Sheriffdom of Lothian and Borders at Jedburgh
Inquiry under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

Determination

by

Sheriff Brian George Donald, Esquire,
Sheriff of Lothian and Borders following an Inquiry held at Jedburgh on Ninteenth, Twentieth, Twenty-first, Twenty-second and Twenty-third January; Second, Third, Fourth, Fifth and Sixth March and Ninth and Tenth September, all Two Thousand and Nine, into the death of Angus Hutcheson, aged four months.

Jedburgh, 30 November 2009.

The Sheriff, having resumed consideration of the cause, in terms of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1926 (" the Act") determines as follows: -

1. In terms of section 6(1)(a) of the Act, Angus Hutcheson (DOB 20/08/04) of Ormiston Terrace, Melrose, Roxburghshire died in the Intensive Care Unit of the Royal Hospital for Sick Children (hereafter referred to as "RHSC"), Edinburgh on 4 December 2004. Angus was pronounced dead at 21:14 on that date.

2. In terms of section 6 (1) (b) the cause of death was RSV Bronchiolitis, Chronic Lung Disease, Extreme Prematurity and Cardiac Failure. The RSV Bronchiolitis (hereafter referred to as “RSV”) resulted from an infection which Angus is likely to have sustained in the Special Care Baby Unit of Borders General Hospital (hereafter referred to as "the Unit" and "Borders Hospital" respectively). It was not possible to find on the evidence how the RSV infection was transmitted to Angus.

3. In terms of section 6 (1) (c) there were no reasonable precautions whereby Angus’ death and any accident resulting in his death might have been avoided.

4. In terms of section 6 (1) (d) there were no defects in any of the systems of working in the Special Care Baby Unit of Borders General Hospital which contributed to the death or any accident resulting in death; and

5. In terms of section 6 (1) (e) some other facts were established which are relevant to the circumstances of the death.

Note

Introduction and preliminary points

(a) This Inquiry into the sad death of little Angus Hutcheson aged only four months when he died took place over the course of three weeks of evidence during January and March 2009 and because of the time taken to transcribe the notes of evidence, the summer holiday period intervened so that final submissions could not be heard before 9 and 10 September 2009. Mr Mark Keane, depute procurator fiscal conducted the Inquiry on behalf of the procurator fiscal; Mr Douglas Jessiman, Solicitor appeared for Dr Alexandra Baxter and Dr Andrew Barclay; Mrs Elaine Coull, Solicitor appeared for Borders Health Board the responsible authority for Borders Hospital and its staff; and Mrs Norma Shippin appeared for Lothian Health Board the responsible authority for the Royal Infirmary of Edinburgh (hereafter referred to as RIE) and the RHSC and their respective staff. Angus was born in the Simpson Maternity Unit of RIE and was cared for and treated there until his transfer to Borders Hospital, apart from a brief stay in RHSC for a minor bowel repair. Mrs Rebecca Hutcheson and Mr Alistair Hutcheson the parents of Angus represented themselves, although Mr Hutchison took no further part in the Inquiry after the end of the evidence. It was highly notable as was understandably commented on by Mr Jessiman, Mrs Coull and Mrs Shippin that it had taken more than four years after Angus' death for the Inquiry to get underway. I endeavoured to ascertain why that delay had arisen that is from the date of Angus' death in early December 2004 until the Inquiry commenced in January 2009 but the depute fiscal Mr Keane had little if any information in that respect and would have required to carry out a cumbersome and perhaps lengthy enquiry before he could try to explain it. From what he did know it appeared that much of the arranging of this Inquiry had been in the hands of the Regional Procurator Fiscal in Edinburgh who had had regular and prolonged discussions with Mr and Mrs Hutcheson and other family members.

