



Western

Australia

RECORD OF INVESTIGATION INTO DEATH

12/13

*I, Barry Paul King, Coroner, having investigated the death of **Daniel Peter Berwick** with an inquest held at the **Bunbury Coroner's Court, Court 3, Bunbury Court House, Bunbury, on 8 and 9 April 2013, find the identity of the deceased person was **Daniel Peter Berwick** and that death occurred on **16 April 2011** and that the cause of death was **Consistent with Multiple Injuries** in the following circumstances:***

Counsel Appearing :

Kate Elison assisting the Coroner

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INTRODUCTION

1. At about 5.30am on 16 April 2011 the Australind passenger train railcar was travelling west towards Bunbury.
2. About 180 metres west of the Robertson Drive level crossing approaching Carey Park, the railcar ran over Daniel Peter Berwick (**the** deceased) who was laying across the tracks in the dark. It is not known if the deceased was alive or dead at the time. The train caused the deceased severe multiple injuries from which he could not have survived if he had been alive.
- s. The last time that it can be certain that the deceased was seen alive was at about 2.30am that morning when two police officers were driving in a police car on Forrest Avenue in South Bunbury. They stopped to speak with the deceased and offered him a ride to his home in Eaton, about 10 kilometres away.
4. At about 4.30am, a resident of a unit backing onto the train reserve where the deceased was struck by the railcar heard the voices of two persons walking east along the reserve. About an hour later, at the time that the deceased was struck, the same resident heard a female voice call, 'Are you all right?' from the direction of the Robertson Drive crossing.
5. Earlier in the night, the deceased had visited a house in Mondak Place in Carey Park where he had visited a friend to ask if he wanted to join him to go stealing.
- s. There was no evidence to establish that the friend or anyone else did join the deceased, however, close to the deceased's injured body were found items known to be stolen from a vehicle on Bray Court in Carey Park, a few blocks from the house on Mondak Place.
7. An investigation by a police officer, Senior Constable Jeremy Davies, completed on 29 December 2011 concluded that the manner of the deceased's death was one of three possibilities:

suicide, accident/misadventure or 'suspicious circumstances'. Senior Constable Davies concluded that suicide and accident were unlikely and that there was no evidence of any obvious suspicious circumstances, but that there were a lot of unknown factors surrounding the death. ■

- s. In August 2012 the State Coroner determined that there should be an inquest into the death with a view to ascertaining the manner of death. An inquest was held at the Bunbury Court House on 8 and 9 April 2013.

15 APRIL 2011

17. At about 7.30am on Friday 15 April 2011, the deceased's mother tried to wake him up so he could attend a meeting at an office of the Department of Corrective Services. She could not wake him, so she left for work at about 8.45am.⁸

⁴ Department of Corrective Services file 09/08517/JSC

⁵ Exhibit 1, Tab 29

^s Exhibit 1, Tab 9, para 54

⁷ Exhibit 1, Tab 9, para 59

⁸ Exhibit 1, Tab 9, paras 23-25

18. Some time later, the deceased wandered into his sister's bedroom, not thinking she was there.⁹ She got up a few minutes later and had a brief discussion with him about what time the bus came near their house.¹⁰ The deceased then left, taking with him a half empty bottle of whiskey, a 2 litre bottle of Coca-Cola and an iPod Touch. That was the last time that anyone in his family saw him.
19. When he left the house, the deceased was wearing a multi-coloured hooded jumper, dark pants and black skate shoes.¹¹
20. No evidence has been uncovered to ascertain to an acceptable level of certainty where the deceased went or what he did between the time he left the house on the morning of 15 April 2011 and about 1.50am on 16 April 2011.¹² A friend of the deceased told police that he had seen the deceased in Bunbury on the morning of 15 April 2011, but his evidence at the inquest was equivocal.¹³

16 APRIL 2011

21. It is clear that at about 1.50am on 16 April 2011 the deceased approached the after hours service counter of the Caltex Service Station at the corner of Forrest Avenue and Strickland Street in South Bunbury.¹⁴ CCTV footage from the service station shows the deceased apparently alone and wearing the same clothing in which he left his home.¹⁵ He was at the counter for about two minutes and then walked east towards Strickland Street.¹⁶
22. At about 2.30am Police Constables Nathaniel Kett and Roy Barker were driving west in a police car on Forrest Avenue in South Bunbury, approximately 300m from the Caltex Service Station,

