IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-996
[2021] NZHC 311

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review
BETWEEN	TANYA FELICITY DUNSTAN Applicant
AND	THE DISTRICT COURT AT MANUKAU First Respondent
	JOHN DUDLEY NEILL Second Respondent
	PATRICIA PLOWRIGHT, KAREN ALLEN, RACHAEL HARRIOTT AND TRICIA STEVENSON Third Respondents

Hearing:	25 November 2020
Counsel:	V McCall, Counsel assisting the Court
Appearances:	TF Dunstan, Applicant in person
Judgment:	26 February 2021

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 26 February 2021 at 3.30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Introduction and summary

[1] The applicant, Ms Dunstan, wants to commence a private prosecution in the District Court against her former partner (Mr Neill, the second respondent) and also the third respondents, who are teachers or others employed at a primary school in Auckland. The proposed private prosecution relates to Mr Neill's care of his and Ms Dunstan's seven-year old son (who I will refer to as "K") following K's fall from playground equipment in May 2019, and what Ms Dunstan also alleges to be failings on the part of the third respondents in the days following K's fall.

[2] Ms Dunstan wants to bring charges against Mr Neill and each of the third respondents pursuant to s 195 of the Crimes Act 1961, which relates to ill-treatment or neglect of a child or vulnerable adult. The crux of Ms Dunstan's claim is that her son suffered a serious head trauma as a result of the playground fall, yet neither Mr Neill nor the third respondents sought adequate medical assistance in response. This is despite Mr Neill taking K to his general practitioner (GP) the day following the fall, and the GP not raising any issues or concerns in relation to K's well-being.

[3] Ms Dunstan filed her charging documents with the District Court in January 2020. They were referred to Judge AJ Johns, and in a decision dated 16 January 2020, the Judge directed that they not be accepted for filing. Judge Johns concluded that there was inadequate evidence in Ms Dunstan's affidavits accompanying the charging documents to warrant a trial.

[4] Ms Dunstan's application for judicial review seeks to challenge Judge Johns' decision. She says it is clear from the decision that the Judge cannot have had before her all materials filed with the charging documents, including what Ms Dunstan considers to be compelling medical evidence in support of the allegation. Ms Dunstan suggests in this context that the Registry may have deliberately withheld materials from Judge Johns. Further and in any event, Ms Dunstan says that if the medical evidence was put before Judge Johns, then the Judge's decision is plainly wrong and cannot stand.

[5] It is relevant to note at this point that following Judge Johns' decision, Ms Dunstan sought to file her charging documents and supporting materials (in the same or substantially the same form) on a number of further occasions, and each time they were directed by a Judge in the District Court not to be accepted for filing. The last decision of the District Court at Auckland was that of Judge AM Wharepouri, who directed the Registry not to accept any further charging documents from Ms Dunstan relating to the alleged offending, unless materially different (improved) from those previously filed. Ms Dunstan then sought to file charging documents at the District Court in Hawera and at the District Court at Papakura. In each case, the Judge concluded there was insufficient evidence to warrant a trial.

[6] As will be apparent from the above, in seeking judicial review of Judge Johns' decision, Ms Dunstan is not seeking to review the most recent and operative decision in relation to her charging documents. Ms Dunstan was given the opportunity in this Court to amend her statement of claim to include any further decisions she sought to challenge. Ms Dunstan did not file an amended statement of claim. Accordingly, and as directed by Palmer J in his minute dated 19 November 2020, Ms Dunstan's application for judicial review is limited to Judge Johns' decision.

[7] All respondents indicated that they did not intend to participate in these proceedings and that they abided the decision of the Court. The Court accordingly appointed Ms McCall as counsel assisting the Court, essentially to fulfil the role of contradictor.

A preliminary point – the record of Judge Johns' decision

[8] Ordinarily the record of the decision being challenged in an application for judicial review will be produced on the application. This will comprise the decision-maker's decision, and all materials that were before the decision-maker when he or she made their decision.

