturbance at the motel involving violence or potential violence towards Ms McLoon gave rise to reasonable grounds to suspect that he had committed an offence against her or some other person in the motel. I have no doubt that his arrest was lawful.

91. The same reports and behaviours could reasonably have suggested to an arresting officer that Mr Plum may have something on his person that he could use to harm himself or others, or which related to the suspected offence(s) and that it would therefore be prudent to search him. His behaviour in the presence of the police, especially his agitation, his lack of co-operation with police, his resistance of arrest, his violence during the struggle to restrain him as well as his attempted escape, together constituted more than sufficient grounds for one of the arresting officers to form the view that a search would be prudent.

92. Once he was caught, restrained and handcuffed, Mr Plum, in my view, was in lawful custody. To reiterate, a person does not have to be taken to a *place* of custody, such as a police station, to be held in custody – the criterion is whether the person is physically controlled, restrained and that restraint is maintained, the person thereby being lawfully deprived of his or her liberty. Whenever and wherever that occurs, s 24 of the Act would seem to empower a police officer to search the person in custody.

93. If my interpretation of s 24 is incorrect, the foregoing discussion may have revealed a latent ambiguity in the interpretation of s 24 and how it is

intended to work with s 23. Does a reading of other provisions in the LEPR Act imply that "lawful custody" under s 24 should be read down as reference to a police station or any other *place of custody?* (See, for example, s 23(2), which talks of an arrest for the purpose of taking a person into lawful custody, but which is itself constrained by the reasonable grounds test; and provisions relating to a custody manager's powers: s 122; or medical examination of persons in custody: s 138.)

94. If so, in my view, the Act should be amended to define explicitly the meaning of "lawful custody" as it is intended to apply under its provisions.

Search at the motel? Conclusions

95. I understand that it is usual NSW police practice for arrested persons taken into custody to be searched before they are placed in a police vehicle. Mr Plum's case makes it obvious why this is both usual practice and best practice.

96. In June 2008, I conducted another inquest into a similar death in custody. A mentally ill man was arrested and placed in the back of a caged police truck. He was not searched. In the back of the truck, he mortally wounded himself with a knife he had concealed on his person.[10]

97. In both these cases, the officers took the view that it was best to get the arrested man away from the scene of the disturbance to the police station where they expected it would be easier to deal with him and where they would have more assistance if they needed it. That point of view is understandable but does not address the problem that this case exposes.

98. Both cases, however, could have resulted in the deaths of police officers as well as of the man who took his own life. In my view, expediency or convenience should never trump the safety of prisoners to whom the police owe a duty of care or of the safety of police officers whose duties are already sufficiently risky.

[10] *Inquest into the death of Steven Caton* 19 June 2008.

99. Of course, deaths of these types are rare events. If persons were not routinely searched on being taken into custody, however, the far more common risk is that those carrying drugs on them would consume those drugs while in the back of a police vehicle on the way to a police station. Such conduct is inherently risky but also destroys evidence.

100. In summary, with the benefit of hindsight, it can be clearly seen that it would have been prudent to search Mr Plum. Given that there were several officers available to restrain him if necessary for the purpose, and there were rooms or places in the motel where a search could have taken place with appropriate dignity, in my view, he should have been searched.

Latent systems defects

101. It is not my purpose to browbeat or scapegoat individual police officers. I fully understand that policing is almost always difficult, often dirty and occasionally dangerous work. Decisions have to be made quickly and very often by young and relatively inexperienced police officers dealing with people behaving badly. Much more important is that organisational issues be addressed internally by the NSW Police Force.

102. The British expert on human error and systems failure, Professor James Reason, has written:

> The basic premise in the system approach is that humans are fallible and errors are to be expected, even in the best organisations. Errors are seen as consequences rather than causes, having their origins not so much in the perversity of human nature as in "upstream" systemic factors. These include **recurrent error traps** in the workplace and the organisational processes that give rise to them. Countermeasures are based on the assumption that though we cannot change the human condition, we can change the conditions under which humans work. A central idea is that of system defences. ...When an adverse event occurs, the important issue is not who blundered, but how and why the defences failed.[11]

103. Reason's "Swiss Cheese" model of accident causation is used in the risk analysis and risk management of human systems. It likens human systems to multiple slices of Swiss cheese, stacked together, side by side, each slice

[11] "Human error: models and management" *British Medical Journal* (2000) March 18; 320(7237): 768–770 at 768.

representing a defence against the consequences of human error. It was originally propounded by him in 1990, and has since gained widespread acceptance and use in healthcare, in the aviation safety industry, and in emergency service organizations. It is sometimes called the "cumulative act" effect.

