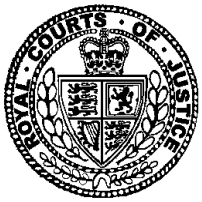

Neutral Citation Number: [2020] EWHC 900 (QB)

Case No: QB-2018-005830

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2020

Before:

SIR ROBERT FRANCIS QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between:

DAVID HARRIS	**Claimant**
- and -	
(1) BARTRUMS HAULAGE AND STORAGE LTD	
(2) PAUL ANDRE ROMBOUGH (t/a) PAR EUROPEAN	**Defendant**

- -
- -

Gerard McDermott QC (instructed by **Stewarts Law LLP**) for the **Claimant**
Derek O'Sullivan QC (instructed by **Clyde & Co**) for the **First Defendant**
Andrew Davis (instructed by **DWF Law LLP**) for the **Second Defendant**

Hearing dates: 21-24 January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

SIR ROBERT FRANCIS QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 17 April 2020.

Sir Robert Francis QC:

Introduction

1. This is a claim for personal injury arising out of a serious accident on 24 February 2015 when an articulated lorry and trailer rolled over the Claimant who was employed to drive it. The immediate cause of the accident was that the brakes of neither the tractor nor the trailer were applied at the time. The determination of this case turns on why that state of affairs came about and who, if anyone, was negligent in allowing that to happen.

2. By an order of 23 November 2018 Master Thornett directed the trial of a preliminary issue as to whether the Defendants are liable to the Claimant by reason of the matters alleged in the particulars of claim. I heard evidence and the submissions of all parties from 20 to 23 January 2020. I am grateful to all counsel for their helpful arguments.

3. In what follows where I quote verbatim from evidence or documents the quote will be in italics.

4. A number of witnesses gave evidence, written and oral. I have had regard to all the evidence and material but will confine my detailed consideration to that evidence which I have considered particularly pertinent to the issues I have to decide.

The Claimant's training and background

5. The Claimant had been employed by the First Defendant at the beginning of February 2015, having previously worked for them as an agency driver for about 12 weeks. Before working for First Defendant the Claimant held a number of responsible jobs and had become a trained and experienced lorry driver. After leaving school he joined the Royal Navy as an avionics engineer and subsequently joined the Metropolitan police as a Police Constable in 1978. He drove articulated lorries as part of his duties having been trained at the force's driving school. He told me that while in the police safety had been "*drummed into us*". However in terms of formal qualifications he had an Advanced Class 1 Driver certificate qualifying him to drive 7.5 tonne vehicles. He left the police on health grounds and, after various jobs not related to driving, in 2003 he worked for a removals company as a driver, again mainly using 7.5 tonne vehicles.

6. In his witness statement the Claimant stated that he obtained the formal qualification to drive Class 1 and 2 HGV vehicles in 2013. The First Defendant's Defence [paragraph 3] averred that he obtained a Class 1/C & E LGV license on 27 June of that year. It has not been suggested that either description of his status is incorrect, and I shall assume that "HGV" [heavy goods vehicle] and "LGV" [large goods vehicle] are synonymous and that the Claimant was fully qualified to drive an articulated lorry of the type he drove on the day of the accident. The Claimant told me that the training for this involved a theory test, testing of hazard perception and a 4 day course. He was required to undertake 35 hours of CPC [Certificate of Professional Competence] training every 5 years to maintain his licence. By the time of the accident he had started to do this. I was shown certificates showing he had completed 2 day courses in October 2013 and documented arrangements for a further course. There has been no suggestion that at the time of the accident he was other than a fully qualified driver entitled to drive an articulated vehicle of the type he was using on the day of the accident.

7. I am satisfied that in order to obtain that licence the Claimant undertook the appropriate training during which he would have been taken through and demonstrated competence in the procedures outlined for the coupling and uncoupling of trailers set out in the Code of Practice guidance on the subject issued by the Health and Safety Executive [*Code of Practice: Coupling and Uncoupling And Parking Of Large Goods Vehicle Trailers – Guidance for managers, supervisors and trainers*] to which I shall refer in this judgment as the Code of Practice. Reference has also been made to the *Safe Coupling and Uncoupling Guide*, [called "the Guide" in this judgment] exhibited to Mr Rawden's report and published by a consortium including the HSE. Mr Rawden's evidence was that it was to be assumed that the Claimant's training was in line with this document. It was not suggested that this was incorrect and I accept that his training was probably consistent with the guidance in both these documents between which there appears to be little if any difference on material matters.

8. The Claimant first worked for the First Defendant through an agency in October 2014 for about 12 weeks. He recalled being given a brief induction by the agency dealing with generic safety requirements but without reference to any technical aspects or procedure involved in the job. He was not given the First Defendant's company handbook at that time.

9. He began work as a direct employee of the First Defendant on 9 February 2015. He stated he was given a copy of the handbook, which he signed for. He recalls being given the handbook at 7.00 am when he arrived for his first shift. He was told he could read it at his leisure.

> "*The attitude was, more or less, "here is the handbook, sign some forms so we can pay your wages and off you go*."

He denied he had been taken through the handbook as had been suggested in the HSE witness statement of Richard Dixon, the First Defendant's then health and safety manager. He agreed he had signed the Review Acceptance and Agreement on 14 February 2015. One of the three declarations signed on that occasion reads

> "*I have read and understood the policies and procedures contained in the Bartrum Group's Staff Handbook (January 2014).*"

It is this handbook which contains the required system for coupling and uncoupling trailers quoted above. In his witness statement the Claimant stated that by 14 February he had not had time to read the handbook because he had been on the road the whole time. Nonetheless he candidly accepted that the handbook did not contain anything [in particular at pages 961 to 962 of the trial bundle] about the relevant procedures for coupling and uncoupling a trailer which he did not already know. This is not surprising as in general the procedures described in those pages are entirely consistent with the Code of Practice and the Guide.

10. In a statement made after the accident to an HSE inspector the Claimant said that when he started work for the First Defendant he was given instructions to apply the trailer parking brake. When this was put to him in cross-examination he clarified that he was simply taken out to the yard by a driver who told him where to park and to put the brake on: he told me this was nothing he did not already know.

The lorry and trailer coupling and braking systems

11. Before considering what happened in this accident it is necessary to consider the systems present in the tractor and trailer for coupling and braking, together with associated warnings and safeguards. There was general agreement between the experts and the Claimant with regard to the relevant parts of these systems.

The Tractor

12. The tractor unit has a parking brake which is operated by a large lever, not dissimilar in appearance to a gearstick in a car, in the centre of the dashboard. When it is the "down" or backward position the brake is engaged. It is disengaged by being pushed into the "up" position. From the photographs produced by Mr Rawden the difference in positions is clear, as confirmed by Mr Kingham's own observation. Mr Kingham noted that when the lever is pulled down to disengage the brake it drops into a detent under the action of a spring, locking the lever in position. If the lever is not pulled back sufficiently it will return to the fully disengaged position under the action of another spring. To release the parking brake from its down/engaged position the handle on the lever must be lifted to disengage the detent.

13. The parking brake operates the brakes on the tractor at all times, but when it is coupled with a trailer, it also operates the brakes on the trailer. This is via an air supply through a red line, called by all factual witnesses in this case a "red suzie". [for reasons which have not been explained]. When air pressure is applied to the parking brake release chamber on the trailer through the red suzie, springs in the chamber which close the brakes are released, freeing the wheels to move. Naturally there is also a service braking system used during actual driving, which supplies air pressure via a separate, yellow, line to the trailer brakes.

14. When the handbrake is engaged a red light appears in the top centre of the instrument cluster in front of the driver's position. When the handbrake is disengaged this light goes off but if the driver opens the door, a warning chime sounds and a message appears in the display panel in the centre of the instrument cluster reading: "*Apply parking brake*". Part of the same panel above and to the left of the verbal warning turns yellow, and, in the left hand of the yellow part, a P in a circle and a diagram of a lorry appears.

