2012 FAI 28

Sheriffdom of Tayside Central and Fife

Under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

Determination

of

Sheriff Michael John Fletcher, Sheriff of Tayside Central and Fife at Perth

in the cause

Fatal accident enquiry into the death of Matthew John Kirk date of birth 26 April, 1987 formerly residing at 52 Carlogie Place Craigiebank Dundee.

Perth 8 May 2012.

The Sheriff having resumed consideration of the cause determines:-

(1) In terms of section 6(1)(a) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 that Matthew John Kirk date of birth 26 April, 1987, formerly residing at 52 Carlogie Place, Craigiebank, Dundee then a prisoner in lawful custody in HM Prison Perth died in Ninewells Hospital, Dundee at 0910 hours on Wednesday 24 June 2009.

(2) In terms of section 6(1)(b) of the Act that the cause of death was I (a) Suspension by the neck from bedsheet ligature (hanging).

(3) In terms of section 6(1)(c) a reasonable precaution whereby the death might have been avoided would have been to have had in place a system of recording information about incidents known to the authorities whereby a person in custody exhibits or has exhibited suicidal tendencies or ideation at the time of, during, or immediately before, being received into custody on a record accessible to all officers subsequently responsible for his care in custody.

Note.

[1] This inquiry can conveniently be divided into two distinct parts. The evidence covered an incident where Mr Kirk was taken into custody in Dundee for his own safety and detained for a relatively short period in the police cells and then released. It also covers a period where Mr Kirk was arrested on a warrant again in Dundee and after due process incarcerated in HM Prison Perth. The two episodes were entirely separate but are connected by the fact that at the time of his first incarceration it was not the normal practice to record information about attempted suicide or suicidal tendencies in the national records to enable other forces to access that information in the event of subsequent incarcerations. The evidence demonstrated that it was possible that had information been contained on the national records about the incident which is the subject of the first part of this enquiry or indeed about previous incidents a different view might have been taken as to how Mr Kirk might have been looked after in the second period of incarceration covered by this inquiry.

[2] It is possible for me to deal with the first part of the enquiry in reasonably short compass because round about the time of the death of Mr Kirk another prisoner died while in custody in the cells at Dundee. As a result a careful and comprehensive report was carried out on the procedures in relation to custodial services in Dundee and indeed in Tayside by Inspector William McGuckin of Central Scotland Police. His report recommended a substantial number of changes to the procedures which should be adopted by Tayside police in relation to the method of looking after persons in their custody. Many of the recommendations touched on matters which were not covered in this enquiry but in particular there were recommendations in relation to the method by which records should be kept of suicidal tendencies in prisoners so that in the event of their being taken into custody again officers looking after them would have prior knowledge of the possibility that they may attempt suicide or self harm. He was critical of the arrangements that had been in place and in particular compared them unfavourably to the arrangements which had been put in place in Central Scotland..

[3] For our purposes the report recommended changes in the system of recording risks which had been identified or had manifested themselves while a prisoner was in custody in the police cells in Tayside. The system which was in operation at the time was referred to using the acronym UNIFI. That system recorded each individual custody episode and provided a nominal custody history including the date of prior custody episodes and what the crime/offence was but no further detail and in particular did not transfer warning risk markers or healthcare markers or other information which might be relevant to the risk a prisoner might pose to himself. This information was supplemented by a paper form with the acronym ADM51 which was retained at or near to the custody area for 3 to 4 months and then removed for archive elsewhere. These forms recorded vulnerability, risk and information relating to visits, movements, interviews, meals etc

provided in respect of a particular custody episode. The main criticism of the system was that it was geared to address custody episodes in isolation of one another and did not have the facility to transfer information in respect of identified risk markers to inform future custody episodes. The report recommended amongst other things an upgrade of the current system UNIFI with an electronic application which would automatically update each nominal custody record permanently with all known risk markers, vulnerabilities, warning markers and healthcare issues and would also record the information recorded at that time on the ADM51 forms.

[3] There was some evidence in the inquiry that there had been the possibility under the old system to record risk markers centrally which involved the officer wishing to record the risk sending an e-mail to those looking after the central computer requesting them to insert the marker centrally. Although there was some knowledge of such a system being in existence amongst people manning the custody suite in Dundee I do not think it can be said that they regarded that method of recording markers as being in any way as usual or normal and the evidence convinced me that it was very much the exception rather than the rule for markers to be placed centrally by e-mail. Those who were asked about it regarded the system as being too complicated and although that was challenged particularly by Mr Bell on behalf of the family it was clear that that was the view which prevailed at the time that Mr Kirk was in custody. The system relying on an e-mail being sent by the person dealing with the custody registration was one which was not adequate.

[4] It was clear from the evidence that the report which had been carried out by Inspector McGuckin was put into effect and the system of recording custody information was changed so that a central electronic system is now in place. Those conducting the inquiry on behalf of the various parties represented were all in agreement that the new system was a considerable improvement on the previous system and that the system no longer suffered from the defect that risk markers and the like would not be available to subsequent officers dealing with new incidents of custody in relation to a prisoner. While it could not be suggested that the new system was perfect my impression was that all those representing parties were content that the system was now satisfactory.

