

**SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY  
AT AIRDRIE**

**[2018] FAI 6**

B183/17

DETERMINATION

BY

SHERIFF MORAG M SHANKLAND

UNDER THE FATAL ACCIDENTS AND SUDDEN DEATHS INQUIRIES (SCOTLAND)  
ACT 1976

into the death of

**JACK MUSTOE**

AIRDRIE, January 2018

The sheriff, having heard evidence and having resumed consideration of the cause, finds and determines that:-

1. In terms of section 6(1)(a) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 ("the 1976 Act") Jack Mustoe who was born on 9 May 1945 died at Riggend Lorry Park, A73 Stirling Road, Airdrie, on 16 November 2016 at 12.07 hours.
2. Mr Mustoe was self-employed and was the owner and operator of the Riggend Lorry Park and died carrying out his occupation.
3. In terms of section 6(1)(b) of the 1976 Act the cause of his death was multiple injuries due to road traffic collision (pedestrian). The cause of the accident was the failure of Saulius Gureckis, the driver of heavy goods vehicle registration number

SM16 FSE to observe the position of the deceased when he commenced driving away from the locus.

4. In terms of section 6(1)(c) of the 1976 Act reasonable precautions whereby the accident resulting in the death might have been avoided was

(i) for Saulius Gureckis, the driver of the said heavy goods vehicle to have waited until the deceased was visible to the driver before he drove the vehicle away from its' stationary position and

(ii) for the driver to have sounded his horn before moving off.

5. In terms of section 6(1)(d) of the 1976 Act there is no finding in respect of defects in any system of working which contributed to the death.

6. In terms of section 6(1)(e) there are no other facts which are relevant to the circumstances of the death.

#### NOTE

#### **Introduction**

[1] This is an inquiry into the death of Jack Mustoe who died after being struck by an articulated vehicle at Riggend Lorry Park, Airdrie. He had owned and operated the lorry park for a number of years. He died while carrying out his occupation.

[2] At the inquiry the Crown was represented by Ms K Milligan, Procurator Fiscal Depute. Mr Mustoe's daughter, Tracy Mustoe or Gibson, was represented by Mr J Barr, Solicitor, and his son, David Mustoe, was represented by Mr I Smart, Solicitor.

[3] Parties were able to agree a Joint Minute of Admissions and the following witnesses gave evidence at the inquiry:-

(i) Gareth John Lappin, former Operations Manager for ChillFlo, employers of the driver of the vehicle involved;

(ii) PC John Denholm, Police Collision Investigator;

(iii) Elizabeth Gray, Health and Safety Officer with North Lanarkshire Council;

[4] PC John Denholm and his colleague PC Ewan Thomson prepared a Road Policing Collision Investigation Report which formed Production No. 3 for the Crown.

[5] The accident reconstruction carried out by Constables Denholm and Thomson was also recorded and Label 2 is CCTV footage of the reconstruction. Still photographs were also taken which formed Production 7 for the Crown.

[6] The post-mortem report was prepared by Dr Julie McAdam and Dr Gemma Kemp, both forensic pathologists and formed Production No. 8 for the Crown.

[7] Mr Barr lodged an Affidavit sworn by his client, Ms Tracy Mustoe or Gibson.

[8] At the time of the accident the lorry park was covered by CCTV cameras which recorded the whole incident from different angles. These recordings were formulated onto a disc which was Label 1 for the Crown. This resulted in the inquiry having the opportunity to view the traumatic circumstances of Mr Mustoe's death as they had happened.

[9] In order to preserve the dignity of the deceased I advised parties that the tape of the incident would only be viewed twice and other evidence relating to the position of the vehicle and other persons was then discussed using the video of the reconstruction.

I am obliged to parties for confining themselves to this manner of leading the evidence.

I understood that Mr Mustoe's family had already seen the tape but I wish to record that this was a very difficult situation for them which they dealt with appropriately.

[10] The Crown had written to the driver of the vehicle concerned, Saulius Gureckis, and advised him that no proceedings would be taken against him. At a Preliminary Hearing in this case I had enquired about the current whereabouts of the driver and whether any party wished to examine him.

[11] The Crown were able to trace him. I had understood that he had been acting in the course of his employment and I expected that some investigation had taken place by his employers. However it transpired and was confirmed in evidence by Gareth Lappin, who was Operations Manager for ChillFlo at the time of the accident, that the driver had not been acting in the course of his employment. He had been selling pallets which were not his property and which he had stolen from his employer's customer, the supermarket chain Lidl. When his employers became aware of this the driver was dismissed immediately for gross misconduct.

[12] It was therefore agreed that although the driver had been told he would not be prosecuted for any driving related matter, the issue of theft may yet proceed and a warning would have to have been given by the court that he did not have to answer questions, the answer to which would tend to show that he is guilty of any crime or offence in terms of section 5(2) of the 1976 Act.

[13] His evidence would therefore be of limited value and in any event all of his actions were covered by the CCTV recording and no party or the court considered it necessary that he should be called.

### **Background**

[14] In terms of her Affidavit Mr Mustoe's daughter, Tracy Mustoe or Gibson, explained that in or around 1993 her father purchased from Shell UK Limited an area of land on the west side of the A73 Stirling Road, Riggend, Airdrie. Prior to the construction of the motorway the A73 had been one of the main roads between Scotland and England. The area of land purchased by her father had formerly been a filling station. A sister filling station was situated on the east side of the A73 along with a transport cafe. The transport cafe closed around 2016. Heavy goods vehicles parked on the west side of the A73 in order to access the transport cafe on the east side. Mr Mustoe had recognised that the former filling station on the west side would be ideal for setting up a business recycling pallets as there was a ready market in relation to the vehicles which used the site to park. Once the site had been cleaned up and decontaminated he began to trade as Jack Mustoe Pallets.

