Just and equitable = flexibility

Toby Kempster advises how to approach an apportionment of liability

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Predicting how liability will be apportioned (if at all) in a road traffic accident often appears to be something of a lottery, but in certain situations themes or presumptions do emerge and which reflect the basis upon which the issue of apportionment of liability is meant to be approached.

The starting point is s1 of the Law of Reform (Contributory Negligence) Act 1945, which states that:

> Where any person suffers damage as a result of his own fault and partly the fault of any other person or persons... the damages recoverable in respect thereof shall be reduced to such an extent that the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage...

In determining what is 'just and equitable', two aspects of the parties' conduct are material, firstly the causative potency of their respective actions and the relative culpability of the parties (although this will often be a rather broad-brush approach and the two factors may not be readily distinguishable). In *Davies v Swann Motor* [1949] Denning LJ stated that:

> The amount of the reduction (in respect of contributory negligence) is such an amount as may be found by the court to be just and equitable having regard to the claimant's share of the responsibility for the damage. This involves a consideration not only of the causative potency of a particular factor but also of its blameworthiness.

It is important to remember that it is not necessary for the relevant conduct of the claimant to be a cause of the accident, but rather whether the relevant conduct contributed to the outcome of the accident on the basis that what the claimant did was not what a reasonably careful person in their position would have done (see *Jones v Livox Quarries Ltd* [1952]).

It may, for example, be the case that an individual's actions have played no part in the accident itself but have caused the injuries to be worse than would otherwise have been the case had reasonable care been taken. In *Jones*, the claimant was hitching a lift on the tow bar at the back of a quarry lorry, contrary to instructions, when that vehicle was struck from behind by a following dumper truck. While the claimant played no part in the cause of the accident, a 20% reduction was made for contributory negligence as a result of the claimant placing himself in a dangerous position. His 'damage' was partly a result of his own fault.

In *Froome v Butcher* [1976] the level of contributory negligence attaching to a claimant who failed to wear a seatbelt depended upon the difference, if any, that the wearing of a seatbelt would have made to the extent of the claimant's injury.

'Driving a motor car imposes a high level of responsibility (and therefore potential culpability if mishandled) upon the driver as a result of the potential danger the car presents.'

Vehicle collisions and collisions involving motorbikes

In an RTA involving two or more motor cars, the level of fault/culpability on the part of the respective drivers will be very much a fact-based assessment. In determining the apportionment of liability, however, the courts will place reliance on the guidance provided by the Highway Code and the extent of any failure to comply with that guidance.

Similarly, where RTAs involve a car and a motorcyclist, it is difficult to identify any common themes or presumptions from recent cases,

save perhaps that if a motorcyclist is found to have been speeding and/or overtaking a stationary line of traffic (only to collide with a car turning right) the courts seem generally unsympathetic to the motorcyclist. Again, observance with the Highway Code emerges as a relevant factor.

In *Burton v Evitt* [2011], the claimant motorcyclist was overtaking a stationary line of traffic when he collided with the defendant's motor car which was turning right. At first instance, the judge found the defendant 33% to blame and the claimant 66%, but the Court of Appeal increased the level of contributory negligence to 80% to reflect the level of culpability arising from the speed at which the claimant was travelling.

In *Grealis v Opuni* [2003] EWCA Civ 177, the pizza delivery claimant was found to be 80% to blame for an accident where he had overtaken a line of stationary traffic waiting to turn right from the main into a minor road, and turned right across the junction when the defendant was driving in the opposite direction along the main road (with the traffic light showing green), The defendant was speeding (37-39mph in a 30mph zone), but while the Court of Appeal recognised that this speed was one cause of the accident, the principal blame for the accident had to lie with the claimant.

Accidents involving pedestrians

The position, however, is different where the accident involves a motor car and a pedestrian, the driver of the car being saddled with the fact that he is responsible for an object which is capable of great damage if it is not properly controlled (see, for example, *Liddell v Middleton* [1996]).

In *Eagle v Chambers* [2003] EWCA Civ 1107, the Court of Appeal noted that the courts had consistently imposed upon a driver of a car a high burden of responsibility to reflect the fact that a car was potentially a lethal weapon (see, for example, *Lunt v Khelifa* [2002]), and stated:

> that it would be rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian had suddenly moved into the path of an oncoming vehicle.

In that case, the claimant, a 17-year-old girl, who was in a distressed and emotional state, was walking along the centre line of the road when she was struck by the defendant driver. As she had not suddenly moved or deviated from the position she had taken up in the road, the driver, who had not been keeping a proper look out, was found principally to blame (60%). (It is to be noted that although the driver's blood/alcohol level was below the legal limit, he accepted that the drinks he had consumed nonetheless impaired his driving ability!)

