CITATION: *Inquest into the deaths of Anthony Malcolm Mahoney and Jane Stuart Mahoney* [2000] NTMC 42

| | |
|---|---|
| TITLE OF COURT: | CORONERS COURT |
| JURISDICTION: | Coronial |
| FILE NO(s): | 9814575 9814577<br>97/98 98/98 |
| DELIVERED ON: | 11 September 2000 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 2, 3, 4, 5, 19 May 2000 |
| JUDGMENT OF: | Mr Greg Cavanagh SM |

**CATCHWORDS:**

Motor Vehicle Accident – Double Fatality – Accident Investigation

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Counsel assisting the Coroner: | Mr W.J. Karczewski |
| Counsel for Police Commissioner: | Mr J. Lawrence |

| | |
|---|---|
| Judgment category classification: | B |
| Judgment ID number: | [2000] NTMC 42 |
| Number of paragraphs: | 14 |

IN THE CORONERS' COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Nos. 9814575, 9814577

Inquest into the deaths of **ANTHONY MALCOLM MAHONEY & JANE STUART MAHONEY**

**FINDINGS**

(Delivered on 11 September 2000 )

Mr Cavanagh SM:

**THE NATURE AND SCOPE OF THE INQUEST**

1. The deaths of the above-named two persons occurred on Sunday 12 July 1998 on the Cox Peninsula Road in the Northern Territory of Australia. They were a married couple. The deaths are "reportable deaths" within the definition of that term in s.12 of the *Coroner's Act* ("the Act") in that they appeared

> "to have been unexpected, unnatural, or violent or to have resulted directly or indirectly, from an accident or injury".

2. This Inquest is held as a matter of discretion pursuant to s.15(2) of the Act, and s.14(4) allows more than one death to be the subject of any particular Inquest. Sections 34 and 35 of the Act set out the limits of my jurisdiction as follows:

> "34. CORONER'S FINDINGS AND COMMENTS
>
> (1) A coroner investigating –
>
> (a) a death shall, if possible, find –

(i) the identity of the deceased person;

(ii) the time and place of death'

(iii) the cause of death;

(iv) the particulars needed to register the death under the *Births, Deaths and Marriages Registration Act*;

(v) any relevant circumstances concerning the death;
or

(2) A coroner may comment on a matter, including public health or safety of the administration of justice, connected with the death or disaster being investigated.

(3) A coroner shall not, in an investigation, include in a finding or comment, a statement that a person is or may be guilty of an offence.

(4) A coroner shall ensure that the particulars referred to in subsection (1)(a)(iv) are provided to the Registrar, within the meaning of the *Births, Death and Marriages Registration Act.*

35. CORONERS' REPORT

(1) A coroner may report to the Attorney-General on a death or disaster investigated by the coroner.

(2) A coroner may make recommendations to the Attorney-General on a matter, including public health or safety or the administration of justice connected with a death or disaster investigated by the coroner.

(3) A coroner shall report to the Commissioner of Police and the Director of Public Prosecutions appointed under the *Director of Public Prosecutions Act* if the coroner believes that a crime may have been committed in connection with a death or disaster investigated by the coroner."

3. This public Inquest commenced on 2 May 2000 at Darwin, Northern Territory. In attendance at the Darwin Court was Ms Sally Keeble, the sister

of Jane Mahoney. Ms Keeble represented her family and was given leave to ask questions of witnesses and make submissions. Counsel assisting me was Mr W.J. Karczewski, the deputy Director of Public Prosecutions. He appeared pursuant to Sec 16 of the *Director of Public Prosecutions Act.* Mr John Lawrence of Counsel sought and was granted leave to appear on behalf of the Commissioner of Police. The findings concluded by way the final submissions on 19 May 2000.

## FORMAL FINDINGS

**First-mentioned deceased:**

(1) The identity of the deceased was Anthony Malcolm Mahoney, a male caucasion Australian born on 26 October 1941 at Adelaide in the state of South Australia.

(2) The time and place of death was at approximately 6:00pm on Sunday 12 July 1998 on the Cox Peninsula Road at a point approximately 3.4 kilometres from the intersection with the Stuart Highway in the Northern Territory of Australia.

(3) The cause of death was multiple injuries sustained after being struck by a white Mitsubishi Triton utility motor vehicle registration number NT 480-638.

(4) The particulars required to register death are:

(i) The deceased was a male.

(ii) The deceased was of Australian origin.

(iii) The death was reported to the Coroner.

(iv) The cause of death was confirmed by post-mortem examination.

(v) Multiple injuries.

(vi) The pathologist viewed the body after death.

(vii) The pathologist was Dr Terence John Sinton of Royal Darwin Hospital.

(viii) The father of the deceased was Michael Jeremiah Mahoney and his mother was Margaret Jean Mahoney.

(ix) The usual address of the deceased was lot 129 Cox Drive, Cox Peninsula, Northern Territory. He had lived in Australia all his life.

(x) The deceased usual occupation was as a seismic geologist.

(xi) The deceased was married to Jane Stuart Keeble on the 20th October 1986 at Hammersmith, England. They died together.

**Second-mentioned deceased:**

(1) The identify of the deceased was Jane Stuart Mahoney (nee Keeble), a female of British origin born on 7 July 1955 at Washington in the United States of America.

(2) The time and place of death was at approximately 6:00pm on Sunday 12 July 1998 on the Cox Peninsula Road at a point approximately 3.4 kilometres from the intersection with the Stuart Highway in the Northern Territory of Australia.

(3) The cause of death was multiple injuries sustained after being struck by a white Mitsubishi Triton utility motor vehicle registration number NT 480-638.

(4) The particulars required to register death are:

(i) The deceased was a female.

(ii) The deceased was of British origin.

(iii) The death was reported to the Coroner.

(iv) The cause of death was confirmed by post-mortem examination.

(v) Multiple injures.

(vi) The pathologist viewed the body after death.

(vii) The pathologist was Dr Terence John Sinton of Royal Darwin Hospital.

(viii) The father of the deceased was Curtis Keeble and her mother was Margaret Keeble.

(ix) The usual address of the deceased was Lot 129 Cox Drive, Cox Peninsula, Northern Territory.

(x) The deceased's usual occupation was as a legal practitioner.

(xi) The deceased was married to Anthony Malcolm Mahoney on the 20 October 1986 at Hammersmith, England. They died together.

**RELEVANT CIRCUMSTANCES (INCLUDING COMMENTS AND RECOMMENDATIONS)**

4. As in all Inquests, this particular Inquest proceeded by way of inquisition. The hearing was concerned about ascertaining the truth relating to the deaths. The hearing was not conducted according to the adversial process with its rules of evidence (which bind such process). In coming to my findings the standard of proof is according to the balance of probabilities.

5. At the Inquest I had before me, all of the extensive written reports, transcripts of interviews, statements and other documentation collected by police investigators. Also, I had the benefit of oral evidence from numerous witnesses (who were also subjected to cross-examination). One of the summonsed witnesses, a Mr Jason Terry Wayne Climas ("Climas"), refused to answer questions on the basis that any answer might tend to incriminate him. Section 38 of the Act gives such a right.

6. During the Inquest there was debate about the quality of the police investigation regarding possible crimes relating to the deaths, and a subsequent criminal prosecution of Climas. In my view, that debate is only peripheral to the objects of this Inquest. I attach as part of my findings the extensive written submissions of Mr W.J. Karczewski (annexure "A") which deal, inter alia, with this debate and with which I generally agree. I note the comment of M/S Keeble in relation to this debate:

> "… neither I nor my family have any intention of pursuing any complaints against the police or prosecution service, and indeed have a high regard for the quality of their work."

7. The evidence tendered and heard at the Inquest confirmed the original findings (albeit brief findings) delivered on the 29th January 1999. That is not to say that the Inquest was unnecessary, it was. The tragedy of this

double fatality and doubts raised in connection with those original factual findings necessitated the public hearing. Furthermore, conspiracy theories about a Hell's Angels motor cycle club "cover-up" were able to be aired and resolved. In my view, there was no such cover-up. Concerns by the family of Jane Mahoney about the quality of the accident investigation were also able to be resolved. In my view, the quality of the investigation was reasonable without being perfect. It is noteworthy that the family submitted at the close of evidence (through M/S Keeble):

> "But what I have said to my family and they accept is that we know everything that there really is to know – everything about the deaths of Jane and Tony."

