



# OFFICE OF THE STATE CORONER

## FINDINGS OF INQUEST

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

TITLE OF COURT: Coroner's Court

JURISDICTION: Brisbane

FILE NO(s): COR 2010/2671; 2010/2672; 201/2673; 2010/2674

DELIVERED ON: 03/04/2012

DELIVERED AT: Brisbane

HEARING DATE(s): 20 February 2011; 30 May 2011; 7 July 2011; 8 August 2011; 13 – 17 February 2012; 5 March 2012; 7 March 2012

FINDINGS OF: Magistrate Tina Previterra, Coroner

CATCHWORDS: **CORONERS: Inquest, multiple fatality motor vehicle crash**

REPRESENTATION:

Counsel Assisting: Mr C. Minnery, Office of the State Coroner

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

QPS Commissioner: Ms B Wadley instructed by Queensland  
Police Service Solicitor

The Estate of Gregory  
Phillip Welsh: Mr W McMillan, Solicitor

Investigating Police  
Officers: Mr Eoin MacGiollaRi of Counsel, instructed  
by McGinness and Associates

Dr Blair Koppen: Mr Angus Edwards of Counsel, instructed  
by Avant Law

## **INTRODUCTION**

1. These are my findings in relation to the deaths of Brett Alexander Kevin McKenzie (Brett), Abigail Denise Ezzy (Abigail), Nicholas James Nolan (Nicholas) and Maxwell Ernest Thorley (Max).
2. The *Coroners Act 2003* provides in s.45 that a Coroner's written inquest findings must be given to the family of any person who died, any persons or organizations granted leave to appear at the inquest and to various officials with responsibility for the subject matter of any recommendations.
3. These findings will be distributed in accordance with the requirements of the Act and posted on the website of the Office of the State Coroner, subject to orders made on 30 May and 7 July 2011 prohibiting the publication of certain evidence (which is contained in paragraphs 43, 44, 45, 47, 115, 116 and 121 which have been clearly underlined).
4. Nicholas, Max, Abigail and Brett all died tragically on 5 January 2008 on the Cunningham Highway, in the vicinity of the Willowvale Road turn-off approximately 11.8 kilometres north of Warwick, at approximately 11.21 pm.
5. All four deceased were travelling in a silver Honda sedan (owned by Abigail's mother). In a single manoeuvre, the Honda overtook a 4WD (driven by Raymond Bell) and a B-Double (driven by Gregory Philip Welsh) which were travelling north. Once in front of the B-Double, the Honda executed a right turn, resulting in the front of the B-Double impacting with the driver's side of the Honda. Both vehicles then moved in a bull-doing configuration across the southbound lanes and came to rest approximately 120 metres later on the right hand side, northbound, of the Cunningham Highway. The Honda was extensively damaged as a result of being embedded under the front of the B-Double.
6. Abigail was flung clear of the Honda during the crash, and came to rest about 18 metres back from the Honda and the front of the truck, on the right-hand side of the truck in the direction of its travel. Brett and Nicholas were inside the Honda, and Max was partially inside/outside the Honda.

## **THE SCOPE OF A CORONER'S INQUIRY AND FINDINGS**

7. A Coroner has jurisdiction to inquire into the cause and the circumstances of a reportable death. If possible he/she is required to find:
  - (a) whether a death in fact happened<sup>1</sup>;
  - (b) the identity of the deceased;

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<sup>1</sup> S. 45 Coroners Act 2003.

- (c) when, where and how the death occurred; and
  - (d) what caused the person to die<sup>2</sup>.
8. There has been considerable litigation concerning the extent of a Coroner's jurisdiction to inquire into the circumstances of a death. The authorities clearly establish that the scope of an inquest goes beyond merely establishing the medical cause of death.
  9. An inquest is not a trial between opposing parties but an inquiry into the death. In a leading English case it was described in this way:- *"It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends... The function of an inquest is to seek out and record as many of the facts concerning the death as the public interest requires."*<sup>3</sup>
  10. The focus is, therefore, on discovering what happened, not on ascribing guilt, attributing blame or apportioning liability. The purpose is to inform the family and the public of how the death occurred with a view to reducing the likelihood of similar deaths. As a result, the Act authorises a Coroner to make preventive recommendations concerning public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future.<sup>4</sup> However, a Coroner must not include in the findings or recommendations, statements that a person is or may be guilty of an offence or is or may be civilly liable for something.<sup>5</sup>
  11. In this inquest, the issues investigated were:
    - (a) The standard matters in s.45 (2) of the Coroners Act 2003 (as referred to in paragraph seven (7) above);
    - (b) The identity of the driver of the Honda sedan at the time of the incident; and
    - (c) The quality, thoroughness and impartiality of the original police investigation, including the availability of resources to investigating officers.

## **THE ADMISSIBILITY OF EVIDENCE AND THE STANDARD OF PROOF**

12. A Coroner's court is not bound by the rules of evidence. Indeed, the Act provides that the court *"may inform itself in any way it considers appropriate."*<sup>6</sup> That does not mean that any and every piece of information, however unreliable, will be admitted into evidence and acted upon. However, it does give a Coroner greater scope to receive information that may not be admissible in other proceedings, and to have regard to its origin or source when determining what weight should be

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<sup>2</sup> S. 45 (2) of the Coroners Act 2003

<sup>3</sup> *R v South London Coroner; ex parte Thompson* (1982) 126 S.J. 625

<sup>4</sup> Section 46 of the Act

<sup>5</sup> Sections 45(5) and 46(3) of the Act

<sup>6</sup> Section 37 of the Act

given to it. This flexibility is because an inquest is a fact-finding exercise.<sup>7</sup>

13. A Coroner should apply the civil standard of proof, namely the balance of probabilities but the approach referred to as the *Briginshaw* sliding scale applies.<sup>8</sup> This means that the more significant the issue to be determined; or the more serious an allegation; or the more inherently unlikely an occurrence; then, the clearer and more persuasive the evidence should be, in order for the trier of fact to be sufficiently satisfied that it has been proven to the civil standard.<sup>9</sup> This is reflected in the current guidelines issued by the State Coroner<sup>10</sup> which include that “*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 be safely made.*”
14. This is therefore the standard that should apply in this case to a finding as to who was driving the Honda. It is not the standard, however, which need be applied to other questions requiring findings, such as the standard matters under s.45 (2) *Coroners Act 2003*, or matters relating to the police investigation.
15. The Court of Appeal in *Hurley v. Clements & Ors*<sup>11</sup> stated as follows: “... *the application of the sliding scale of satisfaction test explained in Briginshaw v Briginshaw does not require a tribunal of fact to treat hypotheses that are reasonably available on the evidence as precluding it from reaching the conclusion that a particular fact is more probable than not.*”
16. This Court, therefore, rejects the submission of Counsel for the McKenzie family 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.
17. A Coroner is also obliged to comply with the rules of natural justice and to act judicially.<sup>12</sup> This means that no findings adverse to the interest of any party may be made without that party first being given a right to be heard in opposition to that finding. As *Annetts v McCann*<sup>13</sup> makes clear, that includes being given an opportunity to make submissions against findings that might be damaging to the reputation of any individual or organisation.

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<sup>7</sup> *R v South London Coroner; ex parte Thompson* per Lord Lane CJ, (1982) 126 S.J. 625

<sup>8</sup> *Anderson v Blashki* [1993] 2 VR 89 at 96 per Gobbo J

<sup>9</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 per Sir Owen Dixon J

<sup>10</sup> Paragraph 8.14 State Coroner's Guidelines published December 2003.

<sup>11</sup> (2009) QCA 167.

<sup>12</sup> *Hamsworth v. State Coroner* (1989) VR 989 and see a useful discussion of the issue in Freckleton I., “Inquest Law” in *The Inquest handbook*, Selby H., Federation Press, 1998 at 13.

<sup>13</sup> (1990) 65 ALJR 167 at 168

## THE INVESTIGATION

18. Queensland Police Service (QPS), Queensland Fire and Rescue (QFRS) and Queensland Ambulance Service (QAS) personnel attended the scene. QFRS personnel moved the B-Double off the Honda by crane and then removed the roof and steering wheel by hand from the Honda in order to remove the three young men from the Honda.
19. QPS commenced an investigation. Sergeant Mark Meehan, an experienced forensic crash investigator, took principal carriage of the investigation. Statements were obtained from a number of eye-witnesses<sup>14</sup> including Mr. Welsh, the truck driver. A check of Mr. Welsh's driving requirements, including his logbook, confirmed compliance. Mr. Welsh was also breath-tested and the result was negative. Given that he was not exhibiting any indicia of intoxication or drug use; and in accordance with QPS policy, there was no requirement and he was not requested, to provide a blood sample.
20. Scenes of Crime Officer Constable Canning assisted with evidence gathering and took photographs,<sup>15</sup> including photos of the positions of bodies in the car and the extraction process. Emergency services personnel and police officers also made observations of the positions in the car of the bodies of the three young men.
21. The police located a number of items, including a blue cooler bag in the Honda front passenger footwell. It contained a bottle of wine and a number of broken vodka cruiser bottles. At least seven (7) crushed cans of rum and cola were also found in the Honda, as well as Nicholas' red nokia mobile phone. Abigail's purse was located in the front passenger area of the Honda and a red Sony Ericsson mobile telephone, which was turned on, was located on the ground about 2 metres south of Abigail.<sup>16</sup> This telephone was handed to Constable Hauff who did not treat it as evidence because the matter was not the subject of a criminal investigation<sup>17</sup> and because it was intended that any personal items would be returned to the family of the owner. (Unfortunately, a QPS inventory document only included property located on the bodies and so there is no mention of the red Sony Ericsson mobile. Neither did Constable Hauff keep any notes of who owned that phone or which items were returned to family or what subsequently happened to them).
22. The four young persons were then removed from the scene and police personnel proceeded with the identification process and undertook the process of delivering death messages to each of their families.

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<sup>14</sup>Trevor Edward Graham; Ronald Raymond Bell; Christine Pamela Bell

<sup>15</sup> Exhibit E2.

<sup>16</sup> Exhibit C6, Statement of Senior Constable Cremasco.

<sup>17</sup> Exhibit C12.1.

23. QPS personnel made requisite markings and measurements, from which diagrams and plans were prepared. Mechanical inspections of each of the two vehicles were undertaken<sup>18</sup>, indicating no mechanical defects with either vehicle that would have contributed to the collision<sup>19</sup>.
24. Autopsy examinations were conducted on all four persons, by Dr. Blair Koppen, on 7<sup>th</sup> January 2008, including the taking of blood and urine samples for subsequent toxicological testing.
25. Dr. Koppen concluded that their respective causes of death were:
- (a) Abigail - a right occipital base of skull fracture with subarachnoid haemorrhage, ruptured spleen, liver, duodenum and haemoperitoneum, due to left pulmonary contusion and bilateral haemothorax, due to a motor vehicle collision<sup>20</sup>;
  - (b) Nicholas – bilateral haemothorax, pulmonary contusions, left occipital skull fracture and sub-arachnoid haemorrhage, ruptured liver, haemoperitoneum, due to a motor vehicle accident<sup>21</sup>;
  - (c) Max – comminuted skull fractures, cerebral contusions, ruptured spleen, rupture left hemi-diaphragm, haemoperitoneum, right basal pulmonary contusion, right upper flail segment, bilateral haemothorax, due to a motor vehicle accident<sup>22</sup>; and
  - (d) Brett – fracture right parietal and base of skull, right cerebral contusion, ruptured spleen, kidneys and liver, haemoperitoneum, bilateral pulmonary lacerations and bilateral haemothorax, due to a motor vehicle accident.<sup>23</sup>
26. Toxicological testing indicated the following blood alcohol concentrations:
- Abigail – Nil;
  - Nicholas – 0.065%;
  - Max – 0.224%; and
  - Brett – 0.129%.

Drug screening produced negative results for all four deceased.

27. Between 6 January 2008 and 3 March 2008, a number of conversations/meetings occurred between the investigating police and the McKenzie family. Sergeant Meehan told the McKenzie family that he had formed the opinion that Brett was driving the Honda at the time of the accident.
28. On 3 March 2008, at the request of the McKenzie family, Sergeant Meehan forwarded to the Officer in Charge of the Forensic Crash Unit, Brisbane, a request for an opinion as to who was the driver of the Honda

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<sup>18</sup> 11<sup>th</sup> January 2008.