[5] Detective Chief Inspector Gordon Milne of Tayside police described in detail the changes which had been made as a result partly of the review carried out by Inspector McGuckin. He described the changes as root and branch and they covered matters well beyond the focus of this inquiry, but a different electronic system which allowed custody reception staff to access the central computer allowing risk markers to be placed directly by them on the central computer had been instituted. As a result some 350 markers of risk had been placed by reception staff. Other changes which had been made included a change in the system of governance of the custody suites in Tayside so that they are managed centrally from headquarters under one umbrella

instead of being separately managed by the regional commanders. Detective Chief Inspector Milne was able to identify four separate prior incidents involving Mr Kirk which would have justified in his view the insertion of a risk marker in relation to a risk of a suicide attempt none of which had been made under the old system. These included an incident on 1st February 2004 where he had made an attempt to hang himself and had been placed in an observation cell with a harm prevention suit, and an incident in February 2005 where he had said that he would kill himself and indeed had been seen placing clothing or other material round his neck. Detective Chief Inspector Milne was clear that these 2 incidents certainly would have justified the insertion of a marker under the old system as well as under the present system.

[6] Undoubtedly it would have been appropriate for me to have made a recommendation that the old system should be reviewed and altered in a similar way had it not been the position that the change had already taken place and been in operation now for some time. The death which is being investigated took place in June 2009 and the report was conducted not long afterwards so the new system has been in operation since 2010. In these circumstances I have made no recommendations formally in relation to the system all the information before me would indicate that these changes had been necessary. As will be seen in due course however, the lack of a marker about the risk of possible self harm may not have had an influence on the decision taken when Mr Kirk was admitted to prison in June 2009. Although it is not necessary for me to make a recommendation about change of the system it is appropriate as will be seen later for me to make a determination under section 6(1)(c) that there was a reasonable precaution whereby the death might have been avoided namely the implementation of a system similar to the one recommended in the report.

[7] Although the system for recording risks was accepted by the witnesses as being not fit for purpose and unacceptable the same should not be said about the care individuals took in looking after Mr Kirk when he was admitted to the cells in Dundee in May 2009. Constable Craig Robertson was called to an incident where he was informed that a person had been taken ill and paramedics had attended. He found Mr Kirk and his girlfriend at the scene. Mr Kirk was incoherent with very slurred speech and obviously under the influence of heroin and he was saying that he was going to kill himself. The paramedics indicated a certain amount of difficulty because he had indicated that he did not wish to go to hospital with them and they were reluctant to take him there in these circumstances. He was also aggressive and difficult to manage and refusing treatment. He was given narkan, the antidote to heroin. The paramedics indicated that this was by no means the first time they had treated Mr Kirk who was well known to them. He stated on this occasion he wanted to be left alone to die and he had said that on more than one previous occasion.

[8] Constable Robertson after consulting his colleague Constable Ritchie came to the conclusion that it was necessary to arrest Mr Kirk for his own safety. He did not think that he could simply leave him where he was even in the care of his girlfriend. It may be that part of the reason for that was that there appeared to be an argument going on between her and Mr Kirk because she was clearly annoyed at what he had done. In any event it was decided to arrest him for a suicidal breach of the peace and he was taken into custody. Constable Robertson in particular thought that Mr Kirk was genuinely suicidal. Sgt George Loudon, now retired, was the custody sergeant who dealt with Mr Kirk when he arrived at the police cells. He was told that the paramedics had administered narkan and he could see from his own observation that Mr Kirk was under the influence of heroin. Sergeant Lowden followed the procedure and insisted that Mr Kirk should be taken to hospital because he had been given the drug narkan and that was done.

[9] When he returned he was still thought to be under the influence and was detained simply to allow him to sober up and become unaffected by drugs. In due course he was seen by a police surgeon and found to be fit to be released into the care of his girlfriend and that was done on 2nd May . There was no suggestion that any of that treatment was somehow defective and no challenge was made to the record kept by police officers in relation to the checks made on Mr Kirk while he was in custody. There was no challenge to the arrangements made for his release and no suggestion that there was anything wrong with the care provided by the national health service at hospital or by the police surgeon. Some time was spent discussing the possibility of a referral to the psychiatric department at Ninewells hospital. Police officers indicated that there was a protocol which indicated that no person who was under the influence of alcohol or drugs should be taken there because it was impossible for the doctors in the psychiatric department to assess the patient while he was under the influence and police officers gave evidence that in their view Mr Kirk fell into that category. They were cross-examined on the question as to who it was who should make the decision that a person was too drunk to answer questions with a view to ascertaining what qualifications they had to enable them to make that decision. It was clear that they did not rely on any specialist training and none of them claimed to have any medical qualifications but they did make it clear that they were very experienced at assessing persons affected by alcohol or by drugs. It cannot be said that this was pursued to any conclusion and certainly in this case the evidence seemed to make it clear that Mr Kirk was in no condition to be assessed.

[10] The second chapter involves a second arrest of Mr Kirk in about 21st June 2009. On that occasion he was arrested on a warrant and although there was some attempt to avoid detection when he was taken into custody he did not cause any trouble or violence. He was however once again under the influence of some substance either drink or drugs and his speech was slurred and his eyes betrayed the fact that something was affecting him. The officer who arrested him indicated that he was unhappy about being arrested and was upset and aggressive

but he appeared to be in reasonable spirits. He was searched with negative results. The officer who processed him indicated that he did not appear to have any suicidal risk and was quite cheery and joked with him. In due course he was processed through the courts and remanded into Perth prison

[11] He was seen at the court by a solicitor and a support officer neither of whom thought that he was acting in any way which would alert them to the fact that he might be a suicide risk and he was transferred from the courts by two reliance officers neither of whom reported any unusual occurrence nor had any particular reason to remember him. Neither noticed any factors which would make them think there was a risk. He was processed into prison by a prison officer Kenneth Macleod and he completed the risk assessment sections 1 and 2. He noted Mr Kirk as suffering from the effects of drink or drugs but stated under part 3 that "States no thoughts of self harm". He has not ticked or marked in any way the question which begins "check PER and any additional info" and he indicated that he had not seen the personal escort record when he completed the form. He confirmed that it was his duty when completing part 2 to assess how the prisoner presented and to use that information to gauge how he was in respect of the possibility of self harm. He indicated that he thought the prisoner seemed fine, quite happy with nothing to suggest that he had any intentions of self harm. Under cross-examination he indicated he did not pick out anything which would have caused him concern. He was clear that his duty was to try to assess as best he could by asking appropriate questions how the person was feeling at the time he was being admitted rather than to rely on past experience.