8. I do not intend to repeat the detailed analysis of the evidence set out in the attached written submissions of Mr W.J. Karczewski. However, I accept and adopt his submissions in relation to the facts. I repeat and confirm my original finding (which relate to Jane Mahoney but which also refer to her husband).

> "On Sunday 12 July 1998 the deceased and her husband were returning to their home in Mandorah after spending time in Darwin. They were travelling together in their White Mitsubishi single cab Triton Utility motor vehicle.
>
> As the vehicle travelled along Cox Peninsula Road its right rear tyre commenced to shred and peel off its casing. The deceased's husband drove the vehicle about 1.5 metres off the southerly edge of the road.
>
> The deceased and her husband both got out of the vehicle. Her husband commenced to change the tyre by jacking up the vehicle and removing the wheel nuts. The deceased sat behind the vehicle reading a book. When her husband had removed one wheel nut

and had another half off, he was struck from behind by a white Mitsubishi Triton single cab utility motor vehicle driven by Jason Terry Wayne Climas. The vehicle then went on to strike the deceased before finally coming to a halt about 60 metres from the deceased's vehicle. The collision occurred towards the end of a long sweeping left hand curve in the road.

The impact caused the body of her husband to be thrown about 12 metres, and that of the deceased to be dragged about 34 metres, from their vehicle. They both received extensive and instantaneously fatal injuries from which they died at the scene.

Prior to the collision Climas had been travelling inbound to Darwin. He was driving through a sweeping left hand bend just prior to the collision when for some inexplicable reason he drove his vehicle onto the wrong side of the roadway and then off the roadway, striking the deceased and her husband before coming to a halt in the scrub. There is no evidence to suggest that the collision was a deliberate act.

Climas abandoned his vehicle and left the accident scene shortly after it occurred. He returned sometime later and surrendered himself to the police"

9. Having regard to all of the evidence, I am more than satisfied that Climas was the driver of the motor vehicle that collided with the deceased persons and that he was alone at the time. This collision caused the deaths. I am satisfied that the collision was not deliberate or intended by Climas. I am satisfied that the collision was not caused by a sudden or random "act of God", and was not an unavoidable collision. In this regard, I note there was evidence that the motor vehicle driven by Climas was roadworthy and in good condition. The relevant portion of the road was in good condition with no faults, impairments or any constrictions on

driving. Weather conditions were good for driving. I am satisfied that the collision was caused by a degree of carelessness or inattention on the part of Climas.

10. I agree with the submissions of M/S Keeble that:

> "Coming round the sweeping left hand bend, - the driver was traveling quite slowly, at about 70 kilometres an hour. The driver did not, as I had rather assumed, miss the bend completely, but came part way round, steering left. He then straightened out, and traveled straight towards Jane and Tony's ute, across the road. Either just as he left the road, or as he hit Tony, he steered hard right, and then went on to hit Jane and to travel some distance into the bush before the vehicle stopped against a tree.
>
> That was the heart of that awful accident."

11. As to the degree of carelessness involved and whether or not it amounted to criminal negligence, this is a matter of speculation due (unfortunately) to four factors (1) the absence of any eye witnesses to the manner of driving by Climas immediately prior to the collision, (2) the absence of any eye witnesses to the actual collision, (3) the absence of any physical indicators or clues at the scene for any reason for the vehicle driven by Climas to deviate from the road, and (4) the absence of any detailed statement or confession from Climas himself. These factors also result in speculation as to how the carelessness was manifested, e.g. did Climas momentarily fall asleep behind the wheel for a second or two, wake up and over correct? We shall never know. On the evidence I do not believe Mr Climas was under the influence of alcohol or drugs at the time of collision, however, he may well have been suffering the affects of the same after a weekend of "partying" at the nearby rock festival (conducted by the Hell's Angels motor cycle club).

12. As to the question of making a report pursuant to Sec. 35 (3) of the Act in relation to a belief that a crime may have been committed, I accept the submission of Mr W.J. Karczewski that I should not make such a report. I believe that offences under the *Traffic Act* may well have been committed, however, they are not crimes (as defined). The only possible crimes are those available in the *Criminal Code* (the "Code"). In my view I could not form a reasonable belief as to the crimes of "unlawful killing" (Sec 161 of the Code), or "dangerous act" (Sec. 154 of the Code). As I have stated the degree and nature of the driver's carelessness is unknown. The results are known but nothing else. Specifically, a change under Sec. 154 of the Code is predicated on the "ordinary man" test, and ordinary men make driving mistakes and have lapses of attention and judgement. Whether the actions of Climas were merely careless or of such a nature as to be sufficient to ground a charge of criminal negligence under Sec. 154 of the Code is speculative.

13. Having regard to the fact that both deceased would have almost certainly have died at the time of impact, I could not form a belief that the "fail to rescue" provision of the Code, Sec. 155, is applicable.

14. Other than to make findings about the circumstances of the deaths as I have, I have no reports or recommendations to make.

Dated this 8th of September 2000.

GREGORY R CAVANAGH

Territory Coroner

ANNEXURE A

# MAHONEY INQUEST CLOSING

## CORONERS FINDINGS PURSUANT TO SECTION 34(1) OF THE CORONERS ACT

### Findings regarding identity of deceased

The evidence which has been adduced in this inquest enables you to make the following findings:

Identity of female deceased

Name: Jane Stuart Mahoney
DOB: 7 July 1955
POB Washington, USA
Address: 6 Cox Drive, Cox Peninsula

Identity of male deceased

Name: Anthony Malcolm Mahoney
DOB: 26 October 1941
POB: Adelaide, South Australia
Address: Lot 129 Ericson Crescent, Mandorah

Time and place of death

Approximately 6.00 pm on Sunday 12 July 1998 on the Cox Peninsula Road at a point approximately 3.4 kilometres from its intersection with the Stuart Highway.

The cause of death

Multiple injuries sustained after being struck by a white Mitsubishi Triton utility registration number NT 480-638.

### Particulars Required to Register Death of Jane Stuart Mahoney

| | |
|---|---|
| SURNAME: | Mahoney (nee Keeble) |
| CHRISTIAN NAMES: | Jane Stuart |
| USUAL OCCUPATION: | Legal practitioner |
| USUAL RESIDENCE: | Lot 129 Cox Drive, Cox Peninsula, NT |
| SEX: | Female |

| | |
|---|---|
| AGE: | 43 |
| DOB: | 7 July 1955 |
| PLACE OF BIRTH: | Washington, USA |
| LENGTH OF RESIDENCE IN AUSTRALIA: | 9 years |
| MARRIAGE DETAILS: | 20 October 1 86 Hammersmith, England to Anthony Malcolm Mahoney |
| PARTICULARS OF PARENTS OF DECEASED: | Father: Curbs Keble<br>Mother: Margaret Keeble (nee Fraser) |

**Particulars Required to Register Death of Anthony Malcolm Mahoney**

| | |
|---|---|
| SURNAME: | Mahoney |
| CHRISTIAN NAMES: | Anthony Malcolm |
| USUAL OCCUPATION: | Seismic geologist |
| USUAL RESIDENCE: | Lot 129 Cox Drive, Cox Peninsula, NT |
| SEX: | Male |
| AGE: | 56 |
| DOB: | 26 October 141 |
| PLACE OF BIRTH: | Adelaide Australia |
| LENGTH OF RESIDENCE IN AUSTRALIA: | Life |
| MARRIAGE DETAILS: | 20 October 1 986 Hammersmith, England to Jane Stuart Feeble |
| PARTICULARS OF PARENTS OF DECEASED: | Father: Michael Jeremiah Mahoney<br>Mother: Margaret Jean Mahoney |

**IDENTITY OF DRIVER OF VEHICLE 1**

In my opening remarks I foreshadowed that at the conclusion of this inquest I will be inviting you to find that Jason Climas was the driver of vehicle 1. Before turning to the evidence which supports this finding several observations need to be made.