15. The audible alarm is similar in noise to that which warns the driver that the vehicle lights are on. Mr Kingham has produced a comprehensive table of what happens when the driver's door is opened in various conditions. The relevant parts of it read as follows:

Conditions	***Outcome when driver's door opened***	***Comments***
Engine off Parking brakes released	*Warning chime (repeating approximately every 1 second). Brake symbol containing the letter "P" on an orange background with the text "Apply parking brake" shown in display; symbol and text remained in display but dimmed after 5 seconds, warning chime continued to sound at the same volume.*	

Conditions	***Outcome when driver's door opened***	***Comments***
Engine off Dipped beam headlights illuminated Parking brake released	*Warning chime (repeating approximately every 1 second). Brake symbol containing the letter "P" on an orange background with the text "Apply parking brake" shown in display. After 5 seconds changes to bulb symbol and "Light?" message. The display remained illuminated but dimmed after 10 seconds, with the display alternating between the two warning messages every 5 seconds. The warning chime continued to sound throughout at the same volume*	*Green "tell-tale" shown in instrument binnacle. This test was repeated several times and on all occasions the "Apply parking brake" warning was displayed upon opening the door.*
Engine running Dipped beam headlights illuminated Parking brake engaged	*No warning chime, no change in display.*	*Green "tell-tale" shown in instrument binnacle. A red "tell-tale" also illuminated indicating that the parking brake was applied with the engine running.*
Engine running Dipped beam headlights illuminated Parking brake released	*Warning chime (repeating approximately every 1 second). Display brightened, and the information shown was a brake symbol containing the letter "P" on an orange background with the text "Apply parking brake" After 5 seconds the display dimmed and message changed to another unrelated alert[1]. The warning message then cycled every 5 seconds between the parking brake warning and the unrelated alert with the display dimmed. The warning chime continued to sound throughout at the same volume.*	*Green "tell-tale" shown in the instrument binnacle.*

16. The Defendants' experts agreed in the joint statement that the warning "chime" which sounded when the driver's door was opened would have functioned as outlined in this table. They considered it to be of particular relevance that with the engine of the tractor unit running, the chime would not have sounded with the handbrake on [engaged] with the headlights on when the driver's door was opened. It would, however have sounded if the driver's door was opened with the handbrake off and the headlights switched on. Mr Mooney, the Claimant's expert was at a disadvantage in that he had not examined

[1] The unrelated alert was a warning message for low fuel level

the vehicle involved or any similar model, but accepted he had no reason to disagree with these propositions. They all agreed there was no "voice" acting as a warning in the tractor unit. Although it was suggested by one witness, Mr Gray, that there was an additional voice alarm, this was not noted by any expert. The manufacturers informed Mr Rawden that some users but not all have added this feature. I find there was none on this vehicle

The trailer

17. The functioning of the trailer braking systems is fully described in the Guide at pages 6 to 8. Like the tractor unit the trailer has two braking systems, parking and service. The service system operates on pressure supplied via the yellow line, but only on condition that the red suzie is connected. When the driver presses the brake pedal air pressure forces the brakes closed. If it is disconnected, the air pressure to the release chamber is discharged allowing the springs to close and immobilise the wheels. There is also a parking brake system. This is applied by pulling out a red knob on one side and underneath the trailer. This exhausts the air from the parking release chambers closing the brakes.

Events leading to the accident

18. The Claimant's task on the day in question was to take the tractor unit to Staveley Yard, which is in Kettering, Northamptonshire, and pick up a loaded trailer which had been parked there by the Second Defendant who was a sub-contractor, not an employee of the First Defendant.

Deposit of the trailer by the Second Defendant

19. The trailer was deposited at the Second Defendant at about 21.30 on 23 February 2015, the day before the accident. He is self-employed, working in his own transport business with his own tractor unit. He had been working for Bartrums for 13 years, but also other companies such as DHL. He expressed 100% confidence that he applied the parking brake of the trailer. However, he frankly admitted in his oral evidence that he could not visualise this particular occasion now, as he had done many changeovers since then. In his written statement he said he always does so, and repeated this in his oral evidence to me. He made the point that he always does this because he has sadly lost two friends who have died as a result of their trailers rolling away and crushing them. While these incidents happened some 20 years previously, he was visibly emotional in recalling this in court.

20. The Second Defendant described his normal routine. He reverses the trailer into a space, applies the handbrake in the tractor cab before getting down from it. He double checks he has applied the handbrake. In accordance with his routine he would then have activated the trailer parking brake at the control panel which is close to the position from which the trailer legs are wound down. He would then wind the legs down. He observed that when the parking brakes are applied they make a hissing sound as the air escapes from the brakes. He then went on to disconnect the trailer from the tractor.

21. In an earlier statement to an HSE inspector, taken on 8 April 2015, the Second Defendant had stated that there had been a time when trailer parking brakes were not used, but it became the accepted way of doing things to apply them. He also said he

had been to Staveley Yard about 6 times always at night. It was either "*mud-sodden or a dustbowl*" and the lighting was "*more or less non-existent*". He agreed that the "*housekeeping*" at the yard was "*not the best"*. However he did not see this as a safety issue either then or now. He had had no difficulty in seeing the trailer brake control, because he had a torch and a head torch. He parked where he was told to park by an attendant at the yard. He asserted, as he did to me, that he was 100% sure he had applied the trailer brake and rarely found a trailer where this had not been done. He amplified that in his oral evidence: in his experience only a very few people did not put the brake on, but he had come across it.

22. The Second Defendant had been aware that there was a slope at the yard and that he was parking at the top of it. He did not then, and does not now, consider there were safety issues involved in leaving the trailer there, although he could "*see the sense"* in parking at the bottom of the slope. Nonetheless he did not think this made any difference: he was familiar with parking trailers on slopes some of them steeper than this one. Slopes were a common feature in haulage yards.

Coupling of trailer and rollaway

23. The only direct evidence of what happened with regard to the coupling of the trailer to the Claimant's tractor and the combination rolling away out of control was given by the Claimant himself. There were a number of statements, and he gave oral evidence before me. As the Defendants have made a number of points about apparent inconsistencies between his various statements it is convenient to summarise the relevant points from them the order in which he made them.

Statement to Mr Watton and Mr Dixon

24. The Claimant was seen on 15 April 2015 by Mr Watton, the Defendant's Group Strategy Officer, and Mr Dixon, the Defendant's Group Health and Safety Manager. The former took down what was said by the Claimant who was then asked to sign it. The Claimant told me that he was in hospital and in bed at the time this statement was taken. He was at the James Paget Hospital, having been transferred from the Coventry and Warwickshire Hospital. His legs were swollen and he was on a drip. He said he was "*so drugged up on morphine*" that he cannot now remember saying some of the things recorded. He agreed, though, that he had signed the statement. Mr Watton told me, and I accept, that he read the statement to the Claimant before he signed it. His description of what happened, after dropping off the trailer with which he had come into the yard, in this statement was as follows:

> "*I took my number plate off, found my trailer (200) and put my number plate on the trailer. I put the tractor unit under the trailer 200 and did the 2 tug test then put the clip in the 5th wheel. I then climbed up on the catwalk. I dropp [sic] the ladder down. I had left the engine running. I connected one of the Suzies on. I then noticed that the vehicle was moving. I jumped off the catwalk*."

He then described how he was caught and eventually trapped under the trailer wheel. The statement ended with this:

> "*I can't remember putting the tractor unit handbrake on. I did hear the alarm but thought that was for the lights*."

The statement was signed by the Claimant under a declaration confirming that this was a true account. The part that the Claimant said he could not remember saying was that he put the number plate on. However, in later statements, he asserted that the number plate had been taken from him by an unidentified man who offered to do this for him.

Statements to HSE Inspector

25. The Claimant made a statement to the HSE inspector on 5 August 2015. In this he described the process for coupling a trailer he used and which he said he had been shown when he took the HGV driving test in February 2014:

> "*a. I back the tractor unit up towards the trailer*
>
> *b. I get out of the tractor unit and check the fifth wheel goes underneath the trailer, by about less than an inch and this then goes into the locking pin*
>
> *c. I get back in, reverse the cab into the trailer. And perform a double tug test, which involves selecting a low gear and then pulling forward twice to test that the tractor unit and the trailer are connected.*
>
> *d. I get out of the tractor until and put the 'dog clip' on*
>
> *e. I walk round the trailer, checking it as I go and put the number plates on*
>
> *f. I wind the legs up*
>
> *g I drop the catwalk steps climb on to the gantry and put the catwalk light on*
>
> *h. I connect the two airlines – the emergency and the service lines, and then connect the two electrical lines*
>
> *i. I come off the catwalk and put the steps back up, push the brake in and drive off*."

26. That was his description of his normal routine. With regard to the accident he described it as follows:

> "*My process for hitching up that morning differed from my normal routine. A guy who was in the yard at the time offered to put the number plates on the back of the trailer for me. I took up his offer. He went off and did this for me. I remember the audible alarm sounded when I opened the tractor unit door. This alarm sounds either because the headlights have been left on or the handbrake has been left off. It is the same type of alarm. At the time I just assumed that the alarm went must have sounded*

> *because I had left the headlights on. I needed headlights on as it was the early hours of the morning and there was not much light. I had left the engine running. I got out of the cab and walked round the front of the near side, to access the catwalk. Via the catwalk steps. As I connected the lines up, I noted the tractor unit and the trailer began to move. At the time, I did not know, but there must have been a slope in the yard. I tried to jump off the catwalk.*"

27. He then gave a similar description of the distressing aftermath as before. Later on in the statement he said this:

> "*I did not check the trailer park brake was on, on the day of my accident. I must have left the handbrake off [sic] the tractor unit.*
>
> *Looking back, the guy who offered to put my number plate on threw me off my routine. I was in the process of putting the dog clip on when he came over. It had rained the day before any accident and there was a misty fine rain when I was at Cranford. It was only chilly not freezing. I used my torch that morning to connect up the dog clip and then left it on the catwalk.*
>
> *When I started work for Bartrums instructions were given about applying the trailer park brakes. But I do not know if Bartrums check this. I would say that drivers who have recently passed put the brakes on and the drivers who have been working for some time do not.*
>
> *I would say that when I go to pick up trailer, I find about 60% of them have their trailer park brakes off. No instructions have been given to me about what to do if I am on the catwalk and the tractor unit and trailer begin to move.*"

28. This statement was repeated word for word in one signed by the Claimant on 21 December 2015. Both statements were on Criminal Justice Act 1967 forms on which the Claimant certified their truth.

