Watch your step!

CONTRIBUTORY NEGLIGENCE IN CTP CASES

By Travis Schultz

She may be the unluckiest little girl in the world, but there is no doubt that the case of Sydney five year old, Sophie Delezio, has once again put 'pedestrian accidents' back in the headlines.

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In 2003, Sophie Delezio suffered burns to more than 85% of her body and lost both feet, a hand and an ear when a car which had left the road crashed into her Sydney childcare centre and exploded in a fireball. In May this year, young Sophie was being wheeled by her carer in a stroller across a pedestrian crossing near her school in Sydney's north, when she was hit by a car travelling at 60kms per hour, throwing her stroller 18 metres and putting Sophie in hospital with severe injuries for a second time.

While you would not expect contributory negligence to be an issue in any claim that might be made by Sophie as a result of either accident, her case highlights the dangers posed by motor vehicles in suburban streets and perhaps justifies the description of modern motor cars as 'insured weapons'.[1]

Since the first motorist took to the roads in Australia in the 1890s, a body of case law has developed dealing with the liability of drivers for injuries they cause to pedestrians. It has been suggested that the advent of compulsory motor vehicle insurance has resulted in courts finding that particular conduct by a driver amounts to negligence.[2] The standard of care expected of drivers has arguably increased as motor vehicles have become more powerful, faster and more dangerous to pedestrians. The law of negligence does not, however, impose strict liability on drivers vis-à-vis pedestrians.

The law does recognise that motorists are in the best position to take steps to avoid collisions with pedestrians. The weight, power and speed of modern vehicles impose on drivers a duty to drive defensively and to be alert not only to immediate dangers, but potential perils.

The relevant principles were summarised by Kirby P in *Caldwell v Deka*:[3]

> 'The plaintiff must still prove negligence. The defendant is not obliged to disprove it. The criterion of negligence is the standard required of an ordinary careful driver in charge of a motor vehicle upon a road in this state.

Although not an absolute one, the duty is a high one. This is so because of the risks of serious injury which almost invariably follow a collision between a motor vehicle and a pedestrian. The high standard of vigilance and care imposed upon motorists derives from a recognition by the law of the fact that, usually, the motorist is in the best position, and has the responsibility, to control events which might lead to a collision between (relevantly) the motor vehicle and a pedestrian.'

A plaintiff pedestrian will also bear the onus of proving negligence on the part of the defendant driver. Australian courts have consistently dismissed cases where the driver simply had no opportunity to avoid a collision and no reason to expect a pedestrian to be present on the road at that time.

In *Derrick v Cheung*,[4] the High Court was called upon to consider a case in which a 21-month-old child 'darted out' from between parked cars on Victoria Avenue, Chatswood. The driver could not have seen the child until immediately before impact. The driver braked heavily and veered to her right but was unable to avoid hitting the child. The trial judge found for the plaintiff and the NSW Court of Appeal dismissed an appeal. The High Court allowed an appeal, saying:

'The appeal to this Court must be upheld. There was no basis upon which any finding of negligence on the part of the appellant could be made. That the facts of the case are tragic, and the collision a parent's worst nightmare, as the trial judge accurately described them, did not relieve his Honour of his obligation to determine the issues according to law: in this case, by not finding an absence of care in circumstances in which reasonable care was, as Davies AJA correctly held, in fact being exercised. Even if the inference which the trial judge drew, that if the appellant's speed had been slower by a few kilometres per hour she would have been able to avoid the collision, was more than mere speculation, it is still not an inference upon which a finding of negligence could be based. Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care. To offer, as the majority in the Court of Appeal did, its consolation that the appellant does not bear any moral, as distinct from legal, responsibility for what occurred is to obscure that issue.'[5]

THE CURRENT CLIMATE

In recent times, appellate courts across Australia have dismissed many claims where the plaintiff was unable to prove negligence. These have been cases such as *Bold v Reed*,[6] where a pedestrian who was crossing a road without looking for oncoming traffic, turned back suddenly and was hit by a car, and the claim was dismissed. Other failed claims include circumstances where a pedestrian in a wheelchair crossed a busy street against a red pedestrian light[7] and where a cyclist rode a bicycle at a crossing against a 'Don't Walk' signal.[8]

Even when a plaintiff pedestrian's claim succeeds, there is often an apportionment of liability.

