Judgments

Ellis (by his Grandmother and Litigation Friend, Titley) v Kelly and another

[2018] EWHC 2031 (QB)

Queen's Bench Division (Birmingham District Registry)

Yip J

31 July 2018

Judgment

Mrs Justice Yip:

1. On 20 September 2008, Caine Ellis, then aged 8 years 8 months, was knocked down by a car driven by the defendant, Mr Kelly. He suffered a severe brain injury, as a result of which he is unlikely to be able to take up employment or to live independently. Mr Kelly's insurers admit primary liability but contend that a finding of contributory negligence should be made. Further, they claim a contribution from Caine's mother, Mrs Ellis, alleging that she bears some responsibility for allowing Caine to go out without proper supervision. I am required to determine whether Caine and/or Mrs Ellis should bear any liability.

Factual background

2. Caine comes from a close family. His grandmother, Mrs Titley, and other family members live in Acocks Green, Birmingham. Caine frequently visited and enjoyed playing with his cousins. His aunt's house was on Tibland Road. This is on a quiet estate, the residents of which make up a tight-knit community and look out for each other. Children regularly play out on the quiet residential roads.

3. Tibland Road leads onto Pollard Road which comes off Gospel Lane, which is where the accident occurred. Gospel Lane is a through road but not a busy one. On one side of Gospel Lane is Fox Hollies Park, which has a children's playground and a fishing pond. On the other side is a skateboard park, an open playing field and a corner shop which sells (amongst other things) sweets and ice-creams. Unsurprisingly then, this part of Gospel Lane attracts many children.

4. I heard evidence from Mrs Ellis, Mrs Titley and Caine's cousin, Jessica Randall. The clear impression I had was that Caine was a normal 8-year-old boy. He was close to Jessica who is a year younger than him. Jessica is now 17. She is a polite and sensible young woman. It seemed to me that the children of the family were generally well-behaved. There was some suggestion that Caine had some difficulties at school. Mrs Ellis told me that he found reading and writing difficult but there were no great problems. Jessica confirmed that Caine had not been boisterous or easily distracted, to her knowledge.

5. From that summer or perhaps a little before, Caine and Jessica had been allowed to go out without adult supervision. They were allowed to go to the Gospel Lane area if they were with Jessica's older brother Cyrus (then aged 11 years 2 months) and/or another cousin Chloe (then aged 10 years 3

months). The children were always told to stay together and encouraged to take a mobile phone to maintain contact with their parents. If the older cousins were not with them, Caine and Jessica were allowed only to be in a closely defined area outside the house between two lampposts.

6. On the day of the accident, Caine was at his aunt's house with his mother and two younger brothers. His other cousins, including Chloe, had gone to Fox Hollies Park. Cyrus, Caine and Jessica asked to go to the park and they were allowed to. As usual, Mrs Ellis told Caine to be careful, watch the road and stay with his cousins. The children walked to the park and joined Chloe and the others. They were playing in the children's playground.

7. After they had been there a little while, Cyrus announced that he was going to see a friend at the skateboard park. Caine stayed with the girls but then said he wanted to go to the skateboard park to be with Cyrus. Chloe told Caine not to go and said she would tell his mother. He went anyway.

8. In her statement, Jessica said “Chloe and I thought that he would be alright so we carried on playing on the swings”. Their plan was to meet up with Caine and Cyrus once they were ready to go. Jessica said “Cyrus would have to come back with us because Dad would have gone mad with him for allowing us to split up.” Jessica was clear in her recollection that Cyrus had never gone off on his own before. This was supported by Mrs Ellis and Mrs Titley. I was told that if Cyrus did want to be with his own friends without his younger cousins in tow he would say so. Jessica and Caine would then have to stay “lamppost to lamppost”.

