



*Western*

*Australia*

## **RECORD OF INVESTIGATION INTO DEATH**

*Ref No: 27/15*

*I, Evelyn Felicia Vicker, Deputy State Coroner, having investigated the death of Mr TOBY, with an Inquest held at Kununurra Courthouse, Coolibah Drive, Kununurra, on 11-13 August 2015 find the identity of the deceased was Mr TOBY and that death occurred on 25 August 2012 at Weaber Plain Road, Approximately 27 Kilometres North of Kununurra Town Site, as a result of Head Injury in the following circumstances:*

### **Counsel Appearing:**

Mr T Bishop assisted the Deputy State Coroner

Mr S Razi and with him Ms H Menaglio (instructed by ALSWA) appeared on behalf of the family

Mr M Holgate (instructed by WAPol) appeared on behalf of the Commissioner of Police and police officers

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## **SUPPRESSION ORDERS**

That the name of the deceased not be published, and that the deceased be referred to as Mr Toby.

No publication of the details of any discussions in relation to the Police Emergency Driving Policies and Guidelines or Operations.

## **INTRODUCTION**

On the late evening of 25 August 2012, the deceased (Mr Toby) was the driver of a Toyota Hilux Utility registration number 1BYR784 (the Hilux) when he lost control of the vehicle on a left hand bend on an unsealed portion of Weaber Plain Road and the Hilux rolled. My Toby was ejected from an open window and was pinned under the Hilux.

At the time the Hilux rolled it was being followed by police in a marked Toyota Hilux Utility (EK 103). They had attempted to stop the Hilux for a random breath test of the driver while it was still in the Kununurra town site. The police officers in EK 103 arrived at the scene of the roll over a few moments after it had occurred and extracted Mr Toby from the crashed Hilux. They attempted to resuscitate him. They were unsuccessful and Mr Toby died at the scene.

He was 45 years of age.

Under the provisions of the *Coroner's Act 1996* there is no doubt the death of Mr Toby was a reportable death.

In addition, by the provisions of section 22(1) (b), where it appears the death was caused or contributed to by any action of a member of the police force, there must be an inquest into the circumstances of the death to enable independent review of the actions of the police officers involved.

## **BACKGROUND**

### ***The Deceased***

Mr Toby was born on 14 September 1966 at Glen Hill Station, an Aboriginal community south of Kununurra. He was the middle child of three, with an older sister and a younger brother, and both his parents predeceased him. He attended school in Kununurra until he was 13 years of age and then attended a school in Darwin, Northern Territory.

Mr Toby had four children to two mothers but one child had died at a young age.

At the time of his death he was usually resident in Kununurra with his younger brother and partner, was unemployed, and was subject to a violence restraining order in respect of his defacto and mother of three of the children.

Mr Toby's criminal justice history indicated a serious problem with alcohol, as a result of which he had never held a motor vehicle driver's licence. He had three life suspensions from holding a WA motor vehicle driver's licence. At the time of his death he was subject to a suspended sentence and on bail for driving under the influence (DUI) and no authority to drive. He was bailed to reside in Wyndham at a rehabilitation centre.

Mr Toby's residence at the rehabilitation centre in Wyndham was voluntary, but was also a condition of his bail on his last court appearance. He left the centre the day before his death.<sup>1</sup>

Mr Toby was a patient with the Ord Valley Aboriginal Health Services (OVAHS) and much of his medical history involved alcohol related illnesses and injuries incurred while intoxicated. He was also recorded with the Kununurra/Wyndham/Halls Creek Health Services.

### ***The Hilux***

The Hilux driven by Mr Toby was owned by the Balgarri Aboriginal Corporation and used by James Dixon. At the time of Mr Toby's death Mr Dixon had only owned the Hilux for seven days and believed it was in good condition.<sup>2</sup>

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<sup>1</sup> Ex 1, tab 5, p32

<sup>2</sup> Ex 2, tab 51 & 42

***25 August 2012***

It is difficult to determine the exact movements of Mr Toby during 25 August 2012, however, it is apparent he was at The Ranch during the afternoon/evening of that day. He had left the rehabilitation centre at Wyndham the previous day but there is no information as to whether he was staying with his family at Greybox Crescent, Kununurra or The Ranch.

The owner of the Hilux, Mr Dixon, was at home in Greybox Crescent, Kununurra, during the day, drinking alcohol and stated he was still relatively drunk from the previous day. He started drinking at about 2pm and walked to Gullivers Bottle Shop with Ben Gundari to collect more cartons of VB.

Mr Dixon's recollection is he went, with Mr Gundari driving his Hilux, to the Diversion dam sometime during the afternoon where they swam with others before driving to Ivanhoe Crossing where there were a number of people drinking alcohol and swimming. Mr Dixon recalls leaving Ivanhoe Crossing whilst it was still light and returning to Ben Barney's home at The Ranch.<sup>3</sup> There were a number of people at that location still drinking and smoking gunga. It was still light.