[15] On 24 September 2004 Mr Mustoe formed a Limited Liability Company TJG Properties Limited currently having its registered office at 82 Greengairs Road, Wattston, Airdrie. 100 shares were issued, 50 to Mr Mustoe, 25 to his daughter and 25 to his late wife. Mr Mustoe described the company as his pension. On 8 November 2005 title of the land at Riggend was transferred to the limited company.

[16] In addition to storing and recycling pallets, the yard was used as an overnight lorry park. The pallet business closed each day at around 4.30 p.m. The staff then went home. There were two exits/entrances to the site, being the exits/entrances in use when it was a filling station. When the pallet business closed, the north gate was shut and secured. From 5.00 p.m. onwards, drivers wishing to park their vehicles overnight accessed the site via the south gate. Mr Mustoe employed an individual to operate the lorry park. Overnight parking fees were paid by the drivers who were required to vacate the site before the pallet business started up again the next morning. The lorry park only operated from Monday night to early Friday morning.

[17] At the time of the accident there were two aspects to the business, sales and purchases. In addition to Ms Gibson and her father there were three other staff members. Vehicles were able to access the yard by either gate, although the majority of traffic tended to access the yard by the south gate. The gates to the yard are set back from the road itself. A vehicle entering by either gate would be observed by a member of staff. There was an area in the centre of the yard. A vehicle would stop and then be approached by a member of staff. If pallets were being sold the vehicle would be directed to stacks of pallets situated in the south west of the yard. Pallets come in various sizes and the driver would be directed to the part of the yard where those particular sizes of pallets were stacked. The driver would leave his vehicle and do whatever was necessary to the trailer to make it ready for the pallets to be loaded. While the driver was preparing the trailer the staff member would get the first batch of pallets loaded onto the vehicle using a forklift truck. Drivers tended to stay with their vehicles.

It was regarded as poor practice for a driver to leave his or her vehicle unattended. After the vehicle was loaded the pallets would be secured by the driver. It was the driver's responsibility to do so. While the load was being secured the staff member would go to the office which was located in a cabin next to the south gate. The staff member filled in a delivery note and then returned to the vehicle for it to be signed by the driver before providing the driver with a copy of the note. The vehicle then left by either gate.

[18] In relation to purchases the vehicle would again be met by a staff member. The vehicle remained in the centre of the yard while the driver prepared the trailer for pallets to be unloaded. A staff member would unload the pallets and these would be stacked before being sorted and then taken by forklift to the south east corner of the yard for sale. Again a staff member would call into the cabin, fill out a delivery note and if a cash purchase, pay the driver. The vehicle then exited using either gate.

[19] Ms Gibson further explained that until her father's death there had never been an accident in the yard, not even a minor bump between vehicles.

[20] By Joint Minute it was agreed that on the morning of 16 November 2016 Mr Mustoe was working at the Riggend Lorry Park. At around 11:45 hours a white coloured DAF XF EURO 6 tractor unit registered number SM16 FSE towing a trailer, driven by Saulius Gureckis, entered the yard. The vehicle stopped and the said Saulius Gureckis exited the cab area of the vehicle and carried out a transaction with the deceased. At the conclusion of the transaction at around 11:51 hours, the said Saulius Gureckis entered the cab area of the vehicle, drove off and struck the deceased.

[21] It was further agreed that Mr Mustoe's life was pronounced extinct at 12:07 hours on 16 November 2016 by paramedic Linzi Reid.

[22] A post-mortem examination was carried out at the Queen Elizabeth University Hospital, Glasgow by Dr Julie McAdam, MB CHB FRC PATH DIP FM and Dr Gemma Kemp, MB BS, FRC PATH, both forensic pathologists at the University of Glasgow. The pathologists concluded that the deceased died as a result of multiple injuries entirely consistent with being run over by a heavy goods vehicle and the cause of death was certified as being multiple injuries due to road traffic collision (pedestrian).

[23] Following the accident, Police Collision Investigators, PC John Denholm and PC Ewan Thomson attended at the locus and carried out a collision investigation. They then re-attended on 13 December 2016 and carried out a reconstruction of the incident and produced a report which formed Production No. 3 for the Crown.

[24] In addition to filming the reconstruction, photographs were also taken which formed Crown Production No. 7. The police investigators concluded that the collision was the result of the driver of the DAF large goods vehicle and the pedestrian failing to observe each other within the confines of the locus. The driver of the vehicle drove the vehicle forward for a short distance and failed to observe the deceased until after the collision. The report goes on to say, "Had he looked eastwards, the deceased Jack Mustoe would have seen the approaching large goods vehicle, however he has failed to observe or react timeously to the approaching vehicle."

[25] As is well recognised a Fatal Accident Inquiry is not a fault finding exercise. It is an inquiry into the accident which in part tries to assist a family in discovering the



circumstances surrounding the death and additionally seeks to determine if any reasonable precautions could have been taken to avoid it.

[26] The 1976 Act also instructs the sheriff to make a determination in terms of section 1(d) in respect of the defects, if any, in any system of working which contributed to the death or any accident resulting in the death. The court also must consider any other facts which are relevant to the circumstances of the death.