<sup>19</sup> Exhibit B1 and B2.

<sup>20</sup> Exhibit A3.1.

<sup>21</sup> Exhibit A1.1.

<sup>22</sup> Exhibit A2.1.

<sup>23</sup> Exhibit A4.1

and where the passengers were located at the time of the incident.<sup>24</sup> (He included photographs, a scale drawing, his own opinion, the opinion of the McKenzies that Abigail was driving and advised that witness statements could be accessed via QPrime).

29. In response, on 17 April 2008, Senior Constable Hans Boon provided a short five (5) paragraph report,<sup>25</sup> indicating that it would be unsafe to assert the identity of the driver without examinations of the cause of the collision, the dynamics of both vehicles, the dynamics of the occupants, and the occupants' injuries. He opined that in order to assert with any confidence that, because Brett's feet were located in the driver's seat position, Brett was the driver; these additional examinations should be undertaken, including opinions from pathologists who might be able to assist in determining driver identity.
30. Subsequently, on 28 April 2008, Sergeant Meehan attended upon Dr. Koppen to discuss the issue of the injuries of the four deceased. No statement was taken from Dr. Koppen, although a report of Sergeant Meehan's conversation with Dr. Koppen was included in Sergeant Meehan's investigation report.
31. On 8 May 2008, Sergeant Meehan provided his report to the OIC, Warwick.<sup>26</sup> (A written list of the attachments enclosed with the report did not include mention of the report from Boon).
32. On the same day, Sergeant Meehan sent photographs and a description of the accident to the District Officer<sup>27</sup>. The photographs included a photo of the driver's side fuel tank and tyre of the B-Double embedded in the seating compartment of the Honda and the left leg of Brett near the front of the tank<sup>28</sup>; and a photo of Brett's right foot under a blue purse in the driver's compartment of the Honda<sup>29</sup>.
33. The report also included information about conditions of the scene as they existed at the time of the accident. For example, the speed limit had changed from 100 km/h to 80 km/h just prior to the accident scene. The road had a slight downhill gradient,<sup>30</sup> one lane travelling north (the direction of travel of the B-double truck) and two lanes travelling south. There was no overhead lighting.<sup>31</sup> The intersection with Willowvale Road became visible at 110 metres before the intersection, due to a slight crest before the intersection.<sup>32</sup> The north and south-bound lanes at the

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<sup>24</sup> Exhibit B3.

<sup>25</sup> Exhibit B4.

<sup>26</sup> Exhibit B5.

<sup>27</sup> Exhibit B6.

<sup>28</sup> Exhibit E2.42

<sup>29</sup> Exhibit E2.40

<sup>30</sup> See the report of Dr Casey (exhibit B13) at page eight and police photographs 33 and 35

<sup>31</sup> See the report of Jon Henry (exhibit F1) at page 11, point 3.4.1

<sup>32</sup> See the report of Jon Henry (exhibit F1) at page 13, point 7



point of the incident were divided by a double white line.<sup>33</sup> The two south-bound lanes were separated by a dotted white line.

34. The road was dry, free of potholes or other patching, and well sealed with good road markings. The area of Warwick experienced heavy rain in the twenty-four hours prior to the incident, but the rain had stopped at 5am on 5 January 2008 and no further rain fell through to the time of the incident. There was no evidence of any flooding in or around the area that contributed to the incident. The shoulders of the highway, however, were still wet from the earlier rain.<sup>34</sup>
35. On 27 May 2008, the Officer in Charge, Warwick Prosecutions, forwarded the completed coronial file (including statements obtained from forensic investigators) to Magistrate Thacker.
36. On 27 June, 2008, Messrs. Gudkovs Power Osborne, Solicitors for the McKenzie family, requested that an inquest be held.
37. On 19 August 2008, Magistrate Thacker made requisite findings and ruled that no inquest would be held. Messrs. Gudkovs Power Osborne were advised by letter on 20 August 2008.
38. On 1 September 2008, Brett's father (joined by Nicholas' next of kin) applied to the State Coroner seeking an inquest. His reasons in support included allegations of unintentional bias by Sergeant Meehan, criticisms of Sergeant Meehan in not obtaining information referred to in Senior Constable Boon's report or a written report from Dr. Koppen, as well as the failure to present to the Coroner certain evidence of Mrs. McKenzie (*"that ..Ezzy was driving the vehicle when it commenced the drive during which the accident occurred*) and the failure to drug-test Mr. Welsh. No fresh evidence, however, was provided with the application which was not granted at that stage.
39. Subsequently, on 9 July 2010, Gilshenan and Luton, Solicitors on behalf of the McKenzie family, provided further evidence<sup>35</sup> under cover of correspondence to the Office of the State Coroner. Such evidence included a mechanical engineering report by Dr. Duncan B. Gilmore of Gilmore Engineers dated 30 June 2010,<sup>36</sup> a second statement of Brett's mother Peta McKenzie dated 2 July 2010,<sup>37</sup> and a statement of Leah Reeves (a console operator at the BP service station, Warwick on the night of the accident), dated 6 July 2010.<sup>38</sup> Gilshenan and Luton submitted that such evidence suggested that Brett was not the driver of the Honda.

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<sup>33</sup> See the report of Jon Henry (exhibit F1) at page seven

<sup>34</sup> Exhibits C6 and C17.

<sup>35</sup> Exhibit A6.1

<sup>36</sup> Exhibits B9.

<sup>37</sup> Exhibit C14.1.

<sup>38</sup> Exhibit C16.

40. The statement of Peta McKenzie included references to alleged conversations with Sergeant Curtin, Constable Prendergast, Sergeant Meehan, Mark Sullivan (QFRS)<sup>39</sup>, Leah Reeves, Ron Christie (QFRS)<sup>40</sup> and Kevin Wendt (QFRS)<sup>41</sup> all of which allegedly took place prior to Peta McKenzie's first statement dated 23 September 2008).<sup>42</sup> The correspondence further criticised Sergeant Meehan for communicating to Abigail's father, the day after the accident, that Brett was the driver. (There is no mention of an assertion by Peta McKenzie that the police indicated to her as early as 6 January 2008, that Abigail was the driver). Repeated reliance was placed on Senior Constable Boon's report and the lack of a statement from Dr. Koppen himself.
41. On 17 July 2010, the State Coroner advised that the matter would proceed to inquest.

## **THE INQUEST**

42. The inquest opened with a pre-inquest conference (PIC) on 20 February 2011 with further PICs held on 30 May, 7 July and 8 August 2011.
43. Paragraph removed - subject to non-publication order.
44. Paragraph removed - subject to non-publication order.
45. Paragraph removed - subject to non-publication order.
46. At the PIC on the 7 July 2011, the court heard an application by Mr. Welsh's solicitors that Mr. Welsh be excused from giving oral evidence at the hearing. This application was contested by the McKenzie and Nolan families.
47. The Paragraph removed - subject to non-publication order.
48. At 3:30pm on 8 July 2011, Mr. Welsh was declared deceased by emergency services personnel after his partner, concerned that he was continuing to sleep, could not find a pulse. An autopsy found significant coronary artery disease with up to 75 percent narrowing of the left anterior descending and right coronary arteries. His heart was massively enlarged (indicating that his body was not coping with the demands of supplying blood to his body). Toxicological analysis confirmed that no acute role was played by toxins, alcohol or drugs in Mr Welsh's death. The cause of death was ischaemic heart disease as a result of coronary atherosclerosis.

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<sup>39</sup> Exhibit C27.

<sup>40</sup> Exhibit C35.

<sup>41</sup> Exhibit C29.

<sup>42</sup> Exhibit C14.

49. Between then and the commencement of the examination of witnesses, the Office of the State Coroner obtained further statements and information, including supplementary statements from investigating police officers;<sup>43</sup> and expert reports from Dr. Robert Casey (a mechanical engineer at UniQuest Consulting and Research),<sup>44</sup> Professor AJ Ansford<sup>45</sup> (a specialist forensic pathologist), Dr. Koppen (the GMO who performed the autopsies), Dr. Adam Griffin (Deputy Director, Clinical Forensic Medicine Unit Queensland) and Sergeant David Stocker<sup>46</sup> (a Senior Collision Analyst, Forensic Crash Unit, QPS).
50. A view of the scene of the accident occurred on Monday 13 February 2012, which involved a number of examinations of the relevant stretch of road, the area where the vehicles came to rest, as well as relevant signage, gradients, road markings and the Willow Vale turnoff area. Two officers from the Department of Transport and Main Roads assisted at the view in pointing out differences in the scene since the accident as contained in a report tendered to the inquest.<sup>47</sup>
51. The examination of witnesses commenced in Brisbane on Tuesday 14 February and continued for 5 days with final submissions made on 7 March 2012. Three hundred and thirty six (336) exhibits were admitted into evidence, including police notebook statements,<sup>48</sup> the QPS Forensic register,<sup>49</sup> and further photographs of the Honda and the truck at the scene,<sup>50</sup> and 28 witnesses were examined.<sup>51</sup>
52. After the commencement of the examination of witnesses, Counsel for the McKenzies indicated that his instructing solicitors Messrs. Creevey Russell, had possession of certain documents/statements of witnesses obtained as a result of the McKenzie's own investigation into the matter, which had not previously been disclosed. The documents were:
- (a) Handwritten notes of Mrs. McKenzie, her daughter and her sister,<sup>52</sup> commencing with an entry on 21 February 2008;
  - (b) a statutory declaration of Leah Reeves signed 15 February 2010 and provided to Gilshenen and Luton, solicitors;<sup>53</sup>
  - (c) an unsigned statement of Leah Reeves provided to RACQ Insurance on 9 August 2011,<sup>54</sup>
  - (d) a statutory declaration of Samuel Dight signed 14 February 2012;<sup>55</sup> and

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<sup>43</sup> Exhibits C5.1, C6.1, C7.1, C4.1, C12.1, C13.1, C15.1, C17.1, C23.1.

<sup>44</sup> Exhibits B13 and B13.1

<sup>45</sup> Exhibits B12 and B14.

<sup>46</sup> Exhibit B16.

<sup>47</sup> Exhibit F6.

<sup>48</sup> Exhibits C4.2, C12.2, C12.3, C40.1.

<sup>49</sup> C23.2.

<sup>50</sup> Exhibit E4, E5, E6 and E7.

<sup>51</sup> Exhibit A7.

<sup>52</sup> Admitted as Exhibit C14.2.

<sup>53</sup> Admitted as Exhibit C16.1.

<sup>54</sup> Admitted as Exhibit C16.2.

(e) an undated statement of David Eric Moore, which Ms. Reeves had asked him to prepare in the week commencing 6 February 2012.<sup>56</sup>

53. Consequently, those documents were admitted into evidence, David Eric Moore was added to the witness list and called to give evidence and the Court made a requirement, pursuant to s.16 (2) of the Coroners Act, that Mr. Peter and Mrs. Peta McKenzie provide to the Court, forthwith, any other documents in their possession containing any version of the events prior, or relating to, the accident, as obtained by them from any witness on the witness list. Messrs. Creevey Russell undertook a search of their file and no further documents were produced.

## **THE EVIDENCE AS TO WHO WAS DRIVING**

54. Evidence in relation to who was driving the silver Honda Civic at the time of the incident comes from eight (8) sources:

- A. Evidence as to the movements/driving of the four young persons earlier on 5 January 2008;
- B. Evidence of independent eye-witnesses;
- C. Evidence of Mr. Welsh;
- D. Evidence of the experience and mode of driving of Abigail and Brett;
- E. Evidence as to body positions;
- F. Forensic Crash Investigation evidence;
- G. Medical evidence; and
- H. Mechanical evidence.

### **A. Evidence as to the movements/driving of the four young persons earlier on 5 January 2008**

55. The evidence of Samuel Dight, Susan Bontoft, Scott David Ellis and Peta McKenzie indicates that the relevant movements of Brett, Abigail, Nicholas and Max on Saturday 5 January 2008 were as follows:

1:00pm-4:00pm	Brett, Samuel Dight and Abigail travelled around Warwick, looking at flood waters.
2:00 pm	Max arrived at the Yangan Hotel, and consumed alcohol.
5:00pm-6:00pm	Abigail dropped Samuel Dight in her Honda Civic to his girlfriend's home, returned to the McKenzie home with Brett, returned to collect Samuel Dight and Samuel's girlfriend and Abigail drove to the Yangan hotel and dropped Brett off. Nicholas arrived at the Yangan hotel at about the same time. Both Brett and Nicholas consumed

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<sup>55</sup> Admitted as Exhibit C8.1.

