



OFFICE OF THE STATE CORONER

FINDINGS OF INQUEST

CITATION: **Inquest into the death of Andrew John BORNEN**

TITLE OF COURT: Coroner's Court

JURISDICTION: Ipswich

FILE NO(s): COR 1289/09(8)

DELIVERED ON: 16 July 2010

DELIVERED AT: Ipswich

HEARING DATE(s): 16 June; 12-16 July 2010

FINDINGS OF: Mr Michael Barnes, State Coroner

CATCHWORDS: CORONERS: Death in police custody, restraint on a road, policing at night

REPRESENTATION:

| | |
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| Counsel Assisting: | Mr Peter Johns |
| Ms Helen Donaldson (mother): | Ms Debra Wardle (instructed by South West Community Legal Centre) |
| Mr Joseph Bornen (father): | Mr Andrew West (instructed by ATSILS) |
| Senior Constables Anthony Brett and Robert Ward: | Mr Steve Zillman (instructed by Gilshenan and Luton Lawyers) |
| Ms Jennifer Hind: | Mr Stephen Kissick (instructed by McMillan Kelly & Thomas Lawyers) |
| Queensland Police Commissioner: | Ms Melanie Dixon (QPS Solicitors Office) |

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The *Coroners Act 2003* provides in s45 that when an inquest is held into a death in custody, the coroner's written findings must be given to the family of the person who died, each of the persons or organisations granted leave to appear at the inquest and to various specified officials with responsibility for the justice system. These are my findings in relation to the death of Andrew John BORNEN. They will be distributed in accordance with the requirements of the Act and posted on the web site of the Office of State Coroner.

Introduction

On the evening of 7 February 2009 Andrew Bornen a 16 year old youth who resided with his mother and siblings in Coalfalls, a suburb of Ipswich, was roaming around nearby streets in an intoxicated state. He interacted with a number of other residents in a strange but not aggressive manner although he was seen by at least two people to be carrying a baseball bat. Another resident saw Andrew in his front yard and believed he was carrying a machete. This caused the resident to call police and report the incident.

Officers responding came across Andrew on a nearby road. They alighted from their vehicle and called to him. They say he adopted a threatening posture and so one drew his firearm and the other drew a Taser. They instructed Andrew to drop his weapon and get down on to the ground. Andrew complied and lay on the roadway. One officer then handcuffed him while the other went to activate the flashing coloured lights on the unmarked vehicle the officers were driving. As this was occurring another vehicle came along the same road and despite the attempts of the officer who had handcuffed Andrew to warn the driver to stop, she failed to do so and struck Andrew killing him almost instantly.

This report:-

- Contains my findings as to the identify of the deceased and how, when, where he died and the medical cause of his death in accordance with section 45(2) of the Act;
- Considers the cause of the fatal accident;
- Determines whether the action of any person involved in the incident warrants being referred to the Director of Public Prosecutions for the consideration of criminal charges or to the Queensland Police Service for the consideration of disciplinary action; and
- Considers whether any changes to police policies or procedures would reduce the likelihood of deaths occurring in similar circumstances in the future or otherwise contribute to public health and safety.

The investigation

Numerous officers had responded to the report of the sighting of a man armed with a machete. They quickly converged upon the scene of the fatal accident and secured it pending the arrival of more senior officer. Approximately ninety minutes after the collision, officers from Ethical Standards Command attended and assumed responsibility of the investigation. On the night of the incident, they made a visual and audio recording of a walk through of events with the officers. Later they recorded a re-enactment based on what they had been

told. Scenes of Crime Officers and Forensic Crash Unit officers participated in that investigation.

The Ipswich City Council supplied information about the lighting in the area and traffic volume.

I am satisfied the matter has been thoroughly and professionally investigated.

The inquest

All of the statements, records of interview, photographs and materials gathered during the investigation were tendered at the inquest. The investigating officer was called to give evidence, as were a number of witnesses to the events, the forensic pathologist who undertook the autopsy and three independent medical experts.

The inquest was opened with a pre-inquest conference on 16 June 2010. Mr Johns was appointed counsel assisting and leave to appear was granted to the father of the deceased, Senior Constables Brett and Ward and the Commissioner of the Queensland Police Service. Leave to appear was later granted to the mother of the deceased and the driver, Ms Hind.

The inquest was convened in Ipswich on 12 July 2010 and evidence was heard over the following four days. In all, 18 witnesses were called to give evidence. All coronial documents, statements, reports and QPS records were tendered. I was also greatly assisted by oral and/or written submissions provided by each of the persons granted leave to appear.

