

IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2009 5930

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1)

Section 67 of the Coroners Act 2008

Inquest into the Death of: MR REX SYLVESTER SIZELAND

Delivered On:	28 June 2013
Delivered At:	Coroners Court of Victoria Level 11, 222 Exhibition Street Melbourne Victoria
Hearing Dates:	25, 26 March 2013
Findings of:	CORONER K. M. W. PARKINSON
Representation:	Mr T. Bourke of Counsel for Mr Costa Mr G. Stewart Solicitor for the family of Mr Sizeland
Police Coronial Support Unit Assisting the Coroner	Leading Senior Constable Kelly Ramsay

I, K. M. W. PARKINSON, Coroner having investigated the death of MR REX SILVESTER SIZELAND

AND having held an inquest in relation to this death on 25, 26, 27 March 2013
at MELBOURNE

find that the identity of the deceased was

born on 1 January 1943

and the death occurred on 22 December 2009

at The Alfred Hospital, Commercial Road, Melbourne.

from: 1 (a) Head injury sustained in a motor vehicle collision (Cyclist)

in the following circumstances:

1. An inquest was held into the death of Mr Rex Reginald Sizeland on 25 and 26 March 2013.
2. The Coronial Brief included statements of witnesses who have been called by the Coroner to expand upon their statements and statements from a large number of persons who have not been called but whose statements form part of the evidence before me. The brief also includes statements from motor collision investigators and additional materials including statements from telecommunication provider Telstra as to communication systems and telephone data analysis. Whilst I do not refer to all of the material or its contents, I have considered all of this material in my finding in this matter.
3. Witnesses who made statements and were also called to give oral evidence were: Mr Robert Hawkins and Mr Robert Hayles, the riders accompanying Mr Sizeland at the time of the collision; Mr Timothy Bennett, Mr Jason Westman, Mr Matt O'Connor, Mr Brendan Nelson, and Mr Tim Miller, who were present at the scene and Mr Zac Anderson who had been communicating with the driver on the morning of the collision. Mr Jackson Costa the driver of the motor vehicle, which struck Mr Sizeland, also gave evidence and was granted a Certificate pursuant to s 57 of the Coroners Act 2008 in relation to his evidence.

BACKGROUND AND CIRCUMSTANCES

4. Mr Sizeland was 66 years old who was born on 1 January 1943. He was a retired man who resided at Torquay. Mr Sizeland was a regular road bike cyclist who rode long distances for fitness. He would regularly travel in excess of 100 kilometres a week on his bike and was an experienced road cyclist who was a safety conscious and courteous rider.
5. On 21 December 2009, Mr Sizeland and two friends, Mr Robert Hawkins and Mr Robert Hayles as arranged the previous evening, commenced a ride to Barwon Heads and return.
6. At approximately 7.55 am, Mr Sizeland departed his house at Torquay with Mr Hawkins. They rode to Horseshoe Bend Road where they met Mr Hayles. Mr Sizeland was wearing a brightly coloured orange and green Torquay Cycle Factory lycra shirt. Mr Hawkins and Mr Hayles were wearing similar cycling clothing. The clothing being worn by each of the cyclists was bright and designed to be visible to other road users. Mr Sizeland was also wearing a pair of novelty reindeer ears as it was approaching Christmas. All cyclists were wearing bike helmets.
7. Mr Hawkins describes that he was riding on the inside closest to the bitumen road edge, Mr Sizeland was next to him and Mr Hayles was riding behind. The group were conversing about general matters and he reports that there was nothing out of the ordinary in terms of physical or emotional demeanour.
8. The weather was clear and sunny and there was a light breeze. The three cyclists travelled North along Horseshoe Bend Road for approximately 3 kilometres until they reached the intersection of Blackgate Road. Mr Hawkins noted that the traffic on this day was light compared to previous occasions when they had ridden this road and found it necessary to ride in single file. On this occasion, however it was unnecessary to do so as there was little traffic and visibility was good.
9. The cyclists arrived at the Blackgate Road intersection and indicated their intention to turn right and travel east. Mr Hawkins and Mr Hayles report that once again the traffic was light and that they proceeded along Blackgate Road at a speed of approximately 30kph. Mr

Hawkins was riding in front on the inside, Mr Sizeland rode beside him on the outside and Mr Hayles was riding immediately behind.

