

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 16 June 2005

B e f o r e:

MR ECCLES, QC
(Sitting as a Judge of the High Court)

TOMPKINS

CLAIMANT

- v -

ROYAL MAIL GROUP PLC

DEFENDANT

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(Official Shorthand Writers to the Court)

MR G PULMAN QC and MS E JONES (instructed by Russell Jones & Walker) and appeared on behalf of the Claimant

MR S KILLALEA (instructed by Bond Pearce, Bristol) appeared on behalf of the Defendant

JUDGMENT

(As approved by the Court)

1. HIS HONOUR JUDGE ECCLES QC (Sitting as a judge of the High Court): In this action the plaintiff, Antony Robert Tomkins, claims damages for personal injuries, and loss, sustained by him as a result of a road traffic accident that occurred on 16 January 2001, when he collided with a stationary trailer belonging to the defendants. It is his case that the accident, and the catastrophic injury he suffered, which consists of a C4 motor and sensory complete tetraplegia, was caused by negligence on the part of David Burdett, the driver of a Parcel Force vehicle belonging to the Royal Mail Group PLC.
2. At this hearing I have been concerned only to decide the issue of liability, and need say no more about the injury suffered by Mr Tomkins, save where it is relevant to allegations of contributory negligence, other than to express the admiration of the court for the courage he has shown in coming to terms with what, sadly, will be a permanent and grievous disability, whatever the outcome of this trial.
3. As I have noted, David Burdett was the driver for Parcel Force on 16 January 2001. He had worked as a heavy goods vehicle driver for many years, had a clean licence and had not previously been involved in, or responsible for, any accidents. He was recruited to work for Parcel Force through an agency, as and when required. On 16 January 2001, he was employed to take a trailer from Peterborough to the Parcel Force depot at President Way, Luton, near the airport. The vehicle in question has been described as a semi-trailer, or a step-frame two-axle box van. It consisted, therefore, of a drawing, or motive, unit pulling a trailer that could, when necessary, be disconnected from the cab. A further description will have to be given later in this judgment.
4. Mr Burdett had driven similar trailers to the same Parcel Force depot on about 15 occasions before 16 January 2001,

and was well acquainted with the layout of President Way. The road in question runs through the Luton Airport industrial estate and off it there are located a variety of offices and warehouses and parking lots. It was about 4.00am when Mr Burdett reached Luton on 16 January. He approached from the direction of the M1, drove over a small island and, shortly after passing the first set of buildings, arrived at the entrance to the Parcel Force depot, which was to his off side.

5. Based on what other drivers had told him when he first visited the depot, and on his own experience in delivering trailers there, he took the view that it would be very difficult to reverse his trailer into the loading bay if it was not completely vacant. He, therefore, decided that he would have to unhitch his trailer, drive his cab into the depot, hitch up to an empty trailer in the loading bay, move it out of the way, and then return to his own trailer and reverse it through the gates and into the vacant space.
6. To this end, as he approached the entrance from the eastern extremity of President Way, he pulled right across the road and stopped by the off-side kerb facing into the incoming traffic. He unhitched the trailer and jacked up the front legs so that the whole trailer could rest in a horizontal position on the roadway. He then drove his tractor unit into the depot to get on with moving an empty trailer out of the loading bay. His trailer was, therefore, left in the carriageway in a place where, it is agreed, it was marked by double yellow lines to indicate that parking was forbidden.
7. Meanwhile, Mr Tomkins was leaving work. He was employed as a van driver by Reed Aviation at their cargo centre, also in President Way, and had worked for them since July 2000. After a period of overtime, Mr Tomkins' night shift finished at about 4.00am. So, after dropping off his work van at the cargo centre, he returned to his car, a Vauxhall Astra, and set off for home about 12 miles away. It was a frosty and clear night, but without ice on the roads. I shall have to consider, in due course, to what extent the weather conditions affected what subsequently occurred.
8. From the cargo centre, which was towards the western end of President Way, Mr Tomkins set off on a journey that would take him past the Parcel Force depot to his near side. There is no dispute that he was driving at no more than about 25 to 30 miles an hour, as he went up a slight incline and followed President Way, round a left-hand bend and into a straight stretch of road running past the depot. In the nearside lane, and facing him, therefore, in his own carriageway, was Mr Burdett's trailer. It was parked close to a lamppost but, because of the way it was parked, there were no reflective markings on the trailer to be caught in the claimant's headlights. It was also agreed that a consequence of unhitching the trailer from the motive unit was to cause the power supply to the trailer to be disconnected and so none of its lights were illuminated.
9. What happened next is described by a witness, Paul Moret, who chanced to be following Mr Tomkins. In his statement, dated 12 October 2001, Mr Moret said this at paragraphs 3 to 6:

"I remember that it was a cold morning and that there was a touch of frost. My windscreen was not iced up as I had the heater running whilst my van was being loaded. It had not been raining and the roads were dry.

I was driving behind a white Vauxhall Astra Estate car. I was about the length of two cars behind him. I was doing perhaps 30 miles per hour, no more than that. The Astra van was doing about the same, perhaps a little less. The road was fairly wide with a slight incline. The car was driving straight ahead and was not wavering from left to right in any way.