[9] That did not occur in this case. Ms McCall advised that at Ms Dunstan's request, her application for judicial review was brought on for hearing relatively urgently, which appears to have led to the formal record of Judge Johns' decision not

being requested from the District Court. For that reason, in presenting her submissions to the Court, Ms McCall relied on the documents produced by Ms Dunstan.

[10] There was, however, some confusion at the hearing before me as to precisely what documents had been put before Judge Johns which, given the essence of Ms Dunstan's complaint set out at the beginning of this judgment, is of some importance. At the conclusion of the hearing, I therefore issued a minute requesting the District Court to produce a copy of the record as soon as possible. That was done promptly, and on 5 February 2021, counsel for the District Court filed a memorandum attaching the record of Judge Johns' decision.

[11] This proved a useful exercise, in that the charging documents and, more relevantly, the affidavits sworn by Ms Dunstan in support of them that were put before Judge Johns are a little different to those she had produced on her judicial review application.[1] I infer that the affidavits produced by Ms Dunstan in her bundle of documents on the present application may have been the affidavits sworn by her in support of later iterations of her charging documents which she sought to file in the District Court.[2] This judgment accordingly refers to the record of Judge Johns' decision as produced by the District Court.

Factual background – more detail

[12] On 26 May 2019, K fell about two metres from a playground gymnasium. As far as Mr Neill was concerned, while suffering some grazing on his face and soreness in his shoulder, K was fine and soon back to his normal self.

[13] Mr Neill contacted Ms Dunstan that afternoon to let her know what had happened. Ms Dunstan was evidently very anxious about what had occurred and K's wellbeing. She was of the view he had suffered a serious head trauma. Ms Dunstan's affidavit in support of her private prosecution says that at around 8.00 pm that evening, she had a brief video call with K, in which she says he appeared shaken. Ms Dunstan opines that "In my professional opinion as a senior first aider, my son was exhibiting

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1 Though in most respects, they are very similar.
2 The later materials tend to have a little bit more detail in them.

signs of sock (sic) and concussion".[3] She wanted Mr Neill to seek urgent medical advice in relation to concussion.

[14] Ms Dunstan says that she told Mr Neill that she did not consent to K attending school the following day without being assessed and cleared to do so. She says she emailed the school on 26 May 2019 to "confirm her guardianship request to ensure her son's safety was made clear."

[15] Ms Dunstan says that she was particularly concerned that K had fallen onto his head, given three years earlier in 2016, he had suffered a seizure from falling 130 centimetres onto his head and had been admitted to Darwin Hospital in Australia as a result. Ms Dunstan produced a medical record from Darwin Hospital which confirmed the 2016 fall, though I note that the notes do not refer to a "seizure". They do however record that there was a two to three hour period of drowsiness and intermittent vomiting in the Emergency Department. The discharge notes record:

> Thanks for your ongoing care of this 3 year old boy who presented with head injury with mild concussion, and was discharged home after remaining well for a 14 hour period observation.

[16] Returning to the chronology, it seems that K attended school the following day, 27 May 2019, though Ms Dunstan had emailed the school requesting that if K presented to school that day, an ambulance was to be called and Oranga Tamariki notified. The details are not clear, but it seems that, in light of Ms Dunstan's insistence, Mr Neill took K to his GP at 3.30pm on 27 May 2019.

[17] Ms Dunstan attached to her charging documents in the District Court the medical notes from the visit to the GP on 27 May 2019. They record that K "[w]as playing on slippery surface and slipped and fell onto bark from 6M" (though Ms Dunstan accepted at the hearing before me that that was an error, and the height was more like two metres). The GP's notes went on to record:

> Scratched face on bark.
>
> Was crying but after was back to usual self.

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[3] Ms Dunstan has completed five units with St John's Ambulance Australia and has received a certificate accordingly.

No other obvious injuries.

No LOC or seizure like activity before or after.

[K] says dad cleaned his face wound and applied savlon yesterday night.

No c/o pain today

Went to school without issue today. John says that mother did not want him to go to school. John says that mother called the school and requested an ambulance but school did not do this and instead contacted father who has bought [K] in for assessment at mothers request.

