IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

COR 2018 003944

FINDING INTO DEATH WITHOUT INQUEST

Form 38 Rule 63(2)

*Section 67 of the **Coroners Act 2008***

Findings of:	AUDREY JAMIESON, Coroner
Deceased:	Eden Herbert-Allan
Date of birth:	18 April 1985
Date of death:	10 August 2018
Cause of death:	1(a) Head injuries sustained in motor vehicle (tree fell on vehicle)
Place of death:	Warburton Highway, Lilydale, Victoria, 3140

INTRODUCTION

1. Eden Herbert-Allan, born on 18 April 1985, was 33 years old at the time of his death. He lived with his family in Wandin North.

2. Mr Herbert-Allan was a much-loved husband to Michelle Maree and father to his four children Jaxon, Ruby, Georgia and Frankie Herbert-Allan.

3. On 10 August 2018, Mr Herbert-Allan sustained fatal head injuries and was declared deceased at the scene after a tree collapsed on his moving vehicle ('the incident').

THE CORONIAL INVESTIGATION

4. Mr Herbert-Allan's death was reported to the Coroner as it fell within the definition of a reportable death in the *Coroners Act 2008* (the Act). Reportable deaths include deaths that are unexpected, unnatural or violent or result from accident or injury.

5. The role of a coroner is to independently investigate reportable deaths to establish, if possible, identity, medical cause of death, and surrounding circumstances. Surrounding circumstances are limited to events which are sufficiently proximate and causally related to the death. The purpose of a coronial investigation is to establish the facts, not to cast blame or determine criminal or civil liability.

6. Under the Act, coroners also have the important functions of helping to prevent deaths and promoting public health and safety and the administration of justice through the making of comments or recommendations in appropriate cases about any matter connected to the death under investigation.

7. Victoria Police assigned Leading Senior Constable Paul Doevelaar (**LSC Doevelaar**) to be the Coroner's Investigator for the investigation of Mr Herbert-Allan's death. LCS Doeevelaar conducted inquiries on my behalf, including taking statements from witnesses and compiled a coronial brief of evidence. The brief contains, *inter alia*, statements made by family, forensic pathologist, investigating officers.

8. In addition to the above materials, LSC Dovelaar made enquiries to VicRoads[1] regarding the incident. VicRoads commissioned Greenwood Consulting to conduct a risk assessment on the

[1] On 1 July 2019, VicRoads and Public Transport of Victoria (**PVT**) came together with the Department of Transport (**DoT**) to create an integrated department. VicRoads and the DoT will be used interchangeably throughout this Finding due to the investigations happening between 2018 and 2020.

trees within the area of 57 Warburton Highway. The subsequent risk assessment report also formed part of the coronial brief.

9. This finding draws on the totality of the coronial investigation into the death of Eden Herbert-Allan including evidence contained in the coronial brief. Whilst I have reviewed all the material, I will only refer to that which is directly relevant to my findings or necessary for narrative clarity. In the coronial jurisdiction, facts must be established on the balance of probabilities.[2]

MATTERS IN RELATION TO WHICH A FINDING MUST, IF POSSIBLE, BE MADE

Circumstances in which the death occurred

10. On 10 August 2018 Mr Herbert-Allan left his house at about 10.30am intending to purchase items from Supercheap Auto in Lilydale and then to Kilsyth to pick up a part.

11. Earlier that day Mr Herbert-Allan reminded his wife to drive carefully as the weather was windy and he seemed '*his normal self*'.[3] Mrs Herbert-Allan left in her vehicle to Marysville before Mr Herbert-Allan.

12. At about 10.58am, as Mr Herbert-Allan was travelling west on Warburton Highway, Glen Styles was out on his property located nearby. Mr Styles stated he heard a loud cracking noise. He looked towards the north-easterly direction and sighted a large tree fallen down from the northern side of the highway across the road, completely blocking the entire road.[4]

13. At about the same time, Adam Spencer was travelling west on Warburton Highway from Seville towards Lilydale. Mr Spencer also heard a loud crashing noise and he looked in his rear-view mirror. He sighted Mr Herbert-Allan's vehicle was *'brushed'* by a tree that had fallen. The vehicle continued to roll, veered off the road to the left then right and *'rolled'* into a tree on the northern side.

14. Mr Styles, Mr Spencer and another road user, Brent Florio attended the scene of incident with Mr Spencer contacted emergency services. Mr Styles recounted Mr Herbert-Allan appeared

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[2] Subject to the principles enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The effect of this and similar authorities is that coroners should not make adverse findings against, or comments about, individuals unless the evidence provides a comfortable level of satisfaction as to those matters taking into account the consequences of such findings or comments.

