Findings of the inquest into the deaths of Alan Paul Toohey and Andrew Tasman Hill

Introduction

Shortly after 6.00pm on 24 April 2003, three Far North Queensland bushmen, Allen Toohey, Andrew Hill and William Fowler, set off in a battered and near-broken Toyota tray back utility - a "bull catcher" - to try to snare some feral bulls that they anticipated might come out from the scrub at dusk to feed in more open country on Andrew Hill's huge and remote cattle station.[1] Catching wild bulls is dangerous but the three were experienced cattlemen who had done this type of work for years.

Half an hour later, two of them were dead, killed not by a bull but by a police vehicle, the driver of which observed them in the un-roadworthy bull catcher on the Peninsular Development Road that transects Hill's property and gave chase when they failed to comply with his direction to stop.

These findings seek to establish the details of the deaths, explain how the tragedy occurred, determine whether anybody should be committed for trial and examine the pursuit policies of the Queensland Police Service to aid consideration of whether they should be changed to reduce the likelihood of similar deaths occurring in the future.

The Coroner's jurisdiction

The basis of the jurisdiction

Although the inquest was held in 2004, as the deaths occurred before 1 December 2003, the date on which the *Coroners Act 2003* (the new Act) was proclaimed, they were "*pre-commencement deaths*" within the terms of s100 of that Act and the provisions of the *Coroners Act 1958* (the Act) are therefore preserved in relation to them.

The deaths were obviously "*violent and unnatural*" within the terms of s7(1)(a)(i) of the Act and they were therefore reportable pursuant to s12(1). Section 7(1) confers jurisdiction on a coroner to investigate such deaths and s7B authorises the holding of an inquest into them.

The scope of the Coroner's inquiry and findings

The Act, in s24, provides that where an inquest is held, it shall be for the purpose of establishing as far as practicable:

- the fact that a person has died,
- the identity of the deceased,
- when, where and how the death occurred, and in so far as it is relevant to this case,

[1] Mt Croll station, owned by the Hill Family Trust, has an area of 128 square miles. The Peninsular Development Road traverses the property

- whether anyone should be charged with the offence of dangerous operation of a motor vehicle causing death as set out in s328A of the *Criminal Code*.

After considering all of the evidence presented at the inquest, findings must be given in relation to each of those matters to the extent that they are able to be proved.

In addition, s43(5) authorises a coroner to make recommendations designed to prevent deaths recurring in similar circumstances.

Where more than one person has died in the same incident, s26 authorises the inquests into multiple deaths to be held concurrently.

The admissibility of evidence and the standard of proof

Proceedings in a coroner's court are not bound by the rules of evidence because s34 of the Act provides that "*the coroner may admit any evidence the coroner thinks fit"* provided the coroner considers it necessary to establish any of the matters within the scope of the inquest.

This flexibility has been explained as a consequence of an inquest being a fact-finding exercise rather than a means of apportioning guilt:[2] an inquiry rather than a trial. In view of the very different character of the various outcomes that can result from an inquest, such versatility is probably essential. A coroner is likely not to need evidence of such precision or weight to justify making a recommendation for review or change as would be required to make a finding of a cause of death for example. On the other hand, when considering whether to commit a person to stand trial, a coroner will only consider evidence that would be admissible in criminal proceedings because the test applied to resolve that question is whether a properly instructed jury could convict the person.

These differences in approach to the evidence, depending upon which aspect of a coroner's findings are involved, might be quite significant in this matter. At the inquest, having been advised that there was a possibility that he might be committed to stand trial, the driver of the police vehicle, Sgt Eaton, in accordance with his entitlements, refused to answer questions about his manner of driving on the grounds that the answers might incriminate him. The officer had, however, given a number of interviews to senior officers investigating the matter. I consider the information contained in those interviews can be relied upon by me when considering the findings concerning the details of the death and any recommendations for changes to police procedures, because to do so would not result in any unfairness to the officer.

[2] *R v South London Coroner; ex parte Thompson* per Lord Lane CJ, unreported but quoted by Freckelton I. in *Expert proof in the coroner's jurisdiction* in The Aftermath of Death, Selby H ed., Federation Press 1992

However, as those interviews were not undertaken voluntarily but given in response to a direction made under the *Police Service Administration Act 1990*, they are not admissible against Sgt Eaton in any criminal proceedings and can not be considered when I am determining whether there is sufficient evidence to commit him to stand trial. The directed interviews with the other officer, Constable Heuston, would be admissible against Sgt Eaton however, and can be considered for all of the findings I need to make.

There is authority for the proposition that a coroner should apply the civil standard of proof, namely the balance of probabilities, but the approach referred to as the *Briginshaw sliding scale* is applicable.[3] This means that the more significant the issue to be determined, the more serious an allegation or the more inherently unlikely an occurrence, the clearer and more persuasive the evidence needed for the trier of fact to be sufficiently satisfied that it has been proven to the civil standard.[4]

It is also clear that a coroner is obliged to comply with the rules of natural justice and to act judicially.[5]This means that no findings adverse to the interest of any party may be made without that party first being given a right to be heard in opposition to that finding. As *Annetts v McCann*[6] makes clear that includes the family of the deceased being given an opportunity to make submissions against findings that might be damaging to the reputation of the deceased.

The effect of these considerations on this matter means that different evidence may be admissible for the various types of findings that are to be made and a different standard of proof may need to be applied. The findings as to the particulars of the deaths – the when, where and how the men died – are extremely important for numerous reasons and so there is little room for uncertainty when considering these issues. The evidence will need to be compelling but the type of information able to be considered to reach conclusions on these matters will not be limited by the rules of evidence. The committal question is also important, with significant consequences for the person who risks being committed for trial. Because it focuses on whether a person could be convicted of a criminal offence, only evidence admissible in a criminal trial can be considered. Recommendations for prevention, on the other hand, do not of themselves affect rights or impact adversely on individuals. Therefore, while a coroner must act judicially and only have regard to cogent evidence, he/she is not required to reach the same degree of certainty in relation to the facts on which they might be based, nor exclude from consideration evidence that might not be admissible in a trial.

[3] *Anderson v Blashki* [1993] 2 VR 89 at 96 per Gobbo J
[4] Briginshaw v Briginshaw (1938) 60 CLR 336 at 361 per Sir Owen Dixon J
[5] *Hamswoth v State Coroner*[1989] VR 989 at 994 and see a useful discussion of the issue in Freckelton I., "Inquest Law" in *The inquest handbook*, Selby H., Federation Press, 1998 at 13
[6] (1990) 65 ALJR 167 at 168

The investigation

Initial investigation at the scene

A short time after the incident, the driver of the police vehicle made radio contact with the Cooktown police station and advised of the fatalities. The officer who received that call made contact with the Coen police station and the Cairns police communication room. As a result, officers from Coen attended and made arrangments for the injured to receive medical treatment.

Also, senior officers from Cairns, including Inspector Harris, the Regional Crime Co-ordinator for the Far Northern Region and Acting Inspector Carless, flew to Coen that night and they were joined soon after by scenes of crime and scientific officers.

An inspector from the Crime and Misconduct Commission (the CMC) and an Inspector from the Ethical Standards Command of the Queensland Police Service (the QPS) also travelled to Coen the next day. Those officers were only involved in the initial stages of the investigation. The CMC officer, Inspector Swindells, says in his statement that after being at the scene and participating in an interview with the driver and passenger of the police vehicle he was satisfied that the matter was being appropriately investigated and so he returned to Brisbane. From that time the CMC maintained only an "overview role."[7]

Acting Inspector Carless had carriage of the investigation throughout. His investigation report was forwarded up through the chain of command to the Acting Assistant Commissioner Far Northern Region.

On 28 November 2003 it was provided to the coroner in Cairns. At the request of the Cairns coroner I took over responsibility for the coronial investigation on 10 December 2003.