John is not concerned about any issues. *Explained to John it is still worthwhile having K checked out.*

(emphasis added)

[18] The GP's notes then state the following:

O/E

normal gait.

appears well.

talkative and answers questions appropriately.

obvious grazed L) face. photo taken. no evidence of infection.

Eyes – Normal ROM.

Ears NAD.

Tenderness of L) facial abrasion only but no bony tenderness of scalp or facial bones.

T-shirt removed.

No bruising of trunk / shoulders.

Neck FROM.

Shoulders FROM.

Spine – normal alignment, no spinal or paraspinal tenderness

Lungs clear. No chest wall tenderness.

Abdo SNT.

no bruising of hips.

[19] At the conclusion of the medical report, it records the "Plan" as being "Represent if any concerns".

[20] Ms Dunstan was not satisfied with the check up of her son, emailing Mr Neill later that evening, stating "[K's] assessment did not assess [K] for concussion. He had a standard check up with a stethoscope and ear and throat check". Mr Neill replied the same evening, stating "He was checked for concussion, that was the only bloody reason we went!"

[21] Ms Dunstan's concerns were not allayed. In her affidavit filed in support of her charging documents, she says that:

> I contacted St Johns ambulance on 29/05/2019 who advised my son needed to be assessed urgently. John Neill prevented this from happening.

[22] It then appears that on 30 May 2019, Ms Dunstan called St John's Ambulance at 9.30 am and requested that an ambulance attend K's primary school to assess his condition. Ms Dunstan states in her affidavit that the first, second and third named third respondents:

> ….convinced the ambulance officers to leave without even sighting [K]. Alleging [K] was "fine" and that a doctor had given him clearance. The ambulance officers were then convinced by [the first and second named third respondents] to complete a misuse of ambulance form".

[23] These allegations, were a private prosecution to proceed, would likely be in dispute. In an email to Ms Dunstan on 31 May 2019, the first-named third respondent, Ms Plowright stated:

> Dear Taz,
>
> Please could you make sure that your facts are correct before you make continued false accusations about myself or the schools' management. At no time did we refuse to allow the ambulance folk to attend your son. We were all taken by surprise when the ambulance arrived having been called by you. They have reported a false use of the ambulance.
>
> They were invited in and asked if they wanted to see [K] where upon they said they were happy to take our word that he was fine. Mrs Allen and myself walked over to the classroom and spoke to 2 teachers that had been in the room with him all morning and they both replied that he was fine.

> **We produced a Doctor's report that stated he was seen by the Doctor and he was reported to be fine.**
>
> (emphasis in original)

[24] Ms Dunstan also states in her affidavit filed in support of her charging documents that:

> I contacted the Manukau SuperClinic on May 2019 at 5.50pm who advised me to "take him straight to emergency".
>
> I contacted a doctor in Australia requesting formal medical advice, widely known that "any fall over one metre requires urgent medical treatment".

[25] It seems that in her materials filed with her charging documents at those later stages referred to at [5] above, Ms Dunstan produced a letter dated 31 May 2019 from a Doctor Molloy based in Victoria concerning medical treatment of head injuries in children. This was not included in the materials filed with the charging documents which were put before Judge Johns. I note in any event, that the advice is generic in nature, the Australian doctor not, for obvious reasons, having examined K himself.

[26] On 1 June 2019, while (it appears) having supervised contact with her two children, Ms Dunstan took them to the Middlemore Hospital Emergency Department to have K assessed. She states in her affidavit that he was triaged urgently and while waiting for a doctor to assess him, Mr Neill arrived and removed K from the hospital. She records in her affidavit that the medical discharge summary from Middlemore Hospital clearly stated "Is patient ready to be discharged? No."

[27] Two documents relating to this hospital visit were included in the materials that were put before Judge Johns:

(a) An Emergency Department Assessment Form, which records as follows:[4]

> Fell from a 2m height [illegible], landed on head. Background of previous head injury which was followed by seizures (within last 18 m). Pt been well over last week, [no] vomiting, [no] headache, has been active, looks well. [No] KC to head. Injury to L forehead – initially some confusion. Mum reports confusion also today.