[3] Coronial Brief of Evidence (**CB**), Statement of Michelle Herbert-Allan.

[4] CB, Statement of Glen Styles.

unconscious and had his neck tilted over on a right angle with the roof resting on top of his head. Mr Florio checked on Mr Herbert-Allan's pulse and was unable to a pulse.

15. Victoria Police and Ambulance Victoria arrived shortly after. Paramedics were unable to revive Mr Herbert-Allan. Mr Herbert-Allan was declared deceased at the scene at 12.31pm.

> **verification of death**: no response to centralised stimulus, no motor response or facial grimace to painful stimulus, no palpable carotid pulse, no breath sounds heard for two minutes, no heart sounds heard for two minutes.

Police investigation

16. Upon attending the scene of incident along Warburton Highway after Mr Herbert-Allan's death, police officers noted Mr Herbert-Allan was still inside the vehicle and he had been wearing his seatbelt. The roof of the vehicle was observed to have been crushed down to door height by the impact of the fallen tree.

17. They searched around the scene and confirmed Mr Herbert-Allan was the sole occupant. There was no evidence to suggest the involvement of another vehicle or person in the incident.

18. While inspecting the fallen tree, LSC Doevelaar observed the tree had been snapped off at the base and uprooted. The tree was approximately twenty-five metres in height and situated six metres from the road. The location of the fallen tree was outside of 36 Warburton Highway.

19. After the initial impact, Mr Herbert-Allan's vehicle continued moving in the west bound lane for 40 metres off the south bound shoulder and travelled 40 metres on the southern side before hitting a culvert. Mr Herbert-Allan's vehicle then steered across Warburton Highway and eventually stopped against a tree opposite the driveway of 30 Warburton Highway.

20. During the investigation, police also learned that Mr Herbert-Allan only had one traffic infringement notice regarding exceeding speed limit by 25 kilometres per hour while Mr Herbert-Allan was a provision driver in March 2005.

21. Mr Herbert-Allan held a full and current drivers' licence. He drove a 1997 Holden Station Wagon that he acquired from a friend about three months prior to the incident.

22. Mrs Herbert-Allan's statement details that Mr Herbert-Allan was a very careful driver and was familiar with his vehicle. She stated that *'he always wore his seat belt and obeyed the*

road rules'. She also stated that Mr Herber-Allan drove along Warburton Highway daily and that *'he was very familiar with the road and the speed zones'*.[5]

23. Warburton Highway is a major and single carriageway road runs in an east-west direction. There is provision for one lane for west bound and two lanes for east bound traffic, separated by painted solid single line. The total diameter of three lanes is 10.8 metres with each lane measured at 3.6 metres. Both sides of the road are heavily lined with trees. The speed limit is set at 80 kilometres an hour.

24. At the time of the collision, the road was noted to be dry and the traffic was light. Police also noted that visibility was good.

25. Enquiries made with the Bureau of Meteorology at Coldstream, the closest weather station to the location of collision, recorded winds of 31 kilometres per hour at 10.00am and 30 kilometres per hour at 11.00am

Identity of the deceased

26. On 14 August 2018, having considered the Victoria Police Report of Death (Form 83), Victorian Institute of Forensic Medicine (**VIFM**) Identification Report and Forensic Odontologist identification report, initial family contact and admission photography of the deceased, Coroner Jacqui Hawkins made a determination pursuant to section 24 of the Act and identified the deceased as Mr Herbert-Allan born 18 April 1985. Identity is not in dispute and requires no further investigation.

Medical cause of death

27. Senior Forensic Pathologist Dr Matthew Lynch from the VFIM, conducted an external examination on 13 August 2018, reviewed the post-mortem computed tomography (**CT**) scan and referred to the Form 83 and VFIM contact log. Dr Lynch provided a written report of his findings dated 14 August 2018.

[5] CB, Statement of Michelle Herbert-Allan.

28. Dr Lynch commented that the external examination of Mr Herbert-Allan's body was consistent with the history. The post-mortem CT scan revealed a comminuted skull fractures with pneumocranium[6] and fractures of the mandible[7] and maxilla[8].

29. Toxicological analysis of post-mortem blood samples identified the presence of methylamphetamine (~1.1mg/L) and amphetamine[9] (~0.2mg/L). No ethanol (alcohol) was detected.

30. Dr Lynch provided an opinion that the medical cause of death was '1(a) head injuries sustained in motor vehicle (tree fell on vehicle)'.

31. I note here that despite the presence of methylamphetamine, there no evidence to suggest that Mr Hebert-Allan's driving may have caused or contributed his death.

