RTAs and Vulnerable Road Users

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The issues

- New/inexperienced cyclists on roads?
- More people out walking?
- Prospects on liability?
- Levels of contributory negligence?
- Recent cases
- Highway Code reforms?

The duty owed/standard of care

- Road users, (both vehicles and pedestrians) owe a duty to take reasonable care in the circumstances. The standard of care of a driver is judged objectively.
- Classic statement of the standard of care Coulson J (as then was) in *Stewart v Glaze* [2009] EWHC 704 (para 5):

> *I have to apply to [the Defendant's] actions the standard of the reasonable driver. It is important to ensure that the court does not unwittingly replace that test with the standard of the ideal driver. It is also important to ensure, particularly in a case with accident reconstruction experts, that the court is not guided by what is sometimes referred to as '20-20 hindsight'.*

Breach/foreseeability of harm

- Court must therefore decide on the expected standard of driving of the reasonable driver not with the use of hindsight but by considering (inter alia) risks that a reasonable driver ought reasonably to have foreseen.

- Most often quoted definition: In *London Passenger Transport Board v Upson* [1949] AC 155 at 173, Lord Uthwatt stated:

> *"[I] dissent from the view that drivers are 'entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care.' It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take."*

The Highway Code/RTA

- Section 38(7) of the Road Traffic Act 1988 states:

  "A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal…) be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings"

- Breach of the HC therefore is relevant and *prima facie* evidence of negligence.

- *Goad v Butcher & Anor* [2011] EWCA Civ 158 Moore-Bick LJ, at [9]: "*A failure to observe the Code may be evidence of negligence, but whether it is will depend very much on the circumstances in which the act in question was committed and who is the claimant*"

- A breach must be causative to support liability.

Contributory Negligence

- Lord Denning in *Froom v Butcher* [1975] RTR 518: "*Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might be hurt himself*"
- It **must** be pleaded and the burden is on the Defendant
- Causation must be proven by the Defendant
- *Davies v Swan Motor Co (Swansea) Limited* [1949] 1 ALL ER 620 CA, Lord Denning, at [326]: "*The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the* ***causative potency*** *of a particular factor, but also of its* ***blameworthiness***"

Contributory Negligence (2)

- Concept of “blameworthiness” can cause difficulty
- *Baker v Willoughby* [1969] 3 All ER 1528 HL
  - Pedestrian (“C”) crossing the road, negligently failed to see D’s vehicle approaching.
  - D had clear view of C, but was speeding and failed to keep a proper lookout.
  - “*Both parties had a clear view of each other for 200 yards prior to impact and neither did anything about it*”
  - Trial judge found 25% contributory negligence, Court of Appeal 50%, House of Lords back to 25%. Lord Reid at [490]:

> *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. and in the present case I can see no reason to disagree with the trial judge's assessment.*

Contributory Negligence (3)

- Difficult to challenge findings upon appeal
- *Jackson v Murray and Anr* [2015] UKSC 5, as per Lord Reed:

> *In the absence of an identifiable error, such as an error of law, or the taking into account of an irrelevant matter, or the failure to take account of a relevant matter, it is only a difference of view as the apportionment of responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong. In other words, in the absence of an identifiable error, the appellate court must be satisfied that the apportionment made by the court below was not one which was reasonably open to it."*

Pedestrians

- Pedestrians are the most vulnerable road users (particularly if very young, very old, or disabled): they have no protection and lack the speed to escape injury.
- The usual battle ground will be the level of contributory negligence (if any) that can be established against a pedestrian
- Relatively rare for there to be a situation where a pedestrian not entitled to judgment (when struck on road), but not impossible.
- Each case will turn on its own facts (authorities of limited assistance).

Destructive Disparity: car vs. pedestrian

- *Eagle v Chambers* [2003] EWCA 1107, Hale LJ

  At [15]:

  > *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;*

  At [16]:

  > *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.***

- *Lunt v Khelifa* [2002] EWCA Civ 801, Brooke LJ, at [20].