<sup>56</sup> Admitted as Exhibit C43.

alcohol.<sup>57</sup> Abigail drove Samuel and his girlfriend back to the latter's residence where she stayed for some time.

- 7:30pm Ms Bontoft arrived at the Yangan Hotel and observed Brett, Max and Nicholas consuming alcohol (although she did not consider them to be drunk).
- 8:45pm-10:40pm Between 8:45pm (Peta McKenzie's evidence) and 10:00pm (Samuel Dight's evidence), Abigail drove with Samuel and his girlfriend to the McKenzie home, the Yangan hotel to collect Brett, back to Samuel's girlfriend's residence and then drove back to the McKenzie home with Brett.
- 9:50pm-10:40pm Ms Bontoft drove Nicholas and Max from the Yangan Hotel to the McKenzie home to get a lift with Brett and Abigail to a second party. On the way, Ms Bontoft heard discussions by Nicholas (on the phone to Brett), that travel to the second party would have to be via the Bacon Factory and the Eight Mile due to local flooding. (The Eight Mile is the intersection between the New England Highway and the Cunningham Highway, approximately eight miles out of Warwick).
- 10:45pm-10:50pm Nicholas, Max, Brett and Abigail left the McKenzie home for the second party in Abigail's Honda Civic.

The evidence of Samuel Dight, Susan Bontoft and Peta McKenzie is that the intention was for Abigail to be the designated driver until arrival at the second party where she would only then commence consuming alcohol and would stay overnight.

## **The evidence of Susan Bontoft**

56. Ms. Bontoft stated to police<sup>58</sup> that as she left Brett McKenzie's home, she saw the four young people getting into a silver sedan, and did not see them again. This differs to her oral evidence in which she said that she saw Abigail and Brett in front of the car, in front of the headlights and did not see either of them getting into or near getting into the car, or heading towards one side or the other. Later in her oral evidence, however, she said that she had seen Abigail more towards the driver's side (although not occupying a particular position inside the Honda). Whilst it is clear on the evidence that Ms. Bontoft, after making her statement to police, spoke with Peta McKenzie at a party (about what

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<sup>57</sup> Exhibit C9, Statement of Scott David Ellis.

<sup>58</sup> Exhibit C3.

Ms. Bontoft had seen) Ms. Bontoft denied that her evidence was affected by that conversation.

57. Nonetheless, on any version, Ms. Bontoft did not see who was driving the Honda as it left the McKenzie residence. In any event, due to the inconsistencies between her statement and her oral evidence and within her oral evidence, little reliance can be placed on Ms. Bontoft's recollection alone on the issue of seating positions in the Honda.

## **The evidence of Peta McKenzie**

58. Peta McKenzie provided statements<sup>59</sup> and also made notes.<sup>60</sup> In Peta McKenzie's first statement,<sup>61</sup> she reported that just before the four young people drove off in the Honda Civic, she saw Brett getting into the front passenger seat and Abigail standing between the car and the open driver's door, although she didn't actually see Abigail sit in the driver's position. (Peta McKenzie presumed the two persons in the back seat were Nicholas and Max because Abigail had told her).
59. Whilst those observations were repeated in Peta McKenzie's second statement, mention of them in her notes is limited to a notation at 8:15pm on 22 February, when reporting a conversation with Kevin Wendt as follows; "*I said to Kevin that I took pillows and blankets out to the car at 11:50 and Abby was the one that drove off. (As she hadn't had a drink all night) (They intended to stay the night).*"<sup>62</sup> Whilst it is accepted that the notes were not made contemporaneously and only commenced being written at all on 21 February 2008, it is surprising that the observations of Peta McKenzie that Abigail was preparing to get into the driver's seat were not more detailed.
60. Further, the evidence of both Sergeant Meehan and Inspector Curtin is that Peta McKenzie did not provide them with any of those details as to the positions of the four young people in the Honda, despite a number of opportunities to do so. (Sergeant Meehan's evidence was that he only became aware of it when shown Peta McKenzie's statements whilst preparing for the inquest).
61. Senior Constable Prendergast confirmed Sergeant Meehan's evidence that when the two of them visited the McKenzie's home a couple of days after the incident, Peta McKenzie did not mention seeing Abigail in or around the Honda's driver's door immediately before the Honda left the McKenzie residence for the last time on 5 January 2008.
62. In oral evidence, both Peter and Peta McKenzie could not recall discussing Peta McKenzie's observations of the four young people at/near the Honda with Sergeant Meehan and Inspector Curtin at the

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<sup>59</sup> Exhibit C14 dated 23<sup>rd</sup> September 2008; Exhibit C14.1 dated 2<sup>nd</sup> July 2010.

<sup>60</sup> Exhibit C14.2.

<sup>61</sup> Exhibit C14.

<sup>62</sup> Page 6 of Exhibit

meeting at the Warwick police station when the McKenzies requested that Sergeant Meehan forward the file to the Brisbane Forensic Crash Unit for a further opinion as to who was the driver. (Whilst there is a dispute on the evidence as to the date of this meeting, it is agreed that it was before 3 March 2008).

63. Contrary to the evidence of Peta McKenzie is the evidence of both Inspector Curtin and Constable Prendergast that, at no time, including when they delivered the death message to the McKenzies at approximately 4:45am on 6 January 2008, did Inspector Curtin say that Abigail was driving, either as stated information or in response to a question from Peta McKenzie. Whilst Peter McKenzie confirms Peta McKenzie's evidence that this positive report was made by Inspector Curtin when the death message was delivered, this alleged communication by police is noticeably absent from Peter McKenzie's application to the State Coroner in 2008 as well as the correspondence of Gilshenan and Luton dated 9 July 2010 in which particular criticism is made of the police for communicating to Abigail's father that Brett was the driver.
64. Whilst it is accepted that difficulties arose as a result of Peta McKenzie's evidence being interrupted and then not resuming for more than 24 hours (as a result of the need to accommodate other witnesses), those considerations don't alter the fact that the evidence of Officers Meehan, Prendergast and Curtin is consistent in relation to the above matters and there is no evidence to support any collaboration between them or any interest held by any of them in a finding that Brett, as opposed to any of the other occupants of the Honda, was the driver.
65. There is also some inconsistency between Peta McKenzie's oral evidence and the notes she prepared.<sup>63</sup> For example, in her oral evidence she was clear that Abigail herself took pillows and a blanket out to the Honda.
66. Contrary to the evidence of Peta McKenzie, Officer Wing denies having any conversation with her at any time, whether in relation to the accident generally or specifically in relation to the issue of who was driving. Officer Wing presented as a clear, credible, reliable witness who did not know any of the deceased and had no interest in a finding that Brett, as opposed to any of the other occupants of the Honda, was the driver.
67. Officer Wendt also gave clear, credible and consistent evidence when he denied Peta McKenzie's suggestion that he (Wendt) had told Peta McKenzie that Abigail was driving and that he had changed his opinion about who was driving because the police had a different view. Officer Wendt conceded that it was possible that he told Peta McKenzie that no-one would ever know who was driving, but he had no recollection of Peta

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<sup>63</sup> Exhibit

McKenzie telling him, as she alleges, that Abigail was driving or that she saw Abigail in the driver's area of the Honda. He clearly recalled the conversation, however, as he had never before received a phone call at his home, which he described as a "stand out event." Again, Officer Wendt did not know any of the deceased and had no interest in a finding that Brett, as opposed to any of the other occupants of the Honda, was the driver.

68. In the event of any conflict, therefore, between the evidence of Peta McKenzie and Officers Meehan, Prendergast, Curtin, Wing and Wendt, this Court prefers the evidence of the officers. This Court does not suggest that Peta McKenzie has been dishonest but it is clear from the evidence that Peta McKenzie formed the view that, because of driving arrangements made for the evening of 5 January 2008, the only possible driver of the Honda was Abigail. For the same reason, as well as her reliance upon evidence specifically gathered by her since the accident, Peta McKenzie continues to maintain that there is absolutely no possibility that Brett was the driver of the Honda.

### **The evidence of Leah Reeves**

69. Ms Reeves,<sup>64</sup> the console operator at the BP located approximately 11.8 kilometres south of the accident location, provided a statement to the McKenzies in July 2008,<sup>65</sup> (after Peta McKenzie twice visited her at the BP and at her home). In it she stated that: Abigail and Brett came into the service station that night, purchased a soft drink and had a brief discussion with her. Because of the use of video surveillance, "*...they should have been recorded on 3 CCTV cameras.*" Ms. Reeves was sure that Abigail got into the driver's seat and that not long after Brett and Abigail left the BP, Ms. Reeves saw a police car speeding north with sirens and lights activated.
70. When questioned by police as to the time that Brett and Abigail were at the BP, Ms. Reeves said that it was "*late in the evening...I wasn't sure of the exact time although it was late at night.*"
71. Ms. Reeves stated the same in the statutory declaration dated 15 February 2010,<sup>66</sup> in which she also stated that police viewed CCTV footage but that when she viewed the footage immediately thereafter, she couldn't find footage of the vehicle, Brett or Abigail; and began to doubt her initial recollections.
72. In a statement taken by RACQ on 9 August 2011,<sup>67</sup> Ms. Reeves stated that: she was "*95% sure*" that Abigail got into the driver's position; there was CCTV footage which would show Brett and Abigail had attended the

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<sup>64</sup> Exhibit C19.

<sup>65</sup> Exhibit C16.

<sup>66</sup> Exhibit C16.1.

<sup>67</sup> Exhibit C16.2.



BP on 5 January 2008; police viewed the footage and told Ms. Reeves that they found no evidence of Brett and Abigail's visit to the BP; but when Ms. Reeves looked for the footage (after she had spoken to Mrs. Peta McKenzie at her home and gained the impression that Mrs. Mckenzie was doubtful about the police action) she couldn't find it. As a result, Ms. Reeves asked her Manager whether he had deleted it and he said no.

73. In her oral evidence, Ms. Reeves conceded that she did not remember where Brett got into the vehicle, and did not watch the vehicle between the time that Abigail was getting into the driver's position and when the car drove off (although it was a matter of seconds only and there would have been insufficient time to swap drivers).
74. In relation to the CCTV footage, her oral evidence was unable to clear up the inconsistent and vague references in her statements. She variously said that she *"never looked at the CCTV footage"*, *"there was really no footage for 5 January;"* *"I couldn't find the footage for that night"* and *"there were no dates or time on the footage – you had to press buttons."*
75. The evidence of Eric David Moore, Ms. Reeves' partner at the time did not assist. He said that four years down the track his memory was not great and he was probably tired at the time when Ms. Reeves spoke to him about the incident on 6 January 2008. His memory of the car (pointed out to him in the police compound the next day by Ms. Reeves) was that it was darker than a silver colour. In relation to the CCTV footage, Mr. Moore's oral evidence was that Ms. Reeves told him that she had watched the relevant footage, but he later said that Ms. Reeves told him that she couldn't find the specific footage she was looking for, although she had found footage for the day in question.
76. In relation to the CCTV issue, Sergeant McKenzie confirmed that cameras were positioned to film persons in the driveway near the fuel bowsers, entering the BP store and/or at the front counter. He and Sergeant Waugh viewed footage at the BP, played and controlled by the Manager, for the period between 10:30pm and 11:15pm on 5 January 2008. (Meehan's evidence was that the date and time were clearly depicted on the screen). Despite a careful process of viewing (slowing it to scrutinise every person, stopping it whenever someone was at the counter, and viewing the footage twice) Sergeant Meehan said there was no evidence of the four deceased or any vehicle matching the description of the Honda Civic. (Sergeant Waugh knew Brett McKenzie by sight, and Sergeant Meehan knew what the four deceased were wearing at the time of the accident).
77. Sergeant Meehan's evidence was not successfully challenged under cross-examination and was corroborated by the evidence of Sergeant Waugh who was not required for cross-examination.