In assessing contributory negligence, it is necessary to consider the relative culpability and causal potency of the plaintiff and defendant. The position was recently well summarised in the judgment of Santow JA in *Jones v Bradley*:[9]

'*Podrebersek* ... holds that in making an assessment of contributory negligence it is necessary to consider, for both plaintiff and defendant, their respective shares of culpability by considering the relative culpability of each and the causal potency of the acts which caused the damage. Thus as a starting point the degree of departure from the standard of care of the reasonable driver and pedestrian must be considered. Then it is necessary to look to the relative importance of the acts of the parties in causing the damage.'

CHILD PEDESTRIANS

Where children are concerned, their appreciation of the danger is a relevant factor in considering the apportionment. Although there will be no liability on the part of a driver where a child runs from between parked cars in circumstances in which the driver had no reason to be aware of or to suspect the presence of children,[10] where the driver >>

does have reasons to reasonably suspect that children might be in the vicinity, they may still be liable even if a child runs on to the roadway unexpectedly.

Recently, the NSW Court of Appeal found that there was no contributory negligence on the part of a seven-year-old child who was crossing a road near a school when he stepped from a pedestrian refuge into the path of the defendant's vehicle,[11] even though the driver didn't expect this action by the child.

In *Edson v Roads & Traffic Authority*,[12] the NSW Court of Appeal held that a 13-year-old plaintiff, who was struck by two cars when crossing a freeway, was 40% responsible for the accident, even though she succeeded in her claim against the Highway Authority. In Queensland, Muir J in the Supreme Court thought that a 15-year-old girl who climbed on to the bonnet of a moving car should have her award reduced by 50% on account of contributory negligence.[13]

The High Court was presented with another opportunity to consider a decision of the NSW Court of Appeal involving a pedestrian claim, in *Roads & Traffic Authority v Ryan*.[14] In that case, a nine-and-a-half-year-old child suffered injuries when hit by a car while crossing a service road which adjoined the Great Western Highway. The plaintiff was with her father when she stepped off the nature strip and on to the service road. She brought a claim against the driver, the Roads and Traffic Authority and the local council. The trial judge found for the plaintiff but also found contributory negligence, to the extent of 10%. The trial judge found the driver to have been 50% responsible and both the Roads and Traffic Authority and the council to have been 25% responsible for the accident. The appeals of both the Roads and Traffic Authority and the council to the NSW Court of Appeal were allowed. The High Court, however, allowed an appeal and remitted the matter to the Court of Appeal for the determination of liability issues as between the defendants. Ultimately, the Court of Appeal (when remitted) decided that the trial judge's determination of liability and contribution issues should not be disturbed.[15]

ALCOHOL

In a somewhat extreme case, the High Court recently dismissed an appeal from a decision of the Supreme Court of Western Australia, where a heavily intoxicated plaintiff had been lying on the roadway in the early hours of the morning and was found to have been 70% responsible for his own injuries. In a joint judgment, their Honours Gummow, Kirby and Hayne JJ said of the driver's responsibility (whose attention had been distracted from the road surface by another person on the footpath in the moments before the impact):

> '... but recognising one possible source of danger does not mean that a driver can or must give exclusive attention to that danger. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger'.[16]

In *Direen v Coad*,[17] Evans J in the Supreme Court of Tasmania found that a drunk pedestrian who was wearing dark clothes when struck while walking on the side of a roadside should have his damages reduced by 40% on account of his own contributory negligence. On the other hand, in *Cirina v Wong*,[18] Master Harper in the Supreme Court of the Australian Capital Territory found two pedestrians to be only 10% and 15% responsible respectively, when they were struck by a car while crossing a road at night while wearing dark clothes. The court thought that even though one of the pedestrians had a blood alcohol concentration of 0.05%, this had not contributed to the accident in any way.

In *Jones v Bradley*,[19] the NSW Court of Appeal allowed an appeal against a trial judge's finding of only 25% contribution on the part of a pedestrian who crossed a busy road without looking. The driver of the vehicle was intoxicated by alcohol and was also adversely affected by rohypnol tablets that she had taken earlier in the day. The Court of Appeal increased the pedestrian's contribution to 50%, given the circumstances.