I saw a juggernaut trailer parked up ahead. It was taking up most of our carriageway. It was faced towards us, against the flow of traffic. There were a few cars coming the other way. I slowed down realising that I could not overtake the trailer until they had passed. Ahead I could see through the rear window of the van and could see Mr Tomkins driving his car. I recall noting that the Astra was not slowing down. I thought that he was going to attempt to overtake the trailer before the cars on the other side of the road reached it. He would not have had time to do so.

Instead he just went straight into the trailer. He did not brake. There were no brake lights at all. His car became wedged under the front end of the trailer, which was raised for the cab."

10. When Mr Moret saw the drivers of cars coming from the other direction stopping, and lending assistance, he drove on to call the emergency services. In due course the police, ambulance, paramedic services, and the fire brigade attended. The claimant was taken to the Luton and Dunstable Hospital, where he was treated for his injuries. I will return to the evidence of the persons who attended upon the claimant in due course, because most of what they have to say, or might have said, is relevant only to what could be observed after the impact had occurred.
11. What all the eyewitnesses seem to agree upon, however, is that the claimant did, indeed, drive straight into the void, under the front of the trailer, causing the kingpin to strike the roof of the Astra and depress it into a crease, against which, it is suggested, the claimant struck his head. The claimant did not appear to any of those witnesses to brake, slow down, or take any avoiding action. From the way the collision occurred, it was as if Mr Tomkins never saw the trailer at all.
12. In these circumstances, the claimant admits that he was negligent but, nonetheless, seeks to establish that the defendant company, whether directly or vicariously, was also negligent. The following issues, therefore it seems to me, fall to be decided: (1) Did the defendants either directly, or through Mr Burdett, owe Mr Tomkins a duty of care? (2) If so, was there a breach of that duty by the defendants, either directly or vicariously? (3) Was the defendant

company a cause of the accident within the legal meaning of that word? (4) If the defendant company was negligent, what should the degree of apportionment be between the claimant and the defendants, having regard to, (a) the respective degrees of fault of the parties; and (b) the question whether the claimant was wearing his seatbelt?

13. The case for the claimant, in summary form, is that Mr Burdett was negligent in parking his trailer facing the wrong way, on double yellow lines, in the early hours of the morning, in circumstances where the claimant was deprived of the opportunity of being alerted to the presence of the trailer, either through catching retro reflective warning signs in his headlights, or through seeing the cluster of parking lights which should have been exhibited, or even through seeing the front facing position lights. The dark void in front of the trailer, it is submitted by Mr Pulman, QC (on behalf of the claimant) constituted something in the nature of a trap. As regards the claimant's seatbelt, it is his case that he was wearing it at the time of the accident. So, apportionment depends, solely, on an assessment of the blameworthiness of the respective parties.
14. Mr Pulman submits that the claimant's recollection is that he had a clear view through his windscreen, was driving carefully and, therefore, the inference is that it is the defendants who must be significantly more to blame for the accident than the claimant.
15. The defendants' case is that the trailer was parked very close to a street lamp, in a well-lit road on a clear night. Everybody else who was at the scene could see it clearly. In those circumstances, the fact that the trailer was parked illegally in a number of different ways, though reprehensible in one sense, is not a material consideration. Mr Burdett was entitled to expect other drivers to see the trailer in time to avoid it. He had no reason to think otherwise and, sadly, the claimant was entirely the author of his own misfortune in driving straight into a plainly visible object.
16. Alternatively, if the action of Mr Burdett in parking the trailer, where he did and in the way he did, was negligent and causative of the accident, then Mr Killalea, on behalf of the defendants, submits that there is evidence that proves that Mr Tomkins was not wearing his seatbelt and that if he had worn his seatbelt he would not have sustained the C4 injury that has rendered him tetraplegic. Therefore, it is contended that not only must the claimant bear the greater share of the blame for the collision, but he should suffer an additional reduction of 25 per cent in his damages, having regard to the decision in Froom v Butcher [1976] QB 286.
17. I start with the evidence concerning the position of the trailer in the road, and what in daylight would have been its appearance. According to the agreed evidence of Mr Hawthorn and Mr Seltzer, the accident reconstruction experts instructed respectively on behalf of the claimant and the defendants, the trailer was 13.5 metres long and 2.5 metres wide. Its colour was red and it was stationary in the road in its offside carriageway close to the kerb. There were two legs in front of the trailer creating a gap between the floor of the trailer and the ground of 1.3 metres. Within that gap, and protruding from the floor of the trailer, was the kingpin that creased and depressed the roof of the claimant's car. The void extended backwards for a distance of about 3.7 metres. To the rear of the trailer were two retro reflector signs, made of a reflective surface, and saying "Long Vehicle", as well as the usual triangular red reflectors. In addition, there were clusters of lights to either side of the reflectors. There were no reflective boards, or markers, to the front of the trailer; at each corner of the front surface there were sidelights, which, as I have noted, were not illuminated at the material time because the power supply had been disconnected. The road, itself, was about 7.2 metres wide at the point where the defendants' trailer had been parked by Mr Burdett. So, if each side of the carriageway was about 3.6 metres wide, the trailer occupied about three-quarters of the available space on Mr Tomkins' side of the road, or about one-third of the total width of the road.
18. It is accepted by the defendants that in parking as he did, Mr Burdett committed three offences, as well as breaches of the highway code. Firstly, he parked his trailer on double yellow lines, contrary to the relevant parking regulations. Secondly, the trailer formed part of a vehicle to which the Road Vehicle Lighting Regulations 1989 applied, and the failure to have any parking lights on, while parked at night, involved the contravention of Regulation 24. Thirdly, parking on the offside of a road, so as to face oncoming traffic, involved a breach of Regulation 101 of the Road Vehicles (Construction and Use) Regulations 1986, and Regulation 24 of the 1989 Regulations. Fourthly, the failure to display a sign on the vehicle, visible to oncoming traffic, and saying "Long Vehicle" constituted a breach, it is said, of the Highway Code.
19. It is also said, by Mr Pulman, that parking close to the entrance of the Parcel Force depot involved a further breach, but that forensic embellishment adds nothing to the liability issue since it is agreed that the trailer was at least 50 metres from the apex of the left-hand bend.
20. Next, I have to consider the degree to which the trailer was illuminated by either street lamps or the lights of oncoming traffic. I do not consider that there was any background illumination from office lights that had any effect on drivers' visibility as they travelled down President Way and so I turn to the streetlights. The evidence here consists of some agreed facts, some photographs and a video, and some impressions relayed to the court through the evidence of witnesses, whose evidence has not been subject to rigorous testing in cross-examination largely because, no doubt, it would be an unproductive exercise.
21. First, what is agreed is that there were lamp posts with high pressure sodium lighting in the following places: (1) On the northern footpath, about 4.5 metres from the eastern most entrance to the Parcel Force depot; (2) On the same footpath, at appropriate intervals; (3) On the southern footpath, at appropriate intervals, with the lamp posts being