(b) Early on in the evidence it became apparent that Mrs Hutcheson who attended court alone on the first day, was unfamiliar with the procedure and had apparently understood from some misguided advisor that she was not entitled to take notes and nor was she entitled to refer to any documents in giving her evidence or answering questions in cross examination. I explained to her that she and her husband were parties to the Inquiry and were entitled to take notes, cross-examine witnesses and refer to documents lodged in process if they chose to do so. I would also comment at this point that Mrs Hutcheson was the first witness called by the depute fiscal and about 3 p.m. on the second day, Mr Jessiman commenced his cross-examination of her. Although she had given her evidence in chief in a straightforward and helpful fashion, Mrs Hutcheson became notably unwilling to answer proper and fair questions put to her by Mr Jessiman. As a result it was necessary for me to interrupt and to enquire as to her change of attitude, explaining that in fairness to all the parties I required to have her answers to all questions put to her so that I could reach a fair and proper conclusion as to all the circumstances of Angus' death. Her response was that she knew the cause of his death and that she did not need to

be told this. I therefore pointed out that it appeared likely to me that this Inquiry was taking place at the request of her husband and herself but she denied this and said that the regional procurator fiscal had insisted on the Inquiry taking place. I went on to tell her that I doubted that that was likely to have been the case but that if the Inquiry was to continue effectively, she would require to cooperate by answering as reasonably as she could all questions put to her. I asked her to consider the situation in conjunction with her husband and other members of her family, in particular her mother who was present that day in court. Given the time of day which by that stage, was approximately 15.20 and the fact that Mrs Hutcheson was seven months pregnant with another child, I adjourned the Inquiry for a short time. Some 20 minutes later Mrs Hutcheson advised me that she would like the opportunity to discuss the situation with her husband overnight and that she would return to court in the morning with her decision. I therefore adjourned the court until 10 a.m. on 21 January 2009. The following morning both Mrs Hutcheson and her husband arrived fully prepared to continue with and co-operate in the Inquiry.

(c) At a later point during continued cross-examination of Mrs Hutcheson, it became apparent that she was referring to a set of notes in her possession and Mrs Coull made a tentative and understandable objection pointing out that neither she nor the other solicitors had any knowledge of such notes which had not been lodged as a production. It soon became apparent that Mr and Mrs Hutcheson had received no advice in respect of the necessary procedure but it also became clear that the notes being referred to were simply the originals of diary entries which Mrs Hutcheson had kept during the time Angus was in hospital. They had been copied by the depute fiscal, lodged as part of his productions and intimated to the other parties. She was also referring however to photographs of Angus when he was in hospital and the interior of the Unit at Borders Hospital of which the solicitors equally had no knowledge. They therefore again gave notice of a likely objection to their admissibility. I allowed the photos subject to competency and relevancy, to be decided if and when they were referred to and substantively relied on. As it happened, later reference to them was brief and no further objection was taken.

The cause of death and other relevant facts and circumstances

I have to say from the outset that in his concluding submission Mr Jessiman made a motion that I should make a formal finding only. I gave serious consideration to this in view of the material disadvantage to all the medical and nursing staff in particular in the Borders Hospital Unit but also those of the RIE and of the RHSC in which Angus was also treated, as a result of the very substantial delay which arose in commencing this Inquiry. However, with respect to the evidence of and what I found to be the genuinely held views of Mrs and Mr Hutcheson, I felt it necessary to deal with those issues which I regard to some extent of substance, from their point of view. I do not intend to refer to the evidence in detail firstly because of the extent of it, the depute fiscal having led in total 19 witnesses; secondly because after the nurses and later the doctors had given their evidence, all of whom were highly experienced and skilled in their respective fields and some indeed expert; and lastly the Hutchesons had had the opportunity of putting their issues to them as they did in cross-examination, my sound impression was that all their