[4] As best as I can tell given that the report is handwritten and is unclear in parts.

> Discussed with her and Police. Pt been cleared by ambulance when incident occurred.

(b) A "Transfer of care to GP" form which, under the heading "Departed Hospital" and the question "Is this patient ready to be discharged now?", the word "No" is written. This is, however, somewhat inconsistent with the remainder of the document, which is a transfer of care to the GP. The "Advice to patient" records "Please follow the advice below: Please come back if your condition gets worse or if you have concerns". The "Advice to GP" is stated as being "Thank you for accepting the ongoing care of this patient, we have no specific advice". Under the heading "Diagnosis" are the words "Head injury". The form then continues, under the heading "Clinical management summary":

> Father has full custody of children. Mum took them from under CFS' noses today – came to ED by car with ongoing concerns about a head injury that occurred at school a week ago. Mum has been trespassed from the school due to ongoing issues with her being upset about the head injury. [K] has been reviewed by his GP and has been cleared.
>
> Police came to the Department and all of them went into the room with K's Dad – and he took both children from the Department. [K] looks well and Dad has no concerns about his head injury.
>
> Mum was escorted from the Department by Police.

[28] There are a number of other materials attached to Ms Dunstan's affidavits, including many emails between her and Mr Neill, the third respondents and others concerning the incident and Ms Dunstan's ongoing concerns. It is not necessary on Ms Dunstan's present application to address those matters in detail, given the content of Judge Johns' decision (and Ms Dunstan's application to review it), to which I turn next.

Judge Johns' decision

[29] Ms Dunstan's charging documents and supporting affidavits were referred by District Court Registry staff to Judge Johns on 15 January 2020. The covering memorandum to the Judge recorded "Please find enclosed a couple of private prosecution charging documents for your perusal before acceptance".

[30] On 16 January 2020, Judge Johns returned the papers to the Registry together with her decision. Her decision recorded:

> Insufficient grounds made out in affidavit in support of charging document – charge dismissed (also complete lack of medical evidence).

[31] I interpolate to note that Judge Johns' reasons for declining to accept the charging documents for filing are brief, but in my view they are sufficient for this Court to understand the essential basis for her decision. Relatively brief reasons are also consistent with a Judge's review of charging documents prior to acceptance for filing being an initial screening mechanism only (see below at [47]).

[32] Returning to the chronology, there then followed a series of emails between Ms Dunstan and a member of the District Court Registry staff. In an email dated 16 January 2020 (and presumably responding to Ms Dunstan's concern that the charging documents had been referred to a Judge), the Registry advised Ms Dunstan:

> Legislation allows me as a Registrar to accept the charging documents for filing or refer the matter to a District Court Judge for directions, which I did so there was nothing suspicious regarding my decision.
>
> As mentioned in my attached email – Judge Johns has declined to accept the charging documents.

[33] That email then set out the terms of Judge Johns' decision.

[34] Ms Dunstan replied:

> Good afternoon Kirsty
>
> I filed two separate charging documents on 14.1.20.
>
> The one against John Neill includes GP reports and a hospital discharge summary stating "Is patient ready to be discharged? No".
>
> Have these documents been withheld from Judge Johns?
>
> Please hold onto the charging documents and I will resend further medical evidence for Judge Johns to reconsider as the High Court has advised these matters MUST be accepted in the District Court.
>
> May you please provide me with a reference number in order to attach further documentation for the charge against the school.

> Please also confirm when a Judge will have a decision on the charging application against John Neill.

[35] The Registry replied later the same day, stating:

> Both charging documents were provided to Judge Johns as well as all of the accompanying documentation.

[36] This advice to Ms Dunstan is consistent with the copy of the record which has been provided to this Court, which includes both charging documents and an affidavit sworn by Ms Dunstan in support of each of them.

[37] Later the same day, Ms Dunstan requested copies of "Judge Johns' two separate decisions on two separate charging documents".