placed at points between the lamps on the other side of the road. According to the agreed plan, the trailer was parked with its rear end, close to, and on the western side of, the lamppost closest to the depot entrance.

22. Secondly, in the absence of direct evidence to the contrary, I find that all lights were working at the time. There was a suggestion by a witness, Miss Betts, who was a supervisor at Reed Aviation, that one of the lamps on the side opposite the Parcel Force depot worked only intermittently but no witness, who was at the scene, has spoken of a broken lamp. As I would expect that to have been noted and recalled, if it had occurred, I conclude that all the lights were on. That, indeed, is the agreed conclusion of the experts from looking at the police photographs.

23. Thirdly, there are the impressionistic descriptions given by the civilian and police witnesses. Miss Betts, to whom I have already referred, said in her statement:

“Street lighting was adequate but not good. ... It is generally a very dark part of the road.”

24. Mr Bransgrove, a Customs Officer, who was driving the other way to Mr Tomkins, and whose evidence was admitted under the Civil Evidence Act 1995 said, “At the time it was dark and the road is/was not that well lit”.

25. Mr Kay, who was the claimant’s immediate supervisor and who came quickly to the scene, implied a degree of deficiency in the lighting when he said at paragraph 32 of his statement:

“It seems to me that the cause of the accident was that the trailer just was not there to be seen.”

In paragraph 32 he went on to say that that section of President Way is not very well lit. In contrast, Mr Burdett described the area as, “Extremely well lit with street lighting at regular intervals”. Mr Campbell, the paramedic who came to the claimant’s aid, said, “The road was well lit”. PC Longley, the officer who attended the scene and wrote a report as to what, in his opinion, appeared to have occurred, described the location as being, “Well lit with bright street lighting”.

26. So far as the photographs are concerned, those taken by the police photographer by flash photography immediately afterwards create an impression of extreme blackness in the vicinity of the trailer, but I am satisfied that that is a misleading impression created by the use of the flashlight. Photographs taken by Mr Seltzer in December 2004, on the occasion of his visit to the site, create, in contrast, an appearance of an area bathed in light. There was an issue as to whether those photographs exaggerated the degree of illumination. So it was agreed that the photographs taken by Mr Wooler, on the same occasion, provided the most reliable impression of the degree of light in December 2004, so far as that can be done with photographs.

27. What Mr Wooler’s photographs show, first of all, are the lamp posts, at intervals on the southern pavement, casting a bright light downwards and outwards, but not so extensively as to eliminate pools of slight darkness in between. On the northern side of the road, where Mr Burdett’s lorry was parked, they show a tall laurel hedge, which to a limited extent absorbs some of the light; they show a trailer parked as Mr Burdett parked his trailer, close to one of the lamp posts placed at similar intervals along that side of the road. Unfortunately, that lamp is not illuminated but it is agreed, on the basis of the defendant expert evidence, that the absence of light there makes only a marginal difference. Underneath the trailer, and because the cab is not there, reflected light on the road can be seen to the rear of the trailer; immediately above that patch of light is a black area consisting of the void created when the tractor unit was driven away. In front of the trailer is a shadow, cast by a lamp on the other side of the road, and the top of the trailer itself, where it can just be seen to be red silhouetted against the night sky, is illuminated by the street lighting. The video taken on the same occasion creates a similar impression although, possibly, the location appears a little more brightly lit than would seem to be the case from Mr Wooler’s photographs.

28. Doing the best I can to put the evidence together, with the impressions created upon me by looking at the photographs, my finding about the degree of illumination and the degree of visibility of the trailer is this: first, the trailer is clearly visible as a large vehicle of some sort parked on the near side of the road; because there is no cab, and because of the black area created by the void with the light on the road beyond, I would not immediately know, unless I was told, that it was a trailer without a tractor unit, facing the wrong way. Indeed, to some extent on first looking at it, there is an impression that it may be an ordinary lorry facing in the correct direction, apart, of course, from the lack of reflectors.