evidence was convincing and effective, despite the fact that they had treated and cared for Angus more than four years before. Fortunately they were all able to refer to the well-detailed and informative nursing and clinical records and notes produced although as I shall also later comment, this was especially difficult for Dr Alexandra Baxter and Dr Andrew Barclay. They were each only employed in Borders Hospital for a limited period at or around the time of Angus' stay in the hospital, in particular Dr Baxter who was only very briefly involved in his actual care. I therefore refer as follows to the issues raised which I regard as material (raised I must say, largely by Mrs Hutcheson although supported in some respects by Mr Hutcheson) and to the evidence which I regard as relevant in answer thereto. I refer mostly to Mrs Hutcheson's position because not only was she mostly involved in the quest for an explanation of how Angus became infected with RSV, but also because after the end of the evidence and prior to the submissions, Mr Hutcheson, although he gave evidence following that of Mrs Hutcheson, played no further part in the Inquiry. Mrs Hutcheson reported to the Sheriff Clerk at the point when efforts were being made to fix a date for submissions that sadly Mr Hutcheson had left her and the children and since then he has refused to have any contact with them whatever. She does not know of his whereabouts.

The first material issue raised by Mrs Hutcheson related to the day on which Angus was transferred from RIE to Borders Hospital namely that she did not receive any general introduction in respect of the rules and procedures in the Unit and nor did she meet with or see a consultant. She also said that Angus was placed in a side room and nursed there. She said that there was no hand-washing policy brought to her attention and no hand-washing signs or illustrations were displayed in the Unit. She also said that both nurses and doctors did not always wash their hands on entering the Unit or after treating a baby and going on to treat another baby. Mr Hutcheson's evidence was largely similar to that of Mrs Hutcheson although I noted that he was not present in the hospital for several days after Angus was admitted, due to the fact that he was ill. Mrs Hutcheson was also briefly absent through illness at that time.

In contrast to all of this, there was ample evidence from various of the witnesses, both nurses and doctors then working in the Unit, and an entry in the nursing notes for the day of Angus' admission to the Unit to the effect that Mrs Hutcheson was shown round the Unit and met with Dr Stephen the Consultant Paediatrician to be responsible for Angus'case and in charge of the Unit on that day. It was also their evidence and that of Mr Adam Wood one of the two Infection Control nurses for Borders Hospital that each baby to be admitted to the Unit is on arrival, immediately put into isolation at the hospital and is screened for infection. The babies are only transferred into the nursery in the Unit when negative results for infection are available. All the nurses who gave evidence and Mr Wood in particular, also explained that the Infection Control System in Borders Hospital requires that on entering any room in the Unit, nurses and doctors wash their hands thoroughly to elbow level and put on an apron and rubber gloves, if in actual contact when examining any of the babies. After examining or caring for any baby, they remove the apron and gloves and dispose of them within the room and again wash their hands before examining any other baby or prior to leaving whichever room they are in. It was also their evidence that there are sinks in every room in the Unit and in addition

alcohol wash dispensers although no such dispensers were situated at the public entry to the Unit. I further noted from the evidence that most if not all of the nurses in the Unit had been working in that Unit for some if not all of the time during which Angus was being treated there. The significant thrust of the evidence given by them and by Dr Stephen, Dr Baxter and Dr Barclay was that in 2004 there was in force a robust infection control system and procedure in the Unit including all reasonable precautions which could have prevented the transmission of any infection there, including the RSV infection. Moreover that Unit was designed in accordance with Government guidance of that time as was also clear from Borders Health Board production number 2. The nurses also gave clear evidence as to the way in which the cots of the babies in the Unit were spaced, namely as far apart as possible and furthermore they were positioned "head to head" with a barrier between them and not side by side. Apart from the nurses' evidence in that respect, Mrs Nicola Ferrier, the mother of baby Lily Ferrier who was also in the Unit nursery with Angus, commented in her evidence, responding to an unrelated question, that the cots were head-to-head in the nursery with a partition between them. It seemed clear to me that only Mrs Hutcheson said that the cots were positioned side to side with too narrow a distance between them, as I shall further refer to later.