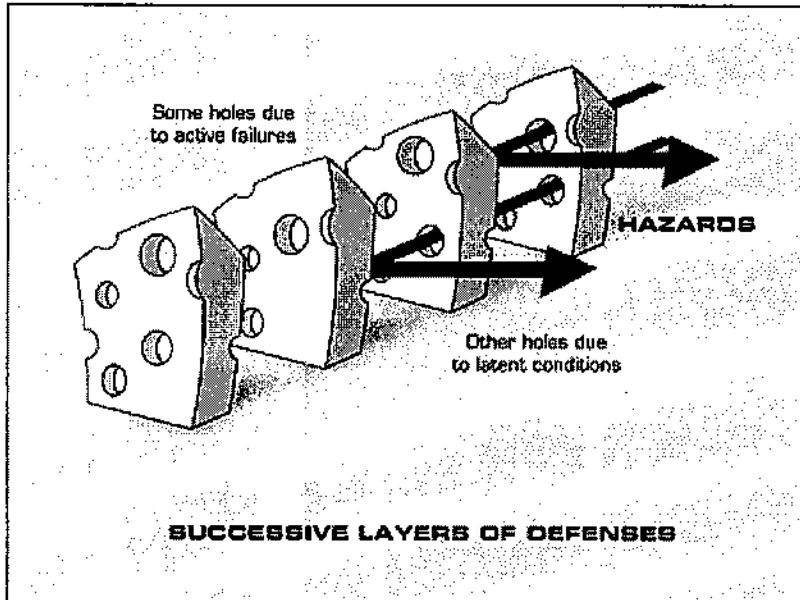

Fig 1. The defence layers work: holes do not line up

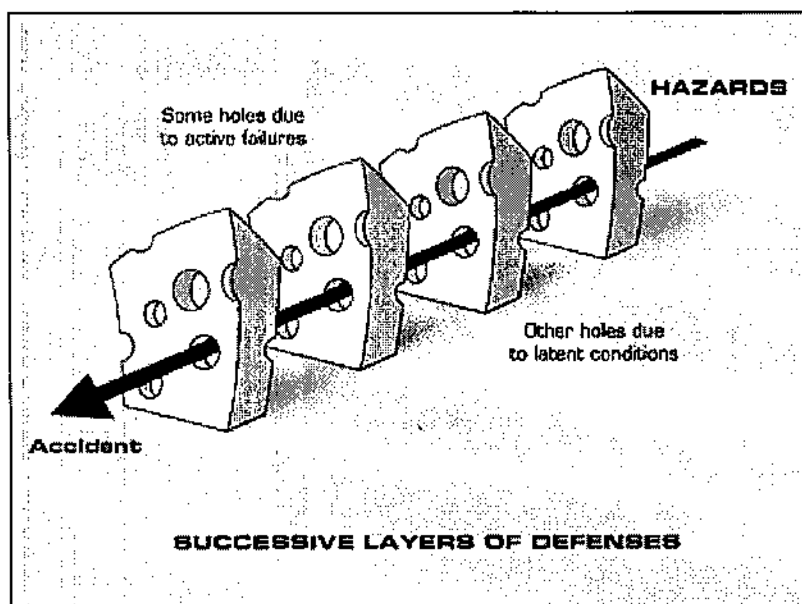

Fig 2. Accident trajectory – defence layers are penetrated [12]

104. The holes in the cheese slices represent individual weaknesses in individual parts of the system, and are continually varying in size and position in all slices. The holes may be *latent* defects: that is, they may not be obvious until something goes wrong. The system as a whole produces failures when all of the holes in each of the slices momentarily align, permitting (in Reason's words) "a trajectory of accident opportunity", so that a hazard passes through all of the holes in all of the defences, leading to a failure. (see Figs 1 and 2 above.) One of the layers of defence that was penetrated in this case was that the usual police practice of searching arrested persons before they are placed in the back of a vehicle was not followed on this occasion. The reasons for that omission are immaterial in analysing the *systems* defect in that approach.