29. Secondly, the lighting, in my judgement, is perfectly adequate but falls considerably short of the brightness to be experienced during daylight. The extent to which the trailer would be readily apparent, however, depends on the judgement one forms as to the difference between concentrating on the relevant material, as I have done, knowing that the trailer is there to be seen, and using one’s eyesight as a driver in the early hours of the morning on 16 January 2001. As to that, Mr Moret, as I have noted already, was driving behind the claimant, saw cars coming towards him, saw what he described as a “juggernaut trailer” taking up most of the carriageway and slowed down. So, he had no difficulty in seeing, and identifying, the obstruction. I do not consider that the lights of cars coming from the opposite direction would have made any material difference.

30. What then of the claimant’s driving? Without reciting all the evidence on the point, I am satisfied that on that frosty night, Mr Tomkins had covered the windscreen of his car to keep the ice off, and that when he drove off there was no ice on the windscreen. I am equally satisfied, having considered the evidence of PC Longley and the witnesses who

came to the scene, and on my own view of the police photographs, that there was no ice on the windscreen when the Vauxhall Astra went under the trailer.

31. There is an issue as to whether mist had formed on the inside of the windscreen. Mr Seltzer, at paragraph 7.18 of his report, wrote this:

“Additionally with such low air temperatures, condensation of moist air breathed out inside the vehicle is likely to have resulted in freezing on the internal glass surfaces. This could account for the driver’s window being seen open immediately after the collision. If the vehicle had been driven away before the vehicle’s heater system had warmed, then moisture from the driver’s breath would have added to the potential for a frosty deposit progressively forming on the inside surface of the windscreen during the first minute or two of driving. This possibility could account for Mr Tomkins not seeing the trailer ahead and hence explain why he had taken no avoiding action.”

32. Mr Kay, in his statement dated 24 May 2002, also considered the point when he said this:
“There is a possibility that his inside screen had been misted up when he turned his heater on. If this was the case, and to such a degree to seriously hamper Tony’s view, Tony would never have managed to get his car as far as he had.”

He then went on to describe the difficulties he would have faced in leaving the car park.

33. According to the evidence of the claimant himself, there had, indeed, been moisture on the inside of the windscreen but it had, according to his recollection, gone away by the time with which I am concerned, leaving a completely clear view ahead. In answer to a question of PC Longley’s later that morning, while he (the claimant) was drifting in and out of consciousness in hospital, the officers noticed that Mr Tomkins said, and the claimant here says he was referring to mist on the windscreen, “No, it was going on its own”.
34. On one view of that evidence the impression is given that there was some mist still left. The question, therefore, is whether this evidence is sufficient for me to find that there probably was some mist on the windscreen, despite the absence of eyewitness observation, or whether it affords no more than a suspicion. I will return to the point later on and continue with the evidence concerning the claimant’s driving.
35. There is no dispute that the claimant successfully negotiated his way out of a parking area full of vehicles, rubble and potholes, and made his way on to the road. Mr Moret, following from behind, saw him driving in a perfectly normal fashion at little under 30 miles an hour. The claimant negotiated the left-hand bend without doing anything to lead Mr Moret to believe he was in some way not in full control of the car. He drove ahead towards the Parcel Force depot in a straight line and, again, the claimant appeared to be completely in control. Mr Moret could actually see the claimant through the rear window of the Astra and, it seems likely that if he (Mr Tomkins) had been looking sideways, or turning to the back seat, or using a mobile phone, or whatever, that he would have observed it and noted it.
36. We know from the expert evidence that, subject to considerations of lighting, the trailer was visible from a point some 65 metres away, slightly before the apex of the bend. However, judging from the video, it is possible that the car’s mirror could have obscured the view slightly on the turn and thus have marginally reduced the distance within which the trailer could be seen. The agreed expert evidence is that at 25 miles an hour the claimant would have travelled 60 metres in 5 seconds. At 30 miles an hour the time taken would be 4½ seconds. It is also agreed that if, erring possibly in favour of Mr Tomkins, a perception and reaction time of 2 seconds is taken, there remained, therefore, 2½ to 3 seconds within which the claimant could have stopped. Whether he was travelling at 25 or 30 miles an hour, therefore, he could have stopped, with either gentle or moderate braking, within the remaining distance of 33 to 40 metres.
37. What did Mr Tomkins in fact do? On the evidence of Mr Moret I have to conclude that the claimant did not apply the brakes. Did he slow down? Mr Moret says, “No” but there is some evidence from Dr Rattenbury, who was called to deal with the seatbelt issue, that Mr Pulman submits should lead to the conclusion that the claimant did slow down at the very last moment. Dr Rattenbury expressed the view (in his report) that he doubts that the Astra was travelling at much more than 20 miles an hour when the roof first struck the trailer, which tends to suggest a slightly slower speed than that estimated by Mr Moret as the claimant was driving along President Way. However, Dr Rattenbury was not putting forward a precise and scientific assessment of speed and, indeed, (reading on in his report) he appears to put the impact speed within a bracket that (he says) is consistent with the evidence of Mr Moret.
38. In my judgement there is insufficient evidence to prove that the claimant slowed down but, equally, the estimates are not precise enough to find that he did not, within the last two seconds, become aware of the trailer and begin to react. There is, therefore, a substantial possibility that he did slow down at the very last moment, but I cannot say that he did so on the balance of probabilities. So far as Mr Tomkins is concerned, he has very honestly said that he has thought and thought about why he did not see the trailer; but he can give no explanation. Given what happened to him, I am quite prepared to accept that he has no memory of the moments before impact, although he has some recollection of the events leading up to those moments.
39. That, then, is the evidence leading to the first question: did the defendants, and Mr Burdett, owe a duty of care to