In addition I noted the Infection Control policy in the Unit which is clearly set down in the policy document, Production number 6 which was spoken to by the responsible manager. The Infection Control nurse Adam Wood also spoke to that policy and how in accordance with it there were posters in various parts of the Unit in respect of hand-washing. Production number 3 which both those witnesses identified, contained a number of illustrations and signs as to how hand-washing should actually be carried out. I was satisfied in respect of all that evidence which I prefer to that of Mrs and Mr Hutcheson that a good infection control policy was in force in 2004 in Borders Hospital and thereafter that all the nurses and the medical staff then working in the Unit were all well aware of the fundamental importance of implementing and applying the policy. I specifically noted that all the nurses in the Unit are well-qualified senior midwives and/or neo-natal nurses, all with considerable experience either in large maternity units or special care units such as the Unit in Borders Hospital. My view was further supported by the evidence as to the infection control procedure implemented after Lily Ferrier was diagnosed with the RSV infection on 8 November 2004. She and Angus were each immediately transferred into an individual isolation room. The entire nursery where they had been, that is the floors, walls and all hard surfaces were thoroughly cleaned with a bleach-based solution, and all soft furnishings such as curtains and cushions and other equipment were also thoroughly cleaned after which an infection risk assessment was carried out. Apart from the nurses then on duty who spoke to this in the evidence, Mr Adam Wood confirmed this in his evidence. He attended the Unit on that day to ensure that the full and correct procedure had been implemented.

A related issue which arose in Mrs Hutcheson's evidence was that on occasions people other than nurses, doctors or children's visitors entered the Unit. She spoke about such persons being shown round, including a group of pregnant women and a group of the hospital management personnel. It was clear on the specific evidence of the hospital

manager and of the nurses however that there is a visitors' policy and in particular production number 1 which was spoken to by them is that that policy applies to all visitors and is properly policed by the nurses on duty. Although Mrs Hutcheson denied any knowledge of a visitor's policy, Nicola Ferrier in her evidence said she was told that she was allowed to visit the Unit at any time and that siblings are welcome although only two visitors can attend any one time. It was also clear on the evidence that although it is necessary in the general hospital management arrangements that sometimes relevant persons as already mentioned may visit the Unit, no such persons ever enter the nursery or the high dependency/isolation rooms in the Unit. In addition there was a discussion during that evidence in respect of other employees such as cleaners or repair persons who require to visit the Unit from which it was also clear that such persons like all staff are trained in and know about the infection control policy and procedures. More specifically it was explained that even if such persons were to touch a horizontal surface on which infection material might still remain, there is no occasion when any of them would ever approach, let alone come in contact with any of the babies. There was no evidence to the contrary and I have to say that on the contrary all the nurses and all the medical staff who gave evidence, in particular an experienced "bank" nurse employed in Borders Hospital and who sometimes works in the Unit and who cared for Angus on the day he was transferred back to RSCH before he died, said clearly that standards of hygiene in the Unit were "excellent" and " high and meticulous". Similarily the Infections Control nurse Adam Wood and Drs Baxter, Dr Paula Midgely of RIE and two of the nurses who had worked in Simpsons Maternity Unit in RIE gave their opinions that hygiene in the Unit in Borders Hospital was of a similarly high standard to that in Simpsons. That was my whole impression from and finding on the evidence.

The most serious and material issue raised by Mrs and Mr Hutcheson related to the alleged failure or lack of attention on the part of the hospital managers and nursing and medical staff of Borders Hospital whereby Angus became infected with RSV in the first place; and also as to why Angus was not given a test for RSV on 8 November 2004 or on the days following, as opposed to 13 November 2004. In fairness, they did not expressly state this but since they did not make concluding submissions or submit prepared written submissions, that is my inference from the evidence they gave and the questions they put in cross-examination of the witnesses. In that respect, when I learned in late August (2009) that Mr Hutcheson had abandoned Mrs Hutcheson and their other three children and that she had been obliged to leave their home in Kelso and was living with her mother and her children in the south of England, I advised via the Sheriff Clerk that she might wish to submit written submissions. I also offered her access to the transcribed Notes of Evidence and productions but in the end when she did attend on the second day set down for submissions in mid-September, she did so only briefly and simply apologised for being unable to prepare any further for the Inquiry and thanked everyone who had attended and given evidence. She explained that given all that had happened since the end of the evidence, in particular that she is now alone caring for her other three children (aged between 3 years and 7 months), she simply was not in a position to prepare any concluding submission.