Claimant's statement for these proceedings

29. The Claimant has made one statement for the purpose of this action, dated 3 April 2019. He gave the following description of the accident [paragraph 19 onwards]:

> "*As part of the coupling process I reversed the tractor towards the trailer and made sure it was in line with the trailer on both sides….As the tractor was close to engaging with the trailer, I stopped and got out to check that the fifth wheel was going to fit underneath the trailer.*
>
> *The tractor drive transmission has automatic gears. When I got out of the tractor on this first occasion, I applied the handbrake and left it in neutral gear with the headlights on and the engine*

> *running. When I opened the door of the cab, an audible alarm started going off, which I presumed was because I had left the headlights on….*
>
> *I checked the fifth wheel and everything seemed fine. I moved the locking pin into place… and got back in the cab (where the alarm was still sounding until I closed the door) to move back onto the trailer and lock the pin… I released my handbrake, and did the double tug test and I could immediately feel that the trailer was connected because I could feel resistance when I tried to pull forward.*
>
> *I turned on the catwalk light from inside the tractor… I then got out of the tractor once again, with the intention of hooking up the airlines and power lines and attaching the "dog clip" to the trailer. I had left the tractor in neutral gear again, with the ignition and the lights on. As I opened the door of the tractor, I heard the alarm sound. I assumed this was because I had intentionally left my headlights on again. I remember swearing to myself and thinking "of course I have left my headlights on, it is pitch black.*
>
> *I now understand that an audible alarm will only sound for the headlights being left on when the ignition is off. However I did not know this at the time of my accident. In my view it was natural and understandable for me to assume there would be an audible warning because the lights were left on, even if the ignition was running. I knew there was an alarm for when the handbrake had not been applied, but I did not consider that at the time. …*
>
> *On the morning of the accident, as I was getting out of the cab, I did not pay attention to my dashboard and I did not notice any visible warnings. I was focussed on the job at hand.*
>
> *As I got out of the tractor unit on the second occasion to attach the airline and powerlines. I was approached by a guy who was working in the Yard… he offered to put the number plate on the trailer for me…. Looking back this threw me off my routine and mean I walked around the front of the cab to the nearside to access the catwalk via the catwalk steps, instead of around the back of the trailer as normal*."

30. The Claimant exhibited a sketch drawing indicating his route as described. This indicated that he met this man about half way down the offside of the trailer and that he then turned round walked in front of the cab and down the nearside to approximately the rear wheel of the trailer before turning round again and approaching he catwalk behind the cab. Pausing there I observe that when asked about this plan in oral evidence he suggested that he had not gone that far down the nearside of the trailer. Had he done so he would have reached the position of the button which operated the trailer parking brake. In his statement he said that had he adopted his normal routine at some point he

would have looked at the trailer parking brake, although this was often difficult to see. He had been "*recommended*" by his HGV instructor not to touch the trailer brake at this stage. He asserted that it was difficult to tell by looking whether or not the parking brake was engaged.

31. He said he had not appreciated that disconnecting the airline was supposed to stop the trailer moving. Indeed he suggested he had been told by his instructor that the airline to stop the flow of air could be disconnected but that did not guarantee that the trailer would be stopped. He also did not know there was a slope in the yard. On this occasion, not having engaged the handbrake, or checked the trailer brake, when he connected the red suzie the tractor and trailer, now combined in one unit, started to roll down the slope.

Claimant's oral evidence

32. The Claimant was cross-examined extensively but courteously by counsel for both Defendants. He agreed that applying the tractor handbrake was the most basic and fundamental safety measure because it would hold both the tractor and the trailer when the tractor and trailer are connected and when the red suzie is connected between the two. He agreed that there had to come a point in every coupling when the only thing holding the combination was the tractor parking brake. He agreed that the tractor parking brake should never be released before the red suzie was connected. He agreed that the system had a number of "failsafes" of which he was aware at the time:

- The driver dropping off the trailer would apply its parking brake and check it is applied
- The driver picking up the trailer should also check the parking brake is applied; (although he also said he had not been told he should apply the brake if it was not engaged);
- The tractor brake should remain on throughout the coupling process
- The red suzie should not be connected while either the tractor parking brake or the trailer parking brake were off.

33. He agreed that the employee's handbook did not contain anything he did not know already.

34. He remained adamant he could recall an audible alarm sounding when he first got out of the truck even though he accepted that the experts had agreed that such an alarm would not sound if the tractor handbrake was applied. However he accepted his memory could not be correct. He must have had the handbrake on at on the first occasion he got out: the lorry was parked on a slope and did not move at that stage. He also agreed that he did not on this occasion check the trailer brake was on and that he must have left the tractor handbrake off. He agreed that when he got out the cab the second time and the alarm went off he did not look at the dashboard. He agreed he could not explain why he had not applied the tractor handbrake even though he was aware it was the most fundamental thing to do.

35. With regard to his evidence of being told by his instructor that he should not touch the trailer parking brake button while checking whether it was applied, he agreed he had not mentioned that in the answer to the First Defendant's request for further information. Indeed as he accepted, in his answer to the request he had agreed that he

knew that if he found the trailer brake was off he should apply it. In relation to this issue, after a number of questions his final answer was

> "*I knew, but I was told not to touch*."

36. He could not explain why he might have been given such advice by his trainer. He agreed he had not mentioned this in either his statement to the HSE or in answer to the request for further information.

37. It was pointed out to him that in his original statement to Mr Watton, he was recorded as saying that he had taken his registration plate off the trailer he was dropping off and had fitted it to the trailer he was picking up. No mention was made of this being done by an unidentified third party. Even though he had signed the statement he denied that he had said this to Mr Watton or at least could not remember doing so because he was "*so drugged up"*.

38. With regard to the yard he agreed that he had been aware he had parked the lorry on a slope.

39. He told me that when the lorry started to rollaway it did not occur to him that he could stop the vehicle by disconnecting the red suzie. He panicked and jumped off the catwalk. He agreed that his training had been to disconnect the lines in such circumstances but he panicked.

40. In relation to many other details the Claimant was unable to remember what happened. Thus he could not remember among other things how far down the near side of the trailer he went before turning round to return to the catwalk, whether he checked the tyres or spray suppression or whether he had in fact checked the parking brakes, or wound up the parking legs of the trailer. This was despite the fact that he had described some of these actions in his written evidence.

The layout of the site

41. The site has been extensively photographed by Mr Rawden and Mr Kingham among others. As is apparent from both the photographs and the video taken from the camera in the lorry at the time of the accident, there is a slight slope from where the trailer was parked towards the other side of the site. At the time there were a number of other trailers parked in the yard. On the opposite, downhill, side of the yard there were at least two parked trailers with a gap between them into which the combined unit of the Claimant's tractor and the trailer rolled when he connected the red suzie. The slope, while a shallow gradient, was clearly discernible in the video. The surface of the yard is difficult to see in the photographs in the bundle but it is obviously not surfaced. Therefore I accept the Claimant's description of the surfaces as muddy. While one photograph shows what might be a slight ramp built out of the dirt this was not in the part of the yard traversed by the tractor and trailer as it rolled away. That part was relatively smooth. At the downhill side of the yard the dirt gives way to scrub. There was no kerb at this point.

Discussion on the facts of the accident

42. The evidence as to what happened is limited to that contained in the various statements made by the Claimant and the First Defendant and their oral testimony, together with the video of the rollaway. Limited assistance is obtained from the expert evidence which is more directed towards matters relevant to the standards to be applied and whether they were complied with.

The Claimant

43. Mr Harris is clearly in my judgment an honest man who has been through a highly traumatic experience the consequences of which will be with him for the rest of his life. As is clear from the account of his various statements and his evidence to the court, there have been many inconsistencies. In particular his account of the intervention of an unidentified third party to install the registration plate on the trailer did not appear in his account to the HSE.

