QUEENSLAND COURTS

OFFICE OF THE STATE CORONER

FINDINGS OF INQUEST

CITATION:	**Inquest into the death of Stephen Arthur Nash**
TITLE OF COURT:	Coroner's Court
JURISDICTION:	Cairns
FILE NO(s):	COR 2012/595
DELIVERED ON:	24 November 2014
DELIVERED AT:	Cairns
HEARING DATE(s):	12 September 2013; 4-8 November 2013; 10-11 March 2014. Further written submissions 20 June - 3 October 2014
FINDINGS OF:	Mr Terry Ryan, State Coroner
CATCHWORDS:	CORONERS: Death in police operations; security providers, positional asphyxia

REPRESENTATION:

Counsel Assisting:	Mr Peter Johns
Ms Ruth Nash:	Mr James Sheridan (instructed by Absolute Law Lawyers)

Constables Joanne Wilesmith and Adam Green:	Mr Calvin Gnech (Queensland Police Union Legal Group)
QPS Commissioner:	Ms Belinda Wadley (QPS Solicitors Office)
Union Jack Hotel, Nui Merebark Eric MacDonald, Kristopher Peters Barry Cunningham:	Mr Tony Kimmins (instructed by O'Reilly Stevens lawyers)
Stephen Lewis:	Mr Habib Mellick

Contents

The *Coroners Act 2003* provides in s. 45 that when an inquest is held into a death in custody, the coroner's written findings must be given to the family of the person who died, each of the persons or organisations granted leave to appear at the inquest and to various officials with responsibility for the justice system including the Attorney-General and the Minister for Police. These are my findings in relation to the death of Stephen Arthur Nash. They will be distributed in accordance with the requirements of the Act and posted on the website of the Office of the State Coroner.

Introduction

Stephen Nash and his partner, Jasmine Mountford went to the Union Jack Hotel in Cairns late on the afternoon of Saturday, 18 February 2012. They had planned to spend the evening relaxing in Cairns and then stay overnight at a local resort.

They had consumed a significant amount of alcohol during the course of the day and at approximately 8:48pm, Mr Nash was asked to leave the Union Jack Hotel by two security providers working at the hotel. While he was being led from the hotel's beer garden there was an altercation between Mr Nash and three security providers, which included the application of a head lock/neck hold by one of these men.

Three of the security providers involved in Mr Nash's restraint (Stephen Lewis, Nui Merebark and Eric MacDonald) were licensed crowd controllers under the *Security Providers Act 1993,* and were working in that capacity at the Union Jack Hotel on 18 February 2012. Barry Cunningham and Kristopher Peters were employees of the hotel but were not employed to undertake crowd control. They did not hold crowd control licences. However, I will refer to all these persons as security providers in these findings.

After this initial restraint Mr Nash appeared to calm down and was released. When he regained his feet Mr Nash punched security provider Lewis forcefully in the mouth. This led to a second and longer period of restraint, during which Mr Nash was taken to the ground and held down by three security providers and two other hotel employees over approximately 12 minutes.

For much of this period Mr Nash continued to struggle with the security providers. He was then handcuffed when police officers arrived at the scene at about 9:04pm and rolled on to his side. After police officers failed to detect a pulse they performed resuscitation efforts until Mr Nash was eventually transported to the Cairns Base Hospital. Mr Nash was placed on life support and did not regain consciousness. He was declared deceased at 1:30am on 20 February 2012. This was 29 hours after he was first restrained at the hotel.

These findings:-

- confirm the identity of the deceased person, the time, place and medical cause of his death;

- consider whether the security providers involved were justified in using force against Mr Nash; whether the force used was necessary and reasonable, and whether it contributed to or caused his death;

- consider the adequacy of the training provided to the staff at the Union Jack Hotel in Cairns with regards to the safe application of force or restraint;

- consider whether the first two police officers to have contact with Mr Nash on the night of 18 February 2012 acted in accordance with QPS policy and procedure; and

- consider the adequacy of the minimum training requirements for the licensing of security providers with regards to the safe application of force or restraint.

The investigation

As police officers were in attendance and had handcuffed Mr Nash at the time of his restraint, his death was reported as a death in police operations under section 8(3)(h) of the *Coroners Act 2003*. An investigation was conducted by the QPS Ethical Standards Command (ESC) and a detailed report was prepared by Inspector Christopher Hobbs.

A post mortem examination was conducted on Mr Nash's body at the Queensland Health Forensic and Scientific Services (QHFSS) facility at Coopers Plains on 22 February 2012. Blood and urine samples taken on admission at the Cairns Base Hospital were obtained and subject to further toxicological testing.

I am satisfied this matter has been thoroughly and professionally investigated and all sources of relevant information have been accessed and analysed.

The death of Mr Nash was the subject of a separate full investigation by the Cairns Criminal Investigation Branch with assistance from the Homicide Investigation Group.

The evidence

Health and social history

Stephen Nash was born in Sydney on 27 July 1972, making him 39 years of age when he died. He was survived by his mother, Ruth Nash, and his sister.

Mr Nash had commenced a relationship with Ms Jasmine Mountford approximately six weeks prior to his death. It is clear they had formed a close connection.

It is also clear that Mr Nash's passing was a very sad event in the lives of his mother, partner and sister. I offer them my sincere condolences.

At the time of his death Mr Nash was employed as a truck driver and nursery assistant with Buffalo Raw Materials at Smithfield, Cairns. He lived in a share house at Yorkey's Knob, a twenty minute drive north of Cairns.

Mr Nash regularly exercised by lifting weights at the local gym. Mr Nash generally attended the gym twice each day. He was a very strong man and was described as much stronger than any other person at his gym. He was able to bench press 160kg.

At the time of his death he weighed 120kg and had a body mass index of 35.1, placing him in the morbidly obese range. He had previously used steroids to assist in gaining body mass but was reported to have stopped. There was no evidence that he continued to use steroids at the time of his death. He continued to consume several protein drinks each day to maintain his bulk.

Mr Nash attends the Union Jack Hotel

Mr Nash worked on the morning of 18 February 2012. He and Ms Mountford booked into their accommodation at the Novotel Oasis Resort in Cairns at approximately 2:30pm.

According to Ms Mountford, while at the Novotel Resort they consumed about half a bottle of bourbon and a bottle of champagne, mixed together. They had a quick meal at a local Italian restaurant at 4:50pm, and arrived at the Union Jack Hotel at approximately 5:40pm.

Ms Mountford indicated that they chose the Union Jack Hotel because they were aware it had a special drinks offer involving 'two drinks for the price of one' between the hours of 5:00pm and 7:00pm.

On arrival at the hotel they sat inside and Mr Nash purchased four vodka lime and soda drinks. He and Ms Mountford consumed two each. Ms Mountford stated that both she and Mr Nash felt unwell so they left the hotel at approximately 6:10pm to go to a local convenience store where they purchased chewing gum and a can of energy drink, which they shared.

They arrived back at the hotel at about 6:20pm and returned to the inside bar where they purchased four 'Bundy Five' white rum drinks, with lime and soda. They then moved to the beer garden area and sat at a table.

While in the beer garden they took advantage of a promotion for Bundy Five with Ms Mountford and Mr Nash consuming three and two shots respectively of Bundy Five with ginger beer and apple juice. Ms Mountford indicated they were drinking as fast as they could to take advantage of the promotion before it finished at 7:00pm.

After 7:00pm Mr Nash went to the bar and returned with three shots of Jaegermeister liqueur and two straight gins. He then drank one of the gins quickly and made a 'Jaeger bomb' with the other by mixing a Jaegermeister into the gin and drinking it rapidly.

After consuming a large number of alcoholic drinks, Ms Mountford's recollection of events was understandably poor. She recalls sitting alone for a time and then becoming aware of a commotion in front of the outside bar. She went to investigate and became aware that Mr Nash was being restrained on the ground.

Ms Mountford agreed under cross-examination that on this evening she was close to the most intoxicated she had been in her life, and that she could remember some things but not others.

Ms Mountford's recollection of the evening was not helped by the fact that she was not wearing her spectacles on the night, so was unable to see more than one metre clearly. She stated that when she found that Mr Nash was being restrained she asked if she could hold his head off the ground and was told that this was okay.