FURTHER INVESTIGATION

32. Following the enquiries LSC Doevelaar made to VicRoads, an Arboricultural Risk Assessment (**ARA**) was conducted on thirty-one trees ('the assessed trees') located in the road reserve on the northern side of Warburton Highway[10] ('the area') by consulting arborist, Daniel van Kollenburg from Greenwood Consulting. Mr van Kollenburg prepared an ARA report dated 14 September 2018.[11]

33. While conducting an ARA in the area, Mr van Kollenburg noted that the watermains in the nature strips[12] in the area were replaced using the pipe crack method[13] (the works). After confirming the method with the contractor, he stated that '*it is understood that open trench excavation was required where the hydrant in the naturestrip that are connected to the water mains are located* [sic]'. He noted that evidence of excavation was observed near the trees located away from the hydrant with one of the hydrants is located between Tree 17 and 18.

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[6] The presence of air between the cranium and the dura mater (a thick membrane made of dense irregular connective tissue that surrounds the brain and spinal cord).
[7] The bone that forms the lower jaw.
[8] The bone that forms the upper jaw.
[9] Amphetamine is a collective word to describe CNS stimulants structurally related to dexamphetamine. One of these is methamphetamine, a strong stimulant drug that acts like the neurotransmitter noradrenaline and the hormone adrenaline. Amphetamine is also a metabolite of methamphetamine.
[10] The area is located outside of 57 Warburton Highway, Lilydale between Glenside Close and Lily Road.
[11] CB, *Arboricultural Risk Assessment Report, for VicRoads on site location 57 Warburton Highway Lilydale*, by Daniel von Kollenburg, 14 September 2018.
[12] Nature strips are the Council owned land that act as buffer between the constructed road and residential dwellings
[13] The pipe crack method is a trenchless installation process where the old pipe is replaced with a new pipe that is drawn along behind the cracking device leaving the old pipe fragments surrounding the newly installed pipe.

34. Mr van Kollenburg further explained, the works undertaken were likely have impacted on some of the trees in the area and could be reasonably expected to impact on the highway in event of failure to assessed.[14]

35. Of the thirty-one trees assessed, Mr van Kollenburg found that seven trees were recommended for removal as high priority works.[15] He noted that in the event of uprooting, three trees (Tree 16, 18 and 23) of the seven trees would likely fall over the driveway of 57 Warburton Highway and onto the main road of Warburton Highway. In his report, he further discussed the following in relation to the works done proximate to Tree 16 and 18.[16]

Tree 16 *– There is evidence that excavation occurred one metre to the South of Tree 16 to install a hydrant. There is a 500 millimetre wide area to the south of this tree that is likely to have been caused by trenching to connect the watermains to the hydrant. These works are likely to have severed all roots along the line of cut impacting on the structural stability of this tree.*

Tree 18 *– A hydrant has been installed in close proximity to Tree 18. It is understood that open trenching was used to install the hydrant. These works were undertaken within the Structural Root Zone of this tree and it is likely that scaffold roots were damaged during the installation of hydrant.*

36. The Court then sought and received further correspondence and information in relation to the works done in the area.

37. By way of letter dated 8 January 2020, Mark Koliba, Acting Regional Director Metro South East of the Department of Transport[17] (**DoT**) advised the Court that VicRoads granted consent for a contractor, DKM Utility Services (**DKM**) to work on behalf of Yarra Valley Water (**YVW**) to complete works. It was commenced on or about 10 July 2017 and completed on 10 August 2017.

[14] CB, *Arboricultural Risk Assessment Report,* page 5.
[15] Ibid, p 60. The priority accorded particular works is based the usage of the site, the risk presented by the tree and good arboricultural husbandry. Priority is usually of a general nature only although the values of High and Urgent indicate that significant consequences are likely if the works are not undertaken within the specified time frames.
High works are works should be performed within twelve months.
[16] CB, *Arboricultural Risk Assessment Report,* page 52.
[17] See footnote 1.

38. The Court later corresponded with YVM and was responded by YVM's lawyer, Sparke Helmore Lawyers. They advised that the responsibility for any further inspections post the works will be reverted to Yarra Range Shire Council (**YRSC**).

39. Subsequent enquiry concerning further inspections conducted after 10 August 2017 until the time of the incident was then made towards YRSC. In a response dated 30 July 2020, Mark Varmalis, Director of Environment and Infrastructure of YRSC advised that there were no inspections undertaken relevant to the area of the works.

40. Following the incident, in the same letter, the DoT has advised the Court that all tasks recommended by Mr van Kollenburg in the ARA report were completed on 9 October 2018.

COMMENTS

Pursuant to section 67(3) of the Act, I make the following comments connected with the death.

