

SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT ALLOA

[2022] FAI 38

ALO-B7-22

DETERMINATION

BY

SHERIFF ALASTAIR N BROWN

UNDER THE INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC
(SCOTLAND) ACT 2016

into the death of

MARGARET JOHNSTONE

ALLOA, 3 November 2022

This is an Inquiry under the Inquiries into Fatal Accidents and Sudden Deaths etc
(Scotland) Act 2016 into the circumstances of the death of Margaret Johnstone.

Mr Morrison, Procurator Fiscal Depute, appeared for the public interest. Mr Adams,
Advocate, appeared on behalf of Mr Grant Waley (who was the driver of the lorry
involved in Mrs Johnston's death). Mr Kane, Solicitor Advocate, appeared on behalf of
The Binn Group Ltd (the operators of that lorry). Mr Gribben, Solicitor Advocate,
appeared on behalf of IVECO Ltd (the manufacturers of the cab and chassis).

Mrs Johnstone's family chose not to participate actively in the Inquiry but members of
the family did observe. The Inquiry heard evidence on 13 and 14 October 2022. Two
joint minutes were lodged, dealing with uncontroversial evidence. In terms of s26 of the

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, I make the following findings as to the circumstances of Mrs Johnstone's death:

- 1) Margaret Johnstone was born on 10 July 1968.
- 2) She lived in Alloa.
- 3) Mrs Johnstone died on Friday, 13 November 2020.
- 4) The medical cause of Mrs Johnstone's death was 1a Multiple injuries;
1b Road traffic accident (pedestrian).
- 5) High Street is a one way, single carriageway road that extends for approximately 126.9 metres.
- 6) It runs roughly north to south.
- 7) High Street is bordered on both sides by a slightly raised kerb onto a footpath extending thereafter into a mixture of retail and residential properties. The east footpath is approximately 4.75 metres wide and the west footpath is approximately 4.07 metres wide.
- 8) Going from north to south, there is on street parking on the nearside of the road before the road narrows to a single lane, widens again to accommodate more on street parking on both sides of the road and then narrows again on approach to its junction with Mill Street.
- 9) Where the road narrows it is approximately 3.04 metres wide.
- 10) Street furniture consisting of several black bollards is present on both sides of the footpath at the two sections of road narrowing.

- 11) There are double yellow lines on the roadway prohibiting parking where the road narrows.
- 12) At the time of the accident on 13 November 2020, High Street, Alloa was busy with pedestrians.
- 13) The vehicle involved in the accident was a lorry, registered mark SP65 ZFF, operated by The Binn Group Ltd.
- 14) The lorry was an Iveco Stralis chassis-cab with a refuse collection body built on the Iveco chassis by Refuse Vehicle Solutions Ltd.
- 15) The lorry was a rigid heavy goods vehicle weighing in excess of 7,500 kg.
- 16) It was fully compliant with all applicable construction regulations.
- 17) The cab of the lorry was high off the ground, as were the bottom of the windscreen and the bottoms of the side windows.
- 18) Partly as a result of the height of the cab and the windscreen, there were significant “blind spots” around the front and nearside of the lorry where the driver’s direct vision was obstructed. The blind spot immediately in front of the lorry extended forwards over distance of approximately 1.31 metres at its longest point (assuming a pedestrian who was 1.55 metres tall).
- 19) The lorry was fitted with several obligatory mirrors which afforded the driver a greater field of visibility. These included: (i) nearside and offside side mirrors with upper wide angle mirrors which provided a view along the nearside and offside of the Iveco; (ii) a Class VI mirror or “front projection mirror”, fitted to the front nearside of the lorry, which, if correctly adjusted,

provided the driver with a view of the area in the blind spot directly in front of the vehicle; and (iii) a Class V mirror or “side close proximity mirror”, fitted to the nearside of the lorry, directly above the passenger door, to afford the driver a view of the blind spot at the front nearside of the vehicle.

20) The effect of those mirrors, if they were adjusted correctly, was to reduce the blind spots significantly but not to eliminate them.

21) At the material time, the lorry was being driven by Grant Waley, who was employed by the Binn Group.

22) Mr Waley was performing waste collection services in Alloa.

