

INQUEST INTO THE DEATH OF SCOTT RUSSELL JOHNSON
(DoB 27.11.1961)

SUBMISSIONS IN REPLY OF COUNSEL ASSISTING



Introduction

1. These submissions respond to particular matters arising from:
 - (a) the written submissions of the Commissioner of Police dated 18 October 2017
(Police Submissions);
 - (b) the written submissions of the Family of Scott Johnson dated 18 October 2017
(Family Submissions);
 - (c) the reply submissions of the Commissioner of Police dated 1 November 2017
(Police Reply Submissions);
 - (d) the reply submissions of the Family dated 30 October 2017 **(Family Reply Submissions);** and
 - (e) the further reply submissions of the Commissioner of Police as set out in the email from Ashurst to the Crown Solicitor's Office dated 2 November 2017
(Further Police Reply Submissions).

2. The particular matters arising from the above submissions addressed in these submissions comprise the following:
 - (a) The proper application of *Briginshaw* to the task under s 81 of the *Coroners Act 2009 (Act)*;
 - (b) Aspects of the Police Submissions concerning suicide;
 - (c) Aspects of the Family Submissions concerning suicide;
 - (d) 

- (e) The treatment of [REDACTED]'s evidence in the Family Submissions;
 - (f) The treatment of the evidence concerning violence at the Blue Fish Point Beat in the Police Submissions; and
 - (g) The issue of recommendations.
3. It is noted that the Commissioner no longer presses the application for the non-publication order at [54]-[55] of the Police Submissions and that neither of the interested parties have otherwise responded to the Addendum to Counsel Assisting's Submissions.

The proper application of *Briginshaw* to the task under s 81 of the Act and the exclusion of possibilities

4. The task under s 81 should be approached in the manner outlined at [41]-[50] of Counsel Assisting's Submissions (**CAS**), particularly in so far as the application of *Briginshaw* to findings of suicide and homicide is concerned.
5. Two significant aspects of the approach to making findings under s 81 warrant emphasis. *First*, a conclusion that the evidence is not sufficient to make a positive finding that Scott's death was an accident (or for that matter a suicide or a homicide) is not necessarily a finding that accident (or for that matter suicide or homicide) can be excluded as a realistic possibility. To the extent that [13], [38]-[39] and [44] of the Family Submissions suggest otherwise, they should not be accepted.
6. *Secondly*, it is not necessary for the Court positively to exclude suicide and/or accident as possibilities before a finding that the death was a homicide can be made. The same can be said in respect of a finding of accident or suicide. Contentions to similar effect at [9] and [14] of the Family Reply Submissions may be accepted. To the extent that the Commissioner contends otherwise at [2] and [8] of the Police Reply Submissions, that contention should not be accepted.
7. What is required is an actual persuasion that the death was probably the result of one of those possibilities. It may be accepted that cogent positive evidence excluding one or other of the possibilities is a matter that may be taken into account in achieving the required level of satisfaction, but it is not determinative of the matter. If the Court finds that one possibility can be positively excluded, the question is whether the Court

feels an actual persuasion that the death was probably the result of one of the remaining possibilities. If the Court does not feel the required degree of actual persuasion in respect of either of the remaining possibilities, an open finding is appropriate.

8. More particularly, the suggestion at [3] of the Police Reply Submissions that Counsel Assisting agrees with the Commissioner's submission that neither suicide nor accident can be excluded as "likely" possibilities does not accurately reflect the position of Counsel Assisting. The view expressed at CAS [155] was that the matters canvassed in relation to suicide (at CAS [142]-[154]) tended to diminish the likelihood of suicide but that it remained a "reasonable possibility". That was principally because of the absence of any information as to Scott's movements or activities between his telephone conversation with Professor Street and his death. As noted at CAS [149] both Professor Large and Dr Robertson considered that for that reason, suicide could not be eliminated as a realistic possibility. As far as accident is concerned, the highest point of CAS was that it could not be excluded as a bare possibility.¹

Aspects of the Police Submissions concerning suicide

9. The matters raised at [13]-[15] of the Police Submissions involve a degree of speculation in relation to the possibility that Scott wrote a suicide note. The submissions rely on the evidence of Mr Butson concerning the presence of a pen on top of the clothes at the time they were located at the top of the cliff together with the evidence of storm activity. On this basis, the Police Submissions invite the Court to draw an inference that Scott may have composed a suicide note, which was subsequently blown away or destroyed by wind and/or rain.
10. There are a number of difficulties with this submission. *First*, the original investigating police did not photograph Scott's clothes in the position they were when first located at the top of the cliff, but removed them and photographed them at another location. It is therefore difficult to corroborate (or, it is accepted, disprove) Mr Butson's account. Certainly, in his first statement dated that same day, Mr Butson referred to finding some clothing, shoes and a pen without further details as to the type of pen or its precise location.²

¹ CAS [140].

