



Record of Investigation into Death

Coroners Act 1995
Coroners Regulations 1996
Regulation 14
Form 4

I, Rod Chandler, Coroner, having investigated the death of

Rene Levi

AT AN INQUEST held in Devonport on 24, 25, 27 and 28 October 2011, and in Launceston on 21 December 2011

Find That :

INTRODUCTION

1. Rene Levi ('Rene') died on 16 November 2009 at Bells Parade in Latrobe whilst participating in a school excursion. An inquest has been held into Rene's death and these are my findings arising from it.

BACKGROUND

2. Rene was aged 15 years, having been born on 14 May 1994. He resided with his family at 112 Cotton Street in Latrobe.

3. In February 2009 Rene was enrolled as a Grade 9 student at the Latrobe High School ('LHS'). Previously he had been a student of the Reece High School in Devonport.

4. LHS is a public high school within the State's Department of Education ('the Department').

5. Bells Parade is a picnic and recreational area located on the western perimeter of the township of Latrobe and is approximately 1.9 kms west of the LHS. It is bounded on the west by a fork of the Mersey River which flows in a general northerly direction into Bass Strait.

6. At the material time:

a) The staff of LHS included –

- Philip Robin McKenzie, its Principal since 2008.
- Timothy Scott Jolly, a Physical Education teacher at LHS since 2001.
- Bernard James Mulraney, a teacher of Maths, Science and Business Studies who was periodically employed at LHS as a relief teacher.
- Stephanie Helen Jackson, a Physical Education teacher who had been employed on a short term contract at LHS commencing 6 July 2009.
- Rebecca Louise Clark, a Physical Education teacher who, since late September 2009, had been contracted to work at LHS for one day per week.
- Alexander Gregory Baldock, a student at the University of Tasmania who was studying for a degree in Human Movement. In November 2009 Mr Baldock commenced a five week stint as a "prac teacher" at LHS.

b) Kelton McGuire, ('Kelton') Jarrod French, ('Jarrod') Wesley Johnston, ('Wesley') Isaac Klug, Hugh Connell, Jason MacMillan, Daniel Bower and Nikita Weeks were all Grade 9 students at LHS.

EVENTS PRELIMINARY TO THE DEATH

7. On Friday 13 November 2009 Rene's Home Group was informed via that day's Student Notes that Grade 9 students were required for all of the following week to bring "*gear for swimming and P.E.*" The students were not specifically informed that the swimming would take place at Bells Parade, it seemingly being assumed that they would know that this would be the venue because, as Mr Jolly stated, it was the "*tradition*" and had been "*a standard practice for several years*". It is not known whether Rene would have been aware of this "*tradition*," he having been a student at LHS for just 9 months.

8. At 7.45am on Monday 16 November 2009 the Bureau of Meteorology issued a forecast for the Burnie/Devonport area. Its précis was "*A few showers. Max 20.*" It was Mr Jolly's evidence that he had not familiarised himself with this forecast during the morning of 16 November.

9. Following the morning recess on 16 November 2009 the students in Grade 9 classes A, B, C & D were assembled in the school gymnasium. Four teachers had been assigned to the group, namely Mr Jolly, Ms Jackson, Ms Clark and Ms Mulraney. Mr Baldock also attended. A roll call was carried out. The records show a total of about 90 students was present. Mr Jolly was the most senior of the teaching staff and he assumed the role of teacher-in-charge. He briefed the students, confirming that the class was to be held at Bells Parade and they were to walk there. He outlined the route to be taken. He also told them that those who had brought swimming gear could swim whilst those who did not would be able to participate in a range of activities including football, cricket and frisbee throwing. The group then set out accompanied by Ms Clark and Messrs Mulraney and Baldock. Mr Jolly travelled by car to transport the first aid and safety equipment which comprised two safety ropes, each fitted with a buoy. Ms Jackson also drove her car "*in case there were any injuries and students needed to be transported.*"

10. The students arrived at Bells Parade at about 11.40 am. Mr Jolly had arrived 7-8 minutes earlier. In that time he carried out a general inspection of the eastern fork of the Mersey River and chose a section which he considered suitable for swimming. That area was bounded on the south by a section of rocky shoal which was commonly described as the "*cross country crossing.*" A wooden bench is sited on the eastern bank and overlooks this section. The area to the north and immediately downstream of the crossing was described during the inquest as Area 1. The river in this section was shallow and flowed largely as rapids. The sections of the river to the immediate north and further downstream were progressively described as Area 2 and Area 3. Both these areas were of uneven depth but in parts were sufficiently deep for swimming. Area 2 was separated from Area 3 by a slight bend in the river to the east. That bend impeded the vision of any person attempting to observe swimmers in Area 3 from the river bank near Area 1. The combined length of Areas 1 and 2 was approximately 50 metres.

11. The current was flowing downstream to the north and was described by Jarrod French as being "*fairly strong*". The water was cold but not unbearably so. Its depth varied but in portions of Area 2 and Area 3 was quite deep, as much as a metre above head height. Mr Baldock, who had swum in the river when he was a student, gave evidence that the "*depth of the water changes quite quickly, you can go from being in waist deep water to above your head quite quickly*". He further commented that the presence of submerged sticks and logs could make the area "*quite dangerous*". In the deeper areas the water was dark and visibility underwater limited to 1.5 to 2.00 metres.

12. Although 15 students had earlier indicated that they would be swimming, only 4 actually did so. These were Kelton, Wesley, Jarrod and Rene.