9. Bearing in mind Jessica was then only 7 years old and is now 17, I am not sure it was entirely realistic to cross-examine her about her decision-making in response to the unfolding events. However, she did remember expecting Caine to be alright and staying on the swings with Chloe. As she swung up in the air, she could see Caine walking out of the park. He crossed at the zebra crossing immediately outside the park and then turned left towards the entrance to the skateboard park rather than right towards the shop. A little time later, they heard screaming. When they went to investigate they found that Caine had been run over on Gospel Lane. Cyrus was not around.

The accident

10. There is no direct evidence as to what Caine did between Jessica seeing him turning left off the crossing and the moments before the collision. The accident happened when he ran into the road from the direction of the corner shop. There is no evidence that Caine had been intending to go to the shop or that he had any money for sweets.

11. I infer that the most likely explanation is that Caine went to the skateboard park but could not find Cyrus. He probably went to look for him at the shop but again did not find him. It seems likely that he would then have recognised that he had become separated from all his cousins, contrary to the rule to stick together, and that he decided that he should get back to Chloe and Jessica in the park.

12. This case had the advantage of excellent eye-witness accounts so that the circumstances of the accident are fairly clear.

13. Mr Vaughan Felton was driving down Gospel Lane. The corner shop and skateboard park were ahead of him on his offside. When he was about 100m away from the zebra crossing, he saw Caine running from the direction of the shop towards the road. He told me that he thought at the time “He's running towards the road, which isn't great but at least he's running towards the crossing.” Caine ran into the road diagonally, entering the road before the crossing, but Mr Felton was clear that he was heading for the crossing.

14. The defendant was travelling in the opposite direction to Mr Felton. He swerved just before impact but hit Caine who was then about a third of the way into the road. In a statement given to the police on the day of the accident, Mr Felton said that Caine was probably just on the very edge of the crossing on the side closest to him. To assist at trial, he very helpfully marked a sketch plan to show Caine's route and the point of impact.

15. Mr Felton was an entirely independent witness. He is a civil engineer and now works for the environment agency. He was precise and measured in his evidence. All parties recognised that he was an excellent witness. His evidence therefore provides a good starting point for analysing the accident.

16. I also heard from Mrs Jayne O'Driscoll. She too was an independent eye-witness and gave clear and compelling evidence. She was driving along Gospel Lane in the same direction as Mr Felton but some way ahead of him. The defendant passed her close to a mini-roundabout heading towards the crossing. As he did so, she had cause to say something like "He's going fast" to her daughter. She explained that she had her car windows open. As the defendant went by, she felt "wind" and her car was rocked. She described this as like being overtaken on a motorway. She had a clear sense that the defendant was travelling very quickly. She then heard a screech and assumed that the car had lost control. On looking in her rear-view mirror, she saw Caine upside down in the air.

17. Two statements, given to the police at the time, were put in evidence without the witnesses being called. One was from a lady called Eileen McCrudden, who is now deceased. She was outside the corner shop when she heard a loud noise like a car engine revving. She said that she saw the defendant driving "very fast". As it got closer she said, "a young boy just appeared from nowhere on the pavement beside me and run toward the road." She saw the car hit him. She confirmed that Caine was not on the crossing at the time of the accident. Mr Felton confirmed that he considered Mrs McCrudden's account to be consistent with his recollection.

18. There was also a statement from Andrew Henry. He could not be traced to attend the trial but he gave a statement to the police on the day of the accident. He had been travelling in the defendant's car. He said:

"Paul was going over the speed limit but I don't know how fast he was going. If I had to guess, not over 60 mph. As we got towards the roundabout at the junction with Pollard Road I said to him "slow down bud you're going to hit someone." He said "I'm trying kid". I didn't notice him trying to slow down. As we got by the shops by the parks I saw a kid on the pavement running towards the road. … The kid looked straight at the car but kept on running. Paul saw him but it was too late. He swerved to our right away from the kid but the car hit him.

…

I don't remember Paul braking but he must have.

…

We had hit the kid on the crossing by the shops and the car had stopped past the crossing but I don't know how far past."

19. The defendant was interviewed by the police twice. There were inconsistencies in what he said. Mr Bright QC sought to introduce evidence about another incident as a challenge to the defendant's credibility. However, the defendant was not called and Mr Matthews did not rely on his account to the police. Therefore, his credibility was not in issue and the evidence relating to the other incident plays no part in my decision.