² Exhibit 4.1/20 at [6].

11. *Second*, the photographs that were taken of Scott's belongings depict what appears to be a plastic black Artline felt tip pen,³ which is inconsistent with Mr Butson's evidence as to the type of pen. *Third*, according to Mr Ludlow (one of the police officers who attended the site where the clothing was located), the felt tip pen was not found on top of the clothing, but was inside the running shoes (together with Scott's digital watch, a black comb and a key).⁴ This is also inconsistent with Mr Butson's evidence.
12. *Fourth*, at its highest, the evidence of a pen (however described) being located with Scott's other belongings would enable the Court to draw an inference that Scott at or around the time of his death had access to at least one part of the means to compose a suicide note if he had wished to do so. There is no evidence of any notebook, pad or paper.⁵
13. *Fifth*, it could equally be said that the fact that Scott had the means to compose a suicide note and no suicide note was located is consistent with an inference that Scott had no intention of composing a suicide note because he had no suicidal intent. Such an inference is no more speculative than the inference the Commissioner asks the Court to draw and demonstrates the limited significance that may be placed upon evidence of a pen being located amongst Scott's belongings.
14. *Sixth*, having regard to Scott's known high level of intellectual functioning, it would seem unlikely that, having composed a suicide note (which one would expect Scott intended to be found), he would not appreciate the possibility of it being blown away or destroyed by weather and take precautions against such an occurrence. That is particularly so in light of the evidence that other items such as his watch, comb and a key having been placed inside one of his shoes.⁶
15. At [17]-[19] of the Police Submissions, the Commissioner contends that the fact that Scott was naked neither supports nor detracts from the possibility that his death was a suicide. While it may be accepted that nakedness does not of itself exclude the possibility of suicide, the evidence of its rarity, when assessed in the light of all the other evidence may diminish the likelihood of suicide.

³ Exhibit 4.5/118.1 and 118.3. See also, per Ludlow at Exhibit 4.1/15 at [4].

⁴ Ludlow at Exhibit 4.1/15 at [4].

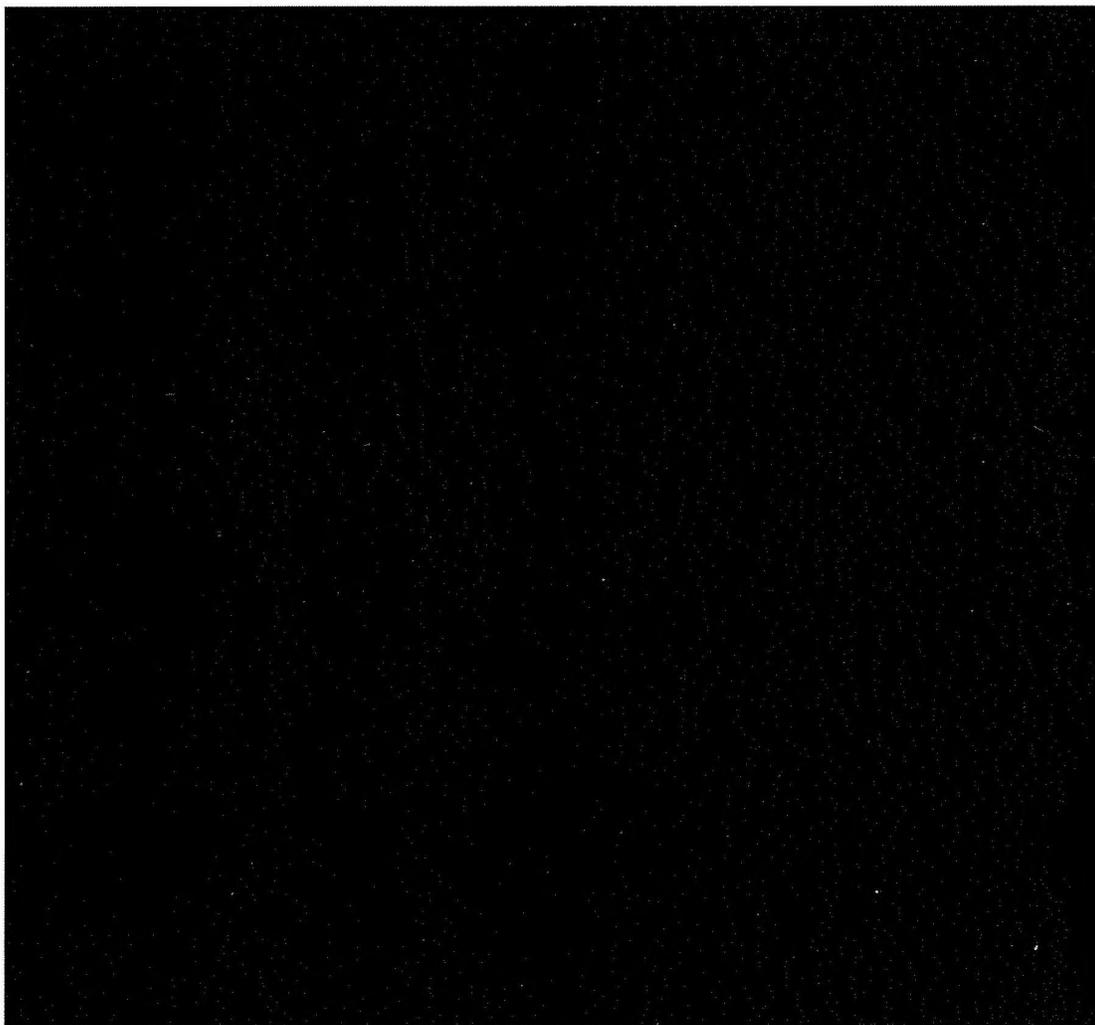
⁵ Exhibit 4.1/16 at page 2.