The evidence

I turn now to the evidence. Of course, I cannot even summarise all of the information contained in the exhibits but I consider it appropriate to record in these reasons, the evidence I believe is necessary to understand the findings I have made.

Social history

Andrew Borden was born in Ipswich on 2 May 1992 making him sixteen years old at the date of his death.

He was one of eight children. For five years, between 2002 and 2007, the family lived in New South Wales. For the rest of his life he lived in and around Ipswich. His parents separated when Andrew was in his mid teens.

In his teens he had been charged with a small number of relatively minor offences. As a result, staff from the Department of Child Safety had some contact with the family and indeed helped Andrew get his first job when he left school after the family returned from NSW. He worked as a labourer in various factories. It seems he was always in paid employment.

According to his mother he used to drink alcohol with some regularity but was not a heavy drinker. As far as she was aware he had never taken drugs. None of his friends or associates have suggested otherwise.

Background to the fatality

On Saturday 7 February 2008 Andrew was at home. His mother was with some relatives at Redbank where apparently she helped them with some work around the house.

Her brother, Steven Donaldson, lived with the family and he was at home on that day. He said they just sat around the house watching TV and talking. For some of the day a cousin of Andrew's was present. Mr Donaldson went to bed at about 3:30pm in the afternoon and didn't get up again. When he retired, Andrew was still in the house. Mr Donaldson was adamant neither of them had been drinking at all that day.

As the evening wore on it seems clear Andrew was roaming around the local streets. A description of the area may help. Andrew and his family lived at 73 Williams Street West. It runs west off Kingsmill Road, the main thoroughfare leading from Coalfalls to Brassall. Those suburbs are divided by the Bremer River. Heading north over the bridge, the main road becomes Albion Street. The first street over the river on the left or western side is Sydney Street. That street also runs east on the other side of Albion Street but its entrance is blocked. A little further north, Chuwar Street branches off on the eastern side.

At about 8:30pm, a family friend, Deepak Wilde was walking across the bridge from Brassall into Coalfalls in a southerly direction. Andrew rode up to him on his bike, travelling in the same direction. He told Mr Wilde that he had been to MacDonald's and was going back to his house to get changed and then he was going back to watch the girls playing soccer at the nearby Brassall Sportsground. He was not intoxicated. He seemed happy and relaxed.

Andrew's mother says he called her at about 9.00pm. He told her he had "*had a beer*", that his Uncle was in bed; and that he was just listening to music. She urged him to go to bed as well.

It seems clear he didn't take her advice. Instead over the next couple of hours Andrew had a number of strange interactions with people in the area.

Between 9:30 and 10.00pm a person I now believe was Andrew walked through the side yard of the house across the road and into the back yard where the residents were sitting in a paved outdoor area having some drinks. He said he wanted to join the party. He seemed very, very drunk according to Mrs Machen, the home owner. She said he was slurring and was stumbling. She asked him to leave. He complied without complaint. She saw him walk across the road and concluded that he must live there. She saw him go inside the house.

A short time later one of the other occupants of the house answered knocking on the front door. Andrew said he wanted the music turned down. He then left.

Mr Machen was told what had happened and went outside to see if the music was indeed too loud. He saw someone I believe to be Andrew standing in the front yard of the residence across the road with a beer in his hand. He also seemed to have what Mr Machen thought was a bat in his hand. He saw him swinging the bat around and "*huffing and puffing*". He says Andrew didn't say anything to him and after he suggested that Andrew go inside he seemed to do so. At least he went into the garden of the house in which Andrew and his family lived.

A little later a friend of the Machens, Lee Collins, arrived at their house. As Mr Collins got out of his car he saw someone come out of the house opposite the Machens' residence. He said words to the effect "*you should keep it down over there*". Mr Collins said Andrew was holding something long and thin down next to his leg. He agrees it could have been a baseball bat.

After that interaction Andrew was seen by other residents of Williams Street. At some time between 9.00pm and 10.00pm Steven White heard some whistling and a thump out the front of his house. He says he decided to go out to make sure his car was locked and to get his wallet in case the vehicle was broken into. He saw a young male he didn't recognise carrying a baseball bat. The youth approached and asked him if he had seen any "*mischief tonight*". He says the youth told him he was part of the neighbourhood watch and Mr White should contact him if there was any trouble. The youth then walked off. Mr White said the youth was swaying a bit and he assumed he was drunk or on drugs because of his strange manner, although the youth was not aggressive at all. He estimated him to be 17 or 18 years of age.