20. To summarise the eyewitness accounts, Caine ran out from the forecourt of the shop, across the pavement, making towards the crossing. He took more or less a straight diagonal line and did not stop. He looked straight at the car but continued running. He appeared to be aiming for the crossing, but he entered the road at an angle and was not on the crossing when he stepped onto the road. At impact, he was within the controlled area but had not reached the zebra stripes. He was just to the far side of the studs looked at from the direction of approaching traffic when he was hit by the defendant's speeding car, which did not brake heavily but was steered to the right at the last moment.

Accident reconstruction evidence

21. The starting point must be the picture gained from the eyewitnesses. However, this was supplemented by expert evidence from Mr Robert Seston, instructed on behalf of the claimant, and Dr Gary Coley, on behalf of the defendant. The experts had prepared a joint statement, which left no areas of disagreement. Nevertheless, they attended trial and listened to the eyewitnesses. Since Mr Felton's evidence was so clear, they had a further discussion at court and produced a short document setting out agreed calculations based upon that evidence. This was helpful and it was unnecessary for them to give oral evidence.

22. There is always a danger of elevating accident reconstruction evidence to something more than it is. Generally, experts will be giving an opinion based upon variables and assumptions and subject to

the court's findings of fact. Useful calculations can be provided by the experts, but care must be taken not to treat them as mathematical certainties. The expert evidence is but one piece of the evidential jigsaw. It must always be cross-referenced with the other evidence and the court must reach its own findings on the balance of probabilities taking everything into account. There is sometimes a danger of seeking to make precise findings where the underlying evidence does not really allow for this.

23. Having said that, the clarity of the lay evidence in this case perhaps allows for a greater degree of confidence in the calculations than is often the case. There are always variables. The experts' final opinion depends on Mr Felton's evidence. Clear as that evidence was, he would not claim to have marked Caine's route or the impact point with precision. Even small variations would have some impact on the resulting calculations. Likewise, estimates must be made of Caine's running speed. Again, variation here would affect the calculations. I bear all that in mind when considering the evidence. However, I do find the accident reconstruction evidence helpful when considering the actions of the defendant and of Caine.

24. Using the point of impact identified by Mr Felton to calculate the pedestrian throw distance, the experts have calculated a range of 31 to 40 mph for the speed of the car at impact. Their joint statement explains that the method of calculation probably includes some under-estimate but the effect is not great.

25. The witnesses give a consistent account of the defendant travelling much too fast. Both Mr Henry and Mrs O'Driscoll had been caused to exclaim about his speed before the accident happened. Mr Henry had told him to slow down. He could only guess the speed was “not over 60 mph”. Mrs O'Driscoll gave the account of her car being rocked as he passed. Mr Henry did not think the defendant slowed down significantly. In the circumstances, I find that the impact speed is more likely to be at the upper end of the range given by the experts.

26. This does not represent the approach speed. There will have been some speed loss before the impact. The defendant did steer. Mr Henry said that he did not remember the defendant braking but he “must have”. Mr Matthews agreed that he must, at least, have taken his foot off the accelerator. Therefore, the speed of the vehicle on the approach to the crossing was somewhat more than 40 mph. It is not possible to be more precise than that.

27. The course that the claimant took meant that he would have been obscured from the defendant's view (and the car would have been obscured from his) until Caine was 13.4 metres from the point of impact. I am satisfied that this is a reasonable estimate, notwithstanding Mr Matthews's suggestion that Caine may have been further obscured by the position of other boys, which I regard as speculation. The experts have anticipated that it took him 3 seconds to cover the 13.4 metres. Of that, he would have been on the pavement for nearly 2 seconds (1.9 s as calculated) and in the road for just over 1 second.

28. Had the defendant been approaching at a constant speed of 40 mph, he would have been about 53.6m away from the point of impact, roughly 50 metres from the near edge of the crossing at the point that mutual visibility was attained. If he was travelling at up to 45 mph, he would have been one or two car lengths further back.