In examining her and Mr Hutcheson's evidence however it seemed to me that Mrs Hutcheson in particular based her view of how Angus became infected with RSV on the fact that the other baby, Lily Ferrier, had been admitted to the Unit nursery at or about the same date as Angus and was for several days alongside Angus in a cot with only a few feet between them before she (Lily) gave a positive test for RSV on 8 November 2004. Mrs Hutcheson's evidence also was that after this, she had immediately asked the nurses about an RSV test for Angus and that she wanted a meeting that day with Dr Barclay in that respect. She said that no action however was taken until 11th or 12th November (2004) when Dr Barclay told her that such a test was not justified by Angus' clinical condition and nor was the expense of such a test justified. Mrs Hutcheson implied, if not saying so expressly, that had Angus had the test on 8 November or in one of the days thereafter, his death might have been avoided.

In testing my aforesaid inference from Mrs Hutcheson's evidence and reaching a view on it, I first turned to the evidence of Dr Barclay and Staff Nurse Leask who spoke to the entries in the clinical and nursing notes which disclosed that they met with and had a lengthy conversation with Mrs and Mr Hutcheson on 10 November 2004. A number of matters were discussed but neither of them remember any request for an RSV test and nor do the notes disclose any such request. As for Mrs Hutcheson's claim that Dr Barclay refused such a test because it was too expensive, I accept Dr Barclay's evidence which was that that part of the discussion was most likely related to the cost of RSV immunization rather than a test for RSV infection. This was a separate matter she had raised with him and the relevant evidence in that respect was from the medical witnesses including Professor Field, to the effect that there is no such immunization akin to the normally accepted sense of advance protection from a known disease or infection. There had been a trial of a substance called Pallubizaman some 10 years ago in the USA, but its use was questioned and its effectiveness was poor. It was extremely expensive to use and since it had been introduced in the hope that it would save costs of treating the many children who do become infected with RSV, its use did not proceed. Furthermore it is disclosed in the nursing notes from the meeting with Dr Barclay that "in general parents were happy with the explanations given and progress at Angus' own pace". I also noted that Mr Hutcheson said that he had spoken with Dr Barclay on the morning of 12 November (2004) but again it was clear from the notes that Dr Barclay was not in the hospital on that morning and that although the matter was raised with the nurses on duty that day, it was not raised with Dr Barclay until the evening of 12th when he discussed it with the Hutchesons, explaining to them that he would reconsider the matter of an RSV test on the morning after, that is 13 November. He took that decision after examining Angus and being satisfied that there were no clinical signs to indicate that an RSV test was required. Moreover he discussed Angus' condition that evening and his opinion as to his condition with Dr Duncan the Consultant in overall charge of Clinical Services in the Unit. (Dr Duncan was not a witness at the Inquiry.) Thus, I find Dr Barclay's evidence supported by the nursing and medical notes wholly reliable and materially more so than the evidence of Mrs and Mr Hutcheson which was largely based on their respective recollections of events 4 years ago.

