Neutral Citation Number: [2024] EWHC 609 (KB)

Case No: J90WX731

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
WREXHAM DISTRICT REGISTRY

The Law Courts
Civic Centre
Mold, CH7 1AE

Date: 19 March 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

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Between:

DARYL OWENS	**Claimant**
- and -	
ROSS LEWIS	**Defendant**

- -
- -

Chris Barnes KC (instructed by **Thompsons**) for the **Claimant**
Meghann McTague (instructed by **DAC Beachcroft Claims Ltd**) for the **Defendant**

Hearing dates: 13 and 14 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. On 6 August 2020 the claimant, who was then aged nearly 16½ years (he had recently completed his schooling) and is now aged 20 years, was one of three passengers on a quad bike being driven along a public highway by the defendant, a friend of his, when he came off the quad bike and suffered serious injury, including a traumatic brain injury. The defendant, who at the time of the accident was aged 15 years and was shortly to enter his final year at school, later pleaded guilty to charges of causing serious injury by dangerous driving, using a motor vehicle on a public road without third-party insurance, and driving a motor vehicle otherwise than in accordance with a licence.

2. These proceedings were commenced on 4 July 2022. The claimant claims damages from the defendant for negligence. By an order dated 26 May 2023 District Judge Roberts directed that there be a trial of the preliminary issue of liability (including contributory negligence). This is my judgment after that trial.

3. By his amended defence dated 20 June 2023 the defendant admitted primary liability on the basis that he was negligent in permitting the claimant to travel as a passenger on the quad bike, which was not intended to carry passengers. He denied, however, that he was negligent in the other respects alleged, in particular as regards the manner in which and the speed at which he drove the quad bike.

4. The defendant avers that the claimant was contributorily negligent in that he: (i) agreed to be carried on a quad bike that was not designed to carry passengers; (ii) positioned himself on the quad bike in such a way as to be vulnerable to coming off it; and (iii) did not wear a motorcycle helmet. The submission on his behalf is that a deduction of 65% ought to be made for contributory negligence.

5. The claimant accepts that he was at fault in agreeing to be carried as a passenger on the quad bike and that this fault was increased by the fact that he was not wearing a helmet. However, the submission on his behalf is that the deduction to be made for contributory negligence ought not to exceed 20%.

The Accident: evidence and facts

6. It is unnecessary to recite at length the details regarding the accident. There is no basic dispute as to what happened; the summary given above will suffice, and I shall focus on those matters that appear to be relevant to the issues before me.

7. The claimant's written evidence was to the following effect. On the day of the accident he received a telephone call from the defendant and another friend, Scott Evans, who asked him if he fancied going rabbiting that evening. He did fancy it. They arranged to meet at the defendant's farm and then to go rabbiting at the farm of Scott Evans' grandfather. (There is an issue, which I regard as unimportant, as to whether the intended location was in fact the farm at which Scott Evans lived rather than his grandfather's farm.) The claimant arrived at the defendant's farm at about 6.45pm; he had with him his two terriers, which he was going to take rabbiting. When he arrived,

the defendant and Scott Evans and the defendant's younger sister were there. They had a quad bike with them. "I said to [the defendant] I thought we would be walking over to Scott's farm. They said just to jump on the bike, it will be quicker. At first, I protested but in the end I relented because they were all adamant it was quicker and insistent I should just get on the bike."[1] There was no discussion concerning helmets. The defendant sat on the large driver's seat, with his sister behind him but also on the seat. The claimant and Scott Evans sat behind, more or less back-to-back, the claimant looking out to the left and Scott Evans looking out to the right, each of them holding one dog. The claimant was holding a dog in his right arm, and with his left hand he held onto the metal bar forming part of the rack that ran along the back of the quad bike. The claimant had believed that they would take a route across the fields to Scott Evans' grandfather's farm but was surprised when the defendant rode the quad bike straight down the track and out onto the main road. The claimant's witness statement did not describe the accident itself. In cross-examination he said that he had no recollection of it or of how it occurred, though he recalled the journey up to the point of the accident.

8. There is CCTV footage, which shows the claimant arriving at the defendant's farm with his dogs and, after a short conversation just out of shot, getting onto the quad bike. It shows the quad bike leaving the farm at 6.48pm with the defendant and his three passengers and three dogs, one held by each passenger. The positions of the three passengers are clearly visible from the footage and from a helpful still taken from it and are essentially as the claimant described in his witness statement. He and Scott Evans were sitting on the rear rack, behind the driver's seat, the claimant on the nearside and Scott Evans on the offside, and they were facing not directly forwards but at an angle of roughly 45 degrees. The claimant's left leg can be seen hanging down towards the ground at a position between the front and rear nearside wheels but nearer to the rear wheel. The footage shows the quad bike driving down the track or driveway at the defendant's home and turning right onto the B4390 road. It shows the defendant alone returning on the quad bike about three minutes later, followed shortly afterwards by his sister and Scott Evans on foot.