Ms Mountford stated that she continued to cradle Mr Nash's head on its side. She recalls that he said to her 'get them off me, they're hurting me'. She stated that after Mr Nash vomited she felt his head move and thought he was able to breathe. Mr Nash was struggling a little at this time and she thought he was trying to get comfortable. She did not become aware at any time that he had stopped breathing or lost consciousness. Ms Mountford stated that when Mr Nash was handcuffed she thought he was okay, but when police officers went to pick him up he was limp.

In her initial statement to police, taken on the night of 18 February 2012, Ms Mountford described three to four bouncers on top of Mr Nash, who was on his back. She thought that two were holding his legs and two had their knees on his chest, 'like they were sitting on him or kneeling on him'. She agreed in cross-examination that this recollection was not correct.

In a supplementary statement she recalled that Mr Nash was lying on his stomach with two security providers positioned at each side, one positioned near his legs and another holding him by the shoulders. Ms Mountford stated that she had placed her hands under Mr Nash's head to keep his head off the concrete. She told the security provider closest to her that 'you're going to kill him' but was ignored.

She asked the security providers to release Mr Nash but was told they were unable to do so until the police arrived, because he had injured one of them. Police arrived shortly after Mr Nash had vomited. Ms Mountford described Mr Nash as becoming quieter during the course of the restraint, but agreed under cross-examination that at no stage before the police arrived did she suspect that Mr Nash had lapsed into unconsciousness.

Two restraints

By approximately 8:48pm two security providers had refused Mr Nash further service of alcohol. He was subsequently asked to leave the hotel. While being led from the beer garden to the street Mr Nash resisted and an altercation ensued. He was taken to the ground and restrained for a short period by three security providers - Stephen Lewis, Nui Merebark, and Eric MacDonald. This restraint included the application of some form of head lock or neck hold by the security provider MacDonald.

While on the ground of the beer garden, Mr Nash appeared to calm down and was released by the security providers. At this time Mr Nash got to his feet and then punched security provider Lewis. The closed fisted punch connected with Lewis's mouth area. Mr Nash struck Lewis with what could be described as a straight left punch, delivered with considerable force. The CCTV footage clearly shows this punch was delivered with such force that it knocked Mr Lewis backwards and he struggled to stay on his feet.

Mr Nash was again taken to the ground and restrained by security providers. Mr Nash was restrained on the ground for a period of approximately 12 minutes by the security providers. The exact details of what occurred during this period are unclear as the second restraint was only partially recorded on CCTV.

Witness accounts

There is a wide variation in witness accounts about how long Mr Nash was struggling with security providers and whether or not he remained still for several minutes towards the end of the second restraint. Some witnesses report hearing him state, 'I can't breathe' and observed him vomiting. Others claimed that he struggled throughout the restraint and continued to struggle when police were placing handcuffs on his wrists. As would be expected many witnesses had some level of intoxication.

Witness accounts suggest two security providers were on his legs, one on each arm/shoulder and possibly another on his back. Some witnesses stated as many as eight persons were involved but given the crowd numbers, some of these may have been onlookers. It is clear that multiple patrons witnessed and approached the scene, several interfering with events, and dancing around the people involved. There were

over 100 people in attendance at the hotel. The hotel continued to serve drinks in the vicinity and play loud music for the duration of the incident.

John Martin

John Martin was a patron at the Union Jack Hotel on 18 February 2012. He had one drink of beer before he observed the events involving Mr Nash. He first observed Mr Nash talking with security providers and the subsequent punch thrown by Mr Nash at Mr Lewis. He could not hear the conversation between Mr Nash and security providers because of background noise, but heard the punch above that noise.

Mr Martin was able to identify security providers from photo boards. He saw security provider Merebark tackle Mr Nash to the ground. Mr Martin described two other security providers holding his legs (Lewis and MacDonald), initially bending Mr Nash's legs backwards and putting pressure on the back of his legs to try and stop his legs from moving. Mr Nash was face down. He described another security provider (Merebark) around Mr Nash's upper body but could not recall exactly where he was holding him as his view was obscured by Lewis and MacDonald. Mr Merebark was at Mr Nash's left hand side.

Mr Martin saw a barman (Peters) place his shin in the vicinity of Mr Nash's right shoulder area to brace against him to stop him rolling around. Mr Martin described the concrete floor as quite shiny and it seemed that the security providers and other people were struggling to get a grip on the floor. This is clear from the CCTV footage.

Mr Martin's evidence was that while Mr Nash was on the ground he continued to struggle and that security were having a very hard time trying to control him. He saw the barman walk away from the group and take his phone out to make a call. The barman was only gone for a short time when he came back and tried to help the security providers again. He went to ground, half leaning on Mr Nash's upper body and trying to restrain his right arm.

Mr Martin observed that Mr Lewis was replaced by another male who he thought was someone from the general public. Mr Lewis returned after a couple of minutes and resumed control of Mr Nash's left foot. Mr Martin thought a lot of force was being applied to Mr Nash but said that the mass of people on the floor was a 'fluid moving body'.

Mr Martin saw the police officers arrive and the male officer try to place handcuffs on Mr Nash with the assistance of the female officer. They had trouble doing so as Mr Nash continued to struggle. Mr Martin then saw Mr Nash lying on his side with his hands cuffed behind his back. After looking away for a brief period Mr Martin could smell vomit. He turned back and saw that Mr Nash was lying on his back, cuffs removed, with police officers attempting resuscitation.

Mr Martin did not witness any neck restraint, punches or kicks to Mr Nash during the period in question. In his opinion, Mr Nash continued to struggle very aggressively for most of the time. While he did calm for a short period before police arrived, he started to struggle again as the police were trying to cuff him – 'it definitely did not look like the man was unconscious at that time'.

Shane Coyne

Mr Coyne had travelled to the Union Jack on the 'Party Bus' with a group of friends. He first encountered Mr Nash when he saw four or five bouncers on top of a male in

the outside bar area. He described Mr Nash as lying on the right side of his body. He saw two bouncers on top of Mr Nash and the other bouncers kneeling around him.

Mr Coyne was unable to recall what part of Mr Nash's body the bouncers were touching but said they were in contact with their hands or knees. He recalled that Mr Nash was more on his back than anything else with his face up. In evidence at the inquest he indicated that once Mr Nash vomited he thought the bouncers could have done more to help, such as putting him on his stomach.

Mr Coyne observed a security provider with his knee against Mr Nash's back and at the same time holding his arm. His perspective was that the security provider was trying to keep him upright and that the security provider was leaning away from him. Another two security providers had contact with Mr Nash's chest with their hands while they knelt on the floor.

Deborah Simpson

Ms Simpson was a qualified nurse and psychologist who had worked in correctional facilities. She was familiar with the phenomenon of restraint asphyxia. She observed that Mr Nash was face down with one security provider across his shoulders with his entire weight on Mr Nash. Another security provider had his hand around his neck in a headlock. A third security provider had his knee up on his back.

Ms Simpson saw two other security providers holding Mr Nash's legs, where they were trying to keep him down because he was 'struggling strongly, jumping like crazy to get up'.

Ms Simpson's evidence was that she was concerned that Mr Nash was unable to breathe, and when he vomited a frothy vomit he was not moving. However, Ms Simpson was not in a position to see whether Mr Nash was conscious from where she was located. Ms Simpson recalled seeing a female approach Mr Nash while he was on the ground but did not see her touch him at any time.

Brendan Giacomi

Mr Giacomi was returning to the Garden Bar when he observed six or seven bouncers on top of a person, with a couple of them holding the person in a restraint. He observed Mr Nash was lying on his stomach face down. He observed one of the security providers holding Mr Nash in a restraint but he could not remember the type of restraint.

He was also unable to remember whether any of the security providers were in contact with Mr Nash's back, and was unable to see Mr Nash's face.

While Mr Giacomo initially stated that he had observed the scene for 10 to 15 minutes he subsequently agreed that it was more likely only two to three minutes. He also stated that he had seen two bouncers lying with their body weight pressing down on Mr Nash. However, he subsequently agreed that one bouncer was holding Mr Nash's leg over his shoulder. A second bouncer was crouching or kneeling and restraining Mr Nash's right arm either on the ground or on his body. A third bouncer was crouching or kneeling and holding his weight on Mr Nash.

Sarah Ganter

Sarah Ganter arrived at the Union Jack at approximately 8:30pm. She noticed a commotion involving five persons piled on top of Mr Nash. She recalled Mr Nash's partner was right in front of his face.

