

**SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN**

**[2018] FAI 10**

ABE-B29-18

**DETERMINATION**

**BY**

**SHERIFF GRAEME NAPIER**

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

**into the death of**

**FARQUHAR GREIG KENNEDY AND RIMAS KUSKYS**

Aberdeen, 12 March 2018

**DETERMINATION**

The Sheriff having considered the information presented at the inquiry, determines in terms of section 26 of the Inquiries into Fatal Accidents and Sudden Deaths Etc

(Scotland) Act 2016 (“the 2016 Act”) as follows:-

1. In terms of section 26(2)(a) of the 2016 Act (when and where the death occurred):
  - a. Farquhar Greig Kennedy whose date of birth was 30 December 1960 and who resided at *[full address redacted]* Aberdeen and who was then driving motor lorry, registered mark PO56 KJY in the course of his employment as an ‘agency driver’ with Driver Hire and Recruitment, Deemouth Centre, South Esplanade East, Aberdeen on behalf of Warburtons Limited, Badentoy Crescent, Badentoy Park, Portlethen, Aberdeen; and

- b. Rimas Kuskys whose date of birth was 13 January 1972 and who resided at *[full address redacted]*, Fraserburgh and who was then driving a motor lorry, registered mark SV62 DNN in the course of his employment with ASCO Group, 11 Harvest Drive, Dyce, Aberdeen;

Both died at about 13.18 hours on 28 September 2015 on the A90 Aberdeen to Peterhead road near to 'Menie Smithy', by Balmedie at a point where the said road consists of a single undivided carriageway with one lane in either direction;

2. In terms of section 26(2)(b) of the 2016 Act (when and where any accident resulting in the death occurred): both Farquhar Greig Kennedy and Rimas Kuskys died as a result of a collision between motor lorry PO56 KJY then being driven south on said A90 road and motor lorry SV62 DNN then being driven north on said A90 road;
3. In terms of section 26(2)(c) of the 2016 Act (the cause or causes of the death): the cause of death of
  - a. the deceased Farquhar Greig Kennedy was multiple injuries sustained in a vehicular collision; and
  - b. the cause of death of the deceased Rimas Kuskys was head and chest injuries sustained as a driver involved in a vehicular collision.

4. In terms of section 26(2) (d) of the 2016 Act (the cause or causes of any accident resulting in the death): the cause of the collision resulting in the deaths of Farquhar Greig Kennedy and Rimas Kuskys was the encroachment of the motor lorry PO56 KJY on to the northbound lane of the A90 road into the path of the oncoming motor lorry, registered mark SV62 DNN giving the driver of that vehicle, Rimas Kuskys insufficient time to avoid a collision between the two vehicles. On the balance of probabilities the cause of the vehicle being driven by Farquhar Greig Kennedy moving into the path of the vehicle being driven by Rimas Kuskys was driver fatigue on the part of Farquhar Greig Kennedy.
  
5. In terms of section 26(2) (e) of the 2016 Act (any precautions which could reasonably have been taken, and had they been taken, might realistically have resulted in the death, or any accident resulting in the death, being avoided): had Fraquhar Greig Kennedy responded to the first symptoms of fatigue which he experienced in the 15 minutes before the collision, by stopping his vehicle and resting, the accident and the resulting deaths might realistically have been avoided.
  
6. In terms of section 26(2) (f) of the 2016 Act (any defects in any system of working which contributed to the death or any accident resulting in the death): there were no defects in any system of working which contributed to the death or the accident resulting in the deaths.

7. In terms of section 26(2) (g) of the 2016 Act (any other facts which are relevant to the circumstances of the death): there are no other facts which are relevant to the circumstances for the purpose of section 26(2) (g) of the Act of 2016.
8. It is not appropriate to make any recommendations in terms of section 26(1) (b) of the 2016 Act.

### NOTE

#### **INTRODUCTION**

[1] This inquiry is held under the Inquiries into Fatal Accidents and Sudden Deaths Etc (Scotland) Act 2016 into the simultaneous deaths of Farquhar Greig Kennedy and Rimas Kuskys. The deaths occurred on 28 September 2015 and were reported to the Procurator Fiscal at Aberdeen on 29 September 2015 and it is difficult to understand why it took so long for the Crown to apply for an inquiry in what is a relatively uncomplicated case. One of the purposes of such enquiries is to identify whether any lessons for the future may be learned to avoid similar accidents occurring. For that reason alone such enquires should be held as soon as possible. But from the perspective of those who have to live with the consequences of the death compassion requires that the any public enquiry is held promptly. It cannot have been easy for the relatives of the deceased or eye witnesses to be kept waiting so long for the matter to call in court. It is no great surprise that after so long the next of kin of the deceased chose not to attend

court and unfortunately I have not been able to express personally to them my condolences.