9. The main significance of the CCTV footage is that it proves, at least to my satisfaction, that the claimant has no reliable memory of the circumstances of the accident, let alone of the accident itself. In cross-examination he confirmed that his present recollection was the same as the account he gave to the police when interviewed some six weeks after the accident, when, after having previously suffered from amnesia, he claimed to have recovered a clear recollection of the incident. That account described the journey to Scott Evans' grandfather's farm and said that, after they had spent about 40 minutes rabbiting there, the accident had happened on the return journey, when the defendant was driving too quickly as the quad bike went over bumps on the road. As the claimant readily accepted both in his witness statement and in cross-examination, that account must be wrong: the accident happened within moments of the quad bike leaving the defendant's farm; there was no rabbiting and no return journey. Yet the account given to the police remains (as I accept) the claimant's recollection of what happened.

10. In cross-examination, the claimant maintained the correctness of the evidence in his witness statement regarding the conversation before he got onto the quad bike (which is neither confirmed nor refuted by the CCTV footage) and the manner in which he was holding onto the bar on the rack at the back of the quad bike (which is confirmed by the

[1] I have no doubt but that this wording comes from those who drafted the statement, not from the claimant himself.

CCTV footage and was not challenged in cross-examination). He also confirmed his recollection that, as he told the police, the quad bike was travelling at roughly 15 to 20 mph on the outward journey; his recollection, which as I have explained cannot be correct, is that the speed on the return journey was roughly 30 to 35 mph, as he also told the police. The claimant admitted that he knew that the quad bike was not meant to carry passengers on the rear, though he said he had believed it could take a passenger as well as the driver on the seat. He accepted that it must have been clear to him when he got onto the quad bike that he would only have one hand with which to hold onto the rack. He accepted that to be carried as a passenger on a quad bike in that manner was obviously dangerous, and that he knew that helmets reduced the risk of injury. (In re-examination he said that, if he had been offered a helmet, he would have worn one.) He said that, if he had been thinking about the matter clearly, he would not have got onto the quad bike.

11. Both the defendant and Scott Evans gave evidence regarding the accident and its circumstances. They both said that there had been no conversation about walking to their destination and that the claimant had shown no reluctance to ride as a passenger on the quad bike. They accepted that there were no helmets and that there was no discussion about helmets. They said that they did not know how the accident had occurred. Scott Evans stated: "We were driving along and one second [the claimant] was sitting on the quad, the next he was gone. I have no idea how he came off the quad." The defendant, who was facing forwards and had the claimant behind him, did not see what happened. Both the defendant and Scott Evans said that the accident had occurred after the quad bike had passed the brow of a hill but before it reached a "bumpy" part of the road.

12. As regards the speed at which the quad bike was travelling, Scott Evans stated in his witness statement that it was "faster than a walking speed" but that he "[could not] say how fast in numbers." When cross-examined, he said that he could not comment on the speed. His witness statement also stated that he had not felt frightened or concerned about the way the defendant was driving, and that at no time did he or the claimant tell the defendant to slow down or drive properly. The defendant stated, in his witness statement dated 18 October 2022, that he was driving at about 20 mph. (The national speed limit applied to the road.) In cross-examination it was pointed out to him that in his original defence, signed on his behalf on 27 September 2022, it was said that he was travelling at a speed of "20 to 30" mph; that on the very day of the accident he had told a police officer that he was travelling at "around 30mph"; and that when interviewed by the police five days later he had estimated his speed at 50 kph, or about 30 mph. The defendant responded that it was actually difficult to see the speedometer on the quad bike and that, after giving these estimates but before making his witness statement, he had ridden a quad bike on the farm and had realised that his initial estimate was too high. I do not accept that explanation. It seems to me inherently implausible that the defendant should have come to a different opinion in this manner and within that window of time, especially as it is clear that he had been riding quad bikes since a young age and it is probable (despite his denials) that he had taken them out on the road before. I accept that estimating speed is not an easy matter, but I think that the estimates originally given were probably broadly accurate. Leaving figures aside, however, the gist of the defendant's evidence was that he was mindful that he had passengers on the quad bike and was travelling at what he considered a safe and suitable speed in the circumstances.

13. In the light of the evidence, including evidence that I have not thought it necessary to recite, I make the following findings of fact regarding the circumstances and occurrence of the accident.

1) The idea to use the quad bike was that of the defendant, though he had the permission of neither his grandfather (who owned the vehicle) nor his father (who was its keeper at the time) to drive it on the public highway.

2) The defendant was neither licensed nor insured to drive the quad bike on the public highway. This is common ground.

3) No helmets were available and there was no discussion about wearing helmets. This is common ground.

4) The claimant did not express any reluctance to ride on the quad bike and did not take any persuading to do so. For reasons that I have already indicated, I consider that he has no genuine recollection of the circumstances of this accident, though I accept that he believes he does. I also regard it as inherently implausible that, especially when in company with his two friends, the claimant would have expressed any reluctance, far less any objection.