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<sup>3</sup> Ex 2, tab 45

Mr Dixon fell asleep as a result of his intoxication and Mr Gundari used the Hilux to drive from The Ranch to the pub to collect more VB while Mr Dixon was asleep.

Mr Dixon believes he woke up once it was dark to drive home, but Mr Gundari's recollection is Mr Dixon left Ben Barney's place while it was still light, and he saw Mr Toby in the Hilux with Mr Dixon before it got dark.<sup>4</sup>

Either way Mr Dixon believes he woke up and drove home. He saw Mr Toby while at The Ranch and took him home with him to Greybox Crescent, Kununurra. Mr Dixon stated both he and Mr Toby were drunk and Mr Dixon's wife was less than impressed with their arrival. Mr Dixon and Mr Toby returned to The Ranch, but this time visited a property on Mulga Street at The Ranch.

Mr Dixon and Mr Toby there drank more, and Mr Toby went to get some cigarettes for Mr Dixon, in Mr Dixon's Hilux, while Mr Dixon remained at the home in Mulga Street. Mr Dixon could not recall whether the shops would still have been open. In the event they weren't he believed Mr Toby would have gone to the 24hr petrol station to obtain the cigarettes. Mr Dixon did not see Mr Toby again.

Gordon Hall drove from Katherine to Kununurra on 25 August 2012 and arrived in Kununurra after dark.

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<sup>4</sup> Ex 2, tab 43

Mr Hall went to the 24hr BP Service Station for something to eat and then drove to Coles in Kununurra for another person in his group to do some shopping. He was unclear about the time but thought it was close to closing time (9pm).<sup>5</sup>

Mr Hall saw Mr Dixon's Hilux turning out of Tristiana Street but was unable to see who was driving the Hilux. A few minutes later Mr Hall again saw Mr Dixon's Hilux being driven on Barringtonia Street with the Hilux full of people. Mr Hall still could not see who was driving, but the vehicle he was in followed the Hilux until it turned right towards the highway and the vehicle he was in turned left onto Weaber Plain Road.<sup>6</sup> Mr Hall is not sure of the time nor the driver. He is sure it was dark because the vehicle he was in was using its headlights.

Mr Gundari stated it was still light on the last occasion he had used the Hilux, although Mr Dixon thought it was dark when he left The Ranch. Fingerprints confirm that Mr Gundari drove the Hilux at some stage and Mr Gundari agreed he had passengers when he was going to and from the pub to collect the beer, although he thought it was during daylight.<sup>7</sup> He did not recall driving the Hilux other than to go and collect beer during the course of the afternoon/evening. Mr Dixon's wife confirmed Mr Gundari

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<sup>5</sup> Ex 2, tab 50, p12

<sup>6</sup> Ex 2, tab 44

<sup>7</sup> Ex 2, tab 43

had driven the Hilux when it left Greybox Crescent earlier in the afternoon.<sup>8</sup>

Taking into account the difficulty with establishing consistent time frames for the afternoon/evening of 25 August 2012 it would appear that at some time after dark Mr Toby left the property at Mulga Street, The Ranch, in Mr Dixon's Hilux intending at some point to buy cigarettes for Mr Dixon.

Depending on the time Mr Toby would either have gone to the shops to purchase the cigarettes or to the 24hr BP Service Station. It is common ground that if Mr Toby was going either to or from the BP Service Station to The Ranch at 9:21pm he would not have been driving west on the Victoria Highway to turn (right) north on to Weaber Plain Road, unless he had also visited another location.

## **THE INCIDENT**

There is no reliable information concerning the time Mr Toby left The Ranch or what he had been doing at the time he was seen driving west on Victoria Highway at approximately 9:21pm on 25 August 2012.

At approximately 9:21pm on that date two police officers in EK 103 observed the Hilux being driven west on Victoria

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<sup>8</sup> Ex 2, tab 45

Highway as they were stationary at the intersection of Weaber Plain Road and Victoria Highway facing south. The driver of the Hilux indicated a right turn into Weaber Plain Road and drove in front of EK 103 to drive north up Weaber Plain Road. As that occurred the driver of EK 103, Senior Constable Simon Hawes (Hawes), informed his passenger, First Class Constable Keith Fay (Fay) he intended to stop the Hilux for a random breath test. These were the duties the police officers had been performing immediately prior to observing the Hilux.

As the Hilux drove past the police officers at the intersection Hawes had observed a single male Aboriginal as the driver of the Hilux. He did not recognise the person nor did he obtain the registration number of the Hilux. Hawes could not see any other people in the Hilux cabin as it travelled past EK 103.<sup>9</sup> At the time Hawes informed Fay he intended to stop the Hilux driver for a random breath test, Fay had been collating work duties from a running sheet and laptop. Fay did not observe the occupant of the Hilux.<sup>10</sup>

Hawes did a U-Turn at the Victoria Highway/Weaber Plain Road intersection in order to follow the Hilux north, while Fay turned on the emergency lights of EK 103 to indicate the police wished the driver of the Hilux to stop.

