

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS**[2016] FAI 17****B111/16****DETERMINATION****BY****SHERIFF MARGARET M. NEILSON****UNDER THE FATAL ACCIDENTS AND SUDDEN DEATHS INQUIRIES
(SCOTLAND) ACT 1976****into the death of****ALEXANDER McMILLAN ANDERSON FRASER****Inverness, 14 September 2016**

The Sheriff, having resumed consideration of the Fatal Accident Inquiry into the death of Alexander McMillan Anderson Fraser, Determines in terms of section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 as follows:-

In terms of section 6(1)(a)

The late Alexander McMillan Anderson Fraser died on the A9 road at Lynchat, by Kingussie, at 06:06 hours on 19 March 2015 as a result of a road traffic collision which occurred at that place and time.

In terms of section 6(1)(b)

The cause of Mr Fraser's death was:-

- 1) (a) Multiple injuries due to

1. (b) Lorry collision; as a result of an accident in which the lorry he was driving crossed onto the opposing carriageway and collided with an oncoming lorry. The cause of said accident was Mr Fraser falling asleep while driving.

In terms of section 6(1)(c)

There are no reasonable precautions whereby the accident resulting in the death of Mr Fraser might have been avoided.

In terms of section 6(1)(d)

There were no defects in any system of working which contributed to the death of Mr Fraser.

In terms of section 6(1)(e)

There are no other facts which are relevant to the circumstances of the death of Mr Fraser.

Findings-in-fact

1. The late Alexander McMillan Anderson Fraser was an experienced HGV driver who lived and was based in Inverness.
2. He was employed by Highland Staff Solutions Limited ("HSS"), an agency which recruits temporary staff including lorry drivers.

3. On 18 March 2015 he had started his shift around 20:00 in Inverness and travelled south to Glasgow in articulated goods vehicle registration number SV14 0BF belonging to M&H Logistics Limited ("M&H").
4. Mr Fraser was fully qualified and licenced to drive large goods vehicles including the articulated goods vehicle registered number SV14 0BF.
5. He stopped at a service station near junction 6 on the M80 motorway near Cumbernauld at around 23:30 hours on 18 March 2015.
6. He stopped at the depot of M&H at 130 Cambuslang Road, Glasgow between midnight and 01:00 on 19 March 2015. Nothing appeared out of the ordinary. He slept in his cab while the lorry was loaded. At around 02:50 a member of staff at the depot took paperwork to the cab of the lorry and let Mr Fraser know that loading was complete. He thought Mr Fraser appeared to have been asleep. The vehicle driven by Mr Fraser exited the security fence of the depot at 03:01 hours to travel north to Inverness.
7. Mr Fraser stopped at a filling station, the Triangle, Perth, from around 04:27 to 04:32 on 19 March 2015. CCTV showed him entering the shop, going to the toilet area, buying a hot drink and other items with cash and leaving the shop. The vehicle started moving again at 04:32 hours.
8. He was an experienced nightshift driver having predominantly worked nightshifts throughout his driving career.
9. At around the time of the accident, Mr Fraser was finding it difficult to sleep during the day because of building work going on in fields adjacent to his house.
10. At around 06:06 on 19 March 2015 Mr Fraser, while driving north on the A9 road at Lynchat, by Kingussie, died when his vehicle collided with articulated goods

vehicle registered number SN13 0XR (the “Argos lorry”), being driven south by James Kenmure.

11. Following the accident both articulated goods vehicles were inspected and found to have no defects.

12. Following the accident the digital data from the driver card relating to Mr Fraser was analysed. The data stored on the card showed that he had fully complied with all legal requirements placed on drivers of large goods vehicles in relation to drivers’ hours and tachographs over the 28 day period ending on the date of his death. He was not near to either the maximum hours for driving or the minimum rest periods required.

13. The digital data stored in the driver card relating to Mr Kenmure, the driver of the Argos lorry, was also analysed. In the period checked, from 16 February 2015 to 19 March 2015, Mr Kenmure had fully complied with the legal requirements placed on drivers of large goods vehicles in relation to drivers’ hours and tachographs.

14. The digital tachograph from the vehicle driven by Mr Kenmure was analysed. A sudden change of speed was recorded from 80kph at 06:06:00 hours to 0kph at 06:06:10 hours on the date of the accident.

15. At around 06:00 on 19 March 2015, witness Kevin Thain had been driving south on the A9 in his motor vehicle. Weather conditions were fair. The road was clear. It was daylight. He was close to Ruthven Barracks and had set the cruise control on his car. He noticed an articulated lorry travelling north towards him. As it came closer to him it began to veer towards the centre white lines. It was not a swerve but a gradual movement over to the opposing carriageway. Mr Thain

touched his brakes and steered towards the nearside of the road. When the lorry was about 20 or 30 yards from him it suddenly swerved back onto its own side of the road. He noticed the green M&H graphics on the lorry. He was shaken by the incident but continued his journey. Later that day he heard that there had been an accident on the A9 near Kingussie and saw a photograph of the articulated goods vehicles involved in the accident on a news website. He contacted the police, having realised that the same "M&H" vehicle which had almost collided with him was involved.

