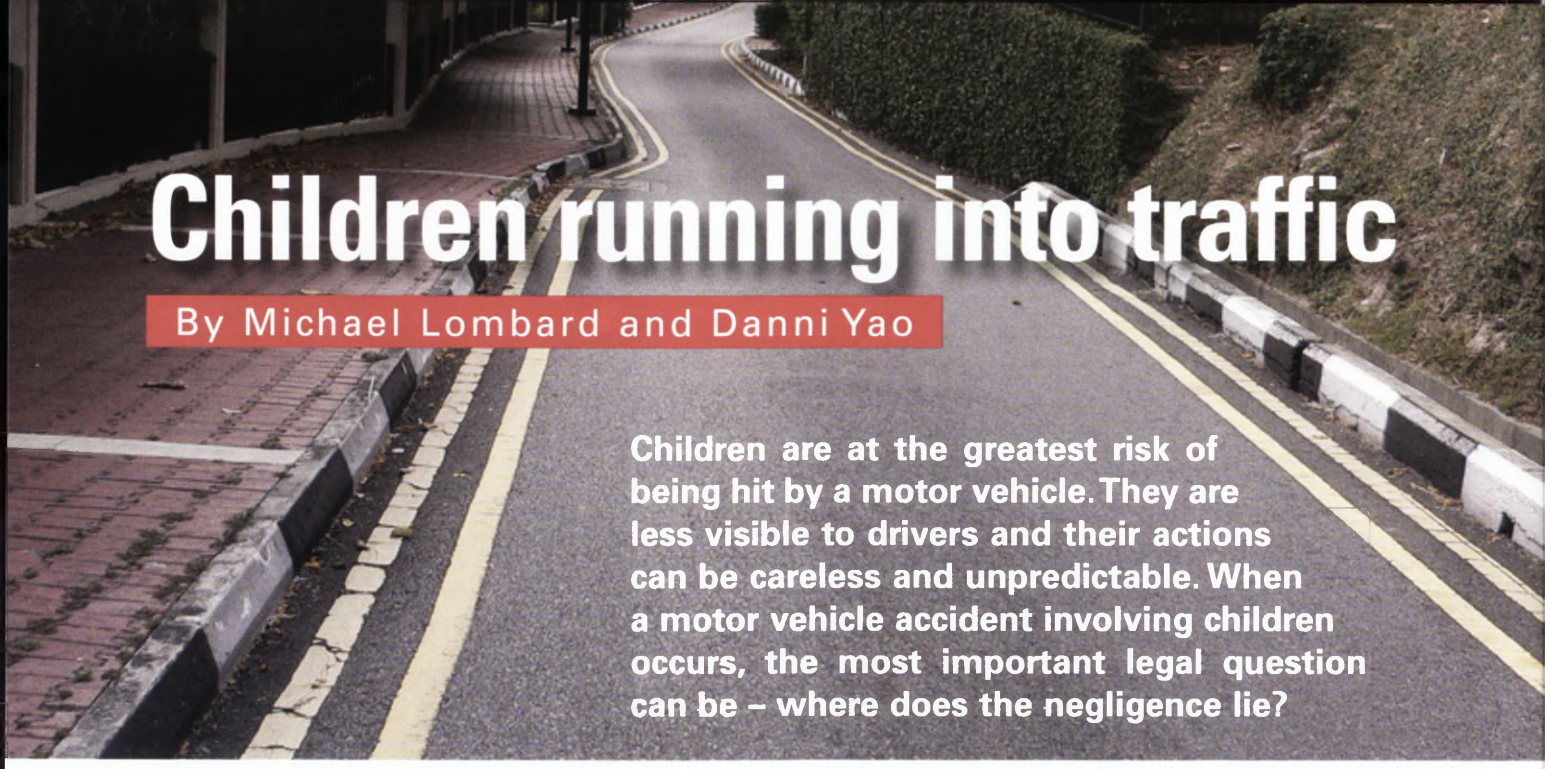

Children running into traffic

By Michael Lombard and Danni Yao

Children are at the greatest risk of being hit by a motor vehicle. They are less visible to drivers and their actions can be careless and unpredictable. When a motor vehicle accident involving children occurs, the most important legal question can be – where does the negligence lie?