105. Having identified a latent defect in the system, the next and most obvious step is to rectify the problem. In arguing that police policy ought not be based on rare occurrences, counsel for the Commissioner of Police overlooks a serious but latent *systems* problem. This is not a forum in

[12] http://patientsafetyed.duhs.duke.edu/module_e/swiss_cheese.html

which liability or vicarious liability *in tort* is an issue. The issues with which *this* court are concerned are the circumstances of Mr Plum's death and whether recommendations that are necessary, appropriate or desirable to reduce risk for police officers and persons in custody should be made.

106. In any event, the evidence speaks for itself, as it did in the *Caton* case. With the benefit of hindsight, it can be clearly seen that Mr Plum could and should have been searched after being handcuffed and before being placed in the police truck. Although the officers who had struggled with him may have had trouble doing so by themselves, sufficient reinforcements had arrived by the time he was placed in the truck to do so. Had the police done so, it is more likely than not that the gun would have been found and his death averted.

Should recommendations be made?

107. It is evident that organisation-wide lessons have not been learned from either the *Caton* incident or this incident. Mr Saidi's submissions suggest that this case has not prompted any intensive internal review of police practice.

108. That is unfortunate. I have no doubt that if Mr Plum had shot a police officer rather than, or in addition to, himself, a very thorough review would have taken place. It would be preferable that such a review take place internally before an armed prisoner in the back of a police vehicle does kill or injure a police officer.

109. In my view, as a result of Mr Plum's death and the findings of this inquest, the NSW Police Force ought consider changing its practice and procedures in a number of respects.

110. First, (assuming my interpretation of s 24 is correct), I propose that the Police Force should consider adopting a policy pursuant to their power under s 24 of the LEPR Act, that unless there are sound reasons *not* to do so, police officers should search all persons taken into police custody

before placing those persons in police vehicles or transporting them to a place of custody.

111. Prisoners in the back of police trucks are contained but the police have a barrier between them and prisoners. If they are not searched before being put in the truck's pod, this allows prisoners time to self-harm or take drugs or attempt to divest themselves of incriminating small items. If police subsequently become aware of something untoward happening in the back of a truck, because of the confined space in the truck, it is very much more difficult to manage the prisoner and conduct a search than if it had been done beforehand.

112. Second, I propose that the Police Force should consider adopting a policy that if, pursuant to s 23 of the LEPR Act, arresting police officers have reasonable grounds to suspect that it would be prudent to search arrested persons, they should do so unless there are sound reasons do otherwise.

113. It seems to be common sense that if reasonable grounds exist to suspect that it would be prudent to search an arrested person, it is imprudent not to do so. The question then becomes one of when, where and how. This raises the question whether it is practicable in the prevailing circumstances to conduct a search. It is raises those considerations, such as the dignity of the person, governed by the provisions of the LEPR Act.

114. Third, I propose that the Police Commissioner review the policy or practice of police officers securing their firearms before unloading persons in custody from police vehicles at police stations. In particular, I recommend that consideration be given to situations in which police transport persons who have not been searched to police stations or other places of custody. In such cases, I recommend that the Commissioner consider issuing a guideline that one or more officers should, at a safe distance from the vehicle, retain their firearms to provide protection while unsearched prisoners are unloaded.

115. This recommendation is a fallback position from that proposed in the first recommendation. Mr Plum could have shot unarmed police officers at Wagga Wagga Police Station. Not only had they unwittingly allowed him to remain armed but they had disarmed themselves.

116. Fourth, I suggest that the NSW Police Education and Training Command consider using this case and the *Caton* incident as case studies for training officers in appropriate search procedures, including the desirability of ascertaining an arrested person's identity and considering COPS warnings if reasonably practicable.

117. Fifth, I also suggest that the NSW Police Force review its training curriculum in the light of these incidents.

118. Sixth, the NSW Police Force has a program of installing CCTV cameras in its caged vehicles. I propose that it be expedited as fast as resources, funding and competing priorities allow.

