By Alice Lam

Duty of care towards **children** on the **roads**

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Motorists must exercise particular care when children are in the vicinity of the roadway. Liability can be imposed even where a child behaves recklessly or unpredictably, such as where s/he moves suddenly out on to the road.

As Kirby P remarked, the heightened duty of care demanded of motorists in such circumstances '...is founded not on the mere sympathy of judges for injured children. It is based on knowledge of the well-known propensities of children which the law attributes to drivers [and]... that it is the driver who is generally in a better situation to anticipate and control events'.[1] Thus, for example, the driver of a car has been held to be negligent where a group of children was playing beside a road and one darted out on to the road into the path of a vehicle that hit him.[2] This stringent standard has also reflected a general tendency by the common law to expect a reasonable person to take account of the possibility of inadvertent and negligent conduct on the part of others.[3] However, some questions arise about how this duty is to be framed in light of the general shift in the High Court in the last decade towards conservativism in its approach to the question of liability where a plaintiff has been careless or where the risk was obvious. In particular, a motorist's duty of care towards unpredictable pedestrians must now be seen in the context of the High Court decision in *Derrick v Cheung*.[4]

DERRICK v CHEUNG

Derrick itself concerned an accident involving a very young child. A toddler, aged about 21 months, ran out of a yard while her mother was talking to a friend, on to the footpath >>

The scope of the duty of care where plaintiffs are reckless or the risk is obvious has narrowed.

and then between parked cars on to a busy road. The defendant driver was driving at about 45–50 km per hour, keeping up with traffic, in a stretch of road where the speed limit was 60 km per hour. The defendant did not see the child until she appeared on the roadway in front of her car. The defendant braked and swerved but was unable to avoid hitting the child. The primary judge found the defendant negligent, and this finding was upheld by a majority of the NSW Court of Appeal. The full court of the High Court allowed the defendant's appeal. Acknowledging that the circumstances were 'tragic' and a parent's 'worst nightmare', the court nevertheless found that reasonable care was in fact being exercised.[5] It approved the dissenting judgment of Davies AJA in the Court of Appeal, who observed that for the defendant to keep up with the general flow of the traffic, when the traffic was travelling at a moderate speed, well under the speed limit, and when there was no particular danger observable, was both a reasonable and a proper response to the traffic conditions on the day.[6]

The High Court warned against allowing hindsight judgements to cloud the application of the appropriate test for negligence, which concerned the standard of reasonable care required in the circumstances. It noted that '[d]ifferent conduct on the part of those involved in [accidents] almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence.'[7] In relation to the authorities on the duty of a motorist to take into account the possibility of pedestrians not taking reasonable care for their own safety, the Court emphasised that these principles did not apply in circumstances where it was unlikely 'an unattended infant of such tender years would dart in front of a relatively slow-moving vehicle on a busy road in such a way that a collision was, to all intents and purposes, unavoidable'.[8] It is notable that the High Court effectively held that the driver had kept a proper lookout despite her evidence that she had concentrated on 'looking straight ahead', hence hampering her ability to see the pedestrian victim emerging through the row of parked cars adjacent to her driving lane.

After the High Court decision in *Derrick*, the duty of a driver exercising reasonable care to take into account the carelessness of pedestrians must be qualified at least by the caveat that 'a common sense overall appraisal of the situation confronting a motorist, travelling within the appropriate speed limits, when a pedestrian enters his or her line of travel, is required'.[9] In many ways, this was a welcome clarification. Even where a driver may reasonably foresee a general risk of pedestrians behaving carelessly, it is difficult to see how one who satisfies conventional criteria for 'safe driving' in circumstances where there is no particular danger apparent is nevertheless committing a breach of duty, merely on the basis that they could have taken some other action that would have prevented the collision from happening. The High Court's decision can also be seen as signalling a broader trend in tort law towards narrowing the scope of the duty of care where plaintiffs are reckless or where the risk is obvious,[10] and consequently towards what is arguably a desirable emphasis on pedestrians' duty to exercise reasonable care for their own safety and for other road-users. However, this rationale for scaling back the standard of care does not have the same force in relation to child pedestrians. It is worth examining whether *Derrick* has affected the special duty of motorists towards children behaving carelessly on the roads.

