Case Comment

Jackson v Murray

personal injury - damages - contributory negligence
SC (Lady Hale DPSC; Lord Wilson JSC; Lord Reed JSC; Lord Carnwath JSC; Lord Hodge JSC) February 18, 2015 [2015] UKSC 5

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Law Reform (Contributory Negligence) Act 1945 (c.28) s.1(1)
Case:
Jackson v Murray [2015] UKSC 5; [2015] 2 All E.R. 805 (SC)

J.P.I.L. C152 Lesley Jackson sustained severe injuries on January 12, 2004 when she was knocked down by a car driven by Andrew Murray. Lesley, who was then 13, had stepped out from behind her school minibus into the path of Murray's car. The accident had occurred at around 4.30pm, when the light was fading. At first instance, the judge Lord Tyre found that Murray had failed to drive with reasonable care. He ought to have kept a proper look-out and identified the bus as being a school bus, or at least a bus from which children were likely to alight. He ought then to have foreseen that there was a risk that a person might, however foolishly, attempt to cross the road.

He went on to find that Murray had failed to modify his driving. He did not reduce his speed from 50mph (the speed limit was 60mph) as he approached the bus. A reasonable speed in the circumstances would have been between 30 and 40mph. However, Lord Tyre also found that the main cause of the accident was the girl's "recklessness" in attempting to cross the road without taking proper care to check that it was clear. He assessed her contributory negligence at 90 per cent. On appeal, the Extra Division reduced her contributory negligence to 70 per cent.

The Supreme Court[1] held that it was not possible for a court to arrive at an apportionment which was demonstrably correct. The apportionment of responsibility under the Law Reform (Contributory Negligence) Act 1945 s.1(1) was inevitably a somewhat rough and ready exercise. The test to be applied by an appellate court was whether the court below had gone wrong. 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 was only a difference of view as to the apportionment of responsibility which exceeded the ambit of reasonable disagreement that would warrant a conclusion that the court below had gone wrong.

Nevertheless they held that the Extra Division had gone wrong in this case. It had rightly considered that Lesley did not take reasonable care for her own safety. Either she did not look to her left within a reasonable time before stepping out or she failed to make a reasonable judgment as to the risk posed by the respondent's car. On the other hand, as the Extra Division recognised, regard had to be had to Lesley's circumstances.

Lesley was only 13 and a 13-year-old would not necessarily have the same level of judgment and self-control as an adult. As the court also pointed out, she had to take account of Murray's car approaching at speed, in very poor light conditions, with its headlights on. As the court recognised, the assessment of speed in those circumstances was far from easy, even for an adult. It was also necessary to bear in mind that the situation of a pedestrian attempting to cross a relatively major road with a 60mph speed limit, after dusk and without street lighting, was not straightforward, even for an adult. ***J.P.I.L. C153***

The Extra Division considered that the driver's behaviour was "culpable to a substantial degree". He had to observe the road ahead and keep a proper look-out, adjusting his speed in case a potential hazard presented itself. As the Extra Division noted, he was found to have been driving at an excessive speed and not to have modified his speed to take account of the potential danger presented by the minibus. The danger was obvious, because the minibus had its hazard lights on. Notwithstanding that danger, he continued driving at 50mph.

As the Lord Ordinary noted, the Highway Code advised drivers that "at 40mph your vehicle will probably kill any pedestrians it hits". That level of danger pointed to a very considerable degree of blameworthiness on the driver's part. They found it to be impossible to discern in the Extra Division's reasoning any satisfactory explanation of its conclusion that the major share of the responsibility should be attributed to the child. The driver's conduct played at least an equal part in causing the damage and was at least equally blameworthy. They concluded that the proper assessment of contributory negligence was 50 per cent.

Comment

In many cases a particularly troublesome issue for personal injury litigators will not be whether a finding of contributory negligence is likely, but what the apportionment will be. We are grateful when we are aided by clear and authoritative judicial guidance which can be applied across a wide range of facts such as that given by the Court of Appeal in *Froom v Butcher* [2] regarding the wearing of seatbelts.

Despite the rarity of straightforward RTA's coming before the Supreme Court (on what basis can it be said that a point of law of general public importance will be raised?) the present case could, perhaps, be considered one of missed opportunity. This might have been an occasion when our highest court chose to give simple to apply guidance on the approach to be adopted to contributory negligence in a situation of car versus pedestrian. This did not really happen. The Court affirmed the well established principles that:

1)

a car is more causatively potent of damage than a pedestrian; and

2)

that a pedestrian will rarely be more to blame than the motorist,

but that is really as far as the judgment went on the issue. The reason for this is probably the obvious one, namely that the factual matrices are so many and varied, any other guidance would be impossible.

There were essentially two issues in the appeal. One was how responsibility ought to be apportioned in a case such as the present. The second was what principles should govern the review of an apportionment by an appellate court.

