

CONTRIBUTORY NEGLIGENCE IN PERSONAL INJURY AND CLINICAL NEGLIGENCE CLAIMS – GENERAL PRINCIPLES AND RECENT CASES

Introduction

- 1 The doctrine of contributory negligence is one that those who practise in the field of personal injury litigation and (to a slightly lesser extent) clinical negligence litigation have to consider regularly. The principles are easily set out. The application of those principles creates many real problems in practice. This paper deals briefly with general principles then focuses upon their application in a number of recent cases.

General Principles

- 2 Until the Law Reform (Contributory Negligence) Act 1945 came into force, the contributory negligence of a Claimant was a complete defence to a claim. The award of damages in tort was either all or nothing.

- 3 The wording of the statute is important. Section 1 of the Law Reform (Contributory Negligence) Act provides:

“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.”

- 4 The concept of contributory negligence therefore has three elements:

- 4.1 That the Claimant was in some way at fault in his behaviour;

- 4.2 That such behaviour was partly causative of the damage that was suffered;

- 4.3 That it is just and equitable for damages to be reduced (in which case they are reduced to the extent that is just and equitable).
- 5 It needs to be noted that the relevant contribution of the Claimant is to the damage, not merely to the accident that causes the damage. This distinction is most obvious when considering accidents involving a failure to use protective equipment. Consider these scenarios:
- 5.1 D and C are driving cars and are involved in a collision which is caused by the fault of them both. C is wearing a seatbelt. He is injured. C has contributed to the damage by contributing to the accident.
- 5.2 D and C are driving cars and are involved in a collision which is caused by the fault of them both. C is not wearing a seat belt. He is injured in a manner which would have been avoided had he been wearing a seatbelt. C has contributed to the damage both by contributing to the accident and by his failure to wear protective equipment.
- 5.3 D and C are driving cars and are involved in a collision which is caused by the fault exclusively of D. C is not wearing a seat belt. He is injured in a manner which would have been avoided had he been wearing a seatbelt. C has contributed to the damage solely by his failure to wear protective equipment.
- 6 In each case one would anticipate a deduction for contributory negligence, but the amounts would vary, according to the blameworthiness and causative potency of the Claimant's fault in each case.
- 7 The reduction of damages works on the basis of a proportion reduction – 25% contributory negligence equates to a 25% deduction in damages. Accordingly, the reduction has a knock on effect on the award of damages:
- 7.1 If an interim payment has been made, the amount paid will be the figure to be deducted from the net award of damages. A Claimant may consider that an interim payment of £50,000 has reduced damages to a disproportionate extent if

he is ultimately awarded £200,000, discounted by 60% for contributory negligence, leaving £120,000, of which he has already had nearly half.

7.2 Contributory negligence may make it undesirable to seek a periodical payments order. The issue arises most obviously with care claims, where the effect of a reduction for contributory negligence may make the net annual sum awarded for future care insufficient to meet the Claimant's needs. The success of the Claimants in the indexation appeals makes it nigh on impossible to move money from other heads of loss into the future "care" pot (since the Claimant would benefit disproportionately if damages that did not relate to care were indexed in accordance with ASHE 6115) and so the effect of a reduction for contributory negligence may make periodical payments less attractive to a Claimant than having the flexibility of a lump sum, albeit one reduced for contributory negligence.

8 However, a finding of contributory negligence has no effect on how damages are calculated, only on the reduction (if any) to be made to the total as calculated. This principle, established in **Kelly v Stockport Corporation [1949] 1 All ER 893**, was re-affirmed in **Sowden v Lodge [2004] EWCA Civ 1370**.