Furthermore I rely substantially on the evidence of the various medical specialists, in particular that of Dr John Stephen, Angus' named Consultant as already mentioned, as well as that of Doctor David Rowney, Consultant in Paediatric Intensive Care at RHSC and of Professor David Field, Consultant Neo-natologist of a similar specialist baby care unit in Leicester Royal Infirmary. I would first mention that Dr Stephen confirmed that Dr Barclay's decision on the evening of 12 November (2004) that an RSV test was not required and could be reconsidered the following morning was entirely reasonable. He confirmed that Angus' clinical condition did not deteriorate until later in the morning of 13 November. More significantly, each of the aforesaid witnesses said that RSV infection is very common in children and is probably the commonest reason why children under two years old are admitted to specialist units such as that in RIE, Borders Hospital and indeed hospitals throughout the UK and other countries. Any child can become infected and it is estimated that most children will have had RSV by the age of two years although the majority do not require hospital admission, let alone intensive care. It was also their evidence that in general terms the most probable cause of the spread of RSV is from actual human contact or sneezing within an area of 6 feet although the infective material can remain on surfaces for a material period. The recognized method of dealing with it is to have in place a strict infection control policy which is implemented. They were satisfied that it is likely in the circumstances disclosed in the medical and nursing notes that the RSV infection was transmitted to Angus from Lily Ferrier given that she was in the nursery in relatively close proximity to him in the few days before she tested positive for RSV. She may have been infective for a few days before she tested positive for RSV, in that a child may be infective on average for up to five days before being diagnosed and even longer. There was however no clinical evidence that Lily was infected prior to being tested just as was the situation with Angus who showed no clinical symptoms until late on the morning of 13 November.

Of special significance however, was the fact that Drs Stephen and Rowney as well as Professor Field were all absolutely clear that it was impossible to say how the transmission of the infection from Lily to Angus took place given the number of people known to have been in the Unit and through whom this might have taken place. Moreover, it is clear to me from the evidence that other routes existed for such transmission to Angus, including via Mr and Mrs Hutcheson who were both ill themselves with flu-like symptoms during the first few days in which Angus was in the Unit. In addition because, as the specialist witnesses said, RSV is present in the general population, any visitors to the Unit such as hospital administrators, cleaners or others with business there, including child visitors such as siblings could have been the source. Similarly Mrs Nicola Ferrier with whom, on the evidence, Mrs Hutcheson had had regular contact in the Unit whilst they were nursing, feeding and caring for Angus and Lily respectively, might have been the source. In addition infection may be inadvertently introduced by way of lines into the body of such an extremely premature baby as Angus for the purposes of feeding him, giving him oxygen and medication, or taking various samples of body fluids from him for testing. Apart from the fact that there was no clinical evidence that Angus' condition merited a test earlier than 13 November (2004), the specialist evidence was abundantly clear that there is no cure for RSV and that an earlier test in Angus' case would have made no difference to his treatment or chances of

surviving. Equally notable was their evidence that with any child as prematurely born as Angus and thus in a very frail state, the least frequent handling of him or physical intrusion into his body such as by way of carrying out tests is highly advisable if not essential.

The overall conclusion I have reached on consideration of all the evidence of all of the witnesses is that on the balance of probabilities, Angus sustained the RSV infection whilst he was being treated in the Unit in Borders Hospital. I cannot however find on the evidence how that infection was transmitted to Angus. I do not require to refer to or rehearse in any detail the evidence of any of the other witnesses but would make a brief comment in respect of that of Dr Paula Midgley, the very experienced neo-natologist in the Simpsons Maternity Unit in RIE, which is that I accept that she and her colleagues did everything possible to give Angus a realistic chance of surviving despite his exceptionally premature birth. There was no real challenge to her evidence and no material basis on which I could find any fault or failure on her part or of that of any of her colleagues in connection with Angus' death. Mrs Hutcheson did raise a point as to the information which accompanied Angus when he was transferred from RIE to Borders Hospital and, as a result, a minor dispute arose (and I use the epithet advisedly) as to whether a heart murmur had been present whilst he was still being treated in the neo-natal unit in RIE just prior to his transfer. Whilst Dr Midgely did agree that such a murmur had been heard at an early stage of his treatment, no such murmur was present at the date of his discharge and transfer to the Borders Hospital although she also accepted that there was an inaccuracy in the discharge letter in that it did not mention such a heart murmur. Professor Field on a retrospective review of the case notes felt that Angus had sustained an element of heart failure but he clearly had not had any opportunity of ever seeing Angus or examining him. He did accept that there was an issue about what "heart failure" means and he took the view that in Angus' case, his heart had had to work harder because his under-developed lungs were failing. I also noted the evidence of Dr Stephen that even if the discharge letter had made mention of such a heart murmur, it would have made no difference to the clinical management of Angus in Borders Hospital. He was satisfied that the discharge letter contained “an enormous amount of highly relevant information which provided a very complete picture of the difficulties faced by Angus because of his premature birth”. On all the specialist evidence therefore, I remain in no doubt whatever about the excellent standard of care which Angus received in RIE and indeed at Borders Hospital. I would add that there was no evidence whatever from which any criticism of the nursing and medical staff at RHSC could have been raised let alone established. Again they worked hard to give Angus every possible chance of surviving his very frail condition resulting from his premature birth.

