NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

Contributory Negligence: Car v Pedestrian/Cyclist

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A flood of New Claims?

- Complacent pedestrians
- Social Distancing
- Born again & new cyclists
- Out of practice drivers
- Walking home from pub!

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Basic Principles

Pedestrian/cyclist vulnerability

- Pedestrians and cyclists most vulnerable road users:
  - Hard to anticipate speed approaching vehicles
  - Lack of high-vis or protective clothing
  - Inability to get out of the way quick enough
  - Bound to come off worse as no protective cage unlike vehicle driver
- Children, elderly and disabled at highest risk

Law Reform (Contributory Negligence) Act 1945

- Section 1:
- *Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to* ***such extent as the court thinks just and equitable*** *having regard to the claimant's share in the responsibility for the damage*

- *Section 4:*
- fault *means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.*

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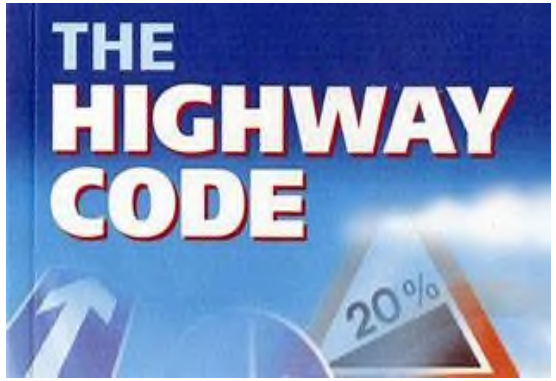
Raising Defence of Contributory Negligence



- D must specifically plead contributory negligence
- D has both legal and evidential burden to prove:
  - Fault on part of C
  - Causative effect of that fault
- Hence if C would have sustained the same injury regardless of his own negligence there will be no deduction (seatbelt being obvious example)
- The standard of care is judged by what is reasonable in the circumstances
- Objective test to be applied
- Highway Code useful indicator of reasonable roads user, (see section 38(7) Road Traffic Act 1988) but breach not necessarily equated with negligence – see Wakeling v McDonagh [2007] EWHC 1201 (QB)

Contributory Negligence

- Davies v Swan Motor Co (Swansea) Limited [1949] 1 All ER 620 CA, Lord Denning stated there are 2 aspects of what is just and equitable in apportioning liability under the 1945 Act, as assessing C's share in the responsibility for the damage:
  - The causative potency of a particular factor
  - The respective blameworthiness

- Important to note the historical origins of the 1945 Act which was designed to be pro-worker: previously any contributory negligence was a complete defence
- The act assumes there is fault on both parties – it is logically impossible to have 100% contributory negligence (see Pitts v Hunt [19900] 3 All ER 344

Contributory Negligence

- Denning LJ's comments in Davies v Swan Motor Co also approved in
  - Fitzgerald v Lane [1989] AC 328 HL
    - Accident on pelican crossing– struck by 2 vehicles from opposite directions. C walked when lights on red in heavy slow moving traffic. Judge apportioned 1/3 C and two D's
    - HL decisions re contributory negligence distinct from apportionment under Civil Liability (Contribution) Act 1978 and sequential approach required
    - If responsibility was equal then should 50% deduction for contributory negligence
  - Stapley v Gypsum Mines Limited [1953] AC 682 – workman case – 80% deduction where co-employees disregarded instructions from supervisor
  - See also Tompkins v Royal Mail Group PLC [2005] EWHC 1902 QB
    - Correct approach is to assess parties causative contributions
    - In light of this assessment, but not confined by it, to decide what is a just and equitable apportionment

BAKER v WILLOUGHBY [1969] 3 All ER 1528 HL

- Car v pedestrian crossing road
- C negligently failed to see D's car approaching
- D had clear view of C but was driving excessive speed/failing keep proper lookout
- Trial 25% contribution increased 50/50 CA but 75/25 restored in HL
- Per Lord Reid:

There are two elements in an assessment of liability, causation and blameworthiness. I need not consider whether in such circumstances the causative factors must necessarily be equal, because in my view there is not even a presumption to that effect as regards blameworthiness.

A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead: and if he is going at a considerable speed he must not relax his observation, for the consequences may be disastrous. And it sometimes happens, though I do not say in this case, that he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him. In my opinion it is quite possible that the motorist may be very much more to blame than the pedestrian….

LUNT v KHELIFA [2002] EWCA Civ 801 CA

- Appeal against 1/3 deduction for contributory negligence, in light of fact C drunk. D argued for 50/50:
  - C stepped out in front D's vehicle when 20-25 yards away and travelling at 25mph
  - C had been drinking: blood alcohol level 3.5x permitted level for driving
  - D not seen C before impact and had not braked
  - Court held that D should have been aware of pedestrians but C at fault for crossing without regard for oncoming vehicles
- CA dismissed appeal: Latham LJ
  - C's alcohol consumption explained his behaviour, but, when considering apportionment of blame, it was necessary to consider what L had done rather than why he had done it
  - C undoubtedly had to bear a substantial burden for the accident because he was the one who had created the dangerous situation by stepping out in front of D's vehicle.
  - D's blameworthiness: if D had kept a proper lookout, he would have been able to take effective evasive action and avoid the collision.
  - **As a high burden had been consistently imposed on drivers of cars to reflect the fact that a car was a potentially dangerous weapon**, judge entitled to hold that D was two-thirds to blame.
  - 33% deduction generous to C but Judge not plainly wrong.

