

SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

DETERMINATION

by

Sheriff Robert Bruce Weir Q.C.

In an Inquiry held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

Into the death of

Sheila Mary Hyslop

Dumfries: 3 August 2015

The Sheriff, having resumed consideration of the cause, in terms of section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, determines as follows:

(1) Sheila Mary Hyslop (date of birth 14 January 1964) of 15 Loch Road, Dumfries, died at the Western General Hospital, Edinburgh, at 1043 hours on 14 March 2014.

(2) The cause of death was traumatic brain injury sustained when Ms Hyslop lost control of, and fell from, her overloaded bicycle after surmounting a speed bump outside 61 Albert Road, Dumfries, at about 1900 hours on 10 March 2014, from which injury she did not recover in hospital.

(3) A reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to have avoided overloading the bicycle with telephone directories before embarking on her deliveries.

(4) A reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to have reduced speed as she descended the hill leading into the speed bump outside 61 Albert Road, Dumfries.

(5) A reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to use a bicycle with roadworthy brakes.

(6) A reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to have worn a helmet.

(7) There was no defective system of working which contributed to the death or the accident resulting in the death.

(8) There are no other facts relevant to the circumstances of Ms Hyslop's death.

Note:

Representation

[1] Representation at this Inquiry was as follows:

- The Crown: Ms Arias, Procurator Fiscal Depute
- The family of Ms Hyslop: Mrs Raymond, Solicitor
- Dumfries and Galloway Council: Mrs Macintyre, Solicitor
- Thomsons Directories Limited: Mr John Morrison, Solicitor

Witnesses led in evidence

[2] The Crown led evidence from the following witnesses:

- Margaret Hamilton McColl
- Judith Bonn
- Neil Fishwick
- Louis Stancovic
- PC Martin Grassom
- PC Ryan Fingland
- PC Steven Kerr
- Dr Graham Nimmo (by way of affidavit)

[3] The family of Ms Hyslop led evidence from the following witnesses:

- Donald Hyslop
- Gerald McGill
- Melanie McGill

[4] I had no concerns about the credibility and reliability of any of the witnesses, all of whom did their best to assist the Inquiry.

The locus

[5] Albert Road is a residential street in Dumfries. The evidence disclosed that the approach to the accident locus from Terregles Road describes a long curved descent to the left. The gradient eases to the point where it becomes roughly level just before a speed bump which bisects Albert Road in the vicinity of the entrances to house numbers 56 and 61. The road at

this point turns slightly to the right before running in essentially a straight line to Castle Douglas Road. The accident occurred, in the circumstances described hereafter, at the bottom of the left handed descent. It resulted in Sheila Hyslop coming to rest on the left hand side of Albert Road, roughly level with the front wall with railings pertaining to 61 Albert Road.

[6] At the time of the accident there was a pothole in the left hand lane of Albert Road, close to the driveway at 61 Albert Road. Its position in the road, which was spoken to by a number of witnesses, can be seen clearly in photographs 3-7, and 10-12 of Crown production 9. Witnesses spoke to the pothole being located at a point where the road appeared to have undergone previous reinstatement.

Medical Evidence

[7] Ms Hyslop was comatose from the time of the accident and she never regained consciousness. After treatment at the locus Ms Hyslop was taken by ambulance to Dumfries and Galloway Royal Infirmary. Her Glasgow coma score was 4 over 15. She was not maintaining her own airway and was consequently intubated and ventilated. After initial examination it became apparent that Ms Hyslop had sustained a head injury and possible fractures to her facial bones. There was blood in her mouth. Her right pupil was not reactive. Her left pupil was reactive. After a CT scan it became apparent that Ms Hyslop had multiple haemorrhaging throughout her brain. As a result of this finding Ms Hyslop was transferred, on 11 March 2014, to the Western General Hospital, Edinburgh, and admitted to the ICU under the care of Mr Fitzpatrick, consultant neurosurgeon.

[8] On admission to the Western General an intracranial pressure monitor was inserted. It showed high intracranial pressure. Throughout her stay in the ICU Ms Hyslop's intracranial pressure was extremely difficult to control, and ultimately she suffered brain stem herniation. Death was confirmed at 1043 hours on 14 March 2014.

[9] The foregoing narrative was the subject of a joint minute between the parties and helpfully confirmed in its essentials by an affidavit dated 13 January 2015 submitted to the Court by Dr Graham Nimmo, Consultant in Intensive Care Medicine, at the Western General Hospital in Edinburgh.

Eye Witness Evidence

Margaret McColl

[10] At the time of the accident Mrs McColl, aged 82, lived at 56 Albert Road. The top of the driveway at this address is visible in photographs 2-4 of Crown production 7. The property lies to the right, and just short, of the speed bump as one approaches from Terregles Road. On 10 March 2014 Mrs McColl was going out with friends. Judith Bonn was due to pick her

up from 56 Albert Road. At about 1900 hours Mrs Bonn's car drew up at the top of the driveway. The weather was cold and it was dark.

[11] As Mrs McColl made to get into the back of Mrs Bonn's car Mrs McColl observed a bicycle. She explained that she just saw the cyclist, now known to be Ms Hyslop, coming down the hill "quite fast", going over the speed bump outside number 56, and, as she put it, "coming down with a clatter". Mrs McColl was unable to tell how far past the speed bump the cyclist had travelled before she came off. There was no other traffic travelling on Albert Road at the time of the accident.

[12] Mrs McColl was unable to say for definite what caused the cyclist to come off her bicycle. When she was asked to consider that question she offered the view "I would imagine all the telephone directories". Mrs McColl approached the cyclist while Mrs Bonn moved her car over to the same side of the road as the cyclist and slightly beyond her. Mrs McColl found the cyclist lying on the ground with the bicycle beside her. She did not appear to be conscious and there was blood coming from her head. There appeared to be telephone directories everywhere. Some were on the ground and some were in the panniers on the back of the bicycle. She also remembered seeing a box of directories. She was unable to say if the box was at the front of the bicycle as it came down the hill; she just remembered a box somewhere and directories appeared to be everywhere at the back of the bicycle after the cyclist had come off. Mrs McColl volunteered that she did not know how the cyclist "coped with what she had". The witness confirmed that the cyclist was not wearing a helmet.