It will be remembered that Jason Climas was charged with 5 offences 4 of which contained as an element proof of the fact that he was the driver of vehicle 1. Those 4 offences were:

*1.* Doing a dangerous with a circumstance of aggravation contrary to s. 154(1) and (3) of the *Criminal Code.*

2. Driving without due care contrary to regulation 95 of the Traffic Regulations.

3. Failing to keep left contrary to regulation 15 of the Traffic Regulations.

4. Driving unlicensed contrary to s.32(1)(a)(1) of the *Traffic Act.*

A preliminary examination was held in respect of count 1 on 6 July 1999. At that examination, the two issues for the magistrate's consideration were –

1. the identification of the driver of vehicle 1, and

2. the sufficiency of evidence of the doing of a dangerous act.

The second issue only became relevant if there was sufficient evidence as to the first issue.

The magistrate ruled inadmissible admissions made by Climas to Sgt Sattler and Const Barrett that he was the driver of vehicle 1 on the ground that at the time of questioning Climas was a suspect and was not cautioned by members before being spoken to. There being no other evidence implicating Climas as the driver, the magistrate found insufficient evidence and discharged the defendant.

On 9 December 1999 Climas was found not guilty of counts 2, 3 and 4.

The finding that you are being asked to make now is not inconsistent with the ruling of 6 July 1999 and the dismissal of charges on 9 December 1999.

[1] s. 39 Coroners Act

Firstly, in these proceedings you are not bound by the rules of evidence[1] was the magistrate conducting the preliminary examination and the court hearing the summary charges. So for present purposes it matters not that Climas was not cautioned (if in fact there was a requirement to do so) or that the conversations were not electronically recorded or subsequently adopted.

Secondly, the standard of proof in these proceedings is unlike that in criminal proceedings where the standard is proof beyond reasonable doubt. The standard of proof in this inquest is on the balance of probabilities on the sliding Briginshaw scale.[2]

Thirdly, even if you find that Jason Climas was the driver of vehicle 1, you cannot go on to find that he is or may be guilty of an offence. The finding is thus of limited application.

Fourthly, the finding is not binding on any other court or tribunal.

Fifthly, a finding that Climas was the driver of vehicle 1 does not in itself implicate him in the commission of a criminal offence.

**Evidence which supports the finding that Jason Climas was the driver of vehicle 1**

The evidence falls into five categories.

1. The evidence that Climas or a male person matching his description was seen running from the direction of vehicle 1 shortly after the accident. This comes from the witnesses Gascoigne and Court.

2. The admission by Climas to Scott Eaton that Climas had been involved in an accident.

3. The admissions made by Climas to police officers at the scene that he was the driver of the vehicle 1. This comes from the witnesses Sattler, Compton, Barrett and Chapman.

4. The admissions made by Climas to police officers at the Peter McAulay Centre that he was the driver of the vehicle 1. This comes from the witnesses Nixon and Jenkinson.

5. The forensic evidence that items found in and about vehicle 1 contained Climas' DNA. This comes from the witnesses Sloan and Eckhoff.

It is now proposed to examine this evidence more closely.

[2] The Inquest Handbook by Hugh Selby at page 8

**Andrew Gascoigne - statement at vol 1 folio 42 dated 13 July 1998**

In his statement he says that shortly after the accident he saw Climas *scramble up the verge onto the road. He was coming directly from the utility parked in the long grass.*[4]

He says that Climas insisted that he, Gascoigne, drive him back to Darwin River Rocks *to get an ambulance and helicopter*[5]. Gascoigne then drove Climas to Darwin River Rocks.

Gascoigne then asked Climas if *he was the driver and he did not even answer me.*[6] However, it may be inferred from Climas' behaviour that he was the driver. Certainly Gascoigne assumed Climas was the driver.

After some time Gascoigne then returned to the accident scene with Climas and was present when Climas told Sgt Sattler that' he was the driver of the utility involved in the accident. Although in his statement Gascoigne does not iterate the conversation he had with Sattler nor the conversation between Climas and Sattler, Gascoigne does say that after he and Climas returned to the accident scene *I yelled out to someone if I could see the officer in charge please. 1 heard someone respond and a police officer approached me and I then explained to him what had happened.*[7]

Gascoigne elaborates sufficiently upon what transpired at the scene in his recent e-mail to the deputy coroner where he states *(t)he dickhead that wanted a lift to the store admitted to the NT police at the road block that he was the driver of the car.*

The text of the actual conversations between Gascoigne/Sattler and Sattler/Climas is dealt with in the evidence and statements of Sgt Sattler.

**Michael John Court - vol 1 folio 48**

Says that he heard the accident and proceeded from his house to the accident scene. He arrived at the scene in what must have been no more than several minutes after the accident. He says he saw a person fitting the description of Climas[9] *running from the rear area of the second ute* (vehicle 1). *He was running towards the road. He was running from the rear area of the vehicle.*[10]

[7]vol 1 folio 45.6
[8]See email from Andrew Gascoigne at vol 3 tab 19
[9]Court's description of the person appears at vol 1 folio 49.5
[10]vol 1 folio 49.2

He says he saw a person fitting the description of Gascoigne attempting to make contact on his mobile phone.[11] Court spoke to this person and was told *I can't get reception.* This is confirmed by Gascoigne who says *as I was running towards where the body was I remember seeing another car and a person and I called out to this person to see if he had a mobile phone as I had been trying to use mine but had no service.*[12]

Court says *I then told him that I would call them, as I knew my phone worked out there. I called for the ambulance to attend.*[13] This is confirmed by Gascoigne who says *at this stage I thought that since he had service that help would be on its way.*[14]

**Rosanne Mavis Rowlings - vol 1 folio 52**

The evidence of this witness supports Gascoigne's account.

She says she stopped and as she was walking hack towards the scene saw two male persons walking together away from the scene. They were walking towards her.[15]

She says one of the males had a full beard and the second one was wearing a red Darwin River Rocks T-shirt. The evidence is that Gascoigne had a beard and Climas was wearing a red t-shirt.

She saw both persons get into a white utility end drive away from the scene. Gascoigne had a white Holden Commodore utility.

The persons she saw had to be Gascoigne and Climas. She says that as she was walking towards the accident scene one of the persons indicated to her that he had already called the police. We know that Gascoigne did not call the police because his mobile telephone would not work. Perhaps he told her that police had been called and she misheard what he said or alternatively perhaps he did say he had called police so that he did not have to explain to her who had in fact called the police and why. Even if he did say that he had called police, that fact alone does not detract from the reliability of the remainder of Gascoigne's statement.

**Scott Eaton**

This witness also supports Gascoigne's account in part.

Gascoigne says that when he drove Climas to Darwin River Rocks Climas *jumped out of the vehicle and ran over to the gate leading to the back stage and disappeared from view.*[16]

[11]vol 1 folio 49.6
[12]vol 1 folio 43.3
[13]vol 1 folio 49.7
[14]vol 1 folio 43.5
[15]vol 1 folio 53.3
[16]vol 1 folio 45.1

Eaton says he was at Darwin River Rocks on the night of Sunday 12 July 1998.

Eaton says that Climas spoke to him on the evening of 12 July 1998 and told him that he had been in an accident. Eaton says he told Climas to go and get the vehicle.

Eaton's evidence is that Climas said nothing about being the driver of the vehicle which had been in an accident.

Eaton confirms the presence of ambulance and a helicopter at Darwin River Rocks that weekend.

In his statement Gascoigne says

> *Some time later 1 saw a group of guys walk over to where my ute was parked including the bloke I had bought l, down. These person were Hells Angels and they told me that they had rung an ambulance, these was no helicopter and asked me to take him back to the accident. I said no way as he was in shock and I did not want to go anywhere with him as he was abusing me and would not listen to reason.*
>
> *They said he had calmed down a bit and they said that they did not know anyone else who was sober enough to take him back. I thought to myself that 1 had no way out at this sage and conceded to take him back. The bloke in the red shirt then got back into my car, and we headed off back to the accident site. I told him to relax, lay back and I would get him there safely.*

In his statement Gascoigne does not name Scott Eaton as being the person who told him to drive Climas back to the accident scene. That appears from the evidence of Sgt Compton who in his second statement says he spoke to Gascoigne at the accident scene on the night of 12 July 1998 during which the following exchange took place:

Compton: *It happened about six o'clock,* its', *now nearly eight, how come it took so long.*

Gascoigne: *Well I took him back there and then the HA's took him away and then I waited around. Scott Eaton brought him back and told me to bring him here.*

In his evidence Eaton says he didn't tell any person to drive Climas back to the scene.