10. Mr Hawkins stated that the road to the intersection with Breamlea Road a distance of approximately 4 kilometres and that it took about 6 or 7 minutes to ride that distance from Horseshoe Bend Road. Blackgate Road is described as flat road with a slight rise at about the turnoff to Point Impossible. During the course of that section of ride, Mr Hayles overtook Mr Hawkins and Mr Sizeland and rode in front to give the two other riders a break. The riders slowed at the 'T' intersection and after checking the intersection for vehicles turned left into Breamlea Road.
11. Breamlea Road is a two-way road with a single lane in each direction for North and South bound traffic. The road is a sealed bitumen road with gravel shoulders. The distance along Breamlea Road, between the Blackgate Road intersection and the Bluestone School Road intersection is approximately 2 kilometres. There is a rise in the road approximately 1 kilometre along this length of the road. A house or farmhouse is situated on the east side of the road at about where the rise commences.
12. Mr Hawkins reports that he had a clear view in both directions, as he turned left into Breamlea Road. He states that there was no sun glare and that there were no other distractions to his visibility. This is also the evidence of Mr Hayles.
13. The three riders travelled north on Breamlea Road. Mr Hawkins were still riding side by side and Mr Hayles in front. They were travelling at approximately 27 to 30kph and had maintained this steady pace as evidenced by the bike computer produced by Mr Hayles and that from Mr Sizeland's bike. The bikes were situated on the left side of the road with approximately 1 foot between the handlebars of Mr Sizeland and Mr Hawkins bikes. As they reached the house and the start of the rise, Mr Hawkins recalls being passed by a blue car.
14. His evidence was that the car overtook the cyclists with reasonable clearance and that it passed at what appeared to be a normal speed. He observed the vehicle pass a VicRoads sign some distance down the road and observed the vehicle return to the north bound lane of the roadway. When last observed by Mr Hawkins the blue vehicle was approximately 80 to 90 metres away from the cyclists.

15. Shortly after the bikes were overtaken by the blue car, the cyclists, Mr Sizeland and Mr Hawkins were struck from behind by a red Mitsubishi Lancer sedan driven by Mr Jackson Costa. It appears from the evidence that the cyclists had also passed VicRoads directional sign by the time the collision occurred. The bike computers identify that Mr Sizeland had a ride time of 32.23 minutes and a trip distance of 13.76 kms. Mr Hayles computer identified his ride time as 26.53 minutes and a trip distance of 11.51 kms.

16. Victoria Police investigator Detective Sergeant Peter Bellion stated that the location of the main impact was 13 metres north of a directional sign for Geelong/Barwon Heads & 13th Beach. Impact was designated by a 0.8 of a metre long tyre skid mark, angling north-north-east and centred in the northbound lane, consistent with coming from the rear wheel of a Garmin Felt, Carbon Fibre road bike fitted with 700 x 23c tyres that had been ridden by victim Rex Sizeland.

17. Mr Hayles heard the initial collision and turned immediately to observe the immediate aftermath of the collision. His evidence is:

“The next thing I remember is an almighty crack which was a very loud noise. I immediately looked around and saw that Rex had been hit by a car and he was in mid air. I can’t remember whether his feet or head were in the air I just remember him being in the air. He was travelling straight ahead in my direction. I don’t recall how far in the air he was and I don’t recall him hitting the ground. Simultaneously Rob had been catapulted towards the left shoulder of the road and I could see him sliding into the drain about two metres off the road shoulder. The drain was in a ditch and this is where Rob stopped. As this was all happening, I could see there was a red car veering to the other side of the road. The left side of the windscreen was broken and he pulled up on the right hand side of the road. I think it was a Mitsubishi Lancer but I am not sure. I didn’t hear any screech of tyres”.