### **The evidence**

#### *The locus*

[27] Photographs of the locus were lodged and form Production No. 4 for the Crown.

[28] A detailed and helpful description of the locus was given in the Affidavit of Tracy Mustoe or Gibson to which I have already referred.

[29] Following the accident the Health and Safety Executive liaised with the local authority. Ms Gray, who is an Environmental Health Officer with North Lanarkshire Council, gave evidence and explained that responsibility for the enforcement of health and safety regulations falls sometimes on the Health and Safety Executive and sometimes on the local authority. The enforcing authority is determined by the nature of the business involved. In this case the enforcing authority was the local authority.

[30] Accordingly Ms Gray, together with her colleague Carol Heaton, attended the premises on 13 December 2016 and observed the reconstruction being carried out by the police. At that time the environmental health officers had a brief look at the yard and did not determine any matters of immediate concern. On 28 February 2017 Ms Gray and

Ms Heaton again attended the premises and were met there by Ms Gibson. They carried out a health and safety inspection. The officers carried out a walk round of the yard and buildings and checked health and safety documentation relating to vehicles, forklifts and operators and discussed general health and safety requirements and risk assessment with Ms Gibson. No particular matters of concern were noted, the layout and surface condition of the yard was satisfactory with adequate visibility around the main areas. The office and staff welfare facilities were satisfactory.

[31] Discussion took place regarding traffic management and advice was given regarding enhancement of the partial one way system for traffic and in particular HGVs within the yard. The yard has two gates, one normally used for entering, the other for exiting. However this sometimes varied if heavy goods vehicles approached the wrong gate and access was given to avoid vehicles from reversing onto the main road.

[32] The officers discussed the sign posting of the entrance to the site and suggested it be enhanced to make it more apparent to approaching drivers where to access the site to avoid any errors. This improvement was carried out but has no bearing on the circumstances of the accident which is the subject of this inquiry. No matters of concern were noted.

[33] In answer to a direct question which I asked, Ms Gray said that in her view having delineated pedestrian walkways on this site was not required and would not have avoided this particular accident.

*The vehicle*

[34] Gareth John Lappin who was the Operations Manager for ChillFlo at the time of this incident and is still employed as a driver there explained that ChillFlo owned four or five similar vehicles at the time. One vehicle had to be repaired and the particular vehicle involved in the accident was a courtesy vehicle provided by DAF which is why it bore no logos identifying either ChillFlo or Lidl. It was however similar to the vehicles ChillFlo usually operated although it may have been slightly longer and had a different axle configuration.

[35] The vehicle concerned was a white coloured DAF XF EURO 6 tractor unit registered number SM16 FSE towing a trailer.

[36] Mr Lappin himself was a HGV driver and could speak from his own direct experience of driving a vehicle such as the vehicle concerned in this matter. His evidence was of great assistance to the inquiry. Of importance in this matter was the question of the mirrors on the vehicle. Mr Lappin explained with reference to the photographs which formed Production No. 5 for the Crown that the vehicle first of all has two wing mirrors which can be seen in photograph 55 and 56 of Crown Production No. 5. There is also a mirror under the side mirrors which gives a better view towards the back of the lorry. There is also a mirror which is positioned above the driver's door and allows him to see down to the kerb. (Photograph 55). The purpose of this mirror is really for parking beside a kerb so that the driver has a clear view. He explained further that if there was an object two or three feet out from the side of the vehicle at the driver's

door the driver wouldn't be able to see it. There is also a mirror at the front of the vehicle which allows the driver a view across the front of the vehicle. (Photograph 60).

[37] The Police Collision Investigation Report to which I will return had identified what was referred to there as a "zone of invisibility" or "blind spot". Mr Lappin was referred to Crown Production No. 3 at Appendix B where the zone of invisibility is marked as a triangle. His evidence was that the whole triangle is not a blind spot. He explained that the blind spot is really a small round circle between the driver's door and the front of the lorry more accurately seen in the diagram on page 9 of Crown Production No. 3 and referred to there as a "Hazard Zone". He said that the driver would be able to see the rest of the triangle. He did accept however that if an adult man with a high visibility jacket was in the triangular zone of invisibility referred to in the Police report he may be slightly obscured by the pillars and mirrors of the vehicle.

[38] As a driver Mr Lappin said he was aware of the blind spot. However, he explained that he himself had had an accident when a very small car had been in the blind spot passing him on the inside lane. He made a manoeuvre to change into the inside lane and he struck the car.

[39] He was asked if it took the accident to inform him of the blind spot but he said he was aware of that beforehand. He said that any professional driver would be aware of such a blind spot. He also explained that he had had another incident of having seen an Audi approaching from the rear of the vehicle and before he made a manoeuvre he was aware that he couldn't see the Audi anymore. He therefore waited until the Audi

re-emerged from the blind spot to pass the lorry. He said that it is most important for drivers to be aware of the blind spot on these vehicles.

[40] Under cross-examination Mr Lappin was asked about the position of vulnerable road users. He explained what his practice was in relation to cyclists. He said that if there was a cyclist on his nearside he would check his offside mirrors and pull out to give the cyclist room. If he couldn't at that point see the cyclist he said his thought process would be to wonder where the cyclist has gone and he would stay behind until the cyclist re-emerged. He would not carry out any manoeuvre if he could not see the cyclist. He said this would be doubly the case if the road user was a pedestrian. In a delivery yard Mr Lappin said that he would take a mental note of where pedestrians were. He said that was common sense. If he was aware of pedestrians before he moved off he would try to locate where they were. If he didn't see them he wouldn't move. Before he moved he would blow the horn of the vehicle to draw attention to it and he may move back a bit first of all. However he would make no movement at all if he could not see the pedestrian. Mr Lappin said that he was not sure if this discussion took place on the Certificate of Professional Competence (CPC) course but said it made common sense to operate in the way he described.

