

# Liability in road traffic accidents involving pedestrians

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# The talk

The outcome of road traffic accidents involving pedestrians is difficult to predict

Each case is extremely fact specific and other decided cases are often of limited assistance in determining what is likely to happen at trial

The purpose of this talk is to try and distill some principles or pointers from the decided cases which have general application and which can be used to assess the potential outcome of different factual scenarios

We will look first at some of the basic principles to be considered in relation to primary liability and then consider the approach of the courts to contributory negligence

# Primary Liability: The Legal Principles

In *Chan v Peters & Advantage Insurance* [2021] EWHC 2004 (QB) Cavanagh J Cited with approval a summary of the law set out by HHJ Stephen Davies sitting as a High Court Judge in *AB v Main* [2015] EWHC 3183 (QB)

That summary is being relied on more and more in cases of this type and we will be looking at its ingredients in this talk

The summary adopted in *Chan* is at paragraphs 15-26 and contains a distillation of a number of cases.

# The Burden and Standard of Care

The first point made in AB v Main and adopted in Chan is that:-

It is for the Claimant to establish on the balance of probabilities that the Claimant was negligent.

The standard of care is that of a reasonably careful driver armed with the common sense and experience of the way in which pedestrians and children in particular are likely to behave.

If a real risk of danger emerging was or ***should have been apparent to the driver*** then reasonable precautions should be taken but if the danger was no more than ***a mere possibility***, which would not have occurred to a reasonable driver, then there is no obligation to take extraordinary precautions

The driver is not to be judged by the standards of an ideal driver nor with the benefit of 20/20 hindsight

# Application of Those Principles: The Role of Expert Evidence

The summary of the judges in *AB v Main and Chan* also included comments on the role of expert evidence in road traffic accidents.

They adopted observations of Coulson J in *Stewart v Glaze* who warned of the danger of accident reconstruction experts:-

(1) giving opinions on matters beyond their expertise and acting as advocate seeking to usurp the function of the judge

(2) elevating their admissible evidence about reaction times, stopping distances and the like into a “fixed framework or formula, against which the defendant’s actions are then to be rigidly judged with mathematical precision”

# Expert Evidence

Coulson J also commented in *Stewart v Glaze* that although accident reconstruction can be useful “it is the primary factual evidence which is of the greatest importance in a case of this kind. The expert evidence (only) comprises a useful way in which that factual evidence and the inferences to be drawn from it, can be tested”

This may all seem very obvious but as accident reconstruction evidence becomes ever more central to road accident litigation (particularly the analysis of CCTV and webcam footage) it is important to remember that experts don't decide cases and that their evidence and the assumptions they make must always be tested against the factual evidence

This is particularly important when considering speeds and reaction times. Experts use their opinions on these issues to try and demonstrate that the accident could have been avoided if the driver had done something different. This may be of some assistance but it cannot trump the primary question of whether what the driver actually did was or was not within the ambit of the actions of a reasonably careful driver in the circumstances that prevailed.

That is the primary test as was made clear in *Chan and AB v Main*.

# Facts in Chan v Peters

Claimant,  
Chan was  
17 years  
old

Accident  
outside a  
school. 2  
friends  
opposite  
side of the  
road had  
waved

Chan had  
in fact  
emerged  
from a  
Vauxhall  
Zafira

Defendant  
had been  
driving at  
about 25  
mph. Not  
covering  
the brake.  
Didn't  
slow down  
as passed  
school but  
it was not  
the end of  
the school  
day

Speed  
limit was  
30 mph

Court  
found that  
Chan had  
jogged out  
from  
parked  
Vauxhall  
Zafira  
giving  
0.6  
seconds of  
visibility to  
the Driver

Collided  
with  
nearside  
wheelarch



# The Decision

*Cavanagh J held*

*The Defendant was traveling at 25mph. That was a reasonable speed for the road and the time of day*

*There was no particular feature of the circumstances which required her to be covering her brakes*

*The Defendant did not fail to see the Claimant when he was there to be seen. The Claimant was obscured by the Vauxhall Zafira until 0.6 second before impact.*