[13] When pressed by Mrs Raymond, for Ms Hyslop's family, Mrs McColl said, that while she knew that Ms Hyslop had a lot of directories, she was unable to say categorically what caused Ms Hyslop to come off her bicycle. She could not say whether she was near the pothole at the time of the accident. She could not remember telling the police that Ms Hyslop had hit the pothole, and did not adopt a passage in her police statement dated 16 March 2014 to that effect. Asked about the position of Ms Hyslop on the road at the time that she fell, Mrs McColl said that Ms Hyslop didn't appear to be on the left hand side; she was nearer the witness than the pavement (the witness then being near to Mrs Bonn's car on the other side of the street). Mrs McColl's position appeared ultimately to be that she saw Ms Hyslop going over the speed bump then coming down with "a wallop".

Judith Bonn

[14] On the evening of the accident Mrs Bonn, aged 74, was heading into town for what was a regular night out with friends. The weather was dry and it was dark. The streetlights were illuminated. At about 1900 hours she descended the hill on Albert Road and pulled in at the top of Mrs McColl's driveway. Because she was expecting to pick up another two passengers Mrs Bonn asked Mrs McColl to get into the back of the car behind the front passenger seat. Mrs McColl headed round the back of the car. As she did so she exclaimed

out loud. Mrs Bonn looked over her left shoulder and saw a person on a bicycle going up in the air and coming down again. She described the cyclist as heading diagonally forwards as she saw it, on the left hand side of the road.

[15] Mrs Bonn drove to the far side of the road and parked at a point where the back of her car was about adjacent to the post box outside 61 Albert Road. She switched on hazard warning lights to warn other road users. Ms Hyslop was lying on the road at a point roughly level with the post box and the wall at 61 Albert Road. Mrs Bonn and Mrs McColl (according to Mrs Bonn) called at number 61. The residents, Mr and Mrs McGill, called an ambulance. (That detail was not spoken to by either Mr or Mrs McGill. It does not greatly matter. It is apparent that an ambulance was called very soon after the accident and arrived at the scene before the police).

[16] Mrs Bonn became aware that Ms Hyslop was bleeding from the head. There was no movement and she was unconscious. She was lying face down and the bicycle was lying on the road around her. The impression given by Mrs Bonn was that Ms Hyslop was not trapped by the bicycle but her legs were still in contact with it. She had not become separated from the bicycle. Mrs Bonn described seeing a lot of telephone directories lying around on the road, some of which she recalled picking up. She recalled that the bicycle had panniers over the back wheel which had been holding directories. She also related that she “had in mind” that there was a box over the back wheel, pannier and saddle. She thought it was somehow tied on with string and assumed that directories had come from the box. She recalled having stacked quite a pile of directories beside the wall outside number 61 by the time the ambulance arrived.

[17] Ms Hyslop was wearing a backpack (but Mrs Bonn did not recall seeing anything inside it). Ms Hyslop was not wearing a helmet or high visibility clothing.

[18] Mrs Bonn said that she did not see what it was that caused Ms Hyslop to come off her bicycle.

[19] In cross examination by Mrs Raymond, Mrs Bonn thought that Ms Hyslop must have been round about the speed bump when she was seen (by Mrs Bonn) to go up in the air. Asked about the position of Ms Hyslop in the road when this occurred, Mrs Bonn thought that she was nearer to the centre of the left hand lane (looking downhill).

Neil Fishwick

[20] Neil Fishwick, 54, was formerly Head of Operations for Thomson Local (which I take to be the trading name of Thomson Directories Limited) (“Thomson”). Thomson’s business included the distribution of Thomson and British Telecom directories. Thomson had six distribution managers located throughout the United Kingdom. They were responsible for the provision of directories to independent contractors for delivery. It is a matter of

agreement that Ms Hyslop was one such independent contractor. The parties agreed by joint minute that Ms Hyslop was self-employed and not an employee of Thomson.

[21] Mr Fishwick described the process by which prospective contractors applied to undertake deliveries. An advertisement would be placed in the press. Crown production 2 was one such example. Its terms reflected Thomson's policy that the distributor would need a car to transport the directories. Ms Hyslop had telephoned in response to an advert. Having been engaged as a distributor Ms Hyslop had then uplifted enough directories for two different routes (comprising 881 and 765 directories, respectively) from Kenneth Hayton Removals which was the distribution site. The delivery time was 7 days and a bonus of £5 was available if the route was completed more quickly. I infer from the evidence that Ms Hyslop was engaged in the distribution of some of those directories at the time of the accident.

[22] Mr Fishwick identified from Thomson's inventory of productions its recruitment script and instructions (item 1) and procedures list for the distribution depot where the directories would be uplifted (item 2). Mr Fishwick identified Crown production 3 as the (undated) distributor contract for one of Ms Hyslop's routes. A further, and fuller, version of that document was lodged as Crown production 5. Both versions contained a set of standard conditions. Standard condition 11 referred to insurance arrangements in respect of "the vehicle you will be using to fulfil this contract". Crown production 4 was a print of the (undated) distributor contract in relation to the second of Ms Hyslop's routes. It (along with Crown production 5) contained a section entitled "Do's and Don't's". Under "Do's" the distributor was enjoined to "[d]eliver between dawn and dusk...Acceptable times are between 8am and 8pm".

[23] Mr Fishwick was asked by Ms Arias what would have happened if a distributor, when uplifting her directories from the distribution warehouse, had mentioned in conversation that she would not be using a car but would intend using a bicycle for deliveries. His reply was that he would like to think that the executive (at the distribution warehouse) would tell the distributor that it would be necessary to take directories to the location of the delivery in a vehicle. He thought that delivery by bicycle would be inappropriate. The BT directories were unwieldy. One could not carry enough directories on a bicycle safely to make it an economic use of time.