[41] He confirmed that the lorry involved had no sensors which would detect pedestrians in the vicinity of the vehicle. The vehicle does have an emergency braking system which operates if the vehicle comes too close to other vehicles on the road. This operates with regard to vehicles, walls and railings, but so far as he was aware this braking system did not apply where there were pedestrians.

[42] Mr Lappin was also asked about trackers on the vehicle. As far as he was aware he thought that Lothian DAF had access to the tracking system for the vehicle but his company did not. He said that the tachograph on the lorry would show if the vehicle had stopped for any length of time. He agreed that a driver might then be asked to explain why his vehicle had been stopped for a lengthy period of time. When the vehicle was ultimately collected by Mr Lappin there was no damage to the vehicle at all.

[43] With regard to the collision investigation and the reconstruction he explained that he had no input into that. He had simply given a statement to the Police.

#### *The driver*

[44] Mr Lappin was able to give evidence about the driver Saulius Gureckis. He had known Mr Gureckis as a lorry driver before he came and asked for a job with Chill Flo. Mr Gureckis had spoken to Kevin Taggart who owned the company and Mr Taggart had advised Mr Lappin that Mr Gureckis wanted to come and drive for them.

Mr Lappin said that they jumped at the chance because Mr Gureckis had driven for another company and he was known to be a very reliable and dependable driver.

Mr Lappin obtained documentation from Mr Gureckis which he passed to the company's transport manager. The documentation obtained was Mr Gureckis's driving licence which confirmed that he was entitled to drive a vehicle of this type and a CPC.

Mr Lappin explained that a CPC Certificate is required by HGV drivers every five years. It can either be obtained by completing a course one day in each year or a driver can do five days at once. He himself had completed his last certificate in a block of five days

but he now felt it might be better to do one day per year. It is a theory based course and there is no practical test. There is obviously a practical test in order to obtain the appropriate HGV licence which Mr Gureckis had passed. Mr Gureckis's documents were all in order.

[45] Under cross-examination Mr Lappin explained that part of the HGV test does include the use of mirrors. He was not 100% sure if mirrors were included in the CPC training which is delivered by a professional company. He did think that the training included discussion and instruction in relation to the blind spot or hazard zone already referred to on the vehicle. He agreed that one of the primary objectives of the CPC courses is safety. Vulnerable road users such as cyclists, pedestrians and motor cyclists are dealt with in the training. Prior to the accident Mr Gureckis had driven the same type of vehicle as the courtesy vehicle provided by DAF and he would have been familiar with it. It did however have a different axle configuration. It may also have been slightly longer than his usual vehicle.

[46] On the day of the accident Mr Gureckis' route was to attend at a shop in Ayr with a load and then return to Livingston to reload. He was then going to Kilmarnock. Mr Lappin thought there may have been another shop that Mr Gureckis had to attend. He had no reason in terms of his employment to be at Riggend Lorry Park which was not on his route. ChillFlo didn't have access to the tracker on the vehicle although Lothian DAF would have had. Mr Lappin did say however that he was in the habit of checking where drivers were every so often on the company's own tracking system.

[47] The pallets in Mr Gureckis' vehicle which he sold to Mr Mustoe were not his to sell. They belonged to Lidl. The empty pallets were supposed to go back to Lidl.

Mr Lappin accepted that if a driver was doing something that he did not wish his employer to know about he would want to be stopped for the shortest possible time.

Mr Lappin had no reason to suspect that Saulius Gureckis was engaged in any illegal activity and was shocked to discover that he had been selling pallets to Mr Mustoe.

[48] When the matter was reported to the owner of ChillFlo, Mr Gureckis was dismissed for gross misconduct in respect of the sale of the pallets.

### *The collision investigation*

[49] The Road Policing Collision Investigation Report which formed Production No. 3 for the Crown deals with the findings of the investigators PC Denholm and PC Thomson. PC Denholm spoke to the report and explained how the reconstruction was carried out.

[50] The Police Officers viewed the CCTV recording of the actual incident itself. From that they plotted the position of the vehicle and the position of Mr Mustoe at various stages of the incident. Photographs were taken of the reconstruction and lodged as Production No. 7 for the Crown. PC Denholm accepted they made no enquires into the height of the persons involved and under cross examination accepted that the respective heights of the driver and the deceased would be relevant in that a taller driver than either of the Police Officers may have had a different view and his zone of invisibility would be different.



[51] In terms of the report the officers detailed what is referred to there as the, “zone of invisibility” and their conclusion was that Mr Mustoe was in that zone and was not seen by the driver. The conclusion of the report states, “In conclusion this collision is the result of the driver of the DAF large goods vehicle and the pedestrian failing to observe each other within the confines of the locus. Saulius Gureckis was the driver of the involved large goods vehicle and has driven same forward for a short distance and has failed to observe the deceased until after the collision. Had he looked eastwards the deceased, Jack Mustoe, should have seen the approaching large goods vehicle, however he has failed to observe or react timeously to the approaching vehicle”.