Mr Tomkins? Mr Tomkins was one of a number of road users of President Way that night (at the material time) and, therefore, at risk of injury if Mr Burdett was negligent in his use of his vehicle. It seems plain enough, therefore, that Mr Burdett owed a duty of care to Mr Tomkins, as one of a number of road users, when it came to parking his trailer. It is also my judgement that the defendants owed a direct duty, as well, to the road users of President Way, that duty being one to manage the business and the employees at the Parcel Force depot in such a way as to avoid reasonably foreseeable injury to road users, by either causing, or permitting, drivers to create dangerous hazards in the road.

40. The more difficult issue is whether Mr Burdett, and/or the defendants were in breach of that duty on 16 January 2001. This involves answering the question, whether Mr Burdett created a foreseeable risk of injury, or (as it is sometimes put) whether he created a potential source of danger to other road users. In deciding this issue, it seems to me relevant to bear in mind the following basic and, I hope, non contentious principles: (1) A prudent man will guard against the possible negligence of others when experience shows such negligence to be common, Grant v Sun Shipping Ltd [1948] AC 549, or as Buckley LJ said in Lee v Lever [1974] Road Traffic Reports 35 at 39C:

“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 drive with all due care and circumspection 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 users of the road.”

(2) A defendant is liable for injury caused in fact by his negligence in breach of a duty of care owed to the claimant, if the damage of that kind or description was reasonably foreseeable as the consequence of his negligence, even though neither the extent of the injury, nor the precise manner of its incidence was foreseeable by him. See, for example, Huges v Lord Advocate [1963] AC 837.

41. So, in deciding whether the duty of care was breached, the court is not constrained to find whether the particular way in which Mr Tomkins drove into the trailer was reasonably foreseeable, but whether an accident of that kind was reasonably foreseeable. In approaching that question, the court will expect a reasonably careful vehicle owner, or driver, to have regard to carelessness by other road users, where experience shows that such carelessness is sufficiently common to have to be guarded against.

42. In this connection, it is also relevant to bear in mind that reasonable foreseeability (in my judgement) is not a fixed point on the scale of probability, because it may not be justifiable to take a small risk if the risk can easily be eliminated. A reasonable road user would, therefore, only be entitled to neglect a small risk if there were some valid reason for doing so, such as being required to spend a large sum of money to eliminate it. A converse of the proposition is that if the occurrence of an event is no more than a mere possibility, then it is not incumbent on the defendant to take steps to guard against it. See Rugg v Marriott, Court of Appeal, 6 October 1999, unreported.

43. In this case, counsel for both parties have put authorities before me in which it is said that there is support for their rival contentions on this point. Mr Killalea relies on Rugg v Marriott in support of his proposition that a collision with Mr Burdett's trailer was no more than a mere possibility. I quote from the penultimate passage in the judgment of Otton LJ:

“In my view, on the facts as found, the possibility of danger emanating from the position of this parked vehicle was not reasonably apparent; it was only a mere possibility. Accordingly, there was no ground on which a finding of negligence could be founded. The possibility of a person riding a motorcycle, along the straight road for 300 yards without observing the parked car was, to my mind, extremely remote. Experience shows that motorists do, in fact, avoid obstacles such as parked and unlit vehicles at night when they are plainly visible.”

44. Mr Pulman relies on Lee v Lever where the judge at first instance held that the owner of a vehicle was the sole and negligent cause of a collision when he parked his unlit car at night on a dual carriageway that was well lit with sodium lights. The owner appealed and the Court of Appeal had no difficulty in upholding the finding that the owner of the car, whose lights had failed, was indeed negligent.

45. At page 37G and 38A Davis LJ said this:

“The judge, in a very clear judgment, directed himself in accordance with some observations of Denning LJ in Hill v Beszant [1950] 2 All ER 1151 where the Lord Justice said at page 1153: ‘I start with the proposition, which is clear beyond controversy, that this unlighted motor cycle was a danger in the road. Any unlighted obstacle on a fast motor road is a danger to traffic. That is a proposition, not of law, but of commonsense’. ...

Of course it is commonsense, as Denning LJ said in Hill v Beszant, that prima facie the presence of a unlit vehicle on a road is evidence of negligence, and it is for the person responsible for the vehicle to displace that presumption.”

46. In the result, the Court of Appeal apportioned liability between the parties equally. So, on one view, what was an obvious danger to one Court of Appeal, appears to have become a remote possibility to another. But, in reality, much

turns on the specific facts and on the distances over which a parked vehicle is visible in the prevailing light conditions.