18. Mr Hayles evidence was that when he turned upon immediately hearing the noise of the collision he did not observe any visual obstruction such as a cloud of dust.

19. Mr Jason Westman was driving the blue car, subsequently identified as a blue VW Transporter Van, observed by Mr Hawkins and Mr Hayles to overtake them. His evidence was

that he also had left Torquay to travel to 13 Beach Golf Course where he was working that morning. He had also travelled east along Blackgate Road to join Breamlea Road.

20. Mr Westman stated that he had sunglasses on but his visor up and that he did not experience any difficulties with sun glare that morning although it is sometimes a problem at that location. He travelled to the intersection of Breamlea Road and noticed no other traffic. He turned left and travelled North along Breamlea Road in the same direction as being travelled by the cyclists.
21. Mr Westman noted a slight rise in the roadway at the same location, near the house or farmhouse as noted by Mr Hawkins and a slight incline before the road levelled out. At about this location he observed the cyclists ahead of him travelling north on the roadway. His evidence is that he was travelling at approximately 80kph and that whilst it was a 100kph zone, he moderated his speed as he knew that the cyclists were approaching the rise in the roadway and that if he were to overtake safely he would need to wait until he was over the rise. This was to ensure there was no oncoming traffic in the southbound lane before he overtook. He overtook after the cyclists had cleared the rise and he had a clear view all the way ahead along Breamlea Road to the intersection with Bluestone School Road.
22. As he overtook the cyclists, he checked his mirrors and observed a red car in the vicinity of the intersection of Blackgate Road and Breamlea Road. The vehicle was travelling north. As Mr Westman overtook the cyclists, he observed that they were riding handlebar to handlebar and that they were well over to the left of the road and using only about half of the width of the northbound lane. He observed that one cyclist was wearing a Torquay Cycle factory top which was orange and green and that this rider was also wearing reindeer antlers.
23. He overtook without the need to fully enter the southbound lane and merged back into the north lane. Before he merged, he checked the location of the cyclists in his mirror and noted that there was a safe distance between his vehicle and the cyclists. He noted that there was no traffic travelling south along Breamlea Road at this time.
24. Mr Westman evidence was that he looked back in his rear view mirror and observed the red vehicle (Mr Costa's) approaching the three cyclists observed that it did not appear to be slowing and that the driver did not appear to be taking any measures to diverge from the path

of the cyclists. His observations caused him to anticipate that there would be a collision between the vehicle and the cyclists. He stated:

“As I approached the intersection of Bluestone School Road I was approximately 100 metres from the intersection I was preparing myself for the right hand turn at the intersection. I looked into my rear view mirror and saw the three cyclists that I had passed about 60 to 80 metres behind me. Their distance from the edge or middle of the road had not changed since I was behind them. It was then that I saw the red car directly behind them. It hadn’t deviated out of its lane and gave no indication that it was going to move around them and I saw no indication of braking. I could see no smoke coming from the front wheels. It was at this time that I thought to myself, ‘he is going to hit them’. As soon as I made that assumption I saw three bodies go up in the air, one body went vertically and two went to left side of the road. I then noticed the red car heading across in to the oncoming lane, there was smoke coming from the front tyres and the left hand side of the windscreen was shattered”.

25. Mr Westman was mistaken that three cyclists were hit. Mr Hayles was not struck by the car. Mr Westman called 000 as he exited his vehicle.
26. During the course of his overtaking manoeuvres Mr Westman did not see any dust cloud or other obstruction and was able to observe in the distance the oncoming red car driven by Mr Costa. Mr Westman described that he also had a very clear view of the roadway in his rear view mirror in the period immediately prior to the collision. At this time he did not observe any dust or other obstacle to observing the cyclists and was clearly able to identify the approaching red vehicle and the cyclists and to do so for a sufficient period of time to anticipate a collision. Mr Westman’s evidence was that he did see any other car passing or travelling in either direction at or around the time of the collision.
27. Mr Hayles stated that when he arrived at Mr Sizeland’s side, Mr Costa was administering first aid and that he did not have a mobile phone on him and he asked a bystander to call 000. Ambulance paramedics and police attended. Mr Hawkins had sustained serious injuries and was transported to hospital by ambulance.

