All England Official Transcripts (1997-2008)*

Eagle v Chambers

[2003] EWCA Civ 1107

(Transcript: Smith Bernal)

COURT OF APPEAL (CIVIL DIVISION)

WARD, WALLER, HALE LJJ

24 JULY 2003

Damages and compensation – Assessment of damages – Personal injury – Contributory negligence – Claimant's appeal against apportionment of blame.

24 JULY 2003

N Leviseur for the Appellant

T Hooper QC and T Petts for the Respondent

Chamberlins; CIS Solicitors

HALE LJ:

THIS IS THE JUDGMENT OF THE COURT.

[1] This is the claimant's appeal from the order of Moses J made on 19 November 2002 in the Queen's Bench Division of the High Court sitting in Norwich. The claimant pedestrian was very seriously injured when struck by a car driven by the defendant. The judge gave judgment for the claimant subject to 60% contributory negligence. The claimant does not deny that she bears some share in the responsibility for her injuries but challenges that apportionment. At the end of the hearing we announced that the appeal would be allowed and a finding of 40% contributory negligence substituted, but that because of pressure of time that day, we would give our reasons in writing later. This we do now.

[2] The accident took place as long ago as 22 June 1989. The judge was obviously concerned about how he should approach the oral evidence when it had all happened so long ago and the witnesses were more likely to be trying to remember what they had said in their witness statements than what had actually happened. He was therefore anxious first to establish what independent recollection they had rather than relying on their witness statements as evidence in chief in the usual way.

[3] The time, place and road conditions were not in dispute. The accident took place at about 11.30pm on the south bound carriageway of Marine Parade, Great Yarmouth. Marine Parade is a dual carriageway with two rows of parking spaces between the two carriageways. The southbound, sea side carriageway is 22.6 feet wide with a broken white line dividing it exactly in two. On that day, the weather was fine, and the street lighting good; the road is virtually straight; the visibility was therefore extremely good. An event had just finished at the Winter Gardens, which is also on the sea side of the road. There were people on the pavement, having recently come out of the building, and people going to get their cars parked on the central reservation.

[4] The eyewitness evidence came in three different forms. Appended to the police report before the court were statements given by four eyewitnesses a few days after the event. Those eyewitnesses also gave evidence in court and all but one had also made witness statements (some time after the event) for the purpose of the civil proceedings. Julie Bowgen (as she then was) was driving down Marine Parade in the same direction as the claimant, going to drop her mother off by her father's car which was parked in the central reservation. She saw the claimant facing towards her and walking backwards along the broken white line. She was able to avoid the claimant. Michael Leveridge was her then boyfriend and a passenger in the car; they were so concerned for the claimant's safety that they stopped further down the road and he went back to try and persuade the claimant to get off the roadway. Michael Ryan and Stanley Rouse were bystanders outside the Winter Gardens. A fifth eyewitness was Julie Bowgen's father, Ted Bowgen. He had not given a statement to the police and his witness statement for the proceedings was made on 16 January 1994. Nevertheless, we are told that his oral evidence was extremely impressive. He had been walking down the pavement towards the point where his car was parked on the central reservation. He had also tried to persuade the claimant to get off the roadway and been told to 'fuck off.'

[5] The claimant was then aged 17. She was dressed in light clothing. She was walking down the carriageway. She had been doing so for some time, long enough for bystanders and other drivers to be concerned for her safety and urge her to stop. She had refused in no uncertain terms. She was in an emotional state. There were various descriptions of how and where she was walking. Michael Leveridge agreed that she had been unsteady on her feet and wandering or not walking in a straight line. She had been seen walking along the broken white line, but others placed her in the offside lane at the time of impact. The judge was satisfied that she was then in the offside lane. She was struck by the offside of the defendant's car, which sustained damage to the offside front wing, front door pillar and windscreen. The defendant said that he was in the nearside lane but no one else did so. The judge was satisfied that he was in the offside lane. The defendant told the police that he was driving at about 30 to 35 mph and the judge accepted this. The defendant failed a roadside breath test but at the police station was found to be four micrograms below the limit. He accepted that he had taken enough alcohol that evening to impair his driving abilities.