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<sup>9</sup> t 12.08.15, p92

<sup>10</sup> t 12.08.15, p121

Immediately after executing the U-Turn and activating the lights for the Hilux driver to stop, both police officers observed the Hilux to partially cross the double white lines with its right hand wheels, before returning fully to the north bound lane and accelerating away. Neither police officer observed that as an inability by the driver of the Hilux to control the vehicle, but rather a momentary lapse as the driver absorbed the information he had attracted the attention of the police who wished him to stop.<sup>11</sup>

Neither of the police officers believed the momentary semi-crossing of the double white lines indicated an incapacity in the driver of significance and consequently were not of the view there was a need to terminate their attempt to stop the vehicle for a random breath test.

The continuation of the driving of the Hilux appeared to be controlled, but the driver failed to stop and as a result the police officers activated the siren of EK 103 to ensure the driver understood the police were requesting the Hilux driver to stop the vehicle.

The Hilux and EK 103 were still within the confines of the Kununurra town site at that stage. There was street lighting, a flat straight bitumen road with dry conditions, good visibility and the driver of the Hilux appeared to be driving competently.

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<sup>11</sup> † 12.08.15, p122

*“He was sticking on the left hand side of the road and his lights remained on. He was, obviously, going faster than us, that’s all. It was just like a normal driver on the road”.*<sup>12</sup>

Once travelling north on Weaber Plain Road the police officers estimated the closest they came to the Hilux was between 50-100 metres which did not allow them to clarify a registration number. Fay, as the passenger of EK 103, used the police vehicle communication channel to contact the Kununurra Police Station and request permission to “continue” after a vehicle “failing to stop” on Weaber Plain Road in the vicinity of Leichhardt Street. He provided the police vehicle call sign and the type of vehicle and police driver classification.

While still in the Kununurra town site and on Weaber Plain Road various civilians living in properties along the road either heard or saw the commencement of the incident and confirmed in court the sound of a vehicle accelerating and observing the flashing lights of a police vehicle some way behind the original vehicle.<sup>13</sup>

Sergeant Peter Janczyk (Janczyk) was the shift supervisor and automatically fell into the role of Police Operations Centre Communications Controller (POCCC) at the Police

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<sup>12</sup> † 12.08.15, p93

<sup>13</sup> † 11.08.15, p71,77,85, Ex 2, tab 40 & 41

Operations Centre (POC) in Kununurra. Kununurra was not part of the centralised metropolitan communication centre although the Kununurra police vehicles in 2012 did have the automatic vehicle locator (AVL) system in place. This provides the ability to approximate speed between locations, and the tracking of police vehicles. Similarly the radio channel used for communication between police vehicles and the Kununurra POC is recorded and can be reviewed after the event.

Once Fay had communicated with Janczyk and explained EK 103 was behind a vehicle “*failing to stop*” on Weaber Plain Road, and was a Class 3 vehicle with a Priority 2 driver, information required by the emergency driving protocols to inform POC as to the circumstances facing police officers in EK 103, Janczyk responded with authorisation for Priority 2 emergency driving. Thereafter the transcript reflects Fay, as the passenger in EK 103, communicating with POC as to the road conditions, and circumstances facing the police officers following the Hilux.<sup>14</sup>

In evidence, Hawes described the proximity of EK 103 to the Hilux initially as about 40-50 metres, but then the Hilux drew away from the police vehicle and remained between 50-100 metres ahead, except for in the vicinity of Carlton Hill Road where they closed the gap to approximately 50

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<sup>14</sup> Ex 1, tab 5, attach 7

metres but were still unable to obtain a registration number.

Throughout the transcript it is clear the police officers in EK 103 were advising Janczyk as to the circumstances of the “*pursuit*”, and the later obtained AVL data indicates that EK 103 maintained its Priority 2 competency throughout the length of the driving. There are occasions when POCCC inquires as to the possibility of obtaining a registration number and a confirmation from the police officers in EK 103 that has not been possible. Janczyk also reminds the police officers they are only authorised for Priority 2 driving.

The intention was to obtain a registration number which would have allowed the police to make follow up enquiries as to the driver of the Hilux on a different occasion and so provided a conclusion to the emergency driving.<sup>15</sup>

The posted speed limit on leaving the Kununurra town site rose in increments from 60-80-110km per hour and Hawes remained with a Priority 2 emergency driving compliance throughout those changes according to the available AVL data.<sup>16</sup>

According to the situation representations (Sitrep) during the course of the emergency driving, the road conditions remained reasonable, the driving of the Hilux was

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<sup>15</sup> † 12.08.15, p133

<sup>16</sup> Ex 2, tab 48

consistent and the only other vehicle on the road, in the vicinity of the Hoochery, pulled onto the verge, presumably as a result of being pre-warned by the emergency lights and sirens of EK 103, to allow the two vehicles to pass.