⁹ Exhibit I, Tab 9, para 14-16

¹⁰ Exhibit 1, Tab 9, para 19-20; Exhibit 1, Tab 6, p2

¹¹ Exhibit 1, Tab 9, para 26; Exhibit 1, Tab 6, p1

¹² Exhibit 1, Tab 6, p2

¹³ t.43

¹⁴ Exhibit 1, Tab 6, p2

¹⁵ Exhibit 1, Tab 6, p2

¹⁶ Exhibit 1, Tab 6, p2

when they saw the deceased walking alone, heading east towards Blair Street away from the Caltex Service Station.¹⁷ They saw no-one else in the area.¹⁸

23. Constable Kett recognised the deceased from previous matters and, given the time of night, considered that it would be appropriate to speak to him, so the police officers conducted a U turn and pulled up beside him.
24. The deceased told the police officers that he had visited some friends in town before he went to the service station where he bought some cigarettes. He said he had just left another friend's house in Carey Park and was heading home to Eaton.¹⁹ He did not name anyone that he had seen that evening.
25. The officers searched the deceased but did not find anything of interest.²⁰ They offered him a lift home, but he declined. He appeared calm and fully compliant. He did not appear intoxicated or under the influence of any substance.²¹ He was last seen by police walking east on Forrest Avenue towards Blair Street.²²
26. The deceased's statement to the police officers that he had visited a friend in Carey Park is substantiated to some degree by evidence from friends of the deceased who were at a unit in Mundak Place in Carey Park on the night of 15 April 2011. As those friends were minors, I do not provide their names here.
27. A friend of the deceased who lived at the unit said that the deceased showed up at the unit in the early hours of 16 April 2011 to invite him to go stealing with him. The friend declined because he was tired, so the deceased left. The friend did not see another person with the deceased.

¹⁷ Exhibit 1, Tab 6, p2

¹⁸ t.59

¹⁹ Exhibit 1, Exhibit Tab 19, paras 7-9; Exhibit 1, Tab 6, p2

²⁰ Exhibit 1, Tab 19, para 10-11; Exhibit 1, Tab 18, paras 4-5

²¹ Exhibit 1, Tab 18, para 6

²² Exhibit 1, Tab 19, para 16; Exhibit 1, Tab 18, para 10; Exhibit 1, Tab 6, p2

28. That friend's father gave evidence to the effect that he had seen the deceased at the front door of the unit early on 16 April 2011. Of note, this witness said there was another young man with the deceased. Despite the fact that he had 'done a fair bit' of drinking whiskey over the afternoon, he was sure that he had seen the second young man.
29. As mentioned above, there was also evidence of a statement given to police by another friend of the deceased that he had seen the deceased in town on the morning of 15 April 2011. This friend told police that the deceased had told him that he planned to visit their friends at the unit on Mondak Place.
30. Though the friend had told police that he went home after speaking to the deceased, in oral evidence he stated that he went to the unit at about 11am and left to go home before the sun went down. He did not see the deceased at the unit.
31. That witness' younger brother had told the police that he had been at the Mondak Place unit on 15 April 2011 and that the deceased had been at the unit for a few hours from 6pm or 7pm, but in his oral evidence this witness said that he could not remember the night the deceased died and that he did not know if the deceased had been at the unit that night. This witness' testimony is contradicted by that of the deceased's friend who lived at the unit, who said that this witness was not there on 15 April 2011.
32. Unfortunately, the evidence obtained from the persons who were at the Mondak Place unit suffers from inconsistency, as is apparent from the description above, and from temporal uncertainty.
33. For example, in oral evidence a parent of one of the deceased's friends identified a young person who was said to have associated with friends of the deceased and who was with the deceased on

15 April 2011. That young person was located by police and attended the inquest to give evidence on 9 April 2013. He testified that he had never met the deceased. His evidence indicated that the time frame in which he was said to associate with friends of the deceased who frequented the unit in Mondak Place was inaccurate by about a year. I have no reason to prefer other evidence to that of this young person.