[24] Mrs Raymond referred Mr Fishwick to Thomson's recruitment script and instructions (item 1 of Thomson's inventory of productions). Mr Fishwick agreed that they said nothing about deliveries having to be made by car. He agreed that the terms and conditions contained no specific stipulation that a vehicle had to be used in making deliveries. Ms Hyslop would not, therefore, have been contravening those conditions if she had used a bicycle during her deliveries. It was not suggested to Mr Fishwick that Thomson's paperwork ought to have included a clear prohibition on the use of a bicycle when

directories were being delivered. On the contrary my impression was that the line of cross examination taken (and taken successfully) was intended to support the contention that there were circumstances in which a bicycle could legitimately be used by a distributor.

[25] In response to Mrs Macintyre, Mr Fishwick said that he understood that the dawn to dusk provision in the “Do’s” and “Don’t’s” was made because (i) it might disturb the directory recipients, and (ii) it was not necessarily safe for the distributor to be going down a dark street alone distributing directories.

[26] Responding to a question by Mr Morrison, Mr Fishwick said that the dawn to dusk rule was there for the avoidance of nuisance to residents. The fuel allowance would still be paid if a car had not been used in the distribution process. Mr Fishwick was unaware of anyone delivering directories by bicycle. He agreed with Mr Morrison’s characterisation of the delivery process as involving a distributor driving to the area of delivery then making the physical deliveries on foot. Thomson had not changed its paperwork for the distribution of directories since the accident.

[27] In re-examination Mr Fishwick said that if someone had said, at the distribution depot, that they would not be using a car to do the deliveries they would probably not be stopped as long as they had arrived at the site by car. How the distributor distributed the directories after they were uplifted from the distribution warehouse was “somewhat out of their control” and Thomson’s expectation was that in most cases you would need a vehicle for the route you were delivering.

Emergency Services

Louis Stancovic

[28] Louis Stancovic, a team leader and paramedic with the Scottish Ambulance Service, was on duty on the night of 10 March 2014. He started work at 1900 hours. Just after assuming his duties Mr Stancovic and a colleague were instructed to attend at Albert Road in connection with a road traffic incident involving a cyclist. It took only about 2-3 minutes for the ambulance to reach the locus.

[29] Mr Stancovic stated that the weather was drizzly. On that matter the evidence of other witnesses together with the photographs in Crown production 9 lead me to conclude that he was mistaken in that regard. He later confirmed that the street lights were on.

[30] On arrival Mr Stancovic observed Ms Hyslop lying on the road. She was still “attached” to the bicycle and he saw a couple of pedestrians. The ambulance drew up slightly beyond Ms Hyslop and illuminated the scene with lights. Mr Stancovic described the position of Ms Hyslop. Her arms were orientated backwards towards her hips and one leg was under the bicycle. She was not wearing a helmet. He remembered that Ms Hyslop

was wearing a rucksack because he had some difficulty removing it. He noticed that the bag was quite heavy. He thought it contained books or magazines.

[31] Mr Stancovic and his colleague gave Ms Hyslop medical attention. She was unconscious and unresponsive. There was not much in the way of external bleeding. With the assistance of pedestrians and the police (who had by then arrived) Ms Hyslop was conveyed onto a spinal board and thence to the ambulance. Mr Stancovic's colleague removed the bicycle to the side. Ms Hyslop was taken to Dumfries and Galloway Royal infirmary.

[32] Mr Stancovic had previous experience of cycle accidents. This was probably the first occasion on which he had dealt with a cyclist who had not been wearing a helmet. He regarded this as significant because the impact had been enough in this instance to cause significant trauma. Mr Stancovic said that he had in the past dealt with cases where a helmet had been worn and less trauma had occurred.

[33] Mr Stancovic identified the general area where he found Ms Hyslop as being adjacent to the wall with iron railings in photograph 5 of Crown production 7. He said that he had noticed, and glanced towards, the pothole outside number 61 but was unsure of its size.

[34] In cross examination by Mrs Raymond Mr Stancovic was (perhaps unsurprisingly) unable to account for what may have caused Ms Hyslop to fall off her bicycle. He did offer the view that if the bicycle had hit an obstruction he might have expected it to rear up or tumble over, whereas the fact that Ms Hyslop was still connected to it (in the sense that her right leg was still below the bicycle) was, as he put it, "a bit strange".

[35] Asked by Mrs Macintyre about the absence of a helmet Mr Stancovic responded that a helmet may have contained the blow to Ms Hyslop's head.

[36] In response to questioning by Mr Morrison, Mr Stancovic explained that Ms Hyslop was found to be bleeding from the head. Evidence of bleeding was visible in photograph 8 of Crown production 9. The position of the blood was indicative of where Ms Hyslop had landed. The area of injury was the right temple. He agreed with the proposition that, had Ms Hyslop been wearing a helmet, that area of the head would have been protected. Mr Stancovic confirmed having observed (but not moved) a box at the locus and that magazines or heavy books appeared to have come from it.

PC Martin Grassom

[37] At 1922 hours on 10 March 2014 PC Grassom and a colleague, PC Smith, were instructed to attend at the locus in connection with a report of a road traffic accident. When they arrived an ambulance was already in attendance. Ms Hyslop was lying face down on the road being attended to by a paramedic and technician from the ambulance. PC Grassom observed blood on the roadway near to Ms Hyslop's head.

[38] PC Grassom identified as having been present at the locus the following productions:

Crown production 10 (Gentleman's bicycle with front and rear carriers and two panniers at the rear)

Crown production 11 (Rucksack)

Crown production 12 (Box)

Crown production 13 (Separate bundle of directories)

[39] According to PC Grassom the panniers were still attached to the bicycle. They contained, respectively, 9 directories and 4 directories together with a packet of biscuits. The rucksack contained some items but PC Grassom could not confirm the evidence of Mr Stancovic that it was heavy and contained brochures. The box contained directories and there was a separate bundle stacked on top of the box. PC Grassom found no evidence of string or other means of securing the box to the bicycle. He explained that after these productions had been recovered, and stored at the police production store, he counted the directories. There were over 80 in number.

