



Neutral Citation Number: [2023] EWHC 526 (KB)

Case No: QB-2021-000320

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2023

Before:

HIS HONOUR JUDGE SALMON
(Sitting as a Deputy Judge of the High Court)

Between:

ARRON JOHN MACDONALD
(a Protected Party by his Litigation Friend, Tony
Michael Smith)
- and -
MS AMLIN CORPORATE MEMBER LIMITED

Claimant

Defendant

MR D. SANDERSON (instructed by **Stewarts Law**) for the **Claimant**

MR J. WATT-PRINGLE QC (Mr Arney KC on 1st March 2023) (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 12-14 July 2022

Approved Judgment
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HIS HONOUR JUDGE SALMON

HHJ Salmon:

1. This claim arises out of a road traffic accident that occurred in the eastbound bore of the Limehouse Link tunnel that runs underneath the Limehouse basin in East London. At around 9.30am on 23rd February 2018 the Claimant was riding his Piaggio scooter when it collided into the rear of a stationary tipper Scania lorry driven by Mr Chilvers (the Scania). The Claimant sustained a spinal injury and severe traumatic brain injury. The claim is brought against Mr Chilvers' insurers. Liability is denied and Master Thornett ordered that the issue of liability be tried as a preliminary issue. This is my judgment on these issues.

Overview

2. The Claimant has no memory of the accident itself. Sadly, Mr Chilvers (unrelated to this accident) has died and the only evidence about the accident comes from what he said to the police on the day of the accident. However, the tragic accident has been captured by a CCTV camera in the tunnel.
3. Both parties were travelling in the same direction through the two lane eastward bound tunnel bore. The CCTV shows Mr Chilvers was in the nearside lane when he activated the flashing beacons on the Scania. At this point in the tunnel a slip lane develops in a tapered fashion creating an exit to the Isle of Dogs. Mr Chilvers having activated his flashing beacons moves across into the slip lane and brings the Scania to a stop. He then gets out of his cab and walks across the front of it and down its nearside out of sight of the CCTV.
4. The Claimant is first seen by the CCTV footage in the outer of the two eastbound lanes behind a vehicle. He then moves from the outer lane into a gap in the traffic in the nearside lane and then into the slip lane in what is in effect one continuous movement. When he enters the slip lane there is no traffic between him and Mr Chilvers' lorry. Tragically he collides into the offside rear of the stationary lorry.

Issues

5. The Claimant says in short, that Mr Chilvers negligently caused the accident by creating an unjustified dangerous obstruction in the tunnel. In the alternative it is submitted if Mr Chilvers stopping of the Scania was justified, it was negligent to stop where he choose to. It is said he should have stopped further ahead where there the slip lane had widened into two lanes.
6. The Defendant denies that the decision to stop was negligent. Firstly they submit in the circumstances Mr Chilvers did not create a dangerous obstruction, but if and to the extent that he did, it was justified by the fact Mr Chilvers had heard a noise and it was in those circumstances reasonable to stop to investigate. Further, they submit that if Mr Chilvers was negligent then the Claimant was also negligent. They argue that the Claimant's negligence was so gross that his actions should be seen as the sole cause of the accident. However, if they are wrong about this, then they submit that there should be an apportionment of liability.

Pleadings

7. The parties' contentions are more fully set out in the pleading.

8. The Claimant alleges that Mr Chilvers:-

“(a) ...stopped in the Limehouse Link Tunnel, a red route clearway, without reasonable excuse;

(b) ...obstructed a clearway;

(c) caused foreseeable and unnecessary danger to the Claimant, in that the place he chose to stop his lorry was:

(i) one in which no one would reasonably expect to encounter a parked vehicle;

(ii) only a short distance beyond a right hand bend; and

(iii) at the start of a slip road;

(d) ...parked in a position that gave the Claimant no reasonable opportunity to observe that the lorry was stationary in time to avoid a collision;

(e) if, which is denied, it was permissible for [Mr Chilvers] to stop his lorry in the Limehouse Link Tunnel, he failed to drive on a further 50 m or more, and to stop in a place where

(i) the slip road had widened into two lanes; and

(ii) eastbound traffic was afforded a much better opportunity to observe that the lorry was stationary in time safely to be able either to stop behind it or to overtake it;

(f) ...failed to activate his hazard lights until some minutes after the collision;

(g) ...obstructed a clearway and caused the Claimant to collide with the rear of his lorry ...”

9. The Defendant alleges that:-

“(a) The driving of Mr Chilvers did not fall below the standard expected of a reasonably competent driver because:-

(i) It was necessary for him to stop where he did to investigate a noise he had heard when driving along.

(ii) He activated his flashing beacons and came to a stop at a safe place in the slip lane such that he did not create a danger to other road users.

(b) The Claimant's own gross negligence, alternatively negligence caused the accident in that he:-

(i) Failed to keep a proper lookout and to observe the [lorry] which was clearly visible by reason of effective lighting in the tunnel, the size of the lorry and the fact its beacon and LED lights were flashing.

(ii) The Claimant turned into the slip lane from running lane 2 and 1 without ensuring that it was safe to do so and that he would be able to stop within a clear distance before the [lorry] and drove straight ahead into collision with it without slowing down or taking effective avoiding action.

(iii) The Claimant drove too fast in the circumstances.

(iv) The Claimant failed to control or steer his [scooter] in such a way as to avoid the collision.

(v) Res ipsa loquitur.”

The Evidence

10. The evidence in this case came from the following sources:-

- i) The Claimant who gave oral evidence before me, however as I have said he has no memory of the accident itself.
- ii) Mr Chilvers did not give evidence in this case having died sometime later from an unrelated cause. However, the police spoke to him on the day of the accident and the police accident report contains details of this including a short signed statement he made at the scene.
- iii) CCTV footage of the scene from a tunnel camera.
- iv) Both sides relied on expert collision investigators, both of whom in turn relied upon the findings of the police from their investigation into the circumstances of the accident. The experts, Ms Evers for the Claimant and Mr Mason for the Defendant, both prepared detailed reports and prepared two joint statements.

The Claimant

11. The Claimant is a scaffolder. In February 2018 he was living on and off with the mother of his child, on the Isle of Dogs. On the morning of the accident he had as usual gone to work at the Chelsea Barracks. Sadly ten days before the accident his mother had suffered a stroke. On the day of the accident, the Claimant's head was in a mess due to his mother's stroke. He could not stop thinking about his mum. Shortly

after his arrival at work his boss sent him home. The route home was one he was very familiar with. He accepted that in order to exit the tunnel he needed to get into the slip road and that he had entered the tunnel in the second lane. Whilst counsel for the Defendant suggested that the Claimant's riding may have been caused by him not paying attention due to his mother's stroke, this is in my judgment speculation. My approach has been to consider all the evidence and determine whether either party was or was not negligent in their driving / riding.

Mr Chilvers

12. The only evidence from Mr Chilvers comes from what is recorded in the police accident report from the day of the accident. Mr Chilvers made a witness statement in which he said:-

“I was coming through the Limehouse link and heard a noise coming from the lorry. I pulled up to the side where it was safe and activated my hazard lights and beacons and got out to walk around and check that nothing was going to fall off and as I walked around I saw a man underneath the rear of the lorry and his bike was on the floor.”

13. Pc Pamboris asked Mr Chilvers what had happened and his recollection was that he told him something along the lines of:-

“He rode straight into the back of me, I came into the tunnel and could hear a noise from the lorry and I thought something wasn't right so I stopped here to check it out. ...”

14. Pc Yard recorded that Mr Chilvers had pulled over as he heard a noise from his vehicle and stopped to investigate.
15. In contrast Pc Ahmed in the accident report, summarising the investigation recorded that Mr Chilvers believed something had fallen from the back of the truck.
16. Given the other evidence, in my judgment, Pc Ahmed was mistaken and Mr Chilver's never believed something had actually fallen from the Scania.
17. From this evidence I can conclude that Mr Chilvers heard a noise and decided to investigate the noise by stopping the Scania and getting out to look at it.
18. There is no objective evidence that anything was about to fall off the lorry. The photographs taken after the accident do not on the face of it suggest something was going to fall from the Scania. A mechanical investigation found no defects with the Scania.
19. I return later in this judgment to whether the stopping of the Scania was justified in these circumstances. However, I must avoid a circular reasoning. Simply because Mr Chilvers choose to park up as he had heard a noise does not mean that a reasonably competent driver would have behaved in this way.