Apportionment

The difficulty for litigators anticipating how the courts will apportion contributory negligence is clearly illustrated by what happened in this case. The judge at first instance found the child's contribution to be 90 per cent. On appeal to the Extra Division the child's contribution was reduced to 70 per cent. The majority of Supreme Court (3:2) then reduced it further to 50 per cent, whilst the dissenting minority considered that there was no basis to interfere with the Extra Division's 70 per cent finding as it was not outside the generous limits of reasonable disagreement.

The majority, which included Lady Hale, drew heavily on the analysis of Hale LJ (as she was then) in *Eagle v Chambers*,[3] where it had been observed that the "destructive disparity" between the parties could be taken into account as an aspect of blameworthiness, contributory negligence being a function of relative blameworthiness and causative potency. It was noted that the courts have consistently imposed a high burden on car drivers to reflect the potentially dangerous nature of driving (though nothing approaching the strict liability imposed on motorists in some of our neighbouring European countries), and the fact that "a car is potentially a dangerous weapon".

The Extra Division had, naturally, concluded that the causative potency of the driver's conduct was greater than the child's. It therefore followed that if the lion's share of responsibility was apportioned to the child (i.e. 70 per cent), the Extra Division must have considered the child to be far more blameworthy than the driver. This the majority of the Supreme Court could not accept on the facts found, namely that if the child had waited until the motorist passed, there would have been no collision. Equally, if the motorist had slowed to a reasonable speed for the circumstances and kept a proper lookout, he would have avoided the child.

When Should an Appellate Court Interfere with the Apportionment of a Lower Court?

Another vexing question for litigants is whether a judicial apportionment is likely to be reviewed on appeal. The present case leaves no very clear signals about this given that the

majority (3:2) were prepared to interfere with the Extra Division's decision, but the two other members of the Court were not.
The Court accepted that a court must deal broadly with the problem of apportionment;[4] that it is a rough and ready exercise; that it is not possible for a court to arrive at an apportionment which is demonstrably correct; and that such matters are incapable of precise measurement. They commented that an appellate court will treat apportionment in the same way it does with an assessment of damages, namely that it will interfere if the judge has gone wrong in principle, or is shown to have misapprehended the facts, or is clearly wrong. Having reviewed the authorities cautioning against interference with a trial's judge's assessment they quoted Lord Fraser:
"the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an imperfect solution the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible." [5]
The Extra Division had not made an error or misdirected itself, but the majority considered that it had reached an apportionment which was not reasonably open to it; that the outcome was not just and equitable. As noted above, the majority considered that the child being found much more responsible than the motorist was substantially different from their own view that the parties were equally responsible.
The minority disagreed. They did not consider the court below to have "manifestly and to a substantial degree gone wrong",[6] though they accepted the trend to attribute more responsibility to vehicle drivers. Lord Hodge cautioned that "there is a danger of an appellate court attaching significance to findings [of the trial judge] which they do not carry and reinterpreting them and what may have lain behind them in a way which the judge, who heard the evidence, did not intend".[7]

Conclusions

This case illustrates to us how, on the same set of facts, individual judges assess contributory negligence differently. As litigators we therefore need to continue to assess contributory negligence within a fairly wide margin. Finality is important, and one sympathises with Lord Hodge's sentiments that appellate courts are in danger of misunderstanding the findings of the trial judge.
Nevertheless, the judgment is a useful analysis of how causative potency and destructive disparity should be analysed. It may well help in bringing more uniformity in how the courts deal with apportionment in RTAs involving pedestrians, and further supports the principle that rarely will pedestrians be found more liable than car drivers.

Practice Points

- An appellate court will interfere with the apportionment of a lower court if it considers it to have exceeded the generous ambit within which reasonable disagreement is possible.
- There may be no reliable way of knowing precisely where the boundaries of this "generous ambit" lie in any individual case.
- The trend in running down cases is clearly to attribute more responsibility to the driver than the pedestrian. This is particularly so in cases of car versus child.
- Each case requires very careful analysis of the actions of the parties involved as well as their experience of the type of situation they encountered.
- Causative potency and destructive disparity ought to be deployable in a wide range of RTA cases—e.g. car versus motorcycle; car versus horse; or bicycle versus pedestrian.
- Each case must depend upon its own facts and courts get little assistance from comparisons of outcomes in other cases.

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J.P.I. Law 2015, 3, C152-C155

1.
Lords Hodge and Wilson dissented as they were not persuaded that the Extra Division's determination was outside the "generous limits" of reasonable disagreement.
2.
(1976) QB 286.

3.
[2003] EWCA Civ 1107.
4.
Per Lord Reid in *Stapley v Gypsum Mines Ltd [1953] A.C. p.682*.
5.
G v G [1985] 1 W.L.R. 651, at 652.
6.
Per Lord Hodge at [46].
7.
At [51].