Shortly after that interaction a person I accept was Andrew had contact with Gregory Osborne who also lived in Williams Street. Mr Osborne was filling the radiator of his 4WD at about 10:30pm when he was approached by an unknown youth and a baseball bat came in front of his face. Mr Osborne said words to the effect "*What's your problem mate?*" The youth said something about being an ex-security guard, having just lost his job and there being cars stolen in the street. As well as the baseball bat he was carrying a bottle of alcohol. Mr Osborne gave him short shrift. He said it was obvious the youth was young and drunk and was likely to get into trouble if he kept approaching people in that manner. He estimated him to be between 15 and 18 years of age.

Mr Osborne recalls the youth asking him if the vehicle was his. It seemed the youth was purporting to check that Mr Osborne wasn't stealing the vehicle. After giving him a dressing down, Mr Osborne went back into the residence he was visiting and did not see Andrew again.

It seems likely that Andrew continued along Williams Street until he came to Kingsmill Road and then turned north and crossed the bridge into Brassall. Someone matching his description was seen there at about 10:50pm. Laura Skinner was driving north across the bridge when she observed a youth standing on the north west corner of the bridge waving what appeared to be a golf club in a menacing fashion. She states he seemed to be focusing on

something underneath the bridge where she believes she could see car headlights. She only had him in her view for a few seconds.

Sydney Street runs off Albion Street in a westerly direction. It is the first street on the northern side of the bridge. Michael Johnson lives at 32 Sydney Street with his family. At about 10:50pm on the night of 7 February he was at home with his wife and children including his nineteen year old son Craig. He estimates he had drunk 10 cans of beer over the evening. He was watching television in the lounge room when he heard a noise "*from down the road near the bridge*". He looked through his side window and could see a tall male person waving something around that, to Mr Johnson, looked like a machete or a sword. He could not see the person clearly because he was thirty or forty metres away and it was dark. The male was standing on the footpath on the opposite side of the road on the corner of Sydney and Ross Streets. He believes he heard the male say "*come out here and I will get you, you bastards*". He told the court he couldn't see who the male was directing his anger towards. However, his son Craig gave evidence that as the person was walking along Sydney Street, his father directed some abuse at him. This would explain why Andrew then came over to the house and stood on the footpath.

Andrew's response caused Mr Johnson to panic and to call 000. That call was of course recorded. He told the operator "*yeah um we've got someone out here with um a, looks like a machete or something ah at 33 Sydney Street*"¹. In response the operator broadcasts a call for assistance "*We have a male standing in that front yard armed with a machete and are going off.*" A little later she says; "*We have a report of an armed person at 32 Sydney Street Brassall*". This was at about 11.02pm.

Shortly before this, police had been called to a disturbance in Leahy Street, about 1.6kms away. It soon became apparent that four of the crews at that job were surplus to requirements and they commenced responding to another tasking when the Sydney Street incident was broadcast. All diverted to that location.

The first car to approach the scene was unit 903, an unmarked grey Volkswagen sedan driven by Senior Constable Robert Ward with Senior Constable Anthony Brett as the passenger. However, by mistake, they went past the Johnson residence and turned left into Albion Street, intending to take the first right hand turn to take them across to the other end of Sydney Street which is blocked off at its junction with Albion Street.

Senior Constable Ward said as they came onto Albion Street, he saw a person he suspected to be the subject of the complaint. That person, who is now known to have been Andrew, was, according to the officers, on the southbound lane and facing away from the police.

¹ Mr Johnson lives at 332 Sydney Street and the operators direct police to go to that address but the transcript of the call shows Mr Johnson saying his address is number 33 on both occasions he mentions it.

Officer Ward said he immediately stopped the police car at the southern end of the right hand turn lane. According to Senior Constable Brett, Andrew advanced towards the police car at this stage with an object raised above his head, even before they alighted from the car. Senior Constable Ward said when they first came upon Andrew he was facing away from them and the officers both alighted from the vehicle at which time he called out; "*This is the police*", which caused Andrew to turn to face them. The officers fanned out, "*triangulation*" they call it. Senior Constable Brett moved across the front of the police car where he took up a position to the north west of Andrew and Senior Constable Ward remained closer to the car, to the south west of Andrew. He says at this point Andrew raised the object he was carrying in his right hand above his head. Contrary to his partner, who when first interviewed did not suggest Andrew advanced towards them. However when he was interviewed the next afternoon Senior Constable Ward's version had changed and he portrayed Andrew as making aggressive remarks, which he could not understand, and of advancing towards Senior Constable Brett with an object held at head height. As a result of the earlier broadcast Senior Constable Ward thought the object in Andrew's hand was a machete while Senior Constable Brett realised it was a bat.