44. He has had to accept that he left the tractor handbrake off and cannot understand why he did that. I observe that he was undertaking a task he had not originally been scheduled to do. He has denied being in a hurry, but a man, who I accept was normally a careful driver, failed to apply a fundamental safety measure. The distraction could not have been the mysterious helpful stranger, because he appeared only after the Claimant left the cab.

45. His account of whether or not he checked the trailer brake or even whether he passed that part of the trailer where the button is located was confused, difficult to follow and in the end unsustainable. In particular his justification for not touching the button that this is what he was told by is instructor – makes no sense in logic or is in any way consistent with the code of practice and other guidance. Such distraction as may have been offered by the stranger did not apparently prevent the Claimant walking round to the nearside of the lorry. While he has disavowed its accuracy, his sketch plan does show him reaching that part of the trailer where the button is situated. I am forced to the conclusion that, while he may believe what he has said, some of his evidence is the product of a search, whether conscious or subconscious, for an explanation of how the trailer parking brake came to be off at the same time as the tractor handbrake.

The Second Defendant

46. In my judgment the Second Defendant was a straightforward and impressive witness who answered questions directly and without hesitation. When he could not remember something he said so, and was clear when he was relying on his usual practice. He was and is a highly experienced HGV driver, qualified for some 34 years. He owns his own tractor unit and runs his own one man haulage business. It is clear that safety is a real priority for him, partly motivated by the sad experience of losing not one but two friends over 20 years ago, both killed in rollaway incidents.

47. Understandably his memory of the incident was somewhat partial. He had no notice of the accident until 7 days later when he saw a note at a delivery site. His first interview on the matter was with the HSE when they took his statement in April 2015, 6 weeks after the incident. He told me he did not think then that there was any possibility he had had anything to do with the accident. He first understood it was being alleged he

had not applied the trailer parking brake when proceedings against him were intimated in October 2017. He told me he couples and uncouples trailers 6 or more times a day. Therefore this is a routine action and there is no reason for this particular occasion to stand out in his mind.

48. In his HSE statement he did not claim to have an actual memory of applying the trailer brake, but said he was "*100% sure*" he had because that is what he always does. He gave a detailed description of his normal practice which in every respect appears to be in accordance with the procedures described in the guidance to which I have been referred.

Findings on the facts of the accident

49. It is convenient to set out my factual findings with regard to the accident itself before considering the allegations of negligence. The factual issues in dispute were

    i) whether the trailer parking brake was on or off when the Claimant came to pick it up;

    ii) what alarms and warnings operated when the Claimant left his cab on the second occasion after testing the coupling to the trailer;

    iii) how the trailer parking brake came to be disengaged when the Claimant connected the red suzie.

Was the trailer parking brake on or off when the Claimant came to pick it up?

50. The evidence of the Second Defendant satisfies me on the balance of probabilities that he engaged the trailer parking brake before he left it at the yard. I accept there is evidence, from the Claimant, and the HSE report of the inspection of the yard, from the Second Defendant himself that trailers are sometime left without their parking brakes applied. Indeed the code of practice refers to accidents occurring as a result of poor practice and trailers rolling away after being incorrectly parked. However the fact that this may occur does not mean it did on this occasion. As already stated I was impressed by the Second Defendant's evidence and the manner in which he gave it. Further I accept he had a particular reason to be careful in the loss of two friends. I accept he was a careful driver in any event. Therefore I find it inconceivable that he would have failed to engage the parking brake. There is no direct evidence that he did fail to do so. The fact that the brake was clearly disapplied when the accident occurred does not mean the Second Defendant left it in that state. I will consider the competing possible causes for this when answering the third question.

What alarms and warnings operated when the Claimant left his cab after testing the coupling?

51. I have already given a detailed description of the available alarms and warnings and need not repeat that here. It is clear, as in effect he has accepted, that the Claimant was wrong to believe there was an audible alarm when he left the cab on the first occasion. If he left the engine running and the handbrake on – as he must have done in order for the tractor unit not to move on the slope – on that occasion, the experts agree there would not have been an audible warning even though the Claimant believes there was.

When he left the cab on the second occasion, as the Claimant accepts, he left gears in neutral, the engine running and the handbrake off. He must have disengaged the brake for the double tug test, and failed to reengage it afterwards. This combination must have produced the alarms and warnings indicated in the table above namely:

- A warning chime (repeating approximately every 1 second).
- A brightened display.
- The letter "P" on an orange background.
- The text "*Apply parking brake"*(there is no evidence that there would have been an alternate alert, but even if there was it would have returned to this message every 5 seconds).

There would have been no audible voice warning in spite of some suggestions to the contrary.

How did the trailer parking brake come to be disengaged when the Claimant connected the red suzie?

52. There are only three possibilities: it was left disengaged by the Second Defendant, by the unidentified helpful stranger, or by the Claimant. I have already indicated by strong preference for the evidence of the Second Defendant as being my reason for finding that he had left the parking brake engaged. In any event of the three possibilities I find that the Second Defendant doing the opposite of what his training, experience, and motivation told him to do to be the least likely. It is also highly unlikely that a stranger, even a helpfully minded fellow lorry driver, would have interfered with the brakes without at least telling the Claimant he was doing so. On the Claimant's account the encounter with the stranger took place on the off side of the vehicle and the stranger than went back towards the rear of the trailer to install the registration plate. In the meantime the Claimant went round to the near side via the front of the tractor. In the unlikely event that the stranger decided to continue on round the trailer to disengage the parking brake button he would have been seen by the Claimant doing this. There is of course no real explanation why the Claimant would disengage the parking brake before connecting the red suzie, except that he was plainly unaware he had left the tractor handbrake off. For whatever reason the Claimant had already failed, despite the warnings referred to above, to take the most basic and easy precaution of engaging the handbrake. He had departed from his usual practice of installing the registration plate himself. His explanation for not touching the parking brake button makes no sense. These factors persuade me that the Claimant did a second thing he would not normally have done, and was contrary to safe practice, and disengaged the parking brake. That he would have done so is less unlikely than the other two possibilities and therefore I find that this is what occurred.

The claim

53. I now turn to the allegations of negligence against both the Defendants

The Second Defendant

54. The main allegation [paragraph 10(b) of the Particulars of Claim] against the Second Defendant is that he failed to engage the trailer parking brake. I have already given my

reasons for finding that he did no such thing. An associated allegation of failing to "make it plain" that the parking brake had not been applied fails for the same reason.

55. It is also alleged [paragraph 10(a)] that he failed to park the trailer so that if it were to move by reason of being unrestrained it would roll backwards against a kerb or other restraint. As he engaged the parking brake I consider that any such criticism has no causative effect. In any event there were no kerbs to park against. Even if there had been the Second Defendant could not have parked the trailer so it would roll into such a kerb: he was parking as he had been directed to at the top of a slope. The only theoretical way of stopping a forwards roll would have been to use chocks. While a form of chocks seems to have been available on most lorries, it does not appear to have been common practice to use them. One reason for this is clear. If the trailer parking brake is engaged, and the support legs wound down, the trailer will not move. It will only move if a coupling sequence is undertaken including the connection of the red suzie if the trailer brake is released and the tractor handbrake is disapplied. I find it unrealistic in those circumstances to expect the Second Defendant to place chocks under the wheels of the trailer. Therefore the claim against him fails

The First Defendant

56. Sixteen allegations of negligence are made against the First Defendant. Reference to breaches relating to their relationship with the Second Defendant are omitted as they do not survive my findings in relation to him. The allegations can be considered in groups:

i) Training and supervision: it is alleged that the First Defendant failed to provide adequate training to the Claimant [or the Second Defendant] in safely coupling and uncoupling a trailer to a tractor unit [paragraph 9(a)]. This is said to be contrary to the *Provision and Use of Work Equipment Regulations 1998*, but it is accepted that this is now a matter to be considered in the context only of common law negligence. At its highest the regulations are said to set a standard of care required by the common law. Associated with this allegation are the complaints that the First Defendant failed to provide sufficient health and safety information [paragraph 9(b)] or to check the Claimant understood the importance of following procedures for coupling and uncoupling trailers, monitor compliance with good practice, and failed to follow HSE guidance.

ii) Risk assessments and safe place of work: it is alleged the First Defendant failed to carry out a risk assessment to assess whether Staveleys Yard was suitable for this operation in the early hours of the morning. [paragraph 9(d)]. Associated with this allegation it is complained that they failed to ensure the yard was level, or adequately lit, or to find an alternative yard. [Paragraphs 9(e), (f), (g), (l)]

iii) Safe system of work and equipment: it is alleged that the First Defendant failed to ensure operatives left trailers so that they would roll backwards into a backstop rather than forwards if there was any mishap during the coupling process, and generally failed to provide a safe system of work [paragraph 9(h)]. It is further alleged that they failed to provide:

(i) chocks [paragraph 9(i)];
(ii) an automatic parking brake [paragraph 9(j)];

(iii)an alarm notifying the driver the parking brake had not been applied [paragraph 9(k)].