Ms Ganter recalled seeing 'Steve' from the party bus around the middle of Mr Nash's back. His feet were anchored on the concrete floor and he was leaning back onto him. Two security providers were over his legs and two were on his upper body. Ms Ganter does not recall seeing Mr Nash move during this time. However, he was conscious.

Ms Ganter recalled seeing a person come and kick Mr Nash in the knee/shin area. Ms Ganter was unable to say how the bouncers were lying on Mr Nash other than they had some sort of body part holding him down. One of the security guards on Mr Nash's left side was holding his arm. A second security officer was holding his right arm. She recalls that he was pinned for five to eight minutes.

Ms Ganter drew her concerns to the attention of one of the security providers by asking him if he thought the level of restraint was really necessary.

Jennifer Bantoft

Ms Bantoft was celebrating her birthday on 18 February 2012. She had consumed two alcoholic drinks prior to the incident. She witnessed the initial altercation, and subsequently saw Mr Lewis spitting blood from his mouth in the vicinity of the toilets at the Union Jack.

Ms Bantoft saw Mr Nash being restrained on his chest with his head to the side. Initially, she saw two security providers pushing his feet towards his back and a third security provider was closer to his head with a knee positioned on his back.

Ms Bantoft said that Mr Nash was angry, trying to get security providers off him. She said that he had struggled for the whole of the ten minutes that she was observing at the same level of intensity. She did not hear Mr Nash say anything but heard security providers telling him to calm down and they would let him up. She described it as an 'intense struggle' with Mr Nash displaying violent resistance.

Ms Bantoft recalls that when police officers arrived Mr Nash was still struggling and she overheard the female officer state that they may need to Taser him. Her recollection was that he was still fighting after the QPS arrived and he was sitting up. He was flailing his arms trying to shake off the police officers who were attempting to place handcuffs on him. She had no concerns about Mr Nash's level of consciousness or his capacity to breathe.

Ms Bantoft recalled two security providers attempting to restrain Mr Nash's legs by bending them towards his back. Another was lying on him holding him down and another was leaning over him with a knee in the middle of his back and hands placed on his arms and shoulders.

Ms Bantoft described the situation as 'dynamic' with people changing positions frequently during the incident.

Adam Matthews

Mr Matthews was a tourist from the United Kingdom. He described seeing five bouncers restraining Mr Nash on the floor. The first was on his left arm, the second on the right arm, the third was on the left leg and the fourth was on the right leg. A fifth bouncer was on his back.

Mr Matthews was seated five to six metres away from the incident and had an unobstructed view. He stated that until the police arrived Mr Nash was very vocal, but

moved less over time. Mr Nash was trying with all his might to get the bouncers off him. Mr Matthews saw that Mr Nash was breathing when the police officers arrived. Mr Nash continued to struggle while police attempted to place the handcuffs on his wrist. He observed that the bouncers were 'holding Mr Nash's palm down and out' and the police officer had moved it around so the palm of the hand was facing up and on the back.

He observed blinking and chest movement but was unable to see after that.

Mr Matthews thought that the struggle continued for at least 10 minutes, with Mr Nash attempting to position himself to get onto his knees. In Mr Matthews' opinion the level of force applied by the bouncers was proportionate because Mr Nash was very strong and was continually fighting against them.

Andre Adomaitis

Mr Adomaitis was employed as a security officer at the Toy Box nightclub on 18 February 2011. This is located opposite the Union Jack Hotel on Spence Street.

While he was setting up for the evening, one of the organisers of the Party Bus told him that security at the Union Jack needed help in managing a patron. He ran across to the hotel where he saw four security staff with Mr Nash. He recognised two of the men as Eric McDonald and Nui Merebark, who he knew through his work in the security industry. Three security providers had hold of Mr Nash and one was overlooking the situation.

Mr Adomaitis assessed that the security providers had Mr Nash under control but that he was in a 'funny position', on his front with his upper body slightly off the ground. Mr Nash was being held but he was not fighting or struggling until one of the police officers placed the handcuffs on his wrist. Mr Adomaitis did not consider that the security providers were placing downward pressure on Mr Nash. They were restraining his legs to stop him kicking, and his arms to stop him from throwing punches. Mr Nash was spitting a white foam but did not vomit. Mr Nash was awake and conscious and he observed Ms Mountford talking with him throughout the restraint. He agreed that he was not at the scene for the entire period of the restraint.

Mr Adomaitis stated that in his training as a security provider he had been instructed on the dangers of restraining a person on the ground, as well as the dangers of using a neck restraint.

Mr Adomaitis had assisted police investigators in the making of a video re-enactment of the respective positions of the security providers in restraining Mr Nash. He maintained that this was an accurate depiction of the restraint. This was played at the inquest and indicated the following:

- Eric MacDonald was securing both Mr Nash's legs;
- Nui Merebark was securing Mr Nash's left arm with a wrist lock;
- A third security provider was placing downward pressure on Mr Nash's back with his hand;
- A fourth security provider was attempting to secure Mr Nash's right arm.

Robert Fenwick

Mr Fenwick was the manager of the Toy Box nightclub. He followed Mr Adomaitis across to the Union Jack Hotel. He was acquainted with all hotel and security staff at the Union Jack through his involvement in the hospitality industry. Mr MacDonald had

been employed by Mr Fenwick previously for a period of approximately six to eight months.

Mr Fenwick was at the hotel for approximately two minutes before the police arrived. He saw Mr Nash struggling to free himself from the grip of the security staff by moving his legs as well as his arms. He was unable to see Mr Nash's face but indicated that he was moving the whole time.

Mr Fenwick also attended at the Cairns police station following the incident and had participated in the making of a re-enactment video which he considered to be an accurate depiction of the restraint. This indicated the following:

- Eric MacDonald was securing both Mr Nash's legs;
- Nui Merebark was securing Mr Nash's right arm, kneeling beside him;
- Barry Cunningham was placing downward pressure on Mr Nash's shoulder blades with his hand;
- Stephen Lewis was securing Mr Nash's right arm, kneeling beside him.

Corrine Grant

Corinne Grant was working as a bar attendant in the garden bar at the Union Jack Hotel. She had worked there for three months. She noticed that Mr Nash was being held on the ground on his stomach with his legs pulled up to his back. She recalled that Nui Merebark had hold of one of Mr Nash's legs and did not change position during the period of the restraint. She did not recall that Mr Merebark was holding Mr Nash's left arm.

Ms Grant's statement to the police indicated that Mr Eric MacDonald was responsible for holding Mr Nash's left arm. However, in cross-examination she agreed that she was not sure who was holding what part of Mr Nash's body.

One of the kitchen hands, Kris Peters, also helped by grabbing one leg and pushing it up. She thought that the security providers were putting a lot of pressure with their body weight on Mr Nash, for what seemed like 30 minutes.

Latoya Chandler

Ms Chandler was at the hotel with Ms Ganter. She noticed a security provider patting his face and asked if he was okay because he looked like he had been in an altercation.

She then saw Mr Nash on his knees and subsequently being taken to the ground where he resisted for about five minutes. She was unable to recall the position the security guards had taken and what contact they had with Mr Nash. It seemed they had all their body pressure on him. A security guard restraining Mr Nash's left arm was leaning against Mr Nash with the arm between his legs.

Ms Chandler observed one security guard, wearing a 'rock and roll' T-shirt, kick Mr Nash in the shin or his knee on three or four occasions. Both Mr Nash's legs were pinned to the ground from the knee up.

Ms Chandler observed Mr Nash's partner lying down and holding his hand. She stated it was very loud and she could not hear anything being said.

Annette Bletchly

Ms Bletchly became aware of Mr Nash's restraint when she had to walk around him to go to the bathroom. She had difficulty identifying the position of Mr Nash because there were too many other people on top of him to see.

It appeared to Ms Bletchly that security staff were leaning on top of Mr Nash. They had braced themselves with their feet and were leaning with their upper bodies over the top. She was unable to tell whether Mr Nash was moving or not. She also witnessed someone come up to the group and kick into the group.

Senior Sergeant Hayden

Senior Sgt Hayden is the officer in charge of the operational skills section at the Queensland Police Academy. Senior Sgt Hayden did not witness the incident but was asked to review materials provided to him by investigators, including re-enactment videos.