One of the few other areas of the evidence on which I feel it fair to make comment relates again to the allegations (express or implied) against Doctors Baxter and Barclay. To some extent I have already commented on Dr Barclay's involvement but will now do so in more detail in respect of both. Dr Baxter was accused by Mrs Hutcheson of failing to comply with infection control procedures in that on one occasion she did not wash her hands after examining Lily and then moved on to examine Angus. Again I have to say that Mrs Hutcheson may not have said so expressly, but I am prepared to go on the basis

that she implied that this alleged failure could have been the source of transmission of the RSV to Angus. I have no difficulty in finding that there is no satisfactory or conclusive evidence on which I could uphold such a claim. I would also comment again that the exceptional delay in getting this Inquiry underway caused extreme unfairness to Dr Baxter because she was, not surprisingly, unable to remember anything of her involvement in the treatment of Lily or Angus more than four years before she gave evidence. Furthermore it was only after the same period of years that she was alerted as to any problem arising and which was being investigated. It is difficult to understand why that failure to contact her and indeed all the other witnesses earlier, should have happened since the clinical and nursing notes as to who was involved and needed to be contacted were perfectly plain and obvious. I feel that for Dr Baxter in particular this is more marked given that she was only involved in ward rounds relating to Angus over a very limited time and it was only on one occasion namely on 8 November 2004 that she was alleged to have breached the infection control procedures. In her evidence Dr Baxter said quite openly that she could not remember what actually happened on that date but that it was her recollection that throughout her substantial experience and further experience to date as a Consultant, she always adhered to and still does adhere strictly to infection control procedures. In particular she always undertook hand washing as required in the infection control procedures, that is to the elbows and she was clear that she did not ever wear jewellery or a watch on duty. She also always wore aprons and gloves in the Unit when examining babies. The evidence against her from Mrs Hutcheson and Mrs Ferrier was less than convincing, especially after more than four years. Mrs Hutcheson was more certain on this matter than Mrs Ferrier because she had kept a diary entry of what happened but the information she included in her diary was based solely on what Mrs Ferrier apparently told her about Dr Baxter's failure to wash her hands after examining Lily. Moreover the diary entry was simply "Mrs Ferrier **thinks** (my emphasis) that Dr Baxter did not wash her hands". For these reasons I do not find it established that Dr Baxter caused the transmission of the RSV infection from Lily Ferrier to Angus and I state again my earlier conclusion that on the balance of probabilities, I have not been able to make any finding on the evidence, in particular that of the specialist witnesses Dr Rowney, Dr Stephen and Professor Field as to how the RSV was transmitted to Angus.