[38] On 22 January 2020, the Registry responded to Ms Dunstan, apologising for the late reply and stating:

> Please find attached Judge Johns' decision. As there is only one for the two charging documents I took them both up for clarification on the second charging doc. As I had not received it back I went to her chambers and found she has unfortunately gone on leave. If you would like another Judge to consider the charging document against Mr Neill I can send it to them for consideration or if you would prefer consistency I could give it to Judge Johns on her return from leave.
>
> Please advise how you would like to proceed.

[39] Ms Dunstan replied noting that she would prefer the charging document against Mr Neill to be referred to a Judge in chambers for urgent consideration. It also appears from Ms Dunstan's email that she had not kept copies of what she had originally filed, because she requested the Registry to scan the complete charging documents and attachments back to her, stating "I believe a medical discharge summary from Middlemore Hospital was attached".

[40] The charging document against Mr Neill was then referred to Judge DJ McNaughton. On 23 January 2020, the Registry emailed Ms Dunstan attaching a copy of Judge McNaughton's decision, which read as follows:

> The section requires a "major departure" from the standard of reasonable care. There is no evidence here that the defendant acted deliberately with knowledge of the relevant risk i.e. likely to cause suffering, injury or adverse

effects to health. Insufficient evidence to justify issuing a summons on the charge.

[41] As noted earlier, Ms Dunstan then filed further iterations of her charging documents, which led to further decisions of different District Court judges directing that they not be accepted for filing.

[42] In light of the above, there is some lack of clarity as to whether Judge Johns' decision related to the charging document against the third respondents, as well as that against Mr Neill, or only the former. Given both charging documents and all supporting materials were put before Judge Johns, however, I proceed on the basis that her decision related to both of them.

[43] Before turning to the content of Ms Dunstan's application for judicial review, I address the relevant statutory provisions concerning private prosecutions. This is necessary as it puts Judge Johns' decision in its statutory context.

Statutory provisions regarding private prosecutions

[44] Once a charging document has been presented for filing in the context of a private prosecution (rather than a public prosecution), s 26 of the Criminal Procedure Act 2011 (the Act) relevantly provides as follows:

> **26 Private prosecutions**
>
> (1) If a person who is proposing to commence a private prosecution seeks to file a charging document, the Registrar may—
>
> (a) accept the charging document for filing; or
>
> (b) refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.
>
> (2) The Registrar must refer formal statements and exhibits that are filed in accordance with subsection (1)(b) to a District Court Judge, who must determine whether the charging document should be accepted for filing.

> (3) A Judge may issue a direction that a charging document must not be accepted for filing if he or she considers that—
>
> (a) the evidence provided by the proposed private prosecutor in accordance with subsection (1)(b) is insufficient to justify a trial; or
>
> (b) the proposed prosecution is otherwise an abuse of process.

[45] The threshold of whether the evidence is sufficient to justify a trial was recently considered by the Supreme Court in *S v Vector Limited*.[5] The Supreme Court stated, in its summary of the result in that case, that:[6]

> The threshold for determining evidential sufficiency is whether, on a prima facie basis, the evidence is sufficient to prove the elements of the charge to the required standard.

[46] The "required standard" in this case is obviously beyond reasonable doubt.

[47] The Supreme Court further noted that s 26 is designed to act as an initial or preliminary screening mechanism only,[7] rather than, for example, a more expansive review under which factual or other issues are resolved.[8]

[48] In their joint judgment (given by Ellen France J), O'Regan and Ellen France JJ also stated:[9]

> The threshold is not a high one and what is required is a prima facie assessment of the sufficiency of the evidence against the elements of the charges.

[49] Their Honours further observed that s 26 provides a:[10]

> Straightforward mechanism to ensure that obviously unmeritorious or abusive private prosecutions do not get under way.

[50] I next address the elements of the s 195 offence.

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5 *S v Vector Limited* [2020] NZSC 97.
6 At [6].
7 At [2].
8 At [49] per O'Regan and Ellen France JJ.
9 At [85].
10 At [89].