9 The Defendant in **Sowden** argued amongst other things that the reduction of the Claimant's damages by 50% for contributory negligence meant that he would not be able to fund the 24 hour care regime for which he contended and that accordingly damages should not be awarded on the basis that such a regime would be put in place. The Court of Appeal rejected this argument. Pill LJ, applying **Kelly**, put it this way: *"Damages are to be reduced having regard only to the "claimant's share in the responsibility for the damage". That assumes an assessment of the sum recoverable prior to any reduction for contributory negligence. Subsection 1(2) points strongly in the same direction. The reduction takes account of share of responsibility for the damage but not how the damages are likely to be spent."*

The Burden of Proof

10 The burden of proving contributory negligence lies on the Defendant. The person who bears the burden of proof leads his evidence first. But the Defendant may have

no meaningful evidence to call on the issue. This can create a dilemma for the Defendant.

- 11 If breach of duty is admitted but the Defendant wishes to allege contributory negligence, he calls his evidence first. If he has no substantial evidence to support a finding of contributory negligence, a Claimant might decline to call evidence, leaving the Defendant with an uphill struggle to establish fault on the Claimant's part. If on the other hand liability had been in dispute, the Claimant would have been forced to adduce evidence in support yet this evidence might have led to a conclusion of some fault on the part of the Claimant without the Defendant adducing any evidence. In consequence, a Defendant may be reluctant to concede liability so as to preserve the opportunity to argue contributory negligence effectively.
- 12 Consider what happened in **Dawes v Aldis [2007] EWHC 1831**. The Defendant stole a motor vehicle and drove it at significant speed on the wrong side of the road in a residential area, colliding with the Claimant. The Defendant driver took no part in the proceedings and no eye witnesses were identified. The Claimant himself (who was catastrophically injured) could not give evidence. The Defendant's insurer's case was that the Claimant was running across the carriageway at the time of the collision. He had certainly been drinking (a mixture of lagers and tequilas) and the Defendant's suggestion was that he may have run into the road to remonstrate with the Defendant. Accident reconstruction experts were called but the available material gave limited assistance in interpreting the facts of the accident.
- 13 The Judge concluded that there was insufficient information from which to draw firm conclusions as to what had happened and that though there was a "*strong possibility*" that the Claimant had acted in a dangerous manner without regard for his own safety, that could not reach the standard of probability necessary for a finding of contributory negligence.

100% Contributory Negligence

- 14 The idea of a Claimant being guilty of 100% contributory negligence is a matter of controversy. There is some authority for the making of such a judgment, most

particularly **Jayes v IMI (Kynoch) Ltd [1985] ICR 155**. The Claimant, a factory worker, was injured when his hand was drawn into a machine whilst he was attempting to clean it. The Claimant established breach of duty on the Defendant's part in failing to fence the machine contrary to section 14 of the Factories Act 1961. The trial Judge held that the accident was entirely the fault of the Claimant and on appeal, the Court of Appeal held that, where there was a claim for breach of a statutory duty, which was intended to provide protection against the folly of an employee, a finding of 100% contributory negligence could nevertheless be made by the Court.

- 15 In **Anderson v Newham [2002] EWCA Civ 505**, the Court of Appeal held that the decision in **Jayes** was made *per incuriam*, the decision of the House of Lords in **Boyle v Kodak [1969] 1 WLR 661** not having been cited. In **Boyle v Kodak**, the House of Lords held that, where an employee was injured and the employer was in breach of a statutory duty, the employer could only escape liability where it showed that its breach of duty was coextensive with a breach by the employee of the same statutory duty and that the employer had done all it reasonable could to ensure compliance with that statutory duty by the employee.
- 16 Having declined to follow **Jayes**, the Court of Appeal in **Anderson v Newham** held that, where an accident was entirely due to the Claimant's fault, even though there was coincidental negligence or breach of statutory duty on the part of the Defendant, no liability would arise. However if the Claimant was not wholly to blame for the accident then, whether the claim arose in negligence or breach of statutory duty, the Defendant's partial fault (if causative of the accident) could not be nullified by a finding of 100% contributory negligence.
- 17 It is worthy of note that, in the case of **Reeves v Metropolitan Police Commissioner [2000] 1 AC 360** (referred to in greater detail below), the trial Judge had assessed the deceased's contributory negligence, in committing suicide, at 100%. In the Court of Appeal, Morritt LJ agreed with this assessment (the majority found 100% for the Claimant). In the House of Lords, an assessment of contributory negligence of 50% was made. The issue of whether a finding of 100% contributory

negligence could ever be appropriate was not canvassed in the House of Lords, but the Law Lords' silence as to how that issue was addressed in the Court of Appeal might be relied upon as tacit support for the argument that a finding of 100% contributory negligence is open to the Court in appropriate circumstances.

