



OFFICE OF THE STATE CORONER

FINDINGS OF REOPENING OF INQUEST

CITATION: Reopening of Inquest into the deaths of:
Brett Alexander Kevin McKenzie
Abigail Denise Ezzy
Nicholas James Nolan
Maxwell Ernest Thorley

TITLE OF COURT: Coroners Court

JURISDICTION: Brisbane

FILE NO(s): COR 2010/2671; 2010/2672; 2010/2673; 2010/2674

DELIVERED ON: 29 April 2015

DELIVERED AT: Brisbane

HEARING DATE(s): 14 April 2015

CORONER: Magistrate Tina Previtiera, Coroner

DECISION: The findings of the Inquest delivered on 3 April 2012 are confirmed

CATCHWORDS: Re-opening; fresh evidence, multiple fatality motor vehicle crash

REPRESENTATION:

Counsel Assisting: Mr. C. Minnery, Counsel

The McKenzie Family: Mr. S. Courtney of Counsel,
instructed by Creevey Russell Lawyers

QPS Commissioner: Mr. C. Capper, Queensland Police Service Solicitor

Investigating Police Officers: Mr. A. McGinness, Solicitor, McGinness and Associates

1. These findings relate to the re-opening of an Inquest held in 2012 into the deaths of Brett Alexander Kevin McKenzie, Abigail Denise Ezzy, Nicholas James Nolan and Maxwell Ernest Thorley. Findings of the original inquest were delivered on 3 April 2012 and should be read in conjunction with these findings. Commentary at Paragraphs 185-188, 207 and 208 includes a conclusion that the cause of the traffic collision resulting in the death of the four young persons (all occupants of a Honda sedan) on 5 January 2008 was a course of driving by one of them, Brett McKenzie, which ended with the Honda at approximately right angles across the road, stationary or nearly stationary, directly in the path of a B-Double, driven by Mr. Greg Welsh who had no time or manner in which to react other than in the manner in which he did.
2. The 2012 Inquest has been re-opened as a result of, the provision of fresh evidence and a successful application by, the McKenzie family to the State Coroner. The single issue the subject of the re-opening relates to the conclusion that Brett McKenzie was the driver of the silver Honda sedan.¹
3. On 14 April 2015, four witnesses² (Peter Collins, Terry Kajewski, Daniel Hoyland and Patrick Boyce) were examined on statements³ provided by them and this Court also received written submissions of Counsel Assisting,⁴ Mr Courtney (for the McKenzie family)⁵ and Mr and Mrs Ezzy (Abigail Ezzy's parents).⁶
4. The evidence of Peter Collins relates to a conversation Peter Collins had at the scene of the accident, with the Bdouble truck driver Mr. Greg Welsh (since deceased) about the driver of the Honda. The evidence of Retired Police Inspector Terry Kajewski (who was not involved in the investigation of the traffic accident) relates to a conversation Kajewski had with Collins about the fatal accident, approximately five (5) years after the accident. The evidence of Daniel Hoyland relates only to contact from Patrick Boyce, as a result of which Patrick Boyce communicated with Peter Collins via phone and email. The evidence of Patrick Boyce relates to that communication, and the provision by Patrick Boyce to Peter Collins on 3 August 2013 of a statutory declaration prepared by Patrick Boyce; and a revised version of that statutory declaration on 11 August 2013. Neither was signed by Mr. Collins and the latter was then provided by Patrick Boyce to the McKenzie family's solicitors.
5. It is not disputed that the standard of proof in inquests is the civil standard of proof, with appropriate regard to the factors as referred to in *Briginshaw v. Briginshaw*,⁷ as contained in guideline 8.8 of the Guidelines issued by the Office of the State Coroner, which provides as follows:

"The particulars that a Coroner must, if possible, find under section 45 need only be made to the civil standard but on the sliding Briginshaw scale. That may well result in different standards being necessary for the various matters

¹ Paragraphs 185 to 188 and 208 of the 2012 inquest findings.

² Additional to the 32 witnesses examined in the Inquest in 2012.

³ Exhibits C45, C46, C47, C48.

⁴ M6.

⁵ Exhibit M8.

⁶ Exhibit M7.

⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

a Coroner is required to find. For example, the exact time and place of death may have little significance and could be made on the balance of probability. However, the gravity of a finding that the death was caused by the actions of a nominated person would mean that a standard approaching the criminal standard should be applied because even though no criminal charge or sanction necessarily flows from such a finding, the seriousness of it and the potential harm to the reputation of that person requires a greater degree of satisfaction before it can safely be made.”

6. As stated by Dixon J in *Briginshaw v. Briginshaw*,⁸

“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the satisfaction of the Tribunal. In such matters ‘reasonable satisfaction’ should not be produced by any inexact proofs, indefinite testimony, or indirect inferences”.

7. This Court rejects the submission of Counsel for the McKenzie family, as it did at the Inquest hearing in 2012, that this Court, in finding that any particular person was the driver, would need to be satisfied, to the criminal standard of proof beyond a reasonable doubt, that such nominated person engaged in conduct amounting to dangerous operation of a vehicle causing death.
8. It does so because whilst S. 45 (2) (e) of the *Coroners Act 2003 QLD* (the Act) provides that a coroner who is investigating a death must, if possible, find what caused the person to die; S. 45 (5) (a) of the Act provides that the Coroner must not include in the findings any statement that a person is, or may be guilty of an offence or civilly liable for something.
9. However, the distinction between apportioning blame and endeavouring to establish the cause of a death is “.. *fine but real.*”⁹ “...*The coroner must however be able to go beyond the mere cause of death if the coroner is to serve a useful social function, and must establish so far as is possible, the circumstances of the death. The implicit attribution of blame may be unavoidable in order for the coroner to ascertain or explain how the death occurred in the wider events that were the real cause.*”¹⁰ But “*A coroner is not concerned with questions of law....Instead the coroner is to find the facts from which others may, if necessary, draw legal conclusions.*”¹¹
10. In establishing the cause/s of death of Brett McKenzie, Nicholas Nolan, Maxwell Thorley and Abigail Ezzy, this Court must, nonetheless, apply a standard of proof, whilst short of the criminal standard, to a high degree of satisfaction given the seriousness of the circumstances resulting from the driving and the gravity of the consequences of a finding as to who was driving. In applying that high

⁸ (1938) 60 CLR 336 at 362.

⁹ Coroner Phillip Byrne in Findings of the Inquest into the Death of Craig Douglas delivered in the Coroners Court of Victoria (Court Reference: COR 2011/1554) on 8 December 2014.

¹⁰ Coroner Phillip Byrne in 8 above referring to paragraph 28 under the heading of “blame” in *Laws NZ, Coroners as referred to in Coroners Court v. Susan Newton & Fairfax New Zealand Ltd* (2006) NZAR 312.

¹¹ Coroner Phillip Byrne in 8 above referring in his findings to Callaway J.A’s judgement in *Keown v. Kahn* (1999) 1 VR 69 at 75.

standard in establish the cause/s of the deaths, the Court is not required to exclude competing possibilities, if such exist.¹²

11. As stated by Coroner Phillip Byrne in the Inquest into the Death of Craig Douglas,¹³ *“Causation goes to the heart of the matter. It has been the subject of considerable judicial attention and discussion in the coronial context. In Chief Commissioner of Police v. Hallenstein, Hedigan J observed: “The issues of causation and contribution have bedevilled philosophers for centuries and have attracted consideration by superior courts in all jurisdictions and places for more than a century. The inclination to expound, in an authoritative way, the connection between human behaviour and consequences has proved seductive. The estimation of the nature and extent of this connection may be described as the evaluation of “contribution”. The law has also espoused minimalism in attempting definition of the causative or contributing effect of conduct. Nearly 50 years ago, a powerful High Court (Dixon CJ, Fullagar and Kitto.JJ) described causation as “all ultimately a matter of common sense” adding for good measure that “in truth the conception in question is not susceptible of reduction to a satisfactory formula.” Fitzgerald v. Penn (1954) 91 CLR 268,278. In E and MH March v. Stramare (1991) 171 CLR 506 the High Court of Australia considered the fundamentals of causation in the negligence context. The statements of principle in relation to causation are, in my view, applicable to the concept of contribution with the Act, is concerned with the causes of death and who contributed to it. “*
12. Coroner Byrne went on to say *“In March v. Stramare (supra) Chief Justice Mason observed: “What was the cause of a particular occurrence is a question of fact “which must be determined by applying common sense to the facts of each particular case”. For an act or omission to be the cause, or one of several causes, of a death the connection between the act and/or the omission and death must be logical, proximate, and readily understandable; not illogical, strained or artificial. In theory it is a difficult and complex concept but one which, in my view, is manageable in practice.”*
13. Having applied the above concepts to the evidence received in the 2012 Inquest¹⁴ this Court must also apply them in its examination of the fresh evidence to determine whether a different finding as to who was the driver of the Honda sedan (including an open finding as submitted on behalf of the McKenzie family) should be made.