78. Sergeant Meehan also gave evidence that when he asked Ms. Reeves whether she had served Brett and Abigail, Ms. Reeves simply said “I think so,” providing the same response when asked if she had also served Dr. Hannon that night. (Peta McKenzie had provided police with information that Dr. Hannon had also attended the BP that evening, which information proved to be incorrect).
79. Given the lack of CCTV footage supporting Ms. Reeves’ recollections, her non-specificity as to the times she saw the deceased and then saw and heard the police vehicles, as well as her evidence about the CCTV footage, this Court places little reliance upon her evidence to be satisfied that Abigail was the driver of the Honda immediately prior to, and therefore at the time of the accident.
80. Regardless, however, of whether Ms Reeves’ evidence can be relied upon or not, there remains the possibility of the positions of the four young people changing within the car before the incident, even if Abigail was driving when the Honda left the BP. (The Honda left the McKenzie home at approximately 10:50pm, and even if it stopped at the BP thereafter, the collision occurred at approximately 11:21pm. It is not disputed that the drive from the McKenzie home, to the BP service station, to the crash site, is less than a half hour drive. Even if travelling at 60 km/h in a direct route, the driving would take less than fifteen minutes).
81. It is unfortunate that the police did not seize the CCTV footage, so as to erase doubts that have arisen about whether or not it was the relevant footage. On the basis, however, that Sergeants Meehan and Waugh did not observe the Honda or occupants on what they were confident was the relevant footage, no criticism can be made of them for failing to seize evidence which they reasonably considered did not add anything to the investigation.
82. Accepting Meehan’s and Waugh’s evidence, it is difficult to find that the Honda drove into the BP with Abigail and Brett entering the store, making a purchase and conversing with Ms. Reeves between 10:30 and 11:15 on 5 January, without determining that the police viewed CCTV footage for another time period; or the footage was erased or removed by the police. There is no evidence from which this Court can infer that the police acted in such a way. There is also no reason to be critical of police for failing to take a statement from Dr. Hannon.

## **B. Evidence of independent eye witnesses**

83. Daryl John Frans<sup>68</sup>, a self-employed truck driver of 21 years, was driving north on the Cunningham highway at approximately 10:20pm on 5 January 2008, in front of Mr. Welsh’s B-Double and Mr. Raymond Bell’s

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<sup>68</sup> Exhibit C10.

4WD. Via radio, Mr. Welsh told Mr. Frans that he and Mr. Bell were travelling together.

84. Mr. Frans stated that the B-Double and 4WD passed him safely, without speeding. Mr Frans lost sight of them through Warwick until he reached the accident, at which time Mr. Frans observed that Mr. Welsh was shaken but that he did not appear intoxicated or affected by drugs. Mr. Frans then heard Mr. Welsh say words to the effect of "*He's dead, he committed suicide, I've run over a car.*" Mr. Frans could not identify or describe the driver of the car.
85. Ronald Raymond Bell<sup>69</sup>(with his wife Christine as the front passenger) had been driving behind Mr. Welsh for approximately 700 kilometres. As Mr. Bell was increasing his speed to 100 kilometres an hour, a silver sedan "*came flying past us on the right. I thought he was crazy. He came up behind us at high speed and just kept going. I'd say he was going at least 140 kilometres per hour. He just flew up that hill.*" (Despite use of this particular language, Mr. Bell was unable to describe the driver, including as to gender).
86. Mr. Bell backed off the B-Double when the silver car was alongside the truck. He picked up his CB radio to warn Mr. Welsh, but put it down when he realised that the silver car would have passed the B double. After the silver sedan was in front of the truck, Mr. Bell saw the sedan's lights turn ninety degrees right, as if the silver sedan was doing a handbrake turn. Mr Bell heard a skid, heavy braking from the B-Double and a bang. The B-Double went right. Mr. Bell applied his own brakes and went left of the B-Double.
87. Under further questioning, Mr. Bell revised his own speed to 82-83 kilometres per hour at the time that he was trying to keep up with the B-Double just prior to the accident.
88. Contrary to what was suggested by Dr. Gilmore in his first report<sup>70</sup> as a possible scenario, Mr. Bell discounted the possibility that the B-Double hit the sedan more than once.
89. When giving oral evidence, Mr. Bell was visibly distressed by having to relive the details. He indicated that he was still talking to a counsellor about it. He reiterated that it was only a matter of seconds after the Silver sedan overtook him and the B-Double on the wrong side of the road that the incident occurred.
90. Mr. Bell was critical of the police who he says required him to sign the statement prepared for him even though it did not include information that he had provided at the scene; that is, that he had seen the handbrake of the Honda still on after the accident; that the Honda was

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<sup>69</sup> Exhibit C2.

<sup>70</sup> Exhibit B9.

travelling at more like 160 kilometres per hour when it overtook him; and that the rear left passenger of the Honda was a male who threw a can from the Honda towards his (Mr. Bell's) vehicle.

91. Christine Bell's statement<sup>71</sup> confirmed her husband's evidence as to the positions of the B-Double, the 4WD and the Honda; the behaviour of the Honda just prior to the collision and the behaviour of the B-Double at the time and immediately following the collision (although her estimate of the Honda's speed when overtaking the 4WD and the B-Double was between 100 to 140 kilometres an hour). She also confirmed that Mr. Bell did not have time to radio Mr. Welsh before she saw headlights in front of the B-double and the small sedan turning "*like the car was doing a U turn*".
92. When giving oral evidence, Ms. Bell was traumatised at having to remember the accident. She was visibly distressed and teary. On a number of occasions she said that she didn't remember certain things, saying that her memory of events was fresher in January 2008 than it is now. Under examination, Ms. Bell stated that Mr. Bell's speed was 90-100 kilometres per hour, but she later said it could have been 80 kilometres per hour, but she also said she wasn't sure and didn't know. She conceded that the Honda could have been travelling at 100 kilometres per hour in which case Mr. Bell was travelling slower than that.
93. Ms. Bell was also critical of the statement which police prepared for her signature and insisted she sign; because it did not contain information she had provided at the scene, that a male with dark hair in the back left rear passenger seat had thrown a can out of the window of the Honda as it overtook the Bells. Ms. Bell remained adamant about the description and behaviour of this passenger, adding that the police at the scene to whom she relayed that information went immediately to search for the can. (None of the police officers, however, provided evidence about either the search for or location of this can).
94. Mr. Trevor Graham<sup>72</sup> told police that he was travelling north at about 11:13pm along the Cunningham Highway north of Warwick with his girlfriend and his son in the car, when he overtook a B-double truck and a four wheel drive. He then saw a sedan come up behind him, very quickly. He checked his speed at 105 kilometres an hour, and estimated that the sedan was travelling at about 130 to 140 kilometres an hour, at least. The car came so close behind Mr Graham that he had to turn the rear view and the two side mirrors away. He started to brake so that the sedan could pass by, but the sedan indicated left, slowed off, turned off the side of the road and (without hesitation or indication) swung to the right. At that point, Mr. Graham, in his rear mirror could see the whole

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<sup>71</sup> Exhibit C1.

<sup>72</sup> Exhibit C11, taken by Constable Brooks and dated 20<sup>th</sup> January 2008.

side of the sedan, which the truck (driven by Mr Welsh) tried to avoid by veering right, but hit on the driver's side door.

95. Mr Graham called 000,<sup>73</sup> clearly stating to operational staff that the actions of the driver of the sedan were suicide. Mr. Graham also approached Mr. Welsh who did not appear to be affected by alcohol or drugs, but didn't want to talk about the accident.
96. In his oral evidence Mr. Graham said that he didn't see any of the occupants of the sedan before the collision. They got so close to his vehicle at one stage that he couldn't see their headlights.
97. The evidence of Frans, Graham, Ronald Bell and Christine Bell supports the following findings:
  - (a) The Honda in which the four young people were travelling, overtook Mr. Bell's 4WD and the B-Double at between 100 and 140 kilometres an hour or more. (Whilst Mr. Peter and Mrs. Peta McKenzie dispute that the Honda was capable of reaching those speeds, there is no evidence to support that assertion).
  - (b) The rear passenger side occupant of the Honda, a male, threw a can from the Honda towards the 4WD.
  - (c) The Honda drove very close behind Mr. Graham's vehicle, indicated left, slowed, backed away and then, without warning, turned right, into the path of the B-double.
  - (d) Mr. Welsh applied the brakes of the B-Double, which veered right, but was unable to avoid hitting the driver's door of the Honda.

### **C. Evidence of Mr Welsh**

98. Mr. Welsh had 35 years of truck driving experience and, at the time of the accident, was driving in the course of his employment with Toll Logistics, for whom he had been working for about six months. The evidence of Mr Welsh is contained in;
  - (a) Statements to/from independent witnesses;
  - (b) A signed statement to police, taken by Constable Snell at 5:15am on 6 January 2008;<sup>74</sup>
  - (c) A signed statement to his solicitor;<sup>75</sup> dated 9 April 2011; and
  - (d) Statements by him to various medical practitioners in the course of his treatment.<sup>76</sup>

#### **(a) Statements to/from independent witnesses**

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<sup>73</sup> Exhibit L1.

<sup>74</sup> Exhibit C19 dated 6<sup>th</sup> January 2008, taken by Constable Snell.

<sup>75</sup> Exhibit C19.1.

<sup>76</sup> Exhibit C25.

99. The evidence of Mr Frans<sup>77</sup> was that Mr. Welsh said that the car had passed him (Mr. Welsh) pretty quickly, backed off and stopped side-on in front of him as if it had done a hand-brake turn; and also said of the driver “*he’s dead, he committed suicide.*”
100. Mark Joseph Sullivan heard Mr. Welsh say that he thought the driver was committing suicide.<sup>78</sup>
101. QAS Officer Wendt<sup>79</sup> was told by Mr. Welsh that the Honda had passed Mr. Welsh, driving erratically at a high speed, with the occupants skylarking, shortly before the accident: and then it suddenly turned right, directly in front of him, such that he had no way of avoiding the collision.
102. Mr. Welsh told QAS Officer Bell<sup>80</sup> that the car had “*flown*” past him previously. Officer Bell considered Mr. Welsh to be coherent and unaffected by drugs or alcohol.
103. Mr. Welsh told QAS Officer Wing<sup>81</sup> at the scene that a male person, in the driver’s seat of the vehicle, was just staring at him (Mr. Welsh) and he did not know if the male person just froze or if the vehicle had stalled. (Officer Wing, in his oral evidence, stated unequivocally that Mr Welsh had definitely provided this description of the driver and told Officer Wing that he (Mr. Welsh) had seen him before the crash).

**(b) Mr. Welsh’s signed statement to police<sup>82</sup>**

104. Mr. Welsh stated that a vehicle was approximately two hundred metres in front of him (on the evidence, this would be Mr. Graham’s vehicle). Mr Welsh heard a car travelling fast behind him and then it overtook him so quickly (“travelling at least 130kph”) that he didn’t have time to spot it in his mirrors before it was pulling in, in front of him. Mr Welsh observed the car to be driving in a “stupid” manner, appearing to push the car in front of it (again, on the evidence, Mr. Graham’s vehicle). The left indicator came on, went off, came on again, and the grey car pulled off the road to the left but did not stop; and then, without the right indicator coming on, it suddenly swung in front of Mr Welsh’s truck and stopped. Mr Welsh thought that the driver of the grey car was committing suicide.

**(c) Mr. Welsh’s signed statement to his solicitor dated 9th April 2011<sup>83</sup>**

105. In this statement, Mr. Welsh stated that when the grey car first indicated left, there was nowhere to pull over due to the presence of a drain and a

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<sup>77</sup> Exhibit C10.

<sup>78</sup> Exhibit C27.

<sup>79</sup> Exhibit C29.

<sup>80</sup> Exhibit C34.

<sup>81</sup> Exhibit C37.

<sup>82</sup> Exhibit C19.

<sup>83</sup> Exhibit C19.1.

bank. When the driver indicated left a second time, the car pulled off the road into a parking bay, rolled down the parking bay without applying its brakes; and then rolled right, directly in front of Mr Welsh's truck. In relation to driver identity, Mr. Welsh 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"). Mr Welsh's headlights were shining straight at the grey car.