28. Mr Sizeland had sustained critical injuries and had a Glasgow Coma Score of 3 at the scene. He was transported to the Alfred Hospital at Melbourne by Air Ambulance where it was established that he had sustained a severe traumatic brain injury.

INJURIES SUSTAINED BY MR SIZELAND AND FORENSIC PATHOLOGIST EXAMINATION

29. The CT scans showed a fractured base of skull with left occipital condyle fracture, fractured left and right orbits, right pulmonary contusions, fractured right ribs from the 1st to 10th and fractured left 1st rib, bilateral pneumothoraces and multiple vertebral fractures.
30. Mr Sizeland underwent craniotomy because of refractory intracranial hypertension. The neurologists were consulted and advised that Mr Sizeland had suffered a catastrophic irreversible brain injury with negligible chance of any meaningful recovery. Mr Sizeland died on 22 December 2009.
31. A post mortem examination was undertaken by Dr Michael Burke, Forensic Pathologist with Victorian Institute of Forensic Medicine who provided a report to the Coroner. Dr Burke reported that the cause of death was: 1(a) Head Injury
32. Toxicological analysis of post mortem samples was negative for alcohol and common drugs or poisons.

THE EVIDENCE OF MR COSTA'S ACCOUNT OF THE COLLISION

33. Mr Brendan Nelson¹ states that he was told by Mr Costa at the scene that he did not know what had happened and that he did not see the cyclists and they had just appeared. He said that there was a car in front of him and that he saw the car move across a bit and that he was trying to work out if the sun had affected him or some dust had caused him not to notice the cyclists.
34. Mr Costa was spoken to by police at the scene and a Preliminary Breath Test administered which was negative. His mobile telephone was provided to police at the scene, some time after the collision. Mr Costa subsequently participated in an interview with police and stated in that

¹ Exhibit 10 - Statement Mr Nelson dated 21 January 2010

interview that he left home at Torquay at approximately 7.30am to drive to Ocean Grove where he was working that day².

35. Mr Costa stated in that interview that he followed a white car into Breamlea Road and that the car was ahead of him and he believed the car had raised a cloud of dust and that this was the reason why he drove into the cyclists without seeing them on the roadway. He stated that he drove through the dust and did not brake or slow his vehicle.
36. He also stated that whilst he may have looked at his speed otherwise he was not distracted by anything, that he did not use his mobile phone and the phone was in the centre console of the car. He described the centre console as an open console without a cover or lid.
37. The car stereo was operating via his iPod which was automatically activated upon starting the car and did not require connection or manual adjustment and that he did not adjust the iPod, he was not eating or drinking and nor was he otherwise distracted by any item in the vehicle. According to police investigators when they undertook a re-enactment in the vehicle the volume of the stereo was loud.
38. Mr Costa stated that he did not recall losing concentration at any time whilst driving, was not prone to daydreaming, that he had adequate rest the night before and that he did not suffer from any medical condition which may have affected his driving. He stated that he believed there was a cloud of dust thick enough to obscure the cyclists from his visibility.
39. In evidence he conceded it was likely that there was not a white car driving ahead of him and that due to the shock and trauma of the incident he may have confused the sighting of the white sedan with that of the transit van, or with another vehicle he may have seen earlier in the morning³. He also conceded that it was possible the cloud of dust he spoke of had occurred after the collision as his car entered the gravel roadside or as a result of braking.
40. There was inconsistency between his initial statement to police that he left home at 7.30 am and his evidence in the inquest where he stated that he left home later. In evidence, he stated that he believed he left home later than 7.30am and that he was mistaken when he initially

² Record of Interview dated 28 January 2010 - Mr Jackson Costa.

³ Transcript 25 March 2013 at page 80

advised police that he left home at 7.30am and that he was mistaken when he said he was due at work at 8.00am.