Senior Sgt Hayden indicated that the preferred option for the restraint of Mr Nash would have been for security officers to adjust the position while maintaining control of him, by putting him onto his side into the recovery position to allow him to breathe. He acknowledged that the security providers had not been trained in this regard.

Senior Sgt Hayden's opinion was that it was possible that security providers had confused Mr Nash's efforts to breathe with attempts to fight security. He was aware from previous deaths in custody that towards the end of a restraint there can be a sudden increase in the intensity of the apparent resistance from the person being restrained as they struggled to breathe, which in turn leads to the increased application of force.

Evidence of the security providers and hotel staff

Each hotel staff member and security officer involved in the restraint of Mr Nash was directed to give evidence pursuant to section 39 of the *Coroners Act 2003.*

Nui Merebark

Mr Merebark was employed by the Union Jack Hotel as a crowd controller. He had been working there for only two weeks but had worked as a crowd controller for five years. At the relevant time he weighed 105 to 110kg and was 198cm tall.

He was rostered on duty with Eric MacDonald on 18 February 2012. A third security guard employed by the Ultimate Party Bus accompanied the persons travelling on that bus to the hotel. Mr Merebark knew this person as 'Stephen'.

Mr Merebark was the holder of a security provider's licence. He stated that his training included a small amount of information in relation to restraint techniques, but he learnt more 'on the job'. He had received some instruction in relation to restraining patrons on the ground – this focused on trying to restrain the limbs and not putting too much weight on the person's body. It was preferable to restrain persons while they were upright, get them out of the venue and release them – 'It was only in the most out of hand situations that you really want to take someone to the ground if they are out of control'.

Mr Merebark was aware that it is not advisable to place weight on a person on the ground 'because it restricts the breathing in the body' and that the same applied to neck restraints.

On commencing employment at the Union Jack Hotel he was provided with the hotel's guide for crowd controllers, but this guide did not specifically deal with ground restraint. Mr Merebark had been involved in restraining persons on the ground on multiple occasions during his career.

Mr Merebark first became aware of Mr Nash when he complained about the music being played in the hotel. This was at around dusk, two hours before the restraints. Mr Nash seemed aggressive and asked that heavy metal be played. He observed that Mr Nash had been drinking a lot of Red Bull and was drinking quickly.

Approximately 15 minutes before the first restrain, Mr Merebark advised Mr Nash that he had probably had too much to drink and it would be time to leave shortly, after he had finished his drinks. His evidence was that Mr Nash tried to 'stare him down' but then agreed to this request.

Mr Nash returned to the bar soon afterwards. Mr Merebark then asked Mr Nash to leave the hotel again. Mr Nash's response was to become verbally abusive. He told Mr Merebark that he could 'destroy' the hotel security staff and that you will 'need an army'.

After speaking with Mr Nash for several minutes he was joined by Mr Lewis, at which time Mr Nash became more aggressive and attempted to drag Mr Merebark to the ground. Mr Merebark attempted to restrain Mr Nash's arm and march him out of the beer garden with the assistance of Mr Lewis and Mr MacDonald. However, Mr Nash was throwing them off with his free arm.

Mr McDonald subsequently dragged Mr Nash to the ground. Mr Merebark applied some downward pressure with his knee to Mr Nash's torso during this episode. Mr Merebark stated that at this point he asked the bar manager, Barry Cunningham, to call the police.

Mr Nash continued to lash out during this restraint. When Mr Nash agreed to calm down, it was agreed that the security staff would let him up and he could walk out of the hotel. However, after Mr Nash was released he punched Mr Lewis in the face. Mr Merebark then wrestled with Mr Nash and took him to the ground. Barry Cunningham came to assist him. Mr Merebark took hold of Mr Nash's right arm and Mr Cunningham took his left arm.

They struggled to restrain him so they rolled Mr Nash onto his stomach with Mr Merebark assuming control of the left arm and Mr Cunningham the right arm. Mr Merebark said that Mr MacDonald then grabbed Mr Nash's legs.

Mr Merebark attempted to place Mr Nash's arm behind his back but he was unable to do so because of his strength. He then laid his arm flat along the ground and placed his knee just above his elbow along the triceps.

Mr Merebark's evidence was that his body weight was pressing down on Mr Nash's elbow. His hips may have also leant against Mr Nash's torso. He said that Mr Nash broke free on several occasions and had 'crazy impressive strength' like he had never seen before. While the level of struggle diminished over time, he said that Mr Nash continued to struggle up until the point that he was handcuffed by the police. Mr Nash repeatedly stated that he would shoot Mr Merebark. He was not aware that Mr Nash had vomited until after he had been rolled on to his side when the police arrived.

Mr Merebark's evidence was that during the second restraint Mr McDonald was leaning back against Mr Nash's body and Mr Cunningham was pushing his right arm against his back. There were several interchanges between chef Kris Peters and security guard Stephen Lewis so that they could give each other a rest.

Mr Merebark recalled that someone might have been striking Mr Nash in the legs because of the nature of the movement. When he told them to stop they said 'he has already struck one of us'. His response was it did not matter as 'we have got him restrained now'.

Barry Cunningham

Barry Cunningham was employed as the bar manager at the Union Jack Hotel. His primary role was bartending and he was not a licensed crowd controller.

He had worked at the hotel for about three months and had previously worked as a venue manager in supervisory roles with respect to crowd controllers. He had no training in relation to the application of physical restraint. At the relevant time he weighed approximately 100kg and was 193cm tall.

Mr Cunningham first became aware of Mr Nash when Mr Peters alerted him to a fight. He came out from behind the bar and saw Mr Merebark and Mr McDonald struggling on the ground with Mr Nash. The situation looked dangerous to Mr Cunningham so he called the police. As the situation appeared to deteriorate he handed the phone to Mr Scott Lane, an employee of the Ultimate Party Bus, who completed the call.

Mr Cunningham recalled that Mr Merebark was trying to immobilise Mr Nash's left arm and Mr MacDonald was trying to restrain his legs. Mr Cunningham was trying to restrain his right arm with both hands on his forearm. He said that Mr Nash was constantly pulling against him trying to straighten his arm out and that he was actually lifting him off the ground. He was lying on the ground next to Mr Nash. He did not recall placing his body weight on Mr Nash's back or chest, but conceded there could have been periods where he was placing weight on his arm and therefore his back.

He recalled Mr Nash saying that he was going to shoot the security providers and that they were going to be killed. He recalled that Mr Merebark was kneeling down on Mr Nash's left arm. Mr McDonald had crossed Mr Nash's ankles and was holding them to his chest with Mr Nash's knees bent. At one point Mr Lewis took over from Mr Cunningham because he physically was unable to hold his arm after about 10 minutes.

Mr Cunningham did not recall seeing Mr Nash being kicked during the struggle, but identified that the person making the kicking movements on the CCTV footage was likely to have been Christopher Peters.

Mr Cunningham's recollection was that Mr Nash continued to struggle until the police arrived. He did not hear Mr Nash say 'I can't breathe'.

Stephen Lewis

Mr Lewis had been employed by Queensland Security Providers for seven years and continued to work for them. On 18 February 2012, he was working on the Ultimate Party Bus, which he described as a 'pub crawl' across five different venues. Most patrons on the bus where backpackers and the Union Jack was the second stop. His primary role was in relation to Party Bus patrons, who could be identified by a wristband. If he had concerns about other hotel patrons he reported those to hotel staff.

Mr Lewis said that he had one week of initial training and then updates were arranged by QSP every couple of years. He had not received any training in relation to positional asphyxia, restraint asphyxia, or the dangers of restraint on the ground.

His interaction with Mr Nash was the first time that he had restrained a person on the ground.

Mr Lewis said that he had approached Mr Nash in order to assist Mr Merebark. He told him that he was refused service and asked him to leave the venue. Mr Nash's response was 'if you want me to leave you will have to throw me out'.

Mr Lewis was struck by Mr Nash after the first episode of restraint and recalled that this dazed him and caused his vision to be blurred. He was also bleeding from the nose and mouth.

When he returned to the beer garden he saw Mr Nash being restrained on the ground. Mr McDonald had hold of Mr Nash's legs, Mr Merebark and Mr Cunningham were restraining his upper body. Mr Lewis said that he joined in the restraint by lifting Mr Nash's left foot upwards and placing downward pressure on Mr Nash's leg with his foot.

