

SHERIFFDOM OF LOTHIAN AND BORDERS AT JEDBURGH

[2018] FAI 2

JED-B93-17

DETERMINATION

BY

SHERIFF PETER PATERSON

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

into the death of

JAMES SCOTT MILLER

Jedburgh, 12 January 2018

The Sheriff, having heard and considered the evidence and submissions of parties, determines in terms of section 6(1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 as follows:-

1. In terms of section 6(1)(a): that James Scott Miller died due to injuries he sustained in a road traffic accident that occurred on the southbound carriageway of the A7 road near Glednest Cottage Teviothead on 10 December 2015 at approximately 09.20.
2. In terms of section 6(1)(b): that the said James Scott Miller, in the course of his employment was driving southbound on the A7 in a Vauxhall Cavalier registration number M362REF and the accident was caused when a north bound vehicle, a Renault box lorry registration MX55 XRR which was driven by John Power care of the Police Service of Scotland, acting in the course of his employment, veered from the north

bound carriageway into the south bound carriageway. This occurred as a result of John Power suffering from a sudden loss of orientation due to a medical event as he drove the said box lorry.

3. In terms of section 6(1)(c): for Dr Paul Davies of North Cumbria University Hospitals NHS Trust to have more fully considered the Driver & Vehicle Licensing Agency guidance for medical practitioners and in particular have considered page 19 and the section dealing with “LIABILITY TO SUDDEN ATTACKS OF UNPROVOKED OR UNPRECIPITATED DISABLING GIDDINESS”. Further that Dr Davies should have been guided by the said section or alternatively section 6 on page 17 of the said guidelines. If Dr Davies had used either of these sections for guidance he would have advised John Power not to drive a vehicle of any type.

4. Further in terms of section 6(1)(c): that John Power on receipt of Dr Davies’s letter dated 26 October 2015, which advised him “not drive a HGV”, should have sought clarification from either Dr Davies or his own general practitioner as to the intention of the letter, given its inherent ambiguity.

5. I make no findings in terms of section 6(1)(d).

6. In terms of section 6(1)(e): I recommended that when doctors are advising patients who drive for a living they should decide if they are fit to drive for a living, not on the type of vehicle they drive or type of licence held by the patient. One of the reasons the DVLA distinguish between group 2 and group 1 licences is that there is a greater risk because of the amount of driving done by a group 2 driver. However, in my opinion, those who drive vans less than 3.5 tonne for a living will quite possibly drive as many

hours as drivers of heavier vehicles covered by a group 2 licence and allowing them to continue to drive carries with it a risk not significantly less than allowing holders of group 2 licences to continue to drive.

NOTE

The Inquiry

[1] The representation at the inquiry was in the following terms:-

on behalf of the Procurator Fiscal –James O'Reilly, Procurator Fiscal Depute;

for the family of the late James Scott Miller – Emma Tonner, Advocate;

for Dr Paul Davies – Lorraine Glancy, Advocate;

for John Power – Seonaid Busby, solicitor;

for J Dickinson Transport Ltd – Clare Bone, solicitor.

Introduction

[2] This inquiry involves the sad and untimely death of James Scott Miller. It is not in dispute that he died as a result of a road accident involving a 7.5 tonne lorry driven by John Power. At the material time Mr Power held a group 2 licence and was employed as a full-time driver by J Dickinson Transport, Carlisle. At the material time Mr Miller and Mr Power were acting in the course of their employment.

[3] The background to the incident is that on two previous occasions Mr Power had suffered events in which he had suffered disabling attacks, the exact nature of which is a matter I will return to. After the first event he consulted his general practitioner. After

the second event on 3 October 2015 Mr Power went to Accident and Emergency at Cumberland Infirmary, which in turn resulted in a referral to Dr Davies and was advised not to drive. He was seen by Dr Davies on 6 October and again on 23 October 2015. Following the consultation on 23 October Dr Davies wrote to Mr Power's general practitioner, copied to Mr Power. In the letter Mr Power was advised not to drive HGV vehicles.