[40] In cross examination by Mrs Raymond PC Grassom confirmed that the bicycle had been moved before their arrival. He confirmed having noticed the pothole and estimated its dimensions at about 1 foot wide by 1-2 inches deep. He placed it nearer to the kerb than the centre of the road. PC Grassom was asked to consider what impact the condition of the road may have had on the accident. Not surprisingly he found that a difficult question to answer (the witness not having attended in the role of accident investigator). He did, however, acknowledge that both the pothole and the speed bump could have been contributory factors. PC Grassom confirmed that all of the directories recovered were the same. When he arrived at the locus the box was sitting on the bicycle next to the wall with railings. He did not know whether the box had been carried on the front or back carrier of the bicycle. While he could not speak to what was in the box at the time of the accident, the contents of the box as they were presented to him in court (Crown production 12) and the separate bundle (Crown production 13) were as they were found by him at the locus. Thus, the contents of Crown production 12 comprised 2 larger bundles of 18 directories bound by a plastic binder, 5 loose directories at the end of the box, 5 loose directories on top of the other contents, together with a double-sided covered pocket street map.

[41] Mrs Macintyre put to PC Grassom other possible contributory factors in the accident. He agreed that other factors could have been the presence of the speed bump, the speed and weight of the bicycle, and the distribution of weight on the bicycle. He confirmed having found no means of securing the box to the bicycle. If it required to be held by one hand that would affect the cyclist's ability to steer. Mrs Macintyre also asked whether sandals and a below the knee skirt would have had any effect on Ms Hyslop's ability to ride her bicycle.

PC Grassom was cautious in answering these points. He acknowledged the possibility that skirt length could be an issue when riding a gentleman's bicycle. Whether sandals had any bearing would depend on the type of sole. PC Grassom said that the pothole was perhaps 5-6m from the drain near to which Ms Hyslop's head came to rest (see photograph 3 in Crown production 9). If cycling towards the centre of the road the pothole would not have been in Ms Hyslop's path when she approached the locus.

[42] In answer to Mr Morrison's question about the potential weight of about 80 directories PC Grassom provided an estimate of several kilos, an estimate which he refined to 8-9 kilos. Taking into account the box full of directories, a rucksack and panniers also full of directories, the weight of the directories would have been significant. In these circumstances it would have been very difficult for Ms Hyslop to have used a hand to secure the box in place on the rear carrier, the design of the bicycle being such as to cause the rider to be leaning forwards. That being so it would have been easier to place a hand on the box leaning forwards (ie. at the front). Even on that scenario PC Grassom described the bicycle as being overloaded. It would have been more difficult to keep the bicycle upright and the steering would have been more difficult. PC Grassom agreed that if one were to ride a bicycle in such circumstances you would want to have good brakes.

Accident Investigation

PC Steven Kerr

[43] PC Kerr, 46, had 28 years' police service and worked out of Dumfries in the road policing unit. His qualifications included basic and advanced collision investigation and he was a qualified vehicle examiner.

[44] PC Kerr received a call to attend the locus with his colleague, PC Fingland, at 1930 hours. They arrived together at about 2000 hours. The information available to PC Kerr was that there was one casualty who had been riding a bicycle and that no other vehicles were involved. The weather was dry and clear, it was dark and the street lights were illuminated. By the time PC Kerr reached the locus Ms Hyslop had already been removed to hospital. His understanding was that, while she had been treated, Ms Hyslop's bicycle had been moved to the wall by the side of the road, as had a number of belongings including a rucksack and telephone directories.

[45] PC Kerr took the photographs contained in Crown production 9 within one hour of his arrival. He estimated the distance between the pothole and the drain in the vicinity of the bloodstaining at about 6 metres. He thought it would have been rather more than a car length between the speed bump and the pothole. PC Grassom did, however, measure the distance between the pothole and the kerb as being between 1.1 and 1.5 metres from the kerb. Accordingly, the diameter of the pothole was about 40cm. There was a distance of 2 metres between the outside edge of the pothole and the centre line of the road.

[46] PC Kerr stated that, if Ms Hyslop had been riding nearer the centre line of the road (as suggested in the eye witness evidence), she should have been able to cycle between the pothole and the centre line without difficulty.

[47] PC Kerr described the whereabouts of Crown productions 10-13 when he reached the scene. Both the bicycle and the rucksack (Crown production 10 and 11) were beside the wall outside number 61 Albert Road. The box (Crown production 12), containing telephone directories, and the separate bundle of directories (Crown production 13), which were bound up, he found sitting on the pavement beside the bicycle.

[48] PC Kerr and PC Fingland carried out an examination of the bicycle at the locus. PC Kerr described it as being in poor condition. The brakes gave him cause for concern. They were "pretty ineffective", the front brake being marginally better than the rear. The panniers were still attached to the bicycle and both contained directories. PC Kerr checked the tyres for any nicks. He did so for any indication that the bicycle had hit the pothole. He found no physical evidence of a collision with the pothole. By way of further explanation PC Kerr found that the tyres were fully inflated on the rim. If the bicycle had hit the pothole at any speed the edge of the pothole would have compressed the front tyre against the rim of the wheel with the likelihood that the tyre would have punctured. Moreover, he would have expected to see a mark on the side wall of the tyre as a result of the tyre becoming compressed during the collision and the rim of the wheel coming into contact with the edge of the pothole.

[49] PC Kerr agreed with PC Fingland's assessment of the depth of the hole as being 4-6 inches. Such was its depth there was the potential for a car wheel to be damaged by the pothole. In view of the absence of any physical damage, and the fact that the tyres were still fully inflated, PC Kerr did not consider that bicycle had hit the pothole.

[50] Asked what, if any, conclusions he could draw from his own observations and the available evidence as to what contributed to the incident, PC Kerr opined that the amount of telephone directories would have contributed quite a bit of weight. (In re-examination PC Kerr explained that the effect of the presence of such a number of directories was that there would be more weight transference from side to side and that would be harder to control). If the box had been carried over the front wheel (which PC Kerr thought would require the rider to hold it with one hand) it would have affected the handling of the bicycle and the weight of the steering – and if any directories fell off that would have a further effect on the bicycle's balance. Conversely, if the box had been carried on the rear pannier the rider would have to have been steering one handed. To hold the box on the back one would have to twist round. This would make balance more difficult to control because one would be leaning partly over. With the box, the panniers at the rear, the rucksack, and a cargo of about 80 directories, all told the bicycle would have been very unstable. Expressing his

personal view as a regular cyclist, PC Kerr stated that he would definitely not ride a bicycle under those conditions.