47. In my judgment, Mr Burdett and the defendants were in breach of their duty of care to other road users. I find that the way the trailer was parked was a potential source of danger to other road users for a number of reasons: (1) Whilst there are provisions, in Regulation 24 of the Road Vehicle Lighting Regulations 1989, that permit cars to be parked at night without side lights, provided that they are facing the direction of the flow of traffic, and are more than 10 metres from a junction, such permission is not accorded to a vehicle such as the trailer with which I am concerned nor is it accorded to any vehicle that parks on the wrong side of the road. No exception exists when the road is lit with sodium lamps. To my mind, this indicates that even though the regulations do not provide for civil liability to be engaged, they do recognise the fact that street lighting does not necessarily remove the hazard presented by unlit vehicles parked on the wrong side of the road.
48. (2) Although there is evidence from the claimant, and others, that Royal Mail vehicles did park illegally on President Way at night, there is also evidence from the claimant (which I accept) that they tended to be gone by 4.00am. There was, therefore, a reduced expectation, to some extent, on the part of road users, including the claimant, that a vehicle would be parked there at 4.00am that morning.
49. (3) In the early hours of the morning, there is an increased risk of drivers being tired, less attentive, and slower to react. Although the claimant was not tired (and that is his evidence) his particular state is not relevant to the question of the potential danger to road users, generally, though it may be relevant on the question of causation.
50. (4) Although the vehicle was parked 60 or 65 metres from the point where it would first become visible, and that distance afforded a driver 2 seconds reaction time, and 2½ or 3 seconds braking time, that is a significantly shorter distance than in Rugg v Marriott. If a driver is distracted in the car, for three seconds, whether through preoccupation with his thoughts or by some occurrence in the car, or outside it, then it is too late for him to avoid a collision. I do not consider three seconds distraction to be a remote possibility.
51. (5) On a frosty night there is (it seems to me) a foreseeable risk that the windscreens of some cars may, to some extent, be iced up or misted over, although no one should be required to pay regard to the reckless driver who carries on with a completely obscured windscreen, the same is not the case (in my judgement) in relation to cars where the driver sets off with some ice or mist partially obstructing his view. Such carelessness is not (to my mind) uncommon.
52. (6) The trailer, though clearly visible, is not brilliantly lit up by the street lighting and the impression I have is that an inattentive driver could be initially confused as to what exactly it was and whether or not it was stationary.
53. (7) Retro reflective markers, and rear position lights, are intrinsically of value in alerting other drivers to the presence on the road of a large vehicle. Although there is no regulation requiring them to be displayed under streetlights, equally there is no regulation exempting them.
54. In my judgement, therefore, a possibility that a driver might collide with the trailer is not remote. The risk was small, having regard to the street lighting, but that small risk could easily have been reduced, or eliminated; it could have been reduced by parking on the correct side of the road so that the retro reflectors warned motorists of its presence in the road. Mr Burdett gave no good reason, in evidence, for parking on the off side of the road. It could have been further reduced by ensuring that the lights were on; Mr Burdett could have requested the defendants, or their management could have worked it out for themselves, that battery power should be separately provided for the trailer lights.
55. The risk could then have been entirely eliminated, if either the management at Royal Mail had arranged the working practices of the Parcel Force depot so that the delivery driver did not himself have to be responsible for moving empty trailers out of the bay, or they could have instructed Mr Burdett, or he could have worked it out for himself, that there were, as the evidence showed, parking areas off President Way, and close to the depot, which he could have used or, albeit possibly some times with difficulty, he could have parked the trailer within the depot. I find, therefore, that there was a breach of duty. The accident and injury sustained by Mr Tomkins were sufficiently of the same kind of accident that Mr Burdett, and the defendants, should have guarded against, as to found a breach of duty and a finding of negligence provided, of course, that causation is proved.
56. I acknowledge that some of the factors that I have considered, giving rise to a foreseeable risk of injury, are not present in the specific case of Mr Tomkins. Mr Tomkins' windscreen was not partially obscured by ice, and though I suspect that it may have been partially obscured by mist on the inside, the evidence is not sufficient to make a finding that that was probably so, nor is there any evidence of extreme events, such as the presence of pedestrians or unusual traffic manoeuvres that might have distracted him. In my judgement, it was reasonably foreseeable that at that time of the morning (in all the circumstances to which I have referred) a moving vehicle might collide with a trailer and that is what, in fact, happened.
57. As for causation Mr Killalea submits that the claimant has given no explanation for how he came to collide with the trailer and, therefore, he cannot prove that the breach of duty caused a collision. For the purposes of this argument, I accept that a properly lit trailer, facing the right way, would not have been negligently parked if it had been left 60 to 65 metres from the first point of visibility. So, the fact that the trailer was parked illegally on double yellow lines, and no

accident would have occurred if it had been parked lawfully somewhere else, is not the right test.