[52] The report was submitted to the Procurator Fiscal and the Crown decided to take no proceedings against the driver.

*The actions of the driver and the actions of Mr Mustoe*

[53] For the purposes of the inquiry it is important to consider the evidence led and to try to establish what exactly Mr Mustoe did and what the driver of the vehicle did.

[54] The CCTV evidence of the incident was of course enormously helpful in that regard.

[55] Firstly the vehicle arrived at the locus and came to a halt. There is no criticism of the manner of driving the vehicle at that point.

[56] Mr Gureckis is seen emerging from the vehicle and is walking quickly. The pallets are then unloaded from the vehicle by forklift truck by employees of Mr Mustoe. The driver is in attendance while that is being done.

[57] Mr Mustoe then leaves his office which is next to the gate and walks towards the vehicle where he is met by Saulius Gureckis.

[58] The two men have a conversation and money is exchanged. When they separate the driver runs back quickly away from Mr Mustoe, who is then behind him, to the vehicle and climbs into the cab.

[59] When the parties separated Mr Mustoe was at the rear of the vehicle and would have been visible to the driver had he not moved.

[60] However by the time the driver had entered the cab Mr Mustoe had walked down the side of the lorry towards his office.

[61] The CCTV recording does not show what the driver did at that point but PC Denholm said that on the police equipment which was better than the court equipment, he could be clearly seen checking his mirrors. He accepted in answer to a question from me that if Mr Mustoe at that time had been in the zone of invisibility as detailed in the report, then checking his mirrors would have made no difference as Mr Mustoe could not have been seen.

[62] There is no suggestion that the driver did see Mr Mustoe and drove off regardless. For whatever reason which I will consider later in more detail, he did drive off. He turned to the left which took him directly into the place where Mr Mustoe was headed.

[63] At that point Mr Mustoe, who had his head down counting money, looked up and saw the lorry. In that split second he decided to run forwards obviously attempting to beat the lorry.

[64] Tragically the lorry kept moving and Mr Mustoe was not able to run to the other side in time and the vehicle collided with him, dragging him with it until it stopped close to the gate. The driver did not at any stage attempt to slow down and it can be assumed that he did not see Mr Mustoe.

## **Submissions**

### *The Crown*

[65] The Crown submitted that Mr Mustoe being a self-employed person was engaged in his occupation and accordingly section 1 of the 1976 Act provides for a mandatory inquiry.

[66] The terms of section 1(1)(a)(i) provides –

“In the case of a death to which this paragraph applies –

(i) it appears that the death has resulted from an accident occurring in Scotland while the person who has died, being an employee, was in the course of his employment or, being an employer or self-employed person, was engaged in his occupation as such -

The Procurator Fiscal for the district with which the circumstances of the death appear to be the most closely connected shall investigate those circumstances and apply to the Sheriff for the holding of an inquiry under this Act into those circumstances”.

[67] The Crown submitted that having heard evidence and viewed the footage from the CCTV recording together with the Joint Minute lodged that there was the basis from which the court could make the findings in terms of section 6(1)(a) that Jack Mustoe, date of birth 5 September 1945, died on 16 September 2016 at 12:07 at Riggend Lorry Park while engaged in his occupation and that in terms of section 6(1)(b) the cause of death was multiple injuries due to a road traffic collision (pedestrian).

[68] In terms of section 6(1)(c) the Procurator Fiscal Depute indicated that she understood that the solicitors for the family would try to persuade the court that the driver had not checked his mirrors properly before moving off. She submitted that that would not be enough to have avoided the accident as there was no requirement on the driver to check where Mr Mustoe was at that time. She was aware that the family's solicitors had sought to challenge the investigators' opinion with regard to the zone of invisibility particularly in light of the fact that no consideration had been taken of the heights of the persons involved. However it was submitted that there was no expert evidence before the court to rebut or confirm those suggestions which had been put in evidence.

[69] Constable Denholm's position remained that the driver did not appear to have seen Mr Mustoe before he set off.

[70] In this inquiry there is fairly unique CCTV evidence of the whole incident. This gives a good description of what happened. When the lorry started moving the lorry's path is clear and there was no one in front of the lorry.

[71] Mr Mustoe himself moves and puts himself into the path of the lorry.

[72] It was submitted that even if the driver didn't see him or was not sure of his location it would not be reasonable for him to assume or predict that Mr Mustoe would act in a counter intuitive manner by putting himself into the path of the lorry.

[73] In these circumstances it was submitted that in terms of section 6(1)(c) there are no reasonable precautions which the driver could have taken whereby the death and any accident resulting in the death might have been avoided.

[74] It is clear from the CCTV that Mr Mustoe appears to have put himself into the space and was not visible to the driver. This is against a background of Mr Mustoe having been involved in the particular location for 25 years and he can be assumed to have experience of avoiding vehicles in the lorry park.

[75] The Crown were at pains to point out that there was no suggestion of any blame being laid on Mr Mustoe at all and it was accepted that this was a very traumatic inquiry for the family. However from the evidence it could reasonably be ascertained that when the transaction took place between Mr Mustoe and Mr Gureckis the driver then ran back to the cab and, given where Mr Mustoe was standing, it is reasonable to assume that he would have heard the engine of the vehicle start.

[76] Again from the CCTV Mr Mustoe seems to be shown speeding up and glancing round as the lorry moves and continues on a route into the pathway of the lorry.