The Scene

20. The Claimant and Mr Chilvers entered the tunnel from “The Highway”. As you enter the tunnel it is initially two lanes (hereinafter running lane 1 and 2). Running lane 1 is marked for “Isle of Dogs” and running lane 2 for the “Royal Docks”. The tunnel is subject to a 30 mph speed limit.
21. Pursuant to the GLA Roads and GLA Side Road (Tower Hamlets) Red Route (Clearway) Consolidation Traffic Order 2008 no person shall at any time shall cause a vehicle to stop in the tunnel unless obliged to do so as to avoid a collision. Further, the London Borough of Tower Hamlets Traffic Management Order 1993 states that no person shall permit any vehicle to stop or remain at rest, unless they have to in order to avoid an accident or to recover an object that has fallen from the vehicle.
22. About 750 m into the tunnel it starts to widen in a taper to form a slip road. For the first 35m the taper gradually widens, until it is the width of one lane (3.5m). For the next 90 m the single lane gradually widens until the slip road is split into two lanes. For the next 120 m, until it enters a separate short tunnel, the slip road is two lanes wide. Once the carriageway is four lanes wide, a gradually widening area of hatched markings begins that separates the two lanes on the slip road from the two initial lanes that continue east in the main tunnel. Once the slip road leaves the main tunnel it quickly climbs to street level and the junction with Westferry Road. Before the junction, on the left, is a layby with double yellow lines and a sign saying “Police Only”.
23. When the Scania is parked up prior to the collision its rear is 75 m from the start of the taper and 40 m after the slip road is a full single width. Had the Scania parked around 50 m or so further along the slip road then the slip road would have comprised two lanes.

The CCTV

24. The CCTV footage shows that before the Scania comes to a stop a white van behind it initially follows it into the slip lane before moving back into running lane 1 and then passing the Scania at about the time the lorry comes to a stop, before then moving back into the slip lane. After the Scania has stopped but prior to the collision, two vehicles “avoid” colliding with the Scania. First a small black saloon car partially enters the slip road from running lane 1 but then moves back into running lane 1. Then as Mr Chilvers is getting out of the cab a second white saloon car also enters the slip road from running lane 1 and then pulls back into running lane 1.
25. From the footage the experts agree that the Claimant crossed from running lane 2 to running lane 1 about 3.76 seconds before the collision. The first time the Claimant had an unobstructed view of the stationary Scania was when it was proud of the car in front of the motorcycle in running lane 1 and this was between 2.2 and 2.92 seconds and on balance 2.5 seconds was an appropriate average in this range. The footage shows that about 0.76 seconds prior to impact there is a movement of the scooter that is indicative of the Claimant taking some form of action. The collision point between the Scania and the Scooter is on the Scania’s offside.

The Expert evidence Speed

26. The experts are in general agreement about the speed the Claimant was travelling at. Ms Evers carried out some calculations from the CCTV. Whilst, subject to imprecision, she found the speed of the scooter to be around 33-36 mph as it entered the slip road and 30-33 mph over the last 12 metres before collision. The footage shows that the scooter was travelling slightly faster than the car adjacent to it in running lane 1, although the speed of this vehicle was not calculated. These relative movements suggest it may have been accelerating and a peak speed may have been higher than the quoted figure. Equally, if the Claimant braked before impact the calculation of speed over the last 12 metres would be an over estimate. The lack of a speed camera flash means it is unlikely the scooter was travelling at a speed greater than 35 mph. This led the experts to the overall conclusion, based on the general circumstances, the CCTV and the other physical evidence that the scooter was likely to have been travelling at a speed in the range of 30-35 mph within the slip road on approach to the collision.

Identification of the Scania

27. The experts agree that the flashing lights from the lorry would have reflected off the tunnel walls and that this would have been identifiable much earlier than the direct line of sight of the Claimant. In my judgment this does not assist a driver in realising that there is a stationary vehicle ahead. In fact the flashing lights are more likely to create an impression that the vehicle is in fact moving rather than stationary.

The Actions of Other Drivers

28. The CCTV footage shows that three vehicles travelling in running lane 1 (who intended to leave the tunnel via the Isle of Dogs exit) managed to avoid colliding into the stationary Scania. Mr Mason and Ms Evers disagreed about the extent this could assist the Court in respect of the its consideration of the Claimant's actions. In short, Mr Mason opinion was that this evidence supported his contention that the Claimant should have been able to avoid the collision. Further, counsel for the Defendant submitted that this evidence supported their submission that the lorry had parked in a safe place. Ms Evers opinion was that the actions of the other vehicles did not assist. She said there were material differences in the opportunity and view of the other vehicles. Further, the Claimant submitted that it was false logic to reason from the lack of any other accident between the lorry and other vehicles that it's parking place was a safe one.
29. When considering this difference of opinion, it is important to note that the initial conclusions of the experts set out in their reports are made on the inaccurate assumption that the scooter was always in running lane 1. This is not the case. There is therefore a fundamental difference between the scooter's path and all of these other vehicles. On this issue I accept the broad thrust of Ms Eyer's evidence namely that each of these drivers was in a better position than the Claimant to have appreciated the presence of the lorry and the fact it was stationary. This judgment accords with common sense and with regard to each of the vehicles I agree with her observations that:- (a) The panel van driver will have seen the lorry activate its lights and begin to slow (b) The dark saloon car driver also would have seen the lights being switched on and is likely to have a direct line of sight as the lorry slowed. (c) The white car also had clear view of the lorry in the slip road and the additional visual cue as Mr Chilvers was climbing out of the vehicle and the driver's door was open.

30. In my judgment, given the Claimant's very different path moving from running lane 2 to the slip road, the actions of other drivers are of very limited assistance.
31. Counsel for the Defendant submitted that the avoidance of the lorry by other drivers was also relevant to the question as to whether the Scania's parked position was itself dangerous. In my judgment the submission that other drivers avoided the accident means that the Scania had stopped in a safe place is one I do not accept for these reasons:- (a) The fact no other accident took place is of limited value in determining whether it was a safe place to stop. A lorry may shed its load in the fast lane of the motorway and fortuitously no car collides with it, but no one would argue that this meant it was safe to place an obstacle in the fast lane of the motorway. (b) Each vehicle we see avoiding a collision had a different perspective (c) It was not suggested that it was not permissible to change lanes to move from running lane 2 into the slip road and in assessing the dangerousness of the place the lorry parked it is necessary to consider that vehicles may well move from lane to lane. I will deal in more detail with this issue when considering the parties' submissions, but in my judgment there is little to be gained by simply saying others did not collide with the lorry therefore it was a safe place to stop.

Perception Reaction Times

32. Ms Eyers and Mr Mason disagreed about the appropriate perception reaction times. Some of the relevance of this issue has been reduced given the concession by Mr Mason that from the point the Claimant had an unobstructed view of the lorry he reacted within 1.74 seconds a period of time that Mr Mason accepted was reasonable. The experts were unable to assist as to whether the Claimant had at any time an unobstructed view of the lorry, prior to beginning to move into the slip lane. In this respect it is common ground that the CCTV shows a van in front of him in running lane 2 as he moves into lane 1 and a car in front of him in running lane as he commences his move into the slip road.
33. As to the difference in opinion about on the question of reaction times I preferred the evidence of Ms Eyers' to Mr Mason. My reasons are as follows. Ms Eyers evidence was careful and considered. She did not make assertions but explained and gave fully argued reasons for her conclusions and was quick to point out the limitations inherent in her own expert evidence and the limitations of collision reconstruction. In contrast I found Mr Mason's evidence less convincing. I give three examples. In his report he spent a lot of time discussing the fact there was a missing red route clearway sign at the start of the tunnel seeking to imply that this cast doubt over the actual status of the tunnel and/or Mr Chilvers' understanding. Then, in cross examination, he accepted that the route for miles prior to the tunnel was a red route clearway and that any reasonably competent driver would know one should not stop in this tunnel. In my judgment, this concession should been set out in his report. He also spent much of his report suggesting that when considering the actions of a driver in running lane 2 they would join the slip route at its very start and then being critical of drivers who did not. However, the Defendants have never pleaded the case on the basis that a reasonably competent driver should always have been in running lane 1 or that a driver should have immediately started to move into the slip lane the moment it began. Whilst I accept that discussing the view and distances from the slip lane starting to the rear of the parked lorry is something that Mr Mason was entitled to comment upon he was in effect postulating a case that was not in fact how the Defendants put their case.

