

SOUTH



AUSTRALIA

FINDING OF INQUEST

An Inquest taken on behalf of our Sovereign Lady the Queen at Adelaide in the State of South Australia, on the 5th, 6th, 7th, 8th, 9th, 12th, 13th, 14th and 15th days of February 2001, the 20th day of April 2001, the 22nd day of August 2002, the 6th day of September 2002, the 9th day of May 2003, the 15th day of September 2003, the 30th day of October 2003 and the 6th day of November 2003, before Wayne Cromwell Chivell, a Coroner for the said State, concerning the death of Lauren Kady Aitken and Callum Macdonald Aitken.

I, the said Coroner, find that:

Lauren Kady Aitken aged 12 years, late of 16 Glenunga Avenue, Glenunga, South Australia died at Mount Barker Road, Crafers, South Australia on the 9th day of January 2000 as a result of severe cerebral trauma associated with extensive cranial vault and basal skull fractures.

Callum Macdonald Aitken aged 10 years, late of 16 Glenunga Avenue, Glenunga, South Australia died at Mount Barker Road, Crafers, South Australia on the 9th day of January 2000 as a result of transection of the aorta.

1. Background

1.1. This inquest commenced on 5 February 2001. It concerns the tragic deaths of Lauren Kady Aitken, then aged 12 years, and Callum Macdonald Aitken, then aged 10 years, on Sunday 9 January 2000. Their elder sister, Haley Aitken, then aged 14 years and younger brother Hayden Lachlan Aitken, then aged 7 years, were injured in the same incident.

- 1.2. At about 2am on that day Scott Aitken, the father of the four children, was driving them in his Mitsubishi Pajero four-wheel-drive station wagon along the old Mount Barker Road towards his home in Stirling.
- 1.3. At a point near Crafers, the vehicle veered to the right, through a gap approximately eight metres wide between two concrete barriers, travelled over a dirt area and over the edge of an embankment. The vehicle fell 26.36 metres through the air and crashed nose-first onto the bitumen surface of the roadway below and rolled over end to end until it came to rest back on its wheels.
- 1.4. Police and ambulance personnel attended at the scene soon afterwards. They found that Scott Aitken, and Haley and Hayden were injured and they were conveyed to hospital. Lauren and Callum were found to have died, and were pronounced dead at the scene (see Exhibit C1a).

2. Issues arising at the inquest

2.1. Adequacy of signage and barriers

The area in question had been the subject of extensive roadworks as part of the construction of the South Eastern Freeway. The road on which Mr Aitken had been travelling was called the 'Measdays Ramp', and was temporarily being used for eastbound traffic. This was the result of a change which was made at 3pm on 8 January 2000. The eight metre gap in the barrier was left to allow work vehicles to have access to the dirt area (see the evidence of Mr O'Connell at T185). Some criticism was directed at the point where the 'Bridle Track', which had been carrying up-traffic before 3pm on 8 January 2000, and the Measdays Ramp bifurcated (see the affidavits of Michelle Moskos – Exhibit C11a, Raymond Caldwell – Exhibit C31a, Lewis Edgley – Exhibit C33, Ronald Brayshaw – Exhibit C39, Michelle Rapkin – Exhibit C40, Suzanne Beaumont – Exhibit C41, Karen Diesing – Exhibit C42, John Howland – Exhibit C43, David Kinnaird – Exhibit C44, Kevin Parish – Exhibit C45, Elvira Huber – Exhibit C45, Paul Driver – Exhibit C46). These criticisms are not relevant to the circumstances of this incident, which occurred 45 metres past that point.

2.2. Presence of an animal on the roadway

There was no apparent reason why Mr Aitken swerved the vehicle to the right when he did. He was heard to say that an animal on the roadway had caused him to swerve

(see the affidavit of Mr Edgley, Exhibit C33). He said something similar to Constable Argent (Exhibit C10a). Haley Aitken said she did not see an animal on the road that night (T38), and nor did any of the other witnesses who drove along the road at that time. Mr Vickery, a partner of Mr Aitken's in their Adelaide law firm, said that he had seen an Alsatian dog on the road on 25 January 2000 (Exhibit C50).