**(d) Versions of events supplied by Mr Welsh to various medical personnel**

106. References in correspondence from Dr. Janis Carter dated 8<sup>th</sup> February and 15 February 2008 include: "*the four young people committing suicide by driving straight under his (Mr. Welsh's) vehicle.*"<sup>84</sup> Notes of Dr. Heim's attendance upon Mr. Welsh on 7 February 2008 record "*two people in the front seat had become one person.*" Correspondence from Dr. B. Klug dated 7 July 2010<sup>85</sup> indicated that Mr. Welsh reported travelling at approximately 100 kilometres an hour, a car overtook him then slowed down and stopped sideways across the road and "*He saw the driver's eyes and instantly knew that this was a suicide.*" Notes of Dr. M. Nothling, Psychiatrist dated 1 July 2008<sup>86</sup> include Mr. Welsh reporting that he was passed at high speed by a Honda Civic which pulled over to the left and then, as he drew level, it pulled out into the road in front of him and stopped. He "*was shocked and he kept re-running over the accident in his mind, seeing the eyes of the driver.*"

**(d) The credibility of Mr. Welsh**

107. The evidence of Mr. Welsh as to the behaviour of the Honda, his reactions, and the mechanism of impact is supported by the evidence of all of the independent eye-witnesses. Whilst Mr. Welsh's interpretation of the behaviour of the Honda as suicide was not communicated to police or included in his police statement, the Court accepts the evidence of Mr. Frans and Officer Sullivan that Mr. Welsh certainly communicated that belief to them at the scene. Further, the medical notes contain numerous references to Mr. Welsh holding that belief. Mr. Graham's evidence and that of the 000 call indicate that Mr. Graham shared the same belief. With the exception of that issue, the reports Mr. Welsh made to treating medical specialists are consistent with his statements to police, and to officers Wendt, Bell and Wing.
108. The following evidence of Mr. Welsh is confirmed by David Wright<sup>87</sup>, the National Line Haul Manager of Toll Pty Limited:- The B-Double was speed limited to 100 kilometres an hour; (a speed limiter reduces the

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<sup>84</sup> Exhibit C25. Statement of Caitlin Honess, attaching correspondence from Dr. Janis Carter.

<sup>85</sup> Exhibit C25 above. Letter to "the Court, c/- RACQ Insurance Limited.

<sup>86</sup> Exhi25.

<sup>87</sup> Exhibit C24.

petrol provided to the engine if the speed limit is exceeded by up to 3.3 percent beyond 100 kilometres an hour, regardless of the actions of the driver). A warning system exists to warn drivers when they exceed the speed limit, and to notify the employer after approximately thirty seconds of driving over the speed limit. No such warning was received by Mr. Welsh's employer.

109. This court accepts the submission of Counsel Assisting that this consistency means that this court can be satisfied that the evidence of Mr. Welsh and the independent eye-witnesses is a truthful and accurate report of the behaviour of the Honda, Mr. Welsh's reactions and the mechanism of impact. In his oral evidence, Officer Wing said that Mr Welsh said "*I just remember the male driver staring at me, moments before the impact.*"
110. There is no possibility of collusion between Welsh and Wing, as Officer Wing moved away from Warwick shortly after this incident, and then retired. Officer Wing's statement was not taken until 12 December 2011, and Mr Welsh's second statement is dated 15 April 2011, just under eight months earlier. Mr Welsh unfortunately passed away in July 2011. The significant consistency between Mr Wing's recollection of Mr Welsh's statement at the scene, and Mr Welsh's own statement, lends significant weight to this already important evidence.
111. I accept the submission of Counsel Assisting that Mr Welsh, above any other witness in these proceedings, was in the best position to indicate who the driver was if he saw the driver. There is no evidence to suggest that Mr. Welsh knew any of the occupants or had any interest in asserting one person as the driver over any of the others. Likewise, Officer Wing did not know any of the occupants of the Honda and had no reason to misreport Mr. Welsh's description to him of the driver.
112. As a result, Mr. Welsh's evidence of the description of the driver as a male with dark hair (consistent as between his second statement and Officer Wing's evidence of Mr. Welsh's comments to him at the scene) is accepted.
113. As confirmed during the autopsies, the three young men in the car had either black or brown hair. Abigail had dyed blonde hair. It seems unlikely that Mr Welsh could have both the sex and the hair colour of the driver incorrect in the circumstances. Mr Welsh was clear that he had a good view of the driver of the sedan, because his headlights shone straight into the sedan.
114. The Court accepts the submissions that the strongest evidence on the identity of the driver is Mr. Welsh's evidence that the driver was male with dark hair, and not female with blonde hair. This court does so despite Sergeant Meehan's evidence that when he asked Mr. Welsh if he could identify the driver or describe the driver Mr. Welsh said he could not (because it happened so quickly) and Senior Constable Snell's



<sup>88</sup> that because of the trauma of the event, Mr. Welsh was more guarded to police who were investigating his culpability, if any, for the incident; than he was in a private, informal conversation with Officer Wing, who was concerned for Mr. Welsh's well-being.

#### **D. Evidence of the experience/manner of driving of the persons involved**

115. There is only evidence in relation to the experience and mode of driving of Brett and Abigail. In relation to Abigail, it is the evidence of Abigail's parents, Samuel Dight and Peta McKenzie. In relation to Brett, it is the evidence of Mr. and Mrs. McKenzie ... [part of paragraph removed – subject to non-publication order].
116. Despite Dr. Gilmore having been instructed with, accepting and acting on contrary information, the unchallenged evidence is that Abigail received her licence in October or early November 2007 on the fourth attempt and completed a defensive driving course in November 2007<sup>89</sup>. Abigail ... [part of paragraph removed – subject to non-publication order]<sup>90</sup> was a timid, careful, courteous driver, with very limited experience.<sup>91</sup>
117. Comments of Peta McKenzie<sup>92</sup> in her statements and to police were that Abigail hated driving on the highway. In her oral evidence, Peta McKenzie stated that Abigail was so fearful of highway driving that she would routinely travel a longer route to her place of employment rather than execute a right hand turn across the highway in the centre of Warwick.
118. Mr. Dight, on the evidence of Sergeant Meehan, stated that Abigail would generally drive at 80 kph in a 100kph zone, (and did so earlier on the night of 5 January 2008); and in his evidence, agreed generally with Abigail's timid nature as a driver. Indeed, the extensive arrangements made on 5 January 2008 for Mr. Dight to travel to and from Yangan with Abigail were due, in large part, to Abigail's lack of confidence as a driver.
119. Therefore, the manner in which the Honda was driven is entirely inconsistent with Abigail's driving manner, ability and experience.
120. Brett McKenzie was a driver with experience of highway and night driving. Brett's father was careful to teach him good road practice and was emphatic that Brett knew the consequences of drink driving.

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<sup>88</sup> Exhibit M3.

<sup>89</sup> Exhibit C20, Statement of Roz Ezzy.

<sup>90</sup> Exhibit G1.

<sup>91</sup> Exhibit C21, Statement of Dennis Ezzy.

<sup>92</sup> Exhibit C14 and 14.1.

121. ... [part of paragraph removed – subject to non-publication order] consistent, at least as far as the issue of speeding is concerned, with the manner of driving adopted by the driver of the Honda. This Court rejects the submission of Counsel for the McKenzie family that this Court could accept that Brett, ... [part of paragraph removed – subject to non-publication order] had a reason to exercise care whilst driving. ...[part of paragraph removed – subject to non-publication order].
122. This Court is not of the view however, that evidence of the manner, experience and ability of any driver, on its own, is conclusive in determining driver identity under the circumstances of this or any accident.

## **E. Evidence as to body positions**

123. QFRS Officer Robert Theo Wing, a fire-fighter with 38 years experience and a qualified trainer in road accident rescue, supervised the removal/extraction process at the scene. In his oral evidence, he stated that the truck lifted off the Honda cleanly. QFRS officers then cut the pillars of the Honda and lifted the roof of the Honda off by hand. At this point Officer Wing was within 2-3 feet of the Honda.
124. Officer Wing stated that he formed the view that the driver was the male person whose legs were still in the driver's position of the Honda. QFRS officers had to remove the steering wheel, in fact, to get one of the male's legs out as the steering wheel was hampering the removal of this leg by lying against the knee of the leg of the male (although the leg was not actually trapped by the wheel). The body of this male was virtually right over in the front passenger seat with his bottom between the front seats. In Officer Wing's opinion, it would be impossible for the male in question to have moved to that position as a result of moving the truck off the car, even though he conceded under cross-examination (having seen certain photographs)<sup>93</sup> that the Honda had in fact moved when the truck was lifted off.
125. Officer Wing said that there was a second male in the front passenger position and another out of the rear passenger window, and maintained that evidence, conceding that he had said otherwise in his statement to police<sup>94</sup> (that is, one male in the driver's position and two male persons in the rear seat).
126. Sergeant Meehan's opinion<sup>95</sup> that Brett was driving the vehicle at the time of the crash is based upon his significant qualifications and experience as a crash investigator, the force of the impact, the witness statements, the driving attitudes of the occupants of the Honda and, in particular, the position in which Brett was found in the Honda as depicted

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<sup>93</sup> Exhibits E2-37 and E3-19.

<sup>94</sup> Exhibit C37.

<sup>95</sup> Exhibits B6 (paragraph 69) and C40.

in a number of key police photographs<sup>96</sup> (including photographs of Brett's right foot in the driver's well and his left foot on the driver's seat; and another of Brett's toes under the steering wheel of the Honda, taken before the B-Double was lifted off and before the steering wheel was removed).<sup>97</sup>

127. Sergeant Meehan's evidence as to the location of bodies corroborates that of Inspector Wing, and is supported by the photographic evidence.
128. Whilst less experienced QPS officers Constable Prendergast, Senior Constables Canning, Cremasco, Hauff and Snell also formed the view that Brett was the driver by reason of their observations of the positions of the bodies, particularly Brett's, I reject the submission of Counsel for the McKenzies that this court should ignore their evidence because they lack the relevant expertise. This court accepts the opinion of Dr. Casey that it is well within the ability of a lay person to make up their own mind as to where a foot is positioned and that such is not the sole domain of expert evidence. Inspector Curtin also observed the position of Brett's feet and formed the same opinion. Each of those officers is also quite clear that they were not influenced by anyone else, including Sergeant Meehan, in forming that view.
129. Cremasco's evidence was that he was close enough to touch the Honda when the B-Double was lifted from the Honda. He says that there was only a slow amount of movement of the Honda and no change in position of the bodies in it. Whilst Senior Constable Hauff conceded that there was movement of Brett's foot during this process, the movement was only a matter of a few inches.
130. The Court accepts the veracity of this evidence which is supported by the photographic evidence. Further, none of the police officers knew any of the Honda's occupants, had ever met any of them, and had no reason to prefer Brett as the driver over any of the other occupants. In any event, the more expert witnesses supported the use of evidence of body positions.
131. Sergeant David Stocker, an expert QPS forensic crash investigator<sup>98</sup> supported the use of body position (as well as angle and force of impact, occupant restraints, occupant dynamics and damage to vehicles) to determine the issue of driver identification. Sergeant Stocker's evidence, when shown Exhibit 2.42, was that Brett's foot was likely to have been occupying that position at impact because the B -Double thereafter would have been pinning his body in that position.

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<sup>96</sup> Exhibit E2.40 (photo of Brett's left leg from the knee down in the driver's side of the Honda under the tanks of the B-Double) and Exhibit E2.42 (photo of several toes of Brett's right foot underneath the steering wheel) and Exhibit E3.19 (photo of Brett's right foot on the passenger side pointing upwards).

<sup>97</sup> Exhibit E2-42 and 2-43.

<sup>98</sup> See Exhibits B8 and B16.