[12] He was asked what difference it would have made to him if there had been a marker indicating previous suicidal tendencies or a suicide risk had been ticked. He indicated that that would have caused them to ask questions about it. Such questions as when did that happen? and how are you feeling now? to try to gauge how he was at that time. Beyond that he indicated that the fact that someone had been marked as having had suicide risk in the past would not necessarily mean that special steps were taken under the ACT procedure. This witness described what would happen if a prisoner was put on the ACT procedure and indicated as did all the witnesses who gave evidence about this that he was perfectly able to initiate the procedure himself without having to obtain permission or discuss it with anyone.

[13] The evidence of prison officer Macleod was corroborated by David McMath also a prison officer and who had 7 years experience. His job had been to search Mr Kirk when he was brought into the prison. It is fair to say that he did not have a good recollection of the process because he had been dealing with a large number of prisoners during that day. He remembered Mr Kirk being under the influence of a substance but did not remember anything that would have given him concern in relation to suicide or self harm.

[14] After Mr Kirk had been assessed by prison officer Macleod he was then assessed by Mrs Catriona Baxter who worked in the prison as a nurse at the time employed by the prison service but now by the National Health Service. She qualified as a general adult nurse in 2004 and had worked for 3 years in prison. She completed the healthcare risk assessment which is page 29 of production number 11. In section 1 she wrongly completed the first question which asked whether he had ever been subject to ACT during any previous period in custody by circling the word "No" instead of as she ought to have circled the word "Yes". She also answered 'yes' to the question had he ever received mental health treatment? The final assessment was 'no apparent risk' and she has written 'no concerns raised, good eye contact'. She was also clear that her duty was to assess the present condition of the prisoner rather than to rely on previous records. She made a point of looking at how Mr Kirk was reacting to her including his eye contact and his general appearance.

[15] She too was asked what difference it would have made to her if she had known that there had been previous suicidal tendencies. She indicated that she did not think that that would necessarily have made any difference to her assessment. She agreed it would have caused her to ask specific questions about that and carefully to watch the reaction but she still would have relied on her general assessment of how Mr Kirk was during the interview and would have placed more weight on that than on previous history. She did not discount the importance of knowing the past position but she was quite clear that she did not regard it as fair if a person who had a marker against his name would automatically be treated as someone who needed special measures to be taken without careful assessment of his current condition. She did accept however that she had incorrectly completed the very first question because she ought to have been able to have known that Mr Kirk had been subject to ACT before. She also said in her evidence that at that time she did not have available to her the Personal Escort Record although nowadays it was available.

[16] During her examination in chief it was drawn to her attention that on the last occasion on which Mr Kirk had been put on the ACT procedure he had subsequently admitted that he had used the procedures simply to try to manipulate and move to a different Hall because he had enemies in the Hall he was in and he was then saying that he accepted that it was the wrong thing to say. She explained that that was one of the reasons for saying that past history was not so important as the immediate assessment of the prisoner on admission.

[17] Mrs Baxter was also asked about withdrawal symptoms. She indicated that she saw no sign of withdrawal symptoms and that Mr Kirk did not make any complaint about either suffering from or expecting to do so. She agreed that she knew something about the type of symptoms that would be expected She was aware that it was said that Mr Kirk had taken drugs something like 30 hours before her interview with him but she was clear that at that time he was

not suffering from withdrawal symptoms. She said it was not normal practice to put someone under special observations on account of withdrawal symptoms only.

[18] In evidence she was followed by Mrs Adriane Robertson who was a healthcare assistant and assisted by taking urine samples writing up results and obtaining records. She did a urine test on Mr Kirk and brought up the results. She also thought that he seemed fine and provided the sample and was able to answer the questions she asked. She noticed nothing out of the ordinary. She did say that in order to access all the records necessary to complete the various forms a computer would be required and since the admission was around about 6 PM there was no access to a computer at the time that Mr Kirk was admitted. At the time that she gave evidence there would be such a computer available. She too indicated that she did not see any sign of withdrawal symptoms and indicated that she did not know the exact time scales for the onset of withdrawal symptoms after drugs had been taken. She indicated that she was the person who obtained any records which were required by the nurse completing the forms and she did not think that the information about PER 2 was checked by any nurse completing the forms.

[19] The Crown then led evidence from three prisoners who were in Perth prison at the time Mr Kirk was admitted. The first was Ronald Sinclair aged 25 who said that he had been a friend of Matthew Kirk all his life and he had seen Mr Kirk when he was brought in at about 7:50 PM. They had spoken for about 5 minutes and he considered that Mr Kirk seemed quite low. He formed that impression from his facial expressions and the fact that he was "head down". Mr Sinclair said he did not have any particular concerns and he told them to "keep his chin up and that he, Mr Sinclair, would see him in the morning". Mr Sinclair indicated that had he thought there was anything seriously wrong he would have contacted prison officers to tell them of that but he did not consider it necessary to do so.