[2] As it was, the application was received at this court on 19 January 2018 (although I understand there may have been earlier discussions between the Crown and Sheriff Clerk to identify suitable dates for the inquiry). A warrant assigning 12 and 13 March 2018 as dates for the inquiry was granted on 22 January 2018. As there appeared to be no benefit in holding a preliminary hearing, I dispensed with a preliminary hearing.

[3] At the inquiry the Crown was represented by Mr Hanton, Procurator Fiscal Depute, Aberdeen. Warburtons, the operators of the lorry being driven by the deceased Farquhar Greig Kennedy, were represented by Miss Anderson, Solicitor, Glasgow. No other party, not even the next of kin, appeared or were represented at the inquiry.

#### **THE LEGAL FRAMEWORK**

[4] The inquiry was held under section 1 of the 2016 Act and was governed by the Act of Sederunt (Fatal Accident Inquiry Rules) 2017. This is a mandatory inquiry in terms of section 2 of the 2016 Act as both deceased died as a result of an accident in the course of their employment or occupation. The purpose of this inquiry is set out in section 1(3) of the 2016 Act as being to establish the circumstances of the deaths and to consider what steps (if any) might be taken to prevent other deaths in similar circumstances. It is not intended to establish civil or criminal liability. It is an inquisitorial process and the Procurator Fiscal represents the public interest.

[5] In terms of section 26 of the 2016 Act the inquiry must determine certain matters, namely where and when the deaths occurred; when any accident resulting in the deaths occurred; the cause or causes of death; the cause or causes of any accident resulting in the deaths; any precautions which could have been reasonably taken and might realistically have avoided the deaths or any accident resulting in the deaths; any defects in any system of working which contributed to the death or deaths; and any other factors relevant to the circumstances of the deaths. It is also open to the Sheriff to make recommendations in relation to matters set out in sub section 4 of section 1 of the Act.

## **SUMMARY**

[6] At the inquiry I was presented with a Joint Minute agreeing a significant number of the crucial facts, including the causes of death and the facts relevant to the 'mandatory' findings. This meant that the oral evidence was in short compass and I am grateful to the agents for their focussed approach to that evidence and submission.

[7] I heard oral evidence from Callum Murray, depot manager at Warburton's distribution depot in Portlethen; Sarah-Jane Robertson, the driver of south-bound motor car SA15 YHD which was following the Warburton's motor lorry PO56 KJY immediately before the accident; Niall Morrison who had been driving his motor car north 2 or 3 vehicles behind the ASCO motor lorry SV62 DNN immediately before the accident and alerted the emergency services; and Police Constable Stephen Morrison, an experienced traffic officer with Police Scotland.

[8] At about 13.18 hours on 28 September 2015 the now deceased Rimas Kuskys who was employed as a driver with the ASCO Group in Aberdeen was driving his articulated motor lorry SV63 DNN north on the A90 Peterhead to Aberdeen undivided single carriageway road (which has one lane in either direction) near to the property known as 'Menie Smithy', by Balmedie, when it encountered the southbound Warburtons motor lorry, PO56 KJY being driven by the now deceased Farquhar Greig Kennedy.

[9] Mr Kennedy was what is described as a full-time agency driver with Driver Hire and Recruitment, Deemouth Centre, South Esplanade East, Aberdeen and was contracted to drive for Warburtons Limited, Badentoy Crescent, Badentoy Park, Portlethen, Aberdeen. He had commenced working for Warburtons on 22 September 2015 and was responsible for carrying out deliveries of bakery products to retail outlets in the Portlethen, Fraserburgh and Mintlaw areas of Aberdeenshire. I heard from the Warburtons' depot manager that Mr Kennedy was unlikely to be kept on as a driver for Warburtons. He had commenced work with them on the Tuesday preceding the Monday of the accident. He had been teamed up with another agency driver for his first 2 days so that he could learn his route. He had then worked on his own on the Thursday, Friday and Saturday before having a day off on the Sunday. The Warburtons' depot manager was concerned that Mr Kennedy was not able to complete his run in the normal time (he would have expected him to be back in the depot by about 11.30 AM. However although on his first 2 days he had been back at the depot by 12 noon, on his first day on his own (the Thursday) he had not finished his round until 4 pm and he had

been later than normal on Friday and Saturday despite other drivers being asked to deal with some of his calls on each of those 3 days.

[10] I heard evidence that the deceased Kennedy despite his over-running the expected duty times was, nonetheless, fulfilling his requirements for daily and weekly rest periods requisite under the relevant EU regulations.

[11] Warburtons' vehicles are fitted with tracking systems to alert them where their vehicles are and also other systems to assist with the management of deliveries and monitoring driver behaviour.