Section 195 - elements

[51] Section 195 of the Crimes Act provides as follows:

> **195 Ill-treatment or neglect of child or vulnerable adult**
>
> (1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), intentionally engages in conduct that, or omits to discharge or perform any legal duty the omission of which, is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult (the **victim**) if the conduct engaged in, or the omission to perform the legal duty, is a major departure from the standard of care to be expected of a reasonable person.
>
> (2) The persons are –
>
> (a) a person who has actual care or charge of the victim; or
>
> (b) a person who is a staff member of any hospital, institution, or residence where the victim resides.
>
> (3) For the purposes of this section and section 195A, a **child** is a person under the age of 18 years.

[52] The elements of the s 195 offence are therefore:

(a) the victim is a child or vulnerable adult; and

(b) the defendant is a person who falls within the scope of s 195(2); and

(c) the defendant intentionally engaged in conduct that – or omitted to perform a legal duty the omission of which – was likely to cause suffering, injury, adverse effects to the health, or any mental disorder or disability to the victim; and

(d) the conduct in question – or the omission to perform the duty – was a major departure from the standard of care to be expected of a reasonable person.

[53] In the present case, the relevant legal duty would be a duty to provide K with "necessaries" and to take reasonable steps to protect him from injury (pursuant to ss 151 to 152 of the Crimes Act 1961).

[54] Ms Dunstan's charging document against Mr Neill alleges that K had suffered a head trauma on 26 May 2019 and that "John Neill refused to provide any medical treatment to K …" and that he "disregarded medical advice stating K required urgent medical attention". The charging document further alleges that Mr Neill "then actively removed K from the emergency ward of Middlemore Hospital on the 1st of June 2019 before a doctor could assess K for head injuries".

[55] In relation to the charging document naming various employees of K's primary school, the proposed defendants are:

(a) the school's principal;

(b) the school's deputy principal; and

(c) a receptionist at the school.[11]

[56] The charging document alleges that K was "refused medical treatment from his day to day carer [Mr Neill]. The staff at [the primary school] refused to report this medical neglect to Oranga Tamariki". The charging document goes on to allege that on 30 May 2019, the first to third named second respondents "actively sent away St John's Ambulance without sighting my son. This negligent behaviour has prevented my son receiving the medical treatment he required".

[57] Turning to the issues likely to arise in any private prosecution, as Ms McCall notes, there is unlikely to be any dispute that Mr Neill fell within the scope of s 195(2). Nor is there likely to be any dispute that Mr Neill had a legal duty pursuant to s 152 of the Crimes Act 1961. The likely key issues in any private prosecution of Mr Neill would therefore be whether the jury (or the Court in a Judge-alone trial) was satisfied

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[11] I have not included the fourth named respondent in this list, as the charging document as presented to Judge Johns on 15 January 2020 did not name the fourth-named respondent as a proposed defendant.

beyond reasonable doubt that Ms Dunstan had proved elements (c) and (d) at [52] above.

[58] In relation to the second charging document, additional issues would likely be whether any or all of the third respondents fell within the scope of s 195(2). For example, I agree with Ms McCall that it is not immediately clear that the school receptionist could be said to have "actual care or charge" over K or that she would be considered to owe any legal duty likely to have any of the effects set out in s 195. The charging document is also defective in that it names all three proposed defendants in the one document (contrary to s 16(2)(a) of the Act).

[59] Against this background, I now turn to Ms Dunstan's application for judicial review.

Ms Dunstan's application for judicial review

[60] Ms Dunstan advances three grounds for judicial review of Judge Johns' decision:

(a) first, Judge Johns was mistaken about the facts;

(b) second, Judge Johns ignored some relevant factors;

(c) third, Judge Johns' decision was made for an improper purpose "such that (sic) to defeat and prevent natural justice."

[61] Ms Dunstan seeks the following relief on her application:

(a) a declaration of her rights and for the High Court to issue a warrant to arrest Mr Neill;

(b) an order that the New Zealand Police must take over the prosecution;

(c) an order quashing Judge Johns' decision and an order that it be reconsidered; and

(d) an order for this Court to accept the charging documents for filing and that they be placed on an "expedited track".