57. The First Defendant denies these allegations. They say the Claimant was a fully trained driver, had been aware of their handbook on the safety requirements for coupling and decoupling trailers, and fully understood how to couple trailers safely, and how air lines worked. He had undertaken some 100 collections and deliveries for the First Defendant before the accident and therefore was fully familiar with the necessary procedures. They point to

iv) The presence of warning lights which came on when the handbrake was not engaged;

v) The absence of a check that the trailer parking brake was engaged;

vi) The Claimant connecting the airline without engaging the parking brake in the tractor unit;

vii) His failing to reconnect the airline when the tractor began to move

58. They remind the court that by reason of section 47 of the *Health and Safety at Work Act 1974* as amended by section 69 of the *Enterprise and Regulatory Reform Act 2013* a breach of statutory duty no longer gives rise to a direct cause of action and that the cause of action is for a common law breach of duty to take reasonable care, which they say they took [First Defendant's defence paragraph 7.2]

59. In any event they say that the Claimant was the sole cause of the accident alternatively contributed to it very significantly by his own negligence.

The HSE Inspector's report

60. Following the accident the site was visited by an HSE inspector in August 2015. His report is dated October 2015. He observed that the yard was made up of compacted soil and hard-core. It was dry at the time of inspection with few holes or puddles present. He described the site as sloping "*gently*" downwards away from the road. I observe that the slope is quite visible in the photograph in this report just as it was in other material before me. He gave the angle as 4.5° and referred to a lighting report which provided more specific angles of the slope.

61. The inspector expressed an opinion that there was a foreseeable risk of being crushed by the vehicle. He considered the direct cause of the accident was likely to be the non-application of the tractor parking brake. Contributory factors were not using the trailer parking brake, not disconnecting the red suzie, the slope, poor lighting, combined alarms, a lack of safe systems of work and not following uncoupling best practice. He went on

> "*It is foreseeable that a vehicle may inadvertently roll down a slope and it is well known that drivers do not always apply parking brakes the consequences of not applying parking brakes are aggravated on this site by the steepness of the slope. If the tractor or trailer park brakes had been applied, the brakes were*

> *in good condition and fully operational and the red and yellow airlines connected then the trailer could not have run away*."

62. In his opinion the consequences of not applying the tractor parking brake needed to be mitigated by a risk assessment to identify the hazards on the site, such as potential harm to a person by being run over, reasonably foreseeable issues with equipment and sensible and proportionate measures to control the risks. He also concluded that

> "*… applying the tractor parking brake or removing the red line would have prevented this accident. A safe system of work should have been operated ensuring that visiting drivers follow industry best practice…*"

63. The inspector made recommendations about the site layout including the positioning of parking areas, and consideration of safety devices such as alarms, locks, and ensuring that drivers were aware of the need to and when to apply the brakes, and to supervise and monitor their use. His specific relevant recommendations were to:

i) Undertake a site specific risk assessment and implement the control measures;

ii) Implement additional control measures as the risks were "aggravated" by the slope, darkness at the site, use by various users, and accident history;

iii) Ensure that drivers apply the tractor unit parking brake, put it into gear, turnoff the engine before coupling or uncoupling;

iv) Ensure the trailer parking brake is applied before the tractor unit is disconnected even on negligible slopes;

v) Ensure drivers are aware of company procedures and site procedures including monitoring, supervision, training and instruction;

vi) Follow best industry practice;

vii) Enhance lighting at the site.

64. A notice of contravention of the *Health and Safety at Work Act 1974* was served on the First Defendant. It alleged that their risk assessment was insufficient in that it ignored measures which would reduce the risk of a rollaway. There was a list of measures it was said should be included, included consideration of automatic braking systems the clarity of alarms and the parking position.

65. The inspector was not called to give evidence but it was agreed I could have regard to his report. The fact that there may have been a contravention of a safety at work regulation does not mean that there has been negligence at common law. Such a fact may indicate a breach of a standard of practice, but again the test I have to apply is whether the precautions taken by the First Defendant were reasonable and proportionate steps to address a risk that a qualified driver might omit to apply two parking brakes on a unit parked on a slope. The fact that other measures might have been deployed is not in point; the issue is whether what the Defendant did was reasonable taking account of all the circumstances. Therefore the inspector's report is a helpful indication of what

might be possible but not necessarily of measures which are so essential that not to apply them would be negligent. As much is clear from the report. It refers to consideration of automatic braking systems. The Claimant's lorry had no such systems but it was not suggested that the use of such a lorry was in itself negligent in spite of such a system being one way to eliminate the risk of a driver not applying the brake manually.

HSE Guidance HSG 136

66. I was referred to guidance issued by the HSE in, I think 2014 [bundle page 833]. This enjoins employers to conduct risk assessments:

> "*You must control risks in your workplace. Risk assessment is about identifying and takis.ng sensible and proportionate measures to control these risks… you risk assessment will help you decide whether you should be doing more*."

67. Specific guidance [paragraph 107] was given about the measures to be taken for parking on a slope:

- *Apply all brakes*
- *Leave vehicles in gear if it is safe to do so*
- *Use wheel chocks or stops where appropriate*
- *Park vehicles facing up or down a slope, not sideways on…*

Drivers should be instructed in the safe use of vehicle and trailer brakes and monitored to make sure tha follow those instructions

68. Hauliers and site operators were advised [paragraph 110] to make sure that coupling and uncoupling areas are *"level, firm and well lit".* this appeared to be with specific reference to the risk of tractor units sinking under their own weight.

69. Lighting was said [paragraph 111] to be important for coupling and uncoupling to enable the safe checking of locking pins, clips and that hoses and cables were properly attached.

70. Under the heading "Parking Brakes" the guidance [paragraph 113] was

> "*When coupling or uncoupling hoses, always turn off the engine, apply the parking brakes on both the tractor and the trailer, and, where possible, remove the keys… never rely on disconnecting the red supply airline ["dropping the red line"] as a way of applying the parking brake. Always apply the trailer parking brake using t the control button on the trailer*."

Safe coupling and uncoupling guide

71. I have already referred to this guide when considering the Claimant's training and experience. It is a comprehensive guide to the processes to be followed on a lorry and trailer such as being operated by the Claimant. It starts [bundle page 426] by identifying the "*problem*" which almost precisely describes what happened to the Claimant:

> "*Fatal and serious accidents to drivers and damage to property occur when trucks and their trailers runaway when the correct coupling procedures are not followed When a runaway starts the driver will be in a position such as on the catwalk of the truck or at ground level on the nearside of the truck. In these positions it is very difficult for the driver to regain control of their vehicle without putting themselves at risk of serious injury.*
>
> *Fatal and serious accidents to drivers and damage to property can also occur as a result of a trailer rollaway. This is usually the result of poor practice by the driver who left the trailer without applying the trailer parking brakes, and the subsequent driver who couples the truck to the trailer without checking that the trailer parking brake has been applied*."

72. The guidance following this is unequivocal [paragraph 3.5]

> "*Parking brakes on trucks and trailers work independently of one another. It is important therefore, that both parking brakes are applied during coupling and uncoupling*"

The Code of Practice

73. This has also been referred to in the context of the Claimant's training and experience. It sets out in detail the procedure for coupling and uncoupling a trailer. The first stage of coupling is described: the tractor is reversed slowly towards the front of the trailer and stopped when the bottom of the "fifth wheel" ramps are level with the front of the trailer. At that point the driver is enjoined to

> "***Check the trailer parking brake is applied***."

The part that follows the double tug test states:

> **"*Apply the tractor unit parking brake, stop the engine and remove the keys.***
>
> *Connect the service air line (yellow) and electrical connections.*
>
> *Connect the emergency air line (red) and watch for an unexpected movement.*
>
> *Note: if the trailer moves, immediately disconnect the emergency airline (red) and* ***check that the trailer parking brake has been applied. [****emphasis in the original]*"

The training video

74. I was shown a training video which demonstrated in detail coupling and uncoupling procedures to be followed in order to pass the driving test. The Claimant agreed that these were the requirements consistent with what he was taught. To avoid overloading this judgment with yet more quotations from documents it suffices to say that it emphasised the need to check that the trailer parking brake was on, and that the tractor

parking brake should be applied after the 5th wheel has been engaged and the double tug test tried.

Employee handbook

75. The First Defendant's handbook which was signed for but not read by him before the accident gave safety requirements for coupling and uncoupling:

> "*Coupling to trailer with a tractor unit*
>
> *1. Check fifth wheel height and check trailer brake is applied before reversing under the trailer.*
>
> *2. Reverse tractor unit… until release lever clicks closed*
>
> *3. apply the handbrake on the tractor unit*
>
> *4. [check the fifth wheel]*
>
> *5. Apply safety clip … connect air lines, hydraulics and number plate.*
>
> *6. wind up trailer landing legs to the highest point*…."