SUBSEQUENT CASES: 'A PARTICULAR PERCEIVABLE RISK'

A review of subsequent cases suggests that existing case law on child pedestrians remains highly relevant. In *Tobin v Worland*,[11] a child aged 26 months ran almost completely across a street in a residential area and was struck down by a motor vehicle travelling at about 45–50 km per hour. The driver had seen another young child on the roadside as she drove along. McColl JA, Tobias and Basten JJA agreeing, upheld the primary judge's decision that the driver had been negligent in failing to keep a proper lookout. Her Honour distinguished the factual circumstances of *Derrick v Cheung*, emphasising that the driver had been aware that children played in the area, frequently on the roads, and that, having seen a small child standing on the road behind a car, she was aware that that child's presence might mean that other children were present but unseen. There was also no other traffic that required her attention. Her Honour stated that it was clear that there was a 'perceivable risk' that the appellant was required to take into account, but apparently did not, that not only the child that she saw, but also another child might emerge from the parked cars.[12] She was also required to be aware that such a child might behave in the unpredictable and irresponsible manner to which children's youth and immaturity impels them. In such circumstances, unlike in *Derrick v Cheung*, it was not reasonable conduct on her part to focus her 'full attention' on the road ahead.

A similar finding was made in *Eccleston v Smith*,[13] where the NSW Court of Appeal found a driver liable for failing to slow while passing a child who was stationary by the side of the road. The defendant was driving at a speed of 25–30 km per hour, and did not see the child until immediately before the impact. However, the child was in school uniform and other school children in the same uniform were about. On the day of the accident, the defendant made a statement to the police that the small child appeared to stop in front of her vehicle and they looked at each other. Mason P, Beazley and Bryson JJA agreeing, accepted the proposition that the defendant was aware that a child waiting by the side of the road in the position of the plaintiff had to be indicating to a

high degree of probability that her intention was to cross the road. His Honour noted that while a 'careful driver would not necessarily be expected to brake upon such a stimulus... he or she ought to take the foot off the accelerator and cover the brakes in readiness for the possibility that the child might dash out'.[14]

What distinguishes these cases from *Derrick* are specific indications that defendants did or should have observed that made it reasonably foreseeable that children may behave unpredictably, such as the fact of a child standing by the side of the road. Courts have emphasised that the key factor in the High Court's reasoning in *Derrick* was the absence of a 'particular perceivable risk', of which the presence of child pedestrians might be *indicia*.[15]

Tobin and *Eccleston* can be contrasted to *Latham v Fergusson*,[16] where the 23-month-old plaintiff was separated from her mother on a pedestrian crossing. Her mother, who was also pushing a pram in which there was a one-month old child, realised the plaintiff was not with her while crossing to the footpath on the other side. She continued crossing, while looking back at the plaintiff, who was playing with a chevron sign, intending to go back for the plaintiff after she had pushed the pram safely on to the footpath. At this point, the plaintiff emerged from behind the chevron sign into the path of the defendant's vehicle. Hoeben J, with whom Santow JA and McClellan CJ at CL agreed, found that the driver was not negligent. His Honour stated that 'a driver in the position of the claimant, having been alerted to the possibility of something or someone on the crossing, or across the road, who then carefully looks at the crossing and cannot identify any person who might be at risk should the vehicle continue, is entitled to do exactly what the claimant did'. He also emphasised that the situation was closely akin to *Derrick v Cheung* in that it was 'a somewhat extraordinary combination of circumstances, that is, a 23-month-old child separated from her mother by a significant distance while crossing a busy road and whose presence is almost entirely obscured by a chevron sign'.[17]

What might constitute a 'particular perceivable risk' was examined in *Lambert v Zammit*,[18] where Cooper AJ held that a defendant driver who struck a seven-year-old plaintiff pedestrian was negligent. As the defendant approached in her car, the plaintiff was stationary and conversing with an older boy on a bicycle by the side of the road, but he then ran on to the road across a pedestrian refuge, where he was struck by the defendant. The latter was travelling at about 50 km per hour. The defendant could see the older boy as she approached, but not the plaintiff. The defendant argued that a reasonably alert approaching driver would not have perceived that the boy on the bicycle was conversing with a child who would run across the road. However, his Honour noted that this would create too high a threshold for negligence. He concluded that the fact that the older boy was present on his bike in the position he was in was >>

Motorists have a special duty of care towards careless pedestrians where there is a 'perceivable risk' of danger.

sufficient to put the reasonable driver on notice to take caution, particularly as the defendant's view of the area towards which the older boy was facing was obstructed, and that ought to have warned 'a reasonable prudent driver that there was a potential for some form of danger. He would not be looking in that direction for no reason at all. The reason may not have been readily apparent to the defendant but it is because of that that it would be necessary for a reasonably prudent driver in those circumstances to take special care by substantially reducing her speed.'[19]