5) I do not know whether the claimant said anything about having expected to walk to the intended location. He might have done, as he had not, I accept, expected a quad bike to be available. But, whether he did or not, I find that he did not express any preference or wish to walk rather than go on the quad bike.

6) The quad bike was intended for the use of the driver only. It was not designed for passengers and ought not to have been carrying passengers. This is common ground.

7) The claimant knew that the quad bike was intended for the use of the driver only. He admitted that he knew it was not intended for carrying passengers on the rear. I reject his claim to have believed that it was designed to take a passenger on the seat. It was obvious from the design of the quad bike that it was only to carry the driver; the seat was clearly for one person only, namely the driver, and the rear rack was plainly not designed for passengers. (Additionally, there was a sign on the vehicle indicating that no passengers were to be carried. The claimant would not, however, necessarily have seen this.)

8) Although it was in my view clearly dangerous to carry passengers on a quad bike designed to carry only the driver, the defendant did not think it dangerous and had no concerns about doing so. He accepted this in cross-examination, though the very fact that he took his 12-year-old sister as a passenger rather speaks for itself.

9) The defendant was driving the quad bike along the public highway at a speed of about 25 mph to 30 mph when the accident occurred. Even if he was proceeding at his lower estimate of about 20mph, this was significantly too fast to be proceeding along a hard-surfaced highway when (a) there were passengers, (b) two of those passengers were on the rear rack, (c) each of those two had one hand full with a dog, and (d) they were not wearing helmets. If the quad bike

had been travelling at walking speed, the claimant would have been unlikely to fall off and, if for some reason he did so, he would have been very unlucky to be badly hurt. But a passenger in his position and without a helmet would obviously be quite likely to fall off and be highly likely to suffer significant injury if he did so, if the vehicle were travelling at 20 mph or above.

10) Precisely why the claimant came off the quad bike is not proven. In particular, it is not proven that the position of his left leg in relation to the rear nearside wheel had anything to do with the accident. It is also not proven that the claimant failed to keep a firm hold of the rear rack on the quad bike. What can be said, however, is that he came off because his position on the rear of the quad bike with an inadequate handhold and nothing to secure him, was inherently precarious.

Medical Evidence

14. District Judge Roberts gave permission for expert neurological evidence on the issue of the causative relevance of the claimant's failure to wear a helmet to his head injury. The claimant adduced evidence from Mr Peter Kirkpatrick, FRCS, and the defendant from Mr Robert Macfarlane, FRCS. Both experts are retired consultant neurosurgeons and they worked in the same team at Addenbrooke's Hospital in Cambridge. Both were (if I may say so with respect) experts of the highest calibre, and they gave their evidence fairly. Mr Kirkpatrick has the greater specialist experience in traumatic head injuries; however, I am satisfied that Mr Macfarlane was as well able to address the issues in the case.

15. Before I turn to consider the neurological evidence, it is convenient to note that the expert evidence regarding the causation of the physical head injury was the only medical evidence before me on this trial of the issue of liability. The particulars of claim record that the claimant also suffered a severe fracture of the right ankle, which has left him with some disability, as well as "psychological/psychiatric injuries amounting to an Adjustment Disorder with features of Post Traumatic Stress Disorder." I proceed on the basis that these further injuries would not have been prevented or mitigated—or, at least, that it has not been proved that they would have been prevented or mitigated—by the wearing of a motorcycle helmet, though of course they would have been avoided entirely if the claimant had not been riding as a passenger on the quad bike in the first place. I do not know the relative values in monetary terms of the various injuries or their economic consequences. This seems to me to be a complication when it comes to making the assessment under section 1(1) of the 1945 Act, though I have not found it to present any major difficulty in the end.

16. The experts' joint memorandum dated 27 November 2023 expressed agreement on the following relevant points.

1) There is no evidence that the claimant had a pre-existing vulnerability to cranial trauma.

2) In the accident, the claimant suffered a right-sided scalp laceration and subgaleal soft tissue swelling at the vertex extending to the right frontal region.

The CT head scan revealed a coronally-orientated undisplaced right para-midline frontal bone fracture with suture diastasis, a 6mm right acute subdural haematoma, multiple haemorrhagic contusions affecting primarily the right inferior frontal lobe, and evidence of sulcal effacement indicative of mass effect. The head injury would be defined as moderate – severe on the Mayo classification, and as severe on the Anneger's criteria.

3) Duration of post-traumatic amnesia was assessed at around 8 days.

4) The only physical neurodisability resulting from the index accident has been loss of sense of taste and smell, though there were some early signs of damage to vestibular function (for which an assessment is required) and there have also been neuropsychological sequelae.

5) The clinical picture is consistent with a single severe cranial impact, but multiple impacts cannot be excluded. The traumatic brain injury was a consequence of both linear and rotational forces.

6) If head protection ought to have been worn, the appropriate form of protection would have been a motorcycle helmet. The standard to which motorcycle helmets are obliged to comply is the equivalent of a fall from a vertical height of around 3 metres onto a hard, flat surface, and motorcycle helmets are tested to withstand both linear and tangential impacts.