29. Cross-referencing various photographs in the trial bundle, allows me to say that the car was probably close to a small traffic island with some bollards when Caine came into view and when he was first able to see the car. Whether the car was immediately adjacent to, just past or just reaching the bollards would depend upon the precise speed it was doing. It is not possible to be more precise than this. At the time of the accident, the road surface on the approach to the crossing was coloured red. By the time Caine entered the road, the car was in the red marked area.

30. Had the car been driven at or below the 30 mph speed limit, then even allowing a perception-reaction time of 2.0 seconds (which would be at the upper end of the accepted range), Mr Kelly could have reacted and stopped before reaching Caine. I understand that this would have required heavy braking.

The defendant's culpability

31. While primary liability is admitted, it is necessary to look at the defendant's culpability in order to view the arguments about the responsibility of Caine and Mrs Ellis in context.

32. The defendant was plainly travelling much too fast. The speed limit was 30 mph but I do not regard that as a safe speed at which to navigate this particular stretch of road. That was also the view of Mr Felton, who knew the road well. He described the area as a "play area" and said it was expected that children would be there. The skateboard park was the only one nearby, attracting many children. There are traffic calming measures in the vicinity reinforcing the need for care. There were groups of people including children around on the day. The defendant was a local man and confirmed in his first police interview that he knew the character of the area. In any event, the parks and the shops were there to be seen, as was the presence of children on the day. Just before the accident, the defendant had been warned by his passenger to slow down because he might hit someone. His driving plainly shocked Mrs O'Driscoll and was such that when she heard the screech she immediately thought he had lost control.

33. In my judgment, a safe speed at this location and at this time was no more than 20 mph. Any reasonable driver would have slowed to go through this particular stretch, approaching the zebra crossing, and would have been alert to the possibility of children running out. A perception-reaction time of as much as 2 seconds would not be reasonable in that state of heightened alertness.

34. Given that he could have stopped at 30 mph and with a perception-reaction time of 2 seconds, driving at a safe speed and keeping a vigilant lookout, the defendant ought to have been able to stop relatively easily.

Caine's understanding, experience and actions

35. I was entirely satisfied that Mrs Ellis's evidence was truthful and accurate. Mr Matthews did not suggest otherwise.

36. Mrs Ellis had taught Caine about road safety in a practical way as they went out and about. From the time he started nursery, she would walk to school with him and would teach him to "stop, look, listen". She had told him to wait for cars. She did not think she had ever told him not to run across the road and she would not have told him not to cross on a diagonal as she was not aware that was in the Green Cross Code. She did teach him to find a safe place to cross and to use a crossing if there was one there.

37. She agreed children should not go out without an adult until they understood the Green Cross Code. I note the evidence that Caine's younger brothers were not allowed out at the time. She thought Caine was sufficiently sensible to go out with his cousins, in the controlled way she described.

38. Caine had used the zebra crossing in Gospel Lane many times with her. The crossing is in a straight line to the path of the park. When using the crossing it was not often necessary to stop and wait for traffic because the road was not busy, as confirmed by Mr Felton.

39. Caine's experience of taking responsibility for himself on the road was limited. He had not been allowed to go anywhere that involved crossing a road without an adult or his older cousins. By all accounts, this was the first time he had done so. The cousins were always told to stay together. There had not been any discussion with Caine as to what he should do if Cyrus were to go off as that was not something he would be expected to do. The children all knew that if they broke the rules they would not be allowed out anymore.

40. The evidence taken as a whole was that Gospel Lane was a quiet road and that cars did not generally travel fast along it. The evidence of Mr Felton and Mrs O'Driscoll gave a clear picture that the manner in which the defendant was driving was out of the ordinary for this area, where to quote Mrs O'Driscoll it was "blindingly obvious" there would be children around. Caine's experience of cars in the Gospel Lane area is likely to have been that they travelled slowly and cautiously in the manner of Mr Felton and Mrs O'Driscoll.