[51] Asked about the use of helmets PC Kerr expressed the view, from his experience as a police officer, that those who did not wear a helmet generally came off with worse injuries than they would have done had a helmet been worn.

[52] In cross examination by Mrs Raymond, PC Kerr confirmed that, although he had been asked to attend the locus for the purposes of investigation, he had not carried out a full collision investigation at the time. This was because there was not at that time an apprehension that a fatality would result from the accident. He took 7 photographs of the pothole because, as evidence, it might have been lost quickly. He agreed that, at the time, he was thinking that the pothole might have been involved. However, having examined the bicycle, he was quite satisfied that the pothole was not involved. That said, PC Kerr agreed that, given the possibility of a swerve to avoid it, the pothole could not be ruled out as a factor in the accident. PC Kerr was present when PC Fingland tried out the bicycle at the locus. He walked alongside when PC Fingland bled the brakes and discovered their poor condition. Since the bicycle was present in court PC Kerr demonstrated the position by moving it and stating that you could hear the brakes just rubbing. They were, he said, capable of slowing the bicycle but would not have been effective in slowing it fast enough, especially if adding the weight of a rider and the directories and travelling downhill (where more brake friction is required than on the level). PC Kerr accepted that he did not know if a helmet would have altered the final outcome.

[53] Mrs Macintyre asked PC Kerr whether, if Ms Hyslop had been travelling down the road nearer to the centre line of the road, it would have been more or less likely that she would have swerved to avoid the pothole. PC Kerr said (perhaps unsurprisingly, given the hypothesis put to him) that it would have been less likely because there would not have been any obvious reason to swerve.

[54] A further scenario put to PC Kerr by Mr Morrison, which he accepted as possible, was that Ms Hyslop may have hit the speed bump at "a fair speed" and lost control.

PC Ryan Fingland

[55] PC Fingland, 34, had 8 years' police service. Of his total service PC Fingland had spent 2.5 years in road policing. He was based in Lockerbie at the time of the accident. PC Fingland explained that he tried to cycle once per week and had done so for 25 years.

[56] He was asked by PC Kerr to attempt to ride the bicycle for examination purposes. The bicycle was already propped up against the wall with railings outside 61 Albert Road, and the box (containing directories) was sat on top of the front carrier. There were panniers at

the back. The box appeared to stabilise itself between the handlebars (a point on which PC Kerr appeared to disagree). PC Fingland was unaware of any binding for the box.

[57] PC Fingland found that, on moving the bicycle into the road, it was difficult to manoeuvre. The directories made it top heavy. The bicycle was in a high gear and it took effort to get it going. This suggested that at the time of the accident the bicycle was travelling either on the level or downhill and, given the gradient on Albert Road, was being pedalled rather than freewheeling. PC Fingland attempted to turn within the width of Albert Road. This proved difficult because the bicycle was top heavy and in a high gear. The presence of the directories made it difficult to handle at low speed and the weight made the bicycle want to topple over. It took both lanes to turn. When PC Fingland then attempted to stop he found the brakes to be in very poor condition. The back brake exerted almost no pressure and the front brake very little. PC Fingland's overall view was that the bicycle was in very poor condition and the witness would not himself have taken it out on the road. The brakes would not have allowed it to stop if unforeseen circumstances presented themselves.

[58] In cross examination by Mrs Raymond PC Fingland confirmed that he had no formal collision investigation training. He confirmed that he was shown the pothole by PC Grassom. He did not think that the speed bump at the locus would have affected a cyclist's view of the pothole because of the relative height of the cyclist and the fact that, on 10 March 2014, the street lighting was on. PC Fingland recollected that the pothole was of the order of 12-14 inches in diameter and 4-6 inches deep. If the front wheel of a bicycle had gone into the pothole the balance of the cyclist may have shifted and her weight may have shifted forward. PC Fingland rejected the proposition that in this case the brakes may have been damaged in the accident because, as far as he could now tell, the structure of the brake callipers was sound. PC Fingland agreed that he could not say where the box was positioned at the time of the accident. He did, however, recall that it was the downward turn of the handlebars which had stopped the box from moving from side to side.

[59] Questioned by Mr Morrison, PC Fingland agreed that, if one were to have hit the speed bump at a "fair speed" while carrying all of the directories, it would cause a jolt – the kind of jolt that could cause a loss of control. Given the condition of the brakes on the bicycle there would have been little a cyclist could have done to stop and the bicycle would in effect have hit the speed bump at the same "fair speed". PC Fingland confirmed that there was nothing at the rear of the bicycle equivalent to the handlebars to hold the box in position and, therefore, nothing to prevent it from sliding backwards or from side to side. He agreed that the pothole was "quite a hole", that if the front wheel had hit the pothole the bicycle quite possibly would have been brought to a halt and that, in such a scenario, there would have been damage at the very least to the tyre and quite possibly to the wheel as well.

Donald Hyslop

[60] Donald Hyslop, aged 53, is Ms Hyslop's older brother. He came to give evidence to the Inquiry and, as he put it, to let his late sister's voice be heard. I was impressed by the measured and eloquent way in which he did so.

[61] Mr Hyslop explained that 15 Loch Road, Dumfries, had been the former family home. Circumstances were such that he and his sister lived apart but kept in touch by various means. Mr Hyslop's work was with the Tate Gallery in London. Over the years his sister had spent time in the United States. She had in fact returned from there to the family home in Dumfries in the autumn of 2013.