7) If the claimant had been wearing a properly secured motorcycle helmet, the scalp laceration, the skull fractures and the underlying acute subdural haematoma would have been avoided. The brain injury would have been mitigated; but the experts disagreed as to the extent of that mitigation.

17. Mr Kirkpatrick's view was as follows. The static test environment for protective headwear did not take account of the dynamic forces involved in falls from moving vehicles. "The mechanisms of cranial injury are complex, chaotic, and often quite different to those observed when a heavy object is dropped directly onto the helmet, for example on a building site" (joint statement, para 10). The forces involved in the claimant's brain injury were primarily rotational. If the claimant had been wearing a motorcycle helmet, he would still have suffered most of the neurocognitive and behavioural difficulties that he has. He would also have suffered the loss of taste and smell and any vestibular organ injury, as these reflect shearing injuries secondary to acceleration/deceleration forces. He would also not have avoided any post-traumatic stress disorder, as this is a psychiatric response to trauma independent of the physical outcome.

18. Mr Macfarlane did not accept that helmets were subjected to merely static testing. His opinion was that empirical evidence in the literature provided "real world", not merely theoretical, evidence of the benefits of wearing helmets, and that the mechanism of the claimant's injury—a fall from a seated head-height of about 1.7m, with no evidence of a second severe impact to the head—lay "well within the protective capabilities of a motorcycle helmet and [was] precisely the type of accident where it would be expected to provide excellent mitigation" (joint statement, para 13). He considered that, if the claimant had been wearing a motorcycle helmet, the initial traumatic brain injury would have been reduced from severe to moderate and there would have been no enduring

organic brain injury. As to psychiatric and psychological sequelae, he deferred to experts in those fields.

19. I have summarised the experts' competing views very briefly because I accept the submission of Mr Barnes KC that the disagreement between them has no practical significance for present purposes. The defendant bears the burden of proving that the claimant was contributorily negligent, and the assessment of the discount for any contributory negligence involves weighing the parties' relative blameworthiness and the causative potency of their actions. (I deal with this below.) The experts' evidence relates to the causal relevance of the fact that the claimant was not wearing a helmet. A helmet would have made no difference to the ankle injury or the soft-tissue injuries to the claimant's torso. A helmet would have prevented the skull fracture, the laceration and the haematoma. The issue comes down to the effect that a helmet would have had in respect of the brain injury. Mr Kirkpatrick thinks it would have made no significant difference, because the evidence from the CT scans suggests that the brain injury was caused by rotational rather than linear forces and because helmets provide no protection against rotational forces. Mr Macfarlane thinks that the primary forces involved in the brain injury were linear rather than rotational and that motorcycle helmets provide protection against both kinds of force, so that a helmet would have mitigated the brain injury, which would have been moderate rather than severe, and the claimant would have made a full recovery in organic terms. However, I am not persuaded that this difference plays out in monetary terms, because it has not been proved that the issue resolves any question regarding the claimant's symptoms. In brief, the claimant has some cognitive and sensory impairments. But the evidence does not establish (a) whether the cause of these impairments is organic or psychological or (b) whether the wearing of a helmet would have obviated or mitigated them. This is because of the narrowly limited scope of the medical evidence adduced at this trial and, in particular, the absence of psychological and psychiatric evidence.

20. Out of deference to the experts, as well as to counsel's attention to the detail of the evidence, I shall however record that I found Mr Macfarlane's evidence to be more persuasive than that of Mr Kirkpatrick, in three particular respects. First, I was thoroughly unpersuaded by Mr Kirkpatrick's contention that motorcycle helmets are tested only for their ability to protect against linear forces, not rotational forces also. It ought to be perfectly obvious that this cannot be correct; such an obvious shortcoming would make a mockery of any testing system. Mr Kirkpatrick seems to have misunderstood what is meant by the "tangential" application of force, which both experts accepted was part of the testing. It does not refer to the application of linear forces to the side of the helmet rather than the top. It refers to what is also known as *oblique* forces, which tend to cause the head to turn. (These forces can be applied either by glancing blows or by bringing the helmet down on a moving surface.) Mr Macfarlane explained that helmets are designed so as to avoid friction with surfaces into which they come into contact. This is clearly more credible than Mr Kirkpatrick's position.[2] Second, Mr Kirkpatrick's opinion as to the limited protection given by helmets in respect of rotational forces was supported by no literature; he accepted, indeed, that there was no published material to support his position but said that the view he was expressing was developing within discussions in various forums in which he had participated. While I am happy to accept that helmets will not protect in the

[2] It is also correct as a matter of fact. The Department for Transport's testing standards are in the public domain.

same manner and to the same extent against all forces, this does not seem to me to be a sufficient basis on which to reject Mr Macfarlane's evidence that helmets provide substantial protection against both linear and rotational forces—especially when Mr Kirkpatrick's views appear to be influenced by a misunderstanding of the testing requirements for motorcycle helmets. Third, I was persuaded by Mr Macfarlane's analysis of the CT scans that details attributed by Mr Kirkpatrick to diffuse injuries due to rotational forces are more probably to be attributed to linear forces.

