

IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: 2012 / 1277

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1)

Section 67 of the Coroners Act 2008

Inquest into the Death of: GARY BRIAN HENMAN

Delivered On:	17 December 2014
Delivered At:	Coroners Court of Victoria 65 Kavanagh Street Southbank Melbourne 3006
Hearing Dates:	10 th June to 12 th June 2014
Findings of:	JACINTA HEFFEY, CORONER
Representation:	Mr Sebastian Reid of Counsel to assist the Coroner Mr T Kassamatis of Counsel on behalf of the family

I, JACINTA HEFFEY, Coroner having investigated the death of GARY BRIAN HENMAN

AND having held an inquest in relation to this death on 10th June to 12th June 2014

At MELBOURNE CORONERS COURT

find that the identity of the deceased was GARY BRIAN HENMAN

born on 22nd January 1988

and the death occurred on the 8th April 2012

on the Portarlinton Road, Moolap in the State of Victoria

from:

1 (a) MULTIPLE INJURIES SUSTAINED IN A MOTOR VEHICLE ACCIDENT

in the following circumstances:

1. Mr Henman was the driver and sole occupant of a motor vehicle, a Nissan Skyline, on the evening of the 8th April 2012. He had dropped off his girlfriend, Jessica, at the National Hotel in Geelong where she was meeting some friends and was on his way home travelling east along the Portarlinton Road. The plan was to return to pick up Jessica later that evening. From all accounts, it was a dark and rainy night and the road surface was wet. From telephone records obtained, it has been established that at 22.35.53, Jessica sent an SMS to his mobile phone. According to the same records, the SMS was "read". The time at which it was read cannot be established.
2. Mr Henman passed the BP Service Station on his left. Within 4 seconds, he left the road and collided with a telephone pole located 2 metres from the solid white line on the near side of the road and approximately 100 metres from the BP Service Station. He was killed instantly. No autopsy was performed. Toxicological analysis was negative for the presence of drugs or alcohol.
3. The BP Service Station was equipped with a surveillance camera trained on the front area adjacent to Portarlinton Road. The Investigating Member, Senior Constable Sam Thorley obtained footage from this camera. It was common ground, prior to the commencement of the Inquest hearing, that this footage captured the instant in which the deceased passed the Service Station. He was in the nearside or left lane. In the frame at that time, a taxi is visible in the right lane. Portarlinton Road is a divided highway at that point with two lanes running east and west. In the frame, there is a gap between the two vehicles. Retired Associate Professor Gale Spring, an expert in analysis of images to determine speed, prepared a Report in which he stated that without knowledge of the "shutter-speed" of the camera (unavailable due to the

age of the camera), it was not possible to estimate the speeds of the vehicles. It was, however, possible to say that the two vehicles were travelling at similar relative speeds.¹ He said this could be determined with a high degree of accuracy with a variation of "*say five or so kilometres an hour difference*".² He told the court that one could not determine if they were accelerating or decelerating.³

4. According to the time stamp on the CCTV footage, the two cars passed the Service Station at 22.30.31 hours. Approximately four seconds later there is a noticeable shaking of the screen image. It was accepted by all that this represented the actual collision with the pole
5. According to the time stamp on the CCTV footage, an ambulance passes the front of the BP Service Station at 22.47.21.
6. However, the Electronic Patient Care Report maintained by Ambulance Victoria has the responding ambulance recording its arrival at the scene at 22.59. Given the importance of recording ambulance response times in this State, I am confident that the Electronic Patient Care Report is close to accurate. According to the same Report, the ambulance was despatched at 22.50 after a call was received at 22.45. The collision was first reported to 000 by the driver of the taxi seen in the footage, Jamie Will. According to his telephone records, this call was made at 22.39. The 000 transcript records the call being received at 22.41 hours and 20 seconds. The audio tape of that call shows that due to difficulties identifying the precise location of the collision, it took slightly more than 5 minutes for the address to be confirmed. This ties in reasonably closely with the Triple O responder contacting the ambulance service immediately after the address was established with Mr Will at 22.45.
7. On the basis of the above, it would seem that the time stamp on the surveillance camera at the BP Service Station was "out" by some 9-12 minutes. According to this, the two cars passed the Service Station at somewhere between 22.39 and 22.41 hours. The time stamp on Mr Will's phone does not accord completely with the Triple 000 time stamp. For this reason, it is not possible to be completely accurate about when the accident happened save to say that it was not, as originally suggested, at around 22.30, as shown on the BP Service Station camera time stamp, but several minutes later.

