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PERSONAL INJURY

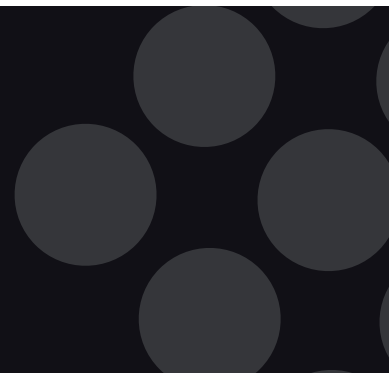
Stepping Out of Line

ABSTRACT

This article considers how the Court of Appeal has wrestled with issues of primary liability and contributory negligence in pedestrian running down accidents.

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Introduction

1. In **Paramasivan v Wicks** [2013] EWCA Civ 262 the Court of Appeal was required to consider issues of primary liability and contributory negligence arising out of a collision between a pedestrian and a motor vehicle. Rather surprisingly this appeal was the *fourth* appeal to the Court of Appeal within a period of about 18 months on issues of primary liability and contributory negligence arising out of pedestrian running down actions. Each of these appeals concerned injuries of the utmost severity.

A Dangerous Weapon

2. In the important judgment of the Court of Appeal in **Eagle v Chambers** [2003] EWCA Civ 1107, Hale LJ, giving the judgment of the Court, concluded

*“It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle...The court ‘has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon’:
Latham LJ in Lunt v Khelifa [2002] EWCA Civ 801, para 20.”*

3. **Eagle** appeared good authority for the proposition that the starting point for apportionment of liability in pedestrian running down cases would be on the basis that primary liability would rest with the driver. This area of the law appeared relatively settled following **Eagle** and for a period of approximately 5 years practitioners in the field seemed reluctant to appeal first instance decisions.

Primary Liability

4. In 2008 the Court of Appeal was asked to consider the issue of primary liability in a running down case.
5. In **Ahanonu v South East London & Kent Bus Co Ltd** [2008] EWCA Civ 274 the Court of Appeal allowed an appeal against a judge’s conclusion that a bus driver had been negligent when his bus collided with a pedestrian. D was driving his bus out of a bus station and moving very slowly due to the presence of a vehicle ahead and a sharp left turn when he crushed A between a bollard and the rear near side corner of the bus. The trial judge found that instead of staying on a pedestrian crossing which would have kept the Claimant behind the bus she had cut across the corner and come up behind the bus. Lawrence Collins LJ considered:

- a) A was probably moving quickly at the time of the collision;
- b) Even if pedestrian did use the carriageway D had no reason to think anyone would be near the nearside rear of his bus. He had just driven around the corner with the front of his bus and there had been nobody there to be seen.
- c) The judges finding that D should have kept an eye on his rear-view mirror imposed a counsel of perfection upon him and ignored the reality of the situation. There was a far more real and obvious danger. He was following another bus. If he had taken his eyes of the bus ahead there could have been a serious accident with the bus ahead.

6. Law LJ added this:

“23. I agree. The judge, as my Lord as has said, has in effect sought to impose a counsel of perfection on the bus driver Mr Votier. Such an approach I think distorts the nature of the bus driver’s duty which was of course no more nor less than a duty to take reasonable care. There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant’s safety than a duty to take reasonable care.”

- 7. Perhaps the words of Laws LJ gave encouragement to practitioners because within one year the Court of Appeal was being troubled by the issue of primary liability again.
- 8. In **Qamili v Holt [2009] EWCA Civ 1625** the Court of Appeal dismissed an appeal by Q who sustained injury when he collided with the side of a van whilst crossing a road. D had been travelling in the southbound carriageway at about 10 – 15 mph approximately 3 metres behind the vehicle in a line of heavy traffic. The northbound carriageway was “choked” with traffic. Q safely crossed the northbound carriageway and having reached the crown of the road walked straight out into the southbound carriageway without looking. He walked into the front offside wing of the D’s van. D did not see Q before the collision occurred. The judge rejected any suggestion that Q was drunk or running. The real issue whether Q was there to be seen by D for long enough for D to have failed in his duty to take care to look out for pedestrians and thus, in time, to take avoiding action by braking or swerving if that could have been achieved. The judge found on the facts that Q had been there for such a short period of time that no amount of care on the part of D could have prevented this collision. Rix LJ giving the judge

of the court refused to interfere with a decision that was correct in law and one the judge was entitled to make on the facts.