Contributory Negligence: the law

21. Section 1 of the Law Reform (Contributory Negligence) Act 1945 provides, so far as material:

> "(1) 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."

22. In *Stapley v Gypsum Mines Ltd* [1953] AC 663, Lord Reid stated at 682:

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

23. Lord Reid's dictum was cited with approval by Lord Reed (with whose judgment Lady Hale and Lord Carnwath agreed) in *Jackson v Murray* [2015] UKSC 5, at [20]. As Lord Reed said at [40]:

> "[I]t is necessary when applying section 1(1) of the 1945 Act to take account both of the blameworthiness of the parties and the causative potency of their acts."

At [27] Lord Reed noted that: "It is not possible for a court to arrive at an apportionment which is demonstrably correct." He continued at [28]:

> "It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given. That is consistent with the requirement under section 1(1) to arrive at a result which the court considers 'just and equitable'. Since different judges may legitimately take different views of what would be just and equitable in particular circumstances, it follows that those

> differing views should be respected, within the limits of reasonable disagreement."

24. For the purposes of the assessment of contributory negligence, a claimant's conduct is judged by an objective standard, namely that of the reasonable and prudent person. However,

> "in assessing contributory negligence the age of the claimant will be taken into account, so that the objective standard of care is to be measured by what is reasonably to be expected of a child of the same age, intelligence and experience"

(*Campbell v Advantage Insurance Co Ltd* [2021] EWCA Civ 1698, [2022] QB 354, at [43]). As I shall mention below, that corresponds to the general rule applicable to the standard of care required of a defendant.

Summary of the Submissions

25. The following summary by no means does full justice to the detailed and helpful submissions of counsel both orally and in their skeleton arguments, but I think it captures the main thrusts of their respective arguments.

26. For the defendant, Ms McTague submitted that the claimant was contributorily negligent in three respects: (i) permitting himself to be carried as a passenger on the quad bike; (ii) positioning himself on the quad bike in such a manner as to be obviously vulnerable to falling off; (iii) failing to wear a helmet. She accepted that, as the second and third matters complained of were in the circumstances of the case necessarily incident on the first, the allegations were really aspects of a single complaint: that it was negligent of the claimant to take a ride on the quad bike, *especially* in circumstances where he would be precariously perched on the vehicle and had no helmet to wear. This was the precise counterpart to the essential complaint against the defendant, namely that he carried passengers and did so in circumstances where they were vulnerable because of their precarious positions on the vehicle and their lack of head protection. This suggested a starting point of equal responsibility for the claimant's injuries. However, the age difference between the claimant and the defendant was significant: the claimant was about one year older than the defendant[3] and had been in the year above him at school, which was a significant difference at that time of life. Together with the significant causative potency of the claimant's conduct and his failure to wear a helmet (especially on the basis of Mr Macfarlane's evidence), this indicated that a reduction of 65% of contributory negligence was appropriate. The main matter in the scales on the other side was the allegation that the defendant was driving too fast. In that regard, however, it was unfair to hold a 15-year-old boy to estimates given to police officers in the aftermath of the accident and again only a few days later, and there was no evidence at all of excessive speed. The defendant's uncontradicted evidence was that he had been driving at a speed appropriate to the carriage of passengers.

[3] The only reference that I can find to the defendant's date of birth has been redacted, so that I cannot read it.

27. Among the decided cases to which Ms McTague referred me were *Joyce v O'Brien* [2012] EWHC 1324 (QB), *McCracken v Smith* [2015] EWCA Civ 380, and *Clark v Farley* [2018] EWHC 1007 (QB), [2019] RTR 21.

28. *Joyce v O'Brien* was not a case about contributory negligence. The claimant was engaged in a joint criminal enterprise with the defendant, by whose negligent driving in getting away from the scene of the crime he was injured. The claim for damages was dismissed on the principle *ex turpi causa non oritur actio*. There was no basis for inferring that the manner of the defendant's driving fell outside the scope of the joint enterprise and the heightened risk that the claimant had taken in pursuance of that enterprise. The decision in the case is irrelevant to the present case. However, Ms McTague relies on the *obiter* comment of Cooke J at first instance that, if he had not dismissed the claim, he would have found the claimant and the defendant equally responsible and would have made a 50% reduction for contributory negligence: see [2012] EWHC 1324 (QB) at [48]. Ms McTague observes that the question of wearing a helmet did not arise in that case and invites the inference that a greater reduction will be justified in a case where it does arise.