[62] Mr Hyslop confirmed that the bicycle (Crown production 10) belonged to his late sister. She had had it for years. Cycling was, by both choice and ethics, his sister's preferred, indeed priority, mode of transport. From her university days Ms Hyslop had become involved in the green movement and she lived life by her strongly held principles. Indeed, Ms Hyslop had graduated in chemical engineering but never practised in that line because it had come to conflict with her environmental beliefs. Mr Hyslop described his sister as being very fit. In the United States she had been engaged in the highly physical occupation of managing animal sanctuaries, and she had returned to Scotland in the hope of continuing in that line of work. Since her return she had been doing part time work in the hope of raising money to pursue this and it would not have surprised Mr Hyslop to learn that his sister had taken on delivery work.

[63] Mr Hyslop gave evidence about becoming aware of the accident on 10th March 2014, the ensuing days of hospital treatment, and the circumstances which ultimately resulted in medical treatment being discontinued. Ms Hyslop was an organ donor and all of her organs were accepted for donation.

[64] In cross examination by Ms Arias Mr Hyslop told the court that his sister's "modus" was to maintain her bicycle in good condition. He evidenced this by her use of cycle shops and the circumstance that Kirkpatricks dis-assembled her bicycle in anticipation of its transport abroad (and its subsequent re-assembly). Perhaps unsurprisingly, given their geographical separation, Mr Hyslop could not offer precise dates for when maintenance was performed on the bicycle.

[65] In answer to a question by Mrs Macintyre, Mr Hyslop stated candidly that he thought his sister didn't generally wear a cycle helmet.

Gerald and Melanie McGill

[66] Mr and Mrs McGill reside at 61 Albert Road. They each gave evidence about the existence of the pothole outside their driveway. The pothole first became apparent after Christmas 2013. Its condition worsened over time to the point where it was hitting the

wheel of the McGills' car. Mrs McGill communicated her concerns to Dumfries and Galloway Council on 21 February 2014. She received a receipt from the Council (Production 11 of the Inventory for Donald Hyslop). The pothole was repaired on the afternoon of 11 March 2014 (ie. the day after the accident).

[67] Mr and Mrs McGill did not witness the accident. Neither spoke to having telephoned the ambulance. Both stated that they became aware of an incident when they saw the lights of an ambulance, and neighbours, outside. Mr McGill went out and offered his assistance. Police officers subsequently requested the use of a bucket and hot water to clean the roadway.

[68] At the time of the accident the weather was dry. It was dark. The streetlights, including the light directly outside the driveway at 61 Albert Road (see photograph 7 of Crown production 7), were illuminated.

Law

[69] The stated objectives for the Inquiry, at least as set out in the petition at the instance of the Procurator Fiscal, were as follows:

1. To publicly examine the place and time and place [sic.] (I infer, of the death and any accident resulting in the death),
2. To publicly examine the cause of death, and
3. To publicly examine the reasonable precautions, if any, whereby the death and any accident from which it resulted, might have been avoided.

[70] In view of certain aspects of the discussion which arose during submissions, it is necessary to recall how the Court should look to address those objectives through the application of section 6(1) of the 1976 Act. Section 6(1) of the 1976 Act provides that the sheriff shall make a determination setting out the following circumstances of a death so far as they have been established to his satisfaction:

“(a) where and when the death and any accident resulting in the death took place;

(b) the cause or causes of death and any accident resulting in the death;

(c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided;

(d) the defects, if any, in any system of working which caused or contributed to the death or any accident resulting in the death; and

(e) any other facts which are relevant to the circumstances of the death.”

[71] A fatal accident inquiry is not the proper *forum* for determination of questions of criminal or civil liability. Thus there is no power in section 6(1) of the 1976 Act to make a finding as to fault or to apportion blame between any persons who might have contributed to the accident. The function of the sheriff at a Fatal Accident Inquiry is different from that which he is required to perform at a proof in a civil action to recover damages. His examination and analysis of the evidence is conducted with a view only to setting out in his determination the circumstances to which the subsection refers, insofar as this can be done to his satisfaction. (*Black v. Scott Lithgow Limited* 1990 SLT 612 at 615, *per Lord President Hope*).

[72] In considering the time, place and cause of death in terms of sections 6(1)(a) and 6(1)(b) the court simply exercises its traditional fact finding functions (*Determination by Sheriff Principal Brian A Lockhart following the Inquiry into the circumstances of the deaths at Rosepark Care Home, 19 April 2011, chapter 1*). The standard of proof it must apply is that of the balance of probabilities (1976 Act, section 4(7)).

[73] In relation to sections 6(1)(c) and 6(1)(d) I would refer to, and respectfully adopt, the observations of Sheriff Kearney in his Determination in relation to the death of James McAlpine, issued on 17 January 1986 (see *Carmichael: Sudden Death and Fatal Accident Inquiries*, 3rd Edition, para. 8-99). Thus:

"In deciding whether to make any determination [under section 6(1)(d)] as to the defects, if any, in any system of working which contributed to the death or any accident resulting in the death the court must, as a precondition to making any such determination, be satisfied that the defect in question did in fact cause or contribute to the death. The standard of proof and the rules of evidence (apart from the consideration that evidence did not require to be corroborated) is that applicable to civil business...and accordingly the standard of proof is that of the balance of probabilities...In relation to making a finding as to the reasonable precautions, if any, whereby the death or any accident resulting in the death might have been avoided (section 6(1)(c)) it is clearly not necessary for the court to be satisfied that the proposed precaution would in fact have avoided the accident or the death, only that it might have done, but the court must, as well as being satisfied that the precaution might have prevented the accident or death, be satisfied that the precaution was a reasonable one...The phrase "might have been avoided" is a wide one...It means less than "would on the balance of probabilities have been avoided" and rather directs one's mind in the direction of lively possibilities."

Determination

[74] With these considerations in mind I turn now to consider the circumstances of the death as required by section 6(1) and in so far as they have been established by the evidence led at the Inquiry.

Section 6(1)(a) – where and when the death and any accident resulting in the death took place

[75] Parties were agreed that Sheila Mary Hyslop (date of birth 14 January 1964) of 15 Loch Road, Dumfries, died at the Western General Hospital, Edinburgh, at 1043 hours on 14 March 2014.