16. At the time of the accident the weather was good, the road surface was dry, and there were no adverse weather conditions and no animals on the road. The temperature was around 3 or 4° Celsius.

17. James Dalziel, who was driving north on the A9 in a transit van early on the morning of 19 March 2015, had stopped briefly in a lay-by. When he pulled out again the lorry driven by Mr Fraser was immediately in front of him. He noticed it starting to sway over the white lines. He initially tried to pass it but then pulled back and followed the vehicle for between 1 and 1 ½ miles. He noticed the articulated vehicle swaying on more than one occasion. He then noticed other traffic coming towards him, including another articulated vehicle (the Argos lorry being driven by Mr Kenmure). He saw that vehicle pull over on to the grass verge to try and avoid being hit by Mr Fraser's vehicle. He witnessed the collision between the lorries. After the accident he stopped, went to assist Mr Kenmure and called the police to report the accident.

18. James Kenmure was driving another articulated goods vehicle south on the A9 early on the morning of 19 March 2015. He is an experienced lorry driver with

around 40 years' experience. He had spent the night sleeping in his cab in the lorry in Alness and was driving south in his lorry which had Argos branding and which was full of empty cages. It had been an ordinary day until he noticed the HGV driven by Mr Fraser travelling north and drifting across the road towards him. It was a gradual process. The lorry coming towards him was travelling at a normal speed for the road and did not appear to be braking. He thought a collision was inevitable. He quickly slowed to almost a complete stop. He turned his cab into the barrier as far as he could in order to try and protect himself. His lorry was hard against the wire barrier. He closed his eyes as he thought he would die. The actual collision then happened very quickly; in a matter of seconds.

19. John Mackenzie was driving south on the A9 in a transit van immediately behind the Argos lorry driven by Mr Kenmure. He was heading towards Drumochter to work on a traffic management system on the A9 there. He first became aware of the incident unfolding when he heard the brakes of the lorry in front of him. He saw the M&H lorry hit the Argos back-carrier, come towards his vehicle and then veer back off onto the other side of the road. He saw the Argos lorry take evasive action by driving onto the grass verge. He did the same. His vehicle was not hit by Mr Fraser's lorry itself but by the contents of it which spilled all over the carriageway.

20. Mr Fraser died immediately from the extensive injuries he sustained in the collision.

21. Mr Kenmure sustained minor injuries and was taken to Raigmore Hospital once the emergency services arrived. No-one else was injured.

22. The company that Mr Fraser worked for (HSS) is a temporary recruitment agency. It also trades as "Driver Hire". Mr Fraser had worked with them for some time. He had previously driven for Highland Haulage ("HH"), and then latterly for M&H.

23. When working for both companies he had worked for five days a week doing nightshifts.

24. On the Monday before the accident, which took place on the Wednesday night/Thursday morning shift, HSS had received a fax from M&H saying that their tracker system showed that Mr Fraser had been taking extra breaks which were making him arrive late at their depot. These breaks were not being detailed on his timesheet and M&H were being charged for them as driving time.

25. Gabby Simpson is an administrator and payroll assistant at HSS. She had received the fax saying that Mr Fraser had been taking extra breaks. M&H's concerns were that they were being charged for those breaks and also that Mr Fraser was later back at the depot than anticipated. After speaking to the owner and her supervisor she contacted Mr Fraser by telephone around 15:00 later the same day (Monday 16 March 2015) and told him that M&H had reported that he had been taking extra breaks. Initially Mr Fraser denied this but when she told him that there were printouts of data from the Navman tracking system which confirmed this he accepted that he had indeed been taking extra breaks. He explained to Ms Simpson that he was tired because he was not sleeping well because of the building work near his house. He was told to record the breaks on his timesheet in future. He was not told not to take breaks.

26. Kenneth McGougan is the depot manager at M&H Logistics. He was advised by one of his supervisors that they were being charged for extra breaks which were being taken by Mr Fraser. This had come to the attention of the company because he was arriving back into the depot later than anticipated. The supervisor had then checked the tracker system data and had found that Mr Fraser had been taking unscheduled breaks. The industry practice is that drivers are not paid for extra breaks that they take and companies are not charged for these breaks by the agency. Drivers are expected to sleep while their lorries are being loaded in the depot in Glasgow. Mr McGougan's main issue was to get the breaks taken off the invoice by Driver Hire (HSS). A secondary issue for him was the late arrival. No-one at M&H spoke to Mr Fraser direct leaving that to HSS, his employer, on an agency basis, in the usual way.