13. No formal assessment had been made of Rene's swimming ability since he enrolled at LHS and the school had not obtained detail of any assessment which may have been undertaken at previous schools. However, at the inquest a record was produced which shows that in late 2005, Rene, when he was a Grade 5 student at Hillcrest Primary School, along with his 32 fellow students were all assessed for water orientation and stroke development. The record shows that Rene was able to continually swim a distance of 8 metres only. The record further shows that Rene did not meet any of the national benchmark criteria for any of the listed swimming strokes. His results were the poorest in the class. It was Rene's mother's evidence that her son had improved as a swimmer

during his high school years and when she had last seen him at the beach in early 2009 he had swum "about 20 metres".

14. Mr Jolly had observed Rene swimming in a swimming pool in February 2009. He had also watched him participate in a LHS surf carnival at Hawley, although not in any swimming events. Too, he had observed him swimming in the Mersey River during kayaking classes but not in water beyond his depth. In his sworn statement Mr Jolly stated; "*Rene is a big strong lad however I don't think that he is a great swimmer*". In his testimony Mr Jolly described Rene's swimming abilities as not being in the "top category" but rather "*in the middle of the field.*" However, Mr Jolly had observed that Rene tended "*to keep drifting to the deeper end (of the pool) with the better swimmers if anything*".

15. Mr Jolly described Jarrod as a "*very competent*" swimmer. In his view Wesley was "*as strong, if not stronger than what Jarrod is.*" As to Kelton he said his "*swimming ability was poor.*" He added; "*I considered Kelton a bit of a danger to himself, he's probably over confident at times, (and) had a tendency to want to show off.....he'd sort of do whatever it took....to get noticed.*"

16. Documents produced by the school show that throughout the 2009 school year behavioural issues had arisen which led to the school writing to Rene's parents on 12 separate occasions. These issues included an apparent tendency on Rene's part to absent himself from the classroom. There were also concerns about an apparent lackadaisical approach to his school work along with some physical altercations involving other students. Mr Jolly described Rene in these terms; "*I just loved his spirit really.....he was a real sort of go getter and enjoyed doing outdoor things*" but he "*had a tendency to wander at times.*"

THE SWIMMING AND ITS SUPERVISION

17. Mr Jolly assumed the responsibility for supervising the swimmers because of his greater experience in managing students involved in water based activities. Although not specifically instructed it was assumed that the other adults would supervise those children who had chosen not to swim.

18. To supervise the swimmers Mr Jolly took up a position on the river bank between the area of the cross country crossing and the wooden bench. He estimated that he stood about 5 to 6 metres below the bench. At all times he held a safety rope with its attached buoy. Area 1 was immediately before him. At no time did Mr Jolly move into Areas 2 or 3 to observe the swimmers.

19. The swimmers were not assembled beforehand and given any specific instructions or safety warnings by Mr Jolly. He recalled Rene asking where the allocated swimming area was and he indicated it to him with a hand gesture. It was Mr Jolly's expectation that all the swimmers knew of the "*rule*" that they were to always remain "*in line of sight*" of a teacher.

20. Kelton and Rene entered the water first followed by Wesley and later by Jarrod. Kelton was inappropriately dressed for swimming wearing skate shoes, jeans and a t-shirt. He had ignored Mr Jolly's advice not to swim in this clothing. Rene was suitably dressed in board shorts and a t-shirt.

21. Initially all four boys stayed in Area 1. There was some interaction with some other students on the bank who were kicking a football into the river. The boys moved into Area 2 with Kelton and Rene being further downstream than the others. At this time Jarrod exited the water to speak to Ms Jackson. She gave permission for he and Wesley to swim around the bend and into Area 3. Jarrod and Wesley then swam downstream and around the bend into Area 3. In doing so they swam passed Kelton and Rene who by this time were near the northern perimeter of Area 2. Jarrod described the water's depth in this area as being "*basically where you could touch the bottom, still have your head above the water.*" Jarrod said at this point that "*they were throwing a frisbee to people on the bank and talking amongst themselves.*" There was nothing about Kelton or Rene's demeanour which caused him concern. Both Jarrod and Wesley then remained in Area 3 where they entertained themselves by jumping from the bank into the river. Once or twice whilst they were there Ms Jackson walked along the pathway which, in that area runs near to the river, and was able to observe the two boys in Area 3.

22. After kicking the football for a time Daniel Bower ("Daniel") sat on the river bank overlooking Area 2. He was alone and listening to his ipod. He estimates he was there about 10 to 15 minutes. Kelton and Rene were both in the water in front of him. He saw Rene dive under the water and

re-surface. He saw no signs that Rene was in distress. He was unable to assess how well he could swim because he was in waist deep water. Sometime during this period he spoke briefly to Hugh who was on the path and heading downstream. It began to rain and when it became heavier he left. When he did so both Kelton and Rene were still in the water. He was aware that both Jarrod and Wes were in Area 3 and jumping off the river bank.

23. It was Kelton's evidence that when he moved from Area 1 into Area 2 the water became deeper. Parts were over his head so that he had to tread water. He was overweight, unfit and, as previously noted, inappropriately dressed. He began to tire describing himself as *"just worn out, exhausted."* He then decided to *"turn around and get out."* At this point Rene was nearby but a little further downstream. Jarrod and Wesley were further ahead and heading around the bend into Area 3. Kelton said that at this time Rene was "mucking around" but he did not notice any sign of distress. Nevertheless, before he had exited the water Kelton spoke briefly to Isaac Klug ('Isaac') who was on the nearby bank. He asked him if *"(Rene) was all right and if he was just mucking around still."* He said *"Poor old Klug didn't know."* By this time it was raining.