23) At about 14.51pm on 13 November 2020, Mr Waley drove the lorry onto High Street, Alloa.

24) He stopped the lorry on the carriageway, where the road narrowed to a single lane.

25) The lorry occupied very nearly the whole width of the carriageway at that point.

26) Mr Waley got out of the lorry and collected waste.

27) At about 14.52.34hrs, Mr Waley returned to the driver’s door of the lorry, got in and sat in the driver’s seat.

28) At that time, Mrs Johnstone was walking on the footpath at the nearside of the lorry, level with the passenger door.

29) At that point, she would have been visible in the nearside wide angle mirror of the lorry.

- 30) At 14.52.41hrs Mrs Johnstone began to walk towards the road.
- 31) At 14.52.43hrs, Mr Waley began to drive forwards.
- 32) At exactly the same time, Mrs Johnstone stepped into the road immediately in front of the front nearside corner of the lorry.
- 33) Mrs Johnstone was approximately 0.41 metres in front of the lorry as she stepped onto the roadway.
- 34) This placed her well within the front blind spot, though she might have been partially visible in the class V and class VI projection mirrors.
- 35) Mr Waley did not see her.
- 36) Mrs Johnstone began to walk more quickly across the road as the lorry continued to move forwards.
- 37) As she crossed the front of the lorry, Mrs Johnstone would not have been visible below the windscreen.
- 38) At 14.52.45hrs, the lorry struck Mrs Johnstone, knocking her over onto the road.
- 39) The front offside wheel of the lorry drove over her, inflicting catastrophic, fatal injuries.
- 40) Accordingly:
- a. Mrs Johnstone died at about 1453 hrs on 13 November 2020 at High Street, Alloa.
 - b. Mrs Johnstone's death resulted from an accident which occurred then and there.

- c. The cause of Mrs Johnstone's death was multiple injuries sustained in a road traffic accident.
- d. The causes of the accident resulting in her death were (a) her decision to cross the road immediately in front of the lorry; and (b) Mr Waley driving the lorry forward from a stationary position without seeing that Mrs Johnstone was about cross the road in front of the lorry and without seeing her as she did cross the road in front of the lorry.
- e. The following two precautions could reasonably have been taken and, had they been taken, might realistically have resulted in Mrs Johnstone's death and the accident resulting in her death being avoided:
 - i. Mrs Johnstone could have chosen to cross the road at a point which was not directly in front of a stationary vehicle
 - ii. Binn Group could have chosen not to send a vehicle with extensive blind spots to collect refuse on the High Street in Alloa.
- f. Apart from the use of an unsuitable vehicle on High Street, Alloa, no other defects in the system of working can be identified as having contributed to the accident resulting in Mrs Johnstone's death.

41) I make no recommendations in terms of s26(1)(b) of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016.

Note

[1] It should be recorded, because it makes a difference to some aspects of this determination, that although no evidence was led about the nature of Mr Waley's work, it was clear enough in submissions that it was the collection of commercial waste. It was not a domestic waste collection. The procurator fiscal led evidence from Iain Macdonald, Senior Manager with Clackmannanshire Council about the safety equipment fitted to their refuse lorries but I discount all of that evidence as irrelevant. Domestic refuse collection, with a driver and a team of loaders, is a different task from that which was being carried out by Mr Waley and Mr Macdonald made it clear that the safety equipment he described (especially cameras at all four corners of the vehicle) was primarily fitted for the protection of loaders. Whilst some of that equipment might well have been useful in detecting other pedestrians, there is no automatic read-across. No evidence was led and no submissions were made about how Mr Macdonald's description of equipment deemed appropriate for domestic refuse collections might inform the assessments which I have to make in relation to a single-crewed commercial collection.

[2] The foregoing findings in fact are based very heavily on the accident investigation report which was spoken to by PC Fraser Mitchell. That report was based substantially on examination of CCTV footage, which showed the accident, followed by a reconstruction. There were two other sources of evidence about the accident itself. One of them was an affidavit from Mr Waley and the other was the police statement of Norma Large, who was on the pavement on the offside of the lorry. The police

statement was made the subject of a Joint Minute because Ms Large, who has hearing loss, had suffered the failure of an implant which meant that she could not hear and therefore could not participate in the enquiry as a witness. In the police statement, she said that Mrs Johnston was walking very close to the front of the lorry and the windscreen was above the top of her head, meaning the driver would need to stand up and look down to see her. That is consistent with and corroborates the assessment made by the accident investigators.