41. Mr Costa stated that he received a text message from his friend Mr Zac Anderson during breakfast and that he replied before he left the house. His evidence was that he now recalled that he did not have to be at work until 8.30 and that this would be consistent with his leaving home at 8.00am as it was a 30-minute journey to where he was working at Ocean Grove⁴. This matter is significant because it relates to the timing of mobile phone text messages and to the veracity of Mr Costa's evidence.
42. This alteration of the account by Mr Costa first arose in the proceedings in the context of the proposition being put that the first text message was not in fact read at home and before he left to drive to Ocean Grove but rather was read by him at some point in the journey to Ocean Grove. The suggestion being, that if this were the case, then it is also possible and consistent conduct, that he opened the second text message shortly after it was delivered at 8.17am and shortly before the collision.
43. The difficulty with both of these propositions is that the evidence is uncertain as to the time Mr Costa left home. The evidence is also uncertain as to the time at which the text message was in fact delivered by the telecommunications carrier to the phone, and there is no telecommunication record as to the actual time the text message was opened and no capacity to interrogate this matter by reference to any telecommunications records or by the phone itself. Telecommunication relay towers do not assist in ascertaining where the mobile phone may have been at the time the first text message communication was received.
44. The evidence is that at the scene of the collision and in its immediate aftermath, Mr Costa did not have a mobile phone in his physical possession. The evidence of Mr Hayles is that he did not have or did not appear to have a phone and that he asked others to call 000. Mr Costa's evidence is that he asked bystanders if they had a phone and would they call emergency services.

⁴ Transcript 25 March 2013 at page 83 to 88 and page 90.

MOBILE PHONE RECORDS AS TO CALLS AND TEXTS MADE AND RECEIVED

45. On 21 December two pertinent SMS or text messages were received by Mr Costa's telephone (061) transmitted from the telephone of his friend Mr Zac Anderson (728). The first message, relating to the Family Guy comedy, was confirmed by Telstra records as having been received on Mr Costa's telephone at 7.57am and 50 seconds on 21 December 2009. The record establishes that Mr Costa replied to that message by text at 7.58.44 seconds am on 21 December 2009.
46. Mr Costa states that he did not leave home until after he sent his reply to the first text message. Telstra records identify that this occurred at 7.58.07 am, although the recipient says that he received the response at 8.07 am.
47. The second text message (the only other message received prior to the collision) relating to the Family Guy comedy was received by Mr Costa's mobile phone at 8.17am on 21 December 2009. Mr Costa states that at the time the text message was received at 8.17am on his mobile phone the phone was lying in the open centre console next to the driver. However he states that he did not hear it being received, probably due to the sound from his stereo and he did not look at the message during that period of driving.
48. The collision between his vehicle and the cyclists occurred at approximately 8.20 - 8.22 am. This is to be ascertained by reference to the first call to 000 recorded by ambulance services at 8.22am. The first ambulance was responding by 8.25am.
49. Mr Costa denies that he opened the 8.17am or second text message until he returned to his car after the collision, to call his parents. He stated that he got back into his car to call his parents and saw that he had a message. He opened the message, saw it was from his friend Zac, did not read its contents and then cancelled the message and called his parents.
50. Whilst it may appear unusual conduct, that even with the stress and trauma of the events occurring around him, he would open a text message on his phone from a friend which was likely to be a further flippant and jocular communication in the nature of their earlier communications, people are prone to doing unusual things in circumstances of stress and this explanation cannot be entirely discounted.

51. It is necessary for me to determine what may be reasonably concluded from the records and from the timing of the activity on the mobile phone.
52. If Mr Costa left home as he originally advised police at around 7.30 am and had responded to a text message at 7.58.07am that suggests that at some point during the course of the journey he had looked at and responded to a text message. He may of course have pulled over to do so; however this is not an explanation which is provided. It is possible that even if he did not leave home until 8.00am that he could have arrived at the scene by 8.20 – 8.22 am, which is the time at which the collision occurred.
53. The timing of receipt does not indicate the time at which the text message was opened and this is not recorded on the phone device or on the telecommunication provider's records.
54. It appears that Mr Costa's response to the first text message at 7.58.07 was sent from a tower different to that which transmitted all of the other messages sent from home that day or the evening prior by Mr Costa. The message was transferred from the Anglesea East tower and not the Bellbrae tower. The evidence of Telstra Systems Specialist Mr Timothy Miller is that this may reflect an automatic transfer by the telecommunications provider to a tower with greater signal strength or it may reflect the nearest tower to the location from which the message is sent.
55. It is not possible to interrogate this information any further on the material available and it is not possible to conclude from this information from where the response to the first text message was sent by Mr Costa.
56. Mr Miller's evidence is that it is not possible to establish the precise time when a text message has been opened or read from the telecommunication records and nor do the telecommunication records indicate that an SMS has been opened. The only record would be if there was a response sent and in relation to the second text message received at 8.17am there was no response sent.