41. I find on the basis of Mr Henry's statement to the police that Caine did look towards the car and therefore he is likely to have seen it as he ran across the pavement to the road. There is no evidence as to whether he heard the noise of the engine. He did not stop. He did not run along to the proper crossing point although he was clearly heading to the crossing point as described by Mr Felton and he entered the road on the far side of the traffic rather than putting himself closer to approaching cars.

42. Caine plainly did not deliberately run into the path of the car. There is nothing to suggest he was being naughty or silly at the time. He was not playing a game. He was not showing off. He does not

appear to have been with anyone when he ran into the road.

Contributory negligence

43. Although very well known, it is worth restating the basis upon which a finding of contributory negligence is to be considered. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 states:

"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 extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …"

44. The passing of the Act did not affect what Viscount Birkenhead said in *The Volute* [1922] 1 A.C. 129:

"Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it."

45. Denning LJ explained the application of section 1 in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 K.B. 291:

"Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness. … Speaking generally, therefore, the questions in road accidents are simply these: What faults were there which caused the damage? What are the proportions in which the damages should be apportioned having regard to the respective responsibilities of those in fault?"

46. That test was approved by the House of Lords in *Fitzgerald v Lane* [1989] A.C. 328 and *Stapley v Gypsum Mines Ltd* [1953] A.C. 663. It is now very well established that apportioning responsibility between claimant and defendant involves considering the respective causative potency of what they have done and their relative blameworthiness.

47. In *Gough v Thorne* [1966] 1 WLR 1387 at page 1390 G, Lord Denning MR said:

"A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age is to be expected to take precautions for his or her safety: and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."

48. There is no hard and fast rule as to the age at which a child may be held to be guilty of contributory negligence. In judging the actions of a child, the standard of care is to be measured by that reasonably to be expected of a child of the same age, intelligence and experience.

49. The parties referred to various reported cases involving child pedestrians. The Court of Appeal has repeatedly said that the fact sensitive nature of road traffic claims is such that comparison with other cases is rarely helpful. However, by way of illustration of different outcomes on different facts, I note two cases cited to me.

50. In *Andrews v Freeborough* [1967] 1 Q.B. 1, there was an issue as to whether the child had in fact stepped into the road or whether she was in some way swept off the kerb. The trial judge had found the latter. The Court of Appeal questioned that finding but concluded that contributory negligence would not have been made out even if the child did step off the kerb in front of the car. Wilmer LJ said:

"…if I thought we could properly find that the child did step off the kerb into the road, I should have needed a good deal of persuasion before imputing contributory negligence having regard to her tender

age.”

Davies LJ said:

“For the little girl was only eight years of age, and in my judgment it is not possible to say that she was guilty of contributory negligence in the circumstances of this case. It is true that she was thought by her parents to be sufficiently trained and traffic-conscious to be fit to be trusted not only to cross highways safely herself but also to be put in charge of her four-year-old brother on such a journey. But even if she did step off into the car, it would not be right to count as negligence on her part such a momentary, though fatal, act of carelessness.”

51. The defendant's insurers relied on *AB v Main* [2015] EWHC 3183(QB), a decision of HHJ Stephen Davies, in which he made a finding of contributory negligence to the extent of 20% in the case of a child aged 8 years 10 months. In so far as this case is relied upon as authority for the proposition that a finding of contributory negligence may be made against an 8-year-old in appropriate circumstances, Mr Bright QC did not dispute that. However, he described the case as an “outlier”. The defendant did not refer to any other reported cases involving 8-year-old children and, based upon my experience, I would agree that a finding against a child of that age is uncommon.

52. In *AB*, the child was walking alongside a busy main road, where the speed limit was 40 mph. The defendant was travelling at 30 mph or just under. The Claimant and his friend were picking up glass bottles and a passing motorist had the impression the claimant might throw one. The claimant then saw another bottle on the other side of the road, told his companion he was going to get it and ran into the road without looking. He was described as being completely unaware of the traffic behind him. The judge said [61]:

“This is not a case where a boy is aware of an oncoming car and runs at high speed into the road in the misplaced belief that by running as fast as he can he can cross safely before the car arrives.”