9. Rix LJ appeared to be influenced by a finding of fact “*that it was not possible to say with certainty whether Mr Qamili could have been seen threading his way through the traffic on the opposite side of the road before he reached the crown of the road between the two carriageways*”. The use of the language of ‘certainty’ is interesting. It could be suggested that it was possible to at least determine on the balance of probabilities whether Q could have been seen crossing the opposite carriageway.
10. The issue of primary liability came before the court again in the recent case of **Birch v Paulson [2012] EWCA Civ 487**. D was travelling at approximately 40 mph along an A-road when she saw B approximately 300 m ahead. B was stood at the side of the road looking towards her vehicle. A witness described B as rocking backwards and forwards although the judge accepted D’s evidence that she did not consider him to be any risk so paid no particular attention to him as he was someone simply waiting to cross the road. When D was a few metres away from B he stepped out into collision with D’s car. The judge made this finding of fact from the agreed expert evidence:

“Crucially, they are agreed that if the defendant was still travelling at 40mph in the centre of her lane at the point when the claimant stepped into the road then, having regard to the range of likely reaction times and the time it would take to undertake emergency braking, the collision could not have been avoided nor could the impact speed have been reduced to the extent that the claimant would not have sustained a severe head injury.”

11. The judge went on to consider that the risk of B attempting to cross the road at the last moment was “extremely remote” and held that a reasonably careful driver would not have considered it necessary either to brake, or to steer towards the centre of the road, still less to do both of those things.
12. Counsel for the Appellant stressed that it would have been very easy indeed for D to have taken her foot of the accelerator or moved to the centre of the road as she approached B.
13. Davis LJ giving the judgement of the court said:

“But, as the judge rightly said, the legal test is not a question of the counsel of perfection using hindsight. Of course it is not, and drivers are not required to give absolute guarantees of safety towards pedestrians. The yardstick is by

reference to reasonable care. As the judge found, there was nothing here to require the defendant as a reasonably careful driver to act in any way other than the way in which she did act given the situation in which she found herself at the time.”

Contributory Negligence Revisited

14. **Belka v Prosperini [2011] EWCA Civ 623** was an appeal by B against a decision that he was two thirds to blame for an accident. B in company with a friend was crossing a dual carriageway in the early hours of the morning. B had crossed two lanes of the dual carriageway and had reached the refuge halfway across. B decided to cross in front of D’s oncoming vehicle whilst his friend waited at the refuge. The judge held that D should have seen two men on the refuge when he was approximately 30 metres from the refuge however D gave evidence that he had only seen one man on the refuge and first saw B in the moments before the collision. The judge concluded that *“with a better lookout, and a slight easing of speed I am satisfied that the accident would have been avoided”* because the appellant would then have crossed the road in front of the taxi.
15. The reasons why B appealed are clear – the judge was satisfied that the accident would have been avoided if D had kept a better look out and eased his speed. That was not a counsel of perfection but something D should have done in the circumstances.
16. Dismissing the appeal Hooper LJ giving the judgment of the court said:

“In my view this is a case where, on the judge’s findings, the pedestrian “has suddenly moved into the path of an oncoming vehicle”. Or, to use the words of Lord Reid, this is a case where the appellant’s conduct in deliberately taking the risk of trying to cross the road in front of the taxi contributed more immediately to the accident than anything that the respondent did or failed to do.”
17. Months later in **Rehill v Rider Holdings Ltd [2012] EWCA Civ 628** the Court of appeal substituted the trial judge’s finding of one third contributory negligence to one of 50/50 division.
18. R stepped onto a controlled pedestrian crossing in front of a bus when the crossing lights were showing red against him. The bus was travelling at approximately 4 mph. The judge found that D should have noticed R when he stepped off the pavement and should have braked accordingly. Had he done so then, although an accident would not have been avoided,

the front wheels of the bus would not have gone over R and serious injury would have been avoided. Contributory negligence was assessed at one third.