132. Professor Ansford<sup>99</sup> and Dr. Koppen's medical evidence<sup>100</sup> supported the use of, and relied upon body position when considering the matter.
133. Dr. Casey's evidence was that body position is a significant and important tool in determining the identity of the driver (in conjunction with an analysis of the likely forces and movement during impact). In fact, Dr. Casey's evidence was that body position is so significant that he based some of his opinions solely on final resting positions.<sup>101</sup> Dr. Casey's reliance upon body position flowed from his opinion that the crushing of the Honda would have held the occupants in place and the crushing of the driver's footwell would have occurred in the initial stages when the lateral forces were applied<sup>102</sup>. (Unlike Dr. Gilmore, Dr. Casey did not base any conclusions on either witness statements or injuries)<sup>103</sup>.
134. Contrary to the evidence of each of Dr. Koppen, Professor Ansford, Sergeant Stocker and Dr. Casey, Dr. Gilmore was critical of drawing conclusions as to driver identity based on the final resting position of the bodies, saying that very little can be ascribed to that evidence. It became very clear, however, that Dr. Gilmore missed the key police photographs.<sup>104</sup> Under examination, when shown the photo of Brett's right foot under Abigail's purse in the driver's compartment of the Honda,<sup>105</sup> Dr. Gilmore's surprise and shock were visibly registered on his face. He nonetheless refused to concede that it altered any of his opinions, because "*it is just a loose foot*" and "*I don't place any significance on it, it is wishful thinking*" and "*it is not surprising that a toe is in any part of the car*" because "*occupants would have been thrown all around the vehicle.*"<sup>106</sup>
135. To be fair to Dr. Gilmore, none of the experts, except Sergeant Meehan (who referred to the specific photos in his report to the Coroner) appear to have understood the significance of the photographs, particularly Exhibit 2-42. Having accepted what was depicted in it, however, none of the experts (except Dr. Gilmore) could explain how Brett's feet came to be positioned as indicated, unless he had been the driver. (For reasons referred to the discussion of Dr. Gilmore's evidence later in these reasons, this Court is of the view that even Dr. Gilmore could not logically explain how Brett came to be positioned where he was found, unless he was the driver).
136. For that reason, there can be no criticism of Sergeant Meehan for forming the view that Brett was the driver of the Honda, when, as

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<sup>99</sup> Oral Evidence of Professor Ansford.

<sup>100</sup> Oral evidence of each of Dr. Koppen and Professor Ansford.

<sup>101</sup> Oral evidence of Dr. Casey.

<sup>102</sup> Oral evidence of Dr. Casey.

<sup>103</sup> Oral evidence of Dr. Casey.

<sup>104</sup> Exhibits E2-40, E2-42, E3-33, E3-19

<sup>105</sup> Exhibit E2.42.

<sup>106</sup> Oral evidence of Dr. Gilmore.

submitted by Mr. Mac Giolli Ri, Dr. Casey reached the same view on less compelling evidence.

## **F. Evidence of forensic crash investigators**

137. Senior Constable Hans Boon was a forensic collision analyst in the QPS Forensic Crash Unit between 1979 and 2008. He undertook more than 500 crash investigations in that period, including at least six (6) which involved the need to determine driver identity. Boon was clear that, in determining driver identity, he would not use information as to who was driving earlier but would assess the situation independently of that information.
138. Boon was provided only with information available as at 3 March 2008.<sup>107</sup> His report dated 17 April 2008<sup>108</sup> clearly indicates that he required further information and his oral evidence confirmed that he was unaware of or could not recall the key photographs.<sup>109</sup> He also stated in his oral evidence that he did not access the witness statements on QPrime. His written report is therefore inadequate in determining the issue of driver identity or otherwise.
139. After viewing the key photographs during his examination, however, Boon's evidence was that the foot position of Brett was significant, but it had to be considered together with all of the other evidence in determining driver identity. He added that if there was a person found immediately to the left of the position of Brett's feet, the person on the right is likely to be the driver. (The unchallenged evidence is that Nicholas was found immediately to the left of Brett).
140. Sergeant David Stocker, in a supplementary Form 1 to the Coroner<sup>110</sup> analysed the crash<sup>111</sup> by reference to photographs, the location and angle of impact, the principal direction of force, the types of vehicles involved, occupant restraints, occupant dynamics, occupant ejection, injuries and a crash video demonstrating the dynamics of a side impact crash as well as occupant movement.
141. Sergeant Stocker's opinion was that Brett McKenzie was the driver at the time of the collision, Abigail and Nicholas were left-sided occupants of the Honda, and Max was in the rear right seat of the Honda. Sergeant Stocker's evidence was clear, credible and consistent. His reported conclusions were not significantly challenged under cross-examination and his ultimate opinions do not conflict with Sergeant Meehan's (even though Sergeant Meehan appears to have relied more on body position).

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<sup>107</sup> Exhibit B3.

<sup>108</sup> Exhibit B4.

<sup>109</sup> Exhibits E3-19, E3-33 and E2-42.

<sup>110</sup> Exhibit B8.

<sup>111</sup> Exhibit B6.

142. All of the evidence of the forensic investigators, therefore, tends towards Brett McKenzie being the driver.

## **G. Medical evidence**

143. Dr Koppen provided a number of reports, documents and charts/tables<sup>112</sup> in relation to the injuries resulting to each of the deceased persons and their positions in the Honda prior to the impact. In each of the reports and in his oral evidence, Dr Koppen clearly indicated that he was not a crash investigation expert and that his opinions were restricted to whether individual injuries made sense medically and were/were not consistent with injuries to be expected to be suffered by occupants of particular seating positions in the Honda.

144. In his statement prepared before reading any of the engineering reports,<sup>113</sup> but after receiving accident scene forensic information, Dr. Koppen opined that the injuries that he would expect the driver of the Honda to receive would be:

- (a) Potentially major lower leg lacerations or fractures (from the early crush down of the leg compartment , making the driver less mobile);
- (b) A potential predominantly right head injury and potential torso injury; and
- (c) Whiplash, initially forward towards the dashboard, and then backwards towards the rear passenger corner of the vehicle.

Dr. Koppen's opinion is that the injuries suffered by Brett were the most consistent with this pattern and mode of injury.

145. The injuries that Dr. Koppen stated<sup>114</sup> he would expect the front seat passenger to suffer would be a potential absence of leg injuries, presence of potential major torso injuries and potential head injuries, consistent with a mobile (not trapped) body moving towards the B-Double, and then forced back and left, towards the rear passenger corner of the vehicle. Most consistent with this pattern of injury, in Dr.Koppen's view, were the injuries suffered by Nicholas.

146. As to injuries expected to be suffered by a person in the position of the right rear passenger, Dr Koppen opined that they would include a right seat belt mark, potential lower leg injuries (less severe than that of the driver), potential very severe head and upper torso injuries and upper body abrasions. Most consistent with this pattern of injury were the injuries suffered by Max.

147. Dr. Koppen opined that the injuries expected to be suffered by the occupant of the left rear seat would be consistent with the person being forced out of the left rear of the car and impacting on the ground – thus

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<sup>112</sup> Exhibits C22, C22.1, C22.2, C22.3, C22.4 and C22.6.

<sup>113</sup> Exhibit C22.1

<sup>114</sup> Exhibit C22.1

widespread, variable and severe injuries, and abrasions under movement. Most consistent with this pattern of injury, in Dr. Koppen's opinion, were the injuries suffered by Abigail, who was found clear of the Honda.

148. In his oral evidence, Dr Koppen noted conclusions reached by both Dr Gilmore and Dr Casey in their reports about the tiny fraction of time it would have taken for the B-Double, laterally striking the sedan, to crush the driver's foot well inward – either 0.02 or 0.03 of a second, that is, "very quick."<sup>115</sup> Dr Koppen concluded from this information that there is a high likelihood that the driver would have extensive bilateral lower-leg injuries.
149. The person fitting this description is Brett. Abigail had no lower leg injuries, Max had a compound fracture of his right ankle with an associated laceration and Nicholas had no lower leg injuries. Brett had bilateral closed fractures of both bones in the lower part of both legs, a laceration on the left leg and abrasions to the right leg. The only person with bilateral lower leg injuries was Brett, and the person with the most extensive lower leg injuries was Brett.
150. Dr Koppen was specific in terms of lower leg injuries, as opposed to leg injuries generally, because the driver's lower legs would have been in the driver's foot well, where the described crushing occurred, while the upper legs were on the seat and not subjected to the same force.
151. Dr. Koppen was critical of the significance placed by Dr. Gilmore on Abigail's femur fracture being evidence of her position as the driver because, in Dr. Gilmore's view, the femur is "*uniquely connected with a high level bending impact as it is a very strong bone.*"<sup>116</sup> In Dr. Koppen's opinion, this involved an over-simplistic interpretation on Dr. Gilmore's part, because the force required to fracture a femur depends on the direction of the force as much as the strength of the force.
152. Dr. Koppen considered that, in determining occupant positions, particular significance should be given to right-sided torso and head injuries. The person in the position of driver would be expected to suffer right-sided injuries as that was the primary initial point of impact of the B-Double – the driver's door and surrounds. The pattern of Brett's injuries included injuries to the right hand side of his head (above his ear), a midline fracture of his jaw, extensive right and left rib fractures (and underlying injuries), and extensive internal injuries to the torso. Abigail had injuries to the head and torso but they were not as significant, and not as right-sided, as those of Brett, in Dr. Koppen's view.

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<sup>115</sup> Evidence of Dr. Koppen.

<sup>116</sup> Exhibit B9, page 32

153. Such injuries as Dr. Koppen opined would be inflicted upon the driver, he would not expect to be suffered by the occupant of the front passenger seat.
154. In his evidence at the inquest, Dr. Koppen drew a careful distinction on the issue of seat belt injuries – he was comfortable identifying seat belt injuries on Max which put Max on the right hand side of the vehicle, but he was careful to indicate that whilst there were injuries consistent with seat belt injuries on both Abigail and Brett (placing Abigail on the left side of the vehicle and Brett on the right) these were not at all conclusive of being caused by a seat belt, because they could also have been caused by other mechanisms.
155. Dr. Koppen provided tables indicating his opinion of the likely placement of the four deceased. In the first table, reproduced immediately below, Dr. Koppen relied on body position.

	Front right	Front left	Back right	Back left
McKenzie	Probably	Possible	Improbable	Improbable
Nolan	Possible	Probably	Improbable	Improbable
Thorley	Improbable	No	Probably	No
Ezzy	Improbable	Improbable	Improbable	Probably

A second table, however, was based solely on his assessment of injuries as follows:

1. Thorley: Right Seat Belt = Right Side (Left No)
2. Nolan: No lower leg injury, least injured occupant = Left Side
3. Lower Leg Injuries: McKenzie (bilateral) + Thorley (Right) = Probable Right Side
4. Most Severely Injured: Thorley + McKenzie = Probable Right Side
5. Potential Seatbelt Injuries: McKenzie Wound Right Shoulder  
Ezzy bruise left shoulder
6. Most Severe Right Side Injuries: Thorley/McKenzie/Ezzy/Nolan.

	Front right	Front left	Back right	Back left
McKenzie	Probable	Improbable	Possible	Improbable
Nolan	Improbable	Left	Improbable	Left
Thorley	Possible	No	Probable	No
Ezzy	Improbable	Left	Improbable	Left

Using either table, Brett is the only probable driver and Abigail is improbable as the driver.

156. Against Dr Koppen's first table is the evidence of Mr and Mrs Bell that they saw a male in the back left passenger position shortly before the



157. Professor Ansford, an expert specialist forensic pathologist, reviewed the material available to Dr Koppen<sup>117</sup> and stated that Dr. Koppen had considerably more experience than he had in relation to motor vehicle/traffic trauma. Professor Ansford opined that, on the pathology evidence alone, it was not possible to positively say who was driving the Honda at the time of the crash, although it was possible to exclude Max as the driver, given the seat belt and other injuries to Max.
158. Professor Ansford provided a further opinion dated 14 September 2011,<sup>118</sup> responding to Dr Gilmore's first report. Professor Ansford confirmed that there is nothing about the pattern of injuries *looked at in isolation* which could enable him to conclude who was driving. However, when considering other factors as well, particularly the position of the bodies, he concluded that Brett was most likely to have been driving, with Nicholas as the front seat passenger, with Abigail most likely in the rear left/passenger's seat, and Max in the rear right/driver's side seat (that is, the same view formed by Dr Koppen in his first table which takes into account body positioning).
159. This Court accepts the submission of Counsel Assisting that Dr Koppen's opinion and Professor Ansford's opinion are not necessarily inconsistent. Professor Ansford indicates that it is not possible to '*conclude*' who was driving while Dr Koppen is simply giving an indication of probability.
160. This court also accepts the submission of Counsel Assisting that the medical evidence, particularly the evidence of Dr Koppen as supported by Professor Ansford, strongly supports the view that Brett was the driver of the Honda. Whilst there has been criticism of Dr Koppen's involvement and findings; and whilst both Dr. Koppen and Professor Ansford stated in oral evidence that, asked again, they might not venture into the area of identifying the driver, there is no evidence to suggest that Dr Koppen did anything other than a careful and impartial examination within his area of expertise. I accept the submissions that no findings adverse to Dr Koppen would be made.
161. Dr. Adam Griffin provided a statement<sup>119</sup> commenting upon the toxicological testing results on the blood and/or urine analyses for Nicholas, Brett and Max. Dr. Griffin opined that sensory motor impairment would be expected to be starting in a person with a blood/alcohol concentration (BAC) of 0.065% (Nicholas); and that the ability of a person with a BAC of 0.224% (Max) or a BAC of 0.129% (Brett) to control a motor vehicle would be severely impaired. Dr. Griffin's opinion was that given the sources of the blood and the period of time that had elapsed (two days) before testing, the percentage drop in the

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<sup>117</sup> Exhibit B12.