The inquest

A directions hearing was held in Brisbane on 1 March 2004. Mr Devlin of Counsel was appointed counsel assisting. Pursuant to s31, leave to appear was granted to lawyers representing Mrs Toohey, the widow of the deceased Alan Toohey, Mrs Camilla Hill the widow of the deceased Andrew Hill, the Hill Family Trust, the owner of Mt Croll Station, Sgt Eaton, the driver of the police vehicle involved in the incident, Constable Heuston the passenger in the police vehicle at the time of the incident and the Commissioner of the QPS.

On 18 April 2004 a view of the scene of the incident was undertaken. This involved travelling over the route taken by the bull catcher and the pursuing police vehicle, viewing the scene of the incident and viewing the bull catcher. All legal representatives of those granted leave to appear were invited to attend and most did. The view greatly assisted my understanding of the evidence given by the witnesses who provided statements and appeared at the inquest.

[7] exhibit 10 p4

The inquest convened in the Cairns Magistrates Court on 19 April 2004. eighty six statements and other exhibits were tendered and 20 witnesses gave oral evidence over the succeeding three days

The inquest then convened in Brisbane on 28 May 2004 to receive evidence from witnesses based there, including that given by a Chief Superintendent O'Regan in relation to Queensland Police Service (QPS) policy on police pursuits, evidence relating to calculations of the speed the police vehicle was travelling immediately before the fatalities and Dr Hoffman of the Crime and Misconduct Commission Research Division who gave expert evidence concerning research undertaken into how police pursuits have been sought to be made less dangerous in other jurisdictions.

At the conclusion of the evidence counsel assisting made submission as to the findings that were open to me on the evidence. Counsel for the driver of the police vehicle was given leave to make submissions in relation to whether his client should be committed for trial. Counsel for Mrs Hill was invited to make submissions about any findings I might make in relation to his contribution to the fatalities. The representatives of the other people granted leave to appear were invited to make submissions concerning any preventive recommendations I might make.

Submissions were only received from Counsel for the driver of the police vehicle, Sgt Eaton.

The evidence

In arriving at these findings I have had regard to all of the evidence contained in the statements and reports tendered at the inquest and the evidence given by the witnesses who appeared. Naturally not all of the evidence can even be summarised in these reasons for findings and the failure to mention any particular piece of evidence should not lead to the conclusion that it was not taken into account.

I set out below an outline of the events surrounding the fatalities and then discuss in more detail the contentious issues which need to be resolved

An outline of the events surrounding the fatalities

On the afternoon of Thursday 24 April 2003, Andrew Tasman Hill was at his home on Mt Croll Station near Coen, working on a Toyota tray back utility with the assistance of his friend and sometime employee Alan Paul Toohey. At about 5.30 they were joined by another local man, William Gordon Fowler, who had agreed to accompany them to another part of the property to try and catch feral bulls.

The vehicle they were working on is referred to as a "bull catcher" because it is used on the station to pursue cattle through the bush and to bump them so that they fall, at which point one of the occupants alights, runs to the fallen beast and ties its legs together. He then puts a rope around its neck and

tethers it to a tree. Later, the men come back with a larger truck and load the bulls onto it and transfer them to a holding yard or directly to market. Not surprisingly, the vehicle was in poor condition and had numerous defects. It had two old tyres tied across the front bull bar. It was not registered.

At about 6.00pm, the three men set off in the vehicle to catch bulls. They drove the 3.5 kms or so from the Hill's home to where the road into the homestead meets the Peninsular Development Road just north of the township of Coen. The Peninsular Development Road is the main arterial road of Cape York. They turned north, intending to drive about 6 kms along that road, just past the Five Mile Grid, before turning onto a track which led to a dam approximately 500 metres to the east of the Peninsula Development Road. Experience had taught them that at about sunset, bulls habitually came out of the dense scrub to graze in the more open savannah near the dam.

However, approximately 2 kms south of that turn off they met a four wheel drive police vehicle driven by Sgt Eaton coming the other way. The officers in the police vehicle both say that they immediately realised that the bull catcher was likely to be unroadworthy and Constable Heuston says he noticed that it was not displaying registration plates. In any event, they had stopped every vehicle they had come across on their trip south from Weipa that day and so there was no doubt that they would seek to intercept the bull catcher driven by Mr Hill.

One of the officers activated the coloured lights on top of the police vehicle to signal to the driver of the bull catcher that they wanted him to stop. The bull catcher did not stop. The driver of the police vehicle turned the vehicle around so that it was also facing north and made off after the bull catcher.

Mr Fowler says the people in the bull catcher were aware that the police wanted them to stop but they realised that the vehicle should not have been driven on the road and Mr Hill did not want to pay the fines that would almost certainly be imposed. Mr Fowler says there was not much conversation in the bull catcher but he was aware that they were trying to outrun the police when they came to the turn off just north of the Five Mile Grid and left the sealed road and drove down a rough unmade track.

At this stage, Constable Heuston estimates that the police vehicle had made up most of the ground it lost while turning around and was only abut 100 metres behind the bull catcher, while Sgt Eaton estimates they were still 300 meters apart.

That track headed almost due east for about 300 mtrs before it met the Old Telegraph Road, which, as the name suggests, follows the now defunct telegraph line in its north/south traverse of Cape York. The bull catcher turned north and, without stopping, set off along a fairly straight and reasonably smooth surface, albeit undulating course into the gathering gloom of dusk. Mr Fowler estimates that they were driving at about 80 kms an hour.

By the time the bull catcher reached the Old Telegraph Road and turned north the police vehicle had turned off the Peninsular Development Road and was just starting down the shorter track that connected the two.

When the police vehicle arrived at the intersection of the connecting track and the Old Telegraph Road the officers were initially confused by another vehicle they saw parked in the bush nearby. They at first assumed it was the vehicle they had been pursuing and Constable Heuston jumped out of the police vehicle and began running around looking for what he assumed would be the occupants of the other vehicle fleeing on foot.

After a short time he returned to the police vehicle surprised and perplexed that he could see none of the occupants of the bull catcher. Both he and Sgt Eaton then realised that the vehicle they had stopped near was not the vehicle they had been pursuing and they also say they saw some dust along the Old Telegraph Road to the north and deduced that it was raised by the bull catcher. They set off after it.

In his disciplinary interview Sgt Eaton says he saw the silhouette of the bull catcher on a couple of occasions when they were driving on the Old Telegraph Road. Will Fowler says he looked behind on two occasions. On the first occasion he says he could see the lights of the police vehicle at the intersection of the connecting track and the Old Telegraph Road. On the second occasion he says the police vehicle was 200 to 300 metres behind the bull catcher and gaining on them.

While they were driving along this part of the telegraph track Mr Fowler says he said to Mr Hill, who was driving the bull catcher, "*I hope you know this road."* He says he said this because he was concerned by the speed at which they were driving in the diminishing light.[8]

Approximately 700 metres north of the intersection of the connecting track and the Old Telegraph Road, a creek runs across the road. It appears that originally the road continued straight on across the creek without much deviation, but as a result of heavy water flow, the road has been washed out and a steep bank approximately 3 metres high at some stage forced a diversionary route to the east to be adopted. This diversion appears equally well used as the main track . It loops around through some trees to the east of the Old Telegraph Road, dips down to cross the creek and then rejoins the road approximately 70 to 90 metres to the north of the washout.

Andrew Hill obviously knew of the existence of the washout and indeed his wife gave evidence that they had driven through there together on previous occasions. The track around the washout could not be negotiated at the speed at which the bull catcher approached it and there is evidence from Mr Fowler, and skid marks at the scene, indicating that Mr Hill reduced speed and attempted to turn to his right to follow the diversion. However, a later examination showed that the brakes on the vehicle were defective in the least

[8] exhibit 26 p7

helpful way for such a manoeuvre: they were only functioning on the left hand wheels. That, coupled with the speed of the vehicle as it approached the washout, seems to have prevented Mr Hill from successfully negotiating the turn and, although the vehicle was only travelling very slowly at this stage, it toppled over the bank and onto the creek bed landing on its left hand side. It seems likely that the vehicle went too near to the edge of the bank and either the edge crumbled or the left hand front wheel went into a fissure running back away from the embankment causing that corner of the vehicle to drop and the rest of it then followed that wheel over the edge.