Shortly after the Hoochery, in the 110km per hour speed zone, the road surface upon which the Hilux was driving changed from a sealed road to a gravel road. While this changed the road condition it did not appear to adversely affect the driving of the Hilux in that both the Hilux reduced speed, and Hawes in EK 103 similarly reduced speed, to compensate for the dust cloud created by the Hilux.

Gravel roads are common in the vicinity of Kununurra and at that time that gravel road was a major throughway to the Northern Territory. The evidence is the road was frequently graded and had been graded days before 25 August 2012.<sup>17</sup> The road was also used by agricultural workers and contractors involved in the Ord East Kimberley expansion project.

While EK 103 was not a Class 1 vehicle it was an appropriate vehicle for the terrain, as was the Hilux.<sup>18</sup> The driver of the Hilux would not have had the same difficulty with dust as did Hawes.

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<sup>17</sup> Ex 2, tab 5, attach 50, p5-13

<sup>18</sup> † 12.08.15, p155

A short distance after the transition from sealed to unsealed road, negotiated by the Hilux, there is a sharp left, followed by a sharp right, hand bend. Both of these were successfully negotiated by the Hilux and the driver still did not appear to have difficulty with control of the Hilux. The Sitrep recording throughout the length of the incident indicates the police officers in EK 103 and Janczyk appear to be conscious of, and complying with, Priority 2 emergency driving protocols.<sup>19</sup> Janczyk's reminds EK 103 of its Priority status from time-to-time and queries the ability to get close enough to provide a registration number to enable termination of the emergency driving.

When Fay requested a Priority 1 authorisation to enable EK 103 to be driven at a higher speed in an attempt to close the gap between the vehicles and enable the police officers to obtain the registration number and so bring the incident to a conclusion, it was denied. Appropriately, due to Hawes' Priority 2 competency, and the lack of exceptional circumstances, Janczyk denied Priority 1 authorisation and reminded the police officers to continue to drive in accordance with Priority 2 emergency driving protocols.

At approximately 9:38pm the police officers in EK 103 were roughly 200 metres behind the Hilux due to slowing down for the dust thrown up by the Hilux preceding them on the road. Hawes was still able to observe the rear red lights of

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<sup>19</sup> Ex 1, tab 5, attach 6

the Hilux and the front beams when it approached a left hand bend.

The officers in EK 103 lost sight of the Hilux as it rounded the bend and Hawes believed the vehicle was out of sight for roughly a minute by the time EK 103 rounded the bend and found the crashed Hilux on its side.<sup>20</sup>

The police officers in EK 103 realised the Hilux had crashed, and at that point also lost communication with POC.

The Sitrep recording places EK 103 northbound on Weaber Plain Road with a lot of dust and no visibility to see the target vehicle at 70km per hour. POC again questioned whether a registration number has been sighted and Fay replied they have been unable to obtain anything other than a description of the vehicle. He confirmed they were behind the Hilux and could not see the tail lights and in the same transmission indicated the *“vehicle has rolled”*.<sup>21</sup>

The response from POC is they are *“starting to break up”* and please can they *“go ahead with your last transmission”*. There is initially no response from EK 103.

Fay left EK 103 to assess the situation with the Hilux and Hawes reversed EK 103 to communicate with POC as to their need for an ambulance as soon as possible. Initially,

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<sup>20</sup> Ex 1, tab 5, attach 13

<sup>21</sup> Ex 1, tab 5, attach 7, p4

Fay believed the driver was deceased but when he managed to establish a pulse he indicated to Hawes they needed to commence CPR. Hawes confirmed with POC they needed help then left EK 103 to assist Fay in attempting to resuscitate the driver of the Hilux.

The police officers managed to release the driver from the Hilux by Hawes lifting the vehicle and Fay removing him from under the vehicle. Hawes provided POC with a registration number and a description of the driver once they had released him.

The two police officers commenced CPR and continued until the arrival of the ambulance from Kununurra.

Two volunteer ambulance officers and a registered nurse attended at the scene to assist with the driver and an experienced paramedic arrived shortly thereafter to assess the situation.<sup>22</sup> The paramedic confirmed the driver of the Hilux had not survived his injuries. He died at the scene.<sup>23</sup>

Due to there being scattered baby clothing in the vicinity of the rolled Hilux the ambulance officers and the police searched the immediate environment to ensure there had been no one else in the vehicle who required assistance. The police officers in EK 103 had at no time seen more than

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<sup>22</sup> † 11.08.15, p58-70, Ex 2, tabs 34,35,36

<sup>23</sup> Ex 2, tab 54

one person in the Hilux and were confident the driver was the only occupant of that vehicle.