[4] The inquiry focused on two specific issues, the advice given by Dr Davies and Mr Power's and his employer's reaction to Dr Davies advice.

Legal Frame Work

[5] The legal frame work of the Act is not in dispute. A fatal accident inquiry is essentially a fact finding exercise, it is not about the apportionment of fault or blame. That said it is open to parties to draw inferences from findings.

[6] There has been considerable judicial comment on inquires and in particular section 6(1)(c) of the Act and what is meant by the expression "might have been avoided". It now appears to be accepted that the test is less than the balance of probabilities, namely a "lively possibilities" – see Lord Armstrong's observations in the *Petition of Fraser Sutherland FRCS* [2017] CSOH 32 paragraph 31.

Witnesses

[7] I heard evidence from three witnesses on the facts, John Power, the managing director of his employer James Dickinson and Dr Paul Davies. I also heard evidence

from three skilled witnesses Dr Christopher Derry, consultant neurologist, instructed by the procurator fiscal; Dr Richard Davenport, consultant neurologist, instructed by BTO solicitors, (it was not entirely clear if Dr Davenport was instructed by those acting for J Dickinson Transport or for Mr Power); and Professor Jesse Dawson, Professor of Stroke Medicine at the University of Glasgow, instructed on behalf of Dr Davies's.

[8] I found Mr Power to be a credible but entirely unreliable witness. He came across as a genuine witness but his memory of events was remarkably poor. For example he appeared to have no recollection of his examination in Dumfries by an Ear Nose and Throat consultant. Given the facts of the accident are not in dispute this lack of reliability might not be an issue but it does cause me a concern in relation to one point, his interpretation of Dr Davies's letter of 26 October 2015.

[9] His justification for driving the 7.5 tonne lorry was the anomaly of having had his driving licence prior to 1997, a matter I will explain in more detail later. He appeared reluctant to address the question of why he was driving the vehicle rather he fell back on the justification of his licence. I accept that the term "HGV" used in the letter is a potentially confusing one, but I remain unclear, if it was unsafe to driver vehicles over 7.5 tonne, why he should feel it was safe to drive vehicles under 7.5 tonne. Simply because he had a licence to do so does not provide a rational explanation.

[10] I have the same concern about Mr Dickinson's evidence. He simply refused to answer directly the question about the difference between HGVs and LGVs (Large Goods Vehicles) simply dealing with this by continual reference to the licencing system. As with Mr Power I remain unclear why he felt it was safe for Mr Power to drive a

vehicle less than 7.5 tonne, the fact that Mr Power had a licence that allowed it does not in my opinion provide a sound explanation for this.

[11] As for Dr Davies, I found him to be an entirely credible and reliable witness who was in my opinion an honest witness. For example he freely admitted that he was not aware of the category at page 19 I have already identified, yet at the very least this admission could not be described as helpful to him. The only doubt I have about his evidence was whether or not he did actually look at the DVLA guidance on 23 October 2015. I will return to this subject later.

[12] As for the skilled witnesses they all agreed that Dr Davies's differential diagnosis and treatment of Mr Power could not be criticised. The disagreement was about whether Dr Davies was correct in categorising Mr Power in terms of section 2 on page 16 of the DVLA guidelines is one of the two central questions faced by this inquiry.

The Facts and Evidence

[13] Many of the background facts were agreed by parties and incorporated into a joint minute, a copy of which I attach to this determination.

[14] The first incident occurred on 2 June 2015 when Mr Power was making a delivery.

[15] In evidence Mr Power advised that he had been making a delivery and had been pushing pallets and suffered a sudden attack of dizziness which lasted for a perhaps a couple of minutes. As a consequence he had to sit down for a period of 45 minutes

before he felt he had recovered. He called his employers who sent another driver to relieve him.

[16] It appears that he called NHS 24 hours on the day of the incident.

[17] There are a number of minor discrepancies on the evidence on this point. The NHS fax report talks of the incident lasting 30 minutes and “still feeling dizzy”. In his evidence there was no suggestion of still feeling dizzy.