[20] Mr Sinclair went on to say that after lockup Mr Kirk operated his emergency bell causing the light outside his cell to light up and a buzzer to operate on the floor. Mr Sinclair was on a different floor of the hall, in fact one floor below but because of the positioning of the cells he was able to see the outside of Mr Kirk's cell. He saw prison officers attending at his cell and heard one of them saying "do your fucking time" and "fuck off". The officers then left and from about 9.30 pm onwards there was a commotion with Mr Kirk's light being constantly on indicating that he was using his emergency bell. The officers were back at his door about 3 times but did not do anything and Mr Kirk was kicking the door and shouting for help. He was kicking the door and shouting for help and swearing and he, Mr Sinclair, was getting worried about him. Other prisoners had heard the noise and had begun to bang their doors in sympathy and eventually prison officers attended but they stayed at the door for only a few minutes and then left. After they had left the shouting began again and went on about an hour until the prison officers

returned again and this time they went into the cell and took Mr Kirk out onto the floor where they tried to resuscitate him.

[21] The second prisoner to give evidence was Charles Gibson who was serving a three-month prison sentence and who said he had known Mr Kirk for about 5 years . He said that he had seen Mr Kirk at about 7 pm and had spoken to him. Mr Kirk had informed him that he was withdrawing from drugs and the witness could see that that was so. He himself had been a drug user and recognised the signs. He also said that Mr Kirk was not in a good mood and that he the witness was concerned about Mr Kirk so much so that he asked how he was. Mr Kirk said that he was all right but the witness was doubtful. The witness was in a cell which was diagonally opposite the cell in which Mr Kirk was put but on the floor below. He said he was able to see the bell light of Mr Kirk's cell. Round about 9 pm the witness heard an officer telling him that he was not getting a doctor. Later he saw that the light on his cell was on again which meant that he was pressing his emergency bell. An officer went to his cell and a witness heard the officers telling Mr Kirk that if he put his bell on again he would not answer it. The witness said that he could hear Mr Kirk shouting and using his buzzer for quite a period. It was clear that he wanted to see a doctor. The witness was aware that there was only one officer on duty during the night. In total he said that he heard the officer going to the cell on 3 occasions but other prisoners had also become worried about Mr Kirk because they were shouting that the door should be opened.

[22] A third prisoner also give evidence. His name was Derek Fine. He said that he had been in prison for the first time and was in the cell next to the cell occupied by Mr Kirk. He had been unable to sleep because he was going back to court the following day. He heard Mr Kirk complaining that he was withdrawing and that he wanted a doctor. He also heard warders coming to his cell. On one occasion the officers were there for about 10 minutes. His impression was that the officers had gone into the cell and had spoken to Mr Kirk explaining that he would see a doctor the next day. It was put to him that the officers had been particularly brusque and indeed had sworn at Mr Kirk. The witness indicated that he had not heard anything like that. The witness was under the impression that Mr Kirk had been given paracetamol and told to wait until morning. Mr Kirk continued to shout sometimes for the officers and sometimes to other prisoners who had begun to ask him or tell him to be quiet. Later on in the evening there was another incident involving banging on the wall of the cell. The buzzer in Mr Kirk's cell was going and officers came and Mr Kirk was removed from his cell and in due course taken to hospital.

[23] The next phase of the evidence came from prison officers who dealt with Mr Kirk. The first officer to give evidence in relation to this was prison officer Colin Bell. He had 9 years service as a prison officer and for the last three years had worked on permanent nightshift. He first of all described what being on duty on nightshift meant. The prison was divided into different parts by the various Halls (A, B and C plus the segregation units) and officers were posted to

different units. Prison Officer Auchterlonie was in charge of the shift. Prison Officer Bell was on duty in the Hall containing the cell in which Mr Kirk was placed. The officer on duty was based in an office on the ground floor where there was a computer and a panel to show if the emergency button in a cell had been activated. The panel showed which floor the cell was on in which the button had been activated but did not indicate which cell in particular. Prison Officer Bell explained that although one officer was in charge of a large number of prisoners during the night, the prisoners were locked in their cells and it was not uncommon for the officer on duty not to have to deal with any unusual situations during the night.

[24] On June 22 a bell was activated in a cell on the 4th floor and Mr Bell attended to it. He looked through the spy hole of the cell to find that Mr Kirk was lying on the floor. He could hear him mumbling and assumed that he had had a fit or had fainted. He regarded him as unresponsive. Mr Bell explained that he was unable to enter the cell on his own and so he contacted Mr Auchterlonie and he and officers Walker and Kerr joined him. Permission was given for the door to be opened and officers Walker and Auchterlonie went into the cell. They found Mr Kirk gradually coming round. He was mumbling but not aggressive. He was anxious to obtain daihydrocodeine but the officers did not have access to any drugs other than paracetamol. The officers spoke to him for some time and he confirmed that he was withdrawing from the use of drugs. He was given paracetamol and once he was apparently feeling better the officers left. Mr Bell was told to keep an eye on him. He was next checked at 11 o'clock and found to be sitting watching television. When he was asked if he was okay he replied that he was.

[25] Mr Bell also explained that there was a system of "pegging" in operation in the prison. This involved an electronic check on where a prison officer was and Mr Bell regularly "pegged" as he went around the prison. However, no record was available of the result of the pegging because they were not retained. However he had "pegged" when he had attended at 11 o'clock.