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The rebuttable presumption, therefore, is that the driver of a car will ordinarily be principally to blame for an accident involving a pedestrian.

While, however, the relevant cases would suggest this relatively sympathetic approach to pedestrians, particularly children, who are knocked down by a motor car, the courts will nonetheless recognise that the test of fault is not to be determined with the benefit of hindsight but with regard to the relevant conditions that were before the driver at the material time. A realistic assessment, therefore, is to be made of the standard of driving and the courts will be ready to reject a pedestrian's claim of fault on the part of the driver where the suggested standard of driving amounts to a 'counsel of perfection'. While *Eagle* represents a high point for claimants/pedestrians, the balance has been partially redressed by the Court of Appeal in *Paramasivan v Wicks* [2013] where it was emphasised that the standard required of a driver was that of reasonable care, not of perfection.

In *Paramasivan*, the Court of Appeal increased the first-instance judgment as to the level of the pedestrian's fault from 50-75%. The claim involved a 13-year-old boy who suddenly ran across a paved area, a parking bay, and between parked cars into the path of the defendant's car, which was being driven at about 25mph in a 30mph zone at 9.45 pm. The claimant argued that the driver, with the presence of children in the area, should have slowed to approximately 15mph and as such would have been able to stop prior to colliding with the claimant, in response to which Hughes LJ stated:

> This assertion is 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 the 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 15mph.

Speed often appears to be a determining factor in determining the standard of driving and relative culpability, with the driver being heavily criticised when speeding but is less likely to be found more culpable than the pedestrian where driving at a reasonable speed. In this respect, a useful summary of cases involving child pedestrians can be found in *Toropdar v D* [2009].

Relative culpability and causative potency

As set out above, it is not always easy to distinguish between factors that are relevant to the issue of culpability and those relevant to causation. As stated, driving a motor car imposes a high level of responsibility (and therefore potential culpability if mishandled) upon the driver as a result of the potential danger the car presents.

In relation to pedestrians, it is also relevant in terms of causation, the Court of Appeal in *Eagle* referring to 'the destructive disparity' between the driver of a motor car on the one hand and the pedestrian on the other.

Whatever, therefore, the level of fault on the part of the driver and/or pedestrian, the level of contributory negligence has to also be assessed with regard to the causative effect of that fault on the accident/injury.

In *Phethean-Hubble v Sam Coles* [2012], for example, the claimant cyclist was struck by a car on a late November evening, and although the claimant was at fault in displaying no rear lights, this was not found to be causative of the accident.

In *Rehill v Rider Holdings Ltd* [2012], the claimant was crossing a controlled pedestrian crossing against the 'red man' when he was struck by a slow-moving bus, knocking him down and the front nearside wheel going over him. At first instance the claimant was found 33% to blame. On appeal, Richards LJ stated that while he found it difficult to draw a clear distinction between considerations of causal potency and of blameworthiness, he went on to approach the issue in the following way. While the pedestrian was 'seriously blameworthy' for crossing in front of a bus, and against a red signal, the serious injury had been sustained not as a result of being knocked down but as a result of the wheel of the bus going over him, which could have been prevented through the driver braking earlier. In terms of 'causative potency', therefore, the greater weight fell upon the bus driver. Taking both matters together he considered that both parties were equally to blame and increased the level of contributory negligence on the part of the claimant to 50%.

In terms of primary liability a claimant has, of course, not only to establish a breach of the duty of care on the part of the defendant driver but also that it was causative of injury.

Causative potency therefore will be most relevant where a collision could not have been avoided even with reasonable care on the part of the driver but the speed at the point of impact, and therefore potentially the level of injury, would have been less.

In that respect, it is important therefore for the parties to be ready to deal with causation at a liability-only trial. In terms of primary liability a claimant has, of course, not only to establish a breach of the duty of care on the part of the defendant driver but also that it was causative of injury. In cases where the argument is that while the accident could not have been avoided the injury may have been less serious had due care been shown, evidence is required to discharge this burden of proof.