24. According to Mr Jolly the four boys had been in the water about 11 to 12 minutes when the rain started. Many of the students on shore sought cover among a stand of trees which separates the river area from an open park space. Mr Jolly signalled for the swimmers to leave the water. Kelton was slow to respond and was yelling obscenities to other students who were running for cover from the rain. He had to be cajoled out of the water by Mr Jolly. He then made his exit in the area of the cross country crossing and Mr Jolly accompanied him as they walked past the wooden bench and sought shelter in the treed area behind it.

25. It was Mr Jolly's evidence that sometime after he signalled for the swimmers to leave the water, and before Kelton had complied, he had a recollection of seeing Rene within Area 2. He says when he initially saw him he was in about the middle of the river and had then *"sort of dog paddle(d)"* towards the bank suggesting that he was intending to leave the water. He said that he then saw Rene stand up. At this point he was in waist deep water about 2 to 3 metres from the river edge. A boy was on the bank in front of Rene and Mr Jolly said; *"I just assumed he's come to meet him and go."* Mr Jolly could not name the boy on the bank. He accepted that he did not see Rene actually leave the water.

26. It was Mr Jolly's further evidence that whilst he was helping Kelton out of the water and later when walking up the bank towards the bench he scanned the river and on neither occasion did he see any person in the water.

27. Isaac had been kicking a football in the park area immediately east of the river. When the rain began he sought shelter among the trees between the park and the river. From there he observed Rene in the water. In his sworn statement he says; *"(Rene) was about 3 metres from the near side of the river and the water looked deep. Rene was bobbing up and down in the one spot. He was coming out of the water to his armpits and then would go fully under. At one stage he called out for help. He waved one of his arms as though he was waving to me. He then kept his eye out of the water and his nose and mouth under the water."*

28. Hugh Connell ('Hugh') was also sheltering among the trees near to Isaac. He is a competent swimmer and had been a lifeguard at the Latrobe pool for 2 years. Isaac pointed out Rene to him. Hugh observed; *"(Rene) was acting like he was drowning. He was putting his arm out in front of him as though he was trying to pull himself to shore. At all times he had a grin on his face. At time (sic) he would call out 'help.'" Together Isaac and Hugh observed Rene for "10 seconds roughly."* In Hugh's assessment there was 'no sign of him being in trouble.' Rather, he thought that Rene was *"playing around."* Hugh assured Isaac that Rene's behaviour was consistent with his *"joking all the time"* personality. At this point Hugh left but Isaac remained.

29. Isaac continued to watch Rene. He said Rene then *"went under the water and I didn't see him again. I believed that he swam under water and around the corner. I was worried at the time but didn't think he would drown."* This was the last sighting made of Rene whilst he was alive.

30. It was Jarrod's evidence that several students arrived in Area 3 whilst he and Wesley were swimming there. They were concerned that Rene *"had been under the water for a long time."* Jarrod was unsure who had told him this although he did not believe it was Isaac. He agreed to look for Rene. He got out of the water intending to walk upstream before re-entering the water and then swimming downstream with the current which by then was becoming stronger. However, before he

could do this he was told by others that Rene had been seen heading back to school. He then continued on intending to collect his belongings before heading back to school himself.

31. Because Isaac *"still had a slight bit of concern"* for Rene's welfare he walked around to Area 3 to look for him. It is not clear when he did this. He was firm in his evidence that neither Jarrod nor Wesley were present in or about Area 3 when he visited there. The likelihood is that there was an interval between when Isaac last observed Rene in Area 2 and when he attended in Area 3 during which Jarrod was advised by others of their concern for Rene and both he and Wesley then got out of the water and left that Area.

32. At the time Mr Jolly was overseeing Kelton's exit from the water Mr Mulraney, Ms Jackson, Ms Clark and Mr Baldock were all sheltering in the trees in the general area of the wooden bench. Mr Jolly accepted that after he reached the stand of trees he did not have a clear view of Area 2. It was Mr Baldock's evidence that from this spot the swimmers in the river could not be seen.

THE DEPARTURE FROM BELLS PARADE

33. Initially the rain was light but it developed into a heavy squall which persisted for about 7 to 8 minutes. The rain came as a "surprise" to Mr Jolly. It had not been planned for and it caused chaos. The timing and order of the response on the part of Mr Jolly and the other adults is unclear. However, the evidence shows that:

- After he had sheltered for several minutes Mr Jolly walked downstream on the pathway intending to check on Jarrod and Wesley. He did not reach Area 3 before he sighted them both moving away from the river. He thus knew they were safely out of the water.
- Many of the students were becoming wet and uncomfortable and some were agitating to return to school. Mr Jolly gave his permission for Mr Baldock and Mr Mulraney to escort a group back to LHS. They then left with about 20 to 25 students. A roll call was not taken beforehand. It was Mr Jolly's evidence that a roll call would have been *"impracticable"* as *"some students had already left the area.....(and others) were scattered about sheltering under different trees."* This group arrived back at the school at about 12.20pm.
- Ms Jackson found a pair of shoes in the area of the wooden bench. It was agreed among the staff that they belonged to Rene. Some students were asked if anyone had seen Rene. One of the students was Nikita Weeks. She said that she *"was pretty sure he had left."* Her basis for this comment was that *"I'd seen Rene's friends leaving and I thought I saw someone leaving wearing the same colour top as Rene."* Mr Jolly and the other staff accepted this explanation. The fact that Rene had seemingly set out to walk 1.9km to his school without wearing shoes did not cause any of them to suspect that he may still have been in the river. Ms Jackson took Rene's shoes with her when she returned to school. Before she did so she made a cursory check of Area 3 to see if she could see Rene. She also, along with Ms Clark, drove her car downstream to the barbeque and picnic car park area to see if Rene or any other students were *"hanging around."* They did not find anyone. They then drove back to school.
- Jarrod had left his belongings in the area of the wooden seat. When he returned to collect them Mr Jolly was there. He asked Jarrod if he'd seen Rene and Jarrod replied that he's been told by others that *"he's headed back."*
- After most of the students had returned to school Mr Jolly did a general *"sweep"* of Areas 1, 2 and 3 along with the park area to collect equipment and to pick up any rubbish. He then drove back to LHS.

THE FINDING OF RENE'S BODY

34. In the afternoon of 16 November Mr Jolly had a kayaking class upstream from Bells Parade beginning at 1.25pm. Rene was in the class but did not appear. One of the students said that he thought Rene had gone home. However, shortly afterwards another student said that he had not seen Rene during the lunch break. Mr Jolly started to be concerned. He paddled his kayak downstream to the area of the cross country crossing and generally scanned the area but saw nothing. However, later on in the lesson three other students including Isaac told Mr Jolly of Rene's behaviour and in particular that he appeared to be feigning drowning and going under the water. This caused Mr Jolly serious concern. He then re-paddled his kayak upstream and this time went

beyond the cross country crossing. He paddled downstream near the eastern bank and through Areas 1, 2 and 3. He then turned and began paddling upstream, this time closer to the western bank. He then sighted Rene's body in Area 2. It was fully submerged.

35. Mr Jolly immediately returned to his car and telephoned Mr McKenzie. Tasmania Police and the Tasmanian Ambulance Service were contacted and they promptly attended at Bells Parade. Rene's body was later recovered by Constable Melle Zwerver who had to dive under the water to retrieve it. He said the water at this spot was about 1.5 to 2 metres deep.

THE POST-MORTEM AND CAUSE OF DEATH

36. A post-mortem examination was carried out by State Forensic Pathologist, Dr Christopher Lawrence. He has reported that the autopsy did not reveal any signs of foul play nor any apparent traumatic injuries. It did reveal changes consistent with drowning. In Dr Lawrence's opinion Rene died as a result of drowning. I accept Dr Lawrence's evidence.

SOME COMMENTS AND FINDINGS

37. All witnesses, in my view, have been honest and forthright in their testimony and have done their best to provide a full account of events as they recall them. Not surprisingly however, some inconsistencies have arisen. Nevertheless, having considered the evidence in its entirety I conclude that the sequence of events which led to Rene's death was as follows:

- Kelton and Rene and later Jarrod and Wesley all entered the water and for a time remained in Area 1. They then all moved into Area 2 with Kelton and Rene being further downstream than the others.
- Jarrod then sought and received the permission of Ms Jackson for him and Wesley to swim around the bend and into Area 3. They proceeded to do this, swimming past Kelton and Rene as they did so. They then remained in Area 3.
- Kelton and Rene continued to entertain themselves in Area 2. During this period they were observed by Daniel who noticed nothing amiss.
- It began to rain. As it got heavier Daniel left the bank to seek shelter. At about this time or shortly beforehand Daniel spoke to Hugh at or near the path. Both Kelton and Rene were still in the water at this time.
- Kelton and Rene moved into a section of Area 2 which was beyond their depth. They had to tread water or swim. Kelton began to tire badly and made the decision to get out of the water. At or about this time Mr Jolly gave his direction for all the swimmers to exit the water.
- When Kelton began to leave the water Rene was slightly downstream from him and in water beyond his depth. Kelton harboured some concern that Rene, like him, may be tiring and having difficulty staying afloat. It was because of this concern that he spoke to Issac asking if Rene *"was alright."*
- At this time Issac was able to observe Rene. He was also concerned that Rene may have been in trouble. He spoke to Hugh. He was assured that Rene was *"joking"*, a judgment based upon Rene's apparent tendency to joke and skylark. Unfortunately, this assessment of the situation was incorrect as Rene was in fact likely in very serious difficulties and in urgent need of help.
- Issac's belief that Rene, when he again went under the water, did so to swim around the corner was in all probability incorrect. More likely is the fact that Rene drowned, either at this time, or very shortly afterwards.

38. I find, based upon the evidence, that Rene, whilst comfortable participating in water-based activities, was a modest swimmer at best and required close supervision, particularly when swimming in areas where the water level was beyond his depth. This was the case at Bells Parade on 16 November 2009 when the depth of the water in Area 2 was in parts as deep as 1.5 to 2 metres. Regrettably, the level of supervision he required was not forthcoming.

39. Mr Jolly was the sole adult who took responsibility for all the swimmers on this day. It is apparent, and I so find, that Mr Jolly did not at any time instruct the swimmers upon water safety

rules save that he may have indicated, in response to individual enquiry, the general area in which swimming was permitted.

40. Mr Jolly was the only staff member who had any knowledge of Rene's swimming capacity. He had not observed him swimming in open water which was beyond his depth. He acknowledged that Rene was not "*a great swimmer.*" These matters required Mr Jolly to be most vigilant in his supervision of Rene, particularly at those times when he was in water beyond his depth.