Later analysis of the incident indicated it had lasted for approximately 17 minutes and covered 27.5km.

### **POST MORTEM EXAMINATION**

The post mortem of Mr Toby was carried out by Dr Jodi White, Forensic Pathologist with PathWest, QEII Medical Centre on 30 August 2012.

Dr White found extensive fracturing of the skull, bilateral rib fractures, internal injuries and aspiration.

Neuropathology confirmed a traumatic brain injury and toxicology revealed a blood alcohol of 0.255% and tetrahydrocannabinol at 1.7mg/L, consistent with recent use of cannabis.

Dr White formed the opinion the deceased had died as the result of a head injury.

### **THE CRASH INVESTIGATION**

At the time of the incident Fay declared a protected forensic area around the crash scene at approximately 10:13pm 25 August 2012. Prior to this time emergency vehicles had attended in an attempt to assist the deceased and search for

the possibility of other people in the locality due to the contents scattered from the rolled Hilux.

Janczyk arrived at the crash scene at approximately 11:00pm, followed at approximately 11:30pm by Senior Constable Stephen Jarvis of the East Kimberley Forensic Office to photograph the scene. Following his forensic examination the Hilux was seized and secured at a local crash yard, while EK 103 was driven back to the Kununurra Police Station for examination.

On Sunday 26 August 2012 Major Crash Investigation Officers travelled to Kununurra to assist in assessing the circumstances of the crash. They attended the crash scene that afternoon and the following day to conduct a full forensic examination. Witnesses were identified and interviewed by Detective Senior Constable Kelly.

Examination of both the Hilux and EK 103 conducted by the motor vehicle examiners detected no defects with either vehicle which could have contributed to the crash. All damage to the Hilux was consistent with it having been involved in a slow, three quarter, rollover. It had landed on the passenger side and Mr Toby had been trapped under the vehicle when ejected through the open windows. Examination of the Hilux driver's side seatbelt indicated it was retracted at the time of the rollover indicating it was unlikely Mr Toby had been wearing a seatbelt.

**10.0 APPENDIX 1**



**Weaber Plain Road looking north towards the left hand bend**

**12.0 APPENDIX 3**



**The involved Toyota**

**Exhibit 2, Tab 5, Attachment 51, Page 8 & 10**

The road was reopened in preparation for the working week on Monday 27 August 2012. Major Crash investigators attending the scene at 8:30am on 27 August 2012 found the area around the crash had deteriorated due to heavy vehicle/traffic usage which compromised the remaining physical evidence relating to the incident, including paint marks made during the protected period. Despite this it was possible for the forensic officers to conduct skid tests in the area to obtain the co-efficient of friction between the unsealed surface and tyre interface. This enabled some assessment of the crash process to be ascertained by the forensic officers. Due to certain critical information being unascertained because of the unsealed surface of the road, a speed estimate for the Hilux could not be obtained.<sup>24</sup>

From the transcription of the POC broadcast it is clear EK 103 maintained its Priority 2 capability (barring one small and insignificant excess) where possible, but also adjusted speed to the road conditions, as it appears did Mr Toby. Thus, generally maintaining a constant distance between the vehicles. It is of note the dust which affected EK 103 in the last 6 kilometres of the incident would not have affected Mr Toby because he was in the front vehicle.

Essentially, the conclusions which the crash investigators were able to deduce from the forensic evidence was that the Hilux was travelling north on Weaber Plain Road. At the

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<sup>24</sup> † 11.08.15, p20

point of travelling around the relevant left hand curve the Hilux entered an anticlockwise yaw across to the eastern side of the carriage way. As the result of steering input, that is driver input, the Hilux continued to rotate around its vertical axis, back towards the left hand side of the carriageway.

Near the centre of the carriageway the Hilux tipped and rolled over onto its left side where it stopped. The close proximity of the Hilux to the end of the tyre marks on the carriageway surface suggests it only completed a 270° (three quarter) lateral roll.

As a result of the driver not wearing a seatbelt and the wound down windows, the driver was partially or fully ejected from the Hilux during the process of it rolling. The major crash investigator pointed out it was not unusual for a rolling vehicle to roll onto a partially or fully ejected occupant.<sup>25</sup>

Thus, the major factors in the death of Mr Toby were the loss of control on the bend, the oversteering to correct the trajectory of the Hilux, the failure to wear a seatbelt, and the wound down windows, which in conjunction with the lack of a seatbelt allowed Mr Toby to be ejected from the Hilux as it three quarter rolled in a low speed rollover.

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<sup>25</sup> Ex 2, attach 50 & 51

There was no evidence obtained which supported the suggestion anyone other than Mr Toby was driving at the time of the rollover.

## **POLICE ACTIONS**

Police protocols require any serious incident involving police officers be examined by senior police officers not connected to the incident. This is usually done by a specialised unit located in the metropolitan area for remote and rural incidents.