¹ Exhibit D

² Transcript page 166.

³ Transcript page 160 Lines 3-9.

8. This also accords with the evidence of the deceased having “read” the SMS sent to him by Jessica at 22:35. If the time-stamp on the surveillance camera was correct, this was not possible.
9. Daryl Henman, the brother of the deceased, gave evidence about viewing footage (no longer in existence) taken by a camera at the Geelong Animal Welfare Service (GAWS) located on the same side as the BP Service Station. This footage, he told the court, showed what he believed to be the taxi and his brother’s car slowing at the intersection of Moolap Station Road and Portarlington Road at around 10.30 PM on the 8th April. He measured this as 400 metres from the collision point.
10. In view of the overwhelming evidence that the accident occurred some ten minutes later, it is difficult to attach any weight to this testimony, although it is possible that by co-incidence the GAWS CCTV camera was similarly inaccurate.
11. It was submitted by Mr Kassimatis on behalf of the family, that I should find that Jamie Will, the taxi-driver, was responsible for Mr Henman leaving the road and colliding with the telephone pole; that he “*by his driving, caused the deceased to take evasive action which in turn caused him to lose control of his vehicle*”. It was submitted that “*that conclusion is born (sic) of necessary inference and close scrutiny of Will’s evidence, his doubtful credibility and unreliability*”.⁴
12. It was further submitted that I should prefer the evidence of Nicholas Larionow, who was the passenger in the taxi. On page 8 of his Submission, Mr Kassimatis summarises “*that part*” of the evidence of Mr Larionow that he considers the “*most cogent and about which he remained consistent throughout his evidence*”. He instances evidence by Mr Larionow that “at the point the taxi and Skyline passed by the camera at the BP service station the taxi occupied the right lane and the Skyline the left lane. The Skyline was travelling at a distance behind the taxi”. No transcript reference is given. Mr Larionow’s evidence was very vague on detail but the thrust of it was that the taxi had been in the left lane until forced over into the right lane by the Skyline and this had occurred before the BP Service Station.⁵ He referred several times to the white car “*coming up beside*” the taxi and that it was travelling on the gravel shoulder and the grass just before the collision. He said he could have reached out and touched it. As I understand the family’s submission, the Skyline was in the left lane, not gaining on the taxi

⁴ Submissions on behalf of the Senior Next of Kin P9.

⁵ Transcript page 136 Lines 7-9; Lines 25-26.

and was forced off the road when the taxi was said to have changed back to the left lane in front of it.