VICTORIA POLICE SCENE EXAMINATION

57. Attending police and Major Collision Investigators examined the scene. Leading Senior Constable Gough stated that his examination indicated that there was no attempt by the driver to avoid the collision, there was no evidence of braking and that the only evasive steps taken after impact with the cyclists. Detective Sergeant Bellion stated:

“The location of the main impact was 13 metres north of a directional sign for Geelong/Barwon Heads & 13th Beach. Impact was designated by a 0.8 of a metre long tyre skid mark, angling north-north-east and centred in the northbound lane, consistent with coming from the rear wheel of a Garmin Felt, Carbon Fibre road bike fitted with 700 x 23c tyres that had been ridden by victim Rex Sizeland.

At 80kph, a vehicle travels 22.22 metres per second. The skid mark from the Lancer started 11.5 metres after the skid mark from the main bike that was struck; this would represent a time gap of about 0.5 of a second. 85% of the adult population that are alert and not affected will perceive and react to an emergency in 1.5 seconds or less, meaning this probably occurred about 22.22 metres south of where the bike skid mark started”.

58. His evidence was that the driver likely observed the cyclists at approximately 22.22 metres south of the collision point and that this likely led him to take evasive action by turning the steering wheel. In DS Bellion’s testing in order to achieve the skid marks off to the right, it was necessary to turn the steering wheel half a turn to the right and then the vehicle followed the path of the angled skid marks. His view was that it was most likely that the turn of the wheel occurred prior to impact. His evidence was that the driver likely only became aware of the cyclists at about one second prior to impact or 22.22 metres south of impact⁵.
59. Detective Sergeant Bellion noted that there was no evidence on roadside gravel of skidding or other disturbance of gravel which might create a cloud of dust and that:

⁵ Transcript 26 March 2013 at page 202

“Visibility of the bicyclist would have been available for a far greater distance than this and indicates the Mitsubishi driver may have been distracted from his driving task”.

60. During the course of his evidence, Detective Bellion stated that length of road travelled without observing the cyclists, caused him to conclude that he was distracted from the driving task and that in his opinion he was probably looking at a text message.⁶
61. It is difficult to understand how it was that the driver was unable to see the cyclists having regard to their high visibility clothing, their location on the road, the profile of the roadway, the weather conditions of the day and the relatively light traffic.
62. The only explanation available is that the driver was distracted by an event either occurring inside the motor vehicle or outside his motor vehicle.
63. Mr Costa stated to police after the collision that he had been distracted by a cloud of dust and that he was immediately upon the cyclists. No other witness was able to recall seeing a cloud of dust or any interference with visibility on the roadway either shortly before the collision or in the immediate aftermath of the event.
64. Both Mr Hawkins and Mr Hayles stated that the roadway was clear, although of course they could not see what was occurring behind them. It would be highly unlikely that the cycles caused any plume or cloud of dust by traversing into the rough, which is in any event denied by the cyclists.
65. Mr Westwood’s evidence was that, other than his own vehicle, which did not go into the rough, there was no other vehicle on the roadway prior to the collision, which may have caused a dust cloud. His evidence was that there was no obstruction by a dust cloud observed by him. Mr Westwood was a clear and credible witness whose account of events and his observations I accept.

⁶ Transcript 26 March 2013 at page 198.29 .