It is difficult to reconcile these conflicts in the absence of further evidence from Gascoigne. It is not appear from Gascoigne's statement whether or not he knew Eaton, and if he did, why he did not mention Eaton's name in his statement. Perhaps Gascoigne thought it prudent not to mention Eaton's name. It seems however that he must have known it. How else did Sgt Compton and other members get Eaton's name?

Perhaps Eaton also sees some value in distancing himself from Gascoigne and for this reason is not prepared to accept responsibility for directing Gascoigne to drive Climas back to the accident scene.

Even though the unsatisfactory state of the evidence on these two aspects prevents you from making a positive finding as to who told Gascoigne to drive Climas back to the accident scene, this fact alone does not detract from the overall thrust of the evidence that Gascoigne drove Climas back to Darwin River Rocks where Climas then spoke to Eaton, a member of the Hell's Angels and the hirer of vehicle 1 and that Gascoigne then drove Climas back to the accident scene at the request of a person, most probably a member of the Hell's Angels.

**Sgt Henry Sattler - vol 1 folio 88a dated 212 October 1998; vol 3 tab 11 dated 4 December 1998**

He was at the scene on the night of the accident. He says that at 7.40 pm he was approached by Gascoigne and Climas.[17] Sattler then a conversation with Gascoigne the full text of which is set out in his second statement.[18] It is plain from that conversation which took place in the presence of Climas that Gascoigne was saying that Climas was the driver of the vehicle 1. At no point did Climas demur to this assertion.

Sattler gave evidence he made notes of the conversation he had with Gascoigne and Climas that night which he retained and from which he was able to reproduce the conversations which appear in his second statement. It is disappointing that if he had the notes as he says he did, he did not then go on to comply with the request made of him by Snr Sgt Thomas in the latter's email dated 1 December 1998 to *attach* (to his supplementary statement) *copies of any notes made at the time or since.*[19]

According to Sgt Sattler's second statement he had the following conversations with Gascoigne and Climas.

Gascoigne: I *was driving behind his car (indicating Climas who was standing next to him) when the accident happened.*

Sattler: *Which vehicle were you driving behind?*

Gascoigne: *That one over there* (pointing to vehicle 1). *The accident just happened and we couldn't do anything so I took him to the Darwin River Rocks*

*because we knew there was medical help there and we thought we might have got a helicopter.*

Sattler: *Who was diving the vehicle that was involved in this accident?*

Gascoigne: *He was* (again indicating Climas who was standing next to him)

Climas was standing several feet away from Gascoigne and was in a position to hear that conversation.

Sgt Sattler to Climas.

Sattler *Were you the driver of the utility that was involved in this accident?*

Climas: *Yes I was.*

**Sgt George Spencer Compton - vol 1 folio 880, vol 3 tab 9**

Sgt Compton was the Officer in Charge of the Accident Investigation Unit at the time. He was called on duty and proceeded to the scene.

At about 7.45 pm as a result of a messaged from Sgt Sattler he spoke to Gascoigne and Climas..Gascoigne told Compton that the person with him (Climas) had been the driver of vehicle l. Following this conversation, Compton then spoke to Climas.

Compton says he made notes of the conversations he had with Gascoigne and Climas in his police notebook. The conversations set out in his second statement dated 2 March 2000 cannot be "verified as the notebook was destroyed in an incident when Compton was saving someone in a river. No conversations were recorded in his first statement, which he frankly acknowledged was poor work. He lost his notebook before he made his second statement. His second statement therefore was made from his unaided memory some 19½ months after the event.

Sgt Compton nevertheless says his recollection of the conversation is good - the inference being that the conversation recorded in his statement is accurate. It must be remembered that his statements do contain a number of errors, one of them being quite significant. In both statements Sgt Compton says that Snr Const Barrett arrested Climas. Barrett in his statements of 13 July 1998[20] and 2 March 2000[21] says that Compton arrested Climas. Barrett gave evidence in this inquest that Compton arrested Climas. Compton gave evidence that his statements were wrong on the issue of who had 'arrested Climas and gave sworn evidence that he, Compton, had arrested Climax. Compton agreed that the issue was significant and attributed the shortcomings in his first statement to the heavy workload at the time.

Sgt Compton's statement of 2 March 2000[22] contains a number of other errors. On page 2 he described vehicle 2 as being a red utility[23] and had vehicle 1 travelling in a westerly direction instead of an easterly direction. On page 7 he was wrong in saying that *DNA and prints* taken from vehicle *1 had proved positive to Climas.* In his evidence he agreed that only the DNA had proved positive and not the fingerprints.

It is against that background that you assess the reliability the contents of his most recent statement. The conversations which he recalls are in the following terms

Compton: *How do you know he's the driver*
Gascoigne: *I was driving home and I saw the dust and then saw him sitting behind the wheel. I helped him out.*

Compton: *Did you see it happen?*
Gascoigne: *No I just saw the dust.*

Compton: *Did you see the ute in front of you?*
Gascoigne: *No.*

Compton: *After you got him out of the car what did you do?*
Gascoigne: *He started to take off towards the Highway and I got him into my ute. He said he wanted to get he' 1p. I took him back to Darwin River Rocks to get the helicopter.*

Compton: *It happened about six o'clock, its now nearly eight, how come it took so long.*
Gascoigne: *Well I took back there and then the HA 's took him away and then I waited around. Scott Eaton brought him back and told me to bring him here.*

[20]vol 1 folio 88
[21]vol 3 tab 10
[22]vol 3 tab 9
[23]It is of interest to note that the same error appears in Det Sgt Chapman's statement at vol 3 tab 5 at page 1.6

Sgt Compton noted that Gascoigne appeared to be highly agitated, talking rapidly and quite loud. Gascoigne's account seemed a little strange to him.

Sgt Compton then had a short conversation with Climas.

Compton: *He (indicating Gascoigne) says that you were the driver of the Triton, is that true?*
Climas: *Yeah.*

Compton: *Were you driving when this happened?*
Climas: *Yeah.*

Compton: *Why did you leave after the accident?*
Climas: *To get help.*

Gascoigne's account to Compton that he had seen Climas *him sitting behind the wheel* and that he *helped him out* is extremely significant. The difficulty with it is that Gascoigne did not mention it to any other member that night. Indeed he was interrogated by three members of the CIB that night to find out the truth of who was driving vehicle 1. It is odd that this version did not emerge again. Nor did Gascoigne say so in his statement. Indeed it was so significant that one would have expected that fact to be the central dank of Gascoigne's statement. Because it did not manifest itself as such, the reliability of Sgt Compton's recollection is questionable. It is not the kind of evidence an experienced police officer would forget or ignore. It is the very kind of evidence one would expect Sgt Compton to pass on to the other investigators and certainly to the Officer in Charge of the case. If the information was not passed on it was poor police work. If it was passed on it is odd that no evidence of that fact has emerged in this inquest other than in the statement Sgt Compton.

**Snr Const Dean Anthony Barrett - vol 1 folio 83; vol 3 tab 10**

This witness made 7 statements only two of which relate to the events of 12 July 1998.

Snr Const Barrett gave evidence that he had a conversation with Climas which he recorded in his notebook in the first person. He also gave evidence that the contents of his notebook were destroyed during cyclone Thelma. Thus the accuracy of the conversation he says he had with Climas cannot be checked against the notes he made at the time or shortly hereafter.

In my submission you can take comfort from the fact that the conversation recorded in Barrett's statement of 13 July 1998 with Climas[24] is reasonably accurate for the following reasons. Firstly, it was made from notes which were made on the night of the conversation. Secondly the conversation would have been reasonably fresh in Barrett's mind. Thirdly, the general tenor of the conversation accords with conversations which that night. Fourthly, the statements made were largely self-serving in nature.