<sup>118</sup> Exhibit B14.

<sup>119</sup> Exhibit B17.

concentrations might be anywhere between 5% and 25% less than the actual results. Dr. Koppen agreed with this evidence.

## H Mechanical evidence

162. Reports supplied by Toll Pty Limited<sup>120</sup> confirm that the B-Double was travelling at approximately 89 kilometres per hour at impact with the Honda which occurred at 11:21:17 on 5 January 2008. This evidence is not challenged.
163. Drs. Gilmore and Casey provided reports<sup>121</sup> and gave evidence. Their significant qualifications, experience and expertise were not challenged.
164. Dr Gilmore concluded that it is highly likely that Brett was in one of the front seats, Nicholas was in a passenger-side seat; but most likely that Brett and Abigail were in the front, and Nicholas and Max were in the rear.
165. Dr Gilmore's first report indicated that the factors against Brett driving were that he had not planned to drive and had been drinking, and the factors against Abigail driving were that it is difficult to work out how she could be ejected from the car into her final resting position, away from the car, if she started off in the driver's seat.
166. Commencing at page 40 of his first report<sup>122</sup>, Dr. Gilmore presented a number of possible occupant scenarios, with reference to injuries and final rest position. They were: Scenario 1:- Brett driving, Abigail front passenger, Max rear right passenger, Nicholas rear left passenger. Scenario 2:- Brett driving, Nicholas front passenger, Max right rear passenger, Abigail left rear passenger. (This scenario accords with Sergeant Stocker's, Dr. Koppen's and Professor Ansford's opinions as to occupant positions, particularly that of the driver). Scenario 3:- Abigail driving, Brett front passenger, Max rear right passenger, Nicholas rear left passenger.
167. Dr Gilmore opined that scenarios 2 and 3 were both possible in terms of the path of travel of each deceased person to final resting position. He then applied the scenarios to the injuries suffered<sup>123</sup>, and used that information alone to conclude that scenario 3 was more likely. He repeatedly insisted that, in forming his opinions, it is at least equally within a mechanical engineer's expertise as it is within a medical witness' expertise to comment on the relevance of injuries to occupant positions in a vehicle and to determine driver identity from injuries.

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<sup>120</sup> Exhibit H.

<sup>121</sup> Exhibit B9, B9.1, B13 & B13.1

<sup>122</sup> Exhibit B9.

<sup>123</sup> Exhibit B9, page 44, paragraph 11.3.

168. Dr. Gilmore's analysis may be summarised as Abigail's right-sided injuries being too significant for her to be a passenger-side occupant of the car, and Brett's injuries, whilst being consistent with being the driver, are also consistent with other mechanisms of damage. Whilst Dr. Gilmore conceded that he had no medical or pathology qualifications or experience, and he relied on a textbook as authority for the force required to break a femur; he was unwilling to concede at all that the causation and mechanism of injuries, the direction and quantity of force required to break bones and distinguishing between injuries caused inside or outside of the car was the field of a medical expert, and therefore outside his expertise. Dr. Gilmore's very clearly stated opinion was that you do not require medical knowledge to make such comments and that, in any event, "*medical reports only record injuries.*"
169. Dr Gilmore also ignored or discounted a significant body of evidence. Specific examples of this are as follows:
- (a) Dr. Gilmore was instructed only about Abigail's driving history. Those instructions were erroneous in that they referred to Abigail having got her licence on a 5<sup>th</sup> attempt. It is concerning that the driving histories of the other 3 occupants of the Honda were not provided to, or sought by, Dr. Gilmore before providing his report.
  - (b) Dr. Gilmore calculated an approximate distance travelled by the B-Double before the accident site, from unspecified sources;<sup>124</sup>
  - (c) When presented with the evidence of driver identification by Mr. Welsh, Dr. Gilmore indicated that "it wouldn't change my mind because I have worked this up in an absolute way."
  - (d) Dr. Gilmore incorrectly assumed that the Honda's speed was 100 km/h, when all the independent eye witnesses consistently and clearly indicated that the speed was possibly as high as 140 or 160 kilometres per hour;
  - (e) Dr. Gilmore inexplicably drew negative conclusions in relation to Mr Welsh's response to the actions of the Honda Civic, including evidence as to his speed when preparing for the upcoming 80 km/h zone (despite this evidence of speed being supported on the data from the engine monitoring system of the truck);
  - (f) Dr. Gilmore attempted, by relying on differences in Officers Cremasco's and Hauff's descriptions of the driver's side footwell, not only to discount the evidence of Brett's foot being in that position, but to opine positively that Brett's foot was in fact more probably in the passenger side of the vehicle<sup>125</sup>. This is contrary to the evidence of every other witness with an opinion and more importantly, the key police photographs.

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<sup>124</sup> Exhibit B9, page 8, paragraph 3.2

<sup>125</sup> Exhibit B9, page 23, paragraph 7.3.

- (g) Even subsequent to realising the depictions in the key police photographs, Dr Gilmore continued to dismiss them as validation of the opinions of other witnesses/experts.
- (h) Dr. Gilmore ignored the evidence and relevance of the speed limiter fitted to, and functioning on, the truck driven by Mr Welsh,
- (i) Dr Gilmore's table describing "major" matters to be considered<sup>126</sup>, whilst including the anecdotal reasons why Brett was unlikely to be the driver, does not include the anecdotal reasons why Abigail was unlikely to be the driver.
- (j) Dr Gilmore demonstrated partiality in his consideration of witness' statements. He concluded Trevor Graham did not have a clear view of the incident because he witnessed the accident in his rear vision mirror. He discounted Raymond Bell's evidence because Dr. Gilmore did not accept that he had a clear view. He ignored the consistency between the independent eye-witness' statements.
- (k) Dr. Gilmore discounted the possibility that Abigail's extensive injuries were because she was ejected from the vehicle.
- (l) Dr. Gilmore was willing to allow a scenario to excuse those injuries inconsistent with his conclusion that Brett was not the driver, but to not allow the same sort of scenario to explain/excuse the injuries of Abigail.
- (m) Dr. Gilmore's explanation that Brett is unlikely to have driven because (i) Brett had been drinking, (ii) it wasn't his car (despite Brett having driven that car many times before) and (iii) Brett was not the designated driver: is unconvincing, as is his willingness to attribute to Abigail a complete change in driving behaviour (which is not open on the evidence).

170. In any event, under cross-examination by Mr. Edwards, Dr. Gilmore confirmed his three conclusions commencing with the strongest and most reliable and concluding with the weakest and least reliable, as follows:

- (a) Any of Brett, Abigail or Max could be the driver;
- (b) Probable that both Abigail and Max were located on the right hand side of the Honda vehicle at the time of impact, (and not Brett);
- (c) Abigail driving.

171. Dr Gilmore confirmed that to move from conclusion (a) to conclusion (b) involved only a consideration of the injuries suffered by each of the deceased, and nothing else. Whilst confident of conclusion (b), he was not as confident as he was of conclusion (a).

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<sup>126</sup> Exhibit B9, page 40, paragraph 9.5.

172. On the basis, however, that Dr Gilmore lacks the expertise to draw conclusions from injuries, the Court considers that the more reliable evidence on injuries is that of Dr Koppen and Professor Ansford.
173. In relation to (c) above, Dr Gilmore was careful to point out that whilst the reliability of this conclusion is to the standard of more probable than not, he is less sure of this conclusion than he is of conclusions (a) and (b). In moving from conclusion (b) to conclusion (c), Dr Gilmore applied the scenarios he created and witness statements. On the basis, however, that conclusion (b) used medical knowledge outside Dr Gilmore's field of expertise, and (c) relied on an unbalanced application of the witness statements, the court is therefore left with conclusion (a), which is not totally inconsistent with the opinions of Dr. Casey, and Sergeant Stocker, and other evidence tending towards Brett being the driver.
174. Dr Gilmore's credibility was also successfully challenged in other ways so as to lead this Court to have some concerns about relying heavily on his opinion. He did not answer direct questions, he adopted a sarcastic tone inconsistent with an independent expert, and he was not willing to make fair concessions open on the evidence. He was also defensive and argumentative.
175. Contrary to Dr. Gilmore, Dr Casey gave his evidence in a clear, considered, credible way. He was impartial, balanced and objective. Dr Casey was careful to confine his opinions to his field of expertise and steadfastly refused to exceed it or go outside it. He declined to offer an opinion based on medical evidence, and he refused to offer an opinion based on likely driver behaviour. He answered questions forthrightly and clearly at every opportunity and was prepared to make fair concessions.
176. Dr Casey's evidence during the inquest remained consistent with his report. He would not alter his opinion based on the evidence of Mr and Mrs Bell about seeing a male in the rear left position of the car seconds before the impact. In any event, this is consistent with his opinion prior to having this information when he thought there was a male and a female in the rear of the Honda but he could not say who was on the left and who was on the right.
177. Given the forces impacting upon the Honda (which all the experts agreed were in the direction of the rear passenger side of the Honda) Dr. Casey's opinion was that the result was the alignment of the occupants of the Honda toward its rear passenger side<sup>127</sup>. Consequently, *"it stands to reason that a person who is initially most remote from the rear passenger corner would come to rest the furthest away from that corner. The driver position is most remote from the rear passenger corner and therefore I expect that the driver would come to rest the furthest away from the rear passenger corner. In this case, Mr. McKenzie came to rest*

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<sup>127</sup> Oral evidence of Dr. Casey.

*the furthest away from the rear passenger corner and therefore I consider it likely that he was the driver.*<sup>128</sup>

178. The evidence that Brett's foot was even further away from the rear passenger side confirmed the likelihood. Dr. Casey's oral evidence was that if Brett's foot had been trapped, Dr. Casey would have been even more certain that Brett was the driver. Dr. Casey also framed the effect of the forces upon the Honda and its occupants in this way, "*The person who started closest to the truck would remain closest to the truck*".<sup>129</sup> (On any version of the final resting positions of the occupants, that person was Brett).
179. Upon viewing Exhibits E3.33 and E2.42 Dr. Casey further opined that all of Brett's body except his foot was pushed away from the position of the driver's side rather than the reverse scenario of Brett's foot going into the driver's footwell from another position. Dr. Casey opined that it would be very difficult for Brett's foot to go into that position or indeed in that direction given the forces at play and the debris from the impact.<sup>130</sup>
180. Dr. Casey opined that Abigail was the least likely to be the driver, given her ejection from the vehicle, which was the strongest evidence that she was not the driver. Dr. Casey was also very confident that Abigail had been ejected late in the incident. On the basis that, in Dr. Casey's opinion, the only likely opening was the rear windshield or the rear roof (because of the clockwise rotation of the car, and Abigail was the first one and the only one fully ejected), Abigail had to have been in the back seat.
181. Dr. Casey conceded the possibility of ejection further forward in the vehicle, but indicated that the difficulty with this is the likelihood of both Abigail and Max being ejected from the same place given the same forces acting on them (and Max was not ejected out the front). He also took into account that the ejection was at a late stage and by this stage there would have been interference in the process of ejection from the truck and the crushing of the car from a front-ended ejection, whereas there would be less difficulty with an ejection from the rear left. These considerations also had a role in determining that Max and Abigail were likely to have been in the back of the vehicle, in Dr Casey's opinion.
182. Whilst at the time of preparing his report, Dr Casey did not appreciate the existence of Brett McKenzie's toes in photograph E2-42, this photograph only lends further support to Dr. Casey's conclusions.