*The Defendant reacted as quickly as she could and could not avoid the collision*

*The Claimant entered the road without looking*

*The Defendant was not liable but if she had been there would have been 75% contributory negligence*



# Analysis- Why was the Defendant not negligent in Chan?

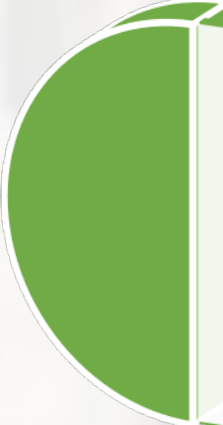
1. The Defendant did not fail to look and take account of her surroundings in the manner to be expected of a reasonably competent driver.
2. She was aware of the presence of the school and the parked Zafira and bus
3. 25 mph was appropriate in the circumstances and nature of the potential hazards
4. There were no features of the scene to cause her to take extraordinary precautions e.g. Passengers getting in or off the bus, not the end of the school day, heavy traffic.

# Defendant not negligent in Chan

5. The Defendant did not fail to see the Claimant when he was there to be seen. Until 0.6 seconds before the accident he was entirely or virtually obscured by the Zafira.

6. A reasonably competent driver could not be expected therefore to take any precautionary steps.

7. The fact two other students were waving from the other side of the road did not give rise to a real possibility that someone would emerge unexpectedly from the parking bay into her path.



**In AB v Main, the same tests  
applied but the opposite result was  
achieved. Why?**

# AB v Main [2015] EWHC 3193

Claimant was aged 8 years 10 months old

Suffered a catastrophic brain injury

Ran out into the road in Hale, Liverpool into a collision with a car driven by the Defendant

Liability was wholly denied. D said travelling at 25-30 mph

Judge found that couldn't place any real weight on Defendant's evidence

# Findings of fact

Defendant saw boys by themselves

Obvious they were 7-9 years of age

Engaged in play

D Saw the Claimant move towards the centre of the pavement

Failed to see Claimant looking towards traffic coming the other way

Defendant maintained her speed at about 30 mph

Did not cover the brakes

# AB v Main –The need to take extra precautions?-

In Main the judge adopted dicta of Dame Janet Smith in O'Connor v Stuttard [2011] EWCA Civ 829 that there is an “exacting burden” on motorists who drive close to children playing on the pavement. A motorist in that situation has a duty to ensure whether by using his horn or otherwise that the children are aware of his presence before going past them.

The imposition of this exacting duty is justified by the fact that children are particularly vulnerable pedestrians whose actions are **unpredictable**



# What justified the requirement for extra precautions in AB v Main?

1. Defendant saw the children in good time
2. There was no adult supervising them
3. Saw them by side of pavement looking down at something
4. Should have been obvious they were in some form of play
5. Saw the Claimant move towards the centre of the pavement
6. Defendant failed to see Claimant looking over at the grassy area on other side of the road



# Duty to take extra precautions in AB v Main

7. Failed to see the Claimant turn back towards the road and begin to move off across the pavement towards the centre of the pavement nearer to the road and into her path.

8. Failed to see the Claimant turn and look at oncoming traffic from the other side

9. Failed to see him turn to speak to his friend and crucially turn round again to face the road “*final signifiers of his intentions*”.

# What did the driver do that was negligent?

1. Failed to take her foot off the accelerator
2. Failed to cover the brakes
3. Maintained her speed of 30 mph or just under
4. Failed to take a natural, almost instinctive and proportionate response to what was happening
5. She should have been driving at no more than 25 mph which would have given her an increased reaction and action time.
6. She should have moved out in advance towards the centre of the road without crossing the white line.

# Judgment in AB v Main- 20%/80% in favour of C

Small cumulative errors led to liability against the Defendant.

Failed to **appreciate** the true extent of the **risk** posed by young boys playing

Failed to keep a close **lookout** on the boys as she neared them

Failed to **anticipate** he may do something foolish

Failed to take sensible **precautions**,

Judgment for the Claimant – But still 20% contributory negligence even though the Claimant was under 9 years of age.