29. In *McCracken v Smith* the claimant was riding as pillion passenger on a stolen trials bike being ridden by S and was injured in a collision caused by the negligent driving of S and of the driver of the other vehicle (B). The Court of Appeal held that the claim against S failed on the ground *ex turpi causa non oritur actio*, because the claimant and S were party to a joint criminal enterprise to ride the bike dangerously on the public highway. However, the claim against B did not fail on that ground, because B owed a duty of care to other road users, including S and the claimant. There was, however, a 65% reduction for contributory negligence. Ms McTague submits that a similar reduction is warranted in the present case; she says that the outcome is consonant with Cooke J's dictum in *Joyce v O'Brien.*

30. Like Yip J in *Clark v Farley* (see her judgment at [77]), I have difficulty with the reasoning of the Court of Appeal in its assessment of contributory negligence. The Court's consideration of the matter may have been skewed by an agreement between the parties that 15% was the appropriate reduction for the failure to wear the helmet. Instead of looking at the matter in the round, the Court seems to have taken a standard 50% reduction in a case of fellow joyriders as a starting point by way of analogy and then added on the 15% on a purely aggregative basis. I doubt (with respect) whether the case is a helpful guide to sound method. *Clark v Farley* was a case involving a 15-year-old claimant who was riding, without a helmet, as a pillion passenger on an off-road motorbike. The judge found that the claimant was not party to a joint criminal enterprise to ride dangerously and accordingly primary liability was established. However, he ought to have foreseen the inherent risk in riding pillion; though young, he was old enough to be conscious of the risks involved, but he probably gave no real thought to his safety: see [75]-[76]. The judge held that the fact of riding pillion would itself have justified a discount of no greater than one third. There was a confidential agreement, which the judge did not divulge, as to the appropriate discount for the lack of a helmet. Taking that agreement together with the other matters, but "taking care not to double-count in assessing [the claimant's] blameworthiness" (see [78]) the judge made a reduction of 40% for contributory negligence.

31. For the claimant, Mr Barnes KC accepted realistically that the claimant was at fault in being carried as a passenger on the quad bike, especially when he would be positioned

as he was and without a helmet. He submitted, however, that the defendant, though younger, had far the greater experience with quad bikes and had taken the initiative, and that neither the defendant nor Scott Evans had shown any concerns about what was being proposed. (Indeed, as he pointed out, the original defence averred as a fact that the claimant's position on the rear rack of the quad bike "did not make him vulnerable to falling off.") Further, while the claimant's conduct jeopardised only his own safety, that of the defendant jeopardised not only the defendant's safety but that of each of his three passengers. Additionally, any speed beyond walking speed was obviously dangerous in the circumstances, and the likelihood was that the defendant was driving at or near 30 mph at the time of the accident. The standard discount for contributory negligence in not wearing a helmet was 15% where the injuries would have been only partially avoided; however, this figure should be reduced to take account of the facts (i) that no helmets were available, (ii) that there was no legal requirement to wear a helmet, and (iii) that the great majority of the claimant's injuries would have been suffered even if he had been wearing a helmet. As for taking a ride on the quad bike in the first place, the cases about accepting a lift from a drunk driver approved a deduction of 20% for contributory negligence; that is a much worse situation than the present. Taking matters in the round, a total discount of a maximum of 20% for contributory negligence would be appropriate.

32. Mr Barnes referred *inter alia* to *Eagle v Chambers* [2003] EWCA Civ 1107, [2004] RTR 115; *Gleeson v Court* [2007] EWHC 2397 (QB), [2008] RTR 10; *Best v Smyth* [2010] EWHC 1541 (QB); and *Campbell v Advantage Insurance Co Ltd* [2021] EWCA Civ 1698, [2022] QB 354. I shall say something about *Eagle v Chambers* later in this judgment.

33. In *Gleeson v Court*, the claimant was injured in an accident caused by the negligent driving of the defendant, whom the claimant knew to be adversely affected by alcohol. The claimant had foolishly volunteered to travel in the hatchback boot of the car; his presence in the boot gave occasion for the mechanism by which the claimant was injured. Judge Foster QC, sitting as a judge of the High Court, followed *Owens v Brimmell* [1977] QB 859 in holding that knowingly accepting a lift from a driver known to be adversely affected by alcohol would, taken by itself, justify a finding of 20% contributory negligence. By analogy with the case of not wearing a seat belt, where the wearing of one would have prevented the injuries, the judge considered that riding in the boot of the car would, taken by itself, justify a finding of 25% contributory negligence. Having regard to the facts that both decisions "flow[ed] from the claimant's impaired decision making" and that a 45% reduction would not sufficiently reflect that the defendant's fault was the cause of the accident and the predominant cause of the injuries, the judge held that the appropriate reduction was 30%.

34. *Best v Smyth* was another case in which the claimant had accepted a lift from a driver he knew to have been drinking; in this instance the passenger did not wear a seat belt. Tugendhat J accepted that the maximum reduction for failure to wear a seat belt (that is, if the injuries would have been wholly avoided) was 25% and that the reduction for a claimant who had accepted a lift from a driver whom he knew to have had too much to drink was generally 20%. The judge rejected the defendant's contention that a reduction of 50% was appropriate. He said:

> "[L]ooking at the matter overall, it seems an ambitious submission to me that the passenger in such a case should be

> considered equally to blame with the driver. I proceed on the basis of a maximum reduction of 30% in respect of the issue of contributory negligence."