In respect of Mrs and Mr Hutcheson's criticism of Dr Barclay, at the risk of repetition, I refer again to the view I took of all the related evidence, firstly that it was said that there was insufficient discussion with them or involvement of his overseeing consultant. This it seems to me is based on the Hutchesons' belief that Angus should have been tested for RSV infection before 13 November 2004. As I have already said earlier, I noted that their evidence in that respect was not consistent with the nursing or medical notes. Mrs Hutcheson said that on both 11 and 12 November Dr Barclay had told them that there was no clinical basis for the carrying out of another test and I bear in mind the specialist evidence that the least physical intrusion possible into the body of such a frail infant is advisable. Most importantly however, the nursing notes and the evidence from the relevant nurse (Leask) as well as that of Dr Barclay was that they had met the Hutchesons on 10 November, not 11th when they had a lengthy discussion with them. The Notes also confirmed that "in general parents were happy with explanations given and progress at Angus' own pace". There was also in my view of the evidence a fundamental

misunderstanding on their part in the suggestion that Dr Barclay had refused the test because of the financial cost of it. I prefer and I accept the evidence of Dr Barclay that he was answering their questions about immunization and its cost. In any event, on any objective basis, Angus was clearly being given a great deal of intensive care and treatment and it is difficult therefore to understand in such circumstances that the cost of one such simple test for RSV could be a reason for refusing it. On the contrary the clinical notes did not suggest that Angus' condition warranted another RSV test prior to 13 November and equally convincing is the evidence that Dr Barclay discussed Angus' situation with the consultant Dr Duncan on the evening of 12 November. I accept that evidence and that Dr Duncan confirmed that there was no apparent deterioration or a change in Angus' condition and that Dr Barclay's decision to do a further test on the morning of 13 November was reasonable. Moreover, Professor Field's evidence in this respect was that he did not think that any part of any deterioration in Angus' condition was due to RSV. He described getting RSV as like "being hit with a hammer and was very obvious and quick ". He made no criticism of Dr Barclay's decision and was satisfied that given all the other problems facing Angus, this sudden change on the morning of 13 November was "the beginning of his unravelling". It was also the case that neither of the other consultants in the Unit was critical in any way of Dr Barclay's decision. In the light of all that evidence, I cannot reasonably conclude on the balance of probabilities that Dr Barclay can in any way be criticised in respect of his care and treatment of Angus. Nor could I make a finding that he acted unreasonably in any way or at any time or that he failed to take a precaution whereby Angus' death might have been prevented. On the contrary the evidence was that even if that RSV test had been carried out several days before, there would have been no different treatment and no difference to the eventual sad outcome of Angus' death.

Finally and to conclude, I also find, in all the circumstances, that there was no lack of reasonable precautions on the part of Borders Hospital or its medical, nursing or any other staff or employees and on the contrary they had taken all possible precautions open to them that that time. They had a proper and effective Infections Control Policy and proper signage as well as an appropriate visitors' policy whereby all those entering the Unit including visitors ought to have been aware of what was required of them to avoid transmitting infections. They had also followed the Government guidance in the planning and construction of the Unit, including the positioning of the cots of babies. The fight against transmission of any infection is one which is widely and publicly known to exercise all those involved in clinical and general management of many of our hospitals in Scotland and elsewhere and those with far greater knowledge of the problems arising have, as far as I can ascertain, a hefty task and responsibility bearing in mind the many ways in which infections are introduced, not least by way of external visitors. The only recommendation I would have seen fit to make relates to the introduction of an entry control system at the public entry to the Unit. Such a system was however introduced into Borders Hospital some years ago, soon after Angus' death. I stress however that I do not suggest that this might in any way have prevented his death, firstly since there was no evidence to that effect but in any event because it is simply a further aid to the nurses in charge of the Unit in policing those who come into the Unit and ensuring as far as is reasonably possible that they read and follow the signage displaying the Infection Control

policy and implement it. It goes without saying however that no system can be perfect but simply as good as it may be reasonably made through proper thought and consideration in good time. I am clear that the responsible management and staff of Borders Hospital fulfilled that standard prior to 2004 and since.

I conclude by expressing my deep sympathy to Mrs Hutcheson and her wider family at the sad loss of Angus, as I did in open Court and as did the depute fiscal and the solicitors for the parties.