27. On Wednesday 18 March 2015 when Mr Fraser left his house to go to work, his wife thought he appeared agitated.

Note

[1] This inquiry was held in terms of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. It was a mandatory inquiry in that the death of Alexander McMillan Anderson Fraser occurred during the course of his employment. The inquiry took place over two days.

[2] Section 6(1) of the Act requires the sheriff to make a determination setting out the following circumstances of the death so far as they have been established to his or her satisfaction:

- (a) Where and when the death and any accident causing the death took place;
- (b) The cause or causes of death and any accident resulting in the death;
- (c) The reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided;
- (d) The defect, if any, in any system of working which contributed to the death or any accident resulting in the death; and
- (e) Any other facts which are relevant to the circumstances of the death.

[3] The only method of establishing those circumstances is by the assessment of the evidence led by the procurator fiscal and any other interested party represented at and participating in the inquiry. A fatal accident inquiry is concerned with fact finding and not fault finding. The purpose of the inquiry is not to attach fault to any person but to inquire into all the circumstances of the accident and the death in order to discover the truth, identify any reasonable precautions which might have been taken and ascertain if any lessons can be learnt which might serve to prevent the re-occurrence of any similar accident.

[4] At this inquiry, parties were represented as follows:-

For the Crown – Mr Gary Aitken, Procurator Fiscal Depute;

For Highland Staff Solutions Limited (HSS) – Mr James Duff, Solicitor,
Harper Macleod, Solicitors;

For M&H Carriers Limited – Ms Victoria Anderson, Solicitor, BLM,
Solicitors; and

For Argos Limited, Ms Laura Irving, Solicitor, BTO, Solicitors

I am grateful to all representatives for their sympathetic and professional conduct of the inquiry and their concise and considered submissions.

[5] The Crown lodged a comprehensive inventory of productions as follows:-

1. Intimations;
2. CCTV disc;
3. Vehicle examination report;
- 4/5. Autopsy report and affidavit;
6. Digital tachograph download;
7. Tracker unit printout;
8. Collision investigation report;
9. CD ROM; and
10. Form DQ3.

[6] At the start of the inquiry, before any oral evidence was led, the Crown lodged a joint minute which was read into the record. This was a substantial joint minute running to 12 pages and encompassing the evidence of a significant number of the witnesses originally listed as witnesses to the inquiry. I am grateful to parties' representatives for agreeing so much evidence which narrowed the scope of the oral evidence significantly. In the event, nine witnesses gave oral evidence to the inquiry:-

1. Susanne Louise Fraser (widow of the deceased);
2. Mark Astley Jones (HSS);

3. Kenneth Stewart McGougan (M&H Carriers);
4. Gabby Joyce Simpson (HSS);
5. James Dalziel;
6. James Kenmure (Argos HGV driver);
7. John MacKenzie;
8. Police Constable Gordon Bremner; and
9. Police Constable Neil John Irving.

[7] Other witnesses on the Crown list of witnesses did not require to be called because of the existence of the joint minute which had been entered into and read into the record, which included the evidence of those witnesses.

[8] I found all witnesses who gave oral evidence to be credible and generally reliable. I gained the impression that they were all trying to assist the inquiry as much as possible.

[9] Mrs Fraser tried to assist the inquiry. Clearly this was a very distressing time for her. I had no doubt that she was telling the court what she genuinely believed to be true. She spoke of what her husband had told her in a passing conversation (which at the time she could not possibly realise might be significant at a later date). She described her husband as being agitated and pacing around before leaving for work on the day in question. Her perception, from what he had told her, was that he had been told not to take any extra breaks.

[10] The evidence of witnesses Jones, McGougan and Simpson suggested that he had not been told not to take breaks but that he had to stop charging for those breaks as M&H (the client company) had complained about overcharging and HSS were also concerned about overpaying Mr Fraser. Clearly it is impossible to know exactly

what was said. On balance I prefer the evidence of witnesses Jones, McGougan and Simpson and consider their evidence to be more probable. They are employed by two separate companies which are involved with professional drivers and, in my opinion, would be unlikely ever to tell a driver not to stop and take a break if he felt tired and was falling asleep. Equally I can understand the commercial significance of delay and why the issue of taking extra breaks was raised with Mr Fraser.

[11] It is quite possible that Mrs Fraser has tried to make sense of the brief conversation she had with her husband. It is equally possible that Mr Fraser did indeed tell her that he had been told not to take extra breaks. I have no doubt that Mrs Fraser genuinely believed that he had been told not to take breaks. On the balance of probabilities, I accept that the issue was principally one of overcharging rather than the time of his arrival although Mr McGougan candidly accepted that that was an issue too. It was certainly clear that the late arrival of Mr Fraser in the depot was what prompted M&H to check the data on the drivers' card on the Navman system, which is where they found that the extra breaks had been recorded.