⁶ Cf Family Reply Submissions at [30].

Aspects of the Family Submissions concerning suicide

16. Notwithstanding the matters raised at [15]-[23] of the Family Submissions, the evidence of Mr Noone concerning the incident of prior suicidal ideation in San Francisco cannot be completely set aside. This is because the fact of an incident having occurred is supported by the evidence of Mr Bancroft and Mr Grealy. In addition, as noted at CAS [146] both Dr Robertson and Professor Large agreed that there was a link between previous suicidal ideation and subsequent suicide, although Professor Large considered it to be a statistically weak link.
17. The issue is whether the incident could be classified as ideation, planning or attempt. It is accepted that to the extent that Mr Noone's evidence speaks to those issues, it may be unreliable for the reasons outlined at Family Submissions [18]-[21]. However, somewhat contrary to the view expressed at Family Submissions [23], it is submitted that the highest that Mr Noone's evidence rises on the issue is that on an occasion whilst Scott was in the US in about 1985, he had a sexual encounter with another gay man that led to his becoming sufficiently concerned at the time that he may have contracted the AIDS virus that he at least contemplated suicide involving jumping from the Golden Gate Bridge but that he could not go through with it.
18. The submissions at Family Submissions [30]-[35] appear to misapprehend the effect of Dr Robertson's evidence concerning the "triggering event that ultimately led to [Scott's] demise" (quoted at Family Submissions [31]). It is submitted that the effect of Dr Robertson's evidence can be expressed by the following propositions:
 - (i) There is an absence of evidence as to what happened between the time of Scott's conversation with Professor Street and his death;
 - (ii) Although Scott was not suicidal at the time of the conversation with Professor Street, there is a reasonable possibility that Scott's death was the result of a suicide following a triggering event that occurred after that conversation, most probably at Blue Fish Point. This is because research supports the possibility that an impulsive suicide can be triggered by a traumatic event if the means to suicide are available; and
 - (iii) In the absence of evidence of a triggering event, accident or homicide also remain plausible possibilities.

19. It is accepted that there is no evidence as to what, if any, triggering event Scott may have experienced at Blue Fish Point that might have caused him to suicide. But that fact must be assessed in a context in which there is a complete absence of evidence of Scott's movements and experiences between the conversation with Professor Street and his body leaving the top of the cliff at Blue Fish Point. That lack of evidence also impacts upon the ability to draw conclusions as to the other possibilities of accident and homicide.



The treatment of [REDACTED]'s evidence in the Family Submissions

22. The Family Submissions at [64] speculate as to the reasons why [REDACTED] may have resiled from the account he originally provided to Mr Glick and later police. While those explanations may be reasonably open, they do not lead to the conclusion that

he must have been speaking the truth when he initially came forward. The Court can only speculate as to [REDACTED]'s reasons for doing so and whether or not (and when) he was motivated to provide an honest account.

23. Moreover, the Court is ultimately left in the unfortunate position of being asked to choose between two contradictory accounts from the one witness. In those circumstances, the Court may find it difficult to place weight on either version of events, particularly in the absence of any independent corroboration.