[3] Mr Waley's affidavit narrates that he stopped the lorry, collected two or three bags of rubbish, returned to the cab and moved off. He says that he did not see Mrs Johnstone but heard someone shouting and a metallic clatter and then, looking in the offside mirror, saw someone under the lorry. That, too, is consistent with and corroborates the assessment made by the accident investigators.

[4] The question which arises is why the accident happened. There are two reasons. The first is that Mrs Johnstone chose a bad place to cross the road. There is really nothing more to say on that matter. No evidence was led about why she might have wished to cross the road at that place in particular (for example, might she have been wanting to go to a particular shop?). Nor was evidence led about the quality of her judgment about things like crossing the road. There is mention, in the autopsy report, of some learning difficulty being recorded in her medical records but I have no evidence about its nature, its extent or its effect and it would be entirely wrong to assume that anyone with any degree of learning disability is unsafe crossing roads. Manifestly, that would not be true. It is simply a fact that crossing the road directly in front of a

stationary lorry (especially one with hazard lights and beacons activated, as Mr Waley says they were) is unwise. Yet that is what she did.

[5] The other cause of the accident was Mr Waley driving off when Mrs Johnstone was crossing in front of the lorry. I accept his evidence that he did not see her. The question is why he did not see her.

[6] The starting point in answering that must be that he was handicapped by the extensive blind spots on a lorry such as this one. The lorry was equipped with an array of mirrors which were intended to alleviate the problem. In particular, the Class VI mirror was designed to give the driver a view of the area immediately in front of the vehicle. However, two things have to be said about that.

[7] First, it was not the evidence of the witnesses that the mirrors eradicated the problem completely.

[8] Second, there was evidence, from Graeme Campbell, a DVSA vehicle examiner, that that mirror was not adjusted properly when he examined the vehicle. It does not follow, however, that the mirror was not adjusted properly when Mr Waley was driving the vehicle, Mr Waley's affidavit says that it was his practice to check the vehicle, including the mirrors at the start of his shift ("Prior to setting out on my run I would check the vehicle") and seems to go on to say that, on the date in question, they were properly positioned (there is some ambiguity in the wording). Moreover, before Mr Campbell examined the vehicle it was moved from the locus to Euroroute Recovery, Banded Industrial Estate, Throsk. No evidence was led about how that was done or about what, if any steps were taken to preserve the vehicle in exactly the state it was in

at the time of the accident. In all the circumstances, I am not willing to conclude that the adjustment of the mirror was defective at the time of the accident.

[9] I am unable to reach any concluded view about whether Mr Waley did actually check the mirrors before moving off. The evidence from the reconstruction was that there were times when Mrs Johnstone would have been visible in the mirrors and times when she either would not have been or, at least, might not have been. This is not a situation in which it is possible to draw the inference that a driver who failed to see something plain to be seen cannot have looked properly. A pedestrian crossing as Mrs Johnstone did might have been visible but might not.

[10] The only direct evidence comes from Mr Waley himself. It is in affidavit form and that is not a very satisfactory way to present critical evidence. At first, Mr Waley's affidavit states that he "would have" checked the mirrors. That reads as a description of his usual practice and leaves open the possibility that he did not follow it. Later, however, his affidavit states that he *did* check the mirrors. The difference between those two ways of expressing things could have done with some exploration. The problem is inherent in the use of affidavit evidence for something other than objectively verifiable fact and in the absence of any cross check. I have no means of knowing whether the words in the affidavit were chosen by Mr Waley himself or were the words chosen by the solicitor who drafted the affidavit to express what he or she believed Mr Waley to have been saying. Nor do I know whether the affidavit was in any way selective. Short of adjourning for Mr Waley to be brought to court to be cross examined (which I did consider), there is no way of resolving ambiguities. For the purposes of the remainder of

this Determination, I make the assumption that Mr Waley did check the mirrors; but it *is* an assumption.