Section 6(1)(b) – the cause or causes of such death and any accident resulting in the death

[76] Parties were agreed that the immediate cause of Ms Hyslop's death was traumatic brain injury sustained when she came off her bicycle in the evening of 10 March 2014. I found on the basis of the evidence led that this probably occurred at about 1900 hours on that date.

[77] The more difficult question, on which parties were not in agreement, is what caused Ms Hyslop to fall from her bicycle in the first place. The Crown confined itself, in submissions, to the position that the accident that caused the death of Ms Hyslop occurred at around 1900 hours on 10 March 2014 "when Ms Hyslop came off the bicycle that she was riding". That does not of course address the underlying cause for Ms Hyslop coming off her bicycle. On behalf of the family Mrs Raymond submitted that the pothole outside 61 Albert Road "may have been a contributory factor and could have contributed to the accident which resulted in the death of Ms Hyslop". She referred in particular to the evidence of PC Grassom and PC Kerr in support of the proposition that Ms Hyslop could have hit the pothole or swerved to avoid it before she fell. Mrs Macintyre, for Dumfries and Galloway Council, submitted that the cause of the accident was not clear cut. There were a number of potential contributory factors from which she invited me to exclude the pothole outside 61 Albert Drive. Mr Morrison did not invite any specific finding in relation to the cause of the accident, but referred me to the police evidence on the roadworthiness of the bicycle and the weight and effect on handling of the telephone directories.

[78] In addressing these submissions I have found that immediately prior to the accident:

1. Ms Hyslop was descending the hill on Albert Road quite fast;
2. The brakes on her bicycle were in poor working order;
3. Ms Hyslop was carrying about 80 BT telephone directories;
4. The directories were being transported in Ms Hyslop's rucksack, two panniers and a box, and
5. Ms Hyslop was not wearing a helmet.

[79] I am unable to reach any firm conclusion as to the whether the box was situated at the front or at the back of the bicycle. I do not, however, consider that this greatly matters. The evidence of PC Kerr, which I accepted, seemed to me to be clear and to the effect that,

wherever the box was situated, it would have had an adverse effect on the ability of the cyclist to maintain control of the bicycle. PC Kerr would not himself ride the bicycle in those conditions.

[80] I agree with the submissions of both Ms Arias and Mrs Macintyre that there is no evidence that the pothole played any part in the accident. Mrs McColl did not see Ms Hyslop hitting a pothole. Nor did she speak to seeing any kind of avoiding action immediately before Ms Hyslop came off her bicycle such as would support the theory that Ms Hyslop swerved at the last minute to avoid the pothole. On the contrary, Mrs McColl's evidence was that she saw Ms Hyslop descending the hill and surmounting the speed bump before coming down with a clatter. Moreover, both eyewitnesses placed Ms Hyslop nearer to the centre of the road on a course that, all things being equal, would have passed clear of the pothole. I also found particularly persuasive PC Kerr's evidence about the absence of any damage to the bicycle indicative of a collision with a pothole. Although not measured precisely, it is evident from the descriptions of both the police investigators and Mr and Mrs McGill that the pothole was of significant size. It had, after all, precipitated a complaint to the local authority.

[81] In all of these circumstances the acknowledgement by PCs Grassom and Kerr that the pothole could, for the reasons outlined in Mrs Raymond's submissions, have been a contributory factor carries little weight, as does the statement by Mrs McGill that, if *she* had been riding her bicycle, the pothole would probably have been in her line of travel.

[82] Aside the involvement of the pothole, it is my conclusion on the evidence presented that the accident was probably caused because Ms Hyslop reached the bottom of the hill on Albert Road at a speed which, in the event, proved to be too great for her to be able to maintain control of the bicycle with its attendant load after it surmounted the speed bump. In reaching that conclusion I have had regard to Mrs McColl's description of how Ms Hyslop appeared to go over the speed bump "quite fast" and then go down with a clatter. In this respect it is, in my opinion, significant that Mrs McColl did not speak to the bicycle slowing down before crossing the speed bump. The clear impression I gained from her evidence, which I accepted as both credible and reliable, was that the bicycle was coming down the hill quite fast and continued at the same rate over the speed bump. I found some independent support for the view that the bicycle was travelling quite fast in the admixture of evidence that the bicycle was found, on inspection, to be in a high gear. I have taken into account Mrs Bonn's evidence that Ms Hyslop must have been round about the position of the speed bump when she was seen to go up in the air. I have also had regard to the evidence, which I accepted, of PCs Grassom and (particularly) Kerr about the probable effect on bicycle handling of such a load of directories, and the evidence of PC Fingland about how a jolt from the speed bump might lead to loss of control of the bicycle. In answer to a point made by Mrs Raymond about the directories not having been weighed as part of any

investigation, it is significant that PC Fingland experienced actual difficulty while attempting to ride the bicycle at the locus on the night of the accident.

Section 6(1)(c) – The reasonable precautions, if any, whereby the death and the accident resulting in the death might have been avoided

[83] Both the Crown and Mrs Macintyre invited me to consider finding that it would have been a reasonable precaution for Ms Hyslop to have used a car, as instructed by Thomson, rather than a bicycle, to deliver telephone directories. I am not prepared to do so. It seems to me that Mrs Raymond was well founded in her submission that there was nothing in the contractual documentation produced by Thomson to preclude the use of a bicycle as part of the delivery process provided that the directories were collected by car from the distribution point. That, after all, was Mr Fishwick's evidence. Accordingly, the premise upon which the desiderated precaution depends has not, in my view, been made out in the evidence. I also note that Mr Morrison, for Thomson, was not enthusiastic about associating himself with such a finding as the Crown proposed, recognising (as I understood him) that Thomson's arrangements with their distributors did not preclude the "reasonable" use of a bicycle within the distribution process.