2.3. Smoking

Mr Aitken said that, having swerved to avoid the animal, the cigarette he was smoking fell in his lap and this caused him to take his eyes from the road. Evidence was heard that Mr Aitken had long since given up smoking (see evidence of Ms Chandler, his ex-wife at T273). Mr Aitken said he had only taken it up a few weeks earlier. Haley Aitken confirmed that he lit one up shortly before the incident, and Mr Edgley, Mr Barmore (Exhibit C34), Constable Argent and Ms Polljonker (Exhibit C35) heard him offer this explanation for what happened. A sinister interpretation on this aspect of the matter, in view of the presence of petrol in the vehicle, was suggested by Mr Bourne, Counsel for Haley and Hayden Aitken, in his submissions.

2.4. The presence of petrol in the vehicle

There were two cans, one of five litres containing two-stroke fuel and one of ten litres containing petrol. Mr Aitken had an elaborate explanation for the presence of these cans which involved his intention to swap two-stroke fuel from one can to the other (T340-344).

2.5. Senior Sergeant England from the Major Crash Investigation Unit of South Australia Police (SAPOL) reconstructed the movements of the vehicle having regard to the physical evidence at the scene. Without going into detail, he gave the opinion that the Pajero was travelling at 37 to 44 kilometres per hour when it left the embankment (T219), and that it was travelling at 40 to 47 kilometres per hour, or slightly more, when it left the bitumen surface of the roadway (T221). There is no evidence that Mr Aitken applied the brakes at any relevant stage, nor did he make any other attempt to manoeuvre the vehicle to avoid driving off the embankment. There was more than enough room to stop if Mr Aitken had applied the brakes before the vehicle left the bitumen (T243).

2.6. At the close of evidence, Mr Bourne submitted that Mr Aitken's account of what happened lacked creditability. He referred to the history of matrimonial discord

between Mr Aitken and Ms Chandler before the incident. He submitted that the peculiar circumstances, the smoking, the petrol, combined with the failure to correct the swerve, apply the brakes, and the general circumstances of the incident should lead to the inference that Mr Aitken intended to take his own life and the lives of his four children (T436).

- 2.7. Mr Martin, counsel for Mr Aitken submitted that there had been no pre-planning by his client, that there was an animal on the road, and that Mr Aitken had offered this explanation consistently, even while he was still shocked at the enormity of the situation, immediately after the incident.
- 2.8. Mr Martin also described a suggestion that his client may have seen the gap in the barriers and driven through it on the spur of the moment as 'preposterous' (T4546).

3. Subsequent proceedings

- 3.1. I adjourned the inquest on 15 February 2001 to prepare a finding.
- 3.2. Before the finding was delivered, Mr Aitken was charged with two counts of murder, and two counts of attempted murder. Section 26(1) of the Coroner's Act 1975 prevented me from proceeding further with the inquest until those proceedings were finalised.
- 3.3. On 8 July 2002 in the Supreme Court of South Australia before the Honourable Justice Besanko, Mr Aitken pleaded guilty to two counts of causing death by dangerous driving and two counts of causing injury by dangerous driving. The charges of murder and attempted murder were not proceeded with.
- 3.4. The following facts were agreed between the prosecution and defence, and were adopted by His Honour in sentencing:
 1. During the early hours of 9 January 2000, Scot Aitken was the driver of a Mitsubishi Pajero 4 wheel drive, registration number VFJ-875, along Mount Barker Road, Crafers, in an easterly direction towards Crafers when an accident occurred.
 2. At the collision scene the roadway was divided into two lanes by broken white lines for the carriage of east bound vehicles. On the northern side of the roadway there was a narrow graded shoulder which extended to an embankment which separated this roadway and the access road to Crafers. On the southern side of the road leading from the junction of the Crafers access road there was an area of bitumen which extended towards a line of concrete barriers. These barriers extended to a position just east of where the tyre marks identified on the bitumen surface

(consistent with having come from the Pajero driven by the accused) were visible on the bitumen surface. After the last concrete barrier, there was a gap measuring approximately 8 metres on the southern side of the roadway before the start of a concrete kerb on the southern edge of the bitumen and an adjacent shoulder and embankment. Over this gap there was a sand and gravel surface adjacent to bitumen and then a dirt area leading to the embankment. That embankment extended down to a newly constructed roadway 26 metres below.