He then moved to restrain Mr Nash's right arm after Mr Cunningham told him he was getting tired and was unable to hold on. His memory of the events has been affected by the concussion he suffered from the punch to the head.

Eric MacDonald

Mr MacDonald was employed as a security officer at the Union Jack Hotel. He had been licensed in this capacity for 29 years. His licence was renewed annually. In June 2011, he had done training on open hand techniques and conflict resolution with Queensland security providers. He had not received any training in relation to restraining or detaining the person on the ground. Mr Macdonald was 192cm tall and weighed around 160kg.

Mr MacDonald first became aware of Mr Nash when Ms Mountford was starting to fall asleep at the table where they were seated. He said that Mr Mia Bach approached the table and asked Mr Nash to remove her from the hotel. After Mr Mia Bach returned the bar managers were asked to stop serving alcohol to Ms Mountford.

Shortly afterwards Mr MacDonald became aware that Mr Nash was at the bar purchasing drinks for himself and his partner. Mr Merebark had a further conversation with Mr Nash in which he was requested to leave the premises. He recalled Mr Nash state that if he was going to be removed from the premises it would not be peacefully.

As Mr Merebark and Mr Lewis attempted to escort Mr Nash from the premises, Mr MacDonald saw Mr Nash pushing them away using his strength. He then took Mr Nash to the floor as he thought Mr Nash would be less likely to harm him in that position. Mr MacDonald indicated this was a strategy he had used on many occasions. He told Mr Nash that if he calmed down he would let him go.

After Mr Nash was released he did not see him punch Mr Lewis but saw the struggle between Mr Merebark and Mr Nash, at which point he jumped on Mr Nash's legs. Mr Nash flexed and threw him off. He then moved to the ground with Mr Nash's right leg across his chest and his upper thigh under his shoulder. Mr Merebark was on his left hand side with Mr Nash's arm outstretched.

Mr Nash's left leg was not restrained until Mr Peters took his ankle and pushed it toward his back. He stated that Mr Cunningham and Mr Lewis swapped on Mr Nash's right arm and that Mr Lewis was not in control Mr Nash's leg.

Mr MacDonald recalled that Mr Nash was constantly trying to flex his leg and he could not tell if he was trying to give up. He agreed that he had good control of the leg.

His objective was to restrain Mr Nash until the police arrived. He had been told the police had been called and that a representative of the Ultimate Party Bus tried to hail the police.

Mr MacDonald asked the police to cuff Mr Nash after they arrived because he was still feeling resistance and he was directed by the officer to continue to hold him. After he heard the cuffs applied he let go.

Kristopher Peters

Mr Peters was an employee of the Union Jack Hotel but was not rostered to work on 18 February 2012. His role at the hotel was kitchen hand. He was not a licensed security provider and had no training as such.

At the time of Mr Nash's restraint he had consumed approximately eight bourbon and lemonade drinks.

He was aware of the interactions between Mr Merebark, Mr Nash and Ms Mountford, including the fact that the hotel did not continue to provide them with alcohol. He witnessed the initial restraint and was asked by Mr Merebark to alert Mr Cunningham. He witnessed Mr Nash punch Mr Lewis in the face. He caught Mr Lewis before he fell to the ground.

He then observed Mr Merebark and Mr MacDonald take Mr Nash to the ground where he went face down and they attempted to put arm locks and leg locks to hold him in position.

Mr Peter's recollection of the positioning of the security providers with respect to Mr Nash was broadly consistent with that of Mr Merebark, except that his recollection was that Mr Cunningham was attempting to restrain Mr Nash's left leg.

Mr Peters said that downward pressure was only being applied to Mr Nash's limbs and that Mr Nash was struggling violently and screaming out 'I will kill you if I get up I'm going to kill you all'.

Mr Peters did not hear Mr Nash or Ms Mountford say that Mr Nash was unable to breathe. Mr Peters was asked by Mr MacDonald to assist in restraining Mr Nash's left leg because whoever had been restraining it was struggling. The CCTV indicates that he took over this role from another person.

Mr Peters indicated that he was not able to secure Mr Nash's leg properly. He was bending the leg back on itself trying to push the lower left leg back towards his buttock.

Mr Peters indicated that on a second occasion during the restraint he was leaning over Mr Nash who was pushing back. He was struggling to get traction so he tried to shift his body weight and kicked under Mr Nash's thigh to get better traction over his body.

Mr Peters agreed that the video depicted him kicking Mr Nash above his knee. (The CCTV footage depicts at least three significant kicks towards Mr Nash.) He considered this was necessary in order to assist with his control of Mr Nash's leg. His intent was not to inflict pain but to get his foot under Mr Nash's leg.

Police officers arrive at the Union Jack

At approximately 9:04pm two uniformed police officers, Constables Adam Green and Joanne Wilesmith, arrived at the beer garden of the Union Jack Hotel. This followed the receipt of a 000 call from bar attendant Paris Collette at 8:57pm.

Both constables participated in re-enactment videos with respect to the position of the security providers and both gave evidence at the inquest. The re-enactment videos of both officers depicted four security providers surrounding Mr Nash. Constable Green's re-enactment indicated that they were crouched on their knees and were pushing down on him and holding his legs down.

Constable Wilesmith's re-enactment depicted four security providers lying across the Mr Nash's upper and lower body. She recalled Mr Lewis due to his facial injuries and states that he was lying on top of the deceased's upper body. Lewis had the deceased's right arm placed behind his back in what she described as a 'chicken wing' restraint.

While their recollection of the position of security providers was generally consistent with that of other witnesses, it was clear from the evidence given by both constables at the inquest that their primary focus was on providing assistance to the security providers in managing Mr Nash's behaviour. They had little opportunity to survey the respective positions of the security providers.

Constable Green's evidence at the inquest was that on arrival at the hotel he was confronted with a significant amount of noise, and a lot of 'rubber neckers' crowded around Mr Nash cheering. The lighting was less than ideal. He considered it to be a confronting situation.

Constable Green saw that there were four security providers restraining Mr Nash on the ground. He likened the image to the bouncers 'surrounding a watermelon'. They were on their knees and appeared to be placing a considerable amount of downward pressure on Mr Nash.

Constable Green's evidence was that the security providers yelled at him repeatedly to handcuff Mr Nash. He saw that Mr Lewis had blood on his face and his lip 'appeared to be busted'. Mr Lewis was facing police officers as they entered the hotel. The bouncers were sweating and appeared to be tiring. He formed the impression that Mr Nash was still struggling and applied handcuffs to him, after which he was rolled onto his side.

Constable Wilesmith's evidence was that after rolling Mr Nash onto his side, she saw vomit on his mouth and on the floor. She saw that his face and lips were blue. Constable Wilesmith placed her fingers into Mr Nash's mouth to clear vomit from his airway and immediately checked his pulse. When no pulse was detected, the handcuffs were removed and resuscitation efforts commenced.

The investigation found that the handcuffs were on Mr Nash's wrists for between one to three minutes.

Police requested the attendance of Queensland Ambulance Officers at 9.08pm, three minutes after police arrival. Police then performed resuscitation efforts until QAS officers arrived at approximately 9:10pm.

At 9:42pm, Queensland Ambulance Officers transported Mr Nash to the Cairns Base Hospital. Upon initial examination, doctors at the Cairns Base Hospital did not observe any significant external injuries but formed a belief that Mr Nash had suffered a hypoxic brain injury. He was placed on life support in the Intensive Care Unit.

Doctor Nicole Liesis, emergency physician from the Emergency Department at the Cairns Base Hospital, provided police with a statement as a result of her involvement in Mr Nash's treatment from 18 to 20 February 2012.

Dr Liesis reviewed Mr Nash on his arrival at 21:58hrs on 18 February 2012. On arrival Mr Nash's condition was documented as:

- Respiratory arrest with hypoxia
- Airway not secured – LMA in place but leaking air
- Cardio-vascular instability and impaired cardiac output
- Cervical collar in place – precautionary as history of physical violence.

Arterial blood gas sampling soon after the arrival of Mr Nash at the hospital revealed a pattern consistent with a prolonged period of inadequate ventilation and subsequent cerebral hypoxia (profound acidosis with very high carbon dioxide level).

Dr Liesis stated that such levels of acidosis are not usually associated with cerebral recovery in the adult population. Mr Nash's prognosis was poor.