35. In *Campbell v Advantage Insurance* the central issue in the Court of Appeal was whether, in assessing contributory negligence, the fact that the claimant, who again had agreed to be driven by a person who was much the worse for drink, was himself drunk. Having held that the claimant's own inebriation was irrelevant and that he was to be judged according to the standards of a reasonable, prudent and competent adult, the Court upheld the trial judge's finding of 20% contributory negligence.

Discussion

36. In performing the exercise required by section 1(1) of the 1945 Act I bear in mind that it is fact-sensitive. Previous cases give helpful guidance as to the approach and occasionally, especially where they seek to provide standard figures for certain situations (such as failure to wear a seat belt or a helmet), even as to the appropriate reduction. But each case requires consideration of what is just and equitable on its own particular facts.

37. Although primary liability has been admitted, it is necessary to begin by considering the fault of the defendant. The admission of liability was on the basis that the defendant was in breach of duty "in permitting the claimant to travel as a passenger on the quad bike in circumstances where the quad bike was not intended to carry passengers" (amended defence, paragraph 11). I add two points.

    1) The admission requires unpacking. The carrying of passengers was particularly negligent in circumstances where (a) each passenger would have at least one hand full with a dog, (b) no passenger was properly secured to the quad bike, and those on the rear rack were perched with at least one leg over the side and only the bar on the rack to hold onto with one hand, (c) no passenger had a helmet, and (d) the quad bike was to be driven on the public highway.

    2) I find that there was a further particular of negligence, namely driving at an excessive speed in the circumstances. Of course, the defendant ought not to have been driving on the road or with passengers at all. But if he did so he ought at least to have driven at a speed that presented the minimum possible risk of injury to the passengers. As I have mentioned, the claimant would have been highly unlikely to suffer a significant injury by falling from the quad bike if it had been proceeding at walking speed. But if (as was almost inevitable once it joined the public highway, and as I find as a fact to have been the case) it was proceeding at a speed of or near to 30 mph, the risk both of coming off the quad bike and of suffering serious injury in that event was obvious.

38. In the course of argument, I raised the question of the relevance of the defendant's age to the standard of care required of him. Ms McTague submitted that the defendant was to be judged by the standard of the reasonable and prudent 15-year-old. Mr Barnes, to the contrary, submitted that the standard took no account of the particular circumstances or characteristics of the specific defendant but was the same for all defendants; he

referred to *Nettleship v Weston* [1971] 2 QB 691, the case of the learner driver who was held to the standard of the driver of skill, experience and care.

39. In the present case, I do not think that anything turns on the answer to my question. Having said that, I can add that I think that, in their way, both counsel were right. The general position is that the standard of care required of a child is that of an ordinarily reasonable and prudent child of the same age: see *Mullin v Richards* [1998] 1 WLR 1304 and *Orchard v Lee* [2009] EWCA Civ 295. This is an example of the nuanced refinements that are recognised to the general position that the standard of care is impersonal and activity-based rather than actor-based; the overarching consideration is that the standard reflects what is reasonably to be expected in the circumstances. (It is unnecessary to explore this point further here.) *Nettleship v Weston* is an illustration of the activity-based standard of care and, as Lord Denning MR observed at 699, also reflects the policy that every driver is required to be insured. In the present case, it seems to me that the defendant's decision to give a lift to his passengers in the circumstances described above is to be judged according to what is to be expected of the ordinarily reasonable and prudent 15-year-old boy. Even on that basis, his actions were clearly negligent. The manner of driving on the public highway is to be judged according to the standard of the driver of skill, experience and care, because those who choose to drive on the public highway are reasonably expected to attain no lesser standard. But even were one to assess the defendant's standard of driving against some lower standard (such as that to be expected of an ordinarily reasonable and prudent 15-year-old boy) he would still be regarded as negligent, because the speed at which he was driving was unsafe, as would be obvious to anyone who gave the matter a moment's thought.

40. As for the claimant's position, I have already set out the realistic acceptance on his behalf that he was contributorily negligent. In my view it is more rational to think of the three allegations against him as aspects of one complaint than as three individual complaints. The claimant did not make three bad decisions: first, to take a ride on the quad bike; second, to adopt an unsafe position on the quad bike; third, not to wear a helmet. Taking a ride on the quad bike necessarily involved being in the unsafe position (because he could be in no other position) and being there without a helmet (as there were no helmets). So the one decision was bad in a threefold way: it was unsafe to take a ride on the quad bike at all, but *especially* when he would be doing so when seated on the rack and holding on with only one hand and when he would not have a helmet. Both the fact that this was a bad decision and the reasons why it was bad ought to have been obvious to an ordinarily prudent and reasonable 16-year-old boy; by the standards of such a boy it was negligent to have done what the claimant did.