3. The roadway being travelled by the Mitsubishi Pajero was part of the Mount Barker or South Eastern Freeway construction and had only been open to the general public on Saturday 8 January 2000. On this day, the roadway carried traffic from the Mount Barker Road down to part of the newly constructed roadway for the South Eastern Freeway. Prior to Saturday 8 January 2000, the roadway had been closed to the general public and another road, which branched off to the left of this road about 50 metres west of the collision scene, was used by east bound vehicles. This other roadway carried vehicles towards the township of Crafers and once the new road on which this collision occurred was open, this other road was only an access road to Crafers. Therefore, on the occasion of the accident this was the first time that the accused had travelled on this road in this direction. However, prior to this incident the accused travelled this area in the opposite direction to that taken on the night, albeit a different road configuration.
4. Whilst travelling in an easterly direction along the Mount Barker Road or South Eastern Freeway scene, Scott Aitken swerved to avoid an animal or he believed that it was necessary to avoid an animal. At the time of the swerve he was smoking. He had a lit cigarette in his hand. As a consequence of the evasive action he dropped his cigarette into his lap and he looked down, taking his eyes from the roadway.
5. Having made a significant turn the car left the bitumen roadway and passed through the gap that existed on the southern side of the Freeway and then went over the cliff face onto the Freeway below. From the point of the first tyre mark on the bitumen surface the car travelled about 27.9 metres to the edge of the cliff. Of that distance, the vehicle travelled approximately 15.7 metres over the dirt surface to the edge of the cliff.
6. The accident resulted in the deaths of Callum Macdonald Aitken, 10 years, born 9 June 1989, and Lauren Kady Aitken, 12 years, born 28 May 1987.
7. Haley Aitken and Hayden Aitken were both injured and were taken to the Women's and Children's Hospital after the collision. Haley Aitken sustained a left forearm fracture and bruising and abrasions including lap sash seatbelt marks. She was discharged on the 10 January 2000. Hayden Aitken sustained a laceration of his liver, and upper abdominal wall haematoma and a spinal cord injury in the form of a C4-5 fracture of his spine. He was discharged on the 31 January 2000.
8. The manner of driving of the accused was culpably negligent by reason of the fact that he had commenced a significant turn to the right (a turn at the wheel of in the order of approximately 130 – 180 degrees) and he looked down for his cigarette instead of maintaining observation on the road ahead in circumstances where he should have appreciated the possibility that beyond the road verge there was a significant drop.
9. Speed, alcohol or drugs played no part in the cause of this accident.
10. There is no suggestion of any earlier careless or negligent driving.

11. The accident was not intentional nor was there any intention to harm his children.
12. The car was in good mechanical condition.
13. The speed of the Mitsubishi Pajero when it went over the embankment was somewhere between 39 to 41 kph.
14. The approximate speed of the Mitsubishi Pajero at the time of its right hand turn onto the dirt surface was between 39 and 53 kph.”

(Exhibit C69)

3.5. On 29 July 2002, His Honour sentenced Mr Aitken. He said:

‘Scott Colin Aitken, you have been found guilty, after entering pleas of guilty, of two counts of causing death by dangerous driving, contrary to s.19A(1) of the Criminal Law Consolidation Act (1935), and two counts of causing bodily harm by dangerous driving, contrary to s.19A(3).

Counsel for the Director of Public Prosecutions, and your counsel, have put before me a Statement of Agreed facts as to the circumstances surrounding the accident which has led to these charges. I am not bound by these facts if I am satisfied beyond reasonable doubt of other facts.

I have read the statements which have been filed, and I do not think I can be satisfied beyond reasonable doubt of other facts. I proceed on the basis of the Statement of Agreed Facts.

The accident occurred during the early hours of the morning of 9 January 2000. You were driving a Mitsubishi Pajero four-wheel drive along Mount Barker Road, Crafers. You were travelling in an easterly direction towards Crafers. You had your four children in the vehicle; Haley, Lauren, Callum and Hayden.

Extensive road works had been carried out in this area and this was the first time you had travelled on the road in the direction in which you were travelling. You had travelled in this area in the opposite direction to that taken on the night, although there was a different road configuration.