Application for judicial review – analysis

[62] I am satisfied that Ms Dunstan's application for judicial review must fail, and fail by some margin. I have reached this conclusion for the following reasons.

[63] First, in the context of judicial review, it is not appropriate for this Court to embark on a re-examination and reassessment of the facts and evidence before the decision-maker in question, being Judge Johns in this case. Review of factual findings is the domain of appeals (unless, of course, the right of appeal is limited to questions of law). There is no right of appeal from a decision made pursuant to s 26 of the Act.

[64] Accordingly, Judge Johns' assessment of the evidence, and whether it met the threshold set out at [45] above, was a matter for Judge Johns, and would only appropriately be the subject of judicial review if the evidence could only reasonably lead to a conclusion *other than that* reached by the Judge (in which case the Judge will have erred in law rather than in fact).[12] For the following reasons, I do not consider the evidence before Judge Johns led only to the conclusion that there was sufficient evidence to justify a trial.

[65] While Ms Dunstan has not articulated precisely what she says Judge Johns was mistaken about, I infer that she suggests the Judge was mistaken in concluding there was a "complete lack of medical evidence". The materials put before Judge Johns included the GP notes referred to at [16]-[19] above, and the two reports from the visit to Middlemore Hospital on 1 June 2019, referred to at [27] above.

[66] In my view, Judge Johns was right to conclude that there was a complete lack of medical evidence supporting the proposed charges. In particular, there was a complete lack of medical evidence that K had actually suffered a serious head injury which required immediate and urgent treatment. In none of the medical documents attached to Ms Dunston's affidavits is there any evidence of significant head injury or

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12 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].

trauma to K; on the contrary, the overall thrust of those documents is that K appeared well and needed no further treatment. None of them record any serious concern or request that K be admitted to hospital or the like.

[67] Ms Dunstan refers to the reference in the GP medical report that it was "worth getting K checked out". It appears Ms Dunstan interprets this as a directive to Mr Neill that K needed to be "checked out" further, that is, *in addition* to the check-up conducted by the GP on 27 May 2019. However, reading that report as a whole, it is abundantly clear that the note that it was "worth getting [K] checked out" is a reference to Mr Neill's stated position that K seemed fine, but the GP reassuring Mr Neill that it had been worthwhile bringing K to the practice for a check-up.

[68] In addition, and as noted earlier, a key element of the s 195 offence is that there has been a "major departure" from the relevant standard of care. Again, there is no basis in my view for concluding that the evidence on this element met the threshold test as articulated by the Supreme Court in *S v Vector*. On the contrary, the fact Mr Neill *did* take K to the doctors (albeit at Ms Dunstan's urging) and that the doctor did *not* express any concern or recommend any ongoing or urgent medical treatment, would be highly relevant to whether Mr Neill discharged his legal duty (and in my view, would likely establish that Mr Neill *had* discharged his duty).

[69] I do not consider the Middlemore Hospital documents alter the position. Again, they do not raise any particular concerns regarding K. Accordingly, while Ms Dunstan herself may have wished matters to be taken further, it is highly unlikely that the fact Mr Neill did not do so could be regarded as a "major departure" from the standard of care, particularly in light of the GP visit and advice on 27 May 2019.

[70] For similar reasons, the proposed charges against the school employees are also misconceived. They were aware that K had been seen by a GP shortly after the incident and that the GP had raised no concerns. The evidence before Judge Johns suggests that the third respondents themselves had also not noticed anything untoward about K in the days following the incident, that they had reported this to the ambulance staff who attended the school on 30 May 2019, who then made the decision that they did not need to examine K. Like the proposed charge against Mr Neill, the evidence

before Judge Johns fell well short of demonstrating that the third respondents' conduct amounted to a major departure from the standard of care expected of a reasonable person.

[71] Ms Dunstan's second ground of review is that Judge Johns "ignored some relevant factors". What relevant factors the Judge is said to have ignored is not expressly pleaded, but I proceed for present purposes that Ms Dunstan alleges Judge Johns ignored the medical records annexed to her affidavits.