# Contributory Negligence

Contributory negligence requires a consideration of an apportionment of liability between the claimant and the defendant according (1) to the respective causative potency of what they have done and (2) their respective blameworthiness

The leading Court of Appeal cases of **Eagle v Chambers** [2003] EWCA Civ 1107 and **Sabir v Osei-Kwabena** [2015] EWCA Civ 1213

In Eagle Hale LJ said.....

## LJ Hale



**“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”**

# Contributory Negligence

In **Sabir** Tomlinson LJ adopted what Hale LJ had said in *Eagle*

He concluded that:-

(1) The observation of Hale LJ was to be explained by the “destructive potential of the car driven even at moderate speed”

(2) The destructive capacity of the car comes into the evaluation of both causative potency and relative blameworthiness

This approach echoes the observations of Latham LJ in **Lunt v Khelifa** [2002] EWCA Civ 801 who said that drivers must always bear in mind that a car is potentially a dangerous weapon

# Contributory Negligence

Those dicta are frequently if not invariably applied in the more recent authorities concerning contributory negligence

Where contributory negligence is likely to be established in any particular case it is important to consider whether the case is an “**ordinary**” case (per Hale LJ in *Eagle*) where the claimant will be less responsible than the driver or whether the case is one where the claimant's responsibility may be more than 50% because he suddenly moved into the path of the car



# The facts in Eagle v Chambers

11.30 pm on the Marine Parade, Great Yarmouth,

This is a dual carriageway with two rows of parking spaces between the two carriageways

Southbound sea carriageway is 22.6 feet wide with a broken white line dividing it in two.

Visibility was extremely good

There were people on the pavement, an event having finished at “Winter Gardens”.

People were going to their cars parked on the central reservation

# The Claimant

17 years of age

Dressed in light clothing

Walking down the carriageway for “some time”, “long enough for bystanders and other drivers to be concerned for her safety and urge her to stop”

She was in an “emotional state”

Unsteady on her feet

Walking along the broken white line at the side of the carriageway

# Findings at first instance about the Claimant

"There can be no dispute but that she was substantially responsible for the accident. She was drunk and emotional and chose to place herself in a dangerous position. Indeed she placed herself in such a dangerous position for such a lengthy period of time that others were clearly concerned for her safety. She had rejected warnings to get off the road, warnings given by other drivers and specifically by Mr HE [Ted] Bowgen. She was sufficiently aware, as I have said, of what was going on to refuse his blandishment to get off the road and indeed swear at him."

# The Defendant

Driving in the offside lane of 2 lanes

Driving at about 30 to 35 mph- accepted by the Judge

Failed a roadside breath test but was just below the limit when tested at the police station.

He accepted that he was impaired.

Road was straight and visibility was good.

Only saw the Claimant at the last moment

Did not brake or swerve

# The decision on liability

## First Instance: -

Claimant held 60% to blame for the accident

Defendant only 40% to blame

## Court of Appeal: -

Decision reversed, Claimant only 40% to blame for the accident, because she was there to be seen and did not suddenly move into the path of the Defendant

# Pedestrian Suddenly Moves into the Path of the Vehicle: No Liability

In Eagle, Hale LJ said that this was the only situation in which she would envisage a claimant being more liable than a defendant.

Do the cases bear this out?

In fact the decisions in the cases suggest that if the claimant suddenly and unexpectedly moves into the path of the defendant the claimant will fail on primary liability. Some examples:-

(1) In Kayser v London Passenger Transport [1950] 1 All ER 231 the claimant crossed in front of a bus and moved out of its path. He suddenly reversed direction and ran back in front of the bus which was moving very slowly in 1<sup>st</sup> gear. Result = Driver not liable

# Pedestrian Suddenly Moves into the Path of the Vehicle

(2) In **Stewart v Glaze [2009] EWHC 704 (QB)** the claimant had been drinking. He was sat at a bus stop with a friend when he suddenly got up and walked into the road where he was struck by a vehicle driving at 31 mph in a 30 mph limit. Result = Driver not liable