When travelling in an easterly direction you swerved to avoid an animal, or you believed it was necessary to avoid an animal. You were smoking at the time, and as a result of taking evasive action you dropped the cigarette in your lap. You looked down, taking your eyes off the roadway. Having made a significant turn, the vehicle left the bitumen roadway and passed through the gap that existed in the southern side of the freeway, and then went over the cliff face on to the freeway below.

Lauren and Callum died as a result of the accident. Haley sustained a fractured left forearm and bruising and abrasions. Hayden sustained a laceration of his liver, upper abdomen wall haematoma and spinal cord injury in the form of a C4/5 fracture of his spine. Your manner of driving was culpably negligent by reason of the fact you had commenced a significant turn to the rig (a turn of the wheel of in the order of approximately 130 to 180 degrees) and you looked down for your cigarette instead of maintaining observation of the road ahead in circumstances where you should have appreciated the possibility that beyond the road verge was a significant drop.

Against the background of previous murder charges which were withdrawn, it is important to emphasise that the accident was not intentional, and that you did not intend to harm your children. There is no suggestion of earlier careless or negligent driving.

Alcohol or drugs did not play any part in the accident. The motor vehicle was in good mechanical condition. Your speed was not excessive.

The speed of the motor vehicle when it wet over the embankment was somewhere between 29 and 41 km/h, and the approximate speed of the motor vehicle at the time of its right-hand turn on to the dirt surface was between 39 and 53 km/h.

You were born on 10 March 1959. You worked for the Bank of New South Wales, now Westpac Banking Corporation, for about 17 years. You achieved a managerial position with the bank. You commenced a law course in 1988, and you were admitted to practice in March 1996. You were a solicitor in Minter Ellison from March 1996 to December 1997. You then became a senior associate at the firm until July 2000 when you were made a non-equity fixed interest partner. After a coronial inquest in February 2001 you retired from your position at Minter Ellison by mutual agreement.

Your counsel submitted that your right to practise would not be affected by your conviction of these offences. I am prepared to proceed on that basis, although that matter is ultimately a matter for the relevant authorities.

I heard evidence from your former secretary, and from a partner of the firm Minter Ellison. I also received a letter from another partner at Minter Ellison. It appears that you had a good work ethic, and you were held in high regard at the firm for your professional qualities. You had a good relationship with all your children before the accident, and with your two surviving children until a coronial inquest in February 2001.

You have been significantly affected by the accident, the charges laid against you and the inability to maintain contact with your surviving children.

I also heard evidence from your brother. He said that from his observations you had a very good relationship with your children before the accident and that you were shattered by the accident. He described how upset you have been since the coronial inquest in not having contact with your surviving children.

I have also had regard to a report of Mr White, who is a social worker, dated 8 July 2002. He described the shattering effects of the accident on you, and that you reported that during the year 2000 you were still having contact with your surviving children.

You have three previous convictions for traffic offences; two for speeding and one for driving whilst you exceeded the prescribed concentration of alcohol. As the last of these convictions was 18 years before the accident I do not think they should influence the sentence which I am about to impose.

You are estranged from your two surviving children who do not want to see you. You have said that you wish to establish contact with them. If working, you will be able to provide some financial support for them. You have suffered the glare of publicity, and the shame and anguish of facing two murder charges and two attempted murder charges.

I have had regard to the victim impact statements which were read in court. The effect on a mother of the loss of two young children is truly tragic and has caused great pain. I accept what your two surviving children say about the effects of the accident on their lives, and the effects on them of the loss of Lauren and Callum. They blame you for the accident and at the present time they do not want to have any contact with you. Your ex-wife and your two children feel that you have not said sorry for what occurred, nor have you taken responsibility for the accident. I accept that that is how they feel. Nevertheless, I accept from the evidence put before me that you did in fact and do feel contrition. By your plea of guilty you accept responsibility for the accident.

I have taken into account all of the above matters, and the submissions of your counsel. In particular, I have taken into account the fact that you have to live the rest of your life knowing that your actions led to the deaths of two of your children, and to injury and trauma to the other two. You have been and are estranged from your two surviving children, and it is not possible for me to say if that will change.