However, the most substantial criticism of Mr Mason, was his failure to provide any evidence to support his claim that the appropriate perception reaction time was 1-2 seconds. In his initial report he merely made this assertion without explaining how he came to this figure. Later, having seen Ms Eyers' report, who relied upon specific research from Muttart, whilst he criticised the use of Muttart figures he still failed to provide any explanation as to why his perception reaction time should be accepted. At trial under cross examination, for the first time he said his opinion came from a well-known book written by Krauss. He said figures from this book were widely accepted by experts. However, Krauss's book was not produced and because of the fact this all arose under cross examination, meant that Ms Eyers had never been directly cross examined about this research. In my judgment it is axiomatic for any expert to explain their reasoning for the opinion they come to and Mr Mason's failure to provide this in his report seriously undermined his evidence.

34. I turn to the specific issue as to whether Ms Eyers was right to rely upon the evidence of Muttart in coming to her conclusions as to perception reaction times. I have already set out that I do not find the actions of other drivers much assistance in determining perception reaction times for the reasons I have given. The evidence relied upon by Ms Eyers comes from Muttart dealing specifically with perception reaction times to stationary or slow moving vehicles by following vehicles. I accept Ms Eyers' contention that this is somewhat similar to the situation in this case. I reject the suggestion that this part of the Muttart research is applicable only to high speed roads and not of relevance here. Whilst Muttart's work is difficult to follow, having read the extracts relied upon by Ms Eyers the chapter deals with "Drivers' Response Times to a Leading Vehicle" the chapter is clearly not only limited to high speed roads. Further, the table relied upon by Ms Eyers only makes a distinction between straight roads and roads and intersections. Further, the footnotes that set out "Limitations for Use" in respect of the table, do not suggest that it is only suitable for situations where approaching speeds are over 35 mph. Therefore, despite Mr Mason pointing out that the text makes reference to "most drivers" being able to avoid a collision when closing at speeds of 35 mph or less, I agree with Ms Eyers that this does not invalidate her use of the table of perception reaction times, within this chapter of the book. The Muttart chapter relates to the vehicle directly behind a stationary vehicle and as we now in this case the Claimant crossed two lanes and then came into the slip road. Interestingly, although I was not directly addressed on this, the "Limitation of Use" footnotes suggest that you need to add 0.26 seconds for every 10 degrees the driver is looking away from straight ahead.
35. Mr Mason based his 1-2 second perception reaction time on what he called reaction time in normal circumstances. In my judgment this was not a normal circumstance. I accept the opinion of Ms Eyers that the situation facing users of the tunnel is in reality more akin to a fast road, as opposed to reactions for example to stationary traffic at an intersection, in circumstances where a driver would not expect to encounter a parked vehicle. I therefore prefer the evidence of Ms Eyers.
36. It is common ground that the table in Muttart does not include what Muttart refers as a "detection and recognition phase". This is a phase where the hazard is not recognisable and this period needs to be added to the Muttart table figures. I have already concluded that Muttart's table is an appropriate guide to use, and therefore some additional time needs to be added to his figures. As to what that period is, both

experts agree there is no published data that can assist. Mr Mason's case was always that his definition of perception reaction times of 1-2 seconds, took account of this. Ms Eyer's suggested an addition of 0.5 seconds would be reasonable to reflect this phase identified by Muttart. For the reasons I have given it is appropriate to use the Muttart figures and it follows that there needs to be some addition to the times. I found Ms Eyer's opinion that it would be appropriate add 0.5 seconds convincing.

37. I conclude therefore that the appropriate perception reaction time is as Ms Eyer suggests namely 2.2 to 2.7 seconds. These figures take account of Muttart's "Limitations of Use" footnote that requires modification to the table to take account of the lorry's flashing lights

Overall conclusions in respect of the disputed expert evidence?

38. For the reasons I have given I prefer the evidence of Ms Eyer to that of Mr Mason. Whilst the lorry had illuminated lights on it, I do not agree with Mr Mason that it would have been easily recognisable as a stationary vehicle. The presence of lights do not automatically mean a vehicle is stationary as opposed to a slow moving one. All motorists will have encountered vehicles that are slow moving or even travelling at normal speeds that have illuminated lights. The lights flashing off the wall of the tunnel in my judgment, even if seen, may well have created a sensation of movement and do not in my judgment lead someone to appreciate the vehicle is stationary. Further, the Claimant may well not have had an unobstructed view of the Scania until it became proud of the car it was following as it moved into the slip lane. In any event any view prior to that would have been from an angle.
39. I also record that the experts agree that the most appropriate table of stopping distances at various speeds and perception reaction times should use 0.7 g deceleration given the tests carried out by the police at the scene.

The Law

40. I was referred to a significant body of case law¹ that related to findings in particular cases where a collision had occurred with a stationary lorry. The starting point is simple namely, were Mr Chilver's actions in parking up his lorry in the tunnel, actions that fell below the standard of care expected of a reasonably competent driver? Many of the cases approach this question by asking three questions. First, does the vehicle cause an obstruction? Secondly, if it does, is it a dangerous obstruction? Thirdly, if it is, is it justifiable in the circumstances? Whilst the cases I have been cited, deal with the issue of negligence, I suspect the origin of the three questions comes from the law of nuisance (not pleaded in this case) where if a private nuisance is created e.g. by way of a dangerous obstruction then the nuisance exists subject to the creator of the nuisance justifying its existence.
41. In reality these three questions are simply breaking down the ultimate issue as to whether the driving was below the standard expected of a reasonably competent driver. Thus, if the parking of the lorry does not create an obstruction in the road then

¹ Dymond -v- Pearce [1972] 1QB 486, Rouse -v- Squires [1973] QB 889, Lee -v- Lever [1973] RTR 35, Foster -v- Maguire [2001] EWCA Civ 273, Bland -v- Morris [2005] EWHC 71, Tompkins -v- Royal Mail [2006] RTR 5, Whitehead -v- Bruce [2013] RTR 25, Howells -v- Trefigin Oil and Trefigin Quarries Ltd (unreported 2/12/97; CA), Houghton -v- Stannard [2003] EWHC 2666, Goad -v- Butcher [2011] EWCA Civ 158.

a driver would not be negligent. Similarly if the obstruction was not dangerous then the parking of the lorry would not be seen as a negligent act, for example a car parked in a lit residential street that by definition restricts the width of the highway would not be dangerous. Similarly, if a driver experiences a sudden unforeseen mechanical failure, and comes to a halt in the fast lane of the motorway, then whilst such a vehicle is a dangerous obstruction, the driver will not be negligent. Whilst the cases I have been cited deal with the issue in negligence I was cited two cases that illustrate two aspects of the law that I do not believe to be in dispute.

42. The first relates to the standard of care expected of a driver. A driver is required to take into account in their decision making process the fact other drivers do not always drive carefully. This proposition is illustrated by the case of *Howells v Trefigin Oil and Quarries Ltd unreported 2nd December 1997* where Beldam LJ said:-

“The question was not whether Mr Rogers [the driver] could have taken his vehicle off the road completely, or could have parked in a different position, the question he should have asked [that is the trial judge should have asked] was whether, in the position in which it was parked it was a possible source of danger to other road users using the road in a way in which he, Mr Rogers [the driver], could reasonably expect them to use it. As was once said by a distinguished Judge, a road user is not bound to anticipate folly in all its forms, but he is bound to pay regard to carelessness by other road users where experience shows that such carelessness is common. Therefore, the question the Judge had to decide in this case was whether, by leaving the lorry in the position in which it was left so that approximately 2 foot 6 inches of it extended into the carriageway (visible as it was for approximately 60 metres, but obvious as an obstruction for 45 metres) the lorry would present a danger to other road users.”