58. I do not accept, however, that the failure to give an explanation is fatal to the claimant's case on causation, anymore than it would be if he had been killed in the accident. Mr Killalea submits that because the claimant gives no explanation, it cannot be proved it would have made any difference if the trailer had been parked the right way round with all its lights on. For example, if the claimant had been using a mobile phone to text a message, or had been looking intently out of the side window, or had been falling asleep, then he cannot prove that those examples are any more or less probable a reason why he ran into the trailer than any other. So, if he cannot prove that he would probably have been in a state of alertness if the trailer had been parked correctly he must, it is submitted, fail in his claim. The answer (it seems to me) to this point lies in whether or not there are inferences that can properly be drawn from the evidence about the claimant's driving, which go to narrow the possible reasons for what happened, to the point where it can be said that the accident would probably not have occurred if the trailer had been parked safely.
59. In this connection, I place weight on the evidence of Mr Moret who saw the claimant driving safely right up to the moments before the impact, who saw the claimant actually at the wheel. I am confident that if Mr Tomkins had looked intently sideways, he would have noted it. I am also of the view that if the claimant had looked down for any prolonged period of time he would have noted that too. As a matter of commonsense, I doubt that Mr Tomkins would have kept such a steady and straight course if he had been doing either of those things.
60. There were no unusual events going on outside the car that had distracted the claimant and all the evidence is that he was looking ahead. This is not, therefore, a case of a reckless driver who runs into an unlit stationary object and, therefore, fails in his claim, either on the basis of causation or on the basis that his recklessness was outside the scope of the duty of care, as being too remote a possibility to anticipate. Here I find the claimant to have been a careful driver, looking ahead, who failed for some reason to react to the presence of the trailer in the road. In my judgement, it matters not whether he failed to react because he was confused as to what, in fact, was in front of him, or because he mistakenly thought that it was not stationary but in motion, or because he was so preoccupied with thoughts of his own that he became distraught.
61. Whatever the reason may be, once I am able to find (as I do) that he was looking ahead at the material time, I am then able to consider whether the existence of retro reflectors, and lights, would probably have alerted him to the danger in time to take action to avoid running into the void under the trailer and striking the kingpin.
62. In this regard, I put to one side the somewhat dramatic effect artificially created by the police flash photography and simply rely on the expert evidence and common experience to conclude that retro reflectors, and lights, would have appeared in the dipped beams of the claimant's headlights, and would (in my judgement) be likely to have alerted him to the fact that there was a large stationary vehicle ahead in time for him, at least, to have avoided going right under the trailer and striking the kingpin. He was, after all, only travelling at about 25 miles an hour.
63. For these reasons I find that the defendants were negligent, both vicariously and directly, and I hold the defendants to be liable to the claimant. The claimant admits that he was negligent and so the question of apportionment arises.
64. In terms of causation of the collision, I find that the claimant was significantly more responsible than the defendants. There is, however, a question whether the apportionment should reflect the defendants' breaches of the regulations (to which I have been referred) and their general attitude towards parking trailers illegally at night outside the depot in President Way. Mr Burdett said that such parking was a regular occurrence and that everyone did it. On the basis of his evidence, I infer that the management of Royal Mail at the depot, condoned the practice and, at least until the accident in January 2001, did nothing effectively to discourage it. This is a case, therefore, where both drivers, and supervisors or managers, treated their obligation to comply with the relevant parking and lighting regulations with a degree of indifference. There is evidence from other witnesses that Royal Mail vehicles were to be found on double yellow lines at other times as well.
65. Mr Kay's evidence, paragraph 30 of his statement, was to this effect:
- "Parcel Force have a habit of leaving all types of vehicles parked on that side of the road, sometimes facing the correct way and sometimes not. There is no regularity to it. The vehicles get in your way and force you to pull out into the opposite carriageway in order to overtake them. It seems that Parcel Force do not have enough space in their yard for all of these vehicles."
66. Miss Betts, in paragraph 23 of her statement, says this:
- "I have seen a trailer parked in that position quite often, at least once a week. It is not always the same trailer and it is not always there at the same time and not always there for any length of time."

And she goes on to make further comments about vehicles parked there.

67. Mr Killalea submits that this evidence is not relevant to apportionment, which should be decided solely on the basis of the respective causative contributions to the accident. Mr Pulman submits that they should be reflected in the apportionment. Section 1 of the Law Reform Contributory Negligence Act 1945 provides that the claimant's damages:

“... shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant’s share in the responsibility for the damage.”