(3) In **Vincent v Walker [2021] EWHC 536 (QB)** the claimant was crossing at a pedestrian crossing when the lights were green in favour of the driver. The speed limit was 50 mph and the judge found that the driver was doing 39-41mph. The judge found that it was not negligent of the driver to have failed to see the claimant on the central refuge. Result = Driver not liable



# Pedestrian Suddenly Moves into Path of Driver: Driver Liable

In these cases primary liability is established but the fact that the claimant suddenly moved into the path of the driver has justified a finding of 50% or more contributory negligence as suggested by the Eagle “exception”. So:-

(1) In **Belka v Prosperini [2011] EWCA Civ 120**. Primary liability was established on the basis that the driver should have seen the claimant on the central reservation and reduced speed which would have avoided the collision. The claimant took the deliberate risk of running across the road and the Court of Appeal agreed with the trial judge’s apportionment of 2/3rds contributory negligence

# Pedestrian Suddenly moves into the Path of the Vehicle

(2) In *Ehrari v Curry* [2007] EWCA Civ 120 the claimant was a 14 year old who stepped into the path of the defendant's lorry 1 second before being hit. The driver was found liable on the basis that he should have seen the claimant before the accident and taken precautions in case she entered the road, including swerving to avoid the accident. He found the claimant 70% to blame.

(3) *Jackson v Murray* [2015] UKSC5 is also a case in this category. The claimant was 13. She crossed behind a school minibus into the path of the defendant. The court found that the driver was driving too fast and should have anticipated the possibility that someone might step out from behind the bus and primary liability was established against him. The finding of contributory negligence was\_

- Trial Judge	90%
- Scottish Inner House	70%
- Supreme Court	50%

# Pedestrian Suddenly Moves into Path of Vehicle: But the Movement is not “Unexpected”

Those cases can be contrasted with other cases where the pedestrian suddenly moves into the path of the vehicle but that movement should have been considered by the driver as a possibility so that although the movement is “sudden” it is not “unexpected”

In those cases the driver is found liable and the contributory negligence is less than 50% because the facts are held not to justify the Eagle exception.

# Pedestrian Movement Sudden but not “Unexpected”

A good example is the recent case of **Parker v McLaren [2021] EWHC 2828**

The defendant was a cab driver. It was a Saturday night in the centre of York with a lot of people around. The claimant stepped into the defendant's path. The trial judge found that the defendant was liable for driving too fast and if he had been going at an appropriate speed the accident would have been avoided

On contributory negligence the defendant argue that the Eagle exception applied because the claimant had moved suddenly into the defendant's path and therefore the contributory negligence should be greater than 50%

The court rejected this argument on the basis that although the movement was sudden it was not entirely “unexpected” because the defendant had agreed that what the claimant did was common in his experience as a cab driver on a Saturday night.

The contributory negligence was assessed at 50%

The decision in Jackson v Murray can probably be explained on the same basis. The movement of the clamant from behind the minibus was sudden but not entirely “unexpected” because that scenario is common and a driver should anticipate it. On that basis there was no justification for making the contributory negligence greater than 50%

# Child Pedestrians

The ordinary rule is that the law applies an objective standard of care which does not have regard to the individual characteristics or abilities of people who owe a duty of care. So the law applies the same standard of care to a learner driver as it does to an experienced lorry driver

But in the case of children there is an exception: the law does have regard to age when assessing contributory negligence

The leading statement of principle is that of Salmon LJ in **Gough v Thorne [1966] 1 WLR 1387**:-

“The question as to whether the Plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13 and a half can be expected to have done any more than this child did. I say “any ordinary child”. I do not mean a paragon of prudence; nor do I mean a scatter-brained child, but the ordinary girl of 13 and a half”

# Child Pedestrians

The law does not set any fixed rules as to the age at which contributory negligence begins.

In recent years the age at which child claimants have been assessed as contributorily negligent seems to have reduced perhaps because more young children are allowed out on the streets on their own and are considered (rightly or wrongly) to have greater training and understanding of road dangers

In **Toropdar v D [2009] EWHC 2997** the claimant was 10 when he ran from behind a bus into the defendants path. Contributory negligence was assessed at 1/3<sup>rd</sup>.