[26] At 11:45 pm the bell was activated again and at that time Officer Bell was in the office so he set off on another "pegging" route and found that the light was on at Mr Kirk's cell. When he checked he found that he was again lying on the floor and so he went through the same procedure to get into the cell. The other officers arrived after about 3 minutes or so and the cell was again opened. By the time they got into the cell Mr Kirk was conscious and the prison officers spoke to him. Again he said he wanted to see a nurse and when he was told he would have to wait until morning he began to become more aggressive. He was upset and angry and would not take no for an answer. After a time prison officer Auchterlonie came to the conclusion that they were going round in circles and that it was time to leave because Mr Kirk was just becoming more upset and the officers did so.

[27] At about 12.30 a.m. prison Officer Bell checked on Mr Kirk again and saw that he was walking up and down inside the cell. At about 12:45 am an emergency bell was again sounded and Mr Bell set off on another pegging route. He saw that the light was on outside Mr Kirk's cell and again checked it. He had difficulty in seeing into the cell because Mr Kirk was close behind the door and was hanging. Again the procedure to get into the cell was gone through and Mr Kirk was found hanging by a bed sheet fixed over the toilet door. His feet were just off the ground and a storage unit which was normally stored under the bed was seen just at the side of where he was hanging. It appeared he had used that to stand on and then kicked it away. Mr Kirk was unconscious. Mr Bell released Mr Kirk and he was removed from the cell and placed on the floor outside while attempts were made to resuscitate him. Emergency services were called and in due course he was taken to hospital..

[28] The Halls are covered by CCTV coverage which operates when it detects movement so that during the night when no one is moving outside the cells the CCTV cameras are inactive but when movement is detected they switch on. A section of CCTV film was shown in the enquiry and basically it showed the officers attending in the way they described. The film corroborated and supported the information given by Officer Bell and contradicted the evidence given by Ronald Sinclair and to some extent Charles Gibson. At 11 o'clock for instance Officer Bell was seen checking the cell and it was possible to tell that the light which would indicate the emergency bell had been used was not operating. Ronald Sinclair and to some extent Charles Gibson had indicated that Mr Kirk had been constantly operating his bell and shouting for help whereas in fact he was being checked in circumstances where his bell was not operating.

[29] There was also controversy about the attitude of the prison officers on duty to Mr Kirk's attempts to get help. Ronald Sinclair indicated that the prison officers' attitude was inappropriate and that they had said to him "fuck off get your head down and do your time". The prison officers denied the use of that language and Derek Fine whose cell was right next door to Mr Kirk's cell did not hear that language either. In some ways also the CCTV belies that evidence although of course it did not contain audio information, but the attitude of the officers shown on CCTV did not illustrate the kind of attitude described in Mr Sinclair's evidence. In my view it was more likely than not that the prison officers did not exhibit the kind of approach described by Mr Sinclair.

[30] In relation to the question of whether or not proper regard was had to the care of Mr Kirk during that evening I prefer the evidence of the prison officers themselves. I do not accept the evidence of Mr Sinclair and Mr Gibson that and an inappropriate approach was adopted by the prison officers in relation to Mr Kirk. I think their evidence was exaggerated either deliberately or simply as a result of the passage of time. I had no reason to disbelieve Mr Bell or

the other officers as to the action which they took. In my view their evidence was supported on what can be seen on the CCTV and by what was said by Mr Fine.

[31] The evidence of Mr Bell, in relation to the occasions upon which it was necessary to enter the cell, was corroborated by Officers Walker and Kerr who spoke of being on duty outside the prison and being called to assist Mr Bell to enter Mr Kirk's cell on the 3 occasions when that was done. It was also corroborated by Prison Officer Auchterlonie who was the officer in charge and who made the decision not to obtain medical attention for Mr Kirk.

[32] Mr Auchterlonie's evidence was that there were 8 officers on duty that night including himself. He explained that normally he would not be dealing firsthand with prisoners but if he was called to a cell because it required to be opened he would normally go immediately. At night the cells were sealed with a yellow tag to indicate whether or not it had been opened during the night. Permission is required to break that seal and he was the person who had to decide whether to give it. If the seal was broken he then re-sealed it with a red seal to indicate it had been opened and he required to complete a report explaining why that had been done. This was all for both the safety of prisoners and the safety of officers.

[33] He was called to the scene by Officer Bell and he saw that it was necessary to enter the cell and give the appropriate permission. When the cell was entered he found Mr Kirk on the floor incoherent and had him lifted into the recovery position until he started to come round. It was thought that he had had a fit which was not unusual in prisoners who were withdrawing from drugs. He was not having a fit when they entered the cell however. After he had come round he was put on his bed and the officers attempted to settle him down. He was spoken to for a while and was engaged in general chitchat as well as being given paracetamol. He asked for dihydrocodeine but that was not available from prison officers. The officers became satisfied that he had recovered and that it was safe to leave him in his cell so that the cell was re -locked and the new seal put in place.

[34] One hour later there was another call and he and the same officers attended. Again Mr Kirk was lying on the floor this time with his head against the door which was again opened and Mr Kirk was helped to his bed. He was again asking for dihydrocodeine and was told that only paracetamol was available. He then asked to be seen by the nurse. When both these things were refused he became annoyed suggesting that Mr Auchterlonie was not telling the truth. It was clear that there was an impasse and the officers decided to leave taking the view that while Mr Kirk was annoyed he was not vulnerable enough for them to take any further action.