SCOTT v GAVIGAN [2016] EWCA Civ 544 CA

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- C appealed decision that he was 100% to blame for collision with moped. C had run across road in alcohol-induced state into moped in unforeseeable manner
- Judge found D negligent – driving too fast (should slowed from 30mph to 20mph) – this would have avoided collision but D might still have crashed
- Judge concluded accident caused by C's gross carelessness, fuelled by excessive alcohol consumption, was so wholly unreasonable that it (1) eclipsed any wrongdoing of the driver; (2) constituted a new intervening cause between the driver's negligence and the injury suffered.
- On appeal:
    - Judge entitled to conclude not reasonably foreseeable that the pedestrian would run out into the road at an angle towards the driver and into the path of his moped. However, judge erred in finding the driver negligent. Visibility had been very good and he could see a considerable distance ahead, he was paying attention and there was no apparent danger. It had been open to the judge to find that if the driver had been going 10 mph slower he would have missed the pedestrian but, given the factual findings and his conclusion on lack of foreseeability, his finding of negligence on the part of the driver could not stand,
    - Doubtful C's behaviour was a new intervening act. Although recklessness could be sufficient to break the chain of causation, it should be exceptional for a C who had surmounted the hurdles of foreseeability, negligence, and causation to be denied any remedy.
    - Not that uncommon for C's to run out into the road carelessly or recklessly. D's who collided with such C's might not be held negligent, or a high level of contributory negligent found.
    - However, the reason for imposing liability on D motorists was because he should have foreseen a risk and he owed a duty of care not to injure even the foolish. It was difficult to see why he should be absolved of all liability and C's denied any relief except in extreme circumstances.
    - In the instant case, the judge had found that the pedestrian had run out into the road because he thought he could stop in the middle and look left before completing his crossing and had thought that he was much closer to a crossing than he was. If that disentitled him to recovery, there would be many cases in which recovery would be denied, where damages had been awarded in the past, albeit heavily reduced for contributory negligence.

WOOLRIDGE v GEORGE [2017] EWHC 332 (QB)

- C suffered severe brain injury crossing road between pubs. D travelling at 20mph failed to see C. C in road for 6 seconds before stepping in front of car.
- C wearing dark clothing but face & arms bare – contrast to dark road
- D should have seen C from 6 metres away and a slight change of steering sufficient to avoid accident. No emergency stop required.
- 30% contributory negligence:
  - The driver of a car had more responsibility than a pedestrian as a car could be a dangerous weapon (see Lunt & Jackson)
  - Intoxication alone not sufficient reason for a finding of contributory negligence (see Owens v Brimmell [1977] Q.B. 859) - question was whether he had put himself in a position to be hurt
  - Undoubtedly C had contributed to the accident. He had been drinking and he had possibly misjudged the speed and location of D's car. He had some responsibility but he had already been in the road as D approached and the greater blame fell on D as she had somehow failed to recognise what was before her.

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ADAMS v GIBSON [2016] EWCA Civ 3209 (QB)

- D driving on single carriageway 30mph limit & speed bumps. There was a pedestrian crossing & rails channelling pedestrians to crossing. There were parked cars in recessed bays
- C crossed road before crossing having been drinking and suffered severe injuries
- D's speed 20-25mph having crossed speed bump
- Primary liability:
  - C had stopped at kerb and crossed at 45 degree angle
  - Without stop, D would have had 5 seconds to brake – in fact had more and ample time to stop
  - D not explain how not seen C until moment of impact
  - D only seen 5 seconds pre-impact when foreseeable C might cross at angle
  - D failed to keep an eye on C or to slow down to avoid him in case he continued into the road.
  - Collision would have been avoided – as D approached a crossing at night, he knew pedestrians might be around, and had failed to exercise the care of a reasonably prudent motorist.
- Contributory negligence assessed at 33% - behaviour affected by alcohol consumption:
  - C had not looked to his right before stepping into the road: a prudent pedestrian seeing an approaching vehicle would not have stepped out
  - C had also chosen not to use the crossing itself, when he should have done and would on balance have avoid collision
  - Liability apportioned based on the parties' respective culpability, and the causative potency of their actions.
  - D, as the motorist, bore a larger portion of the liability, but C had had a serious disregard for his own safety. It was just and equitable to reduce damages by one-third

Contributory negligence & alcohol – other cases

- Liddell v Middleton (1996) PIQR 36 CA
  - Husband & wife crossing road. She ran across but husband remained stood in road as drunk. 25% deduction increased on appeal to 50%
  - Start-Smith LJ:

    It is not the fact that a plaintiff has consumed too much alcohol that matters, it is what he does. If he steps in front of a car travelling at 30 mph at a time when the driver has no opportunity to avoid an accident, that is a very dangerous and unwise thing to do. The explanation of his conduct may be that he was drunk: but the fact of drunkenness does not, in my judgment, make the conduct any more or less dangerous and it does not in these circumstances increase the blameworthiness of it.'
- See also:
  - Cook v Thorne & Parkinson [2001] EWCA Civ 81: 30% deduction for drunk passenger struck after getting out of vehicle to be sick in road
  - Green v Bannister [2003] EWCA Civ 1819: 60% deduction for pedestrian lying in road on cul-de-sac in drunken stupor. D reversed 35 yards at night drove over C – looking over right shoulder and not checking to left hand side.
  - Parkinson v Dyfed Powys Police [2004] EWCA Civ 802: 35% deduction for drunk C who walked out in front of police car, past parked taxi. D driving too fast – greater causative potency on part police officer.
  - Lightfoot v Go Ahead Group Plc [2011] EWHC 89 (QB): 40% deduction for drunken C walking diagonally into road to flag down bus in dark where no pavement. D should have avoided accident near bus stop but not keeping proper lookout as consulting timetable.

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EAGLE v CHAMBERS [2003] EWCA Civ 1107

- 17 year old C knocked down 11.30pm on dual carriageway with 2 rows parking spaces between carriageways on sea front. Road straight and lighting good. C in light clothing walked down carriageway long enough for bystanders and other drivers to urge her to stop.
- C emotional and not walking straight line – struck by D in offside lane travelling at 30-35mph.
- D failed roadside breath test, but was under drink drive limit when tested at the police station
- Judge found D should have seen C and taken avoiding action but found C 60% contributory negligent – she was drunk, emotional and placed herself in a dangerous position.
- On appeal, D accepted that C had only had 1-2 drinks