41. Mr Herbert-Allan's death occurred in tragic and unexpected circumstances. Certainly, it is not possible to foresee the danger of every tree fall along the Warburton Highway. However, given there were no inspections undertaken by YRSC around the area after the works, inaction of this nature may be viewed as an oversight, but it also represents an opportunity lost to minimise the risk of the tree falling onto the highway and thus causing Mr Herbert-Allan's death.

42. I note from the site plan enclosed in arborist, Mr van Kollenburg's ARA report that Tree 16 and Tree 18 of high priority to be removed are situated opposite between 34 and 36 Warburton Highway. As outlined above from the extract of the ARA report, there were works of excavation and hydrant installations proximate to these trees. Additionally, the discussion on Tree 21 in the report indicates that the tree that fell on Mr Herbert-Allan's vehicle was situated between Tree 18 and Tree 21. Hence, it is probable the fallen tree had the same risk as Tree 18.

43. I also note from Mr van Kollenburg's report, there were evidence of previous excavations from other projects done proximate to other assessed trees (Tree 10, 11, 14 and 23) that are recommended for removal as high priority works. These excavations had resulted in damaged roots in these trees, although some of which are not a risk of fall towards the Warburton Highway. I consider this to be a concern and potentially evidence of a need to conduct inspection and arboricultural assessment after any works of excavation to reduce and prevent tree falling hazards.

44. I acknowledge in the DoT's response to the Court that under the *Road Management Act 2004* (Vic) (**RMA**), VicRoads does not have any duty to inspect, maintain or repair the roadside of any public highway. The DoT outlined that it has a Road Management Plan that establishes its responsibilities for asset inspection, maintenance and repair standards. Warburton Highway is classified as a Road Management Category 3 (**RMC 3**)[18] and has a weekly inspection frequency for hazards.[19]

45. I also acknowledge that section 50 of the RMA stipulates a Road Management Plan may include details of the management system that the DoT propose to implement in the discharge of its duty to inspect, maintain and repair public roads with being the coordinating road authority.

RECOMMENDATIONS

Pursuant to section 72(2) of the Act, I make the following recommendation:

46. With the aim of promoting public health and safety and prevent like deaths, I recommend that VicRoads consider coordinate with Yarra Range Shire Council in establishing a database system that captures, analyses and stores condition data for roadside hazards as part of its strategy for achieving its roadside management objectives.

47. With the aim of promoting public health and safety and prevent like deaths, I recommend that Yarra Range Shire Council review its Nature Strips and Roadside Guidelines and include the responsibility to provide suitable safety precautions after any work of excavations done on the nature strips.

FINDINGS AND CONCLUSION

48. Pursuant to section 67(1) of the *Coroners Act 2008* I make the following findings:

    a) the identity of the deceased was Eden Herbert-Allan, born 18 April 1985;

    b) the death occurred on 10 August 2018 at Warburton Highway, Lilydale, Victoria, 3140;

    c) I accept and adopt the medical cause of death ascribed by Dr Matthew Lynch and I find that the cause of Eden Herbert-Allan's death was head injuries sustained in a motor

[18] VicRoads Road Maintenance Category, Department of Transport, Version 1 dated 7 December 2020.
[19] Road Management Plan 2021, Department of Transport, page 17.

vehicle in the circumstances where an uprooted tree fell on his moving vehicle and subsequently caused him to collide into another tree; and

d) Having considered all of the evidence I find nothing in Mr Hebert-Allan's driving may have caused or contributed his death.

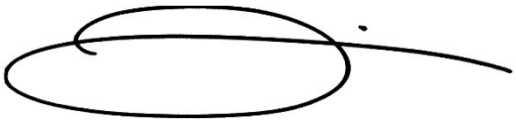
I convey my sincere condolences to Mr Herbert-Allan's family for their loss.

Pursuant to section 73(1B) of the Act, I order that this finding be published on the Coroners Court of Victoria website in accordance with the rules.

I direct that a copy of this finding be provided to the following:

Mrs Michelle Herbert-Allan, Senior Next of Kin
Mr Nathan Herbert-Allan, Brother
Leading Senior Constable Paul Doevelaar, Coroner's Investigator
VicRoads
Yarra Range Shire Council

Signature:



AUDREY JAMIESON
CORONER
Date: 11 November 2021

NOTE: Under section 83 of the ***Coroners Act 2008*** ('the Act'), a person with sufficient interest in an investigation may appeal to the Trial Division of the Supreme Court against the findings of a coroner in respect of a death after an investigation. An appeal must be made within 6 months after the day on which the determination is made, unless the Supreme Court grants leave to appeal out of time under section 86 of the Act.