43. Whilst a driver is expected to take account of other road users who may drive carelessly, ordinarily they are not required to take account of drivers whose driving is grossly negligent.
44. A further illustration of this comes from *Lee v Lever [1974] RTR 35* a case involving a vehicle parked on a clearway where the question was whether the colliding vehicle was entitled to assume that the vehicle must have been moving as it is forbidden to stop on a clearway. At p 39D where Buckley LJ said:-

“It has been urged ...on behalf of the defendant that when the defendant saw a dark object near the kerb of the road in front of him he was entitled to assume it was a moving vehicle. I for my part do not accept that argument. It is not the law that a driver is entitled to assume that all other users of the road will in all respects and at all other times obey the Highway Code or otherwise driver with all due care and circumspection or use the road in every way that it should be used. It is incumbent upon any driver to be prepared for foreseeable hazards, including hazards resulting from the foreseeable bad driving of other

drivers ...I do not think normal experience leads one to the conclusion that it is safe to assume that no one will ever park in a part of the roadway which is classified as a “clearway” and it is incumbent upon every user of such a roadway to drive in a way which enables them to meet an emergency or hazard presented by the fact that someone has parked – it may be for unavoidable reasons, such as a breakdown – in the “clearway”.

45. However, what about a driver who creates a dangerous obstruction negligently and a second driver who collides in circumstances where he too is also negligent? Here there are two competing causes of the accident. In *Rouse -v- Squires [1973] QB 889* at 898C-E Cairns LJ said:-

“If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver’s negligence may be held to have contributed to the causation of the accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person. Accordingly, I would hold in this case that the third party driver’s negligence did contribute to the death of Mr Rouse.”

46. Thus, in this situation the reckless or grossly negligent driving of the driver who collides into a negligently parked vehicle is to be seen as the sole cause of the accident even though the obstruction itself was negligently created. However, if both drivers are negligent then the Court will split liability on the usual basis considering the blameworthiness and potency of any negligence.
47. As I have already set out I was shown a number of examples of how on specific findings of fact the Court at first instance or on appeal has divided liability. Whilst each is of course helpful and illustrate specific factual findings when it comes to apportionment each case is of course very fact specific.
48. The only area of potential area of dispute concerned the issue of burden of proof. The starting point is that the claimant must prove the negligence of the defendant and vice versa in respect of contributory negligence. Counsel for the Claimant submitted that if the Court was satisfied that the obstruction was dangerous then the burden shifted to the defendant to justify it. As I have already said in a case in nuisance the starting point is whether the obstruction is a nuisance and if it is whether the party creating the nuisance can justify its existence. In a case in negligence the focus is upon the global actions of the driver concerned. In *Lee v Lever op cit* there is reference to the well-known case of *Hill-Venning v Beszant [1950] 2 ALL ER 1151* where Denning LJ said:-

“Any unlighted obstacle on a fast motor road is a danger to traffic. This is a proposition not of law, but of common sense. The presence of an unlighted vehicle in a road is prima

facie evidence of negligence on the part of the driver, and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic. In the present case I do not think that the defendant gave a sufficient explanation.

Davies LJ in *Lee v Lever* having cited this case says:-

“Of course it is common sense, as Denning LJ said in *Hill-Venning – Breazant* that prima facie the presence of an unlit vehicle on a road is evidence of negligence and it for the person responsible to rebut that presumption ...”

49. It was submitted before me that if I am satisfied that the parked lorry was a dangerous obstruction then the burden of proof shifts to the defendant to prove it was not negligent. That approach follows the position in nuisance. I do not in my judgment need to decide this issue as in my judgment whether the burden rests with the defendant or with the claimant makes no difference to my decision which is based on the evidence before me. However, my preliminary view is that any burden is in effect an evidential not legal one. However, having said that the Court must determine the issue on the evidence before it. It is important for the Court not to speculate. This case is a good example of the need for caution with what is best described as circular arguments. Had Mr Chilvers given evidence he would no doubt have given evidence about why he stopped and been cross examined about it. He is not present and we only have the very limited evidence he gave at the scene. The absence of more detailed evidence from him does not logically permit an argument to the effect that because he choose to stop the circumstances must have been such that it was appropriate to do so

Issue 1 – Was Mr Chilvers negligent to park up in the tunnel ?

50. The competing submissions can be summarised succinctly. The Defendant accepts that the Scania parked on a clearway, was an obstruction of the highway but submits that so parked it is not dangerous to other road users. This proposition is based upon (a) the fact it was parked up after the right hand bend where there was a view 140 m back from the bend (b) the lights of vehicle were illuminated marking its presence on the road (c) the lorry was parked some 75 m from the start of the slip road meaning that vehicles behind it entering the slip road at the beginning of its existence would be able to stop even if perception reaction times of Ms Evers are accepted (see joint statement table 2) and that includes a vehicle travelling at 35 mph (in other words taking account that drivers have to consider that others may speed) (d) the fact other drivers avoided a collision is evidence that the lorry in this position did not create a danger. The defendant submits that even if the lorry was a danger, the decision to stop was entirely justified given that the driver heard a noise and needed to investigate it. There is no evidence he knew the existence the police layby just after the Isle of Dogs exit. Further, in any event, it was incumbent upon him to stop and check the vehicle sooner rather than later, as continuing to travel after hearing the noise exposed other road users to a risk that something might fall from the lorry that could potentially cause serious consequences for other drivers.

51. Whilst I have summarised the defendant's submissions in the three question approach, the defendant's global submission is that the decision to stop where he did was one that was properly open to a reasonably competent driver in the circumstances. In other words balancing any risks associated with stopping on a clearway with the risks of not stopping, it was a reasonable decision to park up as he did. It was rightly pointed out, that the fact others might have taken a different view, does not mean that the decision of Mr Chilvers was outside the ambit of what a reasonable driver would do.
52. The claimant's submissions can be summarised in this way. This was a clearway and as such vehicles should not stop on them as set out in the various GLA traffic orders referred above. The Highway Code paragraph 240 states you must not stop or park on a clearway and paragraph 242 states that you must not leave your vehicle in a dangerous position where it causes any unnecessary obstruction of the road. They submit, and it is not disputed, that the parking of the lorry creates a substantial obstruction of the road, in that it blocks one lane. The parking up of a lorry blocking the slip road is obviously dangerous – this is a tunnel with free flowing traffic where road users would not expect to encounter a parked vehicle. For the reasons set out in Ms Eyers' report the illuminating of the flashing lights on the lorry do not reduce the danger in the circumstances of this case. In this respect it was submitted that the flashing amber rotating lights, prior to the lorry becoming visible, provide no visual clue that there is a stationary lorry as opposed to a slow moving vehicle. It is foreseeable that vehicles might move across lanes as this scooter did and foreseeable that motorists might not enter the slip road at its commencement but instead, might seek to do so at a later stage. Therefore there is an entirely foreseeable risk that if you stop where this lorry did, vehicles could enter the slip lane not 75 m back from the stationary lorry but much closer to it and in circumstances where this would mean that it was not possible to stop or avoid a collision. In particular they point out that it would have been safer to have stopped further along the slip road where it widens into two lanes. This would substantially reduce the level and danger caused by parking up of the lorry.
53. Further, the claimant submits that there was no sufficient justification to stop. The only evidence is that a noise was heard. Without more, this cannot be sufficient. The examination of the lorry did not demonstrate any defect and the available photographs do not show any obvious problem. Therefore without speculation the court should not conclude that there was an objectively justified need to stop as Mr Chilvers did. They submit that this is a case where such risks as Mr Chilvers could reasonably have perceived should have been dealt by driving slowly perhaps with illuminated lights to a place off the road where if necessary, Mr Chilvers could have stopped. Further, even if it was reasonable to stop in the tunnel, there was obviously a much safer place to do so further down the road, where there are two slip lanes not one.
54. I turn now to my conclusions based upon the findings of fact I have made including my conclusions in respect of the expert evidence in this case. I propose to deal with the three questions advanced by the parties separately.
55. The first question is whether the lorry created an obstruction. It is common ground that it did.