41. It is apparent, and I so find, that those movements of Rene observed by Issac just prior to him disappearing under the water were not observed by Mr Jolly. This in all likelihood is explained because at the time of their occurrence Mr Jolly was either focussed on overseeing Kelton's exit from the water or that exit was complete and he was intent on securing shelter for himself from the rain which by this time was falling heavily.

42. It was Mr Jolly's evidence that his last recollection of Rene was made after the rain had commenced and he had signalled for the swimmers to leave the water. He said that at this time Rene was standing up and about 2-3 metres from the river edge. Rene's movements had suggested to Mr Jolly that he was leaving the water. I accept that this may well have been Mr Jolly's last observation of Rene. However, it could not, when considered with the other evidence, have occurred at the time suggested by Mr Jolly. Rather, it is my view, and I so find, that this recollection must have been made at an earlier time, perhaps when Daniel was on the riverbank and before both Rene and Kelton moved into the deeper water when Kelton started to tire thus prompting his decision to exit the river.

43. It was Mr Jolly's further evidence that he had scanned the river, firstly whilst he was helping Kelton out of the water and later when walking with him up the bank. He said that on each occasion he saw nobody in the river. I accept that Mr Jolly may well have scanned the river at these times. His failure to observe Rene may be explained by either the fact that by this time Rene had disappeared under the water or his scans were so cursory that they failed to detect Rene's presence. It must be borne in mind that at this time Rene was, if he had not already disappeared, at a point in the deep section of Area 2 and an estimated distance of perhaps 30 to 40 metres from Mr Jolly. Too, the rain had become particularly heavy with a likely limiting effect upon visibility.

44. It is in my view an inescapable conclusion, and I so find, that at the time of Rene's drowning he was not being observed by either Mr Jolly or any other staff member and hence was unsupervised.

45. Mr Jolly, as the teacher in charge, had permitted both Kelton and Rene to swim in a section of the River which he knew to be of uneven depth with sections well beyond the depth of both these students. He described Kelton as a poor swimmer and Rene was only moderately better. He permitted Kelton to enter the water when he was fully dressed and clearly unfit. He knew that Kelton was "*over confident at times.*" He knew too that Rene had a tendency, observed at the swimming pool, to drift towards the deeper water. All these matters together should have alerted Mr Jolly to the likelihood that one or both of these swimmers would be at risk of drowning if they were permitted to swim in deep water. This situation required Mr Jolly to either forbid both swimmers from going beyond Area 1 and into deeper water or, upon them doing so, taking up a position, along with another teacher, where they could have immediately responded if either or both swimmers got into difficulties. The failure on Mr Jolly's part to take these steps is illustrative of an overly casual and inadequately planned supervisory regime.

THE DEPARTMENT'S OUTDOOR EDUCATION GUIDELINES

46. At the time of Rene's death the Department had in place Outdoor Education Guidelines ('the Guidelines'). These were accessible via the Department's internal website. Their purpose was to provide advice to Principals and their staff upon the conduct of excursions and outdoor education programs.

47. A preamble to the Guidelines includes this statement; "In all instances it must be remembered that those teachers responsible for all outdoor education programs, including the Principal, will be held accountable for the conduct of such activities and for the health, safety and welfare of participating students."

48. A section of the Guidelines is entitled "*Essential information including approval processes.*" That section includes the following statements:

- *“All schools should develop an Outdoor Education policy to assist students, teachers and parents in understanding the purpose of outdoor education.”*
- *“All programs outside the school require the approval of the Principal who must maintain a record detailing supervision delegations and safety processes of all programs.”*
- *“Parents should be given as much notice of the activity program as possible.”*
- *“The Principal must appoint a registered teacher for all excursions and activity programs who has the authority to make decisions that will be supported and implemented by all other excursion and/or activities staff.”*
- *“The Principal is responsible for all arrangements for out of school programs whether it is a local excursion or a challenging outdoor activity. Principals and teachers are required to ensure that all students are adequately supervised at all times, taking into account the physical and emotional maturity and gender of the students, the degree of actual risk associated with the activity and the skills, knowledge and experience of staff and their capacity to manage emergency situations.”*
- Under the heading “Safety” is this statement; *“All types of Outdoor Education programs provide a challenge for the participants, and an element of real risk may be part of that challenge. The safety of participants must, however, be planned for all stages of the program (safety and risk management) and parents must be included through the Approval process.”*

49. A separate portion of the Guidelines is dedicated to “Safety and Risk Management”. It provides that a risk management plan must accompany every Outdoor Education approval form. The Guidelines prescribe that a structured risk management process firstly identifies the risks, secondly assesses the likelihood and consequences of risks occurring and thirdly, identifies risk treatment activities to lower risks to acceptable levels (e.g. from an extreme or high risk to a medium or low risk). The Guidelines refer to templates incorporating different risk management plans which can be utilised depending on whether the activity qualifies as a minor or major excursion.

50. The Guidelines distinguish between minor and major excursions. The former are stated to include sports days and visits to parks, museums, environment centres or other places of educational value within the local community. In contrast major excursions are defined as overnight and residential excursions and adventure activities that have an inherent risk factor. The Guidelines stipulate that it is sufficient for schools to obtain parental consent for their child to attend all minor excursions and activities to take place in the course of a year so that specific parental permission for each excursion is not required. In contrast, the Guidelines provide that in the case of major excursions the prior written consent of a parent must be obtained before a student participates in any such excursion.