68. I have not been referred to any authority on the point and, therefore, approach the question simply on the basis of what I understand the statute to mean. My understanding is that I should look first at the claimant’s share in responsibility for the damage, which is essentially one of assessing the causative contributions. Then, in the light of that assessment, but not confined by it, I have to decide what is a just and equitable apportionment. It seems to me that this approach (if it is correct) leaves it open to the court to take into account the extent and degree of the defendants’ departure from reasonable standards of care under the second part of the process of assessment, though not under the first.
69. In this way the apportionment may legitimately be assessed differently, depending on whether the tort-feasor has been careless when faced with an emergency not of his own making or has taken a conscious decision to break the law that also involves negligence. In principle, it seems to me appropriate that the court should be able to distinguish between the vehicle owner who makes a negligent decision to leave his unlit car in the road when the lights have failed, and the vehicle owner who leaves his unlit car in the highway because he cannot be bothered to park it somewhere safe, even if the degree of carelessness of the claimant is the same in each case when he comes to collide with the parked car.
70. It would not, however, be appropriate (in my judgement) to penalise the defendants, as it were, for the fact that they had been responsible for illegal and, possibly, dangerous parking on other occasions. Subject to the seat belt issue, my decision on apportionment is that if Mr Burdett had been confronted with an innocent emergency, and had carelessly left his unlit trailer in a dangerous position, the claimant would have suffered a reduction of 75 per cent from his damages for contributory negligence.
71. As it is, the deliberate, but unnecessary, decision to leave the trailer in a location and state, where it contravened the regulations to which I have referred and involved a breach of duty towards the claimant, causes me to adjust the apportionment, because it is just and equitable to do so. The adjustment, adverse to the defendants, is 10 per cent. In other words, I hold that the claimant’s damages should be reduced by 65 per cent and that he should recover 35 per cent of the value of his claim, subject to the seatbelt issue: was the claimant wearing a seatbelt and, if not, did that affect the tetraplegia injury he sustained?
72. The evidence is that immediately after the collision a number of people went to the Vauxhall Astra while it was wedged under the trailer. Three Customs vehicles, coming along on the opposite side of the road from the trailer, stopped and their occupants got out. Mrs Temple and a Mrs Shaw seem to have been first on the scene, but neither were witnesses. Mr King may or may not have been there immediately, but he also was not a witness. Mr Bransgrove, however, was a witness and he (it seems to me) came either third or fourth to the stricken car. In his statement he said, at paragraph 9:
- “He had his seat belt on because he tried to do something with it when he said he wanted to get out. I told him that he had to wait for the emergency services to arrive.”
73. Mr Kay arrived soon after, but could not recall if the claimant was wearing his seatbelt or not. By then a Mr Fenson and a Mr West were by the car. They too were not witnesses.
74. The next event is that the police arrived, in the form of PC Longley, followed by the ambulance and fire brigade. When PC Longley saw the claimant in the driver’s seat, he was not wearing a seatbelt. The claimant said in his statement that he could not recall if he was wearing his seatbelt, though he usually did, but in evidence he said that he had some recollection of putting it on and then trying to take it off when he was struggling in the car after the accident.
75. The medical evidence was considered to be irrelevant and was not before me so there is no evidence as to whether there are circumstances in which it is possible that the claimant could have moved his arms, and hands, with what was later diagnosed as a C4 injury, but the claimant’s evidence was that he had no sensation below his neck while he was in the car and that he was not conscious of any ability to move.
76. There is, then, the evidence of Dr Rattenbury, whose doctorate in 1978 was: “Usage and Effectiveness of Seatbelts”. He has considerable experience of road traffic accidents, the usage of seatbelts and the incidence of severe trauma. His opinion was that the claimant was probably not wearing a seatbelt because his C4 injury (in these circumstances) would probably be caused by a severe flexion movement, accompanied by a significant upward movement of the body. The use of a seatbelt would inhibit both movements and, given that the headrests were well adjusted for a man of 6 foot 2 inches, there is no other mechanism that (on a balance of probabilities) could cause such a severe flexion injury.
77. Mr Pulman submits that Dr Rattenbury has failed sufficiently to investigate the possibility that the crushing of the roof by the kingpin could have forced the head forward and downwards, before the seatbelt restrained the claimant, and therefore his evidence lacks cogency. Mr Pulman prays in aid the fact that Dr Rattenbury did not examine the seatbelt or the interior roof of the Astra, or, indeed, any part of the car and, therefore, his opinion should be treated with caution.
78. A somewhat unusual feature of the case is that Dr Rattenbury very fairly said, at the outset, that this was a very

unusual accident and that the court should, in the circumstances, pay particular attention to the lay evidence before reaching a conclusion. To that extent, Dr Rattenbury's confidence in his own opinion was reduced and he was prepared to accept, or so it appeared, that if there was credible evidence that Mr Tomkins had worn his seatbelt, he would not think that an injustice had been done if that evidence prevailed over his own opinion.

79. On another point, I was (I confess) a little concerned that on one contentious issue, namely, whether an injury to the claimant's head was caused by his hitting the roof of the car, or the frame of the windscreen, Dr Rattenbury said in evidence that the latter was the probable cause of the injury, whereas, in his report he only said that it may have been the cause. His reason for reaching a firmer opinion in his evidence, namely, that he had seen a photograph, which he had previously overlooked, which showed that the driver's visor had been moved was (to my mind) unconvincing. So, I have direct evidence from Mr Bransgrove that the claimant wore a seatbelt, but because he had left the Customs service, and could not be found, he did not attend to be cross-examined. There is, then, no evidence from any other civilian, who was present at the scene, to gainsay what Mr Bransgrove said, because no statements were taken (at least that I have seen) apart from those to which I have referred.
80. There is the evidence of those who knew Mr Tomkins that he was a careful and diligent driver who could be expected to wear a seatbelt, and there is his own evidence that that is what he usually did. The claimant's present recollection that he was, indeed, wearing a seatbelt can really carry very little weight having regard to his statement.
81. Then there is the evidence, from PC Longley, that the claimant did not have a seatbelt on, but that was after a number of people, who did not give evidence, had had the opportunity of releasing it. Finally (as I have summarised) there is the evidence of Dr Rattenbury, after a less than full enquiry, and with the caveat that he does not have complete confidence in his opinion, that Mr Tomkins was probably not wearing a seatbelt. Looking at the somewhat confused and unsatisfactory state of all this evidence I am not persuaded the defendants have proved, on the balance of probabilities, that the claimant was not wearing a seatbelt.
82. Accordingly, my judgement that the claimant should recover 35 per cent of his damages stands and, therefore, judgment will be entered for the claimant for 35 per cent of the damages to which he is entitled to be assessed, not agreed.