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LARGE LOSS PERSONAL INJURY

EAGLE v CHAMBERS [2003] EWCA Civ 1107

- CA allowed appeal: Hale LJ
- Court when considering what's just & equitable must carry out comparative exercise being fair to C & D
- A car can do so much more damage to a person than a person can usually do to a car. The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness
- There is a qualitative difference between a finding of 60% contribution and a finding of 40% which is not so apparent in the quantitative difference between 40% and 20%
- It was rare for a pedestrian to be found more responsible than a driver unless the pedestrian had suddenly moved into the path of an oncoming vehicle.
- There was no evidence in the case that C had staggered or changed direction suddenly.
- The court had consistently placed a high burden on drivers to reflect the fact that the car was potentially a dangerous weapon.
- The driver's conduct in this case was very much more causatively potent than that of C:
    - Car drivers had to be on the look out for pedestrians in the road.
    - It was to be expected that there might be pedestrians in that particular road at that time.
    - On the judge's findings the defendant would have failed to see and avoid any pedestrian, including one whose conduct could not be criticised.
- C's carelessness for her own safety was sufficiently blameworthy to justify a finding of contributory negligence but D was at least, if not more, blameworthy than her.
- Judge was plainly wrong to hold C more responsible than D.
- The right finding was contributory negligence was 40 per cent.

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JACKSON v MURRAY [2015] UKSC 5

- 13 year old C stepped out from behind school minibus on rural road with hazard lights on in fading light and sustained severe injuries when struck by D's car.
- Court at first instance assessed her contributory negligence at 90% - reduced to 70% on appeal by Court Session
- Primary liability:
  - D should have identified school bus ahead & fact children might alight foolishly seek to cross road
  - D should have reduced speed from 50mph (60mph limit) reasonably to between 30-40mph
  - That level of danger pointed to a very considerable degree of blameworthiness on D's part
- Contributory negligence: Supreme Court (Lord Hodge & Wilson dissenting) reduced the contribution to 50%:
  - It was not possible for a court to arrive at an apportionment which was demonstrably correct.
  - The apportionment of responsibility under the Law Reform (Contributory Negligence) Act 1945 s.1(1) was inevitably a somewhat rough and ready exercise
  - C did not look to her left within a reasonable time before stepping out or she failed to make a reasonable judgment as to the risk posed by D's car
- However:
  - C was only 13 and a 13-year-old would not necessarily have the same level of judgment and self-control as an adult.
  - C had to take account of the respondent's car approaching at speed, in very poor light conditions, with its headlights on.
  - The assessment of speed in those circumstances was far from easy, even for an adult.
  - Also pedestrian attempting to cross a relatively major road with a 60mph speed limit, after dusk and without street lighting, was not straightforward, even for an adult
- In circumstances, both parties equally blameworthy

Children:
ELLIS (A CHILD) v KELLY & ELLIS [2018] EWHC 2031 (QB)

Decision by Yip J:

- No contributory negligence where 8 year old child ran across road close to zebra crossing (at an angle), having been allowed to use playground without supervision. C had seen car's approach but continued running. Primary liability admitted – D travelling too fast
- Contributory negligence - there was no hard and fast rule as to the age at which a child could he found guilty of contributory negligence (see Gough v Thorne [1966] 1 W.L.R. 1387, per Lord Denning MR: "*A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense nor the experience of his or her elders. He or she is not to he found guilty unless he or she is blameworthy*." (See also Honnor v Lewis [2005] EWHC 747; Mullins v Richards [1988] 1 WLR 1304 & McHale v Watson [1966] 115 CLR 199).
- In judging the actions of a child, the standard of care was measured by that reasonably expected of a child of the same age, intelligence and experience
- The claimant's previous experience was that the crossing was the safe place to cross. When previously encountering cars approaching it, they would have stopped. It was a great misfortune that the first time he found himself unaccompanied on a road, he had encountered a car driven in a way wholly outside his experience.
- The only reasonable inference was that he believed the car would stop at the crossing for him. It was difficult for a child of eight to judge the stopping distance so as to understand that while the car should stop for the crossing it might be travelling at such a speed that it was unable to do so in time.
- There had been momentary misjudgement by C balanced against reckless conduct by D, whose driving had been outside C's expectation based on his understanding and experience. It would not be just and equitable to find contributory negligence in those circumstances

ELLIS (A CHILD) v KELLY
Guidance on Contribution Claims

- Contribution claim against mother failed – "*wholly wrong*" to find mother blameworthy :
  - Children had been told to stay together & reasonably expected they would
  - Mother had taken reasonable precautions by giving C road safety instructions
  - Holding her responsible would impose far too high a standard on an ordinary parent making ordinary decisions in the course of parenting as to how to keep a child reasonably safe while gradually being allowed more responsibilities and freedoms, Surtees v Kingston upon Thames RBC [1991] 3 WLUK 382 followed
  - Natural sympathy for a parent of a child who had been catastrophically injured could not stand in the way of finding legal responsibility in appropriate cases
  - Undesirable to expand the law so as to routinely attempt to regulate decisions and actions arising in the course of normal daily parenting. Parents were not reasonably able to secure insurance to guard against the risk of claims arising out of their parenting generally.
  - Further, if parents were to be routinely joined to litigation such as the instant case, there would be a real risk that that would encourage an over-cautious approach interfering with parents' assessments of when it was appropriate to allow children some freedom to foster growth and independence
  - Effect on litigation - parent who was best placed to act as the C's litigation friend could not do so. That could create difficulties in exploring quantum before liability was determined and inhibit settlement.
  - Real caution should be exercised by courts that considered claims against parents and by insurers in deciding whether it was appropriate to join parents, and close attention should be paid to the circumstances