[18] The general practitioner’s description is different again, in his referral to the ENT department of Dumfries and Galloway Royal Infirmary it talks of the delivery of parcels. The letter talks of Mr Power still feeling off balance but that was not touched on in his evidence to the inquiry. The ENT consultant discharged Mr Power, suggesting that the symptoms were caused by some vascular reduction of bloods in the brain.

[19] The discharge letter from Dumfries and Galloway Royal Infirmary gives a slightly different description of the event, it talks of heavy lifting and the symptoms settling within half an hour.

[20] When Mr Power related the events of 2 June 2015 to Dr Davies he appears to have advised they occurred five or six weeks ago and lasted for 45 minutes. In fact the previous event occurred twelve weeks before.

[21] The second incident occurred on 3 October 2015 when Mr Power was driving into Carlisle with his wife. He was again overcome with the sudden onset of an attack of dizziness, such that he had to bring the vehicle to an immediate halt. He was taken by ambulance to the emergency department of Cumberland Infirmary and was seen by Dr Graff who advised him not to drive “until seen”.

[22] Dr Graff made a referral to Dr Davies's clinic, and Mr Power was seen by Dr Davies on 6 October 2015. In Dr Davies's report of the consultation to Mr Power's general practitioner he describes Mr Power having a sudden onset of vertigo. The letter talks of a wide differential diagnosis. Dr Davies considered that Mr Power might have suffered two transient ischaemic attacks (TIAs) but thought this relatively unlikely. He also wondered if he had labyrinthitis. Ultimately he ordered a MRI scan and indicated he would take matters further.

[23] At this point Mr Power was not driving.

[24] Dr Davies saw Mr Power again on 23 October 2015, by which time Dr Davies had the results of the MRI scan. Dr Davies's record of the meeting is effectively his letter to Mr Power's general practitioner dated 26 October 2015.

[25] In the letter Dr Davies describes the results of the MRI scan but appears to find nothing of significance in the result. He indicates that some of Mr Power symptoms were suggestive of a pre-syncopal (pre-fainting) but points out there was no prodrome ie early symptoms. As a consequence he indicated that he was going to conduct further tests.

[26] Critically he finished the letter in the following terms:

"Mr Power drives for a living and is the holder of a HGV licence. I have suggested that he should not drive a HGV until we have some more information. I will write again when I have the result of these tests"

In the course of his evidence Dr Davies indicated that when giving this advice what he really meant by the term HGV was lorry.

[27] Dr Davies also indicated that he had in mind the DVLA guidelines when giving this advice and in particular page 16 section 2 which is in the following terms:

“Solitary loss of consciousness/loss of or altered awareness likely to be explained syncope but with a high probability of reflex vasovagal syncope
These have no clinical evidence of structural heart disease and a normal ECG”

[28] The significance of this is that the DVLA recommendation for this section is that under the heading, “Group 2 Entitlement VOC-LGV/PCV (Lorry/Bus” the DVLA says “Can drive 3 months after the event”. There is no prohibition on driving under group 1 entitlement.

[29] I mentioned at paragraph 11 the one aspect of Dr Davies’s evidence which concerned me was the question of whether he actually looked at DVLA guidelines. When questioned about this by Miss Toner on behalf of his family his initial reply appeared a little hesitant, indicating he thought it was section 2 in mind. His evidence appeared to firm up as his evidence went on such that he did say he looked at the guidelines “online”. I find this difficult to square with his evidence that he could not recall the exact details of his consultation with Mr Power on 23 October 2015.

[30] When Mr Power received the letter he discussed it with his employer, specifically Mr Dickinson, and their position in evidence was that they interpreted this as allowing Mr Power to drive vehicles up to 7.5 tonne.

[31] Their justification is one of the key issues the inquiry has to consider. It appear to be the case that all those who obtained a group one licence, category B (ie motor cars) prior to 1 January 1997 have an additional entitlement to drive category C1 vehicle

which in the DVLA guidelines, at page 4, is described as a medium size lorry of weight between 3.5 and 7.5 tonne.