The treatment of evidence concerning violence at the Blue Fish Point beat in the Police Submissions

24. The Police Submissions emphasise what is asserted to be a lack of reliable evidence of violence towards homosexuals at the Blue Fish Point beat in the late 1980s or early 1990s as a matter that militates against a finding of homicide or foul play.⁷
25. In the first instance that approach is predicated upon the Court confining the evidence of Mr Antares and Mr Sharp to the period when they were users of the beat. For Mr Sharp's part, it may be accepted that he ceased using the beat sometime prior to about 1980. It must be remembered, of course, that Mr Sharp was a friend of Bryan (Sadie) Thompson, who in 1986 was the victim of a stabbing after engaging in homosexual acts with a man he met at the Blue Fish Point beat. While Mr Sharp may have not attended the beat after 1980, he maintained contact with Mr Thompson, who apparently continued to use the beat throughout the 1980s, 1990s and even in the 2000s, although less frequently.⁸ According to Mr Sharp, in his conversations with Mr Thompson, Mr Thompson would tell him that bashers had gone through the beat⁹ and another person known to Mr Sharp, Graham Boileau, had told Mr Sharp of seeing someone come down from the beat with a bleeding face or obvious bruising.¹⁰
26. Mr Antares, however, was a beat user from the early 1980s until about 1992. His evidence was that he heard that someone had been bashed at what he called "Fairy Bower beat" but could not initially recall when he heard that information. When asked whether it was in the 80s and 90s or later, Mr Antares said, "*it was, if anything, maybe*

⁷ Police Submissions at [27]-[36].

⁸ Day 6 – 14.06.2017 at T20.1 – T21.12, T24.50 – T25.1.

⁹ Day 6 – 14.06.2017 at T21.14-17.

¹⁰ Day 6 – 14.06.2017 at T21.35-38.

a bit earlier in the early 1980s;¹¹ In short, his evidence was not as definite as suggested in the Police Submissions. Even so, Mr Antares also gave evidence that he often got a bad feeling when he went to the Fairy Bower beat and there were *"maybe even half a dozen occasions where I'd meet somebody who was either very anxious or rude or aggressive"* or who he felt could be aggressive.¹² He also gave evidence that although he felt safer *"beyond the wall"* bashings could still occur and he *"was always wary of what could go wrong, that something could happen there"*.¹³

27. Mr Antares' evidence of his own personal appreciation of the ever present possibility of violence at the Fairy Bower beat is consistent with other evidence in the brief concerning the prevalence of anti-gay violence at gay beats in the 1980s, including the evidence of Detective Senior Constable Cruickshank at the First Inquest that *"if a particular area is frequented by homosexuals we have those in the community who take a dislike to those persons and will frequent there either to assault them or rob them or cause them some harm in some way"*.
28. That evidence was echoed in Mr Klemmer's evidence that although he did not hear talk of the Blue Fish Point beat being a dangerous place *"it is in the nature of a beat to feel threatened"*.¹⁴ Neither the evidence of Detective Senior Constable Cruickshank nor that of Mr Klemmer was confined to a period prior to the death of Scott Johnson.
29. In this context, there is also evidence that there was a reluctance on the part of the gay community to report instances of violence at gay beats to police.¹⁵ By reason of that, the Court may conclude that an absence of reporting of incidents of violence at the Blue Fish Point beat around the time of Scott's death does not of itself support a conclusion that no such incidents occurred.
30. The Police Submissions on this issue also invite the Court to disregard the evidence of [REDACTED] in its entirety,¹⁶ [REDACTED]
[REDACTED]
[REDACTED] While it may be accepted that, as set out above, there is good reason to

¹¹ Day 5 – 13.06.2017 at T50.23-33.

¹² Day 5 – 13.06.2017 at T45.39-49.

¹³ Day 5 – 13.06.2017 at T52.2-10.

¹⁴ Day 5 – 13.06.2017 at T20.46 – T21.2.

¹⁵ See, for example, Day 5 – 13.06.2017 at T12.24-46 (Klemmer XN).

¹⁶ Police Submissions at [32].

¹⁷ Police Submissions at [33].

treat [REDACTED]'s evidence with considerable caution, the Court may well conclude that it cannot be disregarded altogether, particularly as regards the use of the beat by gay men in the late-1980s. This is because much of what [REDACTED] told the police [REDACTED] [REDACTED] was consistent with other evidence before the Court concerning how the beat operated as well as site-specific information concerning access to the beat.

31.

[REDACTED]

32. Moreover, as set out in CAS [240]–[242] there is some evidence before the Court as to violence being perpetrated upon gay men, including in the Manly vicinity, by those who were located at the North Head School of Artillery at around that time.

Recommendations

33. It is understood that in the event that the Court should find either the death was the result of homicide / foul play or that the manner of death remains open, the matter will remain an open case to be further investigated in accordance with the NSW Police's ordinary protocols for such matters. While there remain a number of avenues of investigation that may be pursued (and have continued to be pursued since the conclusion of the hearing of this Inquest in June 2017), it is submitted that it would not be appropriate for this Court to make any recommendations concerning the form any such further investigations should take or as to how the resources of NSW Police should be allocated to those investigations, nor as to referral to the NSW Crime Commission.

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8 November 2017