[35] It was clear that the decision as to whether medical attention was required was taken by Mr Auchterlonie and he accepted that he had the final responsibility for that but made it clear that if any officer felt it necessary to challenge his decision on that question it was likely that

he would listen carefully to what they said and be influenced by any contrary opinion. He also made it clear that he did not consider that there was any difficulty in coming to the decision whether medical attention was required. He would not be influenced in any way by any possible inconvenience or extra work brought about by the decision. He also made it clear that although attention was centred on any medical condition brought about by drug withdrawal he was also checking all the time for possible vulnerability in relation to self harm or suicide and watching Mr Kirk's reaction including body language and eye contact. Nothing in his reaction caused him to think that the ACT procedure should be put into effect and he was of the view that the decision not to obtain medical help for Mr Kirk in relation to the withdrawal symptoms was correct. None of the officers dealing with Mr Kirk formed the impression that he was likely to self harm and the only decision was whether he required to be seen by a doctor for his difficulties in relation to the withdrawal symptoms. All the officers present were ACT trained and all considered the question of whether he required any steps to be taken.

[36] Productions numbers 8 and 9 were two health care plans which had been prepared for Mr Kirk and these plans were supposed to travel with a prisoner and should have been kept in the bottom flat of the hall. When the nightshift officers take over they should see or at least have available to them any documents such as health care plans but these were not available to Mr Bell when he took over and he never saw them. Mr Auchterlonie could not explain why that was but said in evidence that they should have been available however medical matters were not always available to every officer for privacy reasons. Mr Auchterlonie was also of the view that information about previous occasions when Mr Kirk had been on the ACT procedure would not necessarily have made any difference to the steps that were taken by him and the other officers because much would depend on what they thought of Mr Kirk's presentation and he did not think that that was causing concern. He agreed however that would be necessary for any such information which had been available to have been taken into account.

[37] Mr Auchterlonie also spoke about how common it was for prisoners to come into prison suffering from the effects of drug taking or alcohol. A large proportion of prisoners up to 50% in fact can have issues with drugs and many of them have withdrawal symptoms which go so far as to cause them to have fits and many of them were looked after without extra medical help and while he agreed that he was not a doctor he did have a lot of experience of recognising when it was necessary to call a doctor.

[38] The next witness in relation to matters which took place in the prison was a Robert Edward Smith who was Unit Operations Manager in Perth. He had been in prison officer for 36 years. He pointed out that Mr Kirk had not been assessed as being at risk when he was admitted to prison. He gave evidence that in assessing a prisoner's risk it was very important to take note of his presentation. One has to look at in particular his body language and to consider whether he

was prepared to make eye contact. Prison officers have over the years developed a considerable skill in assessing these signs and it would not necessarily be important or at least decisive to know that a prisoner had previously been placed on ACT. If there was thought to be a risk that risk would be assessed and the prisoner would be placed on the ACT procedure and then a decision would be taken as to whether he required a double cell or whether he would require to be allowed to use his own clothing or be supplied with anti-ligature clothing and placed in an anti-ligature cell. He also dealt with the fact that many prisoners suffered withdrawal symptoms after being taken into custody and many arrive in the prison when doctors were not available.

[38] A decision to put someone on ACT procedure should not be taken lightly because it creates an uncomfortable atmosphere for the prisoner both from the point of view of the kind of clothes and type of cell he is in and from the point of view of what other prisoners think of him. That was one reason why it was not appropriate simply to look at a prisoner's history and decide that he should be placed on ACT because he had been on that procedure in the past. On the other hand it was necessary always to be on the safe side and if someone was exhibiting symptoms of possible self harm there was no disincentive to his being put on the procedure.

[39] Evidence on behalf of the family was led from Dr Sivekumar Appan who was a forensic psychiatrist at a grade immediately below a consultant and was employed at the State Hospital. His report was lodged in process. He too was satisfied that the treatment provided by the staff at Ninewells Hospital was satisfactory and did not criticise the police decision to release Mr Kirk after he had attended the accident and emergency department at Ninewells. He also agreed that it was appropriate to allow the records to contain information about previous suicidal tendencies but purely for the purpose of allowing those making the decision on a prisoner's care to be fully informed. He accepted that it was not the position that a previous placement on the ACT procedure would mean that it was necessarily the position that the prisoner would be treated as at risk.

[40] The determinations which require to be made under section 6(1)(a) and (b) are not controversial and in fact were agreed in a joint minute. In relation to section 6(1)(c) the evidence demonstrated that a reasonable precaution which could have been taken and which might have avoided the deaths would have been to have a system in place which allowed markers to be placed on a record system accessible to all those who require it which drew attention to any previous suicidal tendencies which had come to the attention of the authorities one way or another. It is possible that that if such a marker had been placed on the record and had been seen by those admission officers at the prison or by the officers looking after Mr Kirk, these officers might have made a different decision as to the risk posed to Mr Kirk being placed in an ordinary cell. The matter is not straightforward however because all the evidence was that while officers charged with the assessment of the risk to Mr Kirk would take account of such a marker

there was no evidence that it would automatically result in a different position from the one which was taken in this case. Everyone who spoke about this emphasised the need to assess the risk carefully and to err on the safe side but they all took the view that what was really important was carefully to assess the state of mind of the prisoner at the time he was being assessed. All accepted that this was not an easy task but the way to do it was to observe such things as body language and eye contact and to listen to what was being said by the prisoner. Indeed Doctor Appan who gave evidence on behalf of the family also agreed that the foregoing type of assessment was essential and that previous markers might not have such a strong influence on the decision as that type of assessment.