In **AB v Main** the claimant was only 8 when he suddenly ran into the road. The judge took the view that a finding of contributory negligence was appropriate but expressly reduced it to 20% because of the claimant's young age

# Causation and speed

In most pedestrian accidents the speed of the vehicle plays a major part in the happening of the accident.

The trial judge will make a finding as to the actual speed of the vehicle (usually with the assistance of expert evidence) and will determine the maximum non-negligent speed at which the vehicle should have been travelling in the circumstances. If the actual speed as determined is higher than the maximum non-negligent speed then negligence will usually be established against the driver.

But it is often the case that even at the non-negligent speed a collision would still have occurred.



# Causation and speed

Suppose the court finds that the driver was doing 35mph when the maximum non-negligent speed he should have been driving at was 25 mph. If a collision would nonetheless have occurred does the claimant have to prove that even at the non-negligent speed that he would have sustained the same injury?

# Causation and speed

There are a number of cases in which this point has been argued and in which there are findings or suggestions that the burden of proof on this issue is on the claimant and that

If he does not have medical evidence to support him he will lose on causation

(see, for example, **Boyle v Commissioner of Police of the Metropolis [2013] EWHC 395 (QB)** and **Paramasivan v Wicks [2013] EWCA Civ 262**)

# There is a conflicting Court of Appeal decision

In **Phethean-Hubble v Coles** [2012] EWCA Civ 349 the majority of the Court of Appeal thought that on this issue the burden of proof is on the **defendant**.

# Phethean-Hubble v Coles per Tomlinson LJ

*“However the fact remains that the judge has made an unassailable finding that the Defendant was travelling at an unsafe speed. The judge was entitled to conclude and did conclude that at that speed a collision was inevitable. The material before the judge did not persuade him, the burden being on the Defendant, that the Claimant’s conduct was such that he would have sustained injuries of similar severity even had the Defendant been driving at a safe speed (Para 89) (emphasis added)”*

# Longmore LJ at para 90

“The critical facts were (1) that the defendant was travelling at 35 mph, a speed which was not just in favour of the speed limit but also in excess of what has been held to be the safe speed in the circumstances of 26-27 mph and (2) that the accident occurred while the defendant was travelling at that excessive speed. The injury which occurred was injury of a kind likely to have been caused by that breach see Clerk & Lindsell, Torts 20th ed. Para 2-07

In these circumstances I do not consider that it is necessary for the claimant to prove positively the negative proposition that the accident would not have occurred if the defendant had been going at a safe speed; realistically it should be for the defendant (who has already been found to be in breach of duty) to show that even if he had been driving at a non-negligent speed, the accident would still have occurred”

# *Phethean-Hubble v Coles [2012]*

## *EWCA Civ 349*

Strictly these observations were *obiter* because the court decided that the trial judge had been entitled to find (even on the imperfect evidence before him) that the injuries would have been less severe at the non-negligent speed.

The decision was not cited in either Boyle or Paramasivian (which were decided the following year).

This divergence of opinion has not been considered recently but it is obviously important.

# Causation

If the Defendant can show that at a non-negligent speed an accident would still have occurred he may have difficulty in obtaining medical evidence that any brain injury would have been no different when most neurologists accept the correlation between speed and severity of injury even if that is an oversimplistic approach.

# Conclusion

Although the assessment of both primary liability and contributory negligence is entirely fact specific there are some pointers which may help in trying to assess what is likely to happen in any particular case.

Was the driver going at a reasonable speed and keeping a reasonable lookout when suddenly and unexpectedly presented with a pedestrian in the road? If so; then the driver may well escape primary liability and even if he is liable the court may decide that the Eagle exception applies and contributory negligence should be greater than 50%.

Alternatively; was there evidence (e.g. children playing on the pavement or a stationary school bus) which would or should have put a prudent driver on notice of the need to cover the brake, slow down or sound the horn in case someone came into the road. In that scenario if the driver fails to take those extra precautions then he is likely to be found liable and contributory negligence will probably be less than 50% because although the movement of the pedestrian into the road was sudden it was not truly “unexpected”.



**Thank you**



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