Although there are some distinctions between this matter and that of Justin Aaron King,<sup>26</sup> there are significant similarities with respect to general police understanding of the emergency driving policies and procedures in September 2011 (King) and August 2012 for me to use the format of the King inquest in the following discussions.

The actions of the police officers involved in the events which culminated with Mr Toby's death on the unsealed portion of Weaber Plain Road, approximately 27 kilometres north of Kununurra town site, were routine law enforcement activities. The outcome wasn't. It is because of the tension between community safety by way of law enforcement, and the risks to safety which sometimes arise from the process of law enforcement that the community has a right to

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<sup>26</sup> Inquest 14/15 delivered 2 June 2015

request, and expect, there will be independent review of law enforcement activities to ensure safety considerations from the community perspective are properly weighted.

In this case it is not clear what Mr Toby was doing on Weaber Plain Road at 9:21pm on 25 August 2012. I am satisfied Mr Toby was alone in the Hilux on all the available evidence, but I am not clear as to the relevance of Mr Toby's alleged offer to obtain cigarettes for the vehicle's normal driver, Mr Dixon, at some point that evening and his presence on Victoria Highway turning right into Weaber Plain Road at 9:21pm that night.

While, in evidence, Senior Constable Kelly from Major Crash Investigation Unit considered Mr Toby appeared to be returning after buying cigarettes by turning right into Weaber Plain Road off Victoria Highway, as observed by the police officers in EK 103, this is clearly incorrect.<sup>27</sup> Had Mr Toby been using Weaber Plain Road, from The Ranch, to drive to the 24hr service station he would have been driving south on Weaber Plain Road and turned right onto Victoria Highway to drive towards Messmate Road. He was not doing that. Had Mr Toby been returning from buying cigarettes from the 24hr service station by using Weaber Plain Road he would have been travelling east on Victoria Highway and turned left into Weaber Plain Road. He was not.

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<sup>27</sup> † 11.08.2015, p19

The police officers in EK 103 observed Mr Toby drive the Hilux west on Victoria Highway and turn right or north into Weaber Plain Road.

Consequently, I am unclear as to what Mr Toby was doing at that time and whether he was intending to return to The Ranch via Weaber Plain Road or travel elsewhere. I am unable to be satisfied Mr Toby drove north for the length of time he did on Weaber Plain Road as a technique to evade the police, or because that was his intended travel in any event.<sup>28</sup>

While the Main Roads crash location report identified problems with Weaber Plain Road in the vicinity of the crash site, none of those are directly contributable to the severity of the crash but are features which may be corrected to improve the general safety of the road. Those which are reasonable have been rectified, although I note the road is no longer utilised as a major through road.<sup>29</sup>

On 25 August 2012 the police officers in EK 103 were tasked general duties to include random breath tests. It had apparently been a races day in Kununurra that Saturday and the detection of people driving under the

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<sup>28</sup> t 11.08.15, p19 & t 12.08.15, p158

<sup>29</sup> Ex 1, tab 3

influence of alcohol was a focus for police in Kununurra and the Kimberley generally.<sup>30</sup>

In the current case Mr Toby had reason to evade the police. He was subject to a suspended sentence and on bail for driving under the influence (DUI) and no authority to drive. A condition of his bail undertaking was that he reside at a rehabilitation centre in Wyndham which he had breached by leaving that centre on 24 August 2012. He was motivated to evade police for a random breath test on the evening of 25 August 2012. He was again driving under the influence and with no authority to drive. This was unknown to the police officers in EK 103, who had been unable to identify the driver of the Hilux, nor obtain the registration number of the Hilux.

Thus, at the time the police attempted to stop Mr Toby in the Hilux, they were performing lawful law enforcement activities and Mr Toby was highly motivated to avoid those activities. This aspect brings into focus a community or policy issue as to the initiation of pursuits which I do not intend to discuss in this section but rather in the comments at the conclusion of this finding.

The difficulty which arose for the police on Mr Toby's failure to stop on their activation of the lights, and shortly thereafter sirens, was their understanding, across the field

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<sup>30</sup> † 12.08.2015, p153

in the Kununurra district, as to the interpretation of the police emergency driving policies and procedures. This was also an issue in the matter of King, in the metropolitan region. This was the issue of emergency driving at a Priority 2 competency as opposed to a “*pursuit*”. Again I will discuss this further at the conclusion of this finding.

On 25 August 2012 the intention of the police officers in EK 103 was to stop Mr Toby. As an indication they wished to speak with him the lights of EK 103 were activated in an attempt to both attract his attention and request him to cease from driving. Presumably Mr Toby made a decision to ignore the police and continue his driving north on Weaber Plain Road. His level of intoxication was significant (0.255% blood alcohol), however, his driving appeared competent throughout the course of the incident. I have to assume he was able to register the presence of the police behind him, although his judgement as to the suitable options i.e. stop may well have been impaired.