PARAMASIVAN V WICKS [2013] EWCA Civ 262 CA

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- D successfully appealed 50/50 liability finding: D had been driving his car on a suburban road on a summer evening - to his right there was a layby/parking space and a small parade of shops.
- C, (who was 13) had been in a group of boys outside the shops and had thrown an ice-cream at a friend and then run away, between parked cars across the carriageway into the front offside of D's car.
- Primary liability: D had not noticed the group outside the shop or seen C until the impact. Judge held that D ought to have seen the group outside the shop. D had been driving at 25 mph, which was too fast in the circumstances and ought to have reduced his speed to 15 mph once he had seen the group.
- Contributory negligence: one of C's friends gave evidence that P had been looking back over his shoulder as he ran across the road. Liability apportioned 50 per cent each.
- CA held:
  - Judge's conclusion that C had been running at 3.6 metres per second was well within the range of possible findings of fact available to him, and there was no reason to interfere with it.
  - Judge's decision that D should have seen the group of boys and slowed to 15 mph was not a finding of primary fact - rather, it was a judgment of what was reasonable or unreasonable for D to have done. Conclusion was unrealistic and a counsel of perfection. The group had been quite a way from the lane in D was driving, separated by a pavement, parking bay and on the other side of the carriageway. There was nothing to suggest that they were about to run across the road. The boys were not small infants running indiscriminately, and had provided no reason to require every driver passing by to reduce his speed to as low as 15 mph.
  - There was a danger in the liberal use of hindsight, and a pedestrian's safety was not guaranteed, (Ahanonu followed). D not negligent in driving at 25 mph.
  - Judge's conclusion that D ought to have seen C was unchallengeable and inevitable.
  - The apportionment of liability equally could not stand. C was 13, but old enough to understand roads. He had created the hazard by doing something entirely unexpected and careless. W's only fault had been failing to respond as he should have done in the briefest of moments. In those circumstances, C was 75 per cent contributorily negligent and D's liability was 25 per cent.

AHANONU v SOUTH EAST LONDON & KENT BUS COMPANY LTD [2008] EWCA CIV 274 CA

- D bus company appealed against a decision of a judge that one of its drivers had been negligent when his bus collided with pedestrian.

  D following another bus out of bus station and negotiating a 90 degree left-hand turn when C was squashed between the rear end of D's bus and a bollard on the side of the carriageway.
- The carriageway was enclosed by railings but C had deviated from a pedestrian crossing and walked up behind the bus.
- Judge concluded that D was negligent (D should have checked his rear-view mirror in the seconds leading up to the incident), but damages were assessed on the basis of 50 per cent contributory negligence.
- CA overturned decision:
  - Judge had not taken sufficient account of the fact that C was probably moving quickly at the time of impact
  - There was no reason for D to expect pedestrians to take the dangerous path taken by C.
  - Finding that D should have kept his eye on his rear-view mirror imposed a counsel of perfection upon him and ignored the reality of the situation - it would have taken D's constant attention on his rear-view mirror to avoid colliding with C, but that itself would have created a hazard.
  - Buses exiting the station had to queue, and if D had taken his eye off the bus in front of him, there could have been a serious accident. In view of the dangerous actions taken by C and the importance of paying attention to the bus in front, the judge's finding of negligence was flawed and the bus company was not liable.

Contributory Negligence & Child Pedestrians – other cases

- Other cases involving children include:

- Ehrari v Curry [2007] EWCA Civ 120 CA: 70% deduction – 13 year old girl stepped out between parked cars on bust street struck lorry. D could have swerved and should been aware of presence of children on pavement
- Rooke v Liston [1999] EWCA Civ 749 CA: 33% deduction – 16 year old boy attempting crossing main road. D did not see C and did not brake. C should not have attempted to cross when knew not complete crossing due to approaching vehicles on other side of the road.
- Probert v Moore [2012] EWHC 2324 (QB): No contributory negligence on 13 year old walking along 60mph road in dark, when hedgerow forced her to walk in road. Pittaway QC J: '*an ordinary 13 year old should not be expected to consider taking the same level of precautions as an adult. It would be asking too much of her to say that she should not have started to walk home at all, waited for her mother or accepted lift, or should not have started to walk home without borrowing a high visibility jacket, reflective markings or torch from the stables. In my view those actions for a child of her age would have been a paragon of prudence.*'
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Contributory Negligence & Adult Pedestrians – recent cases

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BELKA V PROSPERINI [2011] EWCA Civ 623 CA

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- C knocked down by taxi in early hours crossing dual carriageway where joined roundabout
- C & friend crossing from refuge in middle carriageway
- C took deliberate risk and tried to run across in front of D – friend waited
- D's evidence was that he saw one person on refuge 30m away and only saw C at the last moment
- Judge found that D should have seen both men on refuge and reduced his speed, but that C was 2/3 to blame. In relation to causative potency 50/50 – actions of driver and pedestrian contributed equally to collision.
- C argued Judge not taken sufficient account Lunt & Eagle i.e. that D was driving dangerous weapon:
- On appeal:
  - D was at fault in not easing off accelerator in anticipation that a pedestrian, whom he had seen or ought to have seen, might decide to cross the road in an untoward way.
  - C at fault in taking deliberate risk in running across the road in front of a vehicle which had the right of way.
  - C was far more to blame than D - he had suddenly moved into the path of D's oncoming vehicle.
  - C's conduct in deliberately taking the risk of trying to cross the road in front of D's vehicle contributed more immediately to the accident than anything P did or failed to do.
  - It could not therefore be said that the judge was plainly wrong in his apportionment of causative potency

MARIA SABIR v OSEI-KWABENA [2015] EWCA Civ 1213 CA

- Appeal against 25% contributory negligence dismissed:
  - C crossing busy suburban road with shops – having exited from vehicle,
  - C crossed road few metres beyond pedestrian crossing, having seen D approach at “normal speed” and mistakenly assumed she had time to cross
  - D ha clear view on approach, but failed to see C and struck when 4metres into carriageway.
- On appeal, D’s argued that C should bear more responsibility because:
  - She had made a considered but flawed decision to cross the road
  - Pedestrians who step into the path of oncoming vehicles should attract a higher level of responsibility

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MARIA SABIR v OSEI-KWABENA [2015] EWCA Civ 1213 CA

- CA rejected D's arguments:
  - 2 aspects to apportioning liability: their respective causative potency and their blameworthiness.
  - Motorists had a high burden of causative potency because a car usually did more damage to a person than a person did to a car.
  - The destructive potential of a car, even driven at a moderate speed, was also relevant to blameworthiness, and made it rare for a pedestrian to be found more responsible than a driver.
  - Driving a car without keeping a proper lookout where pedestrians were reasonably expected to be present indicated a considerable degree of blameworthiness (see Jackson v Murray and Eagle v Chambers.
  - D's argument that pedestrians took a greater share of the responsibility if they stepped in front of an oncoming car could not be stated quite so baldly:
    - On the facts, the court could not accept that the pedestrian had taken a deliberate risk.
    - Crossing a busy road usually involved an element of deliberate risk-taking, but "deliberate risk-taking" in the instant context meant conduct such as the pedestrian setting off to cross the road when an accident was likely, unless the motorist took avoiding action, (see Belka v Prosperini)
    - C did not set out on an obviously unsafe errand. She was clearly blameworthy as she misjudged her own safety, but she had not put the motorist in danger or in an emergency situation;
    - D ought reasonably to have seen C and slowed. Not only did he fail to do that, but he failed to see her at all for a period significantly longer than the benchmark.
    - Both the causal potency and the blameworthiness of his conduct were very substantially greater than that of the pedestrian.