I remind myself that the Claimant agreed that these requirements contained nothing of which he was unaware even though he had not read them at the time.

Expert evidence relevant to the allegations breach of duty

76. The experts agreed in their joint statement on many relevant points:

i) The suggestion in the Code of Practice that a voice alarm be considered was not specified in the legislation but was possible to fit. The alarm present on this tractor unit was the manufacturers system providing a generic chime which acted as a prompt to check the information display on the instrument binnacle.

ii) They agreed that the Claimant had several opportunities to apply or be reminded to apply the tractor parking brake when he was in the cab, and when he opened the door.

iii) They agreed that a check could have been made to see if the trailer parking brake was engaged by pulling the control knob. That should have been completed before reversing the tractor to engage the fifth wheel. If he had found the brake disengaged he should have applied it.

iv) They agreed that the employer's procedure did not require the engine to be switched off before leaving the cab, but that would not have prevented this accident had it been done.

v) They agreed that in accordance with the handbook a check of the tractor and trailer brakes should have been made.

vi) They agreed there was no evidence of the First Defendant supplying any training to the Claimant, but also that on the evidence they had seen the Claimant understood that the tractor parking brake should have been applied.

vii) They agreed that there was no site specific risk assessment before the accident .

viii) They agreed that chocks could have been provided but also that the use of chocks and ramps is not universal in the industry.

ix) They agreed it would have been possible to fit an automatic braking system but also that such equipment is not standard. In any event such a system would not have prevented a rollaway at some point if the tractor parking brake was off.

x) They agreed that a torch would have been needed to locate the trailer parking brake button

xi) Disconnecting the red line would have applied to semi-trailer's brakes but the effectiveness of this would depend on many factors.

77. The experts disagreed on the significance of training, the employer's assessment of the Claimant's competence and the sufficiency of their risk assessments. Their differing views will be considered in connection with each issue. However this is an appropriate place in which to consider the respective merits of the experts and therefore the weight to be accorded to their evidence:

i) Mr Mooney. Mr Mooney is a safety consultant with a qualification in occupational safety and health he was an HSE Inspector for 12 years until 1989. He has no specific expertise in the haulage industry, but has done safety projects with haulage firms. He did not consider it was necessary to have specific expertise in an industry to undertake or comment on risk assessments in it. He did not examine the tractor or trailer involved in the accident or any similar vehicles and he did not visit the yard. His report focuses largely on a description of the evidence, a recitation of the statutory requirements and a series of conclusions that certain deficiencies might have prevailed in relation to the system of work and risk assessment. With regard to his criticisms about training or its absence his focus was on what the First Defendant's procedure appeared to state they would provide, rather than on what might be a safe minimum. The Defendants challenged Mr Mooney's expertise, but in my view he did possess qualifications and experience in the relevant areas and therefore the Claimant was entitled to rely on his opinion as an expert. However the weight to be given to his evidence is another matter. The assistance he could offer was somewhat limited because he did not enjoy the benefit of an engineering background. As a result his approach was somewhat general. For these reasons I did not find his evidence particularly helpful or, where expressly critical of the First Defendant, persuasive.

ii) Mr Rawden, the First Defendant's expert, is a chartered mechanical engineer specialising in health and safety. He visited the accident site, examined the vehicle used by the Claimant. He analysed in detail the causes of the accident, the First Defendant's risk assessments and procedures, and the Claimant's

training and experience with detailed reference to the evidence made available to him. He answered questions put to him in a measured manner.

iii) Mr Kingham, the Second Defendant's expert was also qualified as a mechanical engineer. He has specialised in road traffic and other vehicle accidents and appears to have a particular interest in vehicle systems including their braking systems. He, too, inspected the scene of the accident . He was able to examine a tractor and trailer of the same type as that involved in the accident. His evidence was based on a careful analysis of all the evidence available to him. His description of the precise combination of warnings and alarms triggered by particular circumstances was of particular assistance to me.

General background

78. It was generally known that not all drivers put on trailer brakes all of the time.

i) The Second Defendant has said he has albeit not often come across trailers without the brake engaged.

ii) The HSE inspectorate noted in an email of 4 May 2016 [bundle page 699], after this accident, that there had been similar incidents, including fatal ones in the same area.

iii) When he visited Staveleys Yard the HSE inspector found trailers on which the brake had not been applied.

iv) The guidance shown to the Court indicates that these sort of incidents are known to occur.

v) The very existence of a term, rollaways, suggests that the industry generally knows this can occur.

79. The system guarding against this risk consisted of the following components

i) In order to obtain the relevant license drivers have to demonstrate competence in complying with safe coupling and uncoupling procedures. I was shown a training video and have also been referred to the HSE guidance and code of practice on the subject.

ii) Drivers were expected to know and understand the need to engage the tractor and trailer handbrakes and how to do this, and why that was important.

iii) The audible and visual warning described above were activated if the tractor handbrake was not engaged.

iv) The driver was required to check visually whether the trailer parking brake was engaged.

Training and supervision

80. The Claimant's account of the training, induction and supervision provided by the First Defendant has been described above but for convenience I repeat what I said then here.

i) He recalled being given a brief induction by the agency dealing with generic safety requirements but without reference to any technical aspects or procedure involved in the job. He was not given the First Defendant's company handbook at that time.

ii) He began work as a direct employee of the First Defendant on 9 February 2015. He stated he was given a copy of the handbook, which he signed for. He recalls being given the handbook at 7.00am when he arrived for his first shift. He was told he could read it at his leisure.

> *The attitude was, more or less, "here is the handbook, sign some forms so we can pay your wages and off you go."*

He denied he had been taken through the handbook as had been suggested in the HSE witness statement of Richard Dixon, the First Defendant's then health and safety manager. He agreed he had signed the Review Acceptance and Agreement on 14 February 2015. One of the three declarations signed on that occasion reads

> *I have read and understood the policies and procedures contained in the Bartrum Group's Staff Handbook (January 2014).*

It is this handbook which contains the required system for coupling and uncoupling trailers quoted above. In his witness statement the Claimant states that by 14 February he had not had time to read the handbook because he had been on the road the whole time. Nonetheless he candidly accepted that the handbook did not contain anything [in particular at pages 961 to 962 of the trial bundle] about the relevant procedures for coupling and uncoupling a trailer which he did not already know. This is not surprising as in general the procedures described in those pages are entirely consistent with the Code of Practice and the Guide.

81. In a statement made after the accident to an HSE inspector the Claimant said that when he started work for the First Defendant he was given instructions to apply the trailer parking brake. When this was put to him in cross-examination he clarified that he was simply taken out to the yard by a driver who told him where to park and to put the brake on: he told me this was nothing he did not already know.

82. The Court did not hear evidence from Mr Dixon, the First Defendant's safety manager, but there was a written statement by him. Apparently he has left the company but that was not a reason why he could not be called and therefore in so far as his statement is contradicted by other evidence including that of the Claimant I disregard it. However, while he described training provided by the First Defendant he made the following points amounting to admissions:

i) He did not train the Claimant who, he stated, had demonstrated he was a careful and competent driver whilst working through the agency.

ii) The First Defendant has been "*even more conscious"* of certain aspects of training since the accident: stickers have been placed on the rear of cabs reminding drivers of their responsibility to apply the handbrake.

iii) Automatic braking systems have been fitted to some vehicles.

iv) Sections of the handbook have been circulated to drivers with a notice.

v) Contact has been made with the owner of Staveleys Yard to ensure that HSE advice in connection with lighting and location of parking have been complied with.

83. The Court did hear evidence from Mr Watton, the Group Strategy Officer. He was a qualified HGV driver himself and understood the need to apply both brakes. He had never personally had a rollaway incident and had never not put on the trailer parking brake, except possibly when they are parked for servicing. He told me that the First Defendant had 134 tractor units and 300 trailers. The group had a turnover of £30 million.

84. He accepted that if the Claimant's induction was as he had described it, that was unsatisfactory. It would not have been satisfactory if the Claimant had not been taken through the handbook in accordance with the declaration he had signed. He was referred to a record of a meeting after the accident he had attended at which it was stated that the Claimant had not yet attended an employee induction as such training needs are not highlighted until 13 days after the employee has started work.

85. Mr Gomersall, the First Defendant's transport manager, claimed, contrary to an observation recorded in a note of a meeting after the accident, to have undertaken an induction with the Claimant. However, as he accepted this had not involved taking the Claimant through any health and safety points, this has limited relevance to the present case, even if it occurred.