56. The second question is whether this obstruction was dangerous. In my judgment it was objectively dangerous for the following reasons:-
1. The position in which he stopped blocked the entire slip lane.
 2. That obstruction created a risk of a collision with the potential for very serious injury.
 3. Whilst the illumination of the lorry of course creates an element of visibility, as I have set out in my judgment rotating flashing lights off the tunnel walls do not provide any significant assistance and could easily be confused with movement.
 4. Further the lights themselves do not automatically signal that a lorry is stationary as opposed to slow moving and in my judgment are not sufficient to mean that stopping in the slip lane is not dangerous.
 5. It is entirely foreseeable that vehicles might join the slip road after its commencement. It is foreseeable that vehicles might seek to move across from running lane 2 into the slip road as happened here. It is therefore foreseeable that vehicles might join the slip road in circumstances where they had little or no opportunity to react to the obstruction ahead of them.
57. The third question is whether the creation of what I have found to be a dangerous obstruction was justified in all the circumstances. A dangerous obstruction may be justified and could be something that is unavoidable e.g. a well maintained car that without warning breaks down. In this case the only evidence is that Mr Chilvers heard a noise. Whilst the burden of proof rests with the claimant, the court still has to look at the objective evidence which is no more than he heard a noise. The photographs do not reveal any positive evidence that anything was about to fall from the lorry. Furthermore, the vehicle examination does not reveal any such evidence nor evidence of any mechanical defect. I accept there are limitations with the vehicle investigation because we do not know to what extent it specifically considered the reason why the vehicle stopped, however, on the balance of probabilities had there been some immediately obvious evidence of relevance to this it would have been noted.
58. In my judgment in respect of the third question the creation of the dangerous obstruction in the circumstances of this case is not justified for the following reasons:-
1. Despite the missing clearway sign prior to the start of the tunnel, a reasonably prudent motorist would have appreciated that it was not permitted to stop in the tunnel. The effect of this is that any user of the tunnel should have appreciated that to stop on what is otherwise a free flowing road, had the potential to cause serious danger to other road users.

2. Whilst Mr Chilvers heard a noise, a reasonable prudent motorist would not have reacted by parking in the tunnel as he did. A reasonably prudent motorist would have exited the tunnel slowly and cautiously with potentially the addition of illuminating their lights.

59. If I am wrong, I accept the Claimant's alternative submission namely that Mr Chilvers' if he was going to stop, should have stopped further along the slip lane where some 50 m further along it widened into two lanes. Had he done this, he would have still created an obstruction, but the danger caused would have been substantially less such that on the facts of this case the claimant would have been able to avoid the collision.
60. I therefore find that Mr Chilvers parking up the lorry in the position he did was negligent as his actions created a dangerous and unjustified obstruction. The claimant therefore succeeds in establishing primary liability.

Issue Two – Contributory Negligence / Lack of Causation

61. The Defendant's case is that even if Mr Chilvers' driving was negligent, the claimant's driving was grossly negligent such that his riding should be seen as the sole cause of the accident. Alternatively if the claimant was not solely responsible then he was contributorily negligent.
62. I have set out above the Defendant's amended particulars of negligence. I do not propose to consider them separately as in reality there is considerable overlap between them and they have to be seen as a whole.
63. The crux of the Defendant's submission was that the claimant's riding leading up to the collision, was such that he was the author of his own misfortune. It breached the norms of responsible riding as evidenced by the Highway Code. It is said that moving from running lane 2 into running lane 1 and then into slip road combined with acceleration, was grossly negligent in the context of the road layout. The fact he reacted within a reasonable perception time is irrelevant because he should not have been in this position at all.
64. I was referred to various provisions of the Highway Code all of which I have taken into account. In particular the defendant drew my attention to rule 126:-

“Drive at a speed that will allow you to stop well within the distance you can see to be clear. You should ...

- Leave enough space between you and the vehicle in front so that you can pull safely if it suddenly slows down or stops. The safe rule is never to get closer than the overall stopping distance...
- allow at least a two second gap between you and the vehicle in front on roads carrying faster moving traffic and in tunnels where visibility is reduced”

65. Rule 133 provides that
- “If you need to change lanes, first use your mirrors and if necessary take a quick sideways glance to make sure you will not force another road user to change course or speed”.
66. Rule 134 provides
- “You should follow the signs and road markings and get into the lane as directed...”.
67. Rule 146 in relation to one way streets states
- “choose the correct lane for your exit as soon as you can”.
68. Rule 162 in respect of overtaking
- “you should make sure the road ahead is sufficiently clear ... there is a suitable gap in front of the road user you plan to overtake.”
69. Rule 166 again in respect to overtaking says that
- “Do not overtake if there is any doubt or where you cannot see far enough ahead to be sure it is safe. For example, when you are approaching a corner or bend, a hump bridge, the brow of the hill...”.
70. Rule 267:-
- “Do not overtake unless you are sure that is safe and legal to do so....”
71. The Claimant was familiar with the road and undoubtedly knew the slip road expanded into two lanes in a very short distance from where this accident occurred. As I have observed the claimant moved from running lane 2 into running lane 1 and then into the slip road. He did this as almost one continuous manoeuvre, effectively nipping between cars and lanes. Whilst I do not accept the Defendant’s submissions that this movement involved continuous acceleration, we do know from the expert evidence that he is likely to have accelerated during the time he was in the slip road as a probably speed in the range of 33-35 mph. This acceleration at a late stage is important because on balance it demonstrates that the claimant had not appreciated that there was a hazard of any description ahead of him before entering the slip road. Had he appreciated this, he would not on balance have been accelerating.
72. Once the claimant pulls into the slip road, he was confronted by the stationary vehicle. For the reasons I have given the reasonable perception and reaction time when confronted by this unexpected obstruction is 2.7 seconds. Accordingly, a reasonable rider would have had insufficient time react and stop. We know the Claimant in fact reacted in 1.74 seconds but reacted by initially steering and then applying some braking. In my judgment confronted as he was by a sudden and unexpected emergency it was not unreasonable to have initially sought to steer rather than apply

emergency braking. Accordingly once he was in the slip road the Claimant's reactions were within the bounds of a reasonable motorist.

73. The question therefore becomes whether the claimant should have entered the slip road in the manner he did. In this respect the most important provision of the Highway Code is rule 126 which requires a motorist to, "drive at a speed that will allow you to stop well within the distance you can see to be clear". In my judgment a reasonable competent and prudent motorist will not move from one lane into another until they are a position to see and assess what is in front of them. The Claimant should have seen the flashing lights when in running lane 1 and should have altered him to a potential hazard ahead, albeit a reasonable rider would not have been able to determine at this stage what it was. In this respect the Highway code provides that the existence of flashing lights may indicate a stationary or a slow moving vehicle. As such the claimant should have been alert to either scenario.
74. Drawing these strands together, even in the absence of the lights, he should not have commenced his move into the slip lane until he was in a position to see and assess what was in front of him and if necessary stop in his range of vision. The presence of the lights should further have alerted him to the need increased need for caution.
75. Therefore the claimant in nipping between lanes as he did and entering the slip lane without ensuring it was safe to do failed to take reasonable care. This failure falls well short of gross negligence such as would break the chain of causation albeit it does in my judgment amount to contributory negligence.

Apportionment

76. I have been referred to a variety of cases where the courts have apportioned liability in circumstances where a collision has occurred between a stationary vehicle obstructing the highway and another motorist. However, each of these cases turns upon its own specific facts and none are identical to this case and in my judgment they are of little assistance.
77. Counsel addressed me on the appropriate degree of apportionment. Counsel for the Claimant suggested 85/15 split in favour of the claimant and counsel for the defendant 30/70 split in favour of the defendant. With respect neither of these is in my judgment appropriate. Both the Claimant and the Defendant were to blame. The Claimant should not have nipped across lanes as he did, in circumstances where he moved into the slip lane not having established it was safe to do so. However, Mr Chilvers should not have stopped at all in the tunnel and created an obvious and very dangerous obstruction which could easily have been avoided. In these circumstances I conclude that Mr Chilvers who created the obstruction bears the greater blame for this accident and that the appropriate apportionment is 60/40 in favour of the claimant.