Senior Constable Brett drew his firearm and Senior Constable Ward drew his Taser, readied it for deployment that activated a red laser sight which he trained on Andrew, saying "*This is a Taser, drop it; drop it*". Both officers agreed Andrew complied by dropping the object he had held up and a stubbie he had in his other hand. Both officers also claimed Andrew then spontaneously and without any command from them, dropped to the ground on his stomach.

The occupants of various residents in the vicinity heard this exchange and have different recollections of what was said. Robert McElwaine lived in the house fronting the southbound lane immediately adjacent to where the incident occurred. At about 11.00pm he had just returned from the movies. He was upstairs in the two level house. He came out onto the veranda at the front of his house to observe the numerous police cars that were going to jobs further north in Brassall. At about this time his attention was drawn to a youth walking along the median strip outside his house. His version of what happened next is recorded in a statement he wrote the next day and in an interview he gave to investigating officers on 9 February. He also gave evidence at the inquest.

He says the youth was singing or calling out. He noticed a car stop adjacent to the youth and he saw two men get out and call out; "*We are the police. Get down on the ground, get down; do not move.*" He also heard an officer say "*We have a Taser on you*" and he saw a red dot on the man's back.

He said Andrew turned to face the officers, dropped what he was carrying and it rolled into the gutter. Andrew extended his hands like a crucifix and when told to do so, he got down onto his stomach on the roadway. He denied Andrew ever advanced on the officers or threatened them with the object he had in his hands. His estimate that Andrew was about 5 metres in front of, i.e.

to the north of the front of the police car, is consistent with the evidence of the officers.

Stanice St Claire lived on the western side of Albion Street a little to the north of the incident scene. When she was interviewed two days after the death she said she was in the ground floor area of her house watching television, when she saw a car stop in the middle of the road. She saw a man get out and heard yelling "*Face down*" or possibly "*Get down*" on numerous occasions, sounding as if it were being called by more than one person.

Lisa Wright lived next door to Ms St Claire. She recalls hearing "*Get him; get him; hold him down!*"

Sabrina Cox also lived on the western side of Albion Street, just north of its intersection with Sydney Street. She said she saw a car which she identified as a police car on account of it having flashing blue and red lights on the dash board and heard voices yelling; "*Get down on the ground, get down on the ground, now.*"

When these versions were put to the officers both conceded they could have been said and acknowledged the giving of such directions was consistent with their training.

When Andrew lay on the ground, Senior Constable Brett handcuffed him while Senior Constable Ward continued to cover him with his Taser. Both officers agreed this was accomplished without resistance from Andrew.

Senior Constable Ward then went to the car to activate the red and blue flashing lights concealed behind the grill. While he was doing this, he saw Senior Constable Brett stand up and move quickly in a northerly direction towards an on-coming car. He heard Senior Constable Brett yelling "*Stop! Stop!*" repeatedly. Senior Constable Ward estimated the vehicle was 50 metres away when he first saw it. Senior Constable Brett says he saw it when it was about 80 metres north of their position.

Senior Constable Ward said the car did not seem to slow or change its manner of driving as a result of Senior Constable Brett's efforts. That is that officer's evidence too: "*It just kept coming.*" As the car got closer and he realised it wasn't going to stop, Senior Constable Brett began retreating and then jumped towards the median strip. He continued to wave his hands attempting to signal to the driver to stop; to no avail.

The car was being driven by Jennifer Hind, a 22 year old new mother, who had been to visit her now ex-partner in his home in Brassall. She left there between 10.00 and 11.00pm heading to her home in North Booval. Subsequent tests confirmed she had not drunk any alcohol or consumed any drugs. Inquiries also confirmed her mobile phone was not used at the relevant time. When she glanced at her car's speedometer shortly before the incident she was doing 55km per hour and she said she did not increase speed before the crash.

When interviewed she said she did not see Senior Constable Brett waving at her until he was a metre and a half to two metres in front of her, although she conceded in evidence she was a poor judge of distance. Using objects in the courtroom, she indicated the distance could have been five or six metres. When she did see the officer, he was to her right, she did not know what he wanted her to do and she did not recognise him as a police officer. In any event she was adamant she only saw the officer a second or two before she hit a black mass on the road. She did not realise she had hit a person until she stopped, opened the door and looked back. She could not recall if she had braked before hitting Andrew and could not say how she had managed to bring her car to a stop.