[11] Mr Waley explained the order in which he checked the mirrors, as a matter of his usual practice. He said that he began with the nearside mirrors, then checked the central mirrors (I assume he means the Class VI mirror which gave a view of the front of the vehicle) and then the offside mirror, which, he said, would be his main focus as that was the direction the vehicle was travelling. That seems to make sense. Although the issue did not arise in Alloa High Street, because the lorry occupied the whole carriageway, it is understandable that a driver who is about to pull out into traffic would check the offside mirror last. One would expect him then to be looking ahead, through the windscreen, as he moves off. That would mean that, at that point, the driver of a high vehicle, such as this lorry, would not see a pedestrian in the mirrors even if she was there to be seen.

[12] The conclusion which I reach is that this vehicle was unsuitable for the task which Mr Waley was carrying out. He had to keep stopping outside commercial premises, collect rubbish, get back in and drive on before stopping again and repeating the process. He had to drive down a street which was busy with pedestrians, with shops on both sides. The carriageway was so narrow that the lorry occupied its whole width. The extensive blind spots which characterised this lorry made it difficult for him to be sure that pedestrians were not in danger. The mirrors alleviated the problem but did not cure it. In any event, a driver can only look in one direction at a time and, at the point of moving off, may be expected (after checking his mirrors) to be looking ahead

through the windscreen, as a result of which he may miss pedestrians coming from the nearside of the vehicle.

[13] There are alternatives. One, of course, is not to accept contracts to collect waste if the available equipment cannot do so safely. More constructively, though, I heard evidence from Philip Balderstone, Vehicle Examination Consultant, about refuse collection vehicles with low cabs. Such vehicles have windscreens which are much lower than that on the Iveco Stralis, so that pedestrians in front of the vehicle are visible directly through the windscreen. Side windows are also much lower. It was Mr Balderstone's evidence that such a vehicle "will have minimal blind spots to direct vision of pedestrians adjacent to the vehicle, including the nearside". The procurator fiscal said, in submissions, that it was Mr Balderstone's evidence that, if such a low cab vehicle had been used, the driver "would in all likelihood have picked [Mrs Johnstone] up". My note is slightly different. I understood him to say that it "most likely would have assisted". At all events, the use of a low cab vehicle, with a low windscreen and side windows, gives the driver much better visibility and that might well have avoided this accident.

[14] The procurator fiscal, in his submissions, invited me to make two recommendations. I have decided that neither would be justified.

[15] The first was that "operators of refuse collection vehicles [should] consider the use of low cab design vehicles for the purposes of any urban refuse collection or waste operation". The foundation for that submission was the evidence of Mr Balderstone

and, in particular, his account of the “Direct Vision Standard” which, his report says, “is an enforceable standard for vehicles over 12 tonne GVW which enter Greater London”.

[16] To be sure, the use of a vehicle with a low cab design might well have avoided Mrs Johnstone’s death, for the reasons set out above. That does not, however, lead to the conclusion that a recommendation ought to be made.

[17] I was surprised to find evidence being led about what a local authority in a different part of the United Kingdom, with a different legal system, over 400 miles from Alloa, has chosen to do by way of enforceable requirements. No evidence has been led before me about the reasons why Transport for London has introduced those rules and the consideration which informed their decision. Mr Balderstone’s report contains a link to the TfL website but it links only to guidance and not to the rules themselves. Neither his report nor the TfL guidance cites either the terms of the rules themselves or the legislative power which TfL claims to have to make those rules. No evidence was led about what other cities might have chosen to do and why. Any consideration which Glasgow, Edinburgh or Dundee (or Aberdeen or Newcastle-upon-Tyne or Birmingham or Stirling or anywhere else) had given to the issue might have been instructive. Still more, information about any consideration which Clackmannanshire Council had given to the matter would have been particularly helpful. It is not for me to legislate judicially when the competent legislative authorities have chosen not to do so. What the Crown were asking me to do was to make a recommendation addressed to all operators of refuse vehicles (at least in Scotland) on the basis of the facts of a single accident and on the basis of a legislative decision made by a single, non-Scottish local authority without

any information about the precise terms of the legislation or about the factors which led to its adoption.