The content of the conversation was not complex and its main thrust easy to remember.

In short Climas admitted to being the driver. He thought he saw something on the road but couldn't remember. He got out of the car and saw a body lying on the side of the road. He was by himself. He hadn't been drinking except for one beer in the morning and hadn't used drugs. He was going to the shops to get some cigarettes. He didn't know why he didn't get them from Berry Springs. He just knew he wanted to go to the service station at Noonamah.

Later Climas said *I'm in the shit* without further explanation.

**Det Sgt Chapman - vol 3 tab 5**

Det Chapman's presence at the scene was entirely accidental. He was returning from another job along the Cox Peninsula Rd when he came across the accident. He was asked to speak to Climas by some member. He can't remember who it was. The request is consistent with the doubts some of the Accident Investigation Unit members entertained as to who the driver was.

Chapman says he spoke to Climas at the scene. That conversation was not recorded in any way so we cannot make our own assessment of it. Also it was not made under caution. Chapman who was attached to the CIB did not regard CIB as being involved at this time. His evidence was that he was simply questioning Climas to ascertain the driver of the vehicle 1. He did not regard himself as investigating an offence. This is an issue to which I shall return in due course. During this conversation Climas told Chapman he was the driver of the white utility. The account given by Climas was vague. Again we cannot make an independent assessment as we do not know the exact terms of that conversation. Chapman says he thought that Climas was not telling the truth and that he was covering up for some one else. Why that should be so is not readily apparent. The vagueness could just as easily be attributed to self- preservation on Climas' behalf.

Chapman then returned to Police Headquarters where he spoke to Andrew Gascoigne who he had met some months previously.

[24] vol 3 tab 10

There is then an unsatisfactory aspect of Chapman's evidence. In his written statement Chapman says *(Gascoigne) was adamant that it was Jason Climas who was alighting from the while utility when he arrived at the scene.*

It must be remembered that Chapman made his statement on 2 March 2000, almost 20 months after the conversation with Gascoigne. His statement highlights the dangers of too readily accepting as being accurate statements made so long afterwards. His failing memory is evidenced from the fact that he describes vehicle 2 as being red in colour when in fact it was white.[25] In his evidence he was unable to remember the words used by Gascoigne. He acknowledged that Gascoigne had not said he saw Climas *alighting* from the white utility. Rather he saw him coming from the vehicle.

If this inquest fell to be decided on matters of fine detail then Chapman's evidence would need to be closely scrutinized. Such however is not the case. His evidence, consistently with that given by other members, is that Climas maintained he was the driver of vehicle 1. You can accept Chapman's evidence to that extent.

**Det Sgt John Nixon - vol 3 tab 3**

Det Nixon was called on duty on the night of the accident as the investigating members were concerned that the person they had arrested may not have been the driver at the time of the accident.[26]

Nixon spoke to Climas and Gascoigne in the CIB offices at the Peter McAulay Centre on the night of 12 July 1998 in the presence of Det Snr Const Jenkinson. Climas told them he was the driver of the vehicle.

There appears to be no doubt that on the night of 12 July 1998 police were genuinely uncertain as to who the driver of vehicle 1 was. The entry made in the Occurrence Running Sheet on 13 July 1998[27] confirms these concerns and explains the involvement of the CIB that night including that of Det Sgt Chapman.

Nixon's conversation with Climas was not recorded nor was it conducted under caution. In this inquest the police witnesses have maintained that a caution was not necessary as they were not investigating the commission of an offence but in the initial stages were attempting to determine who the driver was. It was only after they had determine that fact that they could then give consideration to the issue of further investigating the circumstances of the accident. As indicated previously, I will return to this issue later.

[25]It is of interest to note that the same error appears in Sgt Compton's second statement at vol 3 tab 9 page 2.7
[26]vol 3 tab 2 under heading Det John Nixon, R/S entry 658at vol 3 tab 3
[27]vol 3 tab 3

**Det Snr Const Wayne Jenkinson - vol 3 tab 4**

The statement from this witness confirms the account given by Det Sgt Nixon.

**Snr Const Paul Sloan - vol 3 tab 14**

This witness attended the scene on the night of 12 July 1998 and photographed vehicle 1. Photos 15 to 27 in vol 3 refer.

Photo 20 depicts a crushed VB can on ground just outside the driver's door. Photo 24 depicts a cap on the floor on the passenger's side. Photos 26 and 27 depict a cigarette butt on the floor on the driver's side.

Snr Const Sloan seized the VB can and the cigarette butt. The vehicles were also seized and taken to the Forensic Motor Vehicle Compound at the Peter McAulay Centre.

On 23 July 1998 Sloan seized the cap from vehicle 1. The cap was tendered in these proceedings as Exhibit 1.

**Carmen Eckhoff - vol 2 tab 4**

This witness examined the VB can, cigarette butt and cap seized from vehicle 1. Her expert opinion is that the DNA profile on all three items was from a male person and was indistinguishable from the DNA profile possessed by Jason Climas. In her opinion the true relative frequency of this DNA profile, as possessed by Jason Climas is rarer than 1 in 200 million in the general population.

The location of the items suggests not only that Climas was in the vehicle at the time of the accident but also that he was in the driver's seat.

The force of this evidence is in no way dependent upon the veracity on any conversations of Climas and others.

**Geoffrey David Farncomb - vol 3 tab 15**

This witness is an expert in fingerprints.

He gave evidence that he examined vehicle 1 and that *no identifiable fingerprints were developed on any surfaces inside the vehicle.*[28]

This does not mean that Climas was not inside vehicle 1.

[28]vol 3 tab 15 page 2.2

In his evidence Farncomb explained that just because no identifiable prints were found inside vehicle 1 does not mean that a particular person did not come into contact with the vehicle. The leaving of fingerprints is a chance occurrence depending on numerous circumstances. Further, even if latent prints are detected they must be of sufficient quality to enable the expert to make a comparison. That wasn't the case.

**SHOULD THE CORONER REPORT OR MAKE RECOMMENDATIONS TO THE ATTORNEY-GENERAL?**

Section 35 of the Coroners Act provides:

> (1) *A coroner may report to the Attorney-General on a death or disaster investigated by the coroner.*
>
> *(2) A coroner may make recommendations to the Attorney-General on a matter, including public health or safety or the administration of justice connected with a death or disaster investigated by the coroner.*

The only issue which emerged in this inquest as being of possible interest to the Attorney-General is that of the uncertain operation of regulation 143 of the Traffic Regulations. It will be remembered that on 25 January 1999 Climas was charged with the offence of refusing to give information which might lead to the identification of the driver of a motor vehicle contrary to regulation 143(2) of the Traffic Regulations. Following legal argument as to its scope of operation the court ruled against the prosecution and dismissed the charge.

If regulation 143 was still in existence you Worship may have been minded to draw that difficulties associated with that provision to the Attorney-General for consideration and possible review.

However, regulation 143 no longer exists. It was repealed on 1 December 1999 and replaced with new regulation 9 as part of the implementation of the Australian Road Rules. New regulation 9 is expressed differently to old regulation 143. Whether new regulation 9 would allow police to make inquiries of a person in Climas' position and require him to answer is not for this inquest to determine. That will have to be determined by a court of competent jurisdiction when the case arises.

**SHOULD THE CORONER REPORT TO THE COMMISSIONER OF POLICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS**

Section 35(3) of the *Coroners* Act requires you Worship to report to the Commissioner of Police and the Director of Public if you believe that a *crime may have been committed in connection with a death.*

[29]See s.3(1) *Criminal Code*
[30]see s.38E *Interpretation Act*
[31]
[32]

The term *crime* is this context has a technical meaning. In the Northern Territory offences are of three kinds, namely, crimes, simple offences and regulatory offences.[29] The following offences are crimes:

- Any offences defined to be a crime by the section creating the offence, or
- Any offence having a penalty of imprisonment of more than 2 years unless expressed to be otherwise.[30]

Offences relating to the misuse of motor vehicles are, in the main, created by *the Traffic Act.* These offences are simple offences or regulatory offences. The *Traffic Act* does not create any crimes. Crimes are serious criminal offences which must be prosecuted upon indictment in the Supreme Court unless otherwise stated.[31]

Is there sufficient evidence that a crime may have been committed?