Will Fowler and Andrew Hill immediately exited the vehicle through the rear windscreen, which was just behind the single row of seats in the vehicle. It had shattered during the crash. They got out very quickly as they were aware of the likelihood that the police vehicle would crash over the embankment very soon.[9]

Mr Fowler ran straight to the embankment to try and climb up to alert the police officers in the approaching vehicle. He says he tried to scramble up two or three times but was unable to because of the steepness of the bank. During this time he could see the lights of the approaching vehicle and hear the sound of its motor growing louder as it approached. On a number of occasions he warned the two other men of the police vehicle's impending arrival.

Mr Fowler says that at this time Mr Hill was trying to help Alan Toohey get out of the bull catcher. Mr Toohey is said to have broken his arm when the bull catcher toppled over the embankment and he was having difficulty lifting himself out of the driver's side door window which was facing upwards as a result of the bull catcher coming to rest on its left hand side.

Mr Fowler says that very soon after his last warning the police vehicle flew through the air above him. When he last saw Mr Hill he was still standing beside the bull catcher near the roof of the cabin which was vertically orientated due to the vehicle being on its side. Mr Toohey was still trying to get out of the bull catcher and had managed to get the upper half of his body clear of the window opening.

The police vehicle flew over the bull catcher, which was lying quite close to the bank, and landed 17.5 metres from where its wheels first left the embankment. It then bounced off a low sand bank on the creek bed, leaving a "*scar*" from which the above measurement is taken before coming to rest a few metres further on.

Although both officers were injured in the crash, they immediately got out of the vehicle and, after being told by Mr Fowler that there were two other people with him, all three survivors began looking for Mr Hill and Mr Toohey.

[9] exhibit p15

Mr Hill's body was found approximately 7 metres in front of the police vehicle and some 20 metres away from where he was last seen by Mr Fowler. Mr Toohey's body was found underneath the police vehicle. Both were clearly dead and beyond resuscitation.

After Mr Fowler explained to the officers their location and that the vehicle they had passed further up the track was able to be driven, Constable Heuston went for help.

Sgt Eaton had some difficulty making radio contact with police before getting through to the Cooktown police station at 6.50pm. He told the officer there that two people were dead as a result of a "*police pursuit*" and that his partner had gone for help. He relayed the information given to him by Mr Fowler as to their location.

The Cooktown police contacted Cairns and Coen police and an ambulance was dispatched from Coen. Officers from Cairns and Cooktown were immediately dispatched to the scene arriving there later that night and the investigation commenced.

Sgt Eaton was breath-tested by the first officer to attend the scene of the accident and blood was taken from him later that night when he was at the Coen hospital. Both tests indicated he had no alcohol in his bloodstream.

Over the next 24 hours Accident Investigation Squad and Scientific Officers attended the scene and took photographs and measurements.

The bodies of Mr Hill and Mr Toohey were not removed from the scene until a crane arrived to remove the vehicles at about 3.00pm on the afternoon following the deaths. The bodies of Mr Hill and Mr Toohey were then taken to the Coen clinic.

Approximately 24 hours after the deaths, investigating officers attempted to recreate the circumstances of the accident by driving down the same stretch of the Old Telegraph Road and video-taping that activity from within the vehicle used for the re-enactment.

The bodies of the two men where identified by Mr Fowler as being those of Andrew Tasman Hill and Alan Paul Toohey. Mr Hill's identity was confirmed by fingerprint comparisons.[10] Mr Toohey's body was formally identified by Mr Benedict Nolan, an acquaintance of long standing.

On Monday 28 April 2003, autopsies were conducted on the bodies of Mr Hill and Mr Toohey at the Cairns Base Hospital by Dr David Williams, an experienced forensic pathologist.

On examining the body of Mr Hill he found multiple fractures of the skull and ribs. He also found fractures to the left clavicle and cervical spine. There were

[10] see exhibit 6

mutiple abrasions on the head and torso of Mr Hill. Dr Williams formed the opinion that Mr Hill had died as a result of the head injuries he received in a motor vehicle accident.[11]

On examining the body of Mr Toohey, Dr Williams found numerous skull factures, a fractured clavicle, a fractured sternum and numerous fractured ribs. His spine was also fractured, as were both his legs. Numerous contusions and abrasions were also present. Dr Williams formed the view that Mr Toohey died as a result of head injuries he received in a motor vehicle accident.[12]

The issues that need to be resolved to enable the necessary findings to be made

The speed of the vehicles

Constable Heuston estimates that when they were travelling down the Old Telegraph Road the police vehicle was travelling at between 70 and 80 km/h.[13] He is supported in this by the driver of the vehicle, Sgt Eaton, who said in a disciplinary interview that at one stage when he was driving on that road he saw that the speedometer was registering approximately 80 km/h.[14]

Mr Fowler estimates that the bull catcher was travelling along the Old Telegraph Road at approximately 80 km/h and says that the police vehicle made up ground on them after they initially got away from it when the police stopped at the intersection of the connecting track and the Old Telegraph Road.[15]

Two experts also gave evidence in relation to this issue: Sgt Robert Ruller of the QPS Accident Investigation Squad and Professor Rod Troutbeck, Head, School of Civil Engineering at the Queensland University of Technology.

Sgt Ruller in his report says that his calculation of the distances travelled by the police vehicle after it left the bank and travelled though the air suggests that its probable speed when it left the embankment was within a range of 60.84 km/h to 81.9 km/h. The range is so wide because it takes into account that both sides of the vehicle did not lose the support of the roadway simultaneously because the embankment did not run uniformly across the path of the police vehicle at 90 degrees but instead cut obliquely across the direction of its travel. While the right wheels left the bank 13 metres from where the vehicle landed, its left wheels were unsupported for 17.5 metres.

Sgt Ruller concluded that the likely speed of the vehicle was at the very bottom end of this range - about 60 km/h.[16] He says he settled on the bottom of the speed range as a result of factoring in the speed he estimates the body

[11] see exhibit 79
[12] see exhibit 80
[13] T p205, exhibit 66 p8
[14] exhibit 64 p10
[15] T p138
[16] exhibit 18 p5

of Mr Hill must have been travelling after it was struck by the police vehicle which he says he calculated by reference to where the body was found after the accident.

In determining this issue Sgt Ruller made assumptions about how far a body would slide in the conditions that prevailed at the scene of the accident.[17] If his judgment in this regard was correct, Mr Hills body would have hit the ground after being propelled through the air by the police vehicle and slid along the sandy creek bed for 11 metres. The photographs of Mr Hill's body and its surrounds show none of the signs one would expect to find if a body had slid for such a distance over loose sand. The absence of any slide marks in the photographs and the inspection of the site lead me to conclude he has overestimated this factor.

When one realises that in his estimation Sgt Ruller made no allowance for the fact that the left hand side of the vehicle lost the support of the ground and became airborne 4.5 mtrs before the right hand side, did not factor in the decelerating effect of the vehicle colliding with at least one 100kg man during its trajectory and assumed that Mr Hills body would have acted in the same way as the body of a pedestrian struck by a vehicle while standing on a road, it is difficult to have confidence in Sgt Ruller's conclusion that the police vehicle was only travelling at about 60 km/h when it went over the bank.

The other expert witness called in relation to that issue, Professor Rod Troutbeck, estimated that the most likely speed of the police vehicle just before it struck Mr Hill and Mr Toohey was 75 to 76km/h.[18] He arrived at a higher speed than Sgt Ruller by taking into account the immediate effect of the left hand side of the vehicle becoming air borne and by dismissing Sgt Ruller's assumptions about the body of Mr Hill sliding for over 10 metres.

Having regard to all of the above mentioned evidence I am satisfied that during the time the police vehicle was pursuing the bull catcher along the Old Telegraph Road it's speed approached 80 km/h and that when it went over the embankment and struck Mr Hill and Mr Toohey it was travelling at about 75km/h.