On the other hand, a driver who struck pedestrians on a road on Norfolk Island was found 100% responsible for the circumstances of the accident. The driver had a blood alcohol concentration of 0.276% and the pedestrians were walking on the roadside and carrying torches.[20]

OTHER RECENT CASES

Where a plaintiff was hit in the driveway of a service station by another motorist who had just filled up his car, the

pedestrian was still found to have been 30% responsible for the accident through failing to appreciate the defendant's moving vehicle and avoiding it.[21] In reaching his decision, Master Harper said:

> 'The driver of a motor vehicle is under a very high duty to ensure that he does not drive that vehicle within the shared area of a service station in such a way as to collide with a pedestrian. A pedestrian crossing the shared area of a service station is under a duty to take reasonable care to ensure that he or she is not struck by a moving vehicle. In the circumstances of this case, it seems to me that the defendant must bear the major share of responsibility for the plaintiff's injury. It would in my opinion be just and equitable for the plaintiff's damages to be reduced by 30% to reflect her share in that responsibility.'

In the ACT, Gray J dismissed an appeal against a magistrate's finding that a plaintiff who crossed a busy road without looking should succeed but have his award reduced by 75% on account of contribution.[22]

In *Anikin v Sierra & Anor*,[23] the High Court considered a pedestrian claim on appeal from the NSW Court of Appeal. The trial judge had found for a pedestrian who was struck by a car while wearing dark clothes and walking on a roadside at night. The pedestrian was hit by a bus travelling at some 70 to 80kms per hour in an area where pedestrians were uncommon. The trial judge found for the plaintiff but also found contributory negligence to the extent of 25%. The NSW Court of Appeal allowed an appeal by the driver and dismissed the plaintiff's claim. The High Court, however, allowed the plaintiff's appeal and reinstated the trial judge's findings by a four to one majority.

These recent decisions reinforce the suspicion that judicial attitude to 'pedestrian accidents' has changed in recent times.

CONCLUSION

In the 1944 decision in *Brosnan v Berga*,[24] the pedestrian was walking along a road at night pushing a bicycle. The driver was driving along the same road in the same direction and ran over the pedestrian. At first instance, it was held that the driver was liable, but that the pedestrian was guilty of contributory negligence. On appeal this was overturned. The driver was thought to be solely liable as he had the opportunity of avoiding the pedestrian. The idea of a pedestrian having to look to their rear as well as all other directions to satisfy themselves that there were no oncoming cars was an unreasonable addition to their duty of care.

Recent decisions of Australian courts would make it seem unlikely that the same facts would, in the current climate, enable the pedestrian to avoid a finding of contributory negligence. There is little doubt that the notion of 'personal responsibility', which has resulted in many footpath 'trip-and-fall' cases failing over the last decade, has also permeated the domain of pedestrian CTP claims – pedestrians are now increasingly having their awards reduced for contributory negligence where they could have taken greater precautions to avoid the accident. ■

Notes: **1** See, for example, articles by Henry Silvester (1999) 37 (11) LSJ 72. **2** See Kirby P in *Mitchell v GIO* (1992) 15 MVR 369 at 372. **3** (NSWCA – 16 June 1993 – BC9301740). **4** [2001] HCA 48. **5** [2001] HCA 48 at para 13. **6** [2005] WASCA 165 (29 August 2005). **7** *Markaboui v Gardener* [2005] NSWSC 648 (12 July 2005). **8** *Martin v Reda* [2004] QCA 268 (6 August 2004). **9** [2003] NSWCA 81 at para 104. **10** See, for example, *Derrick v Cheung* [2001] HCA 48. **11** *Lambert v Zammit* [2005] NSWSC 1135 (10 November 2005). **12** [2006] NSWCA 68 (7 April 2006). **13** *Edwards v Nominal Defendant* [2006] QSC 083 (28 April 2006). **14** *Pledge v Roads and Traffic Authority; Ryan v Pledge* [2004] HCA 13 (11 March 2004). **15** *Roads & Traffic Authority v Ryan* [2005] NSWCA 34 (15 March 2005). **16** *Manly v Alexander* [2005] HCA 79 (14 December 2005) at para 11. **17** [2005] TASSC 21 (5 April 2005). **18** [2005] ACTSC 45 (15 June 2005). **19** [2003] NSWCA 81. **20** *Smith v Edward* [2006] NFSC 4 (22 March 2006). **21** *Heywood v Miller* [2005] ACTSC 4 (28 January 2005). **22** *Harding v Scott* [2005] ACTSC 57 (20 July 2005). **23** [2004] HCA 64 (9 December 2004). **24** (1944) 47 WALR 1.

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