86. Mr Mooney, the Claimant's expert criticised the absence of any training having been provided by the First Defendant. He agreed it is for me to decide whether further training ought to be have been provided with regard to coupling and uncoupling procedures. I observe that in his report Mr Mooney referred to the regulatory requirements for training, but appeared somewhat hesitant to identify what by way of training they should have provided. He speculated, probably correctly, that the First Defendant relied on the Claimant's qualifications. He opines that

> "*If I were engaging someone to drive a complicated, expensive and potentially dangerous piece of equipment, I think I would want something in the way of direct observable proof that the person was trained, qualified, and safe.*"

87. However he conceded that monitoring whether safe systems were being followed was not easy given that the drivers work alone and away from their base. He concluded his report by only going so far as to venture that "*it may be that*" the First Defendant did not provide the appropriate training. As indicated above I did not find his evidence persuasive on the training issue.

88. Mr Rawden said little about training issues but in his report suggested that the First Defendant's induction and their handbook contained appropriate information on the relevant procedures. However he did not consider expressly whether the Claimant actually underwent induction or read this material. In any event he considered that the

Claimant would have had sufficient experience and understanding of these that they should have become second nature. At the joint meeting he agreed with Mr Kingham's view, summarised below.

89. Mr Kingham considered that whether or not the Claimant had received specific instructions about what to do if the unit started to move, he would have expected him to be aware of the guidance on this. He considered that the training required to obtain his license and the ongoing training he would have been required to undergo were sufficient to entitle the employer to consider he was a competent driver without more, He considered that it was fundamental knowledge for the driver of any vehicle, let alone an HGV that the handbrake should be applied to prevent a rollaway.

Risk assessments

90. It is accepted that there was no formal, written risk assessment of the Staveleys Yard carried out before the accident. Mr Watton stated there was a risk assessment "*in place generally*" for coupling and uncoupling. A risk assessment had been carried out since the accident a copy of which he exhibited. This described as significant hazards contact with other vehicles, persons struck by vehicles, excessive speed, poorly lit areas and sloping ground. The control measures listed included requirements to adhere at all times to coupling and uncoupling procedure, to engage trailer brakes on any uncoupled trailers, avoidance of parking across slopes, and provision of lighting was to be available to enable walk round checks to be carried out safely. So far as the yard itself was concerned the transport manager Mr Gomersall said in a statement to the HSE that

> "*One of our drivers went to the site to see if it was suitable. They reported back to say that it was. A map was obtained of the yard*."

91. Mr Gomersall apparently spoke to the yard owners who told him there was 24 hour security and that they could accommodate 4 to 5 trailers. They said they had lighting and CCTV and that there was always someone on site. He told the court that the First Defendant had undertaken an average of over 78 trailer changes a month. He said that he had not considered visiting the yard himself. He was satisfied it was suitable before other people used it and it had a license. He went on to say that he had a driver look at the site and see what he thought and what it was like. He had not given him a check list. There were no designated spaces in the yard and, although drivers were now told to park at the bottom of the slope if there was room he would still allow parking at the top,

92. The Claimant referred in his written statement to risk assessments carried out on 9 March 2015, after his accident, in which the sloping ground and the requirement to engage the trailer brakes and the tractor handbrake are mentioned. He stated:

> "*I believe that if I had received these risk assessments or a specific warning in relation to them, I would have been more cautious and turned my engine off before getting out of the cab. I think I would also have taken longer in carrying out a check of the vehicle and the conditions in the Yard if I had seen the assessment*."

93. The experts agreed that there was no risk assessment specific to the use of Staveleys Yard, or of coupling and uncoupling procedures. Mr Mooney did not consider the risk assessments undertaken by the First Defendant adequate, noting they were improved upon after the accident. For him they did not identify a rollaway as a specific risk, made no reference to safe coupling and uncoupling procedures, or to the physical characteristics of the yard. Mr Rawden pointed out that whatever was or was not in a risk assessment, the handbook contained a safe coupling procedure. He asserted that this meant the Claimant had the appropriate training. That comment depends on whether the Claimant actually read the handbook. He told me he did not consider a risk assessment for the yard was necessary although it could have provided additional information

System of work and equipment

94. *Chocks*: the experts agreed that it would have been possible for chocks to have been supplied, and if correctly used would have prevented the accident. However, as already noted, they also agreed the provision and use of such equipment was not universal practice in the industry. Mr Rawden told me that when they had been used experience showed they were not a reliable control measure and introduced other risks, such as the risk of their springing out under pressure.

95. *Slope*: they agreed that a slope such as present in this yard was not a reason to deviate from the normal procedure. Mr Rawden did not consider the slope in this yard unusual for this sort of site.

96. *Warning notices*: they agreed that warning notices could have been provided but pointed out that they might not be read particularly in the dark. A torch was needed to undertake the procedure given the lighting in this yard, but the Claimant had and used one.

97. *Re-connection of the red suzie*: they agreed that this measure to stop a rollaway was expected to be covered in training for the license; Mr Mooney said it should be stressed in employer's training.

98. *Automatic braking systems*: while the experts agreed this could have been provided it was not supplied as standard by the manufacturer, and there were many vehicles in service without such a system.

Submissions

99. In summary Mr O'Sullivan QC on behalf of the First Defendant made the following submissions:

    i) For the combination of tractor and trailer to have rolled away the brakes of neither could have been engaged when the red suzie was connected.

    ii) There was a prescribed system of work as set out in the handbook, which in any event did not tell the Claimant anything he did not know or understand.

    iii) It was not credible that the Claimant had been instructed in the course of his training not to touch the trailer brake button

iv) The Claimant had provided no explanation why he failed to engage the tractor unit parking brake.

v) His explanation for not checking the trailer parking brake lacked credibility.

vi) The Claimant probably released the trailer parking brake himself.

vii) He was a well-trained driver and any failure to assess his competence is not causative: he was a competent driver, who understood the systems and procedure.

viii) While the risk assessment might lack detail the real issue was what other control measures should have been identified and implemented. It was not reasonable to have expected the employer to require chocks.

ix) The yard was a suitable place of work and was no different to many other places where a lorry might have to be parked.

x) Automatic parking brakes are not universal.

xi) Negligence cannot be inferred from the post-accident revision of the risk assessments

xii) If there is a finding of negligence there should also be a very substantial finding of contributory negligence in the bracket of 70 to 85%.

100. Mr Andrew Davis on behalf of the Second Defendant invited me to find as a fact that he had engaged the trailer parking brake. He attacked the Claimant's credibility on several issues such as the extent of his actual recollection of events and his training.

101. Mr McDermott QC whose submissions on behalf of the Claimant were distinguished by their realism and thoroughness, accepted that the Claimant's omissions had clearly been a cause of this accident, but the yard had presented a danger because of its slope. It was unacceptable that it had not been checked by the First Defendant and their approach to assessment even now was lacking. There was no evidence of an industry standard and it was for the court to set it. Proper training would have reinforced the importance of applying the handbrake and monitoring would have ensured the Claimant understood the importance of safety procedures. It was negligent not to have done a proper risk assessment and not to have provided a kerb or backstop against which the reverse the trailer. If the yard was not safe the risk could have been minimised by an automated braking system.

102. Mr McDermott reminded me of what had been said in the Supreme Court about the importance of risk assessments in *Kennedy v Cordia* [2016] UKSC 6: by Lord Reed and Lord Hodge [paragraph 89]: [emphasis supplied]

> "*The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in Allison v London Underground Ltd [2008] ICR 719 . Smith LJ observed at para 58 that insufficient judicial attention had been given to risk assessments in the years since the duty to conduct them was first introduced. She suggested that that was because judges*

> *recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause. Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree*."

103. That case concerned an actionable breach of statutory duty [predating the change of the law mentioned above] and the failure of a risk assessment to consider the possibility of providing protective equipment to a work facing the "dead cert" risk of slipping on snow and ice while visiting clients [see paragraph 92]. However the Court did consider the context of common law liability. [paragraph s110 and 111]:

> "*110. The context in which the common law of employers' liability has to be applied has changed since 1909, when Morton v William Dixon Ltd 1909 SC 807 was decided. As Smith LJ observed in Threlfall v Kingston-upon-Hull City Council [2011] ICR 209, para 35 (quoted by the Lord Ordinary in the present case), in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. The duty to carry out such an assessment is therefore, as Lord Walker of Gestingthorpe said in Fytche v Wincanton Logistics plc [2004] ICR 975, para 49, logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care.*
>
> *111. It follows that the employer's duty is no longer confined to taking such precautions as are commonly taken or, as Lord Dunedin put it, such other precautions as are so obviously*

> *wanted that it would be folly in anyone to neglect to provide them. A negligent omission can result from a failure to seek out knowledge of risks which are not in themselves obvious. A less outdated formulation of the employer's common law duty of care can be found in Baker v Quantum Clothing Group Ltd (formerly Taymil Ltd) (Guy Warwick Ltd intervening) [2011] 1 WLR 1003, para 9.*"

104. Mr McDermott referred me to that passage in the judgment in *Baker*, which itself cited the judgment of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783:

> "*From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.*"

105. Mr McDermott submitted that this passage was particularly apposite to the present case because rollaways were a known risk, there was significant relevant guidance, no steps were taken to assess the yard, and there were measures [ramps, finding an alternative, site, reinforcing safety instructions, automatic brakes] which could have been taken.