119. Seventh, in addition to and following the thorough investigation that follows a Critical Incident, I propose that the NSW Police Force conduct a policy and procedure analysis, similar to NSW Health's "Root Cause Analysis" process, to determine whether or not latent systems defects have been revealed by the incident and, if so, what measures ought be taken to rectify them. This may not be a matter for detectives conducting Critical Incidents but for those involved in police management, training and policy development.

120. I make this proposal in the light of Professor Reason's identification of the characteristics of "high reliability organisations". Such organisations make a habit of learning from their errors:

> High reliability organisations—systems operating in hazardous conditions that have **fewer than their fair share of adverse events**—offer important models for what constitutes a resilient system. Such a system has intrinsic "safety health"; it is able to withstand its operational dangers and yet still achieve its objectives.
>
> High reliability organisations are the prime examples of the system approach. **They anticipate the worst and equip themselves to deal with it at all**

> **levels of the organisation.** It is hard, even unnatural, for individuals to remain chronically uneasy, so their organisational culture takes on a profound significance. Individuals may forget to be afraid, but the culture of a high reliability organisation provides them with both the reminders and the tools to help them remember. **For these organisations, the pursuit of safety is not so much about preventing isolated failures, either human or technical, as about making the system as robust as is practicable in the face of its human and operational hazards.** High reliability organisations are not immune to adverse events, but they have learnt the knack of converting these occasional setbacks into enhanced resilience of the system. (Emphasis added).[13]

121. The best organisations have a powerful culture of brutal honesty with themselves. They face up to their mistakes and failures and learn from those experiences. They conduct reviews and "autopsies" into their failures to learn what went wrong and how to fix the problems. [14] They are their own most meticulous critics.

Findings s 81 Coroners Act 2009

122. I find that Jason Lee Plum died on 14 August 2011 at Wagga Wagga Base Hospital as a result of a single gunshot wound deliberately self-inflicted while in police custody.

Recommendations s 82 Coroners Act 2009

123. To the Commissioner of Police:

(i) I recommend that the NSW Police Force should consider adopting a policy that, pursuant to their power under s 24 of the *Law Enforcement (Powers and Responsibilities) Act 2002* police officers should search all persons taken into police custody before placing those persons in police vehicles or transporting them to a place of custody, unless there are sound reasons not to do so.

(ii) I recommend that the Police Force should consider adopting a policy that if, pursuant to s 23 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, arresting police officers have reasonable grounds to suspect that

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[13] "Human error: models and management" *British Medical Journal* (2000) p. 770.
[14] See generally Jim Collins *Good to Great: Why Some Companies Make the Leap... and Others Don't* William Collins, NY (2001).

it would be prudent to search arrested persons, they should do so unless there are sound reasons not to do so.

(iii) I recommend that the Police Commissioner review the policy or practice of police officers securing their firearms before unloading persons in custody from police vehicles at police stations. In particular, I recommend that consideration be given to situations in which police transport persons who have not been searched to police stations or other places of custody. In such cases, I recommend that the Commissioner consider issuing a guideline that one or more officers should, at a safe distance from the vehicle, retain their firearms to provide protection while unsearched prisoners are unloaded.

(iv) I recommend that the NSW Police Education and Training Command consider using this case and the *Caton* incident as case studies for training officers in appropriate search procedures including the desirability of ascertaining an arrested person's identity and considering COPS warnings if reasonably practicable.

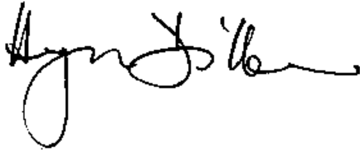
(v) I recommend that the NSW Police Education and Training Command review its training curriculum in the light of these incidents.

(vi) I recommend that the roll-out of CCTV cameras in NSW Police Force caged vehicles be expedited as fast as resources, funding and competing priorities allow.

(vii) I recommend that in addition to and following the thorough investigation that follows a Critical Incident, I propose that the NSW Police Force conduct a policy and procedure analysis, similar to NSW Health's "Root Cause Analysis" process, to determine whether or not latent systems defects have been revealed by the incident and, if so, what measures ought be taken to rectify them.

To the Attorney-General and Minister for Police:

(viii) I recommend that the Law Enforcement (Powers and Responsibilities) Act 2002 be amended so as to define with precision the meaning to be given to the phrase "lawful custody" in s 24 of the Act.



Magistrate Hugh Dillon
Deputy State Coroner