Seatbelts

- 18 The issue of deduction for a driver or passenger who suffers injuries that would have been avoided or at least would have been less serious had they been wearing a seatbelt is an area of continuing dispute. In **Froom v Butcher [1976] QB 286**, the driver of a vehicle was not wearing his seatbelt and suffered head and chest injuries in a collision caused by the Defendant's negligence. Lord Denning in the Court of Appeal stated that "*whenever there is an accident, the negligent driver must bear by far the greater share of responsibility.*" But where the evidence showed that, had a seat belt been worn, injury would have been avoided altogether, it was appropriate to reduce damages by 25% for the negligence of the injured person in failing to wear the seatbelt – where the wearing of the seatbelt would not have avoided injury altogether but the injuries would have been considerably reduced, the appropriate deduction might be 15%.
- 19 The comments of Lord Denning were *obiter* (the Court of Appeal finding no reason to depart from the Judge's assessment of contributory negligence on the facts of the case at 20%) and in any event were expressed in terms of suggested deductions rather establishing any firm rules. Nevertheless, they have generally been treated as firm guidance.
- 20 At the time of **Froom v Butcher**, it was not a criminal offence to fail to wear a seatbelt, although Lord Denning referred to the information available through the press and other sources as to the risks inherent in not wearing seat belts and to fact that legislation was being contemplated to make the wearing of seatbelts compulsory.
- 21 There have been a number of more recent attempts by Defendants to argue that changing standards make the guidance in **Froom v Butcher** inappropriate and that a greater deduction should be made. In particular, the incidence of car users not

wearing seat belts has vastly decreased and it can convincingly be argued that there is much greater public awareness of the risks associated with not wearing belts.

22 There have been two recent cases in the Court of Appeal in which argument has been addressed as to whether the guidance in **Froom v Butcher** should be applied.

23 In **Jones v Wilkins [2001] PIQR P12**, the Claimant was a three year old child, severely injured when the car in which she was being carried as a passenger was involved in an accident due to the admitted fault of the driver of another vehicle, Wilkins. At the time of the accident, the Claimant was sitting on her mother's knee in the front passenger seat, with the lap belt around both mother and child and the diagonal belt across the mother's shoulder and body. Having admitted negligence, the Defendant's insurers brought Part 20 proceedings against the Claimant's mother and her aunt (the driver of the vehicle in which she was a passenger), alleging a failure to take reasonable care for the Claimant's safety by ensuring that she was safely and appropriately restrained in an approved child restraint.

24 Expert evidence supported the conclusion that if the Claimant had been wearing an approved child restraint, the risk of serious injury would have been almost entirely eliminated.

25 The trial Judge, HHJ Rogers, sitting as a High Court Judge, considered himself bound by the decision of in **Froom v Butcher** to apportion liability 75% to the Defendant and 25% to the Part 20 Defendants.

26 On appeal, the Defendant challenged the apportionment, drawing attention to the comments of Lord Denning in **Froom v Butcher** that there would be exceptional cases where the figure of 25% might be exceeded.

27 In the Court of Appeal, Keene LJ giving the judgment of the Court, stated that the trial Judge could not "*be faulted for having described himself as 'bound' by the decision in **Froom v Butcher**...it is clear from his judgment that he was prepared to and did consider the extent to which the figure of 25% suggested by Lord Denning had been exceeded during the 23 years since that decision, so as to see how readily the Courts have been prepared to treat that figure as merely a guideline for the great majority of cases and how readily one should make an exception to it. The fact*

is that there has been no reported case of which counsel are aware where a passenger's failure to wear a seat belt has resulted in a finding of more than 25% contributory negligence."