106. With regard to the actions taken after the event Mr McDermott referred me to *Goldscheider v Royal Opera House* [2019] EWCA Civ 711 paragraph 42 where the Court of Appeal noted that such actions might not prove negligence but they made it difficult to say that all reasonably practical steps had previously been taken.

107. Finally he submitted that while a finding of contributory negligence was inevitable any deduction should not exceed 50%, and the existence of contributory negligence does not exonerate a Defendant from the consequences of a breach of duty.

Discussion and findings

108. I accept the law to be derived from the authorities cited is as described by Mr McDermott and summarised above. Indeed this was not challenged by the Defendants. I have to decide what precautions a reasonably prudent employer should have deployed

to keep the Claimant safe during his work. Such precautions should take into account foreseeable events, including mistakes that could be made by the employee, particularly if such mistakes were known to occur. Such measures are likely to include training, risk assessments, and provision of appropriate equipment to address the risk. The duty of an employer to their employees is not confined to such measures as would be taken by any prudent employer, but will include such measures as they are actually aware of, or should have considered as part of prudent risk assessment. If there is a breach of duty to take such measures, the Claimant is still required to show that the breach was a cause of the injury.

109. I have already found as a fact that the Claimant by reason of his training and experience had a full understanding of the need to apply the brakes of the tractor and trailer. He knew the yard had a slope. He knew his vehicle was equipped with the warnings and alarms that have been described. He was a fully qualified and trained LGV driver and had, as I find, demonstrated his overall competence before the accident during his time working for the First Defendant as an agency driver. I find that the First Defendant has entitled to have regard to their knowledge of the Claimant's abilities in this regard.

110. The attitude of the First Defendant towards induction, and risk assessment left a lot to be desired:

i) *Induction*: It is not in my judgment sufficient merely to supply a new employee with a handbook and obtain, as I find they did, a signature declaring the employee has read it, when manifestly he could not have done so at that point. Acting in this way is likely to suggest to the employee that the requirement to read the handbook is a mere formality as opposed to a confirmation that he genuinely understands the employer's requirements for safety. On the other hand, the employer knew and were entitled to accept, that the Claimant was a competent, qualified and trained driver who understood the details and importance of accepted coupling and uncoupling procedures. There was nothing in their handbook which spelt out safety requirements in this regard which the Claimant did not already know. Therefore a more thorough induction process would not have resulted in the Claimant understanding or applying safety measures any differently.

ii) *Training*: apart from the failure identified above it is entirely understandable that the employer had not provided any specific refresher training by the time of the accident. The Claimant was a new employee, who was already complying with his personal obligations to undertake continuous training as evidenced by his certificates. There was nothing out of the ordinary for a qualified LGV driver about the work they would require him to undertake, and in particular there was nothing unusual about Staveley's Yard requiring special instruction. While there was a slope and the surface was as described the Claimant will have had to encounter such conditions on many occasions, as would almost any driver in this industry. Indeed it would be impossible for any driver of any vehicle not to encounter and have to stop and start on slopes as a matter of common experience. With regard to the requirements of coupling and uncoupling trailers, while complex to someone without the training, the procedures were well understood by the Claimant, who must relatively recently have demonstrated his competence in applying them in order to obtain his licence. There was nothing out of the ordinary about the tractor or trailer being used at the time of the

accident requiring special training. In particular the most basic and fundamental requirement of applying the tractor handbrake before disapplying the parking brake on the trailer, particularly but not exclusively on a slope, is so obvious it hardly needs to be repeated.

iii) *Risk assessment*: in my judgment the First Defendant as a prudent employer should have undertaken a formal risk assessment of Staveley's Yard before requiring their employers to use it. Merely to ask a driver to look at it and confirm that in his opinion it was acceptable was insufficient. The advantage of a documented risk assessment would have been to describe the slope, the lighting and the general conditions and thereby facilitate the consideration of any special risks and precautions required to address them. I am, however, not satisfied that in relation to the risk evidenced by the Claimant's accident at least, the more generic risk assessments described at paragraphs 56 and 57 of Mr Mooney's report were inadequate assessments of the risks regarding coupling and uncoupling. Clearly they could have been more detailed but they did identify the risk of being struck by trailer and crush injury, and the need for drivers to be trained, for vehicles to be parked safely. The reader experienced in the industry would have understood that the training would have included the correct use of the brakes in accordance with the relevant guidance, and that safe parking must involve the same. The generic risk assessment could have, but did not, consider the sort of safety features discussed at length in this case, such as automated braking systems, chocks, ramps and so on. However, for the reasons I address when I consider the issue of whether a safe system of work and equipment were provided, I do not accept that a prudent employer should have included them to address the risk of a driver not applying the brakes. There was a known risk of this occurring as evidenced by the industry's known experience of rollaway accidents. However it was known to the First Defendant, and indeed the Claimant himself, that such risks were addressed by the training he, like all drivers, received, and by the existence of multiple measures built into the equipment and normal procedures. Just because an additional measure is possible and even easy to provide, does not mean it has to be deployed if the existing measures are in themselves reasonably believed to be adequate. Therefore I conclude that any breach of duty to undertake an adequate risk assessment was not causative of the Claimant's injury. Such an assessment would not have required the introduction of measures over and above those in fact taken.

Safe system of work and equipment

111. There were multiple measures provided to address the risk of a rollway. They included:

i) The training undergone by the Claimant in safe procedures.

ii) His experience in applying those procedures on a daily basis demonstrating thereby his competence to apply them in varied conditions.

iii) The warnings and alarms activated when the handbrake was not applied as required. In my judgment they could not have been more explicit and required minimal attention by the driver.

iv) The double precaution of requiring the brakes of both the tractor unit and the trailer to be applied before the red suzie was disconnected, together with the additional requirement to check that the trailer brake was indeed engaged. As the Claimant's accident demonstrates, a considerable number of failsafe requirements had to be overridden to allow such an accident to occur.

112. I reject the proposition that it was unreasonable for the First Defendant not to have taken additional precautions because of the nature of Staveleys Yard. The type of surface and slope in question were not out of the ordinary. In particular, like any other driver, the Claimant will have been required to park and conduct coupling operations in many different surfaces and slopes. Put bluntly, that is what brakes are for.

113. The evidence about the specific additional measures it is alleged by the Claimant should have been provided, some of them, like chocks, are not without additional risks. Others, like automated braking systems, are yet to be standard, and in my judgment it would go beyond what should be expected of a prudent employer to ensure that all vehicles as equipped with them. While the First Defendant have now obtained parking spaces at the bottom of the slope it is in my judgment unrealistic and disproportionate to expect an employer to require their drivers to avoid slopes, or only park where there is a kerb to park against. As with so many points raised on behalf of the Claimant, one comes back to the simple proposition that the risk presented by a slope is reasonably mitigated by the presence of a system of brakes and warnings which is simple to apply and effective to prevent rollaways if followed.

114. For these reasons I find that the First Defendant was not in breach of their duty to provide a safe system of work and equipment.

Overall conclusions

i) *First Defendant*: for the reasons given I find that the First Defendant was not negligent in relation to training or the provision of safe system of work or equipment. There was a breach of duty in relation to the Claimant's induction and risk assessment but in neither case did the breach cause the Claimant's injury.

ii) *Second Defendant*: I have found as a fact that the Second Defendant did apply the trailer brake before leaving it in the yard. Therefore he was not negligent as alleged.

iii) *Contributory negligence*: If I am wrong in finding that the Defendants or either of them were not liable in negligence, it is accepted that there has to be a finding of contributory negligence. Having regard to the submissions made, I accept those of Mr O'Sullivan. The Claimant failed to implement that most basic of safety measures any driver, let alone the driver of an articulated lorry, has to take, namely the application of the handbrake. That failure persisted in the face of ample warnings audible and visible to the Claimant. There is nothing complicated about applying the handbrake in a vehicle which is on a slope. There were no distractions at the relevant time which can explain this omission. Criticism was also made of the Claimant's failure to disconnect the red suzie when the vehicle started to move. While this was a measure he would have been trained to take, I do not consider it fair to criticise him for not using it. It is

entirely understandable that he panicked at that moment. However owing to the first and most basic omissions of not applying the handbrake, ignoring the warnings and going on to connect the red suzie, there has to be a very significant and substantial finding of contributory negligence. In my judgement the appropriate deduction should be 80%.

iv) For these reasons I dismiss the Claimant's action.