OBLIGATION OF DRIVERS TO LOOK FOR CHILDREN

Every driver of a motor vehicle has a duty to keep a reasonable lookout for other road users at all times. The courts have established that extra care, however, may need to be exercised by drivers when driving in areas where the road is likely to be accessed by children, such as near schools, playgrounds, or bus stops.[1]

A driver is said to have breached that duty if they failed the standard of what a reasonable driver would have done in the same circumstances when required to respond to foreseeable risks of injury or danger to other road users.

The standard of care a driver must have for other road users is objective and impersonal.[2] The standard is not lowered to take into account a driver's personal characteristics or driving capabilities.

In the High Court case of *Manly v Alexander*,[3] it was held that '...a driver must control the speed and direction of a vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events'.[4]

Through the case of *Derrick v Cheung*,[5] it was established that the possibility that the accident might have been avoided if the driver had adopted different conduct has no impact on assessing the standard of care expected of that driver. However, the driver is not expected to react to everything that might happen within the vicinity of the vehicle.

In *Derrick*, the 21-month-old plaintiff was struck by a car when she suddenly emerged from between two parked vehicles on the side of the road. She had become separated from her mother. Although Ms Derrick's vehicle was travelling under the speed limit, she was not able to stop in time when the child appeared suddenly near the front headlight.

At first instance, the trial judge held that the driver had been negligent. His Honour believed that if Ms Derrick had been travelling a few less kilometres per hour at the time, the accident could have been avoided.

When the case reached the High Court, it was unanimously held that Ms Derrick was not negligent. In a joint judgment, the court concluded that the trial judge had erred in speculating that the accident may have been avoided if Ms Derrick was driving at a slower speed. It was held that the possibility of a different result was not the test of negligence. Ms Derrick had exercised the reasonable care expected of her as a driver, as at the time of the accident, there was no particular danger 'observable' or 'apparent'.

In *Tobin v Worland by his Tutor John Worland*,[6] the plaintiff was a 26-month-old child who was struck when running across the road. The defendant was travelling below the speed limit and saw another child standing on the road behind a parked car. The defendant initially reduced her speed, but slowly accelerated as that child stood where she was and appeared not to have moved. The defendant had not seen the plaintiff until she unexpectedly darted across the road in front of her.

The NSW Court of Appeal distinguished the circumstances of this case from *Derrick*. McColl JA found that the defendant was aware that '...a child's presence might mean that other children were present but unseen'.[7] Unlike in *Derrick*, however, her Honour held that it was unreasonable for the defendant to focus on the road ahead while driving in an area where she had seen children. The defendant was required to take extra care driving, as children often behave in an unpredictable and careless manner. Special leave to appeal was refused by the High Court.

In *Ibrahim v Davis*,[8] the infant plaintiff sustained serious injuries when the stroller in which she was sitting came into contact with the side wheels of a semi-trailer. The stroller was being pushed by the plaintiff's mother at the time. The civil jury held that the driver of the semi-trailer was not negligent. The Victorian Court of Appeal did not overturn this verdict, as it found that the semi-trailer driver controlled his vehicle and exercised reasonable care for those pedestrians and other road users to whom he was then proximate.

The Court held that the infant plaintiff was not within the vicinity of the semi-trailer. The infant plaintiff may only have come within the vicinity when she was about to impact the rear side wheels of the vehicle.

In *Warth v Lafsky*,[9] the plaintiff, aged seven at the time of the accident, suffered serious head injuries when the scooter he was riding down a steep hill collided with the defendant's motor vehicle. The accident occurred around 3pm on a week day. The trial judge found the defendant was driving in excess of the speed limit in the vicinity of a school zone and failed to keep a proper lookout. The defendant appealed to the NSW Supreme Court. McColl JA, with whom the other judges agreed, rejected the defendant's argument that the accident was inevitable. Her Honour found the defendant negligent as he was driving at an excessive speed in an area where the presence of children was expected. If the defendant had driven at a reasonable speed, the accident could have been avoided.