Although *Lambert* seems to suggest that the threshold for determining what may constitute a perceivable risk of danger is a low one, the more recent case of *Mobbs v Kain*[20] suggests that even if it may be reasonably foreseeable that a child may dash out on to the roadway, a finding of negligence must be based on a failure to respond appropriately to that circumstance. In that case, the existence of a stationary school bus – which the defendant driver acknowledged must have signified the presence of children near the road – was not sufficient for liability where the driver was proceeding at the speed limit. The case involved a learner driver, supervised by his mother, who collided with a ten-year-old child running out from the front of a school bus on a quiet residential street. The defendant driver gave evidence that by the time he reached the rear of the bus he had slowed to the statutorily prescribed speed for passing school buses of 40 km per hour. The primary judge found that as the defendant passed the school bus, the plaintiff emerged at a rapid pace from in front of the bus which completely obscured him until almost the very instant that he collided with the car. Importantly, the child collided with the side of the defendant's car. The driver acknowledged that he had seen the school bus as he approached, and he knew that the likely purpose of the bus pulling over was to let children off, and that he was aware of the need to take special care in an area where it might reasonably be anticipated that young children may be present. At trial, the principal allegations of negligence were that the learner driver, Mr Mobbs, drove at a speed that was excessive in the circumstances and that he failed to keep a proper lookout. The trial judge found that the driver had not failed to keep a proper lookout but that he was negligent in the light of the perceived risk in failing to drive at a speed less than the applicable limit. Notably, he accepted *dicta* by the High Court in *Derrick* relied on by the defendant that the incident in that case did not occur 'near to a school or a bus stop or other place where reducing speed or special caution in driving might be required or prudent'.[21]

On appeal, however, the NSW Court of Appeal overturned this finding. McColl JA, with whom Giles and Macfarlan JJA agreed, rejected the submission that the defendant should have slowed down until he could identify the children who had alighted from the bus and where they were, or seen what they were doing. Her Honour emphasised the statement from *Derrick* that 'travelling within the designated speed limit and in conformity with the traffic flow is ordinarily reasonable. Indeed, to do otherwise would often create risks', and found that this was not a case in which the possibility that a child might emerge from the front of the bus meant that Mr Mobbs had to slow down to a speed where he could stop in any conceivable circumstances.[22] Her Honour found that such a conclusion would impose a strict liability upon the driver and represent impermissible hindsight reasoning. In *Mobbs*, it was significant that the evidence did not clarify (and the trial judge did not determine) what would have constituted a reasonable speed in the circumstances, given the sudden emergence of the child.

CONCLUSION

After *Derrick v Cheung*, two factors are significant in collisions involving careless pedestrians, including children: firstly, the existence of a particular perceivable risk, which the driver should have observed but did not. Secondly, that risk must have required action beyond keeping a proper lookout and driving at a modest speed within the speed limit. *Latham v Fergusson* and *Mobbs v Kain* suggest that the significance of the higher standard ostensibly owed by motorists to child pedestrians is doubtful where there is no indication of a particular danger or where the defendant has already taken the appropriate action to deal with the risk, where the appropriate action to be taken is assessed before the risk eventuated. Although the duty of care owed by motorists to child pedestrians remains high, the principal question is whether, regardless of the age of the plaintiff concerned, the motorist discharged his or her duty to take reasonable care. ■

Notes: **1** *Mitchell v Government Insurance Office* (NSW) (1992) 15 MVR 369. **2** *Settree v Roberts* [1982] 1 NSWLR 649; see also *Delphin v Savolainen* (1989) 10 MVR 37; *Lolomanaia v Rush* (1996) 24 MVR 128. **3** *Stocks v Baldwin* (1996) 24 MVR 416, 418 per Mahoney P. **4** [2001] HCA 48; (2001) 33 MVR 393. **5** [2001] HCA 48; (2001) 33 MVR 393, [13]. **6** [2001] HCA 48; (2001) 33 MVR 393, [10]. **7** [2001] HCA 48; (2001) 33 MVR 393, [13]. **8** [2001] HCA 48; (2001) 33 MVR 393, [14]. **9** *Dennis v Keep* [2002] NSWCA 227. **10** See H Luntz, 'Turning Points in the Law of Torts in the last 30 Years' (2003) 15 *Insurance Law Journal* 1; P Stewart and G Monahan, '*Roads and Traffic Authority of New South Wales v Dederer*: Negligence and the Exuberance of Youth' (2008) 32 Melbourne University Law Review 739, 740. **11** [2005] NSWCA 188. **12** [2005] NSWCA 188, [44]-[45]. **13** (2007) 47 MVR 262. **14** (2007) 47 MVR 262, [114]. **15** *Knight v Maclean* [2002] NSWCA 314, [64] per Heydon JA (with whom Meagher JA and Young CJ in Eq agreed). **16** [2006] NSWCA 288. **17** [2006] NSWCA 288, [53]. **18** [2005] NSWSC 1135. **19** [2005] NSWSC 1135, [182]. **20** [2009] NSWCA 301. **21** Derrick v Cheung [2001] HCA 48; (2001) 33 MVR 393, [11]. **22** [2009] NSWCA 301, [101].

Alice Lam *is a former tipstaff of the Hon Justice Ruth McColl AO, and is currently interning at the Central Land Council.*
EMAIL *alice.lam1@gmail.com.*