In making a finding of contributory negligence, he concluded [95]:

“I am satisfied that an ordinary child of between 8 and 9 could reasonably be expected to have sufficient knowledge and experience of crossing roads such as Hale Road to know of the importance of looking right and left to check for oncoming traffic before crossing.”

53. I note that *AB* was a case in which the issue of primary liability remained live and in which there was a serious argument as to whether the defendant was responsible at all. The defendant was travelling at significantly under the speed limit for the road. However, the judge found that she should have anticipated the risk of one of the boys running out and kept them under close observation and taken other precautions such as covering her brake, changing position and/or sounding her horn.

54. In as much as comparisons can be drawn between the two cases, it seems to me that the facts of *AB* are really quite far removed from this case. AB ran out into a busy road where cars travelling significantly faster than the defendant's were to be anticipated. By contrast, I find that Mr Kelly was travelling in a manner that was outside Caine's experience and anticipation. AB did not look towards the traffic at all. According to Mr Henry, Caine looked straight at the car but carried on running. The inference is that he misjudged the car's speed and/or distance. The fact that Caine was crossing in the vicinity of a crossing is also an important distinction.

55. Mr Matthews argues on the defendant's behalf that Caine was of sufficient age and understanding to be culpable. He acted contrary to the instructions that had been drummed into him to stop at the kerb edge and to look, listen and wait. It is also argued that, while he may have been aiming for the crossing, he entered the road back from it and so was not crossing at a safe place. However, it seems to me that this last point could not be said to have been causative of the accident. The effect was to give a driver such as the defendant more rather than less opportunity to see him, had he been anticipating the crossing.

56. The thrust of the defendant's case was that Caine ran out into the road when the car was plainly close and continuing to approach. He came from a position out of view and so gave the defendant only limited time to react. In that way, Mr Matthews says that Caine created an emergency situation that would have been likely to put any driver in a difficult situation.

57. I bear in mind that Caine's previous experience of Gospel Lane is likely to have been that it was a safe place to be. Generally, drivers proceeded down it with caution. Caine had used the zebra crossing with his mother. He knew that was the safe place to cross the road between the shop and the park. He did know that he should stop, look and listen but often they would cross this zebra crossing without stopping as the road is not heavily used by traffic. It is a reasonable inference from the evidence I heard that when Caine had previously encountered cars approaching the crossing they would have stopped to allow pedestrians to cross.

58. I have found that Caine had not previously experienced being out on the roads alone. It was a very great misfortune that the first time he found himself unaccompanied, he encountered a car being driven in a way that was wholly outside his experience. A car driven at an appropriate speed by a driver alert to the presence of children would have stopped before reaching the crossing.

59. Cyrus is not to be blamed for what happened. No doubt he thought Caine would remain safe with Chloe when he decided to find his own friends. She and Jessica thought Caine should stay with them but were not alarmed when he went across the road to find Cyrus. They simply carried on playing on the swings. What happened is all perfectly understandable viewed from the perspective of children who thought they were in a very safe area.

60. It seems likely that Caine wanted to get back to his cousins in the park as quickly as possible. He started running diagonally towards the crossing and must have seen the car as he looked directly at it. Therefore, the only reasonable inference is that he believed the car would stop at the crossing for him. That involved misjudging the car's capacity to stop in time. The Green Cross Code confirms that “Many children cannot judge how fast vehicles are going or how far away they are.” It seems to me that it is even more difficult for a child of eight to judge the stopping distance for a car so as to understand that while the car should stop for the crossing it may be travelling at such a speed that it is unable to do so in time.

61. This was an 8-year-old boy, trying to cross at a zebra crossing, who encountered a speeding car whose driver had just been warned he might hit someone. As Mr Felton thought at the time, it was “not great” that Caine ran into the road without stopping but at least he was heading for the crossing, where (given the way in which cars were usually driven along Gospel Lane) he ought to have been safe.