The time of the incident

The time the incident occurred is material because it assists in determining the level of daylight at the scene, which is relevant to an assessment of the risk engaged in by the drivers involved in the incident. The time can be estimated by working forward from events that occurred prior to the fatalities and working backwards from events that occurred after the accident.

Mrs Hill and Mr Fowler both say that the three men left the Hill's home at about 6.00 pm, or shortly after.[19] If Mr Fowler's estimation of the speed they

[17] In evidence Sgt Ruller conceded that this accident scene was very different from a roadway or a footpath situation – T p70. None the less he used standardised models worked up from and applicable to just those situations.
[18] Exhibit 82 p8
[19] exhibit 29 p2, T p116 and p132

were driving at over the various sections of the journey is accepted, a total time of approximately 16 minutes from the time they left home until the incident results[20].

Constable Heuston says they first sighted bull catcher at about 6.20pm.[21] It seems accepted by all parties that the police then pursued the vehicle for only a few minutes, making the time of the accident occurred to be about 6.25pm

Sgt Eaton says the pursuit occurred "*around 6.20 to 6.30*."[22]but provides no basis for this calculation.

Shortly before coming across the bull catcher, Sgt Eaton and Constable Heuston had intercepted a truck near the turnoff to the Coen airport. A traffic infringement notice they issued to the driver of this vehicle records the time of that interception as 1807 hrs.[23] It is 20 km from where that interception took place to where they met the bull catcher. If they averaged 100 km/hr, that journey would have taken 12 minutes. If they averaged 80 km/h it would have taken 15 minutes. It is common ground that the pursuit itself would have only taken 3 to 5 minutes, making the time of the accident between 6.22 and 6.27.

Sgt Eaton made radio contact with Cooktown Police Station at 6.50 pm. Between the time of the accident and that contact he had extracted himself from the police vehicle, located and checked the bodies of the deceased men, discussed the incident with Mr Fowler, assisted Constable Heuston to leave the scene and made a number of unsuccessful attempts to make radio contact. Understandably, none of the witnesses are able to give definitive estimates of the time these actions took.

Having regard to all of the above, I am of the view the accident occurred between 6.20 and 6.30pm. I don't consider the available evidence enables a more specific finding to be made.

The available light

Evidence on this question came from eye witness accounts and scientific data extracted from the web sites of the Bureau of Meteorology and Geoscience Australia.

The meteorological evidence concerning the amount of daylight likely to have been present at the material time needs some explaining.

The relevant terms are "*sunset*", which occurs when the upper edge of the sun's disk passes below the horizon and "*civil twilight",* which is said to occur when the centre of the sun is 6 degrees below the horizon. According to

[20] 3.5 kms from the house to the Peninsular Development Road at 30 km/hr, 4 kms along the road before the intercept at an average of 40 km/hr, 2 km at approximately 80 km/h while being chased on the Peninsular Development Road, 200 mtrs on the connecting track at an average of 40 kms, 800 mtrs along the Old Telegraph Road at an average of 70 km/hr
[21] T p202
[22] exhibit 64 p5
[23] exhibit 77

Geoscience Australia, when this happens "*a large object may be seen but no detail is discernible*."[24]

On 24 April 2003, at Coen, sunset occurred at 6.17 and civil twilight occurred at 6.38.[25]

Having regard to the estimation of the time of the accident referred to above it seems that the conditions would have been somewhere between these two.

The eyewitness evidence on this point is as follows:-

Sgt Eaton in his disciplinary interview said that, "*It was dusk going into twilight, there was still some natural light but headlights would have definitely been a requirement."*[26] A little later in the interview, when describing what he could see as the police vehicle was proceeding along the Old Telegraph Road, he said "*we can sight the silhouette of the vehicle in the twilight."* [27]

When interviewed Constable Heuston said that *"It was dusk, the dusk yeah."*[28] When giving evidence at the inquest Constable Heuston was particularly unhelpful in relation to this issue, to the point that, in my mind, he damaged his credibility. He would not say more than "*the sun was going down, it wasn't perfect midday sun but I could still see where we were heading."*[29] He maintained this position under cross examination although conceding it was "*less than optimal light*"[30] and that he saw no shadows.[31]

Mr Fowler was more forthcoming: "*If I'd been driving in my own car I'd have had the lights on"* he said when interviewed.[32] Further, when he gave evidence at the inquest he said that when he first looked back as the bull catcher was travelling along the Old Telegraph Road he saw the police vehicle at the intersection of that road and the connecting track. At that stage he could only see the lights of the police vehicle. When he looked back shortly before the bull catcher went over the embankment the police vehicle had gained on them and at that stage "*you could see the sort of an outline."*[33]

Tendered at the inquest was a video tape of a re-enactment the investigators undertook the day after the accident at about the same time of day as the accident. It is, however, of limited assistance to this issue as Acting Inspector Carless gave evidence that for technical reasons he didn't explain the pictures give a false impression of the extent of the natural light. Certainly it shows a fairly dark scene in which one would have difficulty seeing an unlit vehicle.

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[24] exhibit 73 annexure
[25] exhibit 73 annexure
[26] exhibit 64 p5
[27] exhibit 64 p8
[28] exhibit 66 p5
[29] T p206
[30] T p208
[31] T p225
[32] exhibit 26 p26
[33] T p138

Inspector Carless also stated that at the time the reconstruction was undertaken the light was "*fading fast*".[34]

The fact which perhaps says most about the level of the light, (and the inadequacy of Constable Heuston's evidence on this point) is that, from the moment the police vehicle turned off the connecting track onto the telegraph track it was rarely out of the line of sight of the bull catcher and certainly there was no obstruction between the two vehicles for the last 450 metres of the track over which they travelled. [35] However, the bull catcher, apparently, could only barely be seen. Sgt Eaton says he saw the bull catcher's silhouette on a couple of occasions when it was framed against the sky but obviously neither he nor Constable Heuston could see it when it disappeared over the edge of the embankment some 300 to 400 metres straight in front of them. Mr Fowler says he could see the lights and the outline of police vehicle at that stage, whereas Constable Heuston says he never saw the bull catcher at all when it was on the Old Telegraph Road.[36] Equally pertinent is that Sgt Eaton did not see the clearly defined detour around the washout.

At the inquest, Constable Heuston gave evidence that he could see past the washout to where the Old Telegraph Road rejoined its original path, parallel to the telegraph line.[37] Measurements taken on the instructions of Acting Inspector Carless indicate that occurs nearly 100 metres past the embankment.[38] Looking at the photographs of the scene taken in the middle of the day, the suggestion that Sgt Eaton may have been misled by some sort of optical illusion in this regard may seem superficially credible. However, when it is realised that neither of the occupants of the police vehicle mentioned this when interviewed, and that neither of them could see the bull catcher although it was 100 metres closer to them than these distant tracks, this explanation can be dismissed as a recent invention.

As a result of considering all of the above evidence, I consider that the light at the material time was dim and fading. Dusk had settled and twilight was nigh. The light was such that an unlit motor vehicle, mustard in colour, would be difficult to see unless illuminated by the lights of the following vehicle, which in this case was impossible because the police vehicle was too far behind the bull catcher for that to occur.

Condition of the road and likely users

Acting Inspector Carless, who visited the crash site on a number of occasions and spoke to locals about the scene, said this of the road generally:-

> *"Along the Telegraph Road there are many creeks and small gullies. During the various wet seasons these creeks become swelled causing considerable erosion to the road. When once some maintenance on this road was necessary to keep traffic flowing, this is no longer the*

[34] T p36
[35] exhibit 85
[36] T p206
[37] T p216
[38] exhibit 85

case given the new Peninsular Development Road to the west. This has left the Telegraph Road in a state of disrepair in some areas." [39]

Inspector Harris and Constable Heuston acknowledged that tourists, trail bike riders, miners and local Aborigines use such roads and that there was a likelihood of washouts and free roaming cattle.[40]

When the court attended the scene we saw that the road consisted of two wheel tracks running through knee to thigh high grass which grew on each side and in the centre of the road. Large trees were cleared back some 30 to 40 metres in most places but regrowth has resulted in saplings growing quite close to the road in some places.