Senior Constable Ward was still in the police car. He radioed for an ambulance. That call was received at 11.07pm.

While all of this was occurring, the other three police units which had left the Leahy Street incident at about the same time as unit 903 had arrived at the Johnson residence. Mr Johnson told them the armed man had gone towards Albion Street. While they were talking to him, yelling was heard from that direction. From the response of the officers, it is reasonable to conclude they recognised the shouting to indicate other officers had engaged with the suspect. All of them then ran in that direction.

Constable Christopher Farnam led the pack. As he approached Albion Street he heard a loud thud, followed by heavy braking and then a woman screaming hysterically. As he reached the scene he saw a handcuffed male lying on his stomach in the middle of the road. He approached this person. With the assistance of another officer, the handcuffs were removed and first aid commenced. Other officers quickly arrived. Some joined helping with Andrew while others sought to console Ms Hind.

The officers caring for Andrew say he was breathing shallowly and gurgling when they first got to him but this soon ceased. This caused them to commence CPR. They stopped at regular intervals to check his pulse. As none was found and as his breathing did not resume they kept going until QAS officers arrived at 11.13pm.

The paramedics' examination of Andrew detected no signs of life. He was nonetheless evacuated to the Emergency Department of the Ipswich Hospital where a life extinct certificate was issued at 11.42pm.

Investigation findings

Autopsy results

An autopsy was undertaken on Andrew's body on 9 February 2009 by an experienced forensic pathologist, Dr Beng Ong. As would be expected, significant internal injuries including a rupture of the heart were found. As were fractured ribs, left clavicle and dislocation of the left shoulder joint and contusions of the soft tissue surrounding the cervical spine and extradural haemorrhage.

The injury pattern was in keeping with an impact to the head and upper chest against a vehicle, resulting in avulsion rupture/laceration of the heart.

The findings were in keeping with near instantaneous death and were consistent with the deceased being struck while lying on the road.

Toxicological analysis found a blood alcohol level of 0.197%. No other drugs were detected. No injuries suggestive of Taser or OC spray were found. Marks were found on the wrists indicating handcuffs had been applied.

Dr Ong suggested the cause of death was rupture of the heart, aorta and pulmonary trunk.

Re-enactment

About 8 weeks later, when the moon phase was the same as on the night of the incident, the investigators from the Ethical Standards Command attempted to re-enact the incident as closely as was practically possible. That involved them in positioning a dummy on the road where Andrew's blood was found; placing a car at the location the police officers indicated they had stopped their vehicle; and calibrating the distance on the road to the north of the crash site using numbered signs. They then drove a vehicle of the same make and colour as that driven by Ms Hind towards the crash site at varying speeds while visually recording the events through the front windscreen. An officer dressed in the same manner as Senior Constable Brett acted in the manner described by the senior constable in his interviews. However apart from the first run through which was done at low speed, the officer stood on or near the median strip for safety reasons. This to some extent may have reduced the validity of the results.

I participated in a number of those run throughs. I found it very difficult to make out people at the scene until I was very close to them.

This process established that from the crash scene a car could be seen when it approach to within 148 meters. However, a driver of the car could not see anything on the road or the officer moving towards it from the dummy until it was much closer: approximately 70 – 80 metres when the car was being driven very slowly and the viewer knew there was something there and he or she was looking for it.

Forensic crash unit analysis

A forensic crash investigator, Sergeant Leigh Kuskie, attended the scene and took part in the re-enactment.

Having regard to the investigator's evidence that he could first see one headlight of a car approaching the crash scene from the north when it was 148 metres away, Sgt Kuskie calculated that if the car had been travelling at 55km per hour as claimed by Ms Hind, it would have taken 9.7 seconds to reach the impact location. If the speed was in fact between 70 and 80kms per hour as estimated by Senior Constable Brett, it would have covered the distance in only 7.6 to 6.6 seconds.

If Senior Constable Brett's evidence that the vehicle was 80 metres away when he first saw it is accepted, it would have reached the crash scene in 5.2 seconds had it been travelling at 55 km per hour, or 4.1 to 3.6 seconds if his estimate of the speed is more accurate.

At 55km per hours the best braking distance is 14 .5 metres. The reaction time of the driver is in the range 1.5 to 2.5 seconds. This gives a total stopping distance between 37.3mtres and 52.5 meters.