62. I find that this was a case of momentary misjudgement on Caine's part balanced against reckless conduct on the part of the defendant, whose driving was outside Caine's expectation based on his understanding and experience. In my judgment it would not be just and equitable to make a finding of contributory negligence in these circumstances and I decline to do so.

The Part 20 claim

63. Having heard the evidence and Mr Matthews' submissions, I indicated that the Part 20 claim would be dismissed, giving brief reasons for that decision with a view to expanding upon them in this judgment.

64. I say at once that, from all the evidence I heard, Mrs Ellis is a responsible mother who took proper care for Caine's safety.

65. She had taught him the Green Cross Code through practical application as she walked him to school and elsewhere. She did not let her children go out without an adult until she thought that was safe. She had started to let Caine go out without her but in a controlled way. If he was with his older cousins, he could go as far as the Gospel Lane area. Otherwise, he had to remain 'lamppost to lamppost'. She was letting Caine taste independence in a way that should have been safe.

66. No matter how careful a parent is, it is impossible for children to be completely protected from risk. Keeping children cooped up and not allowing them to experiment with small freedoms carries its own risk. There is a difficult balance to be struck. Different parents in different circumstances will make different decisions about how best to strike that balance. Sadly, when something goes catastrophically wrong, a parent may look back and agonise over the choice they made. The fact that, with hindsight, they would have taken a different course is very far from establishing that their original choice was wrong, still less that they were negligent.

67. It is fair to say that, having heard all the evidence, Mr Matthews did not pursue the Part 20 claim with quite the same vigour as had appeared at the outset. In the end, the case put forward on behalf of the defendant was not that Caine should not have been allowed to go out with his cousins at all but rather that Mrs Ellis should bear a modest degree of responsibility for not ensuring that the children had sufficiently clear and detailed rules.

68. Mr Matthews referred to *Carmarthenshire County Council v Lewis* [1955] A.C. 549, where the House of Lords' decided that the authority responsible for a nursery school from which a 4-year-old child strayed onto the highway causing an accident in which a driver was killed was liable to his widow. The issue was whether the authority owed a duty to other road users and Mr Matthews said that the conclusion that it did was based upon foreseeability. In the same way, it was foreseeable that Cyrus would not remain with the group and that Caine would then follow him. Jessica's evidence was to the effect that the children did not know what to do then. Mr Matthews contended that there should have been clearer rules about who was responsible for Caine and what should happen if Cyrus were to go off.

69. As has been made clear in many contexts, foreseeability is a necessary requirement for establishing a duty of care, but mere foreseeability is not the end of the matter. In *Surtees v Royal Borough of Kingston Upon Thames* [1992] P.I.Q.R. P101 Stocker LJ considering the duty of care owed to a child by a reasonably careful parent said, “It is not everything that is foreseeable that can found the duty.”

70. Here, Mrs Ellis had told the children to stay together. Of course, anything might happen, but Mrs Ellis reasonably expected that Cyrus would be with Caine and that they would stay in the park. In weighing up the risks of Caine going out, the circumstances of where he was going are also highly relevant. Mrs Ellis was entitled to regard Gospel Lane as a safe play area. She took reasonable precautions by giving Caine road safety instructions; restricting where he went and by telling the children to take care and stick together. The events of that day were unusual. Cyrus separated from the group in a way he had not done previously; Jessica had apparently left her mobile phone at home so could not contact the adults when that happened and sadly this coincided with Caine encountering a car being driven in an unusually dangerous way.

71. It seems to me that holding Mrs Ellis responsible would be to impose far too high a standard on an ordinary parent making ordinary decisions in the course of parenting as to how to keep her child reasonably safe while gradually being allowed more responsibilities and freedoms.