MATTERS ARISING RELEVANT TO THE GUIDELINES

Inherent Risk

51. It was the evidence of Mr McKenzie that the outing on 16 November 2009 qualified as a minor excursion within the Guidelines. It is apparent from his testimony that he formed this view without closely considering whether swimming was an activity involving an inherent risk. This exchange with counsel-assisting is illustrative:

“Had you given any consideration in 2009 as to whether the aquatics program at Bell’s Parade entailed any inherent risk?.....There – not any special consideration, no. It’s –

Had you considered it at all?.....I had often considered the safety of students in water environments, yes.”

So what was your state of mind as to what was meant by the words “inherent risk”?.....I guess that in many cases that with the risk it was more about the teachers, their planning. I guess now looking back on that there is more of a risk possibly than was the wording of that, that might be an issue to us.

So the risk of a near drowning or drowning had not crossed your mind?.....It’s not

as if it hadn't crossed my mind but it's not the detail, I guess, that we had gone into.

52. It was Mr Jolly's evidence that "swimming was the highest risk activity." He accepted that it involved an "inherent danger"

53. The Department, in a 'Response' provided to the inquest accepts that swimming is an activity which involves an inherent risk. Clearly that risk is the risk of drowning. The admission made by the Department is a proper one. It follows that under the Department's Guidelines the outing to Bells Parade qualified as a major excursion and it should have been treated as such by LHS, its principal and staff.

Parental Consent

54. Because the excursion to Bells Parade involved an inherent risk prior notice needed to be given to the parents of all participants and they needed to provide their consent. Did Rene's parents have specific notice of that outing and had they consented to it?

55. On the evidence, Rene's parents could only have been aware of the upcoming excursion if Rene had informed them of the relevant reference in the Students Notes of 13 November and if he knew or had deduced that the swimming was to take place at Bells Parade. It was the unequivocal evidence of Mrs Levi that she was unaware that her son may be swimming during his physical education class of 16 November and that it would be taking place at Bells Parade. I accept Mrs Levi's evidence and hence find that Rene's parents did not have prior notice of the excursion planned for 16 November.

56. It was the further evidence of Ms Levi that in February 2009 she signed two consents concerning Rene and his participation in activities outside the school grounds. The first was attached to a proforma letter dated 5 February. That letter states:

"During the school year students will be working off-site as part of their program, eg excursions, activity days, community based projects.

To avoid students having to return permission forms every time they leave school a general permission form is included for you to sign and return. Whilst off-site students will be supervised and follow normal school expectations. Please be aware that giving permission on this form does NOT mean that you cannot stop your child from participating in the excursions if you wish. There will be written notice prior to any excursion and you will be able to withdraw permission at that time if you wish."

57. In signing the attached consent Mrs Levi gave permission for Rene to be off-site "as part of (his) learning program" during which time he would be "supervised and follow normal school expectations."

58. The second consent forms part of an Information Validation Form signed by Mrs Levi on 13 February. That Form includes a section entitled, "Consent for Minor Excursions" and which is expressed in these terms:

"Minor excursions include visits on foot or using vehicular transport to places of educational value within the local community that last one day or less. All other excursions that are overnight or have an inherent risk will require you to sign a separate consent form. The school will notify parent/guardians prior to an excursion being conducted, in a timely manner. Parent/guardians have the opportunity to withdraw their child, in writing to the Principal, from any excursion."

59. Mrs Levi has ticked a box alongside this wording indicating that she consented to Rene participating in minor excursions during 2009.

60. It is clear, in my view, that the two consents completed by Mrs Levi were designed to obtain parental consent for Rene's participation in minor excursions only and not for major excursions including those involving an inherent risk. It is further clear that parental consent was not sought for the excursion on 16 November because the school considered this to be a minor excursion not involving an inherent risk and hence covered by the existing consents. The excursion to Bells Parade did, as I have found, involve an inherent risk and hence the failure by the principal and staff of LHS to secure a specific consent did, in my view, contravene the Department's Guidelines.

61. It was Mrs Levi's further evidence that had she had notice beforehand she would not have given permission for Rene to swim at Bells Parade unless either she or her husband could have been present. I am not prepared to find, upon this evidence alone, that Rene would not have swam at Bells Parade in the absence of a parent if they had prior notice of the excursion. Nevertheless, I am satisfied that by failing to provide such notice the school denied Mr and Mrs Levi the opportunity to refuse their consent or to take such other steps as they considered necessary to better ensure their son's safety.

Risk Management

62. It was conceded by the Department and by the school that a written risk assessment was not prepared for the excursion on 16 November 2009. This was in clear contravention of the Guidelines. It gives rise to this question; separate from providing a written risk assessment, what, if anything was done to assess and to manage any risk, including most critically the risk of drowning associated with the excursion to Bells Parade? The only relevant evidence was provided by Mr McKenzie and Mr Jolly.

63. In an affidavit, under the heading **Written risk assessment** Mr McKenzie deposed:

"In our health and Wellbeing curriculum, Grade 7 and 8 students are taught about water safety, and the lessons are reinforced in grades 9 and 10. Before each lesson, teachers give details and reminders to students regarding water safety in rivers, dams, pool and at the beach. According to assessments of skills and conduct of the group, teachers are placed strategically near water and land activities. Teachers are responsible for the provision and care of gear and for accompanying students to and from off-site venues. The teacher-in-charge checks water level, condition of the river, tidal movement and weather conditions. The accompanying teachers have informed me that this was done by them at Bells Parade on the morning of Monday 16th November 2009. The school is developing a system whereby all outdoor activities will have a written risk assessment plan."