The car driven by Ms Hind came to rest 17 metres past where Andrew was lying when he was hit. This suggests Ms Hind must have seen the officer or Andrew between 20.3 metres and 35.5metres before she hit him and applied the brakes 2.5 metres after him. This is consistent with her memory that she did not break before the crash and that of witnesses who say there were no brake sounds until after the thud.

Sergeant Kuskie said when she partook in a re-enactment of the incident she could not see an officer standing beside the incident site until she was 10 to 20 metres from the impact point. Counsel for the officers submitted that any weight given to this observation should take account of the fact that the officer she saw was not in the same place as Senior Constable Brett.

Conclusions as to the circumstances of the death

I accept the evidence of the witnesses in William Street that from mid evening onwards, Andrew was walking around, carrying a small baseball bat making a nuisance of himself. He was clearly very drunk but he was not acting in an aggressive manner and whenever he was told to desist and leave, he did so.

Unfortunately, a short time later he came into contact with another severely intoxicated person, Michael Johnson. Mr Johnson made a needlessly offensive remark to Andrew from within the safety of his high set house which caused the youth to approach the house and respond. Mr Johnson was panicked by this, especially as he perceived Andrew to be carrying a machete, despite advice from his sober son to the contrary.

Mr Johnson called 000 and relayed his concern and his misapprehension about what Andrew was carrying. He told the operator that a man with a machete was in his front yard and was "*going off*". None of that was true. However it was broadcast over the police radio network and four cars responded.

The first car, driven by Senior Constable Ward and carrying Senior Constable Brett, overshot the Johnson residence and wrongly assumed it was on the eastern end of the street across Albion Street. While going there the officers came across Andrew in the southbound lanes of Albion Street. The evidence of the officers and the local residents was that this was a major thoroughfare.

They stopped the unmarked car and alighted. They say Andrew immediately advanced towards them and brandished the bat in a threatening manner

causing Senior Constable Ward to draw his Taser and Senior Constable Brett his gun.

For the following reasons I do not accept their evidence on this point.

- Andrew had not acted aggressively during any of the interactions with strangers earlier that night.
- It is unlikely he would suddenly for the first time become aggressive and violent when confronted by armed police.
- The officers say he immediately thereafter became completely compliant.
- An independent witness who had a good view of the scene denies Andrew displayed any aggression towards the officers.
- When interviewed immediately after the incident, officer Ward made no mention of Andrew advancing, waving the bat or making aggressive comments.
- Andrew had no history of violence toward police or anybody else.

The officers identified themselves and yelled at Andrew to drop the bat which he immediately did. He then also immediately prostrated himself on the ground in the middle of the southbound lane. The officers say he did this of his own volition. The independent witnesses I have cited above say they heard police commanding him to do this. The officers agree such commands would be in accordance with their training. They don't deny this may have been said. That the commands were given is the most obvious explanation for Andrew acting as he did. In the circumstances, I find Andrew was told to get down onto the ground by police who were pointing their weapons at him.

He was quickly handcuffed by Senior Constable Brett. Senior Constable Ward then went to turn on the police vehicle's coloured flashing lights; something that could and should have been done before they alighted.

While he was doing so, Ms Hind came on the scene. Senior Constable Brett saw her when she was approximately 80 metres away and immediately realised that only maximum effort by him could avoid a fatality. He leapt up and ran forward, waving his hands frantically and screaming at her to stop. The independent eye witness says he only got about 3 metres before the car reached him and he leapt aside to avoid being hit. Andrew was hit and fatally injured.

Ms Hind did not see Senior Constable Brett even though she was keeping a reasonable look out and was not affected by alcohol or drugs. She was not expecting to see anybody on the road and the lights of the police vehicle were shining almost directly at her. The reaction times, stopping distances and measurements taken by Sergeant Kuskie and quoted above lead me to accept that Ms Hind was driving at or below the speed limit and did not see the officer until she was too close to stop before she hit Andrew. She should bear no responsibility for the death.

Almost as soon as the crash occurred, five officers who had also attended the Johnson residence and had heard yelling coming from Albion Street arrived on the scene. They set about giving Andrew first aid and CPR. Their efforts were commendable and Andrew's father placed on the record his appreciation for that. Sadly, nothing could be done to save Andrew and he was dead by the time the ambulance arrived six minutes later.

This incident traumatised Ms Hind and caused considerable distress for the officers involved. Needless to say, it produced intense and on-going grief and sense of loss to Andrew's family. I offer all involved my sincere condolences.