72. I am unable to agree with the suggestion made in Mr Matthews' skeleton argument that it cannot be a reasonable outcome for a child to be held to be too young to be held contributorily negligent but for a parent not to be responsible for permitting the circumstances whereby the child comes to be crossing a road unsupervised. He acknowledged that it may not be reasonable for the contribution for a child's negligence and for breach by the parent to exceed the discount that would be allowed for contributory negligence in the case of a young adult. That may be a pragmatic and fair approach in unusual circumstances where liability is established against both parent and child. However, it is not something that arises here. Even if right, it does not lend support to the notion that either the child or the parent must be liable if a child runs into the road in circumstances where an older child or adult would be held to be partially to blame. Each party's responsibility is to be considered separately by reference to the appropriate standard of care. In the case of the child, this is the standard of a reasonable child of his age and understanding. In the case of the parent, it is the standard of a reasonable parent. I have explained why, in the circumstances of this case, I do not consider Caine or Mrs Ellis to have fallen below the relevant standard such that responsibility should attach to either of them.

73. In his attractive and well-focused skeleton argument, Mr Hirst set out a number of policy considerations which he said should lead to the court being slow to look critically upon a parent in Mrs Ellis's position.

74. Natural sympathy for a parent of a child who has been catastrophically injured cannot stand in the way of finding legal responsibility in appropriate cases. An obvious example is where a dispute arises as to which driver is responsible for an accident where one of the drivers is the child's parent. Mr Matthews referred also to *Williams v Williams* [2013] EWCA 455 where the Court of Appeal upheld a finding that the mother should contribute 25% of the claim for failing to use an appropriate child restraint. Analogy was drawn with the discount that would be made for failing to wear a seatbelt.

75. These are specific examples where parents owe a clearly defined duty to take care for their children when carrying them as passengers. I agree with Mr Hirst that it would be undesirable for the law to expand so as to routinely attempt to regulate decisions and actions arising in the course of normal daily parenting.

76. In *Surtees*, Bedlam LJ said:

"…the law has approached with great caution the problems raised by intruding into a relationship as close as that normally found between parent and child to lay down duties of care which, if rigorously applied, could tend to disturb family harmony."

Similarly, Sir Nicholas Browne-Wilkinson VC observed:

"I further agree with Stocker LJ that the court should be wary in its approach to holding parents in breach of a duty of care owed to their children…There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships…The studied calm of the Royal Courts of Justice, concentrating on one point at a time, is light years away from the circumstances prevailing in the average home…We should be slow to characterise as negligent the care which ordinary loving and careful mothers are able to give to individual children, given the rough and tumble of home life."

77. Parents are not reasonably able to secure insurance to guard against the risk of claims arising out of their parenting generally. In this case, Mrs Ellis faced the very real strain of not knowing how it was proposed that she would meet any liability for damages and costs. It was not until trial that the defendant confirmed that the purpose of the Part 20 claim was only to attack the claim for the gratuitous care she had provided. In a case in which the parent owns assets such as the family home, the family may face fears that action will be taken to enforce against the property. The potential to interfere with family life, including the rights of siblings, is significant.

78. Further, if parents were to be routinely joined into litigation such as this, it seems to me that there would be a real risk that this would encourage an over-cautious approach interfering with parents' assessments of when it is appropriate to allow children some freedom to foster growth and independence.

79. Joining parents into claims such as this also impacts on the course of the litigation. As here, the parent who is best placed to act as the child's litigation friend can no longer do so. This may create difficulties in exploring quantum before liability is determined and in turn may inhibit rather than facilitate settlement. I note that is not always in the best interests of the insurers or the child to attack the gratuitous care claim, since that may legitimately influence a parent's decision as to whether to personally care for the injured child or seek professional care, the latter being costlier.

80. For all these reasons, I consider that real caution should be exercised both by courts considering claims against parents and by insurers in deciding whether it is appropriate to join parents. Close attention should be paid to the circumstances. The circumstances of this case are such that I have concluded it would be wholly wrong to find Mrs Ellis blameworthy.

Conclusion

81. It follows from the above that I will enter judgment for the claimant on the claim with damages to be assessed on a full liability basis and I dismiss the Part 20 claim.