[18] The suggested recommendation was, moreover, excessively vague. What is it that operators would have to do in order to “consider” the use of low cab design vehicles? What criteria should they apply? Does cost come into it? What is the value of a life? A requirement to consider the use of such vehicles for “any” urban refuse collection is extremely wide. Such vehicles are expensive and not all urban environments present the risks which are present in Alloa High Street.

[19] I have reached the conclusion that this particular vehicle was unsuitable for the task which Mr Waley was carrying out at the particular location. That speaks for itself - and to give credit where credit is due, according to the affidavit of

Irvine Morrison, the Transport Director of the Binn Group:

“in an effort to avoid similar accidents occurring in the future the Binn Group have heavily invested in low cab vehicles... Following the accident all eight or so of the refuse or bin lorries purchased by Binn Group have been low cab models...If a pedestrian was to walk in front of one of our new vehicles, they would be readily identified by the driver. The new cabs are designed to fundamentally improve driver’s field of vision. Moreover the side panels on the new vehicles are also split which effectively creates a different and additional window. I would say that this is the crux which would have prevented the fatality occurring”.

[20] The second recommendation sought by the procurator fiscal was in these terms:

“That the operators of refuse collection vehicles consider the use of additional safety features such as blind spot cameras and proximity sensors in the case of vehicles where such measures are not already employed and particularly in the case of high cab design HGVs.”

[21] The foregoing observations about the unsatisfactory nature of a recommendation “to consider” apply here as they did to the first suggested recommendation.

[22] This submission was also based on the evidence of Mr Balderstone and, in particular, in relation to his evidence about the Fleet Operators Recognition Scheme (FORS) which, he said (quoting the FORS website), is a voluntary accreditation scheme for fleet operators which aims to raise the level of quality within fleet operations and to demonstrate which operators are achieving exemplary levels of best practice in safety, efficiency and environmental protection. Mr Balderstone said, without giving any particular basis for his evidence, that it has achieved widespread acceptance, though Mr Morrison said that the Binn Group are not members. He referred to their membership of the RHA, which he regarded as similar.

[23] That is an important point. FORS is voluntary. Mr Kane, on behalf of the Binn Group, was keen to emphasise, and right to emphasise, that the Binn Group complied with all obligations incumbent upon them.

[24] Moreover, FORS applies across the whole road haulage industry but that is a very wide category. It would cover everything from refuse collection on Alloa High Street to international heavy haulage carried out exclusively on three lane motorways. No evidence was led before me about any particular measures tailored to refuse vehicles.

[25] The procurator fiscal’s submission identified two measures for particular consideration. The first was blind spot cameras. I am not persuaded that they would be an improvement on the mirrors with which the lorry was equipped. At the point at

which Mrs Johnstone seems to have stepped in front of the vehicle, Mr Waley was not looking in the mirrors. On his evidence, he had already done that. At the critical point, he was looking ahead, through the windscreen, because he was moving off. There is no reason to suppose that he would have been looking in camera monitors either.

[26] The second measure was proximity sensors. Mr Morrison gave evidence by affidavit about a trial in which the sensors were sounding continuously because they were incapable of distinguishing between street furniture, of the sort found in Alloa High Street, and people. Mr Balderstone said that sensors using newer technology are beginning to be able to make that distinction but gave no detail of trials or limitations. That is an uncertain basis for a recommendation.

[27] There are two more fundamental reasons not to make such a recommendation. First, it is no more than a sticking plaster. For the reasons given above, this vehicle was unsuitable for the use to which it was being put, given its blind spots and the risks presented on Alloa High Street. It was not said in evidence that there was any measure which would have made that vehicle entirely safe. High end, modern proximity sensors might have helped but there is no evidential basis for thinking of them as any kind of sovereign specific.

[28] The second reason is a constitutional one. The requirements which must be satisfied for a vehicle to obtain type approval are a matter for the legislature and for the Department of Transport. I assume that they make carefully considered judgments about what those requirements ought to be. They have not legislated for any requirement for proximity sensors on refuse collection vehicles. It is not for me to seek

to substitute my judgment for theirs (even if I wanted to) and especially not without a much better evidential foundation than has been laid in this Inquiry.