Findings required by s45

I am required to find, as far as is possible, the medical cause of death, who the deceased person was and when, where and how he came by his death. As a result of considering all of the material contained in the exhibits, I am able to make the following findings in relation to the other aspects of the matter.

| | |
|-----------------------------------|---|
| Identity of the deceased – | The deceased person was Andrew John Borgen. |
| How he died | Andrew died when police officers handcuffed him as he lay on a road and a driver who could not see him in time to stop or avoid him, struck him with her car. |
| Place of death – | He died at Albion Street Brassall. |
| Date of death – | He died on 7 February 2009. |
| Cause of death – | He died from internal injuries received when struck by a motor vehicle. |

Comments and recommendations

Section 46 provides that a coroner may comment on anything connected with a death that relates to public health and safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future. That requires the coroner to consider whether the death under investigation was preventable and/or whether other deaths could be avoided in future if changes are made to relevant policies or procedures. This inquest has raised two issues on which such comments might be made:

- Visibility of police uniforms
- Practical application of the QPS situational use of force model (SUOF)

Police Uniforms

The type of uniform worn by the two police officers who arrested Mr Borgen accorded with the type allowed by local QPS policy. In this case the uniforms worn by those officers were ineffective in terms of making them as visible as would be desired. Although I acknowledge it may not have been enough to

have made any difference in this matter, reflective material on some part of the officers' uniform could only have been beneficial.

Reflective strips are commonly worn on all types of work apparel. The addition of reflective patches or sections of material on the standard uniforms of operational police should be considered as a result of the circumstances of this incident.

Recommendation 1 – visibility of police uniforms

I recommend the QPS Uniform Review Committee consider changes to standard QPS uniforms that would enhance visibility of officers at night.

SUOF Model

It was submitted the evidence in this case called into question the adequacy and responsiveness of the SUOF model used by the QPS in dealing with such incidents. I don't accept that. I consider the evidence illustrates a failure to properly apply the mandated risk management procedures, rather than a deficiency in the procedures.

The inquest heard that in coming to a decision on an appropriate use of force, officers are taught to conduct regular risk assessments. This involves theoretical and scenario based training and an emphasis on the ability of threats to emanate from people, objects or places.

In this case it seems the officers did not wait to verify the information that had been broadcast but merely assumed it was accurate and acted accordingly. When they came upon Andrew, they spent no time considering the most appropriate means of addressing the threat they assumed he posed but leapt into action with little regard to the consequences. Their counsel raised various scenarios that could have justified such precipitous action but there was no evidence to suggest there was any basis to suspect those might eventuate in this case. I do not accept that on every occasion an armed man is reported to police, officers should respond as if the subject is likely to kill and main indiscriminately unless immediately apprehended.

Even so, there is no suggestion the officers involved intended or foresaw the dire consequences of their actions. Those were the result of a terrible error of judgement on the officers' part.

There was a tendency by some counsel to dismiss the SUOF model and associated training as nothing more than a checklist. It is clearly more sophisticated. I accept the evidence its development was based on extensive research and consultation. There is no evidence in this case to suggest it is not the appropriate model to be used by police officers who necessarily will be faced with a variety of potentially dynamic situations. To the contrary, the inquest heard that scenario training and local standard operating procedures have been changed, insofar as a non-prescriptive model can, to limit the incidence of detainees being handcuffed on a roadway.

I do not consider I have a basis to recommend the current model be abandoned or further reviewed.

Referral to DPP pursuant to s48

Section 48 of the Coroners Act requires a coroner who, as a result of information obtained while investigating a death, “*reasonably suspects a person has committed an offence*” to give the information to the appropriate prosecuting authority.

I take “*committed an offence*” to mean there is admissible evidence that could prove the necessary elements to the criminal standard. That would include the evidence necessary to rebut any defence reasonably raised by the evidence.

The use of the term “*reasonable suspicion*” is analogous to the test applied when a search warrant is sought. In that context it has been held that a suspicion is a state of mind less certain than a belief and to be reasonable it must be based on some evidence, but not necessarily well founded or factually correct and be a suspicion that a reasonable person acting without passion or prejudice might hold. As a result, a relatively low level of certainty is needed to satisfy the test.

Ms Hind

The Criminal Code in section 328A(4) creates an offence in the following terms: “*A person who operates...a vehicle dangerously in any place and causes the death... another person commits a crime*”.