64. Further, in an exchange with counsel for the Department Mr McKenzie provided this further evidence:

"We've heard evidence to the effect that there was no written risk assessment form completed in respect to the excursion to Bells' Parade on the 16th of September. Is there any reason for there not having been one completed?.....The 16th of November?"

Yes?.....We weren't in the practice of necessarily writing or having published risk assessments, however they took place all the time in discussions with the teachers and the teachers discussing it amongst themselves with students. Every lesson that went to a place like Bell's Parade was begun with reminders of the things that they had to know about.

And such lessons, before they took place, were the subject of discussions with you; that is to say, when there was to be an excursion or movement of students off site?.....Not necessarily with discussion with me every time. I would review it with the head of PE occasionally. We'd have a discussion about what was going well. Mostly fairly informal discussions, but the PE staff themselves would review all their practices all the time.

And how did you know that?.....Well, my information from them is that they did that. Yes."

65. Mr Jolly did not attest that at any time he had discussed or reviewed with Mr McKenzie the management of risks associated with swimming at Bells Parade nor did he attest that he had, either prior to 16 November 2009 or on that day, been part of any review of this subject with other physical education teachers. He was unaware that the Guidelines required a formal risk assessment. It was his evidence that on the morning of 16 November he did brief the students in the gymnasium but he did not, in that briefing, provide any direction or instruction upon water safety. Further, no such direction or instruction was provided when the students arrived at Bells Parade and before the swimmers were allowed to enter the water. In the result none of the swimmers received, contrary to Mr McKenzie's expectation, *"reminders of the things they had to know about."*

66. It is clear upon the evidence that the risk management process applied to the Bells Parade excursion by Mr McKenzie and his staff was informal, ad hoc and seriously inadequate. It fell well

short, in my opinion, of the properly structured risk management process prescribed by the Guidelines. Had that process been applied it would, in my view, have identified drowning at the outset as a risk and set in train a proper consideration of the likelihood and magnitude of that risk and those steps required to alleviate it. A rigorous application of that process should, in my view, have identified the following matters which amplified the risk:

- A shortfall in the real knowledge of Rene's swimming capacity in open water beyond his depth.
- The possibility that Rene may not previously have swum in Area 2, either during a school excursion or privately.
- Rene's recent behaviour history, a factor relevant to his supervision.
- Students such as Kelton seeking to swim when not suitably dressed.
- Students known to be poor swimmers such as Kelton entering water known to be beyond their depth.
- Deterioration in the weather conditions.

Identification of the above risks would have in turn led to the adoption of appropriate plans to alleviate or eliminate them. These should have included:

- The prior securing of parental consent.
- The prior assessment of each student's swimming capacity in a river environment.
- The design of strategies to ensure that students, assessed or known to be poor or average swimmers, did not enter areas of the river known to be beyond their depth.
- The design of strategies to ensure that students who were not suitably dressed for swimming did not enter the water.
- The design of a supervision plan for swimmers that ensured that:
 - a) All swimmers were supervised by sufficient teaching staff at all times.
 - b) That misbehaving students could be promptly removed from the water without the supervision of remaining swimmers being compromised.
 - c) All students known to have entered the water were observed by a teacher to have safely and completely exited it.
- The adoption of a plan to ensure that the proper supervision of all students was maintained in the event of deterioration in the weather conditions. Such a plan would need to include a strategy to ensure that a roll call of all students took place prior to the students being permitted to disperse.

67. It is my view that if LHS, its principal and staff had applied the risk management process prescribed by the Guidelines then it is likely that such process, if conscientiously followed, would have identified the risks associated with the Bells Parade excursion and settled upon strategies which in all likelihood would have avoided Rene's tragic death.

The Department's Response

68. Ms Katharine O'Donnell is the manager of the Department's Legal Services Unit. It was her evidence that:

- Following Rene's death the Department commenced a complete review of the Guidelines undertaken by a working group.
- The working group received feedback that many principals had a misunderstanding of the application of the Guidelines believing that they applied to specific outdoor education

programmes such as scuba diving, sailing and Duke of Edinburgh Award exercises and not to "run of the mill" school-based excursions."

- It was agreed that the Guidelines were "wordy and difficult to navigate and that they could be drafted and presented in a clearer and simpler manner to help ease of use within schools."
- The working group created a new document entitled The Off-Campus Activities Handbook. ('the Handbook') Its content is similar to the Guidelines but, as I understand it, is in a more accessible and user-friendly format. One of its aims was to make it clear that it has application to all off-campus excursions.
- The Handbook was placed on the Department's website. At the same time the Department's Acting Secretary wrote to all principals informing them of its availability and requiring them "to consider it and discuss it with their staff."
- She has conducted Principals' forums in each of the State's education districts to inform principals "about the changes and the Department's expectations of them as managers."
- New principals are now required to participate in an induction programme which incorporates their familiarisation with the content and requirements of the Handbook.
- Departmental schools are subject to audit and it's intended that one of the subject areas for audit is compliance with the Handbook. However, it was not apparent whether a programme for such audit is yet in place.

69. It is to the Department's credit that it, having identified some shortcomings in the format of its Guidelines and in their understanding among principals has moved quickly to address these issues. However, it is critical that there be a regular audit of each Departmental school's compliance with the Handbook and it is my recommendation that this be put in place and acted upon.