Mr Mustoe was the owner and operator of the yard and was aware of lorry movements. If he had taken reasonable precautions and not moved until it was safe to do so then there may have been a real possibility of the collision not having taken place and accordingly that is the only finding that could be made with regard to section 6(1)(c).

[77] Section 6(1)(d) of the Act deals with systemic failures and it was submitted from the evidence taken from the Health and Safety Officers and from the operator of the park, Mr Mustoe's daughter, Tracy Gibson, there were no defects which contributed to this accident.

[78] The Crown properly concluded their submissions by extending condolences to the family in this difficult and distressing situation.

*Submissions on behalf of Tracy Mustoe or Gibson*

[79] Mr Barr for Ms Gibson indicated that he had no issue with the submissions made by the Crown in respect of section 6(1)(a) and 6(1)(b) of the 1976 Act.

[80] However he had strong submissions in disagreement with the submissions made with regard to section 6(1)(c). He had nothing to add with regard to 6(1)(d).

[81] With regard to 6(1)(c) the court is being asked to determine the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided. A reasonable precaution, it was submitted, would have been for Saulius Gureckis to have checked his nearside mirrors on the vehicle driven by him in the manner required of a careful and competent driver. Had he done so the accident would not have occurred.

[82] In relation to Mr Mustoe there has been a systematic error by the Police and the Crown with regard to the investigation of his actions in the course of this inquiry. It was stressed that at the time of the accident Mr Mustoe was a pedestrian.

[83] The CCTV recording provided the court with a unique picture of what happened from two separate angles. The recording shows that from the time that Mr Mustoe and Saulius Gureckis finished their conversation and moved apart until Mr Mustoe is struck is only some 14-15 seconds.

[84] Mr Barr indicated that he had calculated that some 10 seconds passed between the parties separating until Mr Gureckis entered his cab. There is then barely two

seconds which pass before the vehicle moves off and a further two to three seconds before Mr Mustoe was struck.

[85] Looking at the matter objectively it was submitted that Mr Mustoe approached the vehicle and is noted to be there by the driver who comes towards him and meets him at the nearside of the vehicle. The driver knows that Mr Mustoe is there. The driver then enters the truck.

[86] The court was asked to consider whether Mr Mustoe did anything which was unexpected, reckless or foolish or outwith what one would expect of a pedestrian taking reasonable care. It is not a counsel of perfection as appeared to be submitted by the Crown.

[87] It was further submitted that Mr Mustoe knows the driver is returning to his cabin. It is the vehicle which crosses into his path not the other way round as appeared to be suggested by the Crown.

[88] It is accepted that Mr Mustoe would have heard the vehicle. However there are only two to three seconds which elapse from the vehicle starting and Mr Mustoe being hit.

[89] It is clear from the CCTV evidence that Mr Mustoe clearly appreciates that the vehicle has moved off and he has a split second to decide what to do.

[90] If he had stayed where he was then it is accepted that the accident might not have occurred.

[91] If he ran backwards then the accident may not have occurred.

[92] It was submitted however that this is not looking at the whole accident from the correct perspective. Was it reckless or foolish of Mr Mustoe to run forward? He had to calculate if he stood still what would happen. He had two or three seconds in which to react which is no time at all.

[93] The matter should be looked at from the correct perspective of the driver. His actions have to be viewed objectively. He is driving a heavy goods vehicle. He is aware of a pedestrian on his nearside.

[94] If the court accepts that at the time immediately prior to moving off the driver didn't know where Mr Mustoe was then the driver would have to consider whether Mr Mustoe stayed still, walked to the rear of the vehicle, walked diagonally away from the vehicle or walked towards the front of the vehicle.

[95] It was submitted that there was sufficient to conclude from the evidence that Mr Mustoe would go back to where he had come from, ie. moving forward to the front of the vehicle. The driver at that time knows that he has to turn the vehicle in that direction.

[96] Mr Barr then turned to consider the question of the blind spot or zone of invisibility as it was referred to by the Police.

[97] It was submitted that this is entirely a red herring in this particular inquiry. He was very critical of the Police Collision Investigation Report. He submitted that the officers appeared to be pre-occupied with proving the existence of a blind spot and Mr Mustoe's presence in it and that in some way Mr Mustoe was to blame for the accident. It was submitted that that was not the correct position.



[98] It was further argued by Mr Barr that there is no dispute that there is a blind spot in vehicles of this kind. He submitted that the officers simply did not see the woods for the trees. They ignored the sequence of events prior to the driver getting into his cab. Ultimately in evidence Constable Denholm had to admit that he was wrong in his conclusion that the parties had failed to observe one another in that the driver was aware of Mr Mustoe's whereabouts when he left him and ran back to his lorry. As a consequence of the Police failure to take into account the sequence of events it was submitted that Mr Mustoe's family have suffered a miscarriage of justice.

[99] It was further submitted that Saulius Gureckis's driving was reckless. He was aware of the pedestrian and was driving what is in fact a dangerous weapon. He bore a responsibility towards vulnerable road users and ultimately should have been charged in terms of the Road Traffic legislation by causing death by dangerous driving.

[100] It was argued that this was not a moment of carelessness but rather that this was a driver getting into a vehicle and moving off without checking his mirrors.

[101] Mr Barr submitted that the court should reject the evidence of the Police Officer that the driver could be seen checking his mirrors on the police equipment since it had to be accepted that he had barely two seconds in which to do so.