13. Mr Larionow was very clear that the taxi driver had done nothing in his driving to cause the white car to be travelling in his own lane along the gravel and grass.⁶ Indeed, he said that the taxi had moved to the right lane to avoid being hit by the Skyline. Mr Larionow struggled giving evidence. He was clearly very distressed. He suffers from cerebral palsy and “from being nervous and things like that”.⁷ His evidence was contradictory and not borne out by objective evidence in that he had the taxi changing lanes from left to right immediately before the collision in order to avoid the collision and yet the taxi is clearly in the right hand lane according to the BP Service Station footage and the white car is a short distance behind it. In the photos of the scene there is no evidence of tyre marks travelling in a straight line beside the roadway in the gravel or on the grass which, according to Mr Larionow had happened a “long way back”.
14. Due to its inherent unreliability, Mr Larionow’s evidence is, in my view, of little weight. I do not consider that it supports in full Mr Will’s account. It does not support the family’s submission.
15. To characterise the evidence of Mr Will as being of “*doubtful credibility and reliability*” is simply not borne out by any analysis of his evidence. The suggestion that he caused the accident by forcing the deceased to take evasive action and to thereby lose control of his vehicle is speculative at best. In my view, he behaved like a good citizen in every way.
16. From his recollection, and relying largely on the statement he made to police on the 10th May, 2012, Mr Will told the court that, some distance before, he had been following the Skyline in the left lane. He had moved into the right lane to overtake him as the Skyline was going more slowly than the speed limit. He had continued in that lane at 80 kph when he saw that the Skyline was gaining on him. (The analysis of the camera footage by Associate Professor Gale Spring does not rule this out as Mr Spring told the court that there could have been “*five or so kilometres an hour difference*” in terms of relative speeds captured in the frame). He saw the edge of the Skyline in his blind spot and then heard what he described as a “*whooshing noise*” – a high-pitched whining noise. At this, he moved as far as he could towards the outer edge of the right hand lane. He saw the Skyline fishtail left and right and then career sideways and

⁶ Transcript page 130 Lines 9-12.

⁷ Transcript page 120.

then leave the road. He then called Triple 000 to report the accident, drove Mr Larionow home and then returned to the scene.⁸

17. It was a dark night. After he saw the Skyline veer off the road, he heard a loud bang but did not see the collision with the pole. When asked by the Triple 000 responder as to whether anyone had been injured, he replied that he did not know. When the responder said "But it sounds pretty bad", he replied "Yep. You probably might wanna get an ambulance".
18. In my view, it was reasonable for Mr Will to have prioritised the needs of his disabled passenger (who, according to his own evidence, was clearly distressed by what had happened), by taking him home first and then returning to the scene, having already done all he could to get emergency aid to the other driver. Mr Will concluded his time in the witness box by expressing his sympathy for Gary's family but also telling the court that he was, some time after the accident, and having just dropped off a passenger, personally confronted by Mr Henman senior in a way that he found intimidating and threatening. The accusation was made to him: "*You killed my son*". This evidence was not challenged by Counsel for the family other than to ask him "*Can you tell us why you waited till the very end before you made your little speech?*" Mr Kassamatis told the court he would take this up with another witness, but he never did.
19. Sudden and unexpected occurrences like motor vehicle collisions notoriously lead to imprecise evidence from witnesses. Magistrates' Courts adjudicating on property damage claims arising out of such collisions are frequently faced with testimony from several independent witnesses, all of whom are doing the best they can to recall the details, but whose evidence is inherently contradictory inter se. This is because of the unexpected course of events that has occurred. Any vagueness about details such as whether they got the lights at the earlier intersections and at what point Mr Will moved into the right lane due to Gary driving more slowly at an earlier point is nothing more than is likely when trying to recall the run up to a totally unexpected and sudden incident.
20. I am satisfied that there is no basis on which to suggest that Mr Will was responsible for this death.

⁸ The submission in Reply by Counsel for the family that the Court ought to conclude that Gary's car gained upon the taxi before the final intersection as a result not only of his moderate acceleration but because of the latter's deceleration is not in any way supported by evidence. That Mr Will decelerated at any time was never put to him in cross-examination. This has the appearance of "conjecture in disguise" – the very process that Mr Kassimatis warned against in his submission.