[6] Liability was denied. The judge found that had the defendant exercised the standard of care of a reasonable driver he would have seen the claimant earlier and could have taken avoiding action. The road was straight and the visibility good. The claimant was in the offside lane. At least two other cars had been able to avoid her. There was enough of a gap for the defendant either to see her or to see them taking avoiding action. Indeed the defendant had thought there were no cars in front of him, in which case there was nothing to obscure his view. He might not expect someone to be walking along the roadway, as opposed to crossing it towards the parked cars, but he should still have been able to see her if keeping a proper lookout. He had taken enough drink to affect his driving abilities. He only picked her up at the last moment. He did not brake or swerve. There was no evidence that the claimant suddenly stumbled or walked into his path. Hence not only

should the defendant have seen her earlier but his failure to do so was causative of the collision.

[7] As to contributory negligence, the judge directed himself in accordance with s 1(1) of the Law Reform (Contributory Negligence) Act 1945 that 'it is my obligation to reduce her damages to such extent as I consider just and equitable having regard to the plaintiff's share in the responsibility for that damage'. He continued:

> "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."

Hence he concluded that she should bear a greater share of responsibility for the accident than the driver and apportioned it at 60%.

[8] Mantell LJ in granting permission to appeal said this:

> "On the judge's findings the negligence of the claimant would not appear to have been an effective cause of the accident and I consider it at least reasonably arguable that she should not have been found to be mainly responsible."

[9] Mr Leviseur, on behalf of the claimant appellant, attacks only one of the judge's findings of primary fact. He argues that the judge's finding that she was 'drunk' was not supported by the evidence. There was no evidence of drunken behaviour. The only oral evidence about drink was that of Mr Ted Bowgen:

> "Yes she had fell out with her boyfriend I think and she probably had a drink or two which girls do, I got three daughters, that is it."

> "Well, she was just upset and said, you know, as girls do when they are upset about boyfriends."

> "Just sort of sauntering slowly and very upset and emotional."

That being the evidence, the finding that she was drunk has understandably troubled her litigation friend and her family, who are devotedly caring for the interests of the claimant who has been so severely injured that she is unable to give any instructions about the case. Mr Hooper QC, who appears for the respondent defendant, accepts that the most that could be said on the evidence was that 'she had probably had a drink or two'. It is not disputed that she was upset and emotional.

[10] There are, as has often been held, two aspects to apportioning responsibility between claimant and defendant, the respective causative potency of what they have done, and their respective blameworthiness: see the well-known words of Denning LJ in *Davies v Swan Motor Co Ltd* [1949] 2 KB 291, [1949] 1 All ER 620, at 326, approved by the House of Lords in *Fitzgerald v Lane* [1989] AC 328, [1988] 2 All ER 961 at 345; and Lord Reid in *Stapley v Gypsum Mines Ltd* [1953] AC 663, [1953] 2 All ER 478 at 682 and in *Baker v Willoughby* [1970] AC 467, [1969] 3 All ER 1528 at 490.

[11] Mr Leviseur argues that in both respects there is a disparity between the parties. The combination of drink, speed and motors cars is deeply dangerous. The respondent knew that he had had just about the limit, that this impaired reaction

times, and that the drink might have affected him. He was driving at or above the speed limit along a sea front road in a seaside resort in summer with attractions for visitors on each side of the road and cars parked in the middle. The judge should have considered the 'destructive disparity' between the parties. Those who are befuddled by drink and who drive heavy machinery at or beyond 30 mph are not properly to be categorised as less culpable or less blameworthy or less responsible than a 17 year old girl walking along a straight well lit road in the middle of a Norfolk resort. The conclusion that she was more responsible than him was the wrong way round and plainly wrong.

[12] Mr Hooper draws our attention to the genesis and wording of s 1(1) of the Law Reform (Contributory Negligence) Act 1945:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

Before the Act, of course, a finding of contributory negligence defeated the claim altogether. He therefore argues that the focus should primarily be upon the claimant's conduct and her 'share in the responsibility' rather than on a comparison between the two.

[13] He accepts that the car driver's causative potency was much greater than that of the pedestrian in this case. But he argues that her conduct was so much more blameworthy that it justified the judge's conclusion that she was the more responsible. He points to the case of *Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003, in which a car driver drove into the back of a stationary lorry but was nevertheless held only 20% responsible. Hence he argues that the conclusion in this case was not so plainly wrong that the Court of Appeal should interfere with it.

[14] We accept that s 1 of the 1945 Act requires the court to consider 'the claimant's share in the responsibility for the damage'. But the section is premised on both parties being at fault. It is also impossible to consider the claimant's 'share' without also considering that of the defendant. Moreover the court has to do what is 'just and equitable' which includes being fair to the claimant as well as to the defendant. Realistically, therefore, the court has to compare the one with the other. The court would inevitably have to do this if there were cross claims between the parties.