[12] On the day of the accident Mr Kennedy had started work at 04.00 hours and had left the Warburtons' base at Portlethen at 05.38 hours driving Motor Lorry PO56 KJY. At the time of the collision he was driving south (that is in the direction of Aberdeen and Portlethen). Warburtons became aware from their systems that the vehicle was stationary for a long period near Belmedie. Around the same time they received information from the monitoring system that over the preceding days Mr Kennedy had been a 'heavy braker' - that is he appeared from the data to use his brakes more heavily than the company would ideally like.

[13] Sometime before the collision starting from a point between the town of Fraserburgh and the village of Mintlaw, the driver of a southbound vehicle had been following Warburtons' delivery vehicle, which on the basis of the evidence led I conclude was that driven by the deceased Kennedy. It was being driven erratically, "veering from one side to the other" and on at least a couple of occasions "swerving on to the opposite side of the road by about a foot or two" as the vehicles headed towards

the town of Ellon. After this driver had overtaken the lorry it followed him for some distance close behind and at a point where the road was governed by double solid white lines it moved across those lines onto the opposite lane. The motor car driver considered that that was as if the lorry was intending to overtake his vehicle but it did not.

[14] The police officers who subsequently reconstructed the accident viewed CCTV footage from a device in the deceased Kennedy's cab covering the 15 minutes or so from Mintlaw to the point of the accident. The lorry was seen to veer across the carriageway on several occasions for no apparent reason. Approximately 1.5 miles prior to the collision, near to the village of Foveran, the vehicle veered to the left and struck what Constable Morrison described as a kerb (rather than a verge as described in the joint police report (production 1)).

[15] Mrs Robertson who was aware of following the Warburton's lorry through Foveran (they both slowed to 20 mph passing the school) was not aware of any untoward driving. However immediately prior to the collision, as Mr Kennedy's lorry was negotiating a left hand bend, she saw the motor lorry cross on to the northbound lane. She describes that as a sharp turn to the right almost as if the vehicle was intending to make a right-hand turn although there was no indication of such intent, no braking, and nowhere for it to make a right-hand turn into. Mr Morrison, the northbound motor car driver saw the accident unfold and describes the Warburton's lorry as drifting to its right as it travelled round what was for it a sweeping left hand bend into the path of the oncoming articulated motor lorry driven by the deceased Kuskys. Although Mr Morrison thought that the northbound lorry did not brake I am satisfied from the post-

accident investigation that it did, but I nonetheless prefer to accept his description of the moments before the accident to Mrs Robertson's description. It seems that a slight veering onto the northbound lane is more consistent with the point of impact determined post-accident and the description of the earlier driving. It is clear that Mr Kuskys, despite applying heavy braking (sufficient for the articulated trailer to leave skid marks), had no opportunity to avoid a collision and the vehicles collided with the point of impact being to the front offside of both vehicles resulting in significant damage to both vehicles. It is clear from the evidence available to me that Mr Kuskys' driving did not contribute in any way to the accident. There was no prior warning and although he braked heavily during the few seconds prior to the accident there was nothing he could do to avoid the collision.

[16] The motor car being driven by Mrs Robertson behind the deceased Kennedy's vehicle had no prior indication of the impending collision. There was no braking by Mr Kennedy's vehicle and when it came to a halt as a result of the collision Mrs Robertson was unable to stop in sufficient time and her vehicle collided with the rear of motor lorry, PO56 KJY causing damage to that motor car (SA15 THD). Her actions did not contribute to the cause of the collision between the two motor lorries.

[17] During the collision the deceased Kennedy was thrown from the cab of his vehicle coming to rest on the northbound lane and to the rear of his vehicle. The deceased Kuskys remained within the cab of his vehicle.

[18] Police Officers attended the scene as did paramedics. Both drivers were pronounced dead at the scene by the paramedics and their bodies were removed to the

mortuary, Aberdeen, where, on 2 October 2015, post mortem examinations were carried out by Professor James Henderson Kerr Grieve who confirmed that the deceased Kennedy had died as a consequence of multiple injuries. In particular, he has sustained necessarily and immediately fatal chest injuries and severe abdominal, pelvic and lower limb injuries, extensive fractures of the skull and would probably also have suffered a fatal deceleration type injury. In Mr Kuskys's case Professor Grieve confirmed that death was caused by head and chest injuries. Mr Kuskys had sustained a massive head injury with extensive fracturing of the skull and transection of the brain stem along with disruption of the brain substance which were necessarily and instantaneously fatal.