The video of the re-enactment shows that the conditions which existed at the time of the accident were not significantly different to what was witnessed during the view.

How did the bodies of Mr Hill and Mr Toohey come to be in the position in which they were found?

There is no evidence indicating that the police vehicle made contact with the bull catcher as it flew over the embankment; indeed, according to the calculations of one of the expert witnesses called at the inquest, Professor Troutbeck, the lowest point of the police vehicle was approximately 500 mm above the bull catcher when it passed over the mid section of that vehicle.[41]

This raises the question of how it came to so forcibly strike Mr Hill as to propel him almost 20 metres from where he was last seen by Mr Fowler standing beside the bull catcher while Mr Toohey's body was found trapped under the police vehicle. There were no marks on Mr Toohey's body or the bull catcher to suggests he was dragged out of the window by the force of the police vehicle hitting him.

Had Mr Hill been standing on the ground and Mr Toohey still been inside the bull catcher when the police vehicle came over the bank, at most Mr Hill would have only to have crouched slightly and Mr Toohey to have let himself back down into the bull catcher to allow the vehicle to fly harmlessly above them. That did not happen in my view because in the brief period from when Mr Fowler last saw them before the police vehicle came over the bank, until it hit them, they must have moved. Mr Hill must have been much higher to bring himself directly into the path of the police vehicle and Mr Toohey must have been out of the bull catcher, but lower than Mr Hill.

Sgt Eaton says that when he became airborne as the police vehicle flew over the embankment:-

[39] exhibit 61 p2
[40] T p73 p226
[41] exhibit 82 p4

"(A)ll of a sudden the dust wasn't there. ..and in front of me was a male person and I could see him from probably above knee level, I couldn't see below the knee level and there was nothing, he just appeared to be floating there. I didn't know what he was standing on but there was nothing around him…I remember looking at his face as clear as I can see the detective inspector there in front of my bull bar."[42]

In my view, the most likely explanation is that in the final few seconds before the police vehicle crashed over the bank, Mr Hill realised that Mr Toohey was not going to be able to free himself from the bull catcher before the police vehicle arrived on the scene. Instead of diving out of the way and saving himself, as he could easily have done, it seems likely that with great courage Mr Hill has leapt up onto the bull catcher and pulled Mr Toohey free of the vehicle. This would have resulted in Mr Hill standing upright on the vehicle with Mr Toohey below him possibly in the act of swinging his legs off the vehicle prior to jumping to the ground. In this position it can be seen how Mr Hill took the full force of the police vehicle to his head and in the centre of his body while Mr Toohey was knocked in same direction as the path of travel of the vehicle and ended up underneath it. The tragic irony is that had it not been for Mr Hill's selfless heroism they both may have lived.

Was it a "police pursuit"?

"*Pursuit*" is defined in the QPS Operational Procedures Manual as "*an attempt by an officer driving a police vehicle to intercept another vehicle where that officer believes on reasonable grounds that the other driver is avoiding interception."*[43]

When he reported the accident over the radio to Constable Murphy at Cooktown station Sgt Eaton said "*there are two people killed in a police pursuit"*[44]

Sgt Eaton acknowledged, when interviewed by Inspector Harris, that after stopping for a few seconds at the intersection of the connecting track and the Old Telegraph Road, he sighted the silhouette of the bull catcher and dust raised by it and accelerated off after it. *"I wanted to get up a good speed as quick as I could, um I didn't treat it like a Sunday drive but I didn't push the vehicle to its extremes."*[45]Sgt Eaton goes on to say that he expected the vehicle would stop but acknowledges that in the short time they were following it his vehicle got up to a speed of 80 km/h. When giving evidence Constable Heuston acknowledged they were intent on intercepting the bull catcher and that the driver of that vehicle demonstrated that he was attempting to avoid that happening[46].He said that they didn't stop and attempt to use the radio to advise of the pursuit as required by the OPM because had they done so the

[42] exhibit 64 p11
[43] QPS OPM at para 14.23
[44] exhibit 4 p1
[45] exhibit 64 p9
[46] T 229

purpose of the pursuit would have been frustrated: the bull catcher would have got away.

I am of the view that there can be no doubt that Sgt Eaton was involved in a pursuit at the time of the accident. It is surprising that Inspector Harris when giving evidence seemed reluctant to accept that.[47] I am unable to understand why he would be so reticent but that is irrelevant for the purpose of these proceedings.

Section 43 Findings

As a result of considering all the evidence and having regard to the analysis set out above, I am satisfied that the following findings can be made to the requisite standard of proof:

Identities of the Deceased:
Andrew Tasman HILL and Allan Paul TOOHEY

Time of Death:
Between 6.22 and 6:30 pm on 24 April 2003

Place of Death:
In a creek bed on Mt Croll Station, approximately 7kms north of Coen in the State of Queensland

Cause of Death:
Allan Paul TOOHEY – severe head injuries due to a motor vehicle accident,
Andrew Tasman HILL – severe head injuries due to motor vehicle accident.

Committal question

I also need to consider whether any person should be committed for trial on any of the charges referred to in s24(1)(d) of the Act.

The only charge which arises for such consideration in this case is that created by s 328A of the *Criminal Code - Dangerous operation of a vehicle.*

In so far as is relevant to this case, that section provides as follows:-

ss (4) A person who operates a vehicle dangerously in any place and causes the death of…another person commits a crime.

ss (5) In this section "operates…a vehicle dangerously" means operates… a vehicle at a speed or in a way that is dangerous to the public having regard to all the circumstances including-

(a) – the nature, condition and use of the place; and

…

[47] T pp 84,85

(c) – the number of persons, vehicles or other objects that are or might reasonably be expected to be in the place.

It is not my role as Coroner to decide whether Sergeant Eaton is guilty of an offence against Section 328A but rather whether he should be committed for trial. That requires I determine whether a properly instructed jury could, on all of the evidence presented at the inquest reasonably convict Sergeant Eaton of such an offence.[48]

Turning to the elements of Section 328A there is no doubt that Sergeant Eaton operated a vehicle in a place and thereby caused the death of Mr Toohey and Mr Hill.

The issues to be resolved are whether he operated the police vehicle in a dangerous manner and whether the Crown could exclude the operation of any of the defences or excuses set out in Chapter 5 of the Code that are reasonably raised on the evidence.

Subsection (5) of Section 328A quoted above stipulates how the term "dangerously" is to be interpreted in this context and there are ample authorities to assist in an understanding of the term.

In *McBride v The Queen,*[49] Barwick CJ pointed out that the Crown must demonstrate precisely what is the manner of the driving which it claims is dangerous. It can not simply depend upon the resultant injury or damage although such outcomes may of course afford evidence from which the quality of the driving may be inferred. Equally, a person may be guilty of dangerous driving even though they cause no damage or injury.

> *The concept is in sharp contrast to the concept of negligence. The concept of which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave to a particular person, having significance only if damage is caused thereby. These distinctions make it imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining whether any particular speed or manner of driving can have the quality, intrinsic or occasional of being dangerous to the public within the meaning of the section.*[50]

Later in his judgement the Chief Justice goes on to say:

> *Because the charge is unlikely to be laid unless the impact has caused death or grievous bodily harm there will always be before the jury the serious result of the occurrence, and the temptation to try an issue of*

[48] see *Short v Davey* [1980]Qd R 412
[49] (1966) 115CLR 44
[50] ibid at p50

negligence as between the driver and the injured party will naturally be most marked.

…..