34. In the end, I am able to place very little weight on the evidence of the deceased's friends or their parents.

35. I am satisfied that the deceased attended the unit on Mondak Place early on 16 April 2011 and spoke to one of his friends who lived there, but am unable to determine whether he was alone or in company with another person. Although it seems likely that the deceased visited the unit in the afternoon of 15 April 2011, even that is unclear.

THE RAILCAR

36. At about 5.22am, Keith Carpenter was driving an Australind railcar towards the Picton train station from Picton depot.²³ The weather was clear and it was still dark.²⁴ There were no passengers on board.²⁵

37. As Mr Carpenter's railcar crossed the Robertson Drive intersection, Mr Carpenter looked towards the signal ahead and saw an object lying across the rails. As he came closer to the object, Mr Carpenter noticed shoes and realised that it was a person with the feet to the left and the head to the right.²⁶ He did not see any signs of life.²⁷ He applied the brakes but could not stop.²⁸ He did not see anyone else near the tracks.²⁹

²³ Exhibit 1, Tab 8, para 4; Exhibit 1, Tab 6, p2, p4

²⁴ Exhibit 1, Tab 8, para 7; Exhibit 1, Tab 6, p4

²⁵ Exhibit 1, Tab 8, para 5

²⁶ t.10

²⁷ t.17

²⁸ Exhibit I, Tab 8, paras 10- 13; Exhibit I, Tab 6, p4

38. At approximately 188m west of the signal box at the rail crossing of Robertson Drive, the railcar struck the deceased.
39. A video recording from the railcar camera shows the deceased lying on his side or back straight across the rail line, with his head on one rail track, his knees bent and his legs on the other rail track.³⁰

THE RAILWAY TRACK

40. Mrs Robin Phillips lives in a unit which has a rear fence backing onto the rail line in the vicinity of the Robertson Drive crossing.³¹ Mrs Phillips' bedroom is at the back of her unit and she normally leaves her window open.³² Every morning at about 5.10am to 5.20am, Ms Phillips hears the Australind train.³³ She is a light sleeper and is often woken by the sound of people walking along the train lines.³⁴
41. At about 4.30am on Saturday 16 April 2011, Mrs Phillips was awake in her home. She heard a male and a female walking in the vicinity of the rail line. As she listened, she could tell that they were moving away from Picton Road east towards Robertson Drive.³⁵
42. Mrs Phillips noticed that the voices sounded like they were in a normal conversation, not arguing and not shouting. She says they also sounded laboured and puffed.³⁶ Mrs Phillips heard the voices pass, and she fell back asleep.³⁷
43. Mrs Phillips was later woken up by the train approaching. This must have been at about 5.30am on 16 April 2011. The train

²⁹ Exhibit 1, Tab 6, p4

³⁰ Exhibit 1, Tab 6, p. Z

³¹ Exhibit 1, Tab 11, paras 1-Z; Exhibit 1, Tab 6, p5

³² Exhibit 1, Tab 11, para 3; Exhibit 1, Tab 6, p5

³³ Exhibit 1, Tab 6, p. 5

³⁴ Exhibit 1, Tab 11, paras 4-5

³⁵ Exhibit 1, Tab 11, paras 8-11; Exhibit 1, Tab 6, p 5

³⁶ Exhibit 1, Tab 11, paras 12-15

³⁷ Exhibit 1, Tab 11, para 16

sounded different to her, as if it were stopping. She got out of bed.

44. Mrs Phillips then heard a female voice, which she later described as authoritative like a nurse, call out 'are you all right?'³⁸ The voice sounded to her like it was coming from Robertson Drive.³⁹

45. Mrs Phillips put a chair beside her back fence so that she could look over it. She estimated that the time it took for her to look over the fence from the time she heard the voice was about 10 to 15 seconds. It was still a bit dark at the time and there was mist, but Mrs Phillips said that there was enough light to enable her to see whether anyone was about. She saw no-one. The only things she noticed were cars stopped at the level crossing on Robertson Drive.