Addendum to Judgment

1. On the receipt of my draft judgment in the above case the defendant when seeking permission to appeal on the apportionment of liability, indicated that a ground of the appeal was that I had not provided sufficient reasons for my conclusion on apportionment. I disagree, however given this submission, I have decided to set out more detailed reasons for my decision.
2. For the reasons set out in the main judgment I found Mr Chilvers to have been negligent.
3. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides:-

“Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant’s share in responsibility for the damage ...”
4. The Act requires the court to look at the claimant’s share of responsibility for the damage, assessing the causative contributions, and in the light of that assessment, but not confined to it, to decide what is a just and equitable apportionment and in so doing the court is entitled to take into account the extent and degree that the claimant has departed from the reasonable standards expected of him (see *Tompkins v Royal Mail Group Plc* [2005] EWHC 1902).
5. Counsel for both parties cited a number of authorities in support of their respective submissions on the question of apportionment. Before turning to those cases, it is important to note that each of the cases depended on the evidence before the court. In some older cases for example, the court did not have the advantage of expert evidence. In this case I have heard extensive expert evidence in particular about the ability of someone in the claimant’s position to have been able to appreciate the lorry was stationary and the time it would take to react to the lorry’s presence. I do not repeat in full my findings in respect to the expert evidence. In short I accepted the evidence of Ms Eyers over that of Mr Mason, where there was disagreement. I found her evidence clear, well-reasoned, compelling and supported by academic research.
6. I do not refer to all of the cases I was referred to as some related more to issues of liability rather than apportionment. However, I accept there is a degree of overlap. For the avoidance of doubt I have considered all the cases cited to me in argument.
7. Whilst counsel for the defendant on the question of apportionment in his closing submissions only referred me to *Rouse v Squires op cit.*, in his more general submissions I was referred to *Lee v Lever op cit.*, the Court of Appeal unreported case of *Howells v Trefigin Oil and Trefigin Quarries Ltd* 2nd December 1997, and *Houghton v Stannard* [2003] EWHC 2666. Counsel for the claimant on the question of contributory negligence referred me to *Foster v John Maguire* [2001] EWCA Civ 273.

8. In *Rouse v Squires op cit*, an articulated lorry skidded into a jack knife position obstructing the near and centre side lanes of the M1. A motorcar in the central lane of the M1 collided with the lorry and stopped with its rear lights on. A stationary lorry in the nearside lane some 15 feet short of the jack knifed lorry was illuminating the scene with its headlights. Five to ten minutes later, the defendant driving a lorry at 50 mph with dipped headlights came driving in the near lane within view of the collision some 400 yards from it, but did not appreciate the vehicles were stationary until 150 yards away. Seeing the parked lorry, he braked and moved into the central lane and then realised that this lane was blocked. He braked hard but skidded and collided with the parked lorry which was pushed forward, knocking down Mr Rouse who was assisting at the scene. A fatal accident claim was brought by the widow of Mr Rouse against the defendant who had collided with the parked lorry. It was settled. The defendant sought to recover in third party proceedings against the driver of the jack knifed lorry. The judge at first instance found that the defendant had driven extremely negligently by not keeping a proper lookout and should have observed the vehicles long before he did. Further he found that he was driving at excessive speed. He found that the jack knifed lorry was adequately lit and that a driver keeping a proper lookout ought easily to have seen it. He found that in those circumstances the driver of the jack knifed lorry was not negligent. On appeal the issue primarily concerned whether the negligence of the driver of the jack knifed lorry in creating an obstruction on the road could be seen as having contributed to the causation of the accident or whether the immediate cause was the driving of the other driver. The Court of Appeal held there was no break in the chain of causation and went on to decide that the driver of the jack knifed lorry was 25% to blame.
9. This case is clearly very different on its facts but it does illustrate that where through negligence an obstruction is created there is still a significant degree of negligence even in circumstances where the accident was wholly avoidable and occurs because of the very poor driving by driver of the car that collided with the lorry.
10. The case of *Lee v Lever op cit* has some similarities to the circumstances that arose in this case. The claimant was driving his car along a main road when the car lights failed due to an electrical fault. The road was a clearway dual carriageway, lit by sodium street lights. The claimant steered his car onto the kerb and but left it unlit. The defendant travelling in the same direction as the claimant at 30 mph with dipped headlights failed to appreciate that the object in front of him that was a dark shape was a stationary car and collided with it. The county court judge held that the claimant was wholly to blame for the accident for leaving the car in the position it was unlit and found him totally to blame for the accident. The Court of Appeal held that the presence of the unlit car created a danger. They apportioned blame equally between the parties.
11. Again this case illustrates that the negligent creation of an obstruction on a clearway attracts a significant degree of negligence even in circumstances where the driver colliding into the obstruction could and ought to have been able to avoid a collision occurring. Whilst it is said that in this case part of the negligence of the driver was leaving an unlit vehicle on the road (which was well lit itself) similarly in this case the tunnel was well lit but the flashing beacons are both a sign of a stationary or slow moving vehicle and on a clearway and I accept that this is more likely in the eyes of a motorist to be consistent with slow moving vehicle rather than a stationary one. I

accept the suggestion of Ms Eyers that the reflecting flashing beacons on the wall are likely to cement the view the lorry was moving as they create a sense of movement. Further, in *Lee v Lever*, the criticism of leaving an unlit vehicle must be seen in the context of the judge accepting that the road was well lit and the unlit vehicle was entirely there to be seen by the approaching motorist. Further, in the case of *Lee v Lever* the Court of Appeal in assessing the relative negligence of the two drivers noted that whilst the driver who collided with the vehicle was not keeping a proper lookout, the driver of the stationary vehicle was required to be prepared for foreseeable hazards including their bad driving. Buckley LJ at p39C put it in this way:-

“It is not the law that a driver is entitled to assume that all other users of the road will in all aspects and at all times obey the Highway Code or otherwise drive with all due care and attention or use the road in every way in which it should be used. It is incumbent upon any driver to be prepared for foreseeable hazards, including hazards resulting from the foreseeable bad driving of other drivers or a foreseeable breach of the Highway Code or other regulations by other road users ...”

12. The cases of *Houghton* and *Howells* are examples of where the court concluded that there was no negligence upon the driver of the stopped vehicle. In *Houghton* this was because the driver had no option but to stop due to a breakdown (which could not be blamed upon the driver) and where the driver had done all he could to eliminate any danger caused, and where the colliding driver accepted they should have avoided the collision. Further, in *Howells* a cyclist who collided with the stationary vehicle in circumstances where he was riding too fast and practically blind and where he only looked up when he was 15 yards from the back of the lorry and therefore was unable to stop. The Court of Appeal held that although the lorry was an obstruction, the gross negligence of the cyclist was such that there was no liability upon the lorry driver.
13. In *Foster v Maguire* the defendant drove his van and trailer along a dual carriageway and then turned into a break in the central reservation in order to undertake a U turn. After the U turn he drove the van and trailer into the nearside of the opposite carriageway and stopped by the nearside kerb about 50 m from the break in the central reservation. The nearside of the trailer was about 15 cm from the kerb. The van and trailer however completely blocked the cycle lane. The defendant saw the claimant riding her bicycle when he was waiting to complete the U turn not more than 385.5 m away from him and saw her on a second occasion still some distance away. The claimant failed to see or notice the parked trailer. She was riding with her head down and therefore only saw the lorry when she was 5-10 yards away. At first instance Mr Justice Bell held that the sole effective cause of the collision was the claimant's own failure to take care for her own safety in that she rode with her head down at 12-15 mph with a visibility of only 5 to 10 yards when, had she had her head up, the van and trailer was visible for up to 185 m prior to the collision (namely for about 30 seconds). The judge held that the defendant could not have been expected to have reasonably foreseen that the claimant riding down a straight road for about one minute would continue to ride into the back of the trailer. By a majority the Court of Appeal overturned this decision. It held that despite the substantial negligence of the Claimant, who was in effect riding in such a manner that their ability to stop within

their forward vision was extremely limited, the defendant in blocking the cycle lane where stopping was not permitted and in circumstances where there was a safe place to stop further down the road was 30% to blame.