[32] Mr Power and Mr Dickinson were of the opinion that since the letter of 26 October talks of HGVs and because Mr Power could drive category C1 vehicles on his Group 1 licence the letter meant he was prevented from driving a vehicle he could only drive by virtue of his group 2 licence.

Discussion and Recommendations

[33] The first matter to consider is the advice given by Dr Davies. In giving the advice not to drive, Dr Davies said that what he meant was not to drive a lorry. When the vehicle Mr Power was driving at the material time was described to Dr Davies he said that this was the type of vehicle he had in mind when he used the term, lorry.

[34] I have no reason to doubt what Dr Davies had to say about this and what his intention was in terms of the letter of 26 October 2015, sadly that does not advance matters.

[35] The key question is why did Dr Davies give this advice? The first thing that has to be said is that Dr Davies gave the impression that he was not particularly familiar with the DVLA guidelines. As I have observed when asked about his advice by Miss Toner for the family of Mr Miller, his first reply was that he thought what he had in mind was section 2 at page 16. What did surprise me about Dr Davies's evidence was that he was unaware of the advice at page 19. This is even more surprising given that the section is directly below the one under consideration headed, "STROKES/TIA. This is

Dr Davies's specialist area. In fairness to Dr Davies it may be that this is just a feature of the printed version and this may not be obvious on the website version.

[36] It was also pointed out that the index only referred to giddiness, not dizziness or vertigo.

[37] Turning to the actual classification, this took up much of the evidence.

Essentially Doctors Davenport and Derry were of the opinion that Dr Davies's advice on driving was incorrect. They were of the opinion that he had misdirected himself by using section 2 page 16 and that Mr Power should have been told not to drive at all.

Professor Dawson was of the opinion that the advice could be justified.

[38] I agree with the views of Doctors Davenport and Derry.

[39] I have set out in paragraph 27 the terms of section 2 page 16. When these terms are compared to Mr Power's symptoms I find it difficult to understand Dr Davies's position. I accept that the matter is not straight forward. Dr Davenport stressed the fact that in both cases the symptoms came on without notice. He placed weight on the description used, "vertigo". He explained that it was a very specific diagnosis and something quite distinct from dizziness. However the problem with the term is that it is not always used in the correct technical sense, even by doctors.

[40] Accepting that is the case, it does not detract from the fundamental fact that there were two disabling incidents. Section 2 talks of a solitary event but that is not the case with Mr Power. Nor was it the case that the cause was highly likely to be caused by "reflex vasovagal syncope". In his letter of 26 October 2015 Doctor Davies talks of "some

features that sound pre-syncope". That is quite different from the "high probability" talked of in section 2.

[41] Professor Dawson's, who in many ways was a highly impressive witness, position is to be found at paragraphs 4.01(i) and 4.01(ii) of his report. In evidence Professor Dawson expanded on his reasoning. He explained that the justification for using section 2 for guidance depended upon the view taken of the events in June. If I understood his evidence correctly he was of the view that if you considered the terms of the letter from Dumfries Royal Infirmary, this description simply talks of "rotational vertigo." On the basis of that analysis Professor Dawson maintained that this could justify a view that there was only one incident.

[42] I have two problems with this approach. Firstly and most importantly it does not appear to be what Dr Davies thought the position was. In his letter of 6 October 2015 Dr Davies talks of "a similar incident". Secondly it was not clear, to me at least, whether Dr Davies had the Dumfries Royal Infirmary letter before him in October 2015.

[43] Professor Dawson indicates that he can understand why Dr Davies did not select the section at page 19. Again I have two problems with this comment. Firstly the justification is not required as Dr Davies did not know of this section. Secondly, just because a non-medical term is used does not, in my opinion justify discounting the same. Giddiness, while it may not be a medical term, but it does have meaning. If Professor Dawson's logic is correct the section is in effect potentially redundant, because the inclusion of a non-medical term would result in a doctor being entitled to ignore it.