19. On the issue of contributory negligence Richards LJ giving the judge of the court said

“31. The claimant’s action in stepping into the road when the red man was against him and the bus was so close was described by the Recorder as the result of “his misjudgement or his simple failure to look out”. I view that as an understatement. This was a controlled pedestrian crossing with the red man showing against pedestrians. That was a strong reason in itself why the claimant should not have attempted to cross at all. If he was minded to attempt to cross despite the red light, it was plainly incumbent on him to check very carefully indeed on the state of the traffic. It is not clear from the CCTV frame at 13.17.31 whether he was looking in the direction of the bus as it approached; but at 13.17.33 he was definitely not doing so. He was seriously blameworthy; and as Mr Jeffreys submitted, his lack of care made a collision with the bus inevitable.

32. On the other hand, the really serious injuries arose not from the initial impact but from the wheel of the bus going over the claimant, and in terms of causative potency I would ascribe greater weight to the conduct of the driver in failing to brake when he should have done: as the Recorder said, the injuries very largely flowed from the lack of prompt braking. More generally, a heavy responsibility rests on the driver of any bus in a town centre, and it is plain that a substantial degree of blameworthiness must attach to the driver’s failures in this case.

33. Overall, even though the claimant moved into the path of the bus, I do not think that this is one of those cases referred to in para [16] of Eagle v Chambers where the pedestrian should be found more responsible than the driver for the injuries he sustained. I do, however, consider that he should share responsibility for those injuries on an equal basis. There is a qualitative difference between a finding of equal responsibility and a finding of one-third responsibility, and the difference is such as in my view to justify interfering with the apportionment made by the Recorder.”

The Present Position

20. Earlier this year in the case of **Paramasivan v Wicks [2013] EWCA Civ 262** the Court of Appeal had reason again to interfere with a trial judge's finding on contributory negligence.
21. D was driving along a suburban road with one lane in each direction. On his right were some shops, a pavement and an additional width of road described as a layby or parking area. It was dusk and his headlights were on. P, aged 13, was with a group of youngsters outside of the shop. Suddenly and without warning P threw an ice cream at one of his friends and ran away across the pavement, across the parking bay (between parked cars) and across the northbound carriageway and into collision with D's vehicle that was travelling in the southbound carriageway. Although D was travelling at only 25 mph on approach to the shops and had taken his foot off the accelerator D did not notice P until the collision.
22. The judge found that D should have seen the group of youngsters gathering to his right, that 25 mph was too fast in the circumstances and that D should have driven at a speed of 15 mph. Had he done so an accident would have been avoided.
23. Approving the observations of Laws LJ in **Ahanonu** Hughes LJ said:

“The judge held that the defendant should have seen the knot of youngsters outside the shop and should at that stage have slowed to a speed of 15 miles per hour. That is not a finding of primary fact, with which this court would be very slow indeed to interfere. Rather, it is a judgment of what it was reasonable or unreasonable for the defendant to do. I bear very much in mind Mr Bleasdale's sensible submission that it is a finding geared only to the particular facts of this case. It is not in terms a general conclusion that every driver who sees a group of youngsters outside a shop on the far side of the road should drive past at 15 miles an hour. But, even limited to these facts, I am not in the slightest doubt that the judge's conclusion is, in this respect, simply unrealistic. It is not a counsel of reasonable care, but of perfection. These youngsters were quite a little way from the carriageway in which the defendant was travelling. They were on a pavement separated from his carriageway, not only by the northbound carriageway oncoming for the defendant, but also by the parking bay and some part of the pavement area. They were doing nothing whatever to suggest that anybody was about to leave that comparatively distant, and certainly safe, area, and run across the road. They were not small infants running around indiscriminately and sending a signal that something dangerous was about to happen. Laughing and talking together they may well have been, but they did

not, I have no doubt, provide any reason to require every driver passing by on the far side of the road to reduce his speed to as low as 15 miles per hour.”

24. However D had failed to see P at all:

“...the defendant had just over two seconds, 2.1 seconds, to see the claimant and (of those) 1.1 seconds to brake. Those are not long periods, but they are significant in terms of moving vehicles and people. In those 2.1 seconds, the claimant is emerging from a line of parked cars on the defendant’s right, in his direct field of view. He is emerging at speed, running, and he is running across the off-side lane. That is without any consideration being given to whether the defendant had any opportunity to see him immediately before that as he left the knot of friends and started his run. On those facts, the judge’s conclusion that the defendant ought to have seen the claimant and was in breach of duty in not doing so is, to my mind, not only unchallengeable but inevitable.”