In considering the sentence to impose, it is important that I take into account the extent of your culpable driving. Without seeking to minimise the tragic and catastrophic consequences and effects of the accident, your culpable driving is such as to fall within the lower end of the scale for offences of this nature. You have pleaded guilty to these charges at the time you were first arraigned in relation to them, and I will give you credit for the fact that you have pleaded guilty at the first available opportunity.

I propose to impose one sentence in relation to the four offences (see s.18A of the Criminal Law Sentencing Act). A sentence of imprisonment is called for. I start with a figure of two years and six months. I reduce that to two years by reason of your plea of guilty. I impose a sentence of imprisonment of two years. I impose a non parole period of one year.

I have been asked by your counsel to suspend any sentence of imprisonment. I record at this point that the Director of Public Prosecutions accepts that a suspended sentence is within my discretion in the circumstances of this case, although he made it clear that he was not making a positive submission supporting suspension.

The issue of whether the sentence should be suspended is a difficult one. Two young persons were killed, two were injured.

The community is rightly very concerned to see that those who drive dangerously and kill and injure others are adequately punished. However, unlike many other cases that come before the criminal courts, no alcohol was involved and your speed was not excessive. You did not engage in a practice of dangerous driving.

All offences of causing death or bodily injury by dangerous driving are serious, but your offending is at the lower end of the scale of seriousness.

I will suspend the sentence upon you entering into a bond of \$500 to be of good behaviour for a period of two years, including a condition that you perform 120 hours of community service within twelve months from the date of this bond, and obey the lawful directions of the community service officer to whom you are assigned.'

(Exhibit C69a)

- 3.6. On 21 March 2003 I was directed by the Attorney-General pursuant to Section 26(30) of the Coroner's Act 1975 to resume the inquest. The hearing resumed, after several preliminary hearings, on 15 September 2003.
- 3.7. I heard further evidence from Senior Sergeant England. He had undertaken some further testing involving an attempted re-creation of the incident using an almost identical Mitsubishi Pajero. Senior Sergeant England told me that, on the basis of these tests, he formed the conclusion that the 'critical curve speed' of the vehicle at the time of the turn on the bitumen was 51 kilometres per hour. He also calculated that, taking reaction times of 1.25 to 2.5 seconds, he gave the opinion that before the

swerve Mr Aitken would have travelled at least 37 metres between the time he detected a hazard and the time the swerve commenced (T22).

- 3.8. Senior Sergeant England had also contacted Mr Jeffrey W Muttart, an American expert whom he described as ‘the person’ in the world from whom to seek opinions involving vehicle collision reconstruction, particularly in relation to reaction times (T23). The inquest was therefore adjourned further so that a formal opinion could be sought from Mr Muttart.
- 3.9. Counsel Assisting me, Ms Kate Hodder, arranged for all the evidence before me to be conveyed to Mr Muttart in the United States of America, so that he could prepare an opinion.
- 3.10. On 22 September 2003, Ms Hodder received an e-mail from Mr Muttart. I have underlined several key passages in the message which is now reproduced as follows:

‘After reviewing the available materials, which included the photographs of the scene and tire marks, four-volume set of testimony and affidavits and a scale map provided to me by Senior Constable England, I have come to the following conclusions.

(First you must understand that I have intentionally ignored all evidence that does not relate to the driver-induced movement of the vehicle itself. Therefore, evidence related to gasoline containers and reasons for steering as reported by post impact ear witnesses have specifically been omitted from my analysis)

- According the Mitsubishi’s web site, The Pajero is equipped with a load sensing brake proportioning/bypass valve as standard equipment. This would allow sharp braking and steering to occur simultaneously.
- The Sports Utility Vehicle driven by Mr. Scott Aitken left a curved tire mark that is commonly caused when a vehicle is steered sharply in one direction or the other. When a vehicle turns left or right, that is referred to as a yaw rotation or a yam movement, not to be confused with a critical speed yaw mark that is left by a vehicle whose back wheels track outside the front wheels (The rear tires break away from traction with the road).
- A person who is familiar with the history of sports utility vehicle or has turned sharply while driving a sports utility vehicle is likely to know that sharp turning manoeuvres would more likely lead to a vehicle rolling over, than when operating a passenger vehicle that has a lower centre of gravity.
- A sport utility is a vehicle with the frame of a pickup, an enclosed body and is typically 4-wheel drive, or is designed to look like a 4-wheel drive vehicle.
- There would have to be evidence that Mr. Aitken knew how to leave curved tire marks without causing his vehicle to roll over.
- I have practiced leaving yaw marks with a Ford Explorer Sports Utility Vehicle (very similar dimensions to the Pajero driven by Mr. Aitken) and have found that I was successful in leaving a yaw mark in less than 1/2 of my attempts.