28 The Court acknowledged that the figures in **Froom v Butcher** were only put forward by the Court of Appeal as "suggestions or guidelines" but considered that there was great benefit in having clear guidelines available and agreed with the earlier guidance that the figure of 25% would rarely be exceeded.

29 The Court in **Jones v Wilkins** also noted that whilst, at the time of the decision in **Froom v Butcher**, it was not compulsory to wear seat belts, the Court of Appeal had noted that legislation to that effect was in contemplation.

30 In balancing the issue of blameworthiness between the Defendant driver and Part 20 Defendants, the Court considered the former to have been more blameworthy – after all, he had caused the accident itself. Moreover, the trial Judge found that the Part 20 Defendants were not deliberately taking a risk in the manner that the Claimant was restrained but rather taking some steps to restrain her (even though in fact the method was more dangerous than leaving her entirely unrestrained.)

31 In conclusion, the Court declined to interfere with the trial Judge's assessment of contributory negligence.

32 In **Gawler v Raettig [2007] EWCA Civ 1560**, the trial Judge (Gray J) considered himself bound by **Froom v Butcher** to find the Claimant guilty of 25% contributory negligence, where he had been the front seat passenger in a car driven by the Defendant, the Defendant losing control of the vehicle and the Claimant being catapulted from the car because he was not wearing a seat belt. The Defendant argued that this was an exceptional case, justifying a higher deduction under **Froom v Butcher**, but that in any event the guidelines were outdated, given the vastly increased public awareness of the dangers of not wearing seatbelts. The Defendant contended that the appropriate reduction for the Claimant on the facts of that case was 50%.

33 Gray J reviewed the judgement of Lord Denning in **Froom v Butcher** and said: *"Whilst I accept that public awareness of the vital importance of wearing seat belts has increased markedly since 1975, it appears to me that judicial awareness, both in **Froom** and in the numerous*

*cases which followed it, of the dangers of not doing so is clear. The public costs consequences of failing to belt up are self-evident. That being so, I do not accept that in this respect public policy calls for a review of the approach laid down in **Froom**.”*

- 34 The Defendant sought to use the leapfrog procedure under section 12 of the Administration of Justice Act 1969 in order to appeal to the House of Lords. The Claimant consented to this on terms that the Appellant would not seek to recover any deduction from the Claimant’s damages should the Defendant succeed either in the House of Lords or in the Court of Appeal.
- 35 The House of Lords refused permission to appeal on the basis that “*the petition does not raise an arguable point of law of general public importance.*” An application for permission to appeal was made to the Court of Appeal. That court refused permission on the ground that the terms of the agreement under which the Claimant had consented to the section 12 procedure made the outcome of any appeal academic. Thus the ratio of the case relates to the procedural issues.
- 36 The Court of Appeal declined to deal in detail with the Defendant’s arguments as to the application of **Froom v Butcher**, it being unnecessary for it to do so because of the finding on the procedural issue. The Court did however note that the guidance in **Froom v Butcher** had been consistently followed since the time of the judgment.
- 37 In a recent case in the High Court before Cox J, **Stanton v Collinson [2009] EWHC 342**, the issue was considered yet again. The Claimant and another passenger sat in the front seat of a car driven by the deceased, neither wearing a seat belt. The deceased lost control of the vehicle at speed, causing an accident in which he was killed and the Claimant (amongst others) was injured. Primary liability was admitted on behalf of the estate of the deceased.
- 38 During the trial it was argued that the Claimant’s damages should be reduced for his contributory negligence in not wearing a seat belt. Cox J considered the Defendant’s argument that the **Froom v Butcher** guidelines should be revisited on the ground that, having regard to the introduction of compulsory seat belt use, improvements in seat belt design and increased public awareness of the dangers in not wearing seat

belts, it was more blameworthy and more causatively potent to fail to wear a seat belt in 2003 than in the 1970s. Like Gray J in **Gawler v Raettig** at first instance, Cox J saw no reason to revisit the **Froom v Butcher** guidance, commenting that that decision was reached “*in full knowledge of the relevant research and statistical information and also knowledge of the legislative background and the imminent arrival of statutory compulsion.*”