O'DRISCOLL V BUNDRED [2019] 1 WLUK 646

- HHJ Sefton QC Manchester CC:
- Counsel of perfection: pedestrian not required to wear light coloured, bright, reflective or high visibility clothing to avoid liability for contributory negligence during hours of darkness on residential street with normal lighting
- No contributory negligence when pedestrian crossed side road and car driver turned right from main road and cut onto the wrong side of the road.
- Pedestrian not obliged to wait until no traffic & would not have anticipated having to encounter traffic from main road until he approached centreline

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BRUMA (A PROTECTED PARTY) v HASSAN & ESURE SERVICES LIMITED [2017] EWHC 3209 (QB)

- C suffered catastrophic injuries crossing 4 lane road and did not use the close by pelican crossing. She was struck as she reached the centre of the road. Dark at the time and light rain. C wearing dark clothing.
- Primary liability found on driver, travelling too fast in dark on wet road when pedestrians in sight and failing to keep proper lookout.
- 20% contributory negligence, applying Eagle v Chambers:
  - C put herself needlessly at risk by walking across a four-lane road & not making use of the pedestrian crossing;
  - C misjudged the presence and approach of D's car, and its speed in particular;
  - C was wearing dark clothing on the upper body when crossing a road in the hours of darkness;
  - C failed to wait until the person who had given her a lift had driven out of sight before attempting to cross, and
  - C failed stop at the centre line, but attempted to complete her crossing and so walked into the path of D's car

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GLASS v DONNELLY [2016] NIQB 36

- Liability was apportioned 2/3 to the pedestrian and 1/3 to the motorist:
  - C crossed road close to pedestrian crossing & 40-50 yards from bend in road
  - C had stepped into road without looking
  - D travelling 30mph – too fast for the road conditions which warranted no more than 20mph
  - D only seen C at last moment as she stepped off curb
  - If D had been keeping a proper lookout, he would have seen C, and if he had been travelling at or below 20mph, he could have come to a stop without colliding with C
- Contributory Negligence:
  - C's contribution to the accident both in terms of blameworthiness and causation was greater than that of D.
  - If she had been paying sufficient attention both when she left the footpath and subsequently, D probably would not have been placed in the position of having to make an emergency stop.

GONZALEZ-RAMIREZ v FIRST EASTERN COUNTIES BUSES LTD & ANOTHER [2017] EWCA 3842 (QB)

- C crossing road in pedestrianised area near castle – 20mph speed limit in dark and heavy rain. C's partner ran across road to seek shelter.
- C followed, after single decker bus passed, and was almost at the other side of the road when she saw D's double decker bus, which was arms' length away. Tried to run back, but was struck by bus and suffered permanent brain damage
- Primary liability:
  - Bus driving too fast in 20mph pedestrianised zone
  - D's driver's evidence usually approached at 10mph (which was safe speed) but reconstruction evidence was bus travelling at 16mph and impact 13mph
  - Driver should slowed down as dark and heavy rain – had he done so, would seen C, despite heavy rain, poor lighting and C's dark clothes
- Contributory negligence assessed at 50%
  - CCTV showed bus would have been visible 8 seconds before she crossed the road
  - C probably looked right but not left
  - Left view would have been obscured by single-decker bus
  - C should have waited to cross until she had a clear view

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

WORMALD v AHMED [2016] EWCA Civ 823 CA

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- Appeal on primary liability by D taxi driver, after 60/40 split in pedestrian's favour:
  - C crossed one way street (with bus lane) diagonally from pub in Leeds at around midnight, where no taxis waiting
  - C was in road for 2.5 seconds before being struck by D travelling at 25-27.5 mph & 23mph at point of collision
  - D checked mirrors / blind spot for traffic joining from the right and had looked to the right in case pedestrians emerged from where the taxis were waiting. It was only after that that he saw C by which time it was too late to avoid an accident
  - Expert evidence was that if D had seen C leaving the kerb he would have had time to take action to avoid the accident
  - Post- judgment D asked the judge to make an additional finding on the length of the period during which C ought to have been seen by D and treated as a hazard (2.5 seconds).
  - On appeal, D sought to argue that the judge had failed to calculate how much time had been spent by D looking to the right which it had been reasonable for him to have done; and that in the absence of such a calculation he could not properly have made a finding that a failure to see C in time was causative.

- CA: Attack on the judge's additional finding about the period of hazard was misconceived and could not affect the decision he had already reached. Liability based on expert evidence that if D had seen C earlier an accident would have been avoided made a finding of negligence virtually inevitable. The issue was whether D had kept a proper lookout, and as he had not seen C until he was 3 metres into the road (and after passenger in his taxi had seen him), the judge was entitled to reach his decision that the appellant was negligent.

- Argument that judge had to add up the periods spent by D looking to his right to see whether the time he had left to take avoiding action would have made any difference was artificial and unrealistic. A reasonably prudent driver would monitor the road ahead. All that was required was a glance.

- Argument that without adding up the periods the judge could not properly make a finding on causation was also rejected. If D had looked ahead before or during looking to the right, he would have seen C earlier and avoided accident. Judge entitled to reach positive conclusion on causation on the basis that D should have looked ahead in time to see C step off the kerb and into the bus lane at a time when the accident could still have been avoided.