The circumstances existing at the time of the accident are not in dispute. The summary appearing in Const Evan's report date 22 October 1998[32] is well supported by the oral and photographic evidence. It is worth repeating his observations and conclusions.

> **10.*ROAD FEATURES AND CONDITIONS:***
>
> *Cox Peninsula Road, in this area, is a sealed road of bituminous construction, bordered by dirt and gravel verges either side, and is in good repair. Cox Peninsular Road caters for one late of traffic in either direction, with each traffic lane separated by white painted lane markings. At the point of the collision the line markings were broken white lines, with good line of sight vision of on-coming traffic for vehicles travelling in either direction.*
>
> **11.*WEATHER CONDITIONS***
>
> *At the time of the collision the weather was fine and dry. The road surface was dry. There was no hindrances or obstructions to visibility.*
>
> **12.*LIGHTING***
>
> *At the time of the collision there was still natural light from the sun, which was at approximately 20' to the rear of Vehicle 1 as it was travelling towards the highway.*

[29]See s.3(1) *Criminal Code*
[30]see s.38E *Interpretation Act*
[31]see s.3(2) *Criminal Code*
[32]vol 1 folio 99 paras 10, 11, 12 and 13

**13. *TRAFFIC DENSITY.***

*At the time of the collision traffic flow was light*

The witness Rosanne Rowlings drove on the same section of road and in the same direction as vehicle 1 within minutes of the accident. Her statement confirmed in oral evidence is that:

> *At the time of the accident the weather was fine with no rain. There was no dark clouds or anything to obstruct visibility, which was very good. I had no problems seeing that stationary ute some distance before arriving at the area, certainly plenty of distance to have pulled up if required, even towing that heavy trailer. The sun was not shining on my windscreen and there was absolutely nothing that would have caused on obstruction of visibility in that area.*

The evidence available to Const Evans which has been placed before this inquest is that vehicle 1 was in a roadworthy condition prior to the accident. [33]

**Drug/Alcohol Involvement**

Const Evans deals with this issue in his report of 22 October 1998 in the following terms

> *Soon after the collision, the driver of Vehicle 1, Jason CLIMAS, left the scene and returned almost 2 hours later, in an uninjured state. CLIMAS was not subjected to a breath analysis or blood test due to lapsed time constraints.*
>
> *Information received from Senior Constable Dean BARRETT is that he could not smell liquor on CLIMAS'*
>
> *Alcohol is not considered a factor in this collision.*[34]

This conclusion however ignores the evidence of Sgt Sattler.

With the possible exception of Sgt Sattler, the evidence of the other persons who had dealing with him that night is that Climas did not appear to be affected by drugs or alcohol.

Andrew Gascoigne spoke to Climas at the scene, drove him back to Darwin River Rocks a distance of 16.4 klms and then drove him back to the scene.

[33] see report of mechanical inspection at vol 1 folio 28, see report of Const Evans at vol 1 folio 99 para 19
[34] vol 3 folio 99 para 8

In his statement Gascoigne says *I did not smell any alcohol on his breath and I even asked him if and how many drinks he had consumed and he told me two because he had been working*.[35]

Sgt Sattler says that when he spoke to Climas, and it must be remembered that Sattler asked him one question only, *I could smell liquor when standing next to him*.[36]

Sgt Compton had a somewhat longer conversation with Climas than did Sattler. Compton *says Climas did not smell of alcohol and although seemed shocked, he did not appear to be affected by either alcohol or drugs.*[37] Sgt Compton says he has a good sense of smell.

The usual indicia of intoxication were not present.

**Should Climas have been asked to submit to a roadside breath test.**

A member's power to require a person to undergo a roadside breath test or a breath analysis derives from s.23 of the *Traffic Act*. The fact that a member has reasonable cause to suspect that a person was the driver of a motor vehicle at the time of an accident on a public street or public place in which the motor vehicle was involved is sufficient reason to require the person to undergo the breath test or analysis.

Section 23(1 1)(b) however prevents a member from so requiring at any time after the expiration of 2 hours after the accident.

The evidence is that the accident occurred at approximately 6:00 pm. It was reported to police communications at 1809 hours.

The evidence of Sgt Sattler is that he was approached by Gascoigne and Climas at approximately 7.40 PM.[37] As it was still within the 2 hour time limit, police could have required Climas to submit to a roadside breath test. They didn't. Would it have been better for them to do so?

The Officer-in-Charge of the investigation, Constable Evans, gave evidence that he was surprised that a breath test had not been carried out. He said that he would have done one. He had his own breath test kit in the car. He said he would have carried out a breath test for the sake of carrying out a thorough investigation He says it should have been done if for no other reason than to rule the issue out of contention.

[35]vol 1 folio 45.7
[36]vol 1 folio 88b.9
[37]vol 1 folio 88d.7, vol 3 tab 9 page 5.5

The remaining police evidence on this issue was that the reading generated by the breath testing machine - the Draegar - is inaccurate and unreliable. Yet police rely upon the reading provided by the Draegar on a daily basis in deciding whether or not to request a driver to further submit to a breath analysis. Police rely upon its inaccurate result to deprive a person of his liberty for the purpose of providing incriminating evidence against himself. One would have thought that if the results of the Draegar were sufficient for that purpose, they may well have been of some use in these proceedings.

The police evidence was that it is the evidence of the breath analysis which is admissible and not the evidence of the breath test. The nearest breath analysis machine was at the Peter McAulay Centre - some 30 to 40 minutes away. The police witnesses gave evidence that they could not have made it to Berrimah within the 2 hr time limit. At any time after approximately 8.00 pm police could not have legally required Climas to submit to a breath analysis.

The answers which they gave may well accord with the *Traffic Act* and may be appropriate in a court of law bound by the rules of evidence. However any death in the Northern Territory may also be the subject of a coroner's inquest which is not bound by the rules of evidence. In this inquest an issue has arisen as to whether Climas may have been affected by alcohol. There may be conflicting evidence on the issue. Had a breath test been administered, the result may have gone some way in assisting you in resolving this issue.

**The driver's explanation**

On the night of 12 July 1998 Climas was spoken to by 6 members: Sgt Sattler,' Sgt Compton, Snr Const Barrett, Det Sgt Chapman, Det Sgt Nixon and Det Snr Const Jenkinson.

At no time on the evening of 12 July 1998 did any member caution Climas before speaking to him.

The members consistent explanation is that they were not investigating an offence. They were merely attempting to ascertain who the driver was.

Several matters have emerged in evidence which are worthy of comment.

Climas. In his evidence Barrett said had Climas tried to leave he would have stopped him. In his statement dated 2 March 200 he *says at this stage I knew this person to be the driver of the utility located in the long grass*.[39] He confirmed this in his evidence. Snr Const Barrett saw nothing wrong with asking Climas *so what happened here*[40] and a number of other questions directed at the same issue.

It is arguable that at the time of questioning by Snr Const Barrett, Climas was being detained and in fact was under arrest. If so he should have been informed[41] of this fact.