[84] I do, however, find that a reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to have avoided riding a bicycle which was overloaded with telephone directories to the extent that it affected her ability to ride in ordinary road conditions. In doing so I regard the following factors as being of significance: (i) Ms Hyslop was an experienced cyclist; (ii) Ms Hyslop was employing her preferred means of transport; (iii) the evidence disclosed nothing to indicate that weather or lighting conditions played any part in the accident; (iv) there was no other traffic involvement; (v) the pothole was probably not a factor in the accident, and (vi) on the evidence of PCs Grassom, Kerr and Fingland the load on the bicycle was significant and, with involvement of the box in particular, adversely affected the rider's ability to cycle safely and maintain balance. I conclude that the bicycle was overloaded to the point where Ms Hyslop's ability to ride it safely over the speed bump in Albert Drive was undermined. If the load had been reduced to the point where it did not have a material impact on the balance and manoeuvrability of the bicycle there is at least a lively possibility that the accident would have been avoided.

[85] The Crown and Mrs Macintyre both invited me to make a finding under section 6(1)(c) about the speed of the bicycle. On the basis that Ms Hyslop was riding the bicycle under the load conditions and with the worn brakes described in the evidence, and with the wisdom of the permitted hindsight I am entitled to apply, I find that it would have been a reasonable precaution for Ms Hyslop to have reduced speed as she descended the hill leading into the speed bump on Albert Road. I of course recognise Mrs Raymond's point that the actual speed of the bicycle is not known. However, I have already found that the bicycle must

have been travelling at a speed which resulted in Ms Hyslop losing control at the speed bump. It follows that if she had been travelling more slowly on arrival at the speed bump, there is a lively possibility that the accident would have been avoided.

[86] By the same process of reasoning I find that a reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to use a bicycle with roadworthy brakes. Mrs Raymond submitted that the evidence of Donald Hyslop, in respect of his views in relation to the maintenance of the bicycle, should be considered credible and reliable. The problem with this submission is that the views he expressed are at odds with the results of the physical examination carried out by PCs Kerr and Fingland. Both were of the view that the brakes were in very poor condition and would not have been effective in slowing the bicycle as it headed downhill under the conditions in which it was being used.

[87] I also find that a reasonable precaution whereby the accident resulting in her death might have been avoided would have been for Ms Hyslop to have worn a helmet. Mr Stancovic, as I recorded his evidence, was able to identify the area of injury as having been the right temple area. He agreed with Mr Morrison that had Ms Hyslop been wearing a helmet then that area of the head would have been protected. Mr Stancovic had also encountered cases of significant trauma in which a helmet had protected the patient. PC Kerr's evidence was that, in his experience, those who did not wear helmets generally came off with worse injuries than those who did wear them. In these circumstances there is a lively possibility that, had she worn a helmet, Ms Hyslop's death might have been avoided.

[88] Mrs Macintyre invited me to consider making a determination under section 6(1)(c) relative to Ms Hyslop's choice of clothing (and, in particular, a long denim skirt and sandals). It was not pressed with any enthusiasm and I confine myself to holding that there was insufficient evidence before the Inquiry to enable me to consider making such a determination.

[89] Finally, Mrs Raymond invited me to find that "if the repair of the road had been maintained to a standard whereby the pothole was not present the accident might have been avoided". It seems to me that there are difficulties in the way of such a finding. In the first place, I am not persuaded on the evidence that the pothole did have any bearing on the accident (in the sense of being either struck or avoided) In the second place, the court must not only be satisfied that there exists a precaution which might have prevented the accident. The precaution itself must be a reasonable one. Mrs Raymond's submission is to the effect that the road should have been maintained to a standard which precluded the pothole from ever being present. I have, however, heard no evidence that such a high level of maintenance can and should be regarded as reasonable. There were witnesses on the list of witnesses for Dumfries and Galloway Council who may have spoken to such matters but

their evidence is not before me. I am not, therefore, prepared to make a determination in the terms proposed.

Section 6(1)(d) - the defects, if any, in any system of working which caused or contributed to the death or any accident resulting in the death

[90] Mrs Raymond submitted under reference to section 6(1)(d) that it should have been made clear in Thomson's contractual paperwork that a car should have been used throughout the distribution and delivery process. No other party proposed any findings under section 6(1)(d).

[91] I am not prepared to make such finding. The evidence as to whether Thomson's contractual paperwork was or was not intended to preclude the use of a bicycle at any stage in the distribution process was not entirely clear. The Crown led Mr Fishwick from Thomson. It was my impression that it did so with a view to supporting a proposed finding to the effect that the deceased should not have been using a bicycle at all. However, as Mrs Raymond established in her cross-examination of Mr Fishwick, the use of a bicycle would not necessarily have been in conflict with the terms and conditions under which she agreed to deliver the directories. Mr Morrison did not suggest that the effect of the contractual documents was to preclude Ms Hyslop from using a bicycle as long as she acted reasonably in doing so. Both of those positions seem to me to be reasonably based. No one suggested to Mr Fishwick that there should have been a clear and specific prohibition on the use of a bicycle at any stage of the distribution process, far less the exact terms of any such prohibition.

[92] Besides, the warning desiderated by Mrs Raymond itself leaves questions unanswered. Would it preclude the use of other means of transport, including a bicycle? If not, at what point would it be deemed safe to use a bicycle, or even to convey the directories on foot? These are matters of judgment about which, as Mr Morrison pointed out, it would be very difficult to be prescriptive.

[93] More fundamentally, however, a finding under section 6(1)(d) requires the Court to be satisfied that the alleged defect (ie. the failure to make clear that a car should have been used throughout the distribution and delivery process) did in fact cause or contribute to the accident resulting in the death. The court would, therefore, need to be satisfied that had a warning of the kind proposed been included in the contractual paperwork the accident would not have occurred. There is simply no evidence upon which I could make such a finding. I do not know how Ms Hyslop would have responded to any particular contractual stipulation about the use of a bicycle, even if one were capable of being drafted with sufficient clarity as to be comprehensible. In these circumstances I am unable to make the determination proposed.

[94] I have not identified any other defects in any system of working which otherwise caused or contributed to Ms Hyslop's accident.

Section 6(1)(e) – any other facts which are relevant to the circumstances of the death

[95] I have no further determination to make under section 6(1)(e).

[96] I conclude by offering again my condolences to the family of Sheila Hyslop for their tragic loss.