His care was transferred to the Intensive Care Team. He remained anaesthetised, paralysed and on circulatory and ventilatory support. Mr Nash showed no signs of circulatory or ventilatory improvement. He subsequently had a further cardiac arrest in the Intensive Care Unit on 20 February 2012 at 1:30am resulting in his death.

The investigation findings

The Police response

The first response police officers, Constables Green and Wilesmith voluntarily provided urine samples. Upon analysis the samples indicated that no alcohol or drugs were present in their bodies.

The investigation confirmed Constables Green and Wilesmith had achieved currency in relation to Operational Skills and Tactics training (incorporating all use of force options including firearms), First Aid and CPR.

In order to apply force to an individual it is necessary for police officers to consider contents of the Queensland Police Service Operational Procedures Manual (OPM) at 14.3.2 Situational Use of Force Model – 2009, which specifies five conditions that must be satisfied for an application of force to be regarded as appropriate.

The role of Constable Green and Constable Wilesmith was tangential in the overall context of Mr Nash's restraint. I consider that both officers acted professionally and diligently in the circumstances. They arrived at the hotel after Mr Nash had been restrained for a period in excess of 10 minutes. They were required to urgently assess the circumstances and provided appropriate assistance to the security providers restraining Mr Nash.

The evidence disclosed that police officers are trained, as a matter of safety, to apply handcuffs to apparently violent and aggressive subjects prior to conducting a Post Arrest Risk Assessment (PARA). Constable Green conducted such an assessment immediately after the application of handcuffs to Mr Nash. This resulted in police identifying his deteriorating condition.

The first response police officers immediately removed the handcuffs and began the application of emergency cardiopulmonary and expired air resuscitation. They urgently sought assistance from Queensland ambulance officers.

I concur with the findings of Inspector Hobbs that the actions of Constables Green and Wilesmith were authorised, justified and reasonable in the circumstances.

Response of the security providers

As noted previously, there were a number of variations between witness' accounts about which of the security providers was where during the second restraint. The CCTV footage provides limited assistance because it filmed only a partial view of this restraint. The security providers were not engaged in a static restraint. Mr Nash was a strong man who resisted throughout. As such, the relative positions of those engaged changed over the course of the restraint.

The CCTV footage and witness accounts enable the conclusion to be reached that Mr Nash's right leg was restrained for the duration by Eric MacDonald. He was applying downward pressure to Mr Nash's thigh and pulling his foot towards his buttocks.

The CCTV footage and witness accounts also enable the conclusion to be reached that Kristopher Peters was engaged in the restraint of Mr Nash's left leg, and also kicked at Mr Nash's leg during this restraint. Mr Peters was attempting to push Mr Nash's foot towards his buttocks while leaning over his body.

There was sufficient evidence that Nui Merebark had secured Mr Nash's left arm for the duration of the second restraint. Barry Cunningham and Stephen Lewis were involved in the restraint of Mr Nash's right arm.

Merebark, Cunningham and Lewis had considerable difficulty in holding Mr Nash's arms because of his physical strength. The type of restraint applied by each of these security providers involved downward pressure on Mr Nash's arms. Mr Merebark pinned the left arm to the concrete floor with his knee and had Mr Nash's wrist in a lock. Cunningham and Lewis pressed the right arm down against his back or held it against their bodies.

There was insufficient evidence to conclude that any of the security providers lay across Mr Nash's torso for any significant period during the second restraint. However, the combined weight of the security providers was significant – well over 450kg. This would have resulted in substantial downward pressure being placed indirectly on Mr Nash's torso while he was pinned by his limbs to the concrete floor.

There was no evidence that a neck restraint was applied to Mr Nash during the second period, apart from brief contact when he was initially taken to the ground.

There is clear evidence that Mr Nash was placed face down on the concrete floor of the beer garden and that he continued to struggle vigorously for much of the second period of restraint. The intensity of his resistance declined as the restraint progressed.

There was substantial evidence that during the second period of restraint Mr Nash vomited. Shortly afterwards he ceased to struggle when he became unconscious.

I find that the security providers were not aware that Mr Nash had lost consciousness prior to the arrival of police officers. The evidence of the first response police was that the security providers were exhausted and yelled repeatedly for them to handcuff him on their arrival.

During the restraint Mr Nash stated that he was unable to breathe. There is insufficient evidence to find that the staff members heard this when one considers the evidence relating to the noise in the hotel at the relevant time and the dynamics of the situation.

The evidence indicated that the security providers would not have been able to clearly see Mr Nash's face while he was restrained in the positions described in the evidence. The evidence indicated that he had ceased breathing and was unconscious at the time he was handcuffed but this was likely to have been for a very brief period coinciding with the arrival of police. Having regard to the training of the security providers, as well as their evidence, Mr Nash's welfare was unlikely to be have been a primary concern.

The weight of evidence, including that of Mr Nash's partner, was that Mr Nash was still conscious at the time police arrived at the hotel.

The autopsy and expert evidence

Dr Ong

A post mortem examination on Mr Nash's body was conducted by Dr Beng Ong, an experienced forensic pathologist, at Queensland Health Forensic and Scientific Services on 22 February 2012.

At autopsy Dr Ong noted the body of Mr Nash to measure 185cm in height with a weight of 120kg. Dr Ong described him as a stout muscular male.

The toxicological analysis of Mr Nash's blood found only a moderate level of alcohol. However, this was based on a sample taken at 1:19am on 19 February 2012 and it was considered that Mr Nash's blood alcohol level at the time of the restraint may have been much higher. No tests were conducted for steroids or caffeine.

In his findings Dr Ong noted numerous surface injuries on Mr Nash's body. There were numerous bruises and abrasions present on his face consistent with blunt force impacts and consistent with the scuffle as reported in the police Form 1.

Dr Ong found the injury pattern on both the chin and neck were consistent with that caused by a neck hold (either the lateral vascular restraint chokehold type), with the force applied being moderate.

Dr Ong found extensive subcutaneous bruising on the back of the torso which could be caused if Mr Nash was held forcibly with weight placed on his back when he was lying face down. The extent of the haemorrhage would indicate that it was highly likely he was held down by more than one individual. Another possible cause was blunt impacts to the back, which was not consistent with the reported scenario.

Mr Nash's right bicep muscle was torn, indicating excessive force being exerted on the muscle by Mr Nash. This would be consistent with him aggressively struggling to free

himself during the restraint. Bruising to the back of the left leg was consistent with his leg being restrained in a leg lock with considerable force.

The autopsy report concluded that it was clear that 'the altercation prior to hospitalisation had led to collapse and cardiac arrest (asystole), subsequent hospitalisation and eventual death'.

Dr Ong noted that there could be several underlying mechanisms that led to the cardiac arrest and collapse. His report considered that one of the main causes would be asphyxia, and that it was likely the restraint in the second episode had 'compromised Mr Nash's respiration to such an extent that there was an adequate period of asphyxia resulting in hypoxic ischaemic brain injury and ischaemia of other internal organs'.

Dr Ong also noted that the possibility of restraint asphyxia causing death directly had been controversial with some publications indicating restraint might not be able to cause respiratory compromise significantly.

Dr Ong found there were some abnormal vessels (arterial dysplasia), in Mr Nash's heart which might make him more vulnerable to arrhythmias especially in the context of his restraint. However, Dr Ong considered that the changes noted were minor and their contribution would be at best equivocal.

Dr Ong considered that the aspiration of food contents would probably contribute to the ischaemic process, thereby exacerbating the asphyxia or process caused by the restraint, or have caused asphyxia on its own accord.

Dr Ong also considered that there was a possibility death could be due to natural disease that may result in cardiac dysrhythmia, particularly a number of closely related conditions known as channelopathies. In these conditions an individual may die unexpectedly from cardiac dysrhythmia and the post mortem would not show any abnormal features. However, the likelihood of this being the cause of death was small in this scenario where there was an adequate explanation for the cardiac arrest.

At the inquest Dr Ong affirmed the finding he made in his autopsy report that:

> *The eventual cause of death in my opinion was due to hypoxic-ischaemic encephalopathy i.e. brain injury as a result of lack of oxygenation. As alluded, there might be several mechanisms causing the brain injury with the most likely to be resulting from restraint asphyxia. As there were other possible explanations (although considered less likely) the cause of death is given as noted below*.