[19] The motor vehicles driven by the deceased were examined by vehicle examiners employed by DVSA (Driver and Vehicle Standards Agency) and no defects were found which might have contributed to the accident. The tachograph relating to the deceased Kuskys's vehicle was examined and nothing was discovered which could have had a bearing on the accident. The tachograph from Mr Kennedy's vehicle could not be examined because of extensive accident damage. However Mr Murray's evidence was that, as far as rest hours are concerned, the EU requirements were met.

[20] A comprehensive Road Policing Collision investigation was carried out by Constables Morrison and Wright. Both are based at the road policing department, are advanced police drivers, are qualified vehicle examiners and are trained collision investigators. Their qualifications are set out in detail in production No 1. The officers concluded that there were 3 possible explanations for the collision.

- a. Fatigue of the deceased Kennedy causing drowsiness and falling asleep;

- b. Significant distraction within the cab of PO56 KJY; or
- c. The deceased Kennedy suffering some form of medical episode causing lack of proper control

[21] Nothing in the medical histories of the deceased; the post mortem examinations; or the toxicological examinations of samples taken post mortem provides any explanation for the apparent loss of control of his vehicle by the now deceased Kennedy. There is no evidence that the deceased Kennedy was using any hand-held device which might have distracted him. He was on his way back to the depot at the end of the day so is unlikely to have been attempting to complete paperwork. There would be no need to be looking for a map. No other factors relating to the vehicles or the road which might have led to a loss of control of the vehicle were discovered from a thorough examination of the vehicle driven by Mr Kennedy and the A90 road.

[22] Whilst the deceased Kuskys was using a hands-free telephone before the accident that would not have contributed to the collision.

## **SUMISSIONS**

[23] Mr Hanton invited me to make findings in relation to the date, place, time of death and the accident resulting in the deaths and the causes of death, all in line with the joint minute. He also invited me to hold that the cause of the accident resulting in the deaths was the failure of the deceased Kennedy to control his vehicle because of tiredness (referring to his early morning start and the evidence of prior incidents showing loss of control) and that the reasonable precautions which could have been

taken which might realistically have resulted in accident resulting in the deaths having been avoided would have been for Mr Kennedy to take a break. He did not invite me to find any defects in any system of work or make any determination as to other facts which are relevant to the death.

[24] Ms Anderson adopted these submissions emphasising the lack of evidence of any defect in systems of work

## **DISCUSSION**

[25] In this case the causes of death are clear. It may be of some comfort to the relatives of both deceased men that the view of the pathologist is that the devastating injuries sustained by the deceased would have been instantaneously and necessarily fatal.

[26] It is clear that these injuries were sustained as a result of a collision between the motor lorries being driven by the deceased.

[27] The evidence is also clear that the collision was as a result of the vehicle driven by the deceased Kennedy veering on to the northbound lane of the single carriageway road, into the path of the vehicle being driven by Mr Kuskys, giving Mr Kuskys no opportunity to avoid a collision. None of the investigations carried out at the scene, of the motor vehicles or post-mortem by the pathologist or toxicologist, offer any explanation for Mr Kennedy not being able to keep his vehicle under proper control. PC Morrison in his report and in evidence suggested that there were only 3 explanations: fatigue of the deceased Kennedy causing drowsiness and falling asleep; significant

distraction within the cab of PO56 KJY; or the deceased Kennedy suffering some form of medical episode causing lack of proper control.

[28] I accept the logic of that and also accept his preferred explanation being that of driver fatigue. That chimes with the evidence of earlier wandering of the vehicle across the road. Either distraction or a medical cause might have occurred once but not repeatedly. I am accordingly content to accept that that is a cause of the accident for the purposes of section 26(2) (d) of the Act.

[29] I am more hesitant in making a finding that a reasonable precaution which Mr Kennedy could have taken would have been to have stopped after the first warning of tiredness which must have occurred sometime before the accident given the incidents spoken to by eyewitnesses and noted from examination of the CCTV footage. Although there was no direct evidence on the point it seems a matter of common sense that he could have pulled over at some point and had a rest. On the basis of the evidence led if the collision was attributable to Mr Kennedy's fatigue as I am satisfied it was he must have been aware of that fatigue for a reasonable distance and time before the accident. The evidence is that there was more than one fatigue related incident before the collision.

[30] Having considered the matter further, however, it seems to me that the requirements of section 26(2) (e) are met. I can infer that Mr Kennedy could have pulled off the road or at least stopped his vehicle at some point before the collision; it would have been reasonable to expect him to do so given the warnings he had had (through the momentary losses of control) that he was not fully in control of the vehicle; and had he

done that the accident would not have occurred there and then and indeed had he rested properly no further accidents of any sort would have occurred.

[31] Had he been able to keep his vehicle under proper control then the accident and the resulting deaths would not have occurred. Had he taken a sufficient break he would have been able to keep proper control of his vehicle and the accident and deaths flowing from them would have been avoided.