41. In *Eagle v Chambers*, which was cited with evident approval by Lord Reed in *Jackson v Murray* at [25]-[26], the Court of Appeal pointed out that section 1(1) of the 1945 Act is premised on both parties being at fault and that it refers to responsibility "for the damage", not for "the accident". The Court of Appeal also made clear that "causative potency" is different from "but for" causation: see in particular at [13] and [17]. The accident in that case could, in one sense, be said to have been caused equally by the negligent presence of the pedestrian in the road and by the negligent driving of the motorist; however, the latter was "very much more causatively potent" than the former, essentially (as I interpret it) because the pedestrian is not independently dangerous but is, in the circumstances, on the receiving end of "potentially a dangerous weapon". The

"potential 'destructive disparity'" between a car and a pedestrian could also be relevant to the issue of relative blameworthiness: see [15]. These observations indicate to me that the two components of the assessment under section 1(1) are not separated by watertight compartments; the decision as to what is "just and equitable" must rest on a holistic consideration having regard to all matters regarding both components.

42. In my judgment, the preponderance of fault lies with the defendant and not with the claimant. Although the claimant went along with the proposal to travel by quad bike, the initiative lay with the defendant; the claimant accepted what was offered to him. It is true, and I bear firmly in mind, that the claimant was older than the defendant and had recently completed his schooling. But the defendant was familiar with quad bikes in a way that the claimant was not, as he had been brought up with them from a young age. The claimant was therefore liable to take his lead from the defendant and, although the risks in what he was doing ought to have been obvious to him, the claimant can hardly have been uninfluenced by the defendant's blasé approach. Further, without exonerating the claimant's accepted negligence, I think that some realism is required concerning the position in which he was placed. He had agreed to go rabbiting with two friends and had been given a lift by his sister to the defendant's home. He expected to walk to the intended destination but, on arrival at the defendant's home, he was told that they were going by quad bike. The proper and sensible thing for the claimant to have done was decline to travel in that manner. But it is not entirely surprising that, whether from a reluctance to appear timid in the face of friends[4] or from the all-too-common disregard by male youths of their own safety (alluded to by Yip J in *Clark v Farley*, above), or from both of those reasons, he went along with the proposal. A further consideration is that this case is not at all to be compared with cases involving joint criminal enterprise, such as are relied on by Ms McTague. As is reflected in the drink-driving cases and in *Eagle v Chambers*, the primary blameworthiness (as well as the primary causative potency) lies with the driver of the vehicle rather than the person at risk of injury by reason of the driving of the vehicle. This is especially so where, as I find in this case, the defendant drove at excessive speed in the circumstances.

43. The principle against simply aggregating the discounts that would be appropriate to each of several elements of negligence applies in full force in the present case. This is so with respect to the allegation of being negligently positioned on the quad bike and even more forcefully, perhaps, to the allegation of failing to wear a helmet. As I have made clear, I regard the claimant as having made a single bad decision, though it was bad for cumulative reasons: the quad bike was not designed for passengers; he would not be able to sit securely on it; and there was no helmet to be had. An example by way of contrast makes the point. If I get into a car that is to be driven by a person under the adverse influence of alcohol, I can at least put the seat belt on. If I choose not to do so, that is a separate decision and not required by my decision to be carried in the first place. In the present case, the claimant did not decide not to wear a helmet: the matter did not arise, because there were no helmets on offer. To ride on the quad bike unsecured and without a helmet was, so to speak, presented as a job lot. The folly of the one decision was the greater because there was no helmet.

44. As regards the respective causative potency of what the claimant did and what the defendant did, the preponderance again lies with the defendant, as it was he and not the

[4] There is no positive evidence that this was a motivating factor. But one has some knowledge of what it is like to be sixteen and the possibility is plausible.

claimant who both provided and drove the source of the danger, namely the quad bike, and moreover made it more dangerous by driving it at significant speed. The fact that the claimant would not have been injured "but for" his decision to ride on the vehicle does not make him equally causatively potent, as I have explained.

45. Looking at the matter in the round, I do not consider Ms McTague's starting point of a 50% reduction for contributory negligence to be at all appropriate. That figure comes from two cases of joint criminal enterprise, namely *Joyce v O'Brien* and *McCracken v Smith*. That is a world away from the facts of the present case, and the facts of both of those cases (not set out in detail above) were striking. Further, I should regard it as contrary to sound principle, at least in most cases and in this case, to simply add on a further figure for a supposedly discrete part of the negligent conduct (e.g. 15% for failure to wear a helmet).

46. I am, however, not persuaded by Mr Barnes' submission that, leaving aside the matter of the helmet, the facts of the present case indicate the need for a reduction less than the 20% reduction in the case of a passenger of an inebriated driver. Mr Barnes focused on the lack of blame of the present claimant in comparison with, say, someone who agrees to be driven by his friend after they have both drunk large quantities of alcohol. However, that leaves out of the equation the massive culpability of the driver in such a case.

47. Having regard to the matters that I have discussed and to the arguments presented to me by counsel, I have come to the conclusion that a reduction of 30% for contributory negligence is appropriate.