WALKER v CULINA LOGISTICS LTD (2016) Lawtel: Oxford CC – HHJ Charles Harris QC

- C crossing dual carriageway around midnight struck by HGV
- D driving at 44mph in the inside lane, on unlit section of road (street lights off). D saw C moving across beam of his lights - braked as hard as he could and swerved, but unable to avoid collision
- D first seen C 30-40m away. Expert evidence:
  - With dipped beam on unilluminated road pedestrian visibility was 40m
  - Reaction time 2 seconds in dark environment where nothing untoward expected
  - Impact speed 25mph
  - D travelled 20 metres from stark of braking of impact
- C's claim failed:
  - Pedestrians not expected in this area: no pavement, shops or pubs or other nightlife and the central reservation had two barriers
  - D had no reason to expect pedestrian, in grey clothing, might emerge to cross the dual carriageway on which his approaching lorry would have been manifestly visible for a considerable distance
  - D was presented with an acute emergency and reacted with appropriate powerful braking. He was not negligent.
  - C's own bizarre behaviour was the sole cause of his injury. Roaming in the dark across what he called "a motorway" in the face of a well-lit oncoming vehicle was an act of obvious and inexplicable folly
- Court rejected notion that drivers should never drive faster than the speed which enabled them to stop within the limits of their visibility:
  - Unrealistic to conclude that on an unlit dual carriageway no vehicle should drive at night on dipped beams at more than 27mph lest some unexpected pedestrian might attempt cross road;
  - This would conflict dramatically with both common sense and practice.
  - Position might well be different if driving in a busy urban area near schools or public houses or on lanes where people, horses or cyclists might reasonably be foreseen

SPARROW v ANDRE [2016] EWCA 739 (QB)

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- C and D were involved in a minor collision in crowded car park. C got out to inspect the damage. Defendant moved his car away and C's car rolled backwards down a slope. C attempted to hold the car back, fearing for the safety of his children who were in the car. As car increased in speed he was overwhelmed by it and could not get out of the way in time to avoid being crushed against the metal post - resulting in amputation.
- D admitted liability - causation in issue. C satisfied the "but for" test since but for the D's breach of duty which had caused the collision the C's car would not have been obstructed by D's car from completing its manoeuvre and leaving the car park; C's car would not have been left stationary at a dangerous position at the edge of the slope and C would not have got out of his car to inspect the rear damage to his car; his car would not have rolled backwards down the slope and hit the gate post; he would not have been trying to prevent his car from rolling down the slope and he would not have been injured in the collision with the gate post.
- However, court had to determine whether there had subsequently been an intervening cause of the damage, (a novus actus interveniens). The defendant was liable only if the damage caused by the breach was foreseeable as a matter of law, in the sense that it was not too remote. It was reasonably foreseeable that by reversing into another vehicle, personal injury to the occupants could be caused. Provided the chain of causation had not been broken D was liable for the personal injury actually suffered in consequence of the breach..
- D fairly and reasonably ought to be held liable for the entirety of the incident which on the facts flowed directly from his negligent act, Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd) [2009] EWCA Civ 1404 followed. Although there was negligence on the claimant's part it was secondary to, and arose in the context of the defendant's primary breach of duty.
- C's negligence was a material cause of his injury. C's car would not have rolled down the slope and injured C if he had engaged the car in "park" mode, or applied the foot brake, or switched off the ignition. Actions foolhardy - standing behind a car rolling down a slope, even if felt obliged to take that dangerous course of action - fearful his children might be injured if his car hit the electrical switch room and propane gas cylinders in the service area.
- The appropriate reduction by reason of contributory negligence was 60%

Recent Cycling Cases

ELSON v STILGOE [2017] EWCA Civ 193
No Liability

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- Cyclist riding on single carriageway with friend. D driving in opposite direction. C was overtaking line of stationary traffic
- C manoeuvred around puddle and onto D's side of the road and there was a collision
- Judge rejected C's (and witness evidence) that riding in single file and no reason why C, to whom it would have been clear that there was a car approaching, should not have stopped before he went around the puddle and entered the other side of the road.
- D had been driving properly and at an appropriate speed.
- If primary liability had been established. Judge would have found substantial contributory negligence: C was not wearing appropriate clothing and did not have a light on his cycle.
- CA rejected appeal: Judge's findings had presented a picture of D driving properly, confronted at the last moment by C who had made a decision to veer into his path without good reason.
- No reasonable ground for asserting that D should have taken account of the possibility of a sudden veering into his path without good reason by C.

McGEER v MACINTOSH [2017] EWCA Civ 79 CA

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- Appeal against apportionment between cyclist and HGV – 70/30 in cyclist's favour from HHJ Raynor QC in Manchester:
- D stationary at traffic lights – indicating to make left hand turn but straddling 2 lanes (left lane: left and straight on and right hand only) due to tight turn.
- C came from behind D in left lane on downhill stretch and collided with D turning left
- Primary liability:
  - C would have been visible in D's nearside rear-view mirrors for roughly 3 seconds before he moved off. Had D made a reasonably careful check in those mirrors, he would have seen C.
  - Common knowledge that accidents involving undertaking cyclists and HGVs were all too frequent. D accepted that road configuration gave the impression to someone travelling behind that he would be moving to his right.
  - In the exercise of reasonable care D should have checked again in his rear-view mirrors after he moved off and immediately before starting to turn left; had he done so, he would have seen C

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

McGEER v MACINTOSH (2)

- Contributory negligence:
  - C had to bear some responsibility - HGV would have been clearly visible to her for nearly 4.5 seconds before it moved off. C should have realised that D was straddling the two lanes, and she could not reasonably or safely assume that it was going to go straight ahead (for if it was, it would have been in the nearside lane).
  - Even though it appeared to move to its right as it moved off, C could neither safely nor reasonably assume, absent a right indication, that it was going to turn right. In proceeding down the slope at some speed (16.5mph) and with no ability to stop if the HGV made an unexpected manoeuvre, C was negligent and failed to heed the advice in Rule 73 of the Highway Code, which required cyclists to pay particular attention when long vehicles made left turns at junctions.
  - C should not have undertaken D, whom she had seen, or should have seen, to be straddling the nearside lane as she rode towards his vehicle.
  - However, the major share of the responsibility for the accident had to lie with D. The "causative potency" of the HGV was highly significant in assessing apportionment given the likelihood of very serious injury to a cyclist in the event of a collision.
  - D turned across the path of C when, had he exercised reasonable care, a collision would have been avoided.
  - His was a potentially very dangerous machine, as he knew.