46. A short time later, Mrs Phillips noticed police walking along the tracks with torches.

47. Investigation of the railway reserve by police located a number of items of potential relevance near the area where the railcar struck the deceased. In particular were a Samsung mobile phone and charger and a black Bad Boy cap.⁴⁰ There were also a number of cigarette lighters and a broken pair of sunglasses.

48. On 7 April 2013, Counsel Assisting and I inspected the train track in the vicinity of where the deceased was struck by the railcar. We were assisted by the Officer in Charge of the Australind Police Station, Sergeant Brett Cassidy.

49. It was clear from our brief inspection that the rail reserve in that area provides a convenient pathway for persons on foot. It was also clear that the ballast of rough aggregate used to hold the railway sleepers creates a tripping hazard for persons attempting to cross the tracks. It was easy to envisage the deceased tripping

³⁸ Exhibit 1 Tab 11 para 19

³⁹ t.54 evidence of Mrs Phillips 8/4/2013

⁴⁰ Exhibit 1 Tab Z1 para 10; Exhibit 1 Tab 6 p. 5

on the ballast in the dark and falling across the rail tracks, hitting his head on a track and being rendered unconscious.

50. As support for that scenario, evidence available at the scene together with the recollection of the driver of the railcar indicates that the deceased was lying across the tracks with his head to the north, consistent with him walking east to the rail reserve and crossing the tracks on the way to his home in Eaton.
51. However, there is no other evidence to support or refute the likelihood of that scenario.

THE SAMSUNG PHONE

52. Investigations revealed that the Samsung phone was the property of a person who lived on Bray Court in Carey Park, about 1700 metres from where the deceased was struck by the train and about 500 metres north of the Mondak Place unit.
53. The owner of the phone kept it in his vehicle as a spare phone for his work in case the battery failed on his other phone, so it did not have a SIMcard in it.
54. The owner told police that he discovered that his vehicle, which had been parked unlocked on his driveway on the night of 15 April 2011, had been searched that night and his phone stolen together with some loose change. Other items, including a laptop computer, a GPS device and a digital camera were disturbed but not taken.
55. Police conducted forensic analysis of the items in the vehicle to determine if the deceased had touched them, but the analysis was inconclusive.
56. While it may seem unlikely that the deceased would take only a mobile phone and leave other more valuable items in the vehicle, the owner told police that he awoke at about 4.30am as he usually did and turned on the light in the front room of the house. That light would have illuminated the vehicles parked on the

driveway, potentially disturbing the deceased as he looked for things to steal. That time frame is consistent with the deceased then making his way to the train tracks on his way home, possibly stopping at the unit in Mondak Place on the way.

57. There is no evidence to suggest that the owner of the phone accosted the deceased or was even aware of his presence in the vehicle. The existence of the phone charger at the rail track is consistent with the phone having been taken there by someone who had stolen it, because it is unlikely in my view that anyone else would have had the charger in his or her possession there.
58. The existence of the phone and charger at the track suggests that the deceased or an associate of his stole them from the house on Bray Court after the deceased had spoken to the police constables at 2.30am since the constables did not find the items in the deceased's possession when they searched him.

THE BLACK HAT

59. As noted, a Bad Boy hat was found near the area where the deceased was struck.
60. The hat was in new condition and did not look like it had been in the same location for longer than overnight.⁴¹
61. Police conducted a forensic analysis of the hat but no reportable DNA profile was recovered.⁴²
62. Neither the deceased's sister nor any of his friends indicated that the deceased had been wearing a hat that day or that he tended to wear such hats. He was not seen with a hat on the Caltex CCTV footage and he did not have a hat with him when he was stopped by police at about 2.30am.⁴³