  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"***

Wooldridge v George [2017] EWHC 332 (QB)

- C suffered a brain injury when struck by D's vehicle; C was slowly crossing the road from one pub to another, having been drinking
- D was not distracted, and only driving at 20 - 25 mph, but did not see C before impact
- HHJ Walden Smith, held:
  - D had at least 6 seconds to see C, but had failed to do so. Although it was dark, and C was wearing dark clothing, his arms and face were not covered and would have been visible
  - D would not need to have performed an emergency stop to avoid accident, a slight change to steering would avoided collision
  - C's intoxication was not of itself a reason for a contribution finding (*Owens v Brimmell* [1977] Q.B. 859 applied)
  - C 30% negligent due to the likely misjudging of speed and location of D's car
  - Greater blame fell on D who failed to recognise what was in front of her
  - A generous judgment for the Claimant?

Bruma v Hassan & Esure Services Limited [2017] EWHC 3209

- C suffered catastrophic injuries when struck by D's car
- C was midway through crossing a four lane road when she was struck - there was a pelican crossing further down the road
- Held, finding 20% contribution, HHJ Curran QC:
  - The maximum speed D should have been travelling was 20 mph. It was dark and wet. The speed limit was 30 mph. C was probably travelling in excess of 20 mph
  - C would have been visible to D for 2.5 seconds pre collision
  - Although degree of fault on behalf of D was "*not very great*" it did fall below standard expected
  - C had put herself needlessly at risk by walking across the four lane road, and not using the pedestrian crossing
  - C misjudged the presence and approach of D. C was wearing dark clothing on upper body when crossing road in hours of darkness. C failed to wait at centre line, and rather tried to cross in one attempt
  - Another generous judgment for a Claimant?

O'Driscoll v Bundred [2019] 11 WLUK 646

- C was struck by D's vehicle when crossing a side road at a suburban junction.
- As he did so, D turned into the road, and drove on the wrong side of the road, colliding with C.
- Primary liability was admitted, with contributory negligence alleged.
- D argued that C had failed to keep a proper look out
- Held, finding in full for C, HHJ Sephton:
  - The lighting in the street was typical
  - C was not obliged to wait until there was no traffic at all on the main road before crossing.
  - C would not have expected to encounter traffic from the main road until he approached the centre line, by which stage he would have been well established in the junction and could expect vehicles to give way to him.
  - Although C had not been wearing light coloured, bright, fluorescent or reflective materials he would not reasonably have foreseen that a failure to wear such materials risked the injury he suffered. It would be a counsel of perfection to require him to wear different clothing.
  - The driver was not keeping a proper look out, so in any event brighter clothing would have made no difference

Warsama v London Fire Brigade [2020] EWHC 718 QB

- C was injured when hit by the wing mirror of moving fire engine on an emergency call.
- C had been at a party where she had drunk wine and smoked cannabis.
- C was involved in an altercation outside a kebab shop, and called the police. She suggested that when she heard the fire engine's sirens, she believed it was the police arriving, and she was trying to attract their attention.
- Held, finding 50% contributory negligence Anne Whyte QC:
  - C had moved in a rapid fashion from the pavement between parked cars, into the offside lane
  - D's driver had not taken his foot off the accelerator until C was by the white line, and not begun to brake until she was in the offside lane.
  - The braking was not heavy or emergency braking
  - The driver of an emergency vehicles owed the same duty as a normal road user
  - When driving at speed, an emergency driver had to exercise a degree of care and skill proportionate to the speed at which they were driving.
  - D was driving at 45 mph which was too fast for the busy conditions – had he been driving at a more reasonable speed, he would have had time to brake
  - C had placed herself in an obviously dangerous situation and misjudged the speed of the fire engine.
  - Her conduct impeded the legitimate and important public work of those tasked with attending emergency call outs.

Gul v McDonagh & Anor [2021] EWHC 97 (QB)

- C, aged 13, was struck by D's car as he crossed the road. C only needed to travel a further 30 cm to avoid the path of D
- D's driving described at sentencing hearing as "*appalling … reckless and furious driving*" – (45mph in a 20mph zone)
- Primary liability was admitted, with just contributory negligence to be determined.
- *Gough v Thorne* [1966] I WLR 1387, Lord Denning at 1390:

> *A very young child cannot be guilty of contributory negligence. An older child maybe. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age to be expected to take precautions for his or her 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 or experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.*

- Lord Salmon at 1391

> *The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether an ordinary child of 13 could be expected to have done more than this child did. I did say "ordinary child". I did not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary child of 13.*

- No reported cases of contributory negligence being found against a child under the age of eight

Gul v McDonagh & Anor [2021] EWHC 97 (QB)