TO WHAT EXTENT CAN CHILDREN BE HELD LIABLE FOR CONTRIBUTORY NEGLIGENCE?

The courts have developed general principles to guide them in apportioning damages. The concept of a 'reasonable person' also applies to a child plaintiff. The standard of care applicable to a child plaintiff will be assessed based on that expected of a reasonable child of the same age, intelligence and experience.

The leading authority on child contributory negligence is the High Court decision of *McHale v Watson*.[10] The defendant, then aged 12 years and 2 months, threw a metal object which hit the plaintiff in the eye and caused serious injuries. The plaintiff brought an action in negligence and trespass.

The trial judge held that the defendant had no intention of throwing and aiming the object at the plaintiff. The throw was misjudged and the metal object struck the plaintiff in the eye after it had bounced off a pole. The trial judge took into account the age of the defendant when considering if he could foresee or ought to have foreseen that the metal object might hit the plaintiff who was present in the immediate area.

The High Court upheld the decision at first instance, and confirmed that the defendant was not negligent. The High Court held that the age of a child defendant is relevant in determining liability. Owen J stated, '...the standard by which a child's conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience'. His Honour recognised that '...normality is, for children, something different from what normality is for adults'.[11]

In *Edson v The Roads and Traffic Authority*,[12] the plaintiff was a 13-year-old girl who was struck by two motor vehicles travelling approximately 100 kph when she was running across a highway while fleeing police. The plaintiff sued the Roads and Traffic Authority of NSW for failing to erect proper fencing and fix barriers that may have prevented pedestrians gaining access to the highway. The defendant was held responsible as the Authority had known for many years that large numbers of people crossed the highway and yet failed to erect proper barriers to prevent access. Contributory negligence was argued by the defendant and the court agreed. It was satisfied that the plaintiff, in her capacity as a 13 year old, understood the risk of being struck by a motor vehicle when she ran across the highway, but nevertheless took that risk. The court was satisfied that the plaintiff demonstrated a high level of failure to have regard for her own personal safety. Damages were subsequently reduced by 40 per cent.

The NSW Court of Appeal decision in *Axiak v Ingram*[13] involved a 14-year-old student alighting from a school bus. The child plaintiff walked behind the bus and darted across the road. A driver travelling in the opposite direction slowed his vehicle from 80kph to 40kph when he saw the bus. He did not, however, have time to break before hitting the girl who rolled onto the bonnet and windscreen.

At first instance, the defendant successfully argued that the plaintiff had failed to take reasonable care and there was no negligence on behalf of the driver.

Upon appeal, however, the defendant was found to have been negligent in his driving but the plaintiff was found to have departed from the standard of care expected of a 14 year old. Damages were reduced by 50 per cent due to contributory negligence.

CONCLUSION

It is apparent that a child's behaviour can be unpredictable, irresponsible and reckless. The closer the child is to adulthood, the higher the standard of care expected of the child. The court seems less forgiving of irresponsible behaviours of an older child plaintiff, and the award of damages can be severely reduced.

Drivers are expected to control their vehicles so that they can react to what is happening within the vicinity of their vehicle. The prospect that a collision could have been avoided if the driver had taken a different action is no guarantee of success for an injured plaintiff. If the driver takes reasonable steps in the circumstances, an injured child might not receive an award of damages. ■

Notes: **1** *Foskett v Mistry* [1984] RTR 1. **2** *Cook v Cook* [1986] HCA 73. **3** [2005] HCA 321. **4** *Ibid,* at [12]. **5** [2001] HCA 1. **6** [2005] NSWCA 188. **7** *Ibid,* at [44]. **8** [2013] VSCA 238. **9** [2014] NSWCA 94. **10** (1966) 115 CLR. **11** *Ibid,* at [213]. **12** (2006) 65 NSWLR 453. **13** [2012] NSWCA 311.

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