In his autopsy report Dr Ong listed the cause of death as:

> *1.(a) Hypoxic-ischaemic encephalopathy (aetiology not determined)*

Dr Ranson

A separate independent report was obtained from Dr David Ranson, Deputy Director of the Victorian Institute of Forensic Pathology, and Adjunct Clinical Associate Professor in the Department of Forensic Medicine at Monash University. Dr Ranson was asked to review the findings and conclusions made by Dr Ong.

Dr Ranson was asked whether he agreed or disagreed with the medical cause of death nominated by Dr Ong, and in particular whether he agreed it was correct to conclude that aetiology is not determined.

He stated:

> *Such a cause of death represents the immediate cause of death but is of little help in understanding the pathophysiology of the events that led to the cardiac arrest at the Union Jack Hotel. Dr Ong addresses a number of the potential factors that relate to the pathophysiology of the cardiac arrest in his comments and also addresses the reasons for some of the uncertainty that exists with regard to nominating one factor as being the unequivocal mechanism leading to the cardiac arrest.*
> *…*
> *It is relatively uncommon for a pathologist to give a general organ failure/damage cause of death of this type without a further description of the pathogenesis or aetiology that gave rise to the organ failure. By including the words "aetiology not determined" it would appear that Dr Ong is acknowledging this and explaining why further details concerning the pathological processes and circumstantial processes leading to the brain damage cannot be given.*
> *…*
>
> *With regard to the circumstances in which Mr Nash suffered his cardiac arrest I would agree with Dr Ong's comments with regard to asphyxia being a potential mechanism. I find myself in a similar position to Dr Ong in being unclear as to what type of asphyxia could have been involved. In a situation where there is considerable physical struggling and a variety of forces being applied to an individual on the ground more than one type of mechanism of asphyxia may be present at any particular instant and indeed the type of mechanism of asphyxia could vary over the period during which the person was restrained.*
> *…*
> *There are no autopsy observations that unequivocally indicate that asphyxia has definitely occurred and caused death.*

The following passage of oral evidence from Dr Ranson is instructive of the difficulties facing each of the pathologists in this case and the ultimate conclusions that can be drawn:

> **Counsel Assisting**: *If we particularly focus on the event of him being face down for a period of 13 minutes, so including all of the natural - or are natural conditions inherent in Mr Nash, including the first incident, if we accept all of those things are still there, we can still talk in terms of likelihoods of him surviving or otherwise if it wasn't for the 13 minutes face down, though, can't we?*
>
> **Dr Ranson**: *Well, certainly that's one of the factors. Like I said, there may be situations in which another person who's held down for 13 minutes might well survive and they may be some of the factors we have talked about, such as drugs, alcohol, different aspects of positioning and so on. So all I'm really saying was if you take some of those out of the equation, a person might survive. If you put them all back in, and as we know in this case, this individual died. So what I'm saying is that I certainly believe that the restraint episode - or the restraint factor is an important factor, but it*

may not be the necessarily in every case the most significant factor. In some cases it may well be the most serious factor and in part, the difficulty of ascribing particular weight to these different factors is right at the heart of the difficulty forensic pathologists have in this area of practice.

Counsel Assisting: *All right. So you think we can - and unfortunately, lawyers like to think in terms of likelihoods and probabilities which you may not be able to go into, but can we go to this point: that but for the fact that he was for around 13 minutes face down, would he more likely be alive today?*

Dr **Ranson**: *I think when you apply the but for test, you could apply that to lots of those factors. But for the fact that he was restrained, yes, so if he hadn't been restrained, I suspect he might not have died. Had he not been very intoxicated perhaps essentially, and given the circumstances described, he may not have - you know, he might have survived, and that applies to lots of these other factors. Had he been completely cardiac healthy, he might have survived, for example, in - with every factor there. So this is the difficulty. So you could certainly apply the "but for" test in regards to the restraint perfectly reasonably, but the same but for test might apply to some of the other factors as well.*

Dr Ranson agreed with the proposition put to him at the inquest that the opinions of the three pathologists reviewing this case were, ultimately, remarkably consistent.

Dr Duflou

Dr Duflou provided a report on behalf of the Union Jack Hotel and its employees. Dr Duflou is an experienced forensic pathologist. He holds a number of appointments, including Clinical Director of the Department of Forensic Medicine in Sydney and is a consulting forensic pathologist. Dr Duflou was asked to report on the autopsy findings and to provide an opinion as to the cause of death in light of the circumstances.

Dr Duflou considered that a conclusive finding as to cause of death was an 'exceptionally difficult question in the present case, because there is only minor injury, there is no discernible significant natural disease that will inevitably cause death, and the toxicological findings are not expected to be lethal'.

He concluded

In my opinion, this is a complex case from a forensic pathology perspective, and it is not possible to give a discrete cause of death with any degree of certainty. The death of Mr Nash has many features in common with many other cases sudden death during restraint in a non-compliant person. The autopsy findings, taken on their own, are in my view non-specific and entirely consistent with the deceased had been being in a face down position for at least part of the events in question. There appear to be a number of witnesses who saw the deceased held in a choke hold type position – there is however minimal corroborating autopsy evidence of significant neck compression, and there are other ready explanations for the abnormalities seen. Likely the deceased was significantly intoxicated, and alcohol may certainly be a significant contributor to this death….

I am of the opinion that the deceased had a cardiorespiratory arrest during the restraint. Had he not been resuscitated he could have been declared

dead at that time. However, I cannot state with any degree of certainty whether the restraint itself and alone resulted in death or whether the deceased had a cardiorespiratory arrest as a result of conditions mentioned such as stress cardiomyopathy during the restraint.

In a supplementary report Dr Duflou agreed with both Dr Ong and Dr Ranson that 'although a proximate cause of death can be given, it is not possible to give a definite cause of the brain damage from the material available'.

Findings required by s. 45

I am required to find, as far as is possible, who the deceased person was, how he died, when and where he died and what caused his death. As a result of considering all of the material contained in the exhibits and the evidence given by the witnesses, the material parts of which I have summarised above, I am able to make the following findings.

Identity of the deceased – The deceased person was Stephen Arthur Nash.

How he died - Mr Nash died from a hypoxic brain injury which followed a cardiorespiratory arrest that occurred after he punched a security provider at the Union Jack Hotel in Cairns on the evening of 18 February 2012, and he was restrained face down for approximately 12 minutes by security providers and hotel staff until the arrival of police.

Place of death – He died at Cairns in Queensland.

Date of death – He died on 20 February 2012.

Cause of death – Mr Nash died from hypoxic-ischaemic encephalopathy (aetiology not determined).

Section 48 referral

Section 48(2) of the *Coroners Act 2003* requires that if, from information obtained while investigating a death, a coroner reasonably suspects a person has committed an indictable offence, the coroner must give the information to the Director of Public Prosecutions.

In *Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266,* Kitto J stated:

A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust amounting to a 'slight opinion, but without sufficient evidence', as Chambers Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

The judgment of Kitto J was cited with approval in *George v Rockett (1990) 170 CLR 104 at 115,* in which the High Court in a joint judgment stated:

The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.

The authorities also establish, that to have a reasonable suspicion a factual basis for the suspicion must exist, and that there must be sufficient factual grounds reasonably to induce the suspicion. The facts must be sufficient to induce the suspicion in the mind of a reasonable person[1].

In considering whether a coroner's suspicion that a person has "committed an indictable offence" is reasonable, regard can be had to whether there is a factual basis that could prove the necessary elements of the particular offence. That would include the evidence necessary to rebut any defence reasonably raised by the evidence.

The force used by the security providers to restrain Mr Nash, including the manner of restraint, is likely to have contributed to his death. Should the conduct of the security providers be referred to the DPP for consideration of a criminal prosecution?

Causation

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

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

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

In *R v Carter* [2] the Court of Appeal examined the issue of causation as it arises in section 293 in cases where there may be no single cause of death. The court adopted the reasoning of Dean and Dawson JJ in *Royall v The Queen*:-

> *… if the accused's conduct is a substantial or significant cause of death that will be sufficient given the requisite intent, to sustain a conviction for murder. It is for the jury to determine whether the connexion between the conduct of the accused and the death of the deceased was sufficient to attribute causal responsibility to the accused.*[3]

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

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

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

In order to prove the elements of an offence connected to s300 in the present case, it would be necessary to establish that:-

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[1] *R v Bossley* [2012] QSC 292
[2] [2003] QCA 515
[3] (1991) 172 CLR 378 at 423

- the application of force by one or more of those restraining Mr Nash was a substantial or significant cause of his death; and
- the killing was not justified, authorised or excused by law.