But where it is the manner of driving, an expression which can cover a wide and diverse set of facts, it is not enough that the vehicle as driven by the accused has caused death or injury and the accused was negligent even in some glaring respect. It is essential to define what is charged as the manner of driving so that when that has been found the two succeeding questions can be dealt with, namely, was the manner in itself or it its circumstances dangerous to the public and, did the impact that caused the death or injury occur when the vehicle was being so driven. Of all of these matters the jury is to be satisfied beyond reasonable doubt". [51]

Counsel for Sergeant Eaton submitted that it would be rare for an offence against the section to be made out in the absence of an identifiable breach in the traffic regulations. Some support for this contention can be found in the case *R v Gosney*[52] in which the English Court of Appeal accepted that the prosecution did not have to prove an intention to drive badly but rejected the suggestion that dangerous driving was "*an absolute offence*". That is, the court held that "*fault*" was an essential element of the offence. However, when explaining what they meant by that term in this context they said

> "*Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper driving standards. Nor does fault necessarily involve moral blame…Fault involves a failure; a falling below the care or skill of a competent and experienced driver in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight even though it might be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation, it is enough if it is looked at sensibly,* ***a*** *cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation.*[53]

Further comments in this vein can be found in *R v Evans*[54] where it was said

> *It is quite clear from the reported cases that, if a man in fact adopts a manner of driving which the jury thinks was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best.*[55]

[51] ibid at p51
[52] [1971] 3 All ER 220
[53] ibid at p224
[54] [1962] 3 All ER 1086
[55] ibid at p1088

The court went on to reiterate however, that merely because an accident happens and somebody is killed it does not necessarily follow that the driver of the vehicle which caused the accident must necessarily be guilty of dangerous driving.

There are Queensland authorities indicating that the defences and excuses available under Chapter 5 of the Code are not excluded by the way in which the offence under s328A is framed. In *R v Warner* ,[56] for example, the Court of Criminal Appeal held that the trial judge erred when he directed the jury that the defences of extraordinary emergency and mistake of fact had no application when the accused claimed he drove as he did to escape from people he thought were chasing him intent on doing him harm. Further, the High Court has recognised that if a person falls asleep at the wheel, while the car is being driven in that state it is an involuntary act which can not be the subject of a charge of this nature. In those circumstances the question becomes whether the condition of the driver immediately before he/she went to sleep was such that the driving was dangerous. If there was evidence that it would be reasonable for the driver to consider that he/she was not likely to fall asleep the Crown bears the burden of excluding the defence that the driver was honestly and reasonably mistaken in this regard.[57]

From these authorities and the section itself I consider the following principles can be extracted:

- The test as to whether the driving in question is dangerous is an objective one, that is, it is answered by asking whether a reasonable person viewing the driving would consider it posed a risk of danger to those who might be expected to be affected by it.

- It is irrelevant that the driver did not intend to create such danger or indeed had a public purpose for driving as he/she did, although those issues may be relevant to the decision to prosecute or the sentence if the driver is convicted.

- The concept of dangerous in this context is quite different from negligence – it refers to a serious breach of expected standards and requires some fault, although not necessarily any moral blameworthiness.

- The fact that someone was killed by the driving does not necessarily mean that the driving was dangerous in the sense required.

- The defences and excuses created by Chapter 5 of the Code are not excluded just because dangerousness is to be assessed objectively

[56] [1980] Qd R 207 and see also R v Webb [1986] 2 Qd R 446
[57] Jiminez v. the Queen (1992) 173 CLR 572

- The Crown has to particularise what it is about the driving that gives it the requisite character and must prove those aspects and negate any defences raised on the evidence to the criminal standard.

- When considering whether the driving was dangerous, regard must be had to the speed of the vehicle and the nature, condition and use of the place and other users or conditions that might be expected to be there.

In applying those principles to the facts of this case I have to determine whether a jury could reasonably conclude that the manner of Sgt Eaton's driving posed a real or potential danger to his passenger, the people in the vehicle he was pursuing or any other road users who might reasonably be expected to be on the road having regard to the following matters:-

- The speed of the vehicle, which I find was in the vicinity of 75 km/h immediately before the accident. While not an intrinsically dangerous speed to drive a vehicle of the type in question I must also have regard to the context in which the vehicle was being driven at that speed. When undertaking that assessment the following factors are relevant:

    - The light was dim and fading and the vehicle being pursued was unlit and could barely be seen by Sgt Eaton.

    - The vehicle was being driven on an unmade road or track with long grass growing in the centre of it and which was not regularly maintained by any public authority or individual

    - There was a likelihood of cattle on an unfenced road and there was a possibility of other recreational road users.

    - There was a likelihood of watercourses cutting across the road and other obstacles being on the road

    - Neither the driver nor his passenger had ever been on the road and so had no way of knowing what to expect

    - The driver was pursuing another car in which he knew there were three people who had demonstrated that they were intent on evading interception and who were therefore likely to drive faster than was safe and reasonable to avoid apprehension.

    - The vehicle they were pursuing was likely to be un-roadworthy

These factors lead me to conclude that a jury could be satisfied to the requisite standard that the driving of Sgt Eaton on the Old Telegraph Road was dangerous in that it involved a speed that was excessive in the circumstances that posed a real risk of injury or death to his passenger and/or the occupants of the bull catcher.

That is not the end of the matter however. During the hearing of this matter frequent reference has been made to the foreseeability of the events that unfolded on the evening in question. It has been forcefully suggested that the washout was a concealed ravine - a trap - that no reasonable driver could foresee and that it was so difficult to see that even if the police vehicle had been driven at a much slower speed it could not have avoided crashing over the embankment. The fact that the bull catcher fell into the washout, even though the driver knew it was there, is pointed to as evidence that supports these assertions.

This evidence requires me to consider whether, before committing Sgt Eaton to stand trial, I also need to be satisfied that the Crown could negate any defence that is reasonably raised on the evidence. Should I consider possible defences or is that a matter for a jury to determine in the event that the DPP elects to proceed with a charge?

That issue is not free from doubt. The starting point for its resolution is *Short v Davey*[58]in which the Queensland Full Court held that when determining a "no case" submission a magistrate should not consider whether he or she would convict or acquit if required to resolve the question of the defendant's guilt at that stage but rather whether a "*reasonable tribunal might convict"* on the evidence so far laid before the court when the submission is made.

This analysis has been held in some cases to mean that when determining a "no case" submission a judge is determining a question of law – is there a *prima facie* case - and that when so doing there is no room for determinations of fact such as whether the weight that can be given to various aspects of the evidence is sufficient to support a conviction.[59] The test is, *could* a properly instructed jury convict, not *would* they.

There is however another line of authority which suggests it is unrealistic to try and insist on such a definite distinction between questions of fact and law. The argument in those cases asserts that when determining a "no case" submission a magistrate or judge is entitled to have regard to the sufficiency of all the evidence before him or her and to consider its adequacy for supporting a conviction. According to this approach the judicial officer "*is "entitled to draw all proper inferences from the evidence"*.[60]

The test for the committal question set out in s41 of the *Coroners Act 1958* requires a coroner to consider whether "*the evidence taken at the inquest is sufficient to put a person upon the person's trial*." It is the same as that found in s102 of the *Justices Act 1886,* which deals with committal proceedings after charges have been preferred by complaint and summons. No guidance is

[58] [1980] Qd R 412
[59] see Zanneti v Hill(1962) 108 CLR 433, Cox v Salt (1994) 12 WAR 12 and Torrance v Cornsih 1985 79 FLR 87 and Amalgamated Television Services v Marsden [2001] NSWCA 32
[60] Protean (Holdings) Ltd v American Home Assurance Company [1985] VR 187 at 239, see also Jones v Dunkel (1959) 101 CLR 298 at 330 and Rasomen Pty Ltd v Shell Company of Australia Ltd (1997) 75 FCR 216

given in either Act as to what level or weight of evidence is required before it is "*sufficient*" to commit but all of the cases cited above accept that the test is whether a properly instructed jury could reasonably convict. That is something quite different from a mere *prima facie* case. It requires at least consideration of whether the Crown could discharge its onus not just to prove all of the elements of the offence but also whether the Crown can negate any defence reasonably raised on the evidence to the criminal standard. I am confirmed in this view by the decision of the High Court in *Kolalich v DPP (NSW)*[61] in which their honours, when construing the equivalent NSW legislation that has only slightly different wording, concluded that provocation was a matter to which regard should be had when a magistrate was considering whether to commit a person on a charge of murder.

It therefore follows, in my view, that a coroner should not commit anyone to stand trial unless on the evidence put before the inquest the coroner is satisfied that the Crown could satisfy a jury of all of the elements of the offence in question and negate any defence raised by the facts of the case.