14. This case is another illustration that even when the colliding vehicle could and should have ridden / driven in such a way that the accident could have been completely avoided the vehicle creating the obstruction still attracted a finding of negligence.
15. The case also illustrates how on the same factual scenario different judges can come to very different conclusions and how on appeal two judges were of the opinion that the trial judge's conclusion was not one that was reasonably open to him and the other judge in the Court of Appeal was of the opinion that the judge at first instance was correct in his analysis in respect of liability.
16. However, as I have already said in respect of each of the cases referred to, there are dangers in a court trying to derive principles from what are essentially fact specific conclusions in a particular factual matrix.

Discussion
Submissions

17. Counsel for the defendant's submissions can be summarised as follows:-
 - (i) Whilst Mr Chilvers did not give evidence, he indicated to the police he had heard a noise and he judged it necessary to stop. Had he not stopped he would have exposed other road users to the risks associated with the noise that could have included something falling from the lorry with potentially fatal consequences.
 - (ii) Mr Chilvers, having made the decision to stop, minimised any risks associated with his stopping. He activated his flashing beacons (albeit not his hazard lights) and stopped in the slip road where the tunnel was straight and where vehicles entering behind him in the slip road would have had (on any view of the experts' evidence) the ability to stop if they were within the speed limit. Other vehicles were able to avoid a collision with the lorry before and after the collision.
 - (iii) The claimant in moving from running lane 2 into the slip road, whilst not a forbidden manoeuvre (although running lane 1 was the marked lane for those exiting the tunnel in the direction the claimant wished to go), was dangerous and plainly in contravention of various provisions of the Highway Code that place an obligation to ensure that it is safe before moving lanes. It is said that the claimant failed therefore to keep a proper lookout and failed as he should have done to see the lorry that was clearly visible from its beacon and flashing LED lights and the lighting within the tunnel. He failed having entered the slip road to control his scooter by braking or otherwise to avoid a collision.
18. Counsel for the defendant suggested that in these circumstances any negligence on the part of Mr Chilvers was limited to 15% or perhaps 25% and this was a case most closely analogous to that of *Rouse v Squires op cit*.

19. Counsel for the claimant's submissions can be summarised as follows:-

- (i) The tunnel and the roads leading up to it were urban clearways which forbid any vehicle from stopping. As such road users would not expect anyone to stop.
- (ii) The lorry created a substantial obstruction of the road covering the whole of the slip road. Such an obstruction was plainly dangerous.
- (iii) The burden of proof in respect of contributory negligence is upon the defendant. On the very limited evidence of Mr Chilvers the court cannot conclude that there was a need to stop the lorry, for example, to prevent imminent danger to others. He pointed to the fact there was an absence of evidence from the police crash investigation that suggested there was any reason for Mr Chilvers to stop immediately. There was no mechanical defect with the lorry. There was an absence of evidence that there was any loose item on the lorry that might fall off or that there was any problem with the load (if any) in the lorry. The photographs do not show any visible load on the lorry. The actions of Mr Chilvers in continuing to drive some distance before stopping are inconsistent with the suggestion there was any imminent danger. Further, there is no indication that Mr Chilvers had any reasonable anticipation of a danger so acute that he was justified in stopping and parking up in the tunnel rather than driving further to a safe place out of the tunnel (or in the alternative a safer place further along the slip road). The hearing of a noise as described to the police is a frequent enough occurrence for drivers and the evidence the defendant is able to put forward is no higher than that Mr Chilvers heard a noise. As such stopping to investigate cannot be said to be a reasonable reaction and even more so in a tunnel that is a clearway. A prudent driver would look for somewhere safe to stop and if on a clearway that would involve leaving the clearway and then finding a safe place to stop. Instead to stop and cause a fresh danger that clearly outweighs an undiagnosed problem was very negligent. This must also be seen in circumstances where a prudent driver before leaving the depot will have been required to check that any his load is safe and secure and that his vehicle had no mechanical problems. In fact there was layby just outside the tunnel in the direction of Isle of Dogs (the slip road turn off) where he could have stopped. It is possible that the reason Mr Chilvers stopped where he did was because he was in fact wishing to continue in the tunnel and not take the Canary Wharf exit. However, that would not justify him stopping where he did rather than exiting the tunnel as soon as possible and finding a safe place to stop. The thoughtlessness of his actions are evident by the fact he stopped just after signs that made it clear you should not stop in the tunnel. The level of dangerousness is evident by the fact that, whilst other vehicles following in the same running lane 1 did not collide with the lorry, they had to take evasive action to prevent a collision and in the case of one vehicle swerved back from the slip lane into running 1, in circumstances where, unlike the claimant, it was possible to do so.
- (iv) In a case such as *Foster op cit* even where there was ample opportunity to stop and where a prudent cyclist keeping a proper lookout would have been able to

stop in good time, avoiding a collision, there was still 30% negligence upon the van driver for stopping and blocking the cycle lane. However, this is not a case where the claimant was a vehicle behind the lorry, but of the claimant seeking to move from running lane 2 into the slip lane. In conducting such move, the claimant's ability to observe the stationary vehicle was extremely limited both due to vehicles in the other lanes and because the claimant in moving from running lane 1 into the slip lane was also required to ensure that it was safe to do so by looking to their left and behind them.

- (v) Ms Eyers' expert evidence was that when travelling in the same direction as a vehicle that was stationary it is very difficult for a road user to appreciate the vehicle ahead is stationary, even if displaying warning lights. In this case any user of the tunnel would naturally assume, especially as it was a clearway, that the vehicle was moving and not stationary.
- (vi) On the facts of this case the flashing lights were potentially very difficult to observe given the claimant would have primarily been required to concentrate on his moving from running lane 2 into running lane 1 and then into the slip road, where the key concern would be vehicles already in the slip lane behind or to the side of him. Further, the taller van in running lane 2 would have created some obstruction and there was traffic in running lane 1 that had the potential to obscure his view. The flashing lights off the side of the tunnel had the potential to create a sense of movement rather than warn that the lorry was stationary. A road user is more likely to associate flashing beacons with a slow moving vehicle. It is not uncommon for lorries etc to travel with their flashing lights illuminated. Further given this was a clearway where vehicles are not allowed to stop this would further reinforce a view that the lorry was slow moving rather than stationary.
- (vii) The other vehicles driving behind the lorry in running lane 1, despite being aware of the slowing lorry and the greater visibility of the lorry to these vehicles, including Mr Chilvers' opening of the lorry door, all attempted to join the slip road, but were able to move back into lane 1. This has to be contrasted with the claimant whose view of the lorry and movement across the lanes of traffic gave him no real chance to avoid a collision.
- (viii) The claimant's expert evidence shows that when the lorry was in direct sight of the claimant he would not have had the ability to stop in time at the speed he was travelling which was just above the speed limit and even at the speed limit stopping would not have been possible.
- (ix) If Mr Chilvers' lorry had been moving even at a slow speed then no collision would have occurred. This is illustrated by the fact that the claimant reacted before impact at about 0.76 seconds. If the lorry had been travelling at even 10 mph then it would have travelled a further 12 to 15 m in the time it took the claimant to come across from running lane 1 and join the slip road and by the time therefore it arrived at the point of impact the lorry would have been 15 m or so further along and therefore no collision would have occurred. This example is based on 10 mph. In fact many slow moving vehicles are likely to be travelling faster than that.