- Held in terms of contributory negligence:

> *It is generally expected that a court will impose a high burden on drivers of cars to reflect the fact that a car is potentially a dangerous weapon. The first defendant's driving in this case was particularly egregious. His speed was excessive, the risk of injury obvious and his motivation the desire to avoid arrest. Insofar as the claimant could see the defendant so too the defendant could see the claimant and could and should have slowed down. It would not have taken much adjustment on the part of the defendant to allow the claimant to complete that final 30 cm across the road. The causative potency of all these factors is extremely high and must weigh heavily against the first defendant*

- D had not proved that C did not look to his right before crossing the road
- C was likely wearing headphones at the time which prevented him hearing D oncoming vehicle, though this was not negligent of itself. When wearing headphones, it become even the more important to look carefully when crossing
- Other witnesses at the scene had commented on how badly and how fast D's vehicle was being driven before the impact
- At [89]

> *I consider that a reasonable 13 year old would have considered that the Focus represented a source of potential danger and would have waited for the Focus to pass. Further, even if a reasonable 13 year old had set off, I consider that they would have kept the Ford Focus under observation so that, if necessary, they could hurry across the very short distance*.

- A 10% reduction was made

Barrow & Ors v Merret & Anor [2021] EWHC 792 (QB)

- Judgment in March this year, claim dismissed against 11 year old claimant crossing road.
- Useful analysis of assessment of witness evidence, and importance of contemporaneous accounts
- Case turned on whether C was in the process of getting up from falling, or was struck moments after he ran and fell
- C had no memory of accident, could not give evidence at trial
- Accident seen by C's friend, who had given "*at least five accounts*" of what had occurred
- Initial statement given to police at scene found to be the most reliable
- Most probable series of events was that C ran across the road towards friend, into the path of oncoming traffic. He probably slipped and fell into the path of the defendant's car. The defendant had no realistic opportunity of avoiding the collision.

Pedestrian Crossings

- Starting point is where possible pedestrians should not cross between parked cars, but there is no obligation to use pedestrian crossings.
- Highway Code, Rule 14

  Parked Vehicles – If you have to cross between parked vehicles, use the outside edges of the vehicles as if they were the kerb. Stop there and make sure you can see all around and that the traffic can see you. Never cross the road in front of, or behind, any vehicle with its engine running, especially a large vehicle, as the driver may not be able to see you

- *Adams v Gibson* [2016] EWHC 3209
  - C struck by D's car when crossing the road. C had been drinking.
  - Impact occurred just before a pedestrian crossing, D had failed to see C once he stepped into the road
  - C's damages reduced by one third due to:
    - Failing to look for oncoming traffic as he stepped out
    - Failing to use the pedestrian crossing
  - The Court emphasised that such cases were fact sensitive, but that the Claimant had shown a serious disregard for his own safety

Intoxication

- *Liddell v Middleton (1996) PIQR 36 CA*
- Husband & wife crossing road. W ran across but H remained stood in road due to being drunk.
- Initially, a 25% deduction however increased on appeal to 50%
- Stuart-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***

Cyclists

- Many of the same principles which apply to pedestrians will also apply to cyclists
- However, greater scope for contributory negligence where cyclists have performed inherently dangerous manoeuvres, or travelled at excessive speed
- Lack of high visibility clothing and lights also likely to be of more relevance – conspicuity is key –and reasonable to expect specific clothing to be worn

Rickson v Bhakar [2017] EWHC 264 (QB)

- Rare case of major road user (Claimant cyclist) guilty of contributory negligence.
- C sustained catastrophic injuries when cycling in a time trial on A27 dual carriageway when collided with the side of D's van as D turned right across C's path.
- C tried to swerve, but could not avoid impact.
- The only issues at trial was C's contributory negligence
- Held, Blake J:
  - C was 20% liable for the collision
  - He was an experienced cyclist, aware of potential hazards
  - The van had been stationary for four seconds before making the right turn
  - A slight deceleration by C would have enabled the van to pass without impact
  - The possibility that C had dropped his head, or been focused on checking his speedometer could not be discounted
  - The choice of the Claimant to swerve to avoid the accident was a last minute reaction, when the choice to apply the brakes earlier had not been taken.