25. On the issue of apportionment:

“...the claimant was 13. That is, however, quite old enough to understand roads. It was, sadly, the claimant who created the hazard and he did it by doing something entirely unexpected and, sad to say, very careless. The defendant’s only fault was to fail to respond, as he should have done, in the briefest of moments. Once there is removed from the case the additional complaint that he was travelling too fast, a 50/50 apportionment simply cannot stand. I do not, myself, arrive quite at the figure for which the defendant contended, but I have little doubt that the appropriate apportionment between these two parties is 75/25: that is to say, there is 75 per cent contributory negligence.”

Analysis

26. It is noteworthy that none of the above cases involve very young children. The courts are likely to be more sympathetic in the case of a young child, see for example **O’Connor v Stuttard [2011] EWCA Civ 829** in which the Court of Appeal allowed an appeal against a first instance decision that a driver had taken reasonable care when he struck a child who had stepped back from the kerb. There was a high duty of care on the driver and although the child’s movement was unpredictable it was for the defendant driver to ensure that it was safe to proceed.

27. At face value the principle enunciated in *Lunt* and *Eagle* seems straightforward – the driver of a potentially lethal weapon will often bear the greater share of responsibility unless the pedestrian moves suddenly into his path.
28. If a pedestrian moves suddenly into the path of an oncoming vehicle a collision is likely to follow unless the defendant is able to take evasive action. If the defendant, exercising reasonable care, is not able to take evasive action primary liability may not attach. Although the issue of primary liability or no liability is often finely balanced the cases of *Ahanonu*, *Qamili* and *Birch* suggest that the Court of Appeal will not, with the benefit of hindsight, impose a counsel of perfection on the Defendant; that they are both alive and sympathetic to the realities of driving in the modern world.
29. If the defendant could have avoided the accident or reduced the severity of injury by sudden braking or swerving then issues of contributory negligence arise.
30. But, how ‘*rare indeed*’ is it for a pedestrian to move suddenly into the path of an oncoming vehicle? That scenario appears to have been the precise facts of the cases reviewed in this article. How many pedestrian road traffic accidents do not involve a pedestrian suddenly or unexpectedly walking or running out in front of an approaching vehicle? Experiences may vary but many pedestrian running down accidents fit this general description. It could be argued that it would be *rare indeed* for there to be a collision in circumstances where the pedestrian is stood waiting in the road for an oncoming vehicle to collide with him/her.
31. Will trial judges be assisted by arguments over whether a pedestrian’s movement was ‘sudden’ or merely ‘*unexpected*’? Just how sudden or unexpected must a pedestrian’s movement be for the Defendant to avoid liability or for the Claimant to be regarded as more blameworthy than the Defendant? In a post-Jackson world does such detailed analysis of the Claimant’s movement pre-accident reasonably require accident reconstruction evidence to consider the Defendant’s speed and the Defendant’s visibility in conjunction with the Claimant’s movement across the road?
32. The cases of *Lunt* and *Eagle* are generally regarded as cases favourable to the injured pedestrian. The recent line of cases such as *Belka*, *Rehil* and *Paramasivan* suggest that the Court of Appeal may regard a pedestrian more to blame than the driver of a vehicle in what can often be described as typical scenarios. It is open for debate as to whether the Court of Appeal’s approach has shifted and whether it now really means that in most cases the pedestrian should be more to blame than the driver of the motor vehicle.

Conclusion

33. The above authorities suggest that in some 'stepping out' cases, not involving young children, the pedestrian is at risk of being found equally, if not more, to blame than the motorist, particularly where speed is not in issue.
34. It is an interesting fact that in the 6 cases considered in this article which followed *Eagle*, 3 were appeals brought by the Claimant and 3 were appeals brought by the Defendant, the Defendant was successful in all 6 appeals. This might be explained by the particularly difficult facts of these cases which are more likely to attract the involvement of the appeal courts.
35. The judgment as to the balance of blame in stepping out cases is a very fine line. Even if the hurdle of primary liability is surmounted the court has indicated that a momentary failure by a driver to brake or swerve may not be regarded as more blameworthy than a pedestrian who steps out in front of an oncoming motor vehicle.
36. It remains to be seen how these Court of Appeal decisions will affect trial judges and to what extent these litigation risks will be reflected in negotiations in high value cases.

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