- (x) Mr Chilvers only needed to have stopped a short distance further down the slip road to provide a greater chance for drivers to avoid a collision both generally and in respect of a vehicle moving across lanes, as such a vehicle could use the second slip lane that emerged shortly after the stationary lorry. Further, the addition of an extra lane would give vehicles a greater opportunity if they were in the initial slip lane to be able to move into the second slip lane in order to avoid a collision.
- (xi) The court should accept the claimant's expert Ms Evers' evidence (which I have done).
- (xii) When considering any negligence of the claimant the court should take the following matters into account:-
 - (i) The claimant was approaching from running lane 2. The ability to see the lorry was thus restricted by virtue of traffic in front of him and to the side. Further, any view the claimant would have had would be over the top of other vehicles and at an angle.
 - (ii) The visual clues that the lorry was stationary that following vehicles would have had were not available to the claimant e.g. the initial activation of the beacons, the lorry slowing and brake lights coming on the opening of the lorry door and the actions of cars in front of the lorry.
 - (iii) By the time the claimant had a direct sight of the lorry, he would not on the expert evidence have had time to appreciate it was stationary and to have stopped.
- (xiii) In order for the claimant to have been negligent, whilst the Highway Code requires a driver to take reasonable steps to make sure it is clear to change lanes the court would have to be satisfied that the claimant ought to have anticipated that the lorry might have been stationary and thus it was unsafe to cross into the slip lane at the point he did. A reasonably prudent driver was entitled to assume that the vehicle was slow moving and in such circumstances his entry into the slip lane when there was a safe distance ahead of him was not negligent.
- (xiv) The case of *Foster v Maguire op cit* illustrates that a cyclist was 70% to blame in circumstances where they were driving with their head down and had some 30 seconds in which had they looked ahead they would have been able to see the stopped van and trailer. With this as a long stop in terms of contributory negligence at its highest we have a claimant criticised for not appreciating that the lorry was not a slow moving lorry to be contrasted with the much higher degree of negligence by Mr Chilvers who took an unjustified decision to stop in the first place and where in any event if he had to stop he could have done so out of the tunnel or at the very least further along it. Therefore in terms of causative blameworthiness and causative potency Mr Chilvers' negligence is

far greater than the claimant who is being criticised for momentary inattention and a marginal excess of speed.

- (xv) The reduction in the claimant's damages should be no more than 15%.

Analysis

20. Broadly I accept the submissions of counsel for the claimant but do not believe his proposed apportionment of liability is appropriate. Similarly, whilst I accept the suggestion that the claimant in crossing into the slip lane was negligent, I do not accept that the degree of negligence is as high as counsel for the defendant suggests.
21. The starting point in any analysis in my judgment is that Mr Chilvers created an obvious danger. He stopped on a clearway in a tunnel. As such a stopped vehicle is going to be a rare and unusual occurrence. The lorry blocked the whole of the slip lane. There was a much safer place to stop just a few metres along. Whilst Mr Chilvers stopped because he heard a noise, in my judgment, that was not sufficient to justify the decision to stop where he did. There is no evidence of any reason, apart from the hearing of a noise, that could justify the decision to stop. The lorry on inspection had no defect. There is no evidence that any load or other part of the lorry was unsafe. Noises are heard by drivers on many occasions and that does not justify a decision to stop and block the highway. This is even more the case in respect of a tunnel and an urban clearway. Whilst I accept that the lorry stopped some 75 m into the slip road, it had just come round a bend. The safer approach would have been to slow down, exit the tunnel and find a safe place to stop. Thus, in my judgment the stopping of the lorry created an obvious and very substantial danger on the highway. Counsel for the defendant makes much of what might be called mitigation measures to reduce the danger, namely the illumination of the flashing beacons. It is significant to note that even for cars following the lorry they all drove into the slip lane, albeit were able to avoid a collision, as running lane 1 was clear. I accept that after the accident there was no second collision but in my judgment that does not of itself prove that the use of the beacons was a sufficient mitigation of the substantial danger caused by a stationary lorry in a tunnel on a slip road on a clearway. Further, it was entirely foreseeable that vehicles may move from running lane 2 for example and seek to cross into the slip lane. It is obvious that the flashing beacons in these circumstances would be much less visible given the potential of traffic in front of vehicles in running lane 2 and any vehicles in running lane 1. Further, a vehicle moving across the two lanes firstly has to ensure it is safe to move from running lane 2 into running lane 1 and thus their immediate attention concerns the safety of moving into the next lane across. Further, I accept the suggestion that the flashing lights bouncing off the tunnel walls are quite likely to create a sense of movement rather than the lorry being stationary. Lastly but most importantly flashing beacons do not mean a vehicle is stationary. In fact most drivers are in my judgment likely to associate flashing lights on a lorry as meaning the vehicle is slow moving rather than stationary, especially on a clearway.
22. Therefore, in my judgment the beacons do not significantly reduce the dangerousness of the decision that in my judgment was unjustified to stop on the slip road. In fact,

far from reducing the danger they may have led to a belief that the vehicle was simply slow moving.

23. The cases I have been referred to such as *Rouse v Squires* and *Foster v Maguire* illustrate that even in cases of very substantial negligence on the part of the colliding motorist / cyclist the vehicle negligently creating the obstruction was still liable for a significant degree of negligence – 25 and 30% respectively. In my judgment neither of these cases supports the suggestion that the level of contributory negligence of the claimant should be in the sort of order suggested by counsel for the defendant, namely 85% to 75%.
24. The expert evidence of Ms Eyers is that from the moment the claimant would have had an unobstructed view of the lorry he would not have appreciated the lorry was stationary (even taking into account the flashing lights) and been able to stop at the speed the claimant was travelling. At 30 mph there would still have been a collision. In fact the claimant reacted quicker than that the range of reasonable reaction times. In these circumstances in my judgment it is difficult to criticise his reaction, after he realised the lorry was stationary, which appears to have been to consider the possibility of re-joining running lane 1 (which was blocked) or violent braking. In my judgment how the claimant reacted at this point is not something that can be held against him.
25. In my judgment however, the claimant was required to ensure that it was safe before moving lanes. I accept that had the lorry been slow moving a collision would not have occurred, but in my judgment, it was foreseeable that the lorry might have been stationary and by moving into the slip road a risk was being created.
26. The question is to what extent is this contributory negligent. Counsel for the claimant suggests that the negligence in such circumstances is small and puts it 15%.
27. I disagree. This is not a case of simple momentary inattention but a failure to contemplate something that the claimant should have realised was a real possibility, albeit on Ms Eyers' evidence he would not have actually been able to appreciate it was stationary before colliding with it.
28. So in short Mr Chilvers created an obstruction. That obstruction was in my judgment extremely dangerous. It was not justified to stop in the tunnel at all or in alternative where he did. If he had not stopped where he did there would not have been a collision at all. Whilst the flashing lights on one level were an attempt to reduce the risks associated with his unjustified stopping, they were of little help with regard to the foreseeable movement of vehicles from running lane 2 to running lane 1. In fact, the bouncing lights off the tunnel walls will have created an illusion of movement. As the expert evidence demonstrates, the claimant cannot be criticised for not realising that the lorry was stationary, given the reaction times. Therefore the criticism of the claimant is that he nipped across the lanes and failed to give any thought or if he did consider wrongly discounted the fact that the lorry was stationary. Further, the claimant on the expert evidence slightly accelerated as he moved into the slip lane slightly over the speed limit. Had the lorry been slow moving this would not have been a problem.

29. In these circumstances there are not dissimilar amounts of negligence on both parties in this case. In my judgment:- (i) Mr Chilvers created the unjustified dangerous obstruction and (ii) the claimant cannot be criticised for not appreciating that the lorry was stationary but (iii) he can be criticised for failing to consider that it was a possibility. However, this possibility was much less likely than a slow moving vehicle, particularly in circumstances where both vehicles were on a clearway. Further, the key focus when moving lanes is on the key dangers of crossing lanes namely to ensure there was no vehicle to your side or rear. Whilst as the claimant crossed into the slip lane his speed increased by a small amount, I accept Ms Eyer's evidence that shows that a collision would still have occurred. In my judgment when the claimant became aware (as evident from the CCTV footage) his reactions cannot be criticised. Not unsurprisingly his initial reaction appears to have been whether he could swerve around the lorry (which he could not) and then deciding to brake.
30. Therefore in assessing the relative contribution of the parties, the defendant created a dangerous obstruction blocking the slip road, in circumstances where the ability of the claimant to appreciate the danger was limited as I have found, set against the failure of the claimant to consider the possibility that the lorry was stationary. Balancing all of these respective factors in my judgment leads to a conclusion that the appropriate apportionment of liability is 60/40 in favour of the claimant.