The are well established constraints that apply to the interrogation of suspects. They were discussed by Mason CJ in the case of *Van Der Meer v The Queen*[42] in the following terms,

> *The common law balances (a) the need to allow the police freedom of action in the investigation of crime in order to ascertain the wrongdoer and (b) the need to ensure that a suspect is fairly treated and his right to silence protected. This balance is achieved by permitting the police to conduct a general inquiry into an unsolved crime until the stage is reached when the accusatory stage begins. It is notoriously difficult to define the point at which that stage begins because there is an infinite variety of fact situations. The Judges' Rules endeavoured to meet this problem by imposing restrictions on police interrogation by reference to the occurrence of three events in the course of an investigation. They were: (1) when a police officer made up his mind to charge the suspect with a crime (Rule 2); (2)* ***when a suspect was taken into custody*** *(Rule 3); and (3) when a suspect was formally charged (Rule 8). The occurrence of any one of these events may be taken as marking the beginning of the accusatory stage when the giving of a caution is required. see The, 'An Examination of the Judges' Rules in Australia", (1972) 46 Australian Law Journal 489, at p 493. And in one other situation at least the obligation to give a caution will arise earlier. For example, when the police have sufficient evidence in their possession to justify a charge, even if they have not decided to charge the suspect: see DeWin, op. cit., p 29.* ( emphasis added)

[38]vol 1 folio 84.9, vol 3 tab 10 page 3.1
[39]vol 1 folio 85.1, vol 3 tab 10 page 3.4
[40]vol 3 tab 10 page 3.5
[41]Dunne v Clinton [1930] Ir R 366 at 372 per Hanna J, Heiss v R; Kamm v R (1992) 2 NTLR 150 at 180-181 par Gallop, Martin and Angel JJ
[42]62 ALJR 656 at 658 per Mason CJ, see also R v Maratabanga 3 NTLR 77 at 86 per Mildren J

Each of the four events just mentioned is a signal that the general inquiry has reached the stage whereby the suspect has been identified as the perpetrator of the crime and as the guilty party. It follows, therefore, that further investigation will almost certainly be directed to the obtaining of further evidence to support a prosecution. In saying this I have so far referred to "custody" in the sense in which it seems to have been understood in Lee (at p 155), that is, as the equivalent of formal arrest, at least for the purposes of Rule 3. In Smith v. The Queen (1957) 97 CLR 100 Williams J took a rather different view, observing (at p 129): 'Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody. 7rue it is, unlawful detention for the purpose of interrogation does not have quite the same significance in marking the end of the general inquiry into the crime as do the other events already discussed. On the other hand, it is a fundamental principle of the common law that a person cannot be taken into custody or kept in custody for the purpose of interrogation: Williams v. The Queen (1986) 161 CLR 278, at pp 291-299, 305. And there is much to be said for the view that, when interrogation takes place at a police station in the circumstances described by Williams J in Smith (at p 129), the police come under an obligation to administer a caution. That is not only because the interrogation takes place under compelling circumstances but also because the fact that the police create the impression that they are detaining the suspect is in itself some indication that they are contemplating the taking of further steps in relation to him.

If one accepts Sgt: Compton's evidence that he *instructed (Barrett) to continue making further inquiries with Climas* the situation regarding admissibility of evidence becomes more precarious. Barrett denies that he was instructed by Compton to make further inquiries yet his questioning of Climas belies that denial.

If Compton did ask Barrett to *continue making further inquiries with Climas it* is strange that he arrested Climas without first inquiring of Barrett the results of those further inquiries. Barrett in his evidence said that he had no recollection of speaking to Compton before Compton arrested Climas. Compton does not

[38]vol 1 folio 84.9, vol 3 tab 10 page 3.1
[39]vol 1 folio 85.1, vol 3 tab 10 page 3.4
[40]vol 3 tab 10 page 3.5
[41]Dunne v Clinton [1930] Ir R 366 at 372 per Hanna J, Heiss v R; Kamm v R (1992) 2 NTLR 150 at 180-181 par Gallop, Martin and Angel JJ
[42]62 ALJR 656 at 658 per Mason CJ, see also R v Maratabanga 3 NTLR 77 at 86 per Mildren J

say that he spoke to Barrett before arresting Climas. Admissions to Barrett aside, no additional information had been received by any member at the scene implicating Climas as being the driver of vehicle 1.

The only basis upon which Sgt Compton could have arrested Climas was that[43] he believed on reasonable grounds that Climas had committed an offence. That belief could only have been based on what Climas had told him and Sattler and from descriptions obtained from the civilian witnesses. It is not clear from the evidence which offence(s) Climas was arrested for. Any offence for which Climas was arrested had to contain as an element that he was the driver of vehicle 1.

There can be no doubt that by the time Det Sgt Chapman spoke to Climas at the scene Climas had been formally arrested by Sgt Compton. What then was the purpose of Chapman speaking to Climas and what was the evidentiary value going to be of any conversation which was not made under caution and was not recorded. The submission will be that the Chapman/Nixon conversations were not intended to have any evidentiary value. It is difficult to see how the issue of determining the driver was not inextricably bound up with any matter upon which Climas had been arrested. It is my submission that given the evidence was sufficient to justify arrest, any conversations following his arrest should have been conducted in accordance with the general principles of common law and the provisions of Part VII Division 6A of the *Police Administration Act.*

The purpose of the conversations between Climas, Chapman and Nixon are not in doubt. Their purpose of the Climas/Nixon conversation is apparent from running sheet entry 658,[44] it was to determine whether Climas was the driver.

The police put themselves in a very difficult position that night. If nothing else they left themselves open to judicial criticism in the event that Climas had made admissions the following day which he subsequently challenged as having been obtained in breach of established principles. In addition, all they managed to secure for the purpose of these proceedings was their conclusion that Climas was the driver. It seems as if a good part of the evidence upon which that conclusion is based is missing.

[43]s.123 Police Administration Act
[44]vol 3 tab 3

Accepting the main thrust of the evidence of Chapman and Nixon on this aspect, following those discussions the position was that the CIB members confirmed Compton belief that Climas was the driver of vehicle 1. Yet the following morning Climas was released without being charged after the declined to participate in a formal interview.

In my submission that part of the investigation focusing on Climas as the driver of vehicle 1 lost some direction on the night of 12 July. The burden of running with the case was passed from member to member without sufficient regard being has to the status of the detainee.

I turn now to consider any explanations provided to police by Jason Climas. The only account we have out of his mouth is that given to Snr Const Barrett[45] and said to have been confirmed by other members. That conversation was in the following terms:

Barrett: *So what happened here?*

Climas: *I can't remember. I was driving along the road and I thought I saw something on the road.*

Barrett: *Did you see the vehicle on the side of the road?*

Climas: *No I thought I saw something but I can't remember.*

Barrett: *Do you remember hitting anything or any noises of something being hit?*

Climas: *No. I remember trying to reverse the car out of the bush but it wouldn't go anywhere. I then got out of the vehicle and saw a body lying on the side of the road.*

Barrett: *Did you go over to where this person was lying?*

Climas: *No*

Barrett: *Was there anyone else in the car with you?*

Climas: *No I was by myself.*

Barrett: *Have you been drinking at all?*

Climas: *I've had one beer this morning but nothing since.*

[45]at vol 3 tab 19 page 3-4

Barrett: *Have you used any sort of drugs today?*

Climas: *No*

Barrett: *Where were you going?*

Climas: *To the shops to get some cigarettes*

Barrett: *Why not get them from Berry Springs store?*

Climas: *I know I just wanted to go to the main service station at Noonamah.*

After some time Climas said *I'm in the shit.* Why he thought so remains unexplained. The statement is however equivocal. Putting it at its highest, perhaps he knew that he had committed an offence. Putting it somewhat lower perhaps he thought he had done something wrong. Putting it lower still, perhaps he thought he would incur the wrath of Scott Eaton because he had damaged the car. No adverse inference can be drawn from the utterance.

When Const Evans attempted to formally interview Climas on 13 July 1998, Climas declined to participate, as is his right.

Similarly when called before this inquest to give evidence Climas declined to answer any questions on the ground that his answers may tend to incriminate him. His refusal was in accordance with law.[46]

In summary all the objective circumstances available to the investigators have been placed before this inquest. No other avenues of inquiry present themselves. The only person who can tell this inquest what happened has refused to do so and is not compellable.