Counsel assisting submitted that it was probable that the force used to restrain Mr Nash contributed to his death, and that the contribution was substantial and significant. Counsel for Mr Nash's family joined in this submission.

Counsel for the security providers submitted that the state of the expert evidence was unsatisfactory given it is of little assistance in determining the contribution on the part of any of the security providers to Mr Nash's death in terms of the legal requirements for the test of "substantial or significant" contribution. I was referred to two decisions where security providers had been acquitted in circumstances similar to Mr Nash's death where there were also gaps in the expert evidence.[4]

I have concluded that while the force used to restrain Mr Nash has likely contributed to his death it is less apparent that the security providers' conduct was 'a substantial or significant cause of his death'.

In their reports and in their evidence given at the inquest, each of the three senior forensic pathologists was of the opinion that there was considerable uncertainty about the cause of his death.

Several potential underlying mechanisms were identified by Dr Ong that could have led to Mr Nash's cardiac arrest and collapse. While Dr Ong considered the most likely mechanism to be restraint asphyxia, he also noted there were a number of other possible explanations. This constrained him to find that the cause of death was:

1.(a) Hypoxic-ischaemic encephalopathy (aetiology not determined)

As Dr Ranson's evidence emphasised, it cannot be assumed that Mr Nash would not have died if the security providers and hotel staff did not restrain him for over 10 minutes on 18 February 2012.

Similarly, Professor Duflou was of the opinion that he could not state "with any degree of certainty" whether the restraint itself and alone resulted in death or whether the deceased had a cardiorespiratory arrest as a result of other conditions such as stress cardiomyopathy during the restraint.

As the expert evidence leaves open a range of possible causes of death, and is not able to provide a sufficient connexion between the conduct of the security providers and Mr Nash's death "sufficient to attribute causal responsibility", I do not consider that there is a sufficient basis for me to refer the conduct of the security providers to the Director of Public Prosecutions.

If there were sufficient evidence to conclude that the security providers' conduct was a substantial and significant cause of death it would also be necessary to consider any defences available to them.

Counsel assisting submitted that the security providers could not be criminally liable because the defences of accident and self-defence would be available in the

[4] *R v James, Tappin & Thomas* [2009] QSC 93 and *R v Legradi & Lombaard* [2010] QCA 364

circumstances. Counsel for the security providers joined in this submission while counsel for the family submitted to the contrary.

Accident

The defence provided for in s. 23(1)(b) of the Criminal Code is one open to the security providers on the evidence.

That section provides that, subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for an event that:

> *(i) the person does not intend or foresee as a possible consequence; and*
> *(ii) an ordinary person would not reasonably foresee as a possible consequence.*

The meaning of "accident" is requires a consideration of what is reasonably foreseeable and is explained in the following passage from *Kaporonovski v R*[5]:

> *'It must now be regarded as settled that an event occurs by accident within the meaning of [s 23(1)(b)] if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person'.*

The question is this case is whether the Crown could prove the security providers should reasonably have foreseen that by restraining Mr Nash in a prone position in the beer garden, they were placing him at risk of asphyxiation because it was likely that he would be unable to breathe when held in this position for an extended period.

I accept that those restraining Mr Nash did not intend to cause him serious harm and his death would not have been reasonably foreseeable by a person with their training with respect to restraint asphyxia.

Any charges relating to the incident would need to overcome the defence available to those who restrained Mr Nash in s. 271 of the Code - self-defence against unprovoked assault. This section provides as follows:

> *271 Self-defence against unprovoked assault*
> *(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.*
>
> *(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.*

It is likely that this defence would be available to those restraining Mr Nash to the extent that they reasonably believed him to be conscious while the restraint was maintained. This is because the actions of Mr Nash in punching Mr Lewis in the head prior to his

[5] (1973) 133 CLR 209

being restrained on a second occasion provided a clear basis for members of staff to reasonably believe he would assault them (and potentially cause grievous bodily harm) if he were released.

There is no reasonable basis to conclude that the restraint continued when those holding Mr Nash knew, or ought reasonably to have known, that he was unconscious. As noted above, this is because the evidence is not sufficiently strong to base a finding that Mr Nash was in fact unconscious for any more than a very brief period prior to the arrival of police.

The availability of the defences under sections 23 and 271 also militate against a referral to the DPP.

I have considered separately the actions of Mr Peters in apparently kicking Mr Nash.

There is admissible evidence in the form of partial CCTV footage and the evidence of Mr Merebark that Mr Peters used a kicking action to apply force to Mr Nash's left leg.

This occurred while Mr Nash was already restrained, perhaps not as completely as desired. It is not clear where this force was actually applied. The autopsy report did not find any significant bruising to Mr Nash's left leg. The bruising that was identified on his calf muscle was indicative of the left leg being held in a leg lock.

Mr Peters' actions need to be considered in the context of the overall struggle, including the evidence that he was asked by another member of staff to assist in restraining Mr Nash's left leg, which at that time was not fully under control. In the circumstances defences under sections 271 and 273 of the Code would be available. Section 273 provides as follows:

> *273 Aiding in self-defence*
> *In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person*

I do not propose to refer Mr Peters' conduct to the Director of Public Prosecutions.

Comments and recommendations

Section 46, in so far as it is relevant to this matter, provides that a coroner may comment on anything connected with a death that relates to public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future.

Evidence from the security providers at the inquest generally displayed a lack of awareness of the risks of holding a person face down on the ground for a lengthy period. The risks are clearly exacerbated for individuals who are either obese or bulky such as Mr Nash and those who are intoxicated. There have been a number of hotel patrons who have died in similar circumstances in Queensland and other States over the past decade.

Some agencies who employ workers engaged in use of force options as part of their work have developed specific training programs that emphasise the safe application of force, and highlight the risks associated with restraint and positional asphyxia.

Examples of such programs can be found in the Queensland Police Service and Queensland Corrective Services. The same cannot be said of the security industry.

Security providers in Queensland are required to possess a formal qualification to allow them to perform these duties. In order to obtain a licence security providers are required to complete competency module CPPSEC3013A – 'Control persons using empty hand techniques'.

This module does not have any reference or training in the issues/dangers of restraint or positional asphyxia. The module is currently being reviewed by the Australian Skills Quality Authority, as part of a strategic review into security training.

I recommend that these findings are provided to the ASQA and that the issue of restraint or positional asphyxia be incorporated into the curriculum for the training of security providers, and other occupations engaged in work that may require the use of force and restraint, in order to prevent similar deaths occurring in the future. All security providers should be required to complete a revised competency module dealing with restraint asphyxia in order to renew their licence.

It is ironic that the Union Jack Hotel encouraged Mr Nash and his partner to consume significant quantities of alcohol in a short period of time with a 'two for one' drinks offer, and then soon after the security providers employed by the hotel were placed in a position where they felt compelled to remove them from the premises because they were considered to have had too much to drink, and Mr Nash's behaviour had deteriorated.

Alcohol-related violence is an ongoing problem confronting governments. Disproportionate levels of police and health resources are required to respond to incidents involving people who are intoxicated. The Queensland Government's efforts to address alcohol-related violence are articulated in the Safe Night Out Strategy which was released in June 2014. A survey conducted in the development of that strategy found that more than half of entertainment precinct patrons had witnessed violence in or around venues and public events.

While the Strategy acknowledges that patrons should consume alcohol responsibly, it is pleasing to note that the Government proposes to ensure that licensees comply with requirements under the *Liquor Act 1992* to provide a safe environment for patrons. It has committed to improved and consistent liquor licensing compliance arrangements. Under the strategy the Government proposes to implement 'new ways to ensure licensees are prohibited from encouraging rapid or excessive consumption of alcohol including', a new power to prohibit licensees from engaging in specific promotional practices that encourage the irresponsible consumption of alcohol.

One measure that should be included in assessing whether the Strategy is succeeding is a reduction in the number of deaths associated with violence in and around licensed premises.

I close the inquest.

Terry Ryan
State Coroner
Cairns
24 November 2014