[44] Dr Derry's opinion follows broadly the line taken by Dr Davenport in terms of how Dr Davies should have dealt with Mr Power's driving and was of the opinion that the entry at page 19 was the correct section to apply to Mr Power.

[45] I accept that the selection of the correct part of the DVLA guidelines is no easy matter. There are an infinite number of variations in the human condition and much can depend on the history provided by the patient and how this is recorded. The exercise is always going to involve trying to find the best fit and no doubt on occasions this might prove difficult. This is particularly so when dealing with symptoms not diagnosis, which was the situation faced by Dr Davies on 23 October 2015.

[46] Equally I am not surprised that Dr Davies cannot remember specifically looking at the DVLA guidance, he no doubt sees many many patients and quite understandably he is unlikely to have any specific recollection of any one consultation. That of course is why notes are taken.

[47] However in my opinion I find Dr Davies's explanation for basing his advice on section 2 unconvincing. There are two other possible entries, section 6 page 17 or page 19 which in my opinion are materially better fits. Even if Dr Davies's choice is capable of justification I am unable to understand why it was the better choice. The fact that he was unaware of page 19 I find difficult to understand and something he should have been aware of.

[48] It is for these reasons that I have made the first of my determinations under section 6(1)(c) of the Act.

[49] As for my second determination under section 6(1)(c), I have already explained the justification given by Mr Power and Mr Dickinson for Mr Power driving after Dr Davies's letter of 26 October 2015. I do not understand the explanation provided. The whole matter turns on the exception provided for drivers who held a group 1 licence prior to 1 January 1997. The difficulty with their position is that the letter talks of a class of vehicle. However, as I have said the basis of Messrs Power and Dickinson's decision was based on the licence not on the type of vehicle. The logic of Mr Power and Mr Dickinson's position would appear to be that if Mr Power had obtained his licence after 1 January 1997 he would not have driven.

[50] This tends to suggest that both Mr Power and Mr Dickinson accept that the expression HGV does cover vehicles between 3.5 to 7.5 tonne, or at least capable of covering it.

[51] The real problem with their position is that it assumes that Dr Davies knew of the 1997 exception and that it applied to Mr Power. How else would they come to the conclusion that Dr Davies thought Mr Power could drive vehicles between 3.5 and 7.5 tonne?

[52] The reality is that they had no idea what Dr Davies thought about the 1997 exception. In my opinion what Mr Power and Mr Dickinson were doing was looking for a justification to allow Mr Power to drive and found that in the 1997 exception. According to their evidence at least, at no time did they ask themselves the question, is it safe for Mr Power to drive in the course of his employment.

[53] At the very least what Mr Power and Mr Dickinson should have done was to seek clarification of what was meant by the letter of 26 October 2015.

[54] My recommendation relates to the current distinction used by the DVLA between a group 1 entitlement and a group 2 entitlement. The logic behind this dichotomy is to be found at page 4 and is based on the increased risk of the height and weight and length of time at the wheel.

[55] In my opinion of these two factors, by far the greater risk is time at the wheel. There are many fulltime drivers who drive vehicle under 3.5 tonne. Couriers, delivery drivers, etc. are all at the wheel of their vehicle for many hours with all the risks that come with time spent driving.

[56] I noted with interest the evidence of Dr Davenport that his advice focused on the nature of the driving and he phrased his advice as “not to drive in the course of your employment.” In my opinion this advice focuses on the real risk and at the same time removes the ambiguity created by the 1997 exception.

[57] In my view the DVLA should give further consideration to the distinctions currently used ie group entitlement and focus on the distinction of whether someone who drives on a full-time basis and drives for their living. The problem with the current system is that it appears not to consider as a separate category those drivers who work on a full-time basis driving vehicles less than 3.5 tonne.

[58] Finally I would like to add a personal note on how moving I found the letter addressed to the court about the effect Mr Miller’s death has had on his whole family.