[41] I was satisfied by the evidence that each of the officers and medical staff who carried out this assessment were diligent in making the observations which are required for the personal assessment. These officers assessed him as acting in a perfectly normal fashion apparently not upset and in a reasonably cheery mood and indeed other persons including Reliance officers who escorted him from the court to prison, an officer who escorted him in the prison to the Hall, a member of the medical staff who spoke to him and obtained from him a urine sample and a project worker who saw him before he went to court either assessed him in a similar manner or at least indicated that they were unaware of anything unusual about him. Some of these other people were trained in the ACT procedure and were observing Mr Kirk with that training in mind. It can be said therefore that the evidence indicated that none of the persons who had contact, formal or informal. with Mr Kirk on his admission to prison detected anything which would have caused them to consider that he was at risk. There was sufficient evidence from a number of different people including the officers and medical staff who carried out the formal admission to satisfy me that there was nothing in Mr Kirk's demeanour which ought to have alerted officers to a risk of a suicide attempt. In these circumstances it is more than likely that even if the kind of markers described in the evidence had been placed on a record accessible to the admission officers no different decision in relation to how to look after him would have been taken and so while it is possible to say that such a marker might have made a difference I do not think that it is likely that it would. I say that even although it is clear that officers would have been aware that it was likely that Mr Kirk would begin to suffer from drug withdrawal symptoms and the unpleasantness of that condition would be likely to alter his mood and possibly his attitude to life.

[42] As I have already said an extensive enquiry was carried out on behalf of the police authorities to investigate the circumstances of two deaths connected with periods of detention in police cells in Dundee which occurred close together and the conclusion of that detailed enquiry was that a system should be implemented which allowed officers who had knowledge of suicidal attempts to place markers on an accessible record available to officers all over the country that such an incident had taken place. The system was put into place some time go and the new

system was not the subject of criticism by anyone except Mr Bell on behalf of the family who suggested that the markers should contain more detail of the incident so that an officer making an assessment of risk would be able to take into account how serious the incident had been. I was also satisfied that the new system would avoid the defect which had previously existed and was sufficient to give the necessary information to those who had to make the risk assessment. In these circumstances although I have made a determination that that was a reasonable precaution which might have been taken and which might have avoided the death I emphasise that the system has changed adequately between the time of the death and this enquiry and the lesson has been learned. I also emphasise that the word used in the Act is 'might' and the situation could not be put higher than that.

[43] Mr Bell for the family of Mr Kirk argued that another precaution would have been to have placed Mr Kirk in an anti-ligature cell or at least in a two-man cell until he could be more fully assessed. He argued that there was no problem in doing so and that Mr Kirk would have had to endure that indignity for only a short time until a case conference had a chance to discuss his case more fully. The ACT procedure enjoined those dealing with prisoners who might be vulnerable to act always on the safe side and the action suggested by him would have fulfilled that criterion. He argued that his submission was supported by the evidence of Doctor Appan.

[44] It should be remembered of course that the precautions which are the subject of subsection (c) are 'reasonable' precautions. There was evidence that while a decision to implement the ACT procedure was available to every officer and should be put into place if any officer detected what he or she regarded as a risk, on the other hand it should not be undertaken lightly without an indication of risk in the circumstances of a particular prisoner. The ramifications for the prisoner involved being placed in a very bare anti-ligature cell possibly wearing paper clothes and with bedclothes and the like which could not be used for suicidal purposes. Prisoners do not find such a prospect attractive and if they are imposed when someone is not in fact at any risk they could be regarded as oppressive or counter productive. A further ramification is that other prisoners who become aware of a prisoner's detention in such a cell may bully or make fun of the prisoner as a result. Such action therefore might have the very opposite effect of what was intended. In this case the evidence did not indicate a reasonable justification for taking that action.

[45] In relation to section 6(1)(d) the same considerations apply. The wording of that subsection however is different. That section provides that the court "shall make a determination setting out the defect if any, in any system of working which contributed to the death or any accident resulting in the death". The question for the court therefor is whether there was a defect in a system of working which contributed to the death or any accident resulting in the death. The defect which is suggested is the failure to have a system which allowed individual officers easily to

place a marker on the record which would be available to officers such as the reception officers at the prison to assist them in assessing any risk to any of the prisoners they were admitting. In particular there had been no system which would allow a record to be made of any suicidal tendencies detected by previous custody officers. It is accepted in this case that the system employed by Tayside police at the time of Mr Kirk's admission to the police cells was defective in that it did not allow such a record to be made and a completely new system was recommended by the officer investigating the circumstances of the death and that system is now in force. The next question is whether the lack of such a system contributed to the death. In other words whether the defect contributed to the death. Bearing in mind the unanimous evidence of all those people who found it necessary to apply the ACT procedure that while they would welcome as much information as possible about a prisoner including any evidence of pre-existing suicidal tendencies, the existence of a marker would not necessarily change the decision that was made in this particular case. It was likely that the presentation of Mr Kirk at the time of his admission as seen by the witnesses previously mentioned would have outweighed the information contained in the records even if it had contained information about previous suicidal tendencies. Each officer who directly dealt with his admission accepted that such a marker would have caused them to ask more questions than they might have asked otherwise but the general tenor of their evidence in my view was that his presentation was such that they would not have regarded him as a risk of suicide simply because such a marker existed.