To be "raised" in the relevant sense does not mean that the accused has to give evidence in relation to it. The question is whether on all of the evidence the circumstances leave a defence reasonably open.[62]

In my view, in this case a defence of accident is raised. In so far as it is relevant to this matter, s23 of the Code provides that a person is not criminally responsible for an event that occurs by accident. This section has been subject to extensive judicial examination and interpretation, some of it inconsistent, much of it confusing. Thankfully, there is no need to seek to resolve those conflicts as a result of the judgment of the Court of Appeal in *R v Van Den Bemd.*[63] There, the Court held that the second limb of s23 means that a person is not liable for the consequences of his/her willed act if the consequences were not intended or foreseen by the accused and were so unlikely to flow from the act that an ordinary person could not have reasonably foreseen them.

In this case the driving of the police vehicle in a dangerous manner is the willed act and the deaths of Mr Toohey and Mr Hill as a result of the police vehicle flying over the embankment and striking the two men as they emerged from the bull catcher is the event to be considered.

Van den Bemd is authority for the proposition that it is not enough for the Crown to prove that those deaths were the immediate and direct consequence of the dangerous driving; the Crown must also negate the possible conclusion that the deaths were not a reasonably foreseeable consequence of that driving. Or, to frame it in the positive, the Crown has to prove that the collision between the men and the police vehicle and the resulting deaths was either intended by the accused, foreseen by him/her as a

[61] [103] ALR 630
[62] R v Watt [1999] QCA 202
[63] [1995] 1 Qd R 401

possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the events as possible outcomes.[64]

According to the Court of Appeal in *Taiters case*, the jury should be directed to disregard possibilities that are no more than remote and speculative. If the subject event is something which a reasonable man might think of as no more than a remote possibility which does not call to be taken into account and guarded against, it can, when it happens, be fairly described as accidental.

In *Van den Bemd*, the Court of Appeal held that the jury should have been directed to consider whether the death of the deceased as a result of a predisposition to suffering a fatal subarachnoid haemorrhage caused by being punched to the neck by the accused was reasonably foreseeable. Their ruling in that regard has been affirmed by the High Court.[65] Section 23 was amended in 1997 by the insertion of subsection 1A to countermand the effect of the decision in *Van den Bemd* in so far as it related to the unforeseeability of death resulting from an unknown defect or abnormality in the deceased. That amendment has no application to this situation that prevailed in this case and therefore the analysis set out above states the relevant law as I understand it to be.

In my view, in this case, while a reasonable person might have considered Sgt Eaton's driving created a real or potential danger for the people in the bull catcher, and/or his passenger I consider that the Crown could not lead evidence that would show that a reasonable person would have foreseen the chain of events that led to the death of Mr Hill and Mr Toohey or anything sufficiently close to it. Accordingly, the Crown could not rebut a defence under s23 and Sgt Eaton should not therefore be committed for trial.

Preventive recommendations – riders

Police pursuit policy and practice

Section 43(5) of the Act prohibits a coroner from expressing any opinion on a matter outside the scope of the inquest except in a rider which is, in the opinion of the coroner, designed to prevent the recurrence of similar deaths. For the reasons set out below, the facts and circumstances of this case lead me to consider that the policies of the Queensland Police Service governing urgent duty and pursuit driving warrant being reviewed.

On its face, the policy seems eminently reasonable, but if this case is typical, in practice it would seem otherwise. In the part headed "*Justification for initiating or continuing a pursuit*" it stipulates that *"(t)he risks involved must be balanced against the necessity for the pursuit. Pursuits may be conducted only when;*

> *(i) the known circumstances are sufficient to justify a pursuit; and*

[64] Tai9ers (1996) 87 A Crim R 507 at 512
[65] R v Van den Bemd [119] ALR 385

(ii) *identifying or apprehending the occupants of the vehicle at a later time is unlikely.*

The policy goes on to direct that "a *risk assessment must be conducted in relation to every pursuit. The following factors must form part of the assessment* (I quote only those factors that appear directly relevant to this case):

(i) the safety of all persons, i.e. police officers, members of the public and offenders is paramount;
(ii) the known circumstances that initiated the pursuit;
(iii) the possible consequences;
(vi) the manner in which the pursued vehicle has been driven including the speed of both vehicles;
(ix) any other relevant circumstances such as road, weather, visibility and other traffic conditions.

The standard risk management approach is continued by the direction that *(t)he reasons for and risks involved must be assessed before initiating the pursuit and be continually reassessed during the pursuit. The mandatory operating principle is "the safety of police, the public and the offenders or suspects is paramount". The pursuit must be abandoned if the risk outweighs the necessity for and known circumstances of the pursuit. …A pursuit must be abandoned immediately it creates an unacceptable risk to the safety of any person.*

I would have envisaged that a reasonable police officer applying that policy to the circumstances which prevailed in this case would have considered the following factors:

- From the time the police vehicle left the bitumen, the pursuit was over a road on which the driver had never before travelled
- The pursuit was over a unsealed road, little more than a bush track which was obviously little used and on which no regular maintenance could be expected
- The pursuit was over an unfenced road in an area in which stock would obviously freely roam and on which it might be reasonable to expect to come across tourists and other recreational road users.
- The pursuit was being conducted in dim and fading light.
- The vehicle being pursued was thought to be unroadworthy.
- The vehicle being pursued was not displaying any lighting.
- The driver of the vehicle being pursued had demonstrated that he was unlikely to voluntarily stop and comply with a police direction.
- The vehicle being pursued was known to be carrying three people.
- There was no basis for suspecting that either of the two passengers had committed any offence.

- The driver could only reasonably be suspected of committing minor traffic offences.

In those circumstances I would have expected that any reasonable police officer conducting the risk assessment that the policy demands would have concluded that the risk of injury to those in the police vehicle, the vehicle being pursued or others who might have been on the road, was significant. On the other hand, the diminution to law enforcement flowing from the pursuit being abandoned would be minimal. I consider that a reasonable officer would have concluded that the pursuit should have been abandoned when the bull catcher left the bitumen.

I do not accept that a reasonable assessment in this fashion was undertaken. Indeed, the description of Constable Heuston alighting from the police vehicle at the junction of the connecting track and the Telegraph Road, running around in the dusk searching for offenders he thought had escaped on foot, and being collected by Sergeant Eaton who then accelerated up through the gears to a speed approaching 80 km an hour is in no way indicative of a careful balancing of possible benefits and detriments.

I am also concerned that neither officer seems to have had sufficient, if any, regard for the safety of those in the bull catcher and how continuing to pursue that vehicle might have impacted on the safety of its occupants. When asked whether he thought the manner in which the police vehicle was driven contributed to the accident Mr Fowler said, quite reasonably in my view, "*Well if they weren't chasing us we would have stopped, we would have slowed down*."[66] Rather than considering how chasing the bull catcher might endanger the occupants of that vehicle, the police officers involved in the chase and even Inspector Harris, seem to consider that the fact that the vehicle being pursued might crash before the police vehicle did, somehow made the pursuit more justifiable.

Inspector Harris, while conceding that driving at speed along unfamiliar, unsealed country roads was dangerous, sought to qualify that concession by saying "*Yes, but at the same time, having said that, they are following a vehicle. So there is something of a safety barrier in them doing that."* When it was pointed out to him that the vehicle being pursued might suffer a serious mishap he seemed unperturbed by that possibility. He said, "*Exactly right, but it's still there in front of them and they're following behind."*[67]

Obviously Mr Hill should have stopped when he clearly knew that the police wanted to him to. In failing to do so he was foolhardy and his driving on the night in question was at least reckless if not dangerous, albeit he at least knew the road. This in no way, in my view, excuses the actions of the police officers who have a positive duty to consider the safety of all members of the public and are expected to act in a professional and considered manner.