Do these circumstances give rise to a belief that *a crime may have been committed.* One principle that needs to be understood clearly in these circumstances is that no adverse inference can be drawn against a person by reason of his failure to answer when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they each played. In 1991, the right to silence was considered by the High Court of Australia in the case of *Petty and*[47] *Maiden v The Queen.* In that case Mason C.J., Deane, Toohey and McHugh JJ in their joint judgment said:

[46]see s.38 of the Coroners Act
[47](1991) 193 CLR 95

> *A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless. …*

The only crime which presents itself for any consideration on the evidence is the offence of doing a dangerous act contrary to s.154(1) of the *Criminal Code.* It is the offence which is used to prosecute cases of dangerous driving or culpable driving. Section 154 relevantly provides:

> *(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years. (See back note 2)*
>
> *(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.*
>
> (4) *If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.*
>
> (5) *Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section.*

Section 154 was considered by the Nordier Territory Court of Criminal Appeal in the case of *Sanby v The Queen*.[48] A number of observations made in that case are apposite to the present. In his judgment Martin CJ said:

[48](1993) 117 FLR 218

> *In a case arising from a fatal event, a fortiori, a calamitous one, great care must be taken to ensure that the workings of the minds of the members of the jury do not initially focus on the result, and then work backwards in a search for an act or omission giving rise to the result. The provisions of s 154 of the Code distinctly separate the two happenings. Indeed, they need not co-exist. The offence may be committed without anyone suffering grievous harm or death (for example, firing a rifle across a suburban parkland or busy thoroughfare). It is only if all of the elements going to make up the offence are found that the circumstances of aggravation, if they are alleged, fall to be considered In that regard the heavily qualified language of s154(1) must be carefully observed and rigorously applied. The danger must be serious; the circumstances in which the ordinary person is to be placed must be similar to those of the accused at the relevant time; the ordinary person must be found to have clearly foreseen the danger. All that beyond reasonable doubt. To approach the question of displacing the presumption of innocence attendant upon any accused person in a manner which does not give full effect to the words constituting the offence is to invite injustice. That is so whether the conduct alleged to have caused the serious danger might be regarded as comparatively trivial or most serious (I do not agree that it is only when potential danger is alleged to have been caused can comparatively trivial conduct constitute an element of the offence).*
>
> *There are two further essential elements which must be made out to constitute the offence. The act or omission complained of must be shown to have been done or made by the accused, and to have caused the serious danger. The first of these requirements might not normally present any difficulty, but the second can give rise to difficult questions of fact, to be decided by the application of commonsense to the evidence, and applying the criminal standard of Proof*[49]

Angel J observed:

> *Section 154 of the Criminal Code is very broad in scope and covers all manner of conduct: Baumer v The Queen (1988)* 166 CLR *51 at 55, Attorney-General v Wurrabadlumba* (1990) 74 NTR *5. Whilst the act or omission giving rise to the danger needs to be voluntary, the danger created thereby need not be an intended consequence, nor a consequence actually foreseen by the perpetrator of the particular act or omission in question.*

[48](1993) 117 FLR 218

> *The section creates an offence regardless of consequences beyond the danger, actual or potential itself. The section relates to voluntary conduct constituted by acts and/or omissions which objectively cause serious actual or potential danger irrespective of any consequential harm. The deliberate use Of the words "serious" and "clearly" is significant. The offence created by s154 is a lesser crime than manslaughter which, under the Code, relevantly requires actual foresight of the possibility of death. Section 154 addresses the question of foresight in terms of an ordinary person in similar circumstances to the accused clearly foreseeing a serious danger being caused by the accused's voluntary acts and or omissions. I am of the opinion the use of "serious" and 'clearly' is intended to permit juries to say in any given case where the line should be drawn between dangers which may be characterised as ordinary incidents of modern life, and dangers caused by plainly blameworthy conduct. In my opinion, s154 is not directed at conduct which causes dangers which are ordinarily accepted as incidents of modem life, or, conduct which, even if giving rise to civil liability in negligence, would not widely or generally be regarded as "criminal" The use of "serious" and "clearly", in my view, requires the jury to say in any given case on which side of the line between an acceptable or an unacceptable risk of danger to others, the case before them falls. Questions of foreseeability are inevitably addressed in hindsight and as Lord Pearce said in a different context in Hughes v Lord Advocate (1963) AC 837 at 857: ".. to demand too great precision in the test Of foreseeability would be unfair ... since the facets of misadventure are innumerable ... "4. The jury's task in approaching these matters is a practical and commonsense one. The terms of s154 enable due allowance to be made for errors of judgement, momentary lapses of attention and the like which no reasonable person would label "criminal* ,[50]

It was the opinion of Mildren J that

> *the section requires more than Proof of conduct which, in a civil court, might be sufficient to sound in damages for negligence. First, the section requires proof of an act or omission that causes serious danger, actual or potential, to the life, health or safety of another. Although the act or omission need not be of a quality that it causes any actual danger, so long as there is a potential danger, (it is in this*

[50] 221-222

> *sense that the offence may be comparatively trivial) nevertheless the danger, whether actual or potential, must be serious. Obviously this is a question of degree calling for an evaluation of the severity of the risk. If the danger is serious, the quality of the seriousness of the risk is to be judged by the requirement that the danger must be clearly foreseeable by an ordinary man, and of such a quality, that the ordinary man would not have taken it. The use of the word clearly indicates, as does the word serious , that the risk must not be too slight, too remote, too improbable or unlikely; but that is not to say that only risks that are fanciful or far-fetched are outside of the section. In my opinion the test of foreseeability of risk is not the same as reasonable foreseeability of risk of injury in the law of civil negligence. The test to be applied is that of the ordinary man similarly circumstanced in contradistinction from that of a reasonable person similarly circumstances: of s31(2) of the Code. This is another indication that the proper test is a higher one than the standard of care of the reasonable man on the Clapham omnibus. The test of the ordinary man similar circumstances who must clearly foresee the risk, is an indication that the section intends to make allowance for ordinary human fallibility - the sort of common place error of judgment and inadvertent acts of carelessness that happen because the risk is outside of normal human experience, because the wrongdoer's attention is distracted, because the wrongdoer makes the wrong choice when confronted with the need for sudden decision, or because of other similar factors. But to say that is not to substitute a different test from that required by the section. The jury must be satisfied beyond reasonable doubt that the act or omission caused serious danger to the life, health or safety of some other person in circumstances where an ordinary person, similarly circumstances to the appellant, would clearly have foreseen such danger and not have done or made the circumstances that the appellant found himself in as well as take into account the age, experience and level of skill of the appellant in whatever he was engaged in, if relevant tot he foreseeability of danger by the act or omission in question.*[51]

The danger must therefore be assessed without regard to the deaths. Deaths aside, all that can be said is that vehicle 1 crossed onto its incorrect side of the road at some point as it was traveling through a sweeping left hand bend. It then continued on coming to rest in the bush. There is no evidence of what acts or omissions caused the vehicle to travel this path other than the assumed omission of the driver to control the vehicle properly so that it travelled in its correct lane.

[51] 231-232

Four possibilities present themselves as to how the collision may have occurred.

1. It was totally accidental. That is it occurred through no fault of the driver.

2. It occurred through some fault of the driver falling short of the crime of doing a dangerous act

3. It occurred through the fault of the driver amounting to the crime of doing a dangerous act

4. It was deliberate,

There is also no evidence that the accident was as a result of some freak happening totally beyond the control of the driver.

There is not a shred of evidence that the collision was deliberate. I mention it only because by Const Evans advanced it as a possibility when he was giving his evidence. It can be dismissed out of hand.

Whether the failure was as a result of some voluntary or involuntary act or omission on the part of the driver cannot be said. Whether any act or omission amounted to a mistake or fault cannot be said. If there was fault its extent cannot be quantified. Whether or not an ordinary person similarly circumstanced to the driver would have acted in the same or similar way cannot be said. Whether an ordinary person similarly circumstanced would have clearly foreseen the serious danger occasioned by vehicle 1 following the path that it did without knowing what caused it to do so in the first place cannot be said.

For you to report to the Director of Public Prosecutions and the Commissioner of Police you must *believe* that a crime has been committed. Suspicion and speculation will not suffice. In my submission the state of the evidence is insufficient to give rise to a belief that a crime may have been committed. In these circumstances it is my submission that no report be made to the Commissioner of Police and the Director of Public Prosecutions.

**Summary**

In my submissions you should find. That

both deceased died from multiple injuries sustained after being struck by a white Mitsubishi Triton utility registration number NT 480-638

the driver of that vehicle was Jason Climas.

just prior to the collision Jason Climas was driving through a sweeping left hand bend when for some inexplicable reason his vehicle crossed onto the right hand side of the road and then struck both deceased before coming to a halt in the scrub.

As to how the accident occurred, whether because of civil negligence, criminal negligence or otherwise must be left open.