[15] A little time was spent in argument discussing the case (which this is not) where there are cross claims between the parties. Section 1(1) of the 1945 Act refers to responsibility for 'the damage', not responsibility for the accident. That is why a passenger who was in no way to blame for 'the accident' may share responsibility for his own damage, for example by not wearing a seat belt. Could there ever be a situation in which one party was, say, 60% responsible for the other party's damage but only 40% responsible for his own? A car can do so much more damage to a person than a person can usually do to a car. Fortunately, it is not necessary for us to resolve this debate. The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness. Where there are cross claims, the arithmetic will reflect the different amounts of damage done. Thus while one might not wish to rule out the possibility that there might be an exceptional case in which different apportionments were possible, no-one has yet thought of an example where this would be so.

[16] We also accept that this court is always reluctant to interfere with the trial judge's judgment of what apportionment between the parties is 'just and equitable' under the 1945 Act. But a finding as to which, if either, of the parties was the more responsible for the damage is different from a finding as to the precise extent of a less than 50% contribution. There is a qualitative difference between a finding of 60% contribution and a finding of 40% which is not so apparent in the quantitative difference between 40% and 20%. 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. That is not this case. 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': Latham LJ in *Lunt v Khelifa* [2002] **EWCA Civ** 801, para 20.

[17] In our view the driver's conduct was very much more causatively potent than that of the claimant:

i) This was a wide, near-straight, well-lit road: the visibility was as good as it could be at night.

ii) There was not much traffic, and on any view of the judge's findings, nothing to obstruct the driver's view.

iii) This was not an unrestricted dual carriageway in the country, but a restricted road in a built up area. More than that, it was a sea front road in a seaside resort in early summer, with attractions for visitors on both sides of the road and cars parked in the middle.

iv) Car drivers have to be on the look out for pedestrians in the road. While a driver might not expect someone to behave as the claimant had been behaving, it was certainly to be expected that there might be pedestrians in that particular road at that time. The event at the Winter Gardens had just finished. There were people on the pavement outside. People like Mr Bowgen might be going for their cars on the central reservation. They might even be walking along the offside edge of the carriageway looking for their cars. These people could not be criticised.

v) The longer a person is in the road, the easier it should be to see them, especially if they are wearing light coloured clothing and remain in roughly the same place in relation to traffic approaching from behind.

vi) Although there was evidence that the claimant had been wandering or unsteady, there was no evidence that the claimant had staggered or changed direction suddenly.

vii) There was nothing to prevent the defendant taking avoiding action, as others had done before him.

viii) On the judge's findings, the defendant would have failed to see and failed to avoid any pedestrian, including one whose own conduct could not be criticised.

ix) 'But for' causation is not sufficient to hold a person contributorily negligent; if it were, blameworthiness would be the only criterion in assessing the degree of contributory negligence.

[18] However, we accept that the claimant's carelessness for her own safety was sufficiently blameworthy to justify a finding of contributory negligence, albeit that the defendant was also at least as if not more blameworthy than her:

i) She put herself needlessly at risk by walking along the middle and then the offside lane of the carriageway without keeping a proper lookout for vehicles coming from behind.

ii) She had been doing so for some time.

iii) She had ignored at least two warnings from sensible people who had made some effort to persuade her to stop.

iv) She was young, upset and emotional, but rejected attempts to help her in terms which suggest that she was not totally unaware of the danger she was putting herself in.

v) The car driver was a mature man. He was driving needlessly in the offside lane or straddling the white line.

vi) He was driving at or a little above the maximum permitted speed on a road he knew, the sort of road where particular care should be taken to look out for and avoid pedestrians.

vii) He knew that he had had enough to drink to affect his driving abilities.

viii) For whatever reason, he failed to see the claimant until the very last moment and took no action at all to avoid her.

[19] In those circumstances, we consider that the judge was plainly wrong to hold the claimant more responsible than the defendant. It is always difficult in cases where the claimant is so severely injured that the judge is deprived of the benefit of her evidence. Her litigation friend and the rest of her family may understandably feel that because of the defendant's

negligence she was not able to defend herself. But we have to accept that the judge was entitled to take into account the impression gained from the witnesses, and in particular Mr Ted Bowgen and the defendant himself. It is for this reason that we can justify a finding of contributory negligence as high as 40%.

[20] We therefore allow the appeal and substitute a finding of 40% contributory negligence.

Appeal allowed.