All police officers, on the understanding a Priority 2 “*pursuit*” was available, followed Mr Toby with the intention of obtaining the registration number of the Hilux which would enable them to make enquiries separately as to the driver of the Hilux and so bring the emergency driving to a conclusion.<sup>31</sup>

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<sup>31</sup> † 12.08.15, p133

The recording of the incident indicates all three police officers involved in the incident, Janczyk, Hawes and Fay, were following their understanding of the emergency driving procedures for a Priority 2 “pursuit”.

For the first time during the course of the oral evidence in this matter it was clarified that under no general circumstances can there be a Priority 2 authorisation for an active pursuit.<sup>32</sup> As a consequence all three police officers were ultimately disciplined for a breach of the emergency driving policies. This did not occur immediately but after a delay while the correct interpretation of the policies was established. The fact clarification was necessary emphasises some difficulty with the way the policy is written.

In my view the interpretation by the Kununurra police of the emergency driving policies and guidelines in existence in August 2012 was not unreasonable, without the benefit of the specific aid memoir made available to persons acting as POCCC following the Samson inquest, delivered in June 2014.<sup>33</sup> This clarified the interpretation of the emergency driving guidelines policies and procedures.

Had the interpretation of the emergency driving guidelines been as clear in August 2012, then the police in EK 103 would not have followed the Hilux on the evening of

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<sup>32</sup> † 11.08.2015, p25-30

<sup>33</sup> Samson Inquest 13/14 p37

25 August 2012 under Priority 2 compliance. Without a registration number for the Hilux police were not in a position to make enquiries at a different time to enable law enforcement to occur via a different strategy.

While it is tempting to say had EK 103 not followed the Hilux, Mr Toby would not have died, that is not the only conclusion available. He was intoxicated and driving without authorisation which could have resulted in a motor vehicle accident at any point due to impaired judgement and a loss of control. Had Mr Toby made a decision to stop at 9:21pm on 25 August 2015 he would not have died within the hour in a motor vehicle roll over.

### **CONCLUSION AS TO THE DEATH OF THE DECEASED**

I am satisfied Mr Toby was a 45 year old Aboriginal male who was very recently returned from a rehabilitation centre in Wyndham. This may have promoted his desire for alcohol on his return to Kununurra.

On the evening of 25 August 2012 he was the sole driver of the Hilux at approximately 9:21pm when the police attempted to conduct a random breath test. Mr Toby chose not to stop when called upon to do so by the police officers in EK 103.

There then followed a “*pursuit*”, using the term loosely, at Priority 2 capabilities, while police officers in EK 103 attempted to obtain a registration number for the Hilux which would enable them to cease following the Hilux and to continue with their law enforcement activity with respect to the driver of that vehicle failing to stop at another time.

The police officers made risk assessments as to the competency of the driver of the Hilux, along both the sealed portion of Weaber Plain Road and then onto the unsealed portion of Weaber Plain Road. Mr Toby negotiated the transition from the sealed to the unsealed surface perfectly competently, and thereon proceeded for some 6 kilometres along the unsealed portion of Weaber Plain Road, including a sharp left, then right hand, bend. For some reason Mr Toby lost control of the Hilux on a left hand curve where it experienced a three quarter roll over.

There are many unsealed roads in the vicinity of Kununurra and I would disagree with submissions from counsel for the family of Mr Toby that driving on an unsealed road on its own in a suitable vehicle was an unreasonable risk. It changed the road conditions and both drivers appear to have taken that into account. It was properly a matter for risk assessment for the police officers involved. I do accept that once radio contact with POCCC was impaired the incident warranted closure. Unfortunately the roll over and impaired radio contact occurred at the same time.

Mr Toby died at the scene of the rollover despite the efforts of the police officers to extricate him from the vehicle and assist him. This was never an intended or anticipated result.

I find death arose by way of Accident.

### **COMMENTS OF THE ACTIONS OF POLICE**

The interpretation of the emergency driving guidelines, procedures and policies, both the prior guidelines, and the amended guidelines which came into operation in 2011/2012 has been a difficulty for police officers, as noted in inquests over the recent years. I consider the aid memoir distributed to those acting in the position of POCCC after June 2014 does clarify the interpretation considerably.

The interpretation of “*exceptional circumstances*” in conjunction with the definition of “*critical incident*” may be a difficulty which can presumably be overcome with specific training for those acting in the position of POCCC, which needs to become part of training for critical skills.

To me both those terms imply a serious known risk to the community, as opposed to a simple law enforcement activity. A serious known risk would support both initiation and continuation of a pursuit.

In the current case all police officers at Kununurra Police Station in August 2012 understood a pursuit could be conducted at Priority 2 competency. It appears from the papers even the original IAU investigation considered that to be a workable interpretation of the emergency driving guidelines.