66. Police investigators examined the scene and whilst they identified marks in the roadside gravel where Mr Costa's car came to rest, there were no marks or other indications of a vehicle having driven into the gravel on the side of the road at which the cyclists were located⁷.
67. The driver of the blue van, Mr Westwood, travelling ahead of Mr Costa, observed the cyclists with plenty of opportunity to slow, travel behind them for some distance and then overtake when safe. At no time did the blue van traverse the roadside gravel.
68. I do not accept that there was any dust cloud obscuring Mr Costa's view of the cyclists at or around the time that the collision occurred. Had there been a cloud of dust obscuring the cyclists to Mr Costa, the same cloud of dust would have obscured Mr Westwood's view of both the cyclists and the red car driven by Mr Costa and the collision.
69. Nor do I accept having regard to the length of roadway between Mr Westwood's Blue van and Mr Costa's vehicle that there was likely to have been any obstruction to his vision of the cyclists caused by the presence of the blue van. The blue van overtook wide of the cyclists and by way of the south bound lane and was long past the cyclists before the collision occurred.
70. There is no evidence of any external factor, which may have contributed to the obscuring of the driver's view of the roadway.
71. All of this begs the question; If none of these factors applied in the circumstances then what was it that caused a perfectly healthy 19-year-old male to entirely fail to observe three cyclists on the road in front of him on a clear sunny day with no weather interference or other outside interference.
72. The cyclists were riding in a careful manner, were appropriately located on the roadway and not causing undue interference to other road users; they were dressed in highly visible clothing and were all wearing fluorescent or brightly coloured gear. It is not suggested that any riding action on the part of the cyclists placed them improperly in the way of the motor vehicle driven by Mr Costa.

⁷ Transcript 26 March 2013 at page 185.8 -19

ONUS OF PROOF AND HAVING REGARD TO DENIAL OF USING OR LOOKING AT MOBILE PHONE.

73. At issue in this case is the explanation for why the driver did not see the cyclists in front of him on the roadway. It is clear that he was distracted and it has been suggested that this was because he was reading a text message recently received on his mobile phone. Mr Costa denies this was the case and initially reported to police that he had been distracted by a white car and dust, which had obscured visibility and the cyclists on the roadway.
74. Mr Costa conceded in his evidence that there was no white car and that there did not appear to have been any dust cloud visible to any other person. He also gave evidence that he was now unable to recall any of the events, which occurred on the roadway immediately prior to the collision.
75. It is possible that Mr Costa's memory of the events and recollections was affected by the shock of the events and that he is genuinely unable to recall events. It is also possible that his recollection of dust may have been due to an event occurring after the collision as he braked or skidded into the gravel verge, as with the recollection of a 'white' car.
76. The evidence is overwhelming that there was no white car and that there was no dust cloud obscuring the cyclists. I do not accept that there was any distraction arising from the road conditions, weather conditions or any other vehicle causing Mr Costa not to see the cyclists. It is likely that Mr Costa was distracted by an event occurring inside of his vehicle.
77. There are a number of aspects of Mr Costa's evidence which were unsatisfactory. These include his revised evidence in the proceedings as to the timing of his leaving home that morning in the context of his location when he sent the text message reply, his recollections of the white vehicle and his evidence as to the dust cloud at the scene in the face of the evidence of the eye witnesses to the events.
78. Mr Costa's evidence was prone to alteration when he was unable to comfortably come to grips with certain factual matters put to him. It is not clear whether this is because of the length of

time since the event, the shock of the events or whether it is contrived. It may be a combination of all these matters, however I am not on this basis able to conclude that Mr Costa's evidence is not to be accepted in relation to pertinent matters including his denial of certain conduct.