PHETHEAN-HUBBLE v COLES [2012] EWCA Civ 349 CA

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- C cycling along a payment when he turned into the road and was struck by a car driven by D (newly qualified driver). The speed limit for the road was 30 mph.
- Primary liability established against D:
  - C had been travelling at 35 mph. C should have been travelling at 26/27 mph;
  - At a lower speed there would have been a greater likelihood that C's behaviour would have been modified C would have had more time in which to react in a way that might have avoided the accident and take evasive action and his injuries would have been less severe if C's speed had been lower.
  - CA stated C's "awareness" was capable of involving an element of assessment of other things about a vehicle in addition to its presence on the road (which he had noted), in the instant case notably its speed.
  - The extra time might have enabled C to assess the situation better and he might have modified his behaviour by waiting until the car had passed.
  - The judge had been entitled to say that, at a lower speed, C would have had more time to react and take evasive action, and that on the balance of probabilities P's injuries would have been less severe.
- Contributory negligence: C had contributed by leaving the payment ("bunny hopping" at an angle) in such a way that he was bound to move into the path on an oncoming vehicle. Contributory negligence assessed at 50 per cent, but judge found it *just and equitable* to reduce it to one third to reflect his age of 16
- CA found that it had not been just and equitable to reduce the damages by one third. There was no reason to treat C as if he were anything other than an adult - damages reduced by 50 per cent to reflect C's contributory negligence.

PHETHEAN-HUBBLE v COLES [2012] EWCA Civ 349

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- Judge at first instance considered issues arising out of the fact C was not wearing a cycle helmet:
  - Although there was no legal compulsion to wear a helmet, the appropriate starting point was to accept that a cyclist who failed to wear a helmet ran the risk of contributing to his injuries, Smith v Finch [2009] EWHC 53 (QB)
  - Although there was evidence regarding the potential benefit of helmets in head injury cases and the generally beneficial nature of wearing helmets, in the instant case, as there was more than one impact that caused severe head injuries, wearing a helmet would have had a minimal effect.
  - D failed to discharge his burden of showing that a significant albeit small part of the complex pattern of injury would have been prevented had C worn a helmet
- Smith v Finch remains the only High Court authority:
- It did not matter that there was no legal compulsion for cyclists to wear safety helmets because there could be no doubt that the failure to wear a helmet might expose the cyclist to the risk of greater injury; Mr Justice Griffith Williams*: As it is accepted that the wearing of helmets may afford protection in some circumstances, it must follow that a cyclist of ordinary prudence would wear one, no matter whether on a long or a short trip or whether on quiet suburban roads or a busy main road […] There can be no doubt that the failure to wear a helmet may expose a cyclist to a greater risk of injury […] and so subject to issues of causation any injury sustained may be the cyclists own fault and 'he has only himself to thank for the consequences'*
- Such a failure, like the failure of a car-user to wear a seatbelt, would not be sensible and so, subject to causation, any injury sustained might be the cyclist's own fault, Froom v Butcher [1976] Q.B. 286 applied.
- On the facts, wearing of a helmet would have made no difference to the injuries sustained. The scalloped shape of most modern helmets would probably not have prevented C's injuries, given the location of the impact on the back of his head. Even if the impact speed had been low enough for a helmet to have afforded protection, D had adduced no medical evidence to support his case that C's injuries would have been reduced or prevented by his wearing a helmet.

FAILURE TO WEAR CYCLE HELMET

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- Other reported cases on contributory negligence and failure to wear cycle helmet include Reynolds v Strutt and Parker [2011] EWHC 2263 (QB): cyclist participating in a cycling race organised by his employers, sustained a head injury following a collision with another competitor. C was not wearing a cycle helmet, and the impact speed was found to be below 12 mph. Claim against employer succeeded: D had failed to properly assess the need to recommend and require the participants to wear cycle helmets and had been negligent in failing to communicate information regarding the wearing of helmets. A combined finding of two thirds contributory negligence was made in light of C's reckless actions in the race and his failure to wear a cycle helmet.
- Highway Code recommends cycle helmet, but proving that wearing cycle helmet would have made a difference is difficult. Every case fact specific and other contributory factors might prove more fertile for insurers: i.e. standard of riding (e.g. ignoring red lights or checking speed/heart rate monitor), visibility (lighting/clothing), group riding and use of mobile phone/ear buds etc.
- Cycle helmets in UK are required to comply with the relevant European Standard and are designed to provide effective protection when the cyclist falls from a stationary riding height of one metre onto a stationary kerb shaped object, at an impact speed of no more than 12 mph.
- Helmets offer protection by distributing the impact force over a larger surface area and by absorbing some of the impact energy.
- Cycle helmets are not designed nor tested to offer effective protection to cyclists who collide with a moving vehicle or where there is a glancing blow mechanism of injury.
- Cycle helmets offer little effective protection in rotational skull injuries - wearing of a helmet could worsen the severity of head and neck injuries as it increases the head impact surface area, adds additional weight to the skull and may convert a direct force into a rotational force.
- Apparent from the above cases that expert liability and medical evidence likely to be crucial on helmet design, fit, level of protection offered, speed, the impact and mechanism of any head injury and the extent to which a suitable helmet would prevented or reduced the severity of injury.