The evidence of Mr Peter Collins

14. Mr. Collins provided a Statutory Declaration dated 28 August 2013 (prepared and witnessed by Daniel Creevey, solicitor for the McKenzie family, after provision by Patrick Boyce to Daniel Creevey of the revised statutory declaration prepared by Patrick Boyce); and subsequently swore a police statement dated 17 December 2014.
15. In his first statement, Mr Collins says of Mr Welsh’s conversation with him at the scene of the accident, where Mr. Collins attended as a television cameraman;

¹² Hurley v Clements & Ors 2009 QCA 167 at paragraph 32.

¹³ Findings delivered in the Coroners Court of Victoria at Melbourne on 8 December 2014 Court Reference: COR 2011/1554.

¹⁴ Section 50(8) *Coroners Act* 2003.

“6. The driver said to me that the car (in the accident) had passed him on the highway travelling north near the top of the hill approaching the Eight Mile. He said he looked at his speedometer and he was doing about 80 km/h. He said there was nothing unusual about the way the car passed him and he thought it was probably doing about 100 km/h.....

10. He said the driver did not seem to realise how close his truck was, having picked up speed after coming over the hill towards the eight mile. He said that he thought he was doing about 100 km/h at the time of the collision. He said he braked and tried to avoid the car, but could not – it was just straight in front of him.

11. He said he saw there was a male in the rear driver’s side seat and a female in the driver’s seat.

12. He said the young woman driver looked up at him as the truck was about to impact over the top of the car. ‘I’ll never forget the look on that little girl’s face as long as I live’ he said.

16. I am under no doubt the driver said words to me, to the effect that the driver of the vehicle involved in the collision was a young female¹⁵.”

16. In the later statement to police, however, Mr. Collins stated:-

“34. That’s when he said to me that he braked and said that he saw the driver looking up at him just before hitting the car.

35. I remember he said that he told me that the driver of the vehicle looked like a young woman¹⁶ and looked up at him just prior to impact. He said that he saw that there was a male rear passenger in the back.”

17. This Court considers these statements to be different. The former suggests a much clearer statement by Mr Welsh to Mr Collins of Mr. Welsh’s level of certainty as to the gender of the driver. The Court accepts the submissions of Counsel Assisting that Mr Collins’ evidence, to the effect that the discrepancy between the statements can be explained by the second statement presenting a summarised version of the first statement, cannot be accepted. The second statement contains significantly more detail on all aspects of Mr Collins’ evidence. It is not credible that, on the only issue to be considered in this re-opening, the second statement would contain only a summary, whilst on all other issues much more detail is provided despite Mr. Collins assuming that the second statement was supplementary.

18. Mr. Collins’ evidence was also inconsistent in relation to certain matters. His evidence under cross-examination that the subject traffic incident was a matter with particular memorable features contrasts with his statement to police¹⁷ that “As my work involved attending this type of incident as a cameraman I thought this specific incident had little importance to me at the time” and he “gave no further thought

¹⁵ The Court’s italics.

¹⁶ The Court’s italics

¹⁷ Paragraphs 42, 43 and 47.

to this actual incident.”¹⁸ Whilst he was unable to tell police in December 2014 the name of the journalist reporting the story in January 2008, he was immediately able to recall the name of the journalist in his oral evidence. Despite saying it was not possible that he could be wrong about what Mr. Welsh told him in 2008, Mr. Collins struggled with recalling the process of how his first statement was taken in 2013.