In determining whether a vehicle was being operated dangerously it is appropriate to apply an objective test – *R v McBride* [1962] 2 QB 167. For this reason the accused person’s state of mind – that is whether he or she intended to drive carefully or dangerously is irrelevant and the offence does not require proof of criminal negligence – see *R v Wilson* [1965] QWN 42. It is simply a question for the jury to determine whether the manner of driving was dangerous in all of the circumstances.

For many years Queensland courts had held when determining whether a person was guilty of dangerous driving the Crown must show some fault on the part of the driver which caused the danger to the public – see *R v Webb* 2[1986] 2 Qd R 446. However that is no longer the case. In *R v Wilson* [2008] QCA 349 it was confirmed that the High Court decision in *Jiminez v R* (1992) 173 CLR 572 obviated this. In the leading judgement of the court McMurdo P stated; “*it follows from Jiminez that in a trial for an offence against section 328A the jury need not be told that fault is an element of the charge. That is not to say that in establishing the offence any consideration of the offender’s mental state must necessarily be disregarded. Section 24 and other provisions of chapter 5 Criminal Code like section 23, section 25 and section 31 are sometimes raised in such cases*”.

Applying that law to the circumstances of this case I am of the view a jury is likely to conclude that the driving by Ms Hind was objectively dangerous – she drove towards a man prone on the road without slowing or altering her course.

However the question then becomes whether the Crown could negate the defence provided by section 24 - Mistake of fact. That is, could the Crown prove Ms Hind did not have an honest and reasonable belief it was safe to drive in the manner in which she did because there was no likelihood of any person being handcuffed and lying on Albion Street.

Having set out my conclusions above as to what was likely visible to Ms Hind, I am of the view a defence under section 24 could not possibly be negated. I will not therefore refer the material to the DPP.

Sergeant Brett and Senior Constable Ward

Section 291 of the Criminal Code ("the Code") provides that it is unlawful to kill another person unless that killing is authorised, justified or excused by law.

Section 293 of the Code states that, "*... any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.*"

Section 300 of the Code states that, "*Any person who unlawfully kills another person is guilty of a crime, which is called murder, or manslaughter, according to the circumstances of the case.*"

In *R v Carter* [2003] QCA 515 the Court of Appeal examined the issue of causation as it arises in Section 293 in cases where there may be no single cause of death. The court adopted the reasoning of Dean and Dawson JJ in *Royall v The Queen* (1991) 172 CLR 378 at 423:-

"...but if the accused's conduct is a substantial or significant cause of death that will be sufficient given the requisite intent, to sustain a conviction for murder. It is for the jury to determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused."

In *Royall* Toohey and Gaudron JJ noted that the jury must be told they need to reach a conclusion as to what caused the death but stated:

"...That does not mean that the jury must be able to isolate a single cause of death; there may be more than one such cause ... In that event it is inevitable that the jury will concentrate their attention on whether an act of the accused substantially contributed to the death."

In *Carter*, McPherson JA considered that the use of the words 'substantial' and 'significant' in the above passages were made in the context of their being synonyms.

I acknowledge the submission made that a causal link must be established between the act and the subsequent death.

I am satisfied in this case such a link exists. The actions of the two officers was a substantial and significant cause of Mr Bornen's death; notwithstanding that there was a more proximate cause; namely his being struck by the vehicle of Ms Hind.

Criminal Code Section 23

The defence provided for in s.23 of the Act is one open to the officers on the evidence. That section provides that, subject to the express provisions of the Code relating to negligent act and omissions (including, relevantly s.289), a person is not criminally responsible for an event that occurs by accident.

The meaning of "accident" is tied to notions of what is reasonably foreseeable and is best espoused in the following passage from *Kaporonovski v R* (1973) 133 CLR 209 which is concerned with how a jury should be directed in circumstances where the prosecution is burdened with excluding a s.23 defence:

"The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome."

The question in this case is whether the Crown could prove the officers should reasonably have foreseen that by handcuffing Andrew on the road they were placing him in danger of being run over because it was likely a vehicle would come along, he would not be able to get himself off the road and it was possible they would not be able to warn the driver to stop in time.

Having regard to the evidence of the volume of traffic likely to be using the road and the limited visibility at night, I consider a jury might accept that to be the case.

Accordingly I am obliged to refer the information gathered during the investigation and inquest to the DPP to enable him to consider whether charges should be laid. It is not my role to determine the guilt or innocence of any party and no conclusion adverse to the officers should be drawn from this report.

I close the Inquest.

Michael Barnes
State Coroner
Brisbane
16 July 2010