[102] However even if the court felt that a finding could not be made that the driver did not check the mirrors it was submitted that the court could make a finding that the driver did not check the mirrors properly. He did not use the equipment provided in the lorry properly. Had he checked the mirrors properly he would have seen Mr

Mustoe walking to the front of the lorry and he was reckless in setting off if he did not know where Mr Mustoe had gone.

[103] Mr Barr submitted that the evidence of Mr Lappin is informative in this regard. His evidence was that if a driver knew a pedestrian was in the vicinity he should look to find where the pedestrian was if he had disappeared from view. There was sufficient evidence before the court to enable the court to make a finding that Saulius Gureckis was aware of a blind spot in the vehicle which he was driving. He was a professional driver. He had a valid Certificate of Professional Competency. The court can assume that he was aware of a blind spot. If he looked in his mirrors and Mr Mustoe was not there it was perhaps inevitable that he was in the blind spot.

[104] On any view of the driver's behaviour his driving was reckless.

[105] The Crown say that there is no evidence to contradict the evidence of PC Denholm. However it has been said time and time again that it is not the expert's job to determine the facts of any matter, which is the task of the presiding judge.

[106] Considering the CCTV evidence it is perfectly clear that it is the driving of Mr Gureckis which caused this accident to happen and that fact for some reason has been overlooked by the two officers tasked with investigating the collision. It was submitted that most of Constable Denholm's evidence is of little assistance to the court. Mr Barr submitted that this was not really a situation where any reconstruction was needed and in fact the reconstruction simply confused the matter. He said it was difficult to understand what the officers hoped to achieve by the reconstruction which was carried out in a haphazard manner without even any consideration being given to the height of

the driver or the height of Mr Mustoe. This was relevant because even a very minor change in Mr Mustoe's position would have rendered him visible to the driver.

[107] The only finding that the court could properly make, it was submitted, with regard to section 6(1)(c) relates to Saulius Gureckis's driving and his failure to check his mirrors properly.

[108] It was submitted that in terms of section 6(1)(e) the court would be able to make a number of findings about other facts which are relevant to the circumstances of the death. Some consideration could be given to the length of time between the vehicle moving and Mr Mustoe being struck.

*Submissions on behalf of David Mustoe*

[109] Mr Smart for Mr Mustoe indicated that he was in agreement with the Crown with regard to findings in terms of section 6(1)(a) and 6(1)(b). He had no comment to make with regard to any findings in respect of 6(1)(d) or 6(1)(e).

[110] With regard to submissions relating to 6(1)(c) Mr Smart indicated that his position was slightly different to that taken on behalf of Tracy Gibson by Mr Barr.

[111] It was his position that Saulius Gureckis should have established the whereabouts of Mr Mustoe before he moved off.

[112] With regard to the blind spot on the vehicle he shared Mr Barr's criticism of the exact extent of the blind spot given that the police had not taken into consideration the height of the driver or of Mr Mustoe.

[113] There is common ground between Mr Lappin and the Police Officers that there is a blind spot in vehicles of this type. There is also common ground that there is a possibility that Mr Mustoe was in that blind spot. I was referred to Crown Production No. 7 at photograph 93 which shows that because of the eye bar someone of the height of the officer could not be seen. Constable Denholm is standing between the cab and the gate and he cannot be seen and is most likely obscured by the eye bar of the vehicle. That position has to be compared with photographs No. 94 and 95 where the officer becomes visible after a slight movement. I was also asked to consider the photograph included in Crown Production No. 5 at 056 which shows the nearside mirrors.

[114] It was submitted that if Mr Mustoe had stayed where he was he would have been visible. Given the fact that he was invisible there were therefore only three alternatives. He could have moved at right angles to the vehicle, he could have moved to the rear or he could have moved to the front of the lorry.

[115] I was then referred to the Collision Investigators' Report, Crown Production No. 3 and at page 9, a diagram is included where the area where Mr Mustoe was is described as a hazard zone. However the blackened part of that diagram was an area which was clearly visible so that if Mr Mustoe had stayed where he was he would have been able to have been seen.

[116] This would not be conclusive if the driver checked his mirrors and criticism was again made of Constable Denholm's evidence that the driver could be seen in the Police equipment checking the mirrors. It was submitted that the driver failed to establish Mr Mustoe's whereabouts.

[117] There is no suggestion the driver in some way knew where Mr Mustoe was and drove off regardless. The evidence all points to the fact that the driver didn't know where Mr Mustoe was and he did not know that it was safe to drive off. He was not entitled to assume that it was safe to drive off. If the driver had paused for a second Mr Mustoe would have come back into his view. The most important point, it was submitted, was that the driver did know where Mr Mustoe had been. If he was not visible then he must have gone somewhere. There was a one in three chance that he had moved to the front of the vehicle. A reasonable precaution for the driver to have taken was to establish the whereabouts of Mr Mustoe before he moved off knowing of the possibility of him entering the blind spot.

### **Determination**

[118] In considering the evidence led at the inquiry I have found the Police Collision Investigation to be of limited assistance. The reconstruction of the accident was based on the CCTV recording which was of course the most accurate description of the accident. In carrying out the reconstruction no account was taken of the height of either Mr Mustoe or the driver. PC Denholm accepted in his evidence that the heights of both persons would have been relevant. There is a point in the reconstruction illustrated in Crown Production No. 7 photograph No. 93 where the deceased would have been obscured by the eye bar of the vehicle. I cannot know if the driver was taller or smaller than the police officer if he would have had the same view or not. It does not in my

opinion take an expert to tell the court that the height of both persons was relevant. It was in any event conceded in evidence by PC Denholm.