19. Significantly, Mr. Collins’ evidence of what Mr Welsh told him is inconsistent with the evidence of all other relevant witnesses at the inquest. For example, Mr. Collins’ evidence as to what Mr Welsh told him of the behaviour of the Honda sedan is inconsistent with the evidence on that issue given in the original inquest by all of the witnesses who observed it. The independent eye witnesses,¹⁹ Darryl John Frans, Ronald Raymond Bell and Christine Bell variously described the Honda as *“Flying past us on the right”*,²⁰ *“crazy”*,²¹ and *“high speed and just kept going...at least 140 km/h. He just flew up that hill,”*²² Trevor Graham estimated the speed of the Honda at 130 to 148 km/h and said that it was so close behind him after it had overtaken the Bdouble that he had to turn the rear view and two side mirrors away.²³
20. Mr. Collins’ evidence of what Mr. Welsh told him about the Honda is inconsistent with that of other witnesses to whom Mr Welsh spoke at the scene of the accident. Mr. Frans²⁴ evidence is that Mr. Welsh told him that the Honda passed him *“.. in the dip and was going pretty quick... by the time he got over the hill he said the car had backed right off and had stopped as though he had done a hand break turn. The driver said that the vehicle had stopped in the roadway facing him side on and that’s why he said he thought it was suicide.”* Mark Joseph Sullivan’s evidence is that Mr Welsh also told him that he thought the driver was committing suicide.²⁵ QAS Officer Wendt’s evidence²⁶ is that Mr Welsh told him that the Honda had passed him, driving erratically at a high speed, with the occupants skylarking shortly before the accident (which accords with the stated observations of the independent witnesses Mr Ronald Bell and Ms Christine Bell); *“and then it suddenly turned right, directly in front of him, such that he had no way of avoiding the collision.”*²⁷ QAS Officer David Bell’s evidence is that Mr Welsh told him that the car had *“flown”* past him.²⁸
21. Mr. Collins’ evidence is inconsistent with what a number of medical personnel stated Mr Welsh told them about the behaviour of the Honda sedan:²⁹ for example *“four young people suicided by driving straight under his vehicle;”* *“a drunk driver pulled out on the highway in front of Mr. Welsh’s truck”* and *“the car pulled out in*

¹⁸ Statement to police, paragraph 42 and 43.

¹⁹ Paragraphs 83 to 97.

²⁰ Witness Ronald Raymond Bell at paragraph 85.

²¹ Witness Ronald Raymond Bell at paragraph 85.

²² Witness Ronald Raymond Bell at paragraph 85.

²³ Paragraph 94 of original findings.

²⁴ Exhibit C10.

²⁵ Exhibit C27.

²⁶ Exhibit C29.

²⁷ Exhibit C29.

²⁸ Exhibit C34.

²⁹ Exhibit 25.

*front of his truck and stopped, not allowing him enough time to brake.*³⁰ As to the issue of the gender of the driver, Mr. Welsh made no definitive disclosures to medical personnel. Notes of Dr Heim's attendance upon Mr Welsh on 7 February 2008 record Mr. Welsh as saying "*two people in the front seat had become one person*". (The most probable scenario put forward to the inquest by the expert opinion evidence is that the two front seat persons were most probably Brett McKenzie as driver and Ms Abigail Ezzy as the front seat passenger).

22. Mr. Collins' evidence is inconsistent with Mr Welsh's statement to police about the driving behaviour of the Honda sedan³¹ and in his statement signed on 9 April 2011³² in relation to both the behaviour of the Honda and the gender of the driver.
23. Mr. Welsh's statement of 9 April 2011 is a pivotal statement, given that it was purposefully taken at a time when it was abundantly clear (as it had been since 1 September 2008) that the identity of the driver of the Honda was very much in dispute. In it Mr Welsh specifically addressed the issue of the gender of the driver of the Honda sedan when he stated that just before impact "*...I saw the driver of the vehicle. He was looking at me smiling and it was definitely a male. He had dark hair. The picture has stayed in my mind since the incident.*" This statement by Mr. Welsh is consistent with what QAS Officer Wing stated at the 2012 inquest was Mr. Welsh's statement to him at the scene: that a male person was in the driver's seat just staring at Mr Welsh and Mr Welsh had not known if the male person just froze or if the vehicle had stalled. Officer Wing was unequivocal in his evidence and adamant that he could not have misinterpreted what Mr. Welsh had told him. This Court considers, as it did in 2012, that the significance of Mr. Welsh's statement to his solicitor, together with its consistency with other evidence, particularly Officer Wing's evidence, is not diminished by the evidence of Sergeant Meehan and Constable Snell (to whom Mr. Welsh said at the scene and the next day respectively, that he did not know who the driver was). It is possible, as submitted by Counsel Assisting, that Mr. Welsh was being more guarded with investigating police than with a health worker at the scene and his own solicitor.
24. There are other difficulties with Mr. Collins' evidence. It relies on recall after a significant passage of time where Mr. Collins' diary entry for 5 January 2008 does not record anything about the driver or indeed anything about the incident. It simply records Mr. Collins' attendance at the scene and nothing more. Mr. Collins' first conversation about his presence at the accident was in early 2013 when he spoke to Mr Kajewski at the scene of another fatal incident. Mr. Collins made no notes of that conversation either. Mr. Collins only knew of the inquest and the issue of the identity of the driver when he was contacted by Mr. Boyce some months after his conversation with Kajewski and asked for the first time to detail the contents of his conversation with Mr. Welsh. Over the entire period, Mr. Collins has attended a couple of thousand traffic accidents, including close to 100 fatal accidents. Mr. Collins has no connection to any of the four young people or their families. There is no particular reason for him to recall this incident.