## **Resolving the conflict between Dr Casey and Dr Gilmore**

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<sup>128</sup> Paragraph 12, page 25 Exhibit B13.

<sup>129</sup> Oral Evidence of Dr. Casey.

<sup>130</sup> Dr. Casey's oral evidence.

183. Given this Court's assessment of the evidence of each of Dr. Gilmore and Dr. Casey and the critical analysis of the manner in which they gave their evidence, this Court attaches significant weight to the evidence of Dr. Casey by reason of Dr. Casey's non-adversarial, objective, balanced, impartial approach and most particularly, because Dr. Casey confined his opinions to those within his area of expertise.<sup>131</sup> That is, to the extent that Dr. Gilmore's evidence is in conflict with that of Dr. Casey, this Court accepts the evidence of Dr. Casey,<sup>132</sup> as the best view of the mechanical engineering evidence. Again, it supports the view that Brett McKenzie was the driver of the Honda.

### **Findings required by s. 45(2) Coroners Act 2003**

184. I make the following findings required by s. 45 (2) of the *Coroners Act 2003*:

- (a) The deceased persons are Nicholas James Nolan, Maxwell Ernest Thorley, Abigail Denise Ezzy and Brett Alexander McKenzie.
- (b) They each died at or about 11:21:17pm on 5 January 2008.
- (c) They each died in a motor vehicle collision that occurred about 11.4 kilometres north of Warwick on the Cunningham Highway, and 100m north of the intersection of Willowvale Road.
- (d) They each died as a result of significant injuries they suffered as a result of that motor vehicle collision.

### **Findings as to who was driving**

185. This court is satisfied to the requisite standard that Brett McKenzie was driving at the time of the motor vehicle incident. No doubt about the identity of the driver is created by the evidence of Dr Gilmore, for the reasons indicated above.

186. Neither is reasonable doubt created by the evidence of Ms Peta McKenzie, Ms Susan Bontoft or Ms Leah Reeves, for the reasons discussed above. In any event, also as discussed above, there remains the possibility that Abigail stopped the car and swapped positions with another person in the car after the Honda was observed to leave the McKenzie home, and even if Abigail was driving, when the Honda left the BP.

187. A finding that Brett was the driver is a finding supported by the medical evidence, forensic crash analysis evidence, mechanical engineering evidence of Dr Casey, direct eye witness evidence, evidence of the location of the bodies, evidence of Brett McKenzie's driving history and even one of the scenarios hypothesised by Dr. Gilmore.

188. An open finding about the identity of the driver, as submitted by Counsel for the McKenzie family, is against the weight of the evidence.

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<sup>131</sup> Fox v. Percy (2003) 214 CLR 118 per Callinan. J.

<sup>132</sup> See Moynihan. J in Dan Milu v. WJ Smith & Ors (2003) QSC 430

## **Findings as to the quality and thoroughness of the police investigation**

189. Sergeant Meehan's approach in the formation of his opinion is confirmed by Dr Casey. Whilst certain deficiencies in the investigative process are identified and discussed below, it could not fairly be said that it was anything other than impartial. There is no evidence to suggest that Sergeant Meehan applied pressure to any of the other police officers or investigators in the formulation of their views about who was driving. Neither is there any evidence that Sergeant Meehan applied any pressure to Dr. Koppen or other experts in the investigation.
190. There is no evidence to support any finding, as was suggested in questioning at the inquest, and in the submission to the State Coroner, that Sergeant Meehan formed a view as to the identity of the driver early and then, as a consequence, ignored any contrary evidence. Senior Constable Boon's evidence was that an investigator who leaves the scene without having determined who the driver is, is in trouble. In any event, Sergeant Meehan spoke to witnesses whose names were provided by the McKenzies as persons with possibly relevant information, including Susan Bontoft and Leah Reeves. Sergeant Meehan also viewed CCTV footage as a result of being informed of the possibility that Leah Reeves was a relevant witness.
191. There is also no evidence to support a finding that Sergeant Meehan misled the local Coroner by failing to include a copy of Senior Constable Boon's report in his report to the Coroner. Whilst mention of the report is not indicated in the list of documents which Sergeant Meehan refers to in his report, this court accepts Sergeant Meehan's evidence that it was included in the physical material provided to the Local Coroner. Even if this court could be satisfied that the report was not forwarded to the Coroner, there is certainly no evidence, as submitted by Counsel for the McKenzie family, that the failure was a deliberate one.
192. No criticism can be levelled at Sergeant Meehan for an apathetic process of investigation, as submitted by Counsel for the McKenzies. Boon directed Sergeant Meehan to speak to the pathologist/GMO who did the post mortems, which Sergeant Meehan did promptly. It is also correct to say that Sergeant Meehan had at the time a significant body of investigative experience with forensic crash analysis, and so it is difficult to be critical of him for not seeking another opinion on the forensic crash analysis.
193. A statement was not taken by Sergeant Meehan from either Peta McKenzie, Peter McKenzie or from Leah Reeves. Whilst one cannot be critical of the failure of the police to take a statement from a witness who has not given police reason to consider them an eye-witness to certain events, the taking of a statement from Peta McKenzie would have been prudent once it became clear that she was undertaking her own investigation into the incident because of her strongly held belief that it



194. It is not possible to be critical of Sergeant Meehan for failing to take a statement from Peter McKenzie – his evidence relates only to the manner of the driving of his son, and the complaints of the McKenzie family directed to the process of the investigation undertaken by police.
195. In relation to a failure to take a statement from Leah Reeves, no criticism can be levelled at Sergeant Meehan, given this Court's acceptance of his evidence of Leah Reeves' statements to him when he questioned her and his follow through in watching the CCTV footage. Some criticism can be levelled at Sergeant Meehan, however, for failing to take notes of his conversation with Leah Reeves.
196. As already noted, a concession was made on behalf of the officers involved that the seizure and dealing with the phones from the scene and from the deceased could have been better handled. It remains uncertain, as a result, whose phone was found near Abigail, for example. It also remains uncertain as to why, according to the evidence of Peta McKenzie, Brett's and Abigail's phones were only found in the Honda some significant time after the incident, and only upon the insistence of Peta McKenzie that they be returned to their families.
197. Whilst Ms. Peta McKenzie raised the possibility of deliberate deletion of messages from 4 and 5 January 2008 from Brett's phone, all of the police questioned denied such a suggestion and there is no evidence of a possible motive for any of them in doing so. In any event, Ms. McKenzie's oral evidence was that the phone bills for Brett's phone also had no recording of any messages sent on 4 or 5 January 2008.
198. Only two findings need be made, therefore, in relation to the conduct of the police investigation:
- (a) the seizure and handling of the mobile telephones of the deceased should have been carried out so as to provide clear documentary evidence of where each of the phones was located; when each of the phones was located; whether each of the phones was on at the time of location; who owned each of the phones: and each of the phones should have been stored in a location specific to the investigation and known to all of the investigators involved; and
  - (b) It would have been appropriate for all QPS officers involved in the investigation to have taken notes in relation to all conversations with any potential witnesses, and even more so once it became known that the McKenzies were conducting their own investigation, which included the provision of information to police which the McKenzies made plain to police they thought was relevant.

## **Findings in relation to Dr Koppen and pathology processes**

199. No basis has been established in the evidence for any criticism of Dr Koppen. This Court finds that he acted in an entirely careful, logical, professional and appropriate manner at all stages during the investigation and the inquest. Dr Koppen's professionalism was confirmed in the evidence of Professor Ansford, who is very much in the best position to judge Dr Koppen's actions from both a medical and a forensic standpoint.
200. In any event, Exhibit B15 in the proceedings is a letter under the hand of Associate Professor Charles Naylor, in relation to the allocation of pathologists to particular matters. This court accepts that, on the basis that the approach to the selection of pathologists to perform post-mortem examinations is standardised and carefully considered, this issue requires no further findings.

## **Findings in relation to police training, resources and policy**

201. Senior Constable Boon's evidence was that certain training and resource issues were lacking in his time in the Forensic Crash Unit, ending in April 2008.
202. It is apparent, however, from the evidence of Sergeant Stocker during the inquest that these issues have been identified and acted upon. The provision of sufficient equipment to investigators has been dealt with, and the standardisation of training and the development of minimum standards has been actioned, with the process expected to be completed in June 2012.
203. Given Sergeant Stocker's evidence, there is no reason to make findings suggesting changes to police training or resources on the issue of forensic crash analysis.

## **Findings in relation to the drug testing of Mr. Welsh**

204. The statement of Acting Inspector D.F. McDonald (Regional Traffic Coordinator, Southern Region, Queensland Police Service)<sup>133</sup> indicates the policy and procedure that applied to roadside drug testing or testing of drivers involved in traffic incidents by the Queensland Police Service at the time of the incident.
205. Mr. Welsh was breath-tested at the scene. He returned a negative result. He also showed no indicia of intoxication or being affected by drugs or alcohol. The police at the scene of the incident were empowered to require a breath or saliva sample within time limits (two hours for breath, three hours for saliva) by s. 80(2A) *Transport Operations (Road Use*

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<sup>133</sup> Exhibit K1 in the proceedings, statement dated 23 August 2011

*Management) Act 1995.* If those results were inconsistent with indicia observed, the police could have required a blood sample by virtue of s. 80(9) TO(RUM) Act 1995. Since there were no indicia of intoxication or drug use observed on Mr Welsh, there was no disparity between the observations of the officer who took the breath sample and the (lack of) indicia he observed.

## **Recommendations**

206. In a recent inquest, however, into the death of Roslyn Amelia Law, the Brisbane Coroner recommended: That the Queensland Police Service ensure there is performed full alcohol and drug testing of all potentially culpable surviving drivers involved in motor vehicle accidents where serious injuries or deaths occur. This may require amendments to both policy and legislation. I repeat that recommendation.

## **Findings in relation to the actions of Mr Welsh**

207. The weight of the evidence clearly establishes that Mr Welsh had no time or manner in which to react other than in the manner in which he did. The collision was unavoidable.

## **Conclusion**

208. The cause of the incident was a course of driving by Brett McKenzie which ended with the Honda at approximately right angles across the road, stationary or nearly stationary, directly in the path of the B-Double, and the ensuing collision caused injuries to all four occupants which tragically ended their lives.

## **Findings required by s45**

<b>Identity of the deceased –</b>	Brett Alexander Kevin McKenzie
<b>Place of death –</b>	Cunningham Highway WILLOWVALE QLD 4370 AUSTRALIA
<b>Date of death–</b>	05 January 2008
<b>Cause of death –</b>	Multiple injuries, including fracture right parietal and base of skull & Right cerebral contusion, Ruptured Spleen kidneys & liver + Haemoperitoneum, Bilateral pulmonary lacerations and bilateral hemothorax due to, or as a consequence of a motor vehicle accident.
<b>Identity of the deceased -</b>	Abigail Denise Ezzy

**Place of death –** Cunningham Highway WILLOWVALE QLD  
4370 AUSTRALIA

**Date of death –** 05 January 2008

**Cause of death –** Multiple injuries, including Right occipital & Base of skull Fracture with subarachnoid haemorrhage, Ruptured Spleen, Liver & duodenum with Haemoperitoneum, Left pulmonary contusion, bilateral haemothorax due to, or as a consequence of a motor vehicle accident.

**Identity of the deceased –** Nicholas James Nolan

**Place of death –** Cunningham Highway WILLOWVALE QLD  
4370 AUSTRALIA

**Date of death –** 05 January 2008

**Cause of death –** Multiple injuries including Bilateral Haemothorax, pulmonary contusions, Left occipital skull fracture & right Subarachnoid haemorrhage, Ruptured liver, haemoperitoneum due to, or as a consequence of a Motor vehicle accident.

**Identity of the deceased –** Maxwell Ernest Thorley

**Place of death –** Cunningham Highway WILLOWVALE QLD  
4370 AUSTRALIA

**Date of death –** 05 January 2008

**Cause of death –** Multiple injuries including Comminuted Skull Fractures and Cerebral Contusions, Ruptured Spleen + Left ruptured Diaphragm + Haemoperitoneum due to, or as a consequence of a Motor Vehicle Accident.

I close the inquest.

Tina Previtara  
Coroner  
BRISBANE