[46] I take into account the expression 'hindsight is a wonderful thing' and that witnesses were having to rationalise their decision a considerable time after it had been made but the amount of evidence which demonstrated a favourable impression displayed by Mr Kirk when he was being admitted allows me to come to the conclusion that it is more likely than not that the markers would not have altered the decision taken on admission to treat Mr Kirk as not at risk on that occasion. I do not think it can be said in these circumstances that the defect identified by the police authorities in the records system contributed to the death on this occasion.

[47] Another possible defect in the system was said to relate to the failure to obtain medical treatment for Mr Kirk when he exhibited serious symptoms of withdrawal from drugs. On two separate occasions during the evening or night on which he died Mr Kirk was found on the floor of his cell either having suffered a fit or at least some loss of consciousness as a result of his withdrawal from drugs. On these two occasions officers dealt with him sympathetically and spent some time with him making sure that he was recovered but they did not give him any access to medical treatment other than to offer him paracetamol. It was not thought necessary to contact help from either a nurse or a doctor. Withdrawal from drugs is something regularly witnessed in the prison and a very high proportion of persons admitted to prison are likely to experience a drug withdrawal in the days after admission. The evidence demonstrated that prison officers were very much used to dealing with prisoners suffering from withdrawal. Detox programs are available but

require to be put into place by medical staff rather than prison officers and no doubt Mr Kirk would have had the benefit of such a program in the days following his admission but no medical steps were taken during his first night. His symptoms sounded particularly severe since he was found to have been unconscious or in a fit on two occasions but those giving evidence who dealt with him did not find the symptoms sufficiently severe to require medical assistance. The evidence did not make it clear whether the decision taken by Mr Auchterlonie not to call a doctor or nurse was wrong or not. By coincidence it is possible that the calling of a doctor to deal with the symptoms caused by drug withdrawal might have avoided the death because the attendance of a doctor would have interrupted the chain of events which brought about his death but in view of the fact that the cause of death was not directly related to drug withdrawal I do not think that it is possible to connect the failure to provide medical treatment in relation to the drug withdrawal with the incident which caused the death in a direct manner.

[48] In these circumstances I do not think that the evidence demonstrates a defect in the system in relation to the provision or otherwise of medical treatment and even if I am wrong on that I do not think that the defect could be said to have contributed to the death. It is just possible that it might have contributed to the failure to avoid the death in a coincidental manner but I do not think it can be said to have contributed to the death or the incident causing the death.

[49] Mr Bell also asked me to consider whether there was a defect in the ACT procedure in relation to how it was implemented by officers. He pointed out that while it was fair to say that the ACT system was a good system it had not worked in this case and it was not clear why certain events had taken place. He asked me to consider finding that the system was appropriate but had not been invoked properly because it allowed for failures on occasions such as this. He suggested that there was confusion about how the system should be invoked.

[50] It is true to say that nothing prevented the suicide of Mr Kirk but that single fact does not follow me in my opinion to come to the conclusion that a review of the ACT system should be recommended or that it can be said that the procedure was not properly invoked. In fact the evidence demonstrates that it was properly followed even if there were some processes which could have been carried out more efficiently such as the completion of the forms by Nurse Baxter. Every effort must be made to have a system which is as efficient as it possibly can be but it would be naive to suggest that any system requiring the assessment of the state of mind of a prisoner could be expected to be perfect. Nothing in the evidence indicated that the process leading to the assessment of risk should contain some different procedure than the ones put into effect in this case. The officers dealing with Mr Kirk explained how they implemented the system and what it was about him that they were looking for in order to spot the risk. I do not have evidence led in this enquiry which would demonstrate something lacking in the procedures put

into effect which would justify the suggestion that the procedures should be re-evaluated. The argument that the system did not work on this occasion because Mr Kirk committed suicide does not justify a further overhaul of the system other than to make sure that there was nothing other than the lack of markers which should in future be done differently when operating the ACT system which might make a difference to the assessment of risk. The assessment of clues and cues by looking at a prisoner's body language and eye contact and listening to what he says about the future has been devised over a period and the evidence in this case did not demonstrate that it was an ineffective way of completing a difficult task. In these circumstances I make no determination in relation to that matter.

[51] In relation to section 6(1)(e) of the Act there was some discussion about how a decision should be made to obtain medical assistance for a prisoner. The person who required to make the decision that night was Mr Auchterlonie. He was a prison officer of considerable experience but who had no direct medical training. He had seen a considerably large number of prisoners suffering the effects of drug withdrawal, many of whom would be admitted when it was too late to have medical assistance available on site. He had seen other prisoners going through the same process including having a fit as a result of withdrawal. He took the decision not to contact a doctor. There was no evidence that that failure caused or contributed to the death. On page 6 of his report Doctor Appan points out that the prisoner care plans relating to Mr Kirk specified that the health care centre should be contacted if concerns arose regarding Mr Kirk and that did not happen. He indicated that he would have expected that prison staff would have contacted medical personnel for advice regarding Mr Kirk rather than follow medication procedures by giving him paracetamol. No other evidence was led which criticised the decision not to obtain medical advice in the circumstances. The evidence demonstrated that if medical advice had been sought it would have been not in relation to suicidal thoughts or ideation but in relation to the drug withdrawal which cannot be said to have been directly the cause of death. The information contained on the prisoner care plans seem to me to relate to the mental health of Mr Kirk rather than his physical health and I take the view that it is unlikely that Mr Auchterlonie's decision would have altered if he had seen the prisoner care plans. In these circumstances I have made no determination under section 6(1)(e) in relation to this matter.