[72] For the same reasons set out above, I do not consider the Judge erred in this way. The Judge's reference to a "complete lack of medical evidence" is plainly a reference to medical evidence that might support the commission of an offence. Given it is clear that the relevant medical records were put before the Judge (and not withheld from her for potentially sinister reasons, as Ms Dunstan sought to suggest at the hearing), there is no basis upon which to conclude that the Judge did not take them into account. This cannot be inferred from her statement that there was a "complete lack of medical evidence".

[73] The third ground of review must similarly fail. Again, it is not precisely clear how it is said that Judge Johns made her decision for an improper purpose, namely to defeat and prevent natural justice. This aspect of Ms Dunstan's statement of claim appears to be linked to her attempt to file documents in separate court proceedings, which were also refused for filing. Ms Dunstan says in her statement of claim that this "… left me no option but to list the matters in the Criminal District Court in January 2020, which were declined by Judge Johns against my rights under section 25 of the Criminal Procedure Act 2011."

[74] Whether other documents were rightly or wrongly refused to be accepted for filing is not relevant to Judge Johns' decision. Further, s 25 of the Act simply sets out the time periods within which charging documents must be filed. This statutory requirement does not provide Ms Dunstan with a "right" to file charging documents in a private prosecution.

Would relief have been granted in any event?

[75] For completeness, I record that *even if* there had been a deficiency in Judge Johns' decision, the difficulty with Ms Dunstan's application for judicial review is that the Judge's decision has effectively been "overtaken" and superseded by successive District Court decisions declining to accept the same or similar charging documents for filing. Judge Johns' decision is therefore not the most recent and operative decision which is preventing Ms Dunstan from filing charging documents in the District Court in relation to the incident on 26 May 2019. It was for this reason that Walker J noted in her minute dated 1 October 2020 that Ms Dunstan would need to consider amending her statement of claim given those later decisions. Palmer J also raised this matter in his minute dated 30 October 2020. Ms Dunstan did not amend her pleadings.

[76] Given this, ordering Judge Johns' to reconsider her decision would be futile. While the threshold for declining to grant relief in judicial review proceedings when the decision is found to have been unlawful is high,[13] in this case, directing Judge Johns to reconsider her decision would effectively be moot. Judge Wharepouri's decision in the District Court at Auckland rejecting Ms Dunstan's charging documents (and directing the Registry not to accept further iterations for filing unless materially different and improved) would still stand.

[77] I also observe that a number of the remedies sought by Ms Dunstan could not have been granted by this Court in any event. For example, as the Supreme Court confirmed in *S v Vector*, following the coming into force of the Act, the Crown cannot take over the conduct of a private prosecution.[14] For that reason, this Court could not direct the Police to take over Ms Dunstan's proposed prosecution. Nor would it be possible or proper for this Court to issue a warrant to arrest Mr Neill. It would also not be possible to direct that Ms Dunstan's charging documents were to be accepted for filing in this Court; the Act requires *all* charging documents to first be filed in the District Court.

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13 *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 at [39]. The Court of Appeal observed that "If some form of relief could have a practical value then it ought to be granted."

14 *S v Vector Ltd* [2020] NZSC 97 at [45].

[78] Finally, in a document entitled "Urgent Memorandum 4th February 2021" filed shortly after the substantive hearing, Ms Dunstan refers to r 20.19 of the High Court Rules 2016, requesting that various orders be made and actions be taken by this Court. However, r 20.19 of the High Court Rules deals with the powers of this Court on an *appeal*, rather than on an application for judicial review. As noted, Ms Dunstan does not have a right of appeal against a decision pursuant to s 26 of the Act.

Result and costs

[79] Ms Dunstan's application for a judicial review is dismissed.

[80] Given none of the respondents took an active role in this proceeding, and that Ms McCall was appointed as Counsel assisting the Court, it may be appropriate to order that costs are to lie where they fall. However, should any party seek costs, they may file a memorandum within 10 working days of the date of this judgment. Ms Dunstan may then file a memorandum in response within a further five working days, upon which I will determine the question of costs on the papers. No memorandum is to be longer than three pages in length.

Fitzgerald J