DID ANY PERSON CONTRIBUTE TO RENE'S DEATH?

70. S28(1)(f) obligates me to identify any person who contributed to the cause of Rene's death. An identical provision in the *Victorian Coroners Act* 1985 was the subject of consideration by the Court of Appeal in *Keown v Khan and Anor* [1999] 1 VR 69 where Callaway JA said at [16]:

"The findings by a coroner as to how death occurred and the cause of death should, where that is possible, identify any person who contributed to the cause of death. Section 19(1)(e) serves no purpose other than to ensure that that is done. The reference to contribution to the cause of death reflects the commonplace truth that it is sufficient if a person's, acts or omissions are a cause of a relevant event. Civil juries are, for example, regularly asked whether the negligence of the defendant was a cause of the plaintiff's injuries. The test of contribution is solely whether a person's conduct caused the death. It may have been the only cause or one of several causes. There are also cases where no one satisfies the description in s. 19(1)(e), as in the case of a death solely from natural causes. In determining whether an act or omission is a cause or merely one of the background circumstances, that is to say a non-causal condition, it will sometimes be necessary to consider whether the act departed from a norm or standard or the omission was in breach of a recognised duty, but that is the only sense in which para (e) mandates an inquiry into culpability."

71. I propose applying the test set out by Callaway JA in determining the issue of contribution in this instance. There are, in my view, several potential contributors. I will deal with each in turn.

Mr Jolly

72. Mr Jolly was the most senior teacher among the staff caring for Rene and his fellow students and he was the person in charge of the excursion. Critically, he was the sole person who took responsibility for the supervision of the swimmers. As I have found above Mr Jolly failed to discharge this responsibility by properly supervising Rene and this failure was, in my view, a factor contributory to the death.

The Excursion Staff Apart from Mr Jolly

73. Mr Mulraney, Ms Clark and Ms Jackson, as teachers, all had a collective responsibility to ensure

that all students participating in the excursion were properly supervised. This responsibility did not extend to Mr Baldock as he was not a teacher at the time. However, from the outset it was made clear by Mr Jolly, as the teacher-in-charge, that he would assume sole responsibility for the supervision of the swimmers and by inference, at least, the remaining students were the responsibility of the others. In these circumstances it is my view that no finding can properly be made that the conduct of either Mr Mulraney, Ms Clark, Ms Jackson or indeed Mr Baldock contributed to the cause of Rene's death.

The Department

74. The Department accepts that its Guidelines were "*wordy and difficult to navigate.*" Its working group discovered, following Rene's death, that many principals did not have a full understanding of the guidelines and their application. This was illustrated both by Mr McKenzie and by Mr Jolly. It is clear from the former's evidence, which I have set out, that he did not appreciate that swimming was an inherent risk activity which required the outing to Bells Parade to be treated as a major excursion thus requiring parental consent and a risk management assessment. Mr Jolly was similarly ignorant, it being his evidence that he had never received any instruction upon the guidelines and the obligations they imposed upon him.

75. I am satisfied upon the evidence that the Department failed to ensure that the principal and staff at LHS were sufficiently aware of and fully understood the Guidelines, most particularly their obligations with respect to proper risk management. Had the Guidelines been complied with so that a properly considered risk management plan was put in place and followed it is likely, as I have said earlier, that Rene's drowning would have been avoided. In these circumstances, the failure on the Department's part to ensure that Mr McKenzie and his staff were aware of and fully understood the Guidelines was a factor which contributed to Rene's death.

The Principal

76. The Guidelines stipulate that Mr McKenzie, as principal, would be held accountable for all outdoor education programmes and for the health, safety and welfare of participating students. However, the evidence makes it clear, as I have already noted, that Mr McKenzie did not have a full understanding of the Guidelines and in particular their requirements for excursions involving inherent risk activities. The evidence of Ms O'Donnell was clear that Mr McKenzie was only one of many principals with this deficit. It was, as I have found, a consequence of a systemic failure on the Department's part to ensure that its principals were fully aware of and understood the Guidelines. In these circumstances it could not be fairly concluded, in my view that Mr McKenzie, by his failure to ensure the Guidelines were complied with had so far departed from the norm so to permit a finding that he contributed to Rene's death.

The Students

77. When Kelton made the decision to exit the river he harboured, as I have found, a concern for Rene's well-being. A short while later both Isaac and Hugh observed Rene behaving in a manner which may have suggested that he was at risk of drowning. None of the boys raised the alarm or initiated any other lifesaving measure. Did this omission represent such a departure from the norm or standard so to require a finding of contribution? This question, in my view, must be considered by reference to that norm or standard applicable to 15 year old schoolboys, and in Hugh's case, one with some lifeguard experience. Too, it must be borne in mind that all boys believed Rene to be prone to skylarking. When considered in this context, it is my view that their judgment that Rene was engaged in horseplay, erroneous as it sadly transpired, was not unreasonable or beyond the norm. It follows that their conduct does not, in my opinion, permit a finding that any one of the boys contributed to Rene's death.

FINDINGS REQUIRED BY S28(1)(a) TO (d) OF THE CORONERS ACT 1995.

78. I formally find that Rene Levi, who was born at Auckland in New Zealand on 14 May 1994, died at Bells Parade in Latrobe on 16 November 2009. The cause of death was drowning which occurred whilst Rene was swimming as part of an outdoor education excursion.

79. I conclude by extending my sincere condolences to Rene's family.

Dated this 7th day of May 2012.

Rod Chandler
Coroner

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