[66] Exhibit 26, p24
[67] T p59

Of course, an error of judgement by two relatively junior officers would not necessarily indicate a significant policy failure or defect. It may be that they are particularly incautious individuals or had received insufficient training. Further, had it not been for the remote area in which the incident took place, the officers, if they had complied with the current policy, would have made radio contact with the nearest police communications centre and the officer in charge of that centre would then have become the pursuit controller. The theory underpinning that policy is that an officer not directly involved in the pursuit is more likely to make a sound judgment about the merits of it continuing.

However, it would seem from the facts surrounding this case, those expectations are unduly optimistic. To my mind one of the most telling factors indicating that the policy is flawed is that none of the officers involved in the investigation, or in reviewing that investigation, came to the conclusion that the pursuit was unnecessary and unduly dangerous. Indeed as quoted earlier in these reasons Inspector Harris even quibbled about whether the pursuit policy applied to these circumstances.

The investigation report was sent up the chain of command to two Assistant Commissioners. Neither of them, nor any of the numerous officers who reviewed it, disagreed with the investigating officer's conclusion that the policy had been adhered to. All apparently considered that the fairly minor traffic law enforcement objective the officers were engaged in when Mr Toohey and Mr Hill were killed, justified the risk the officers undertook. If all of these officers considered the pursuit in the circumstances that prevailed in this case was justified in order to seek to issue traffic infringement notices for an unroadworthy and/or unregistered vehicle, it is difficult to imagine what precarious conditions would have to prevail before they would consider it appropriate to discontinue the pursuit of offenders suspected of more serious offences.

I am aware from discussions with the Commissioner of Queensland Police Service and as a result of evidence given by Chief Superintendent O'Regan that the Commissioner is concerned about the danger posed by police pursuits and indeed he has sought to influence the conduct of all Queensland police officers to reduce that risk by himself directly raising it in numerous police forums. Regrettably, in my view, this case demonstrates that the Commissioner has overestimated the power of reason to persuade and restrain officers in the field or influence those charged with the responsibility of supervising them.

Of course this is not a problem that is unique to Queensland; it is a problem law enforcement agencies around the world are seeking to address.

I was greatly assisted in my consideration of this issue by a report published in 2003 by the Crime and Misconduct Commission.[68] Its author, Dr Gabi Hoffmann, gave evidence to the inquest that convinced me that the QPS can

[68] See Exhibit 84

do more in this area. As the CMC's report points out, the challenge is to find "*the balance between the need for police to be effective in apprehending offenders and the need for them to consistently act in a manner that minimises any risk to public safety*".[69] A review of the Queensland data by the CMC indicated that 11% of all pursuits engaged in by police resulted in personal injury to someone. In the five years before the tragedies which were investigated by this inquest, eleven other people were killed in police pursuits. In none of those cases was the person killed suspected of any serious offence.[70] These results are entirely consistent with the findings of interstate and overseas studies. For example, in Victoria in a two year period from July 2001 to September 2003, 24 people were killed in police pursuits.[71] A study undertaken in 1996 in America and Canada found that 32% of pursuits resulted in an accident, 11% resulted in a personal injury and 1% resulted in death.[72]

It is often assumed that when a suspect flees from police he must have committed a serious offence. The facts do not support this assumption. Research consistently shows people most often flee because they are fearful of being detained in relation to minor offences. That was again the case in the matter dealt with in this inquest. During the course of this inquest the Queensland Police Union of Employees suggested in a media release that police should desist in engaging in high speed pursuits until they are given better training in driving techniques. With all due respect, that suggestion entirely misses the point; it not the quality of the driving that is the cause for concern, it is the quality of the decision making. Indeed, a study by Professor Ross Hommel found that pursuit trained drivers had more accidents than their untrained colleagues because they were more likely to keep pursuing even when other motorists had to take evasive action or the offenders attempted to ram the police car.[73]

In my view, the evidence points to the need for a more restrictive pursuit policy that limits the discretion that officers continue to demonstrate they are unable to exercise wisely with sufficient consistency. Even if this were to mean that on occasions minor offences were less likely to be effectively detected and prosecuted, I consider the saving of innocent lives would justify such an outcome and therefore justify a more restrictive policy. However, when one realises that the evidence indicates that the vast majority of people, even those who break the law, do stop when required to do so by police the justification for an open-ended discretionary system diminishes further.[74]

In Western Australia and in Tasmania more restrictive policies have been introduced but I am unaware of any evaluation of the impact of those policies.

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[69] Police pursuits; a law enforcement for public safety issue for Queensland CMC 2003 p3
[70] Eight of the deceased were suspected of traffic or driving violations, two were pursued because they were in a stolen vehicle and one was fleeing from a serious assault although he thought not the perpetrator of the assault. CMC report p 12
[71] Evidence given at the inquest into the deaths of Lovitt, Vo and Law heard before Victorian State Coroner Graeme Johnson - decision 29/01/04
[72] Payne and Fenske 1996 sighted in the CMC report at p 4
[73] See study of Hommel sighted in the CMC report p23
[74] Falcone 1994, quoted in the CMC report at p5

In the United States also, in recognition of the unacceptable risk posed by police pursuits, increasing numbers of the law enforcement agencies have adopted more restrictive pursuit policies. For example, the Miami - Dade Police Department in Florida in 1992 limited pursuits to "violent felons". The policy was found to have significant public safety benefits; including an 82% decrease in pursuit related injuries. There was no increase in the crime rate and no increase in the number of suspects attempting to flee from police.[75]

Recommendation

I am therefore of the view that it is time that Queensland Police Service took more decisive action in relation to this significant public safety issue. I recommend that the Queensland Police Service in conjunction with the Crime and Misconduct Commission design, implement and evaluate a trial, in a suitable geographic region of the state, of a more restrictive police pursuit policy that prohibits police from pursuing drivers suspected of only minor offences. Depending on the results of that trial, consideration should then be given to amending policy and practice state wide.

Family members contact with the deceased

There is another issue which I feel warrants some comment. As mentioned earlier in this decision, the bodies of Mr Hill and Mr Toohey remained at the scene of the accident until about 4.00 pm on the day after the accident. As a result, the bodies commenced to decompose and Mrs Hill's request to see her husband was, in my view wisely, discouraged.

It is well recognized that family members frequently wish to, and may benefit from, viewing and/or having contact with the body of their loved one after death, particularly when the death is unexpected.[76] Mrs Hill's evidence to the inquest that she sometimes has trouble believing that her husband is dead is typical of the symptoms frequently experienced by people who are denied an opportunity to have some contact with the body of their loved one. In most cases this should happen in a secure and private setting. The Queensland Health Scientific Services Counselling Unit has developed a policy that gives guidance on how this can best be undertaken.

I am concerned that in this case the bodies weren't removed from the scene sooner so that this could happen. I can see no good reason for this not happening.

Despite the questioning of numerous witnesses during the inquest, no one indicated that they had consciously caused the bodies to remain *in situ* for so long, although Inspector Harris suggested it was necessary to allow measurements and photographs to be to be taken and there was also the

[75] See CMC report p4

[76] See for example discussion of this in McKissock, M & McKissock, D (1995) *Coping with Grief,* 3rd edition ABC Books, Sydney and Worden, W J (1991) *Grief Counselling and Grief Therapy: A handbook for the mental health practitioner*. 2nd ed., Routledge, London

issue of removing the vehicle under which Mr Toohey was pinned.[77] None of these factors, in my view, justify the added distress that may have been caused to the families in this case by their being unable to view the bodies of their loved ones in a timely and less disfigured state.

I have not the slightest doubt that the bodies were left in place with the best of motives – to ensure that the matter was thoroughly and meticulously investigated. However, it will frequently be necessary to strike a balance between the forensic purposes served by leaving a death scene undisturbed until all initial inquiries are completed and the need to attenuate the distress that delay in gaining access to the body can cause the family of the deceased person.

Recommendation

I recommend that the Queensland Police Service remind its officers of the importance to family members of having timely access to the bodies of their deceased relatives and loved ones in an appropriate environment and that this should be postponed only for so long as it takes to have the most essential investigative steps completed.

Michael Barnes
State Coroner

Cairns , 14 October 2004

[77] T p52