³⁰ Exhibit 25.

³¹ Exhibit C19.

³² Exhibit C19.1.

25. The Court, whilst satisfied that Mr Collins has not been dishonest in his recall of what he says Mr Welsh told him, is sufficiently concerned about its inconsistency with the rest of the evidence at the inquest, including the large volume of expert evidence which was the subject of rigorous examination and analysis at the 2012 inquest. This Court considers, as a result, that Mr. Collins is mistaken in relation to what he says Mr. Welsh said to him and misinterpreted/misunderstood what Mr. Welsh said to him.
26. This view is further reinforced by what this Court considers the very real possibility that Mr. Collins' recollection has been inadvertently tainted by his conversation with Mr Kajewski and the involvement of Patrick Boyce.
27. Mr Kajewski, despite being an experienced investigator and trained police officer admitted that, despite the inquest findings (which he did not recall if he had read in full) he has always been sure from conversations with Mary Thorley (Max's mother, with whom Mr Kajewski is in a relationship) that Abigail Ezzy was the driver of the Honda. Mr. Kajewski he told Mr. Collins of this certain personal view when he spoke to him in early 2013. Mr Kajewski conceded that had his conversation with Mr Collins been a professional conversation with a potential witness, he would not have expressed his personal view as to do so would, in those circumstances, be unprofessional and inappropriate and could potentially taint that witness's evidence.
28. A further difficulty with the evidence of Mr Collins arises from Mr. Boyce's involvement in the process of preparation of Mr. Collins' statutory declaration. Patrick Boyce is related to each of Brett McKenzie and Nicholas Nolan, although he has had significant ongoing "extensive" contact only with the McKenzies whom he has been assisting "*since the end of 2009 in seeking an inquest and now this reopening of the inquest*".³³ Mr Boyce has had no contact with the Thorley, Nolan or Ezzy families about their interests in the outcome of the inquest or the re-opening. Whilst he said in evidence that, in speaking with Mr. Collins and taking a draft statement, he was simply pursuing, as a journalist, the truth of Collins' statement, it is this Court's view that, in doing so (instead of simply referring Mr. Collins to the McKenzie's solicitors) Mr Boyce failed to do the very thing which he says, in a number of self-serving statements in his oral evidence, was his motivation in relation to the statement; "*to preserve its independent integrity*".³⁴ Under cross-examination by Mr. McGinness, Mr. Boyce agreed that he was representing the McKenzies, only to immediately answer in the negative when he realised what the concession might mean. This Court is satisfied that, as Mr. Boyce stated in an annexure to his statement, he was "... *essentially representing the McKenzies....*",³⁵ and in doing so, has only further tainted the evidence of Mr. Collins.
29. For all of the reasons referred to above, this Court considers Mr. Collins' evidence as sufficiently unreliable to place any such weight on it as might alter in any way the original findings. It is difficult to reconcile his evidence against the weight of the credible, logical and inherently reliable evidence as to the issue of

³³ Exhibit C48.

³⁴ Oral evidence of Mr. Boyce.

³⁵ Exhibit C48.

who was driving the Honda. Even if Mr. Collins' evidence was accepted so as to raise some doubt as to what Mr. Welsh said at the scene of the accident, the findings at the original inquest were based on a significant volume of other evidence, including credible expert opinion evidence, the strength of which was such that the issues raised by Mr. Collins' evidence do not diminish it.

30. This Court therefore confirms the commentary, conclusions and findings of the original inquest.

Tina Previtiera
Coroner
29 April 2015