- The primary cause for the low percentage was my fear of rolling the vehicle.
- This is because I wanted to steer sharply enough to cause a tire mark but not too sharply that would cause the vehicle to roll over.
- Additionally, when intentionally attempting to leave a yaw mark and at the same time guide the vehicle into a planned location (I placed cones in a parking lot), I found that both leaving a curved tire mark and having the tire mark continue off the paved portion of the road (In my case through the cones) was a very complex task that I did not feel comfortable repeating (although I did several times), and I was not very successful.
- I found the statement by Haley Aitken that her father's arms were locked to be confusing, if her father was steering off the road and leaving yaw marks, his arms had to be crossed (based upon my re-enactment).
- After a momentary loss of control during a yaw mark, if Mr. Aitken could have regained control of the vehicle within 1 second after leaving the road, and if it would have taken him approximately 1 second (plus or minus ½ second) to respond to the known audible and tactile stimulus of being off the road, at a speed of 40 km/h (11.1 m/s), Mr. Aitken's vehicle would have been off the cliff before an average driver could have implemented a manoeuvre.
- I apologize for leading Senior Constable England to believe that Mr. Aitken's response was inappropriate when I was first contacted, but I was unaware of the yaw mark or the fact that Mr. Aitken's manoeuvre began in the left lane or that the supposed hazard emerged from Mr. Aitken's left at that time I communicated with him.
- If it can be established that the yaw mark was placed at a different time or that Mr. Aitken practiced leaving such marks at a prior time, then I would have to alter my conclusions.
- In this case, a yaw mark suggests to me that there was not intent to steer to a particular location, but to move away from a hazard to the left.
- My research shows that drivers are very likely to steer to the right when a hazard emerges from the left and that drivers in the left lane are more likely going to steer right when faced with a hazard directly ahead. Therefore, Mr. Aitken responded, as would a typical driver faced with a similar stimulus.
- Further, when I refer to right and left, I have found that country and customary side of the road on which traffic drives had no bearing upon the manner in which drivers respond. Drivers will typically drive away from the road edge if they are in the lane next to the road edge and they will typically steer away from a hazard.
- Regarding the "confusion" caused by the area. I do not have enough information without visiting the scene and reviewing accident rates for that section of the highway, although, the scene does appear to have a degree of visual noise.
- If the curved tire mark was not caused by the Aitken Pajero, or if a Pajero were capable of being braked and steered without a great deal of lateral (rolling) forces great enough to leave a tire mark) and if Mr. Aitken were to state that he started from the right lane, not the left lane, then my opinions in this regard are subject to change.
- Based upon the information I have reviewed to date, I am of the opinion that there is no evidence that Mr. Aitken intentionally drove off the road.

I would particularly like to thank Senior Constable England who has assisted me in this investigation and congratulate him on a very detailed investigation that has allowed me to understand the facts in this case and also his steadfast desire to seek the truth.’

(Exhibit C70)

- 3.11. Having regard to Mr Muttart’s conclusion, in my opinion there are no grounds for making findings inconsistent with the agreed facts put before Besanko J. Accordingly, I adopt, with respect, His Honour’s findings of fact for the purposes of this inquest, and see no value in elaborating further.

4. Recommendations

- 4.1. There were criticisms of the roadworks signage and protective measures in the evidence. However, I have found that they were not relevant to the causation of the deaths of these two children. Accordingly, I make no recommendations pursuant to Section 25(2) of the Coroner’s Act, 1975.

Key Words: Motor Vehicle Accident; Murder Allegations

In witness whereof the said Coroner has hereunto set and subscribed his hand and

Seal the 6th day of November, 2003.

Coroner