[119] However, I consider that much of this evidence is not relevant. There is no suggestion from the evidence that the driver deliberately drove at Mr Mustoe and it appears to me to be axiomatic that when the driver set off he did not see Mr Mustoe. That appears to be where the Police Collision Investigation ends. The question the Inquiry has to address is why the driver drove off at a time when Mr Mustoe was not visible to him?

[120] Mr Gureckis was a qualified HGV driver. He had a CPC certificate. Mr Lappin's evidence of the components of the CPC courses was most helpful and from that I consider that the driver was aware of the blind spot or hazard zone.

[121] Mr Lappin was also able to explain, from his own experience as a driver, the difficulties drivers encounter where vehicles may have entered that zone. The evidence was that Mr Gureckis was a driver of some experience and I therefore conclude that like Mr Lappin he would have known of these difficulties.

[122] That the driver was in a hurry is beyond doubt. He was not supposed to be at the locus nor should he have been carrying out the transaction that he was. He is seen clearly on the CCTV running back round to his cab and only 2-3 seconds elapse until he moves off.

[123] In those 2-3 seconds what did the driver do? PC Denholm averred that he could be seen clearly checking his mirrors. That is not visible on the CCTV played at the inquiry.

[124] If I were to accept that the driver looked in his mirrors would he have seen Mr Mustoe? Mr Mustoe was wearing a high visibility jacket. He was a well-built gentleman. He was walking at a normal pace and at that point was not running. Photograph 95 of Crown Production No. 7 shows the edge of the police officer's high visibility jacket. There is therefore in my opinion the possibility that the driver may have had an opportunity to see Mr Mustoe just as he entered the blind spot had he looked in his mirrors.

[125] Mr Barr's submission was well founded. If the driver checked his mirrors he could only have done so for a second or two. He had engaged the engine of the vehicle. If he had checked his mirrors properly there is, as I have said, the possibility that he may have had the opportunity to see Mr Mustoe.

[126] What then if he had checked his mirrors properly and had not seen Mr Mustoe at all? That clearly is also a possibility. The very short time frame when Mr Mustoe would have been visible may have passed by the time the driver checked his mirrors. Therefore I do not consider that the use of the mirrors by the driver of itself could be said to be a reasonable precaution whereby the accident and Mr Mustoe's death could have been avoided in terms of Section 6 (1)(c) of the 1976 Act.

[127] The situation therefore was that an experienced HGV driver who had just left a pedestrian at the rear of his vehicle now could not see him either because he did not look properly in his mirrors or the pedestrian had entered his blind spot and even with the use of mirrors could not be seen. As I have already said the clear position is that the driver did not see Mr Mustoe. What should he then have done?

[128] There was some discussion about Mr Mustoe going back from whence he had come. There was no evidence before the Inquiry that Mr Gureckis had been in the yard before nor whether he knew where Mr Mustoe's office was. In the CCTV recording the driver is seen to be busy with the other employees getting the pallets unloaded when Mr Mustoe arrives. It is not clear whether he could see where Mr Mustoe came from. In my view that matters not. What matters is not where Mr Mustoe was going but where he was at the point in time that the driver set off.

[129] Consideration of Mr Mustoe's whereabouts does not seem to have formed any part of the driver's thought process at all before he drove off.

[130] I accept the submission made that he was under a duty to consider other road users and that particular care requires to be afforded to pedestrians. Mr Lappin's evidence was of particular importance in this regard.

[131] Had Mr Gureckis adopted Mr Lappin's practice of waiting until a person or vehicle re-emerges from the blind spot then the accident would not have occurred.

[132] Mr Lappin also said that if he could not see a pedestrian then in addition to waiting for him to re-emerge from the blind spot, he would also blow the horn. Again if Mr Gureckis had done so the accident would not have occurred.

[133] I therefore have made the appropriate findings in terms of Section 6(1)(c) of the 1976 Act.

[134] The Police Collision Investigation Report goes on to state that,

"Had he looked eastwards, the deceased Jack Mustoe should have seen the approaching large goods vehicle, however he has failed to observe or react timeously to the approaching vehicle."



This appears to me to miss the point. What is significant is that the vehicle was approaching. What Mr Mustoe could or should have seen at that point or how he may have reacted to what he saw has nothing to do with the reasonable precautions whereby the accident and his tragic death might have been avoided.

[135] I am satisfied on the evidence of Ms Gray and the inspection that she and her colleague carried out that there were no defects in the system of working and make no finding in terms of section 6(1)(d) of the 1976 Act.

[136] Mr Barr submitted that some consideration should be given to the time which lapsed between the driver entering the cab and moving off and invited me to make some finding in terms of section 6(1)(e) of the Act. I do not think any restriction placed on the time between a driver entering a vehicle and moving off would be helpful. During any such time lapse other hazards may have arisen. The important point is that the driver makes himself clearly aware that there is no impediment to him moving off at all. There are therefore no other facts relevant to the circumstances of Mr Mustoe's death and I make no finding in respect of section 6(1)(e) of the 1976 Act.

[137] I am grateful to parties for their careful presentation of this case and for their assistance at the various preliminary hearings which enabled lines of enquiry and witnesses to be identified. The inclusion of Mr Gareth Lappin on the list of Crown witnesses without doubt assisted the inquiry and I wish to record my thanks to him.

[138] I also wish to extend my sympathy to the family of the late Jack Mustoe who have suffered his loss in such traumatic circumstances.