[12] In this case the inquiry had the benefit of direct eyewitness evidence from four people who witnessed the accident. Three gave oral evidence, (James Dalziel, James Kenmure and John MacKenzie) and one's evidence (that of Kevin Thain) was agreed and admitted by way of the joint minute. I concluded that all of these witnesses were entirely credible. It was abundantly clear when watching them give evidence that they have all been affected and indeed troubled by witnessing the accident and subsequent events. Full credit has to be given to all of them for coming to give evidence about what was undoubtedly a very distressing experience for all of them. Having to re-live the events of the morning of 19 March 2015 was clearly

distressing for all of them, in particular for the driver of the Argos lorry, Mr Kenmure, who candidly told the court that when Mr Fraser's lorry was drifting towards him he thought he was about to die. Their evidence was credible, consistent and largely reliable taking into account the passage of time and the distress and shock that they were subject to on the day in question.

[13] It was clear from the autopsy report that when he died Mr Fraser had some alcohol and cannabis in his system. The report stated that only a small amount of alcohol was in his system and it was impossible to say whether it had any effect on his driving or not. Police Constable Irving gave evidence about this matter. He is an experienced road traffic police officer with extensive experience of attending fatal road traffic accidents. In his opinion it was impossible to say from the level found during the post-mortem examination whether Mr Fraser had taken a large amount of alcohol earlier in the day or a small amount during his shift. Neither could it be ascertained when the cannabis had been ingested by him. Any inference to be drawn from the presence of alcohol and cannabis would be entirely speculative and accordingly I cannot make any finding one way or another in this respect.

[14] From the evidence before me there can be no doubt that Mr Fraser's lorry veered across the road and collided with Mr Kenmure's lorry resulting in the death of Mr Fraser.

[15] Police Constable Irving, the police officer responsible for the police collision report, spoke to various types of distraction that could cause a driver to veer off the road including using a mobile phone, being distracted by someone or something within the vehicle or outside the vehicle, trying to avoid an animal, bad road

conditions or falling asleep. All eyewitnesses were asked about the presence of animals. None saw any. All spoke to the road and weather conditions being good.

[16] A lot of the evidence I heard pointed to Mr Fraser falling asleep as opposed to there being another cause of distraction. In particular the evidence of Mr Dalziel, Mr Kenmure, Mr MacKenzie and Mr Thain was eloquent of someone falling asleep.

[17] In particular all four eyewitnesses spoke to it being a gradual movement variously described as “drifting”, “swaying”, and “veering” rather than swerving.

[18] Mr Dalziel who was driving behind Mr Fraser spoke to seeing no brake lights coming on. All spoke to their being no increase or decrease in speed but rather the lorry keeping to a steady speed.

[19] There were other aspects of the evidence which support the theory of Mr Fraser having fallen asleep. Mr Fraser had stopped at Perth and had bought a coffee which might suggest that he was trying to keep awake. There was no sudden swerve back onto his own carriageway as one might expect if it had been a short-term distraction. The “veering” movement happened more than once (Mr Thain reported that he had witnessed a similar event a few minutes before the accident). Mr Fraser had spoken about having trouble sleeping both to his wife and to Ms Simpson. The police investigation findings were all consistent with Mr Fraser having fallen asleep.

[20] On the basis of the evidence before me and in the absence of any other positive evidence to suggest an alternative reason for inattention or distraction, it seems to me that the inevitable conclusion is that on the balance of probabilities Mr Fraser fell asleep at the wheel causing his lorry to cross onto the opposing carriageway and collide with the Argos lorry being driven by Mr Kenmure.

[21] In these circumstances it is not appropriate for me to make any findings in terms of sections 6(1)(c), (d) or (e). The date, time, place and cause of death were all a matter of agreement and contained in the joint minute lodged in this case which covers section 6(1)(a) and (b).

[22] As long as modern day businesses require quick transportation of freight and other goods around the country throughout the night to satisfy consumer demand, there will continue to be a need for HGV drivers like Mr Fraser to drive throughout the night. The Police collision investigation report includes an extract from Rule 91 of the Highway Code which states:- "Driving when you are tired greatly increases your risk of collision. To minimise this risk; Make sure you are fit to drive. Do not begin a journey if you are tired. Get a good night's sleep before embarking on a long journey. Avoid undertaking long journeys between midnight and 6.00am when natural alertness is at a minimum. Plan your journey to take sufficient breaks. If you feel at all sleepy, stop in a safe place." This should be borne in mind by drivers.

[23] During the course of the inquiry and at the conclusion I extended my condolences to Mr Fraser's family, in particular Mrs Fraser who showed considerable fortitude and composure while giving evidence which cannot have been easy. I was joined in those condolences by the procurator fiscal depute and the solicitors representing other interested parties. I would wish formally to repeat those condolences in this determination.