I accept the interpretation of the Emergency Driving Policy and Guidelines to be a matter for the Commissioner of Police related to the safety of police officers, road users, drivers of target vehicles, and the community at large. Consequently, breaches of the policy due to a misunderstanding of the policy are not matters I wish to comment upon, other than to say it is of extreme importance there not be misunderstanding as to the interpretation of the Emergency Driving Guidelines and Policies.

I am sure they can be communicated in a way which would make the interpretation clear. Because I understand the guidelines are currently being re-written I do not wish to comment further other than to say I anticipate the new policy document, in the process of production, does not contain the same apparent contradictions which in theory look unworkable, but are being made to work in practice by various verbal strategies. Use of the term “*not active pursuit*” may be preferable to the current comment in

parenthesis appearing in Priority 2 driving definitions. It may clarify Priority 2 driving can be used for other activities surrounding pursuits to facilitate alternative resolution of an incident. This is only an observation based on difficulties expressed by police officers during inquests.

Currently police officers in remote POCs, attempting to work with the emergency driving guidelines, policies and procedures are unclear as to whether there should be two separate policies covering pursuit driving and, as a separate issue, emergency driving priorities 1 and 2, or one policy which allows all police officers to drive according to driver/vehicle competency. That is a matter for police.<sup>34</sup>

The issue more recently has been whether there should be police pursuits at all. I canvassed this issue quite extensively in the matter of Samson and my views have essentially not changed since that time. While I understand the submissions on behalf of Mr Toby's family, elegantly put by counsel instructed by ALS, I do not agree there is sufficient data available at this point to put matters any more strongly than I did in the Samson Inquest or the King Inquest. I note the intent of police law enforcement activities surrounding intercepts, incident responses, and pursuits is still with an emphasis upon those acting in the position of

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<sup>34</sup> † 12.08.15, p144 & 160

POCCC being able to obtain enough resources to bring incidents to a close by other interventions.<sup>35</sup>

To enable this to occur police need information that will enable them to employ other strategies. In this case the police had no information to enable them to make separate enquiries and there was not sufficient proximity for an alternative resolution. With the clarified interpretation of the emergency driving procedures EK 103 would not have continued with the incident once Mr Toby failed to stop. There was no known risk to warrant invocation of exceptional circumstances. The fact there was no known risk, and clearly, high motivation for the driver of the target vehicle in not stopping, may also have been enough to discourage continuation of emergency driving, even had there been an appropriate police car/driver, but that is a matter for properly trained POCCC. It is not a criticism of police in the current case who, at all times, believed they were following appropriate emergency driving practices.

The way the guidelines are implemented in practice emphasises the need for continual risk assessment by all those involved in emergency driving practice, whether they be drivers, passengers, or supervisors. I am satisfied police officers engaging in emergency driving in 2015 understand continuous risk assessment. The issue is always tension between the inherent dangers of a pursuit, and the

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<sup>35</sup> The West Australian 28 August 2015, p18

availability of other strategies whereby an offending motor vehicle driver may be apprehended and so prevented from harm to the community, including himself.

Unfortunately, inquest hearings are somewhat delayed and the practice on the road in 2015 is, hopefully, not the same as was evident in 2012/13, especially in remote areas without the benefit of the experience of those in the metropolitan POC involved as POCCC on a daily basis.

There are not yet the statistics to indicate the current emergency driving policies and protocols are ineffective in reducing fatalities. The data referred to by Mr Razi was examined in the Samson Inquest and it appears Western Australia is experiencing fewer fatalities for an increased number of pursuits.

While the community supports the inherent risk of pursuits as a means of law enforcement, and I was provided with statistics after the King<sup>36</sup> Inquest that indicated a correlation between criminal activity and the successful conclusion of pursuits, I am of the view the current emergency driving guidelines policies and procedures can be effective in reducing the risk of fatality, provided the interpretation is clarified across the police force by explicit training, especially for those in the role of POCCC. This is a

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<sup>36</sup> Inquest 14/15 – other criminal activity was not a factor in the King matter.

role that, in remote and rural areas, can fall to any police officer finding themselves the senior officer on shift.

This training needs to cover continuous risk assessment, with the concepts of high target driver motivation to avoid apprehension for whatever reason, versus known risks to the community for both initiation and continuation of emergency driving practices. An obviously intoxicated driver can be a known risk to road users, including themselves. A driver who is apparently capable of driving may not be a risk if left alone, if there are no other known risks apparent, and alternative resolutions are not available.

While the community still accepts the concept of pursuits, then the way in which they are conducted in Western Australia 2015 appears, in practice, to minimise the inherent risks, but they can never be entirely removed. That is the tension, and remains the tension, around pursuits which are a form of law enforcement already strictly regulated in this state.

E F Vicker  
**Deputy State Coroner**  
17 September 2015