79. There is no evidence that Mr Costa had a propensity to read text messages whilst he drove or that he had ever done so. The evidence in this proceeding does not support a conclusion that on 21 December he read the earlier text message during the course of his journey such that a propensity may even have been established.
80. There are a number of possibilities as to the type or manner of distraction which may have engaged Mr Costa including reading a text message on his mobile phone immediately prior to the collision.
81. Other possibilities such as pure inattention, looking out the window, day dreaming and looking at the car stereo were also raised. Although Mr Costa did not recall any of these matters to have been relevant. It does not appear that Mr Costa suffers from any health issue making him prone to inattention or distraction or that a transient health event occurred on this day. I have also earlier concluded that there was no distraction by a dust cloud during the course of the incident.
82. One explanation for the collision is that Mr Costa was reading the 8.17am text message. There is a co-incidence between the timing of the receipt of the text message and the timing of the collision which is troubling and which gives rise to this possibility. The text message was received at 8.17am and the collision occurred some 3 to 5 minutes later. In addition, there is no evidence of any other distraction arising during the course of the driving.
83. Mr Burke submitted that this timing meant that the text message had been received some minutes before the collision and before Mr Costa entered Breamlea Road. He submitted that the distance travelled from the turn into Breamlea Road and the collision constituted less than 1 to 1 ½ minutes and that this length of time was significant as it suggested there was no immediacy about any response to the message and was consistent therefore with the text not having been read or seen.

84. The fact that there is no other apparent or immediate explanation does not exclude the possibility that there may have been another factor of distraction. The absence of a precise explanation for distraction, does not entitle a conclusion that the only explanation must be that he was reading the text message. This is not the proper approach to the test to be applied in a case where such a finding as to his conduct may give rise to serious criminal proceedings. The standard of proof requires there to be clear and cogent proofs and to a comfortable level of satisfaction.
85. In relation to the proposition that Mr Costa was in fact reading the text message, *'because of the gravity of the allegation, proof of the criminal act must be clear, cogent and exact and when considering such proof weight must be given to the presumption of innocence'*⁸. In the face of Mr Costa's firm denial and in the absence of any objective basis, other than by inference, upon which it could be concluded that he was reading the text message at the time of the collision, whilst it is possible, I am unable to conclude with sufficient level of certainty that this was in fact the case.
86. I am conscious of the reasons for judgment in *Briginshaw v Briginshaw* (1938) 30 CLR 336 at 362; *Secretary to Department of Health and Community Services v Gurvich* [1995] 2 VR 69 at 73; *Anderson v Blashki* [1993] 2 VR 89; *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1 as to standard of proof.

FINDING AS TO CAUSE OF DEATH AND CONTRIBUTING FACTORS

87. I find that Mr Rex Sizeland died on 21 December 2009 and that the cause of his death was head injury sustained in a motor vehicle collision as a cyclist.
88. I find that Mr Sizeland and the other cyclists would have been readily observable on the roadway to any driver who was paying proper attention to the roadway ahead and that the driver of the vehicle Mr Jackson Costa was distracted from the task of driving although I am unable to conclude as to the basis for the distraction.
89. I find that the driver Jackson Costa caused the death and that the death was preventable had proper attention been paid by him to the task of driving.

⁸ *Anderson v Blashki* [1993] 2 VR 89 at 95-6 per Gobbo J.

90. I find that no action on the part of the cyclists caused or contributed to the death.
91. I find that no action on the part of any other driver caused or contributed to the death.
92. I find that there were no roadway characteristics or roadway maintenance issues which caused or contributed to the death.

COMMENTS


Pursuant to section 67(3) of the *Coroners Act* 2008, I make the following comment(s) connected with the death:

1. The death of Mr Sizeland is a tragic reminder, particularly to young or inexperienced drivers, that the task of driving a motor vehicle is a serious responsibility and that momentary distraction whether as a result of distraction by electronic devices or for any other reason can be sufficient time for a catastrophic collision to occur.
2. There are many road safety campaigns directed to the issue of inattention and the use of devices which may distract from the driving task. There is no further recommendation I might usefully make as to this matter.
3. There are no road management or design matters which might usefully be the subject of recommendation.

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

The family of Mr Rex Sizeland and their legal counsel;
Mr Robert Hawkins; Mr Robert Hayles; Mr Jason Westman;
Mr Jackson Costa and his legal counsel;
The Interested parties;
The Investigating member;

Signature:



CORONER K. M. W. PARKINSON

Date: 28/6/2013.