Elson v Stilgoe [2017] EWCA Civ 193

- C appealed against dismissal of his PI claim
- C cycling with a friend along single carriageway, overtaking a line of stationary traffic. C not wearing high vis, and without lights on bicycle.
- Manoeuvred around a puddle and entered into D's side of the road, and was struck by D's car
- Trial judge held that C and friend were cycling side by side, and it would have been easy for C to see D's vehicle.
- D had been driving at an appropriate speed
- Held, Treacy LJ, dismissing the appeal:
  - Trial judge was entitled to dismiss C's account of riding single file having heard the evidence
  - Trial judge was entitled to find that D was driving properly, and was confronted at the last moment by C who had veered into his path without any good reason for doing so.
  - The sole cause of the accident were C's actions, rather than D's inaction
  - D was not at fault, the judge had found that C was not on D's side of the road for any length of time sufficient for him to be observed, or to take evasive action.

McGeer v Macintosh [2017] EWCA Civ 79 CA

- D appealed finding that he was liable for C's injuries. C found 30% contributorily negligent
- D was driving HGV and was stationary at traffic lights, straddling both lane, but indicating to turn left.
- A car behind the HGV prevented C from seeing the left indicator
- C approached at speed on his cycle from behind D in left hand lane, up the HGV's near side and across its front, as the HGV turned left
- Held, Treacy LJ, dismissing the appeal:
  - The Trial judge had reached a finding that the time between the HGV moving off and the collision was 8 seconds. Accordingly, C would have been visible in D's mirror for approximately 3 seconds before he moved off. Had he checked the mirrors, he would have seen C.
  - It was not negligent for D to straddle both lanes when turning left, however it was negligent not to again check the HGV mirrors after moving off. D's positioning would suggest that he might be turning right, so additional checks were particularly important
  - C could not safely assume that D was turning right; she could not see either indicator.
  - By proceeding down the hill towards D at some speed, with no ability to stop of C made a sudden manoeuvre, she had failed to heed the advice of Rule 73 of the Highway Code.
  - The causative potency of the HGV given the likelihood of very serios injury justified the 70/30 split

Motorcycles

- ***Clarke v Winchurch*** **[1969] 1 WLR 69 (CA)**

  A motorcycle is in the fortunate position of taking up so little road space that you can slide along the offside of stationary traffic', but that such a manoeuvre 'warrants a very, very high degree of care indeed

  – Filtering Is therefore legitimate, though the risks are very high, so the driver must take great care.

- **Rule 88** of the Highway Code warns motorcyclists to *'look out for pedestrians crossing between vehicles and vehicles emerging from junctions or changing lanes*' when overtaking traffic queues.]

- **Rule 167** states:

  DO NOT overtake where you might come into conflict with other road users. For example:

  – Approaching or at a road junction on either side of the road . . .
  – where traffic is queuing at junctions or road works”

Kyriacou v Finch [2021] 1 WLUK 359

- C (scooter driver) established primary liability against D (car driver), with 80% contributory negligence
- C drove at over 50 mph down a single carriageway towards and intersection, overtaking a van.
- D's vehicle, travelling at around 14 mph in the opposite direction was turning right at the intersection. D cut the corner as doing so,
- C chose not to give evidence at trial – adverse inference that he had consumed cannabis
- Held, Nigel Bird
  - D was negligent in failing to see C, and in cutting the corner. But for those breaches, the accident would not have occurred
  - C was driving at around twice the speed limit and preforming an inherently dangerous manoeuvre in overtaking near a junction.
  - D's risks were momentary, where as C's were over a sustained period, and of much greater magnitude.
  - A "*huge proportion*" of the blame lay with C, namely 80%

Where next?

- Proposed changes to Highway Code
  - Introducing a hierarchy of road users which ensures that those road users who can do the greatest harm have the greatest responsibility to reduce the danger or threat they may pose to others
  - Clarifying existing rules on pedestrian priority on pavements, to advise that drivers and riders should give way to pedestrians crossing or waiting to cross the road,
  - Providing guidance on cyclist priority at junctions to advise drivers to give priority to cyclists at junctions when travelling straight ahead
  - Establishing guidance on safe passing distances and speeds when overtaking cyclists and horse riders
- Proposals do not appear to significantly alter the way in which the court has interpreted the responsibilities owed by road users
- Likely to be easier for cyclists to point to a direct breach of the code
- Safe passing distances will remove some uncertainty, however, often a finding in regard to the actual distance depends on witness evidence

QUESTIONS