SINCLAIR v JOYNER [2015] EWHC 1800 (QB)

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

- Claim by cyclist against car driver – travelling in opposite directions. Collision on bend. C had deviated into D's side of the road and suffered severe brain injury. Defendant driving at reasonable speed along a road she knew well, with family in the car, on a warm summer's evening in a quiet, rural location;
- Primary liability:
  - D failed properly to assess the hazard C presented as she drove around the bend. D saw C, and failed to stop when it was necessary to do so to allow C to pass by safely.
  - D noticed C's proximity to the centre of the road as soon as she saw her, and for the reasonable, prudent driver in those circumstances, alarm bells would have sounded instantly. Fact C riding on her pedals and not sitting on the saddle normally meant that D would have seen enough to form the view that she was in discomfort.
  - D not keeping a proper lookout as she came around the bend - fact that a collision occurred demonstrated that there was insufficient room for D to pass C in safely
  - Reasonable, prudent driver would have braked immediately to allow C sufficient room to ride past. C bore some responsibility - she should not have been riding her bicycle in a central position in the road, and her negligent conduct in doing so materially contributed to the damage caused.
- Contributory negligence: C bore some responsibility for the accident. She should not have been riding her bicycle in a central position in the road, and her negligent conduct in doing so materially contributed to the damage caused.
- Judge refused to make finding on contributory negligence in relation to the failure to wear cycle helmet as no medical evidence this had made injuries worse.
- Appropriate apportionment of fault for C was 25 per cent

RICKSON v BHAKAR [2017] EWHC 264 (QB)

- Experienced cyclist taking part in time trial on dual carriageway. D turning right in central reservation gap across C's path.
- D had been stationary for 4 seconds – collision with rear nearside wheel arch, having travelled 9-10metres at 10mph. Primary liability admitted.
- Contributory negligence:
  - A reasonable cyclist keeping a lookout on the road ahead would have had an opportunity to avoid the collision, either by stopping completely or because even slight deceleration would have enabled the van to pass without impact.
  - Claimant was experienced cyclist who had performed time trials on the same road twice before.
  - C was aware of the position of the junction and the hazard it presented to cyclists.
  - There was no reason why, if he was maintaining a forward lookout and had not dropped his head down over the handlebars, he would not have seen the van starting to move across at a slow and steady pace. Had he done so, he would have decelerated.
  - The possibility that he had put his head down (to lower drag and increase efficiency) or become absorbed in checking either his time computer on the handlebars or the position of his fellow competitors could not be discounted
  - A person in a situation of responding to danger could not be considered negligent merely because one of two available options to him turned out to be less effective. C might have braked instead of swerving which was a last-minute reaction when the opportunity had not been taken to brakes earlier. C's failure to observe or react when he had the opportunity to do so was culpable and constituted contributory negligence to the extent of 20%.

MALASI V ATTMED [2011] EHWC 4083 (QB)

- Accident between car and cyclist at traffic light controlled junction. Lights on green for D taxi – D traveling 41-50mph in 30mph zone. C emerged from side road against red light
- Court apportioned liability 80/20 against cyclist:
  - C had travelled through the junction against a red light. Had C complied with the traffic signal there would not have been an accident;
  - Had C reduced his speed by braking after he had crossed the junction his bicycle would have passed behind the taxi.
  - Plain that if C had complied with the red light, paid attention to the presence of the taxi and had taken even modest steps to take account of its approach, in particular by braking, a collision would have been avoided
  - Exceeding the speed limit which was fixed for the road was, technically, not per se negligent. However, any prudent motorist should have regard to the speed limit for the road on which he was travelling, not least because the speed limit was some indication to a prudent motorist of the likelihood of hazards being encountered and the nature of those hazards. Thus, D was negligent in driving at a speed and his negligence was causative of the accident
  - D's evidence was that he noticed C as soon as his vehicle had passed the sight screen of the hedge – hence questions of the use of dark clothing or failure to wear high visibility clothing were immaterial
  - In considering the Law Reform (Contributory Negligence) Act 1945, the accident had three causative factors, and If one of those factors had been removed, there would have been no accident and no injury:
    - C's failure to comply with the red light,
    - C's failure to apply his brakes in time to avoid the accident, and
    - D's excessive speed.
- Accordingly, the balance of fault lay very heavily with C. The extent of D's responsibility was dependent on him travelling at an excess speed through a green light, where he had a legitimate expectation that other road users seeking to enter the junction would comply with the traffic signals.

NICOL v KUPINSKI [2017] SC EDIN 71

- In the case of group riders, where cyclists ride at speed in tight formation just a matter of inches from the wheel in front of them, insurance companies may quote rule 126 of the Highway Code which states that every road user should maintain a safe stopping distance.
- There is clearly not enough stopping distance for group riders "*chain gang formation*" travelling at speed in the event that the rider in front brakes suddenly.
- In *Nicol* experienced cyclists were riding in a group when the front rider braked heavily to avoid a lorry unexpectedly pulling out from a parked position whilst overtaking.
- C was unable to stop in time before colliding with the rider in front of her.
- The argument for contributory negligence was rejected and D was found to be 100% responsible for the accident.

NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

Other Cycling Contributory Negligence Cases

- Lamoon v Fry [2004] EWCA Civ 591 CA collision between a car and an 18 year old cyclist. The cyclist was on the wrong side of the road cutting the corner and the car driver was driving at about 40 mph which the judge found was too fast. The cyclist was found to be 60% to blame for the accident. The Court of Appeal declined to interfere with that although agreeing decision appeared to have been generous so far as the cyclist was concerned
- Clenshaw v Tanner [2002] EWCA Civ 1848 CA 50/50 apportionment. C was cycling on cycle track overtaking slow moving traffic. D driving breakdown lorry turned left into petrol station and there was a collision. D liable for crossing cycle track without checking again before he turned or using his wing mirror. C failed to see D's signal. Appeal dismissed – cyclist fortunate to get 50% apportionment as in a racing position on his racing bike with his head looking down so that he did not see the lorry's indicator and did not appreciate that the lorry was turning until it had almost finished its turn when he looked up and tried to take evasive action.
- Allen v Conrwall Council [2015] EWHC 1461 – High Court dismiss appeal against permission to rely on cycling expert – rejecting argument that the standards to be expected of road users, whether drivers, pedestrians or cyclists were matters for the Court – it had been part of the Judge's broad case management discretion.

NINESTJOHNSTREET
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Questions?

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