⁴¹ Exhibit I, Tab 6, p7

⁴² Exhibit I, Tab 6, p7

⁴³ Exhibit I, Tab 6, p7

63. The existence of the hat is one of the several mysteries surrounding the deceased's death.

CONCLUSION AS TO THE CAUSE OF DEATH

68. Given Dr White's evidence, I find that the cause of death was consistent with multiple injuries.

⁴⁴ t.64

⁴⁵ Exhibit 1, Tab 24

⁴⁶ l.Oug/L

CONCLUSION AS TO THE MANNER OF DEATH

69. As noted earlier, the police officer, Senior Constable Davies (now Detective-Sergeant Davies), who investigated the death concluded that suicide and accident were unlikely, and that there was no evidence of foul play.
70. Suicide was not likely because there was no evidence of any actual suicidal act by the accused and no evidence that the deceased had any of the attributes usually associated with a suicidal person. Communication with the Department of Corrective Services led the police officer to believe that the deceased had no history of depression or mental illness. The deceased had not been a risk of self-harm while in detention. Police records likewise did not indicate that he had been a risk of suicide while in police custody.
71. This Court has since received the Department of Corrective Services file relating to the deceased. I can confirm that, although the deceased clearly suffered from psychological problems, he displayed no overt indication of being at risk of self-harm while in detention. However, one item of particular relevance in those records is the fact that at the time of his death, the deceased was on remand for sentencing as an adult. He had not been sentenced as an adult before. It is possible that the deceased was motivated by that prospect to take his own life.
72. While that possibility may exist, none of the persons who knew the deceased considered that he had any signs of being depressed or suicidal. The friend who met the deceased in town in the morning of 15 April 2011 stated to police that the deceased seemed his normal, happy self⁴⁷ though, as noted above, it is difficult to place any weight on what this witness told police.

⁴⁷ Exhibit I, Tab 16, para 7

73. When Constable Kett, who had previous dealings with the deceased, spoke to him at 2.30am on 16 April 2011, he seemed calm and collected.⁴⁸ He did not seem to be under the influence of alcohol or drugs. As noted earlier, the toxicology report showed no alcohol and relatively low levels of tetrahydrocannabinol.
74. In short, there is insufficient evidence to support a conclusion that the deceased intended to take his life.
75. In these circumstances, it is not open on the evidence to find that the deceased committed suicide. However, the possibility of suicide cannot be excluded entirely. It is not possible to know what the deceased was doing or thinking between the time he was stopped by the police officers and the time he was struck by the train.
76. Similar circumstances attend the possible finding of accident.
77. While I have noted that the ballast on the sleepers of the railway track increased the possibility of a trip hazard which could have led to the deceased falling across the tracks, the way in which the deceased was neatly lying across the tracks seems inconsistent with the notion of an accidental fall. This is especially so given the deceased's age and otherwise good health.
78. Apart from the trip hazard at the track, it is difficult to imagine what other accident could have befallen the deceased. It may be possible that he placed himself on the tracks and fell asleep, but that seems so unlikely as to be fanciful.
79. In this context I cannot be satisfied that the manner of death was accident, but the evidence of the way in which the deceased was situated across the tracks does not in itself exclude the possibility that the death occurred by accident, and nor does any other evidence.

⁴⁸ t.58 evidence of Constable Kett 8/4/13

80. Similarly, an analysis of the evidence in order to determine whether the deceased met with foul play is beset with difficulties.
81. In particular, it is not possible having regard to the paucity of the evidence to find to any degree of certainty what the deceased was doing or where he was between 2.30am and the time of his death at about 5.30am. He may or may not have been in the company of another person during some of that time, but it appears that he was alone at 2.30am. It is, perhaps, likely that he was at Bray Court at about 4.30am, but that is all I can surmise.
82. The fact that the deceased was lying across the tracks may suggest that another person had placed the deceased there either to kill him or to cover up the evidence of having killed him earlier. However, no evidence of foul play was discovered by police investigators.
83. In addition, the evidence of Mrs Phillips and Mr Carpenter that they saw no-one else near the track, together with the video recording from the railcar, establishes that the deceased was not pushed onto the track immediately before he was struck by the railcar.
84. This is not to say that the possibility that the deceased met with foul play can be excluded entirely, but in my view it is clear there is insufficient evidence to establish it as the manner of death.
85. In the end, I cannot be satisfied as to the manner of death, so I must make an Open Finding.



B PKING
CORONER
1 May 2013