In *Boyle v Commissioner of Police of the Metropolis* [2013], the claimant (who had been drinking alcohol throughout the evening) fell into the road and into the path of the defendant's motor car, which was travelling at between 33 and 35mph in a 30mph zone. Had the driver adopted a more moderate speed, it was argued that the claimant's injuries would have been avoided or at least have been less severe. The judge concluded that a reasonably prudent driver would have driven at about 5mph more slowly than the defendant, taking into account that he was driving at night and that it was at least foreseeable that the occasional intoxicated pedestrian or pedestrians might still be at large. However, this reduction in speed would not have been enough to have avoided the collision with the claimant, and without any evidence before the court to assist in determining what, if any, difference the lower speed would have had upon the injuries sustained by the claimant, the claim was dismissed. Turner J stated as follows:

> Am I able despite this *lacuna* to attribute any element of the claim in respect of injury, loss and damage, to the fact that the impact speed would have been less if Mr Curry (the defendant driver) had been driving more slowly?... There is no material upon which I am able to form a judgment on this matter. It would be impermissible for me to embark upon a process of pure speculation and I am constrained to find that the claimant has failed to prove what, if any, loss has been occasioned as a result of Mr Curry's breach of duty.

In determining causative potency therefore, one has to have regard not only to the causes of the accident but also the causes of the damage sustained. Without determining this issue at a liability hearing, it would appear that a judge will be at some disadvantage in determining the issue of contributory negligence.

The drunk pedestrian

The issue of drink in relation to a driver is clearly relevant to the issue of culpability. It is less relevant for a pedestrian. In *Liddell*, the plaintiff pedestrian ran across a road in front of the defendant's motor car which was found to have been travelling at an excessive speed. At first instance, the judge found that the claimant, who had been drinking alcohol prior to the accident, was 25% contributory negligent in failing to observe the approaching motor car.

On appeal, the level of contributory negligence was increased from 25-50% as the parties were equally to blame (in this respect, the Court of Appeal observed, contrary to the initial criticism of the defendant driver, that 'it was unrealistic in this case to expect the defendant to have sounded his horn simply because he saw the plaintiff standing in the middle of the road'). Of significance however, and as regards the relevance of the claimant being drunk which, according to the defendant, made the claimant more blameworthy than a sober person, Stewart Smith LJ stated that:

> ... he was not persuaded that it makes a significant difference in the case of a pedestrian. It seems to me that the pedestrian's conduct has to be judged by what he did rather than the explanation as to why he did it.

In *Lunt*, the claimant pedestrian was struck by the defendant motor car as he crossed the road. The claimant was found at the time of the accident to have a blood alcohol level three and a half times in excess of that permitted for driving. At first instance, the defendant was found principally to blame for the accident (although travelling at only 25mph in 30mph zone), while the claimant was found one-third contributory negligent. In that respect, the judge, who had been referred to a number of authorities where the injured party had been affected by alcohol, concluded that a claimant affected by drink would ordinarily be found contributory negligent to the extent of between 20-40%.

However, on appeal, and in relation to the issue of alcohol, Latham LJ stated:

> It seems to me that both appellant's counsel and respondent's counsel appear to have placed far more emphasis on the issue related to alcohol than the facts of the case merits. The fact is that the alcohol which had been consumed by the appellant (pedestrian) may well explain why he behaved as he did. It does not seem to me that it in any way affects the blameworthiness of the appellant in the circumstances of this case.

Referring to the earlier case of *Liddell*, Latham LJ relied on the following part of that judgment:

> It is not the fact that the plaintiff (pedestrian) has consumed too much alcohol that matters, it is what he does. If he steps in front of a car travelling at 30mph 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 those circumstances increase the blameworthiness of it.

For the purposes of apportioning liability, therefore, the Court of Appeal disregarded the reason for the claimant's actions and concentrated on what he had actually done when crossing the road.

Summary

As set out above, the overriding obligation upon the court is to apportion liability on the basis of what is 'just and equitable'. This provides the court with a considerable degree of flexibility in determining the issue on the circumstances of the case before it. As such, the Court of Appeal has repeatedly emphasised its reluctance to interfere with the assessment of the trial judge. It is all the more important therefore that a favourable result is achieved at first instance and that the trial judge properly recognises the test of relative culpability and causative potency. ■

The issue of drink in relation to a driver is clearly relevant to the issue of culpability.

Boyle v Commissioner of Police of the Metropolis
[2013] EWHC 395 (QB)
Burton v Evitt
[2011] EWCA Civ 1378
Davies v Swann Motor
[1949] 2 KB 291
Eagle v Chambers
[2003] EWCA Civ 1107
Froome v Butcher
[1976] QB 286 (CA)
Grealis v Opuni
[2003] EWCA Civ 177
Jones v Livox Quarries Ltd
[1952] 2 QB 608
Liddell v Middleton
[1996] PIQR P36
Lunt v Khelifa
[2002] EWCA Civ 801
Paramasivan v Wicks
[2013] EWCA Civ 262
Phethean-Hubble v Sam Coles
[2012] EWCA Civ 349
Rehill v Rider Holdings Ltd
[2012] EWCA Civ 628
Toropdar v D
[2009] EWHC 2997