21. The forensic evidence called was useful to clarify, as much as possible, the issue of the likely speed of the Skyline when it left the road. A mechanical inspection of the car ruled out any malfunction that might otherwise have contributed to the loss of control of the vehicle. An assumption had been made by Detective Senior Constable Robert Hay of the Major Collision Investigation Unit that the car had been in third gear based on his understanding that the tachometer reading was stuck on 5000 rpm. He commenced his evidence by acknowledging that, based on the expert opinion of Robert Le Guier, the car had actually been in fourth gear and the tachometer instrument had been deformed in the collision. This, however, did not alter his belief that the car would have been travelling at a minimum speed of 94 kph.
22. David Axup, the family's expert on calculations of speed, estimated that the Skyline would have been travelling at between 75 and 95 kph at the *point of impact* with the pole.⁹ There would have been a degree of deceleration caused by application of brakes and friction values as the car's wheels mounted the gravel and then the grass verge. Accordingly, the speed at which the brakes were applied was greater than 75 kph and greater than any other speed up to and including 95 kph. The speed limit along that stretch of the Portarlington Road is 80 kph.
23. Detective Senior Constable Hay did not agree with the contention by Mr Axup that the methodology that he had applied in his analysis was deficient (in that the numerous various values were not calculated based on skid marks other than the yaw marks and the crush analysis and assuming a friction value for the grass based on reference work of Fricke). I accept that Detective Senior Constable Hay has the requisite expertise regarding these matters. He was also not interested in the maximum speed but the minimum speed and he concluded that the Skyline was travelling at a minimum speed 94 kph with an impact speed of 85 kph.
24. Mr Axup told the court that that particular model of the Skyline is a powerful motor vehicle and that it being turbo-charged made it quite capable of very high speeds and rapid acceleration. He believed that the modifications that had been made to the car would have made it a higher performance car than it was initially, capable of even higher speeds and more rapid acceleration.¹⁰ There was no evidence as to the speed to which the Skyline could have accelerated in 4-5 seconds from the point at which, according to Associate Professor Spring, it could not have been exceeding the speed of the taxi by more than 5 kph. Mr Will believed that his taxi was travelling at 80 kph along Portarlington Road. He gave no evidence about

⁹ Transcript page 63. Lines 18-25.

¹⁰ Transcript page 62.

the basis for this belief other than his familiarity with the road and his usual practice. There was no evidence that he physically checked his speedometer at the time.

25. These gaps in the evidence (no capacity to estimate speed based on the surveillance camera footage, no evidence as to acceleration capacity of the Skyline over 4-5 seconds, no objective evidence of the speed of the taxi) do not permit a determination of the conflict between the evidence of Mr Axup and Mr Hay as to the likely speed of the Skyline at the moment the brakes were applied. The range would appear to be “*in excess of 75 kph up to in excess of 95 kph*” according to Mr Axup and “*in excess of 94 kph*” according to Mr Hay.
26. There is no evidence of any impact between the two vehicles (such as paint transference) and none was alleged.¹¹
27. Finally, it simply cannot be established to the appropriate standard of proof applicable in coronial inquests what caused Gary Henman to lose control of his motor vehicle. I could list several hypotheses but they would remain just that, hypotheses.¹² As was stated in the Supreme Court of Victoria Court of Appeal in the case of *NOM v DPP* (2012 VSCA 198):

“Mere mechanical comparison of probabilities independent of a reasonable satisfaction will not justify a finding of fact”.

28. In the present case, it is not a case of comparing even *probabilities* but rather, *possibilities*. The evidence does not permit of more than speculation.

I direct that a copy of this Finding be provided to:

The family of Gary Henman
Tim Freeman, Tony Hargreaves & Partners Lawyers,
Senior Constable Thorley
Mr Jay Will

¹¹ It is unfortunate that the family, contrary to the instructions given to them by the Investigating Member, removed the car from the place to which it had been taken by police, thereby compromising continuity. That continuity was compromised was accepted by Mr Axup. The car was taken by the family against instructions back to the place where the modifications had previously been made to the car. However, there is no evidence to suggest that the car was altered post-accident.

¹² The family’s expert Mr Axup agreed with Counsel assisting that there were two possibilities that led to the fishtailing - “a tap on the acceleration or a tap on the brakes”. Transcript page 65.

Signature:

Jacinta Heffey

**JACINTA HEFFEY
CORONER**

Date: *17th December 2014*