39 The Judge went on to consider the Claimant’s argument that the Defendant had not shown that, even if the Claimant had been wearing a seatbelt, his injuries would have been any less. The Claimant suffered a serious head injury in the accident causing brain injury. The joint statement of engineering experts agreed that the severity of the head injury would have been reduced had the Claimant been wearing a seatbelt, but complete prevention of head injury would have been unlikely.

40 The Defendant did not call any medical evidence as to the effects of a less severe head injury and the Judge concluded that the Defendant had not discharged the burden of proving that the Claimant’s action in not wearing a seat belt was causative of his injuries. Accordingly the Claimant recovered in full.

41 The case of **Hitchens v Berkshire County Council (13.10.99, Lawtel)** is cited from time to time in support of the contention that the guidelines in **Froom** should be revisited. The trial Judge, HHJ Thompson QC felt bound by the guidelines, but said that he would have found the contributory negligence of the Claimant to have been very much higher were he not so bound. He also said that he felt the time might have come for the Court of Appeal to revisit those guidelines, given that “*not only has there been a dramatic change in the law in that nowadays failure to wear a seat belt is a criminal offence but there has also been a sea change in attitudes of mind towards the wearing of seat belts.*” The Defendant’s appeal in that case was settled on the basis of a 50% deduction for contributory negligence.

42 In **Gawler v Raettig**, Gray J commented that counsel for the Defendant “*rightly accepts that the settlement at the higher figure of 50 percent which was agreed in the unreported case of **Hitchins v Berkshire Council** has no jurisprudential value and was probably influenced by extraneous considerations.*”

43 It is worth noting that, as the authorities stand, the unbelted passenger, whose fault plays no part in the happening of the accident, but whose injuries would have been avoided but for the accident, will suffer the reduction of 25% regardless of whether the driver who caused the accident did so through momentary inattention or by driving at 100mph whilst under the influence of alcohol. The Act speaks of a reduction that is “*just and equitable having regard to the Claimant’s share in the responsibility for the damage.*” Whilst the Courts invariably focus on the Claimant’s blameworthiness, the Defendant’s culpability is rarely a factor to which the Courts look, at least in claims at common law – it is more often a relevant consideration in cases arising from the Defendant’s breach of statutory duty.

Passengers and drink driving

44 The leading case is **Owens v Brimmell [1977] 1 QB 859**. Both driver and passenger drank 8 or 9 pints of beer. On the drive home, the driver lost control of his car and collided with a lamp post. The Court of Appeal held that “*a passenger may be guilty of contributory negligence if he rides with the driver of a car whom he knows has consumed alcohol in such quantity as to impair to a dangerous degree that driver’s capacity to drive properly and safely. So, also, may a passenger be guilty of contributory negligence if he, knowing that he is going to be driven in a car by his companion later, accompanies him upon a bout of drinking which has the effect eventually of robbing the passenger of clear thought and perception and diminishes the driver’s capacity to drive properly and carefully.*”

45 In **Booth v White [2003] EWCA Civ 1708**, the Court of Appeal considered the Defendant’s contention that the Claimant (who knew the Defendant to be a heavy drinker) should have known that there was a significant risk that the Defendant had consumed excessive alcohol prior to offering the Claimant a lift. The Claimant himself had drunk a significant quantity of alcohol in a pub. The Defendant had been in the pub for a while, left to play football and returned. A little later, while giving the Claimant a lift home, the Defendant lost control of his vehicle and crashed, causing severe injuries to the Claimant. The Defendant’s alcohol level was found to be twice the legal limit.

- 46 At trial, the Defendant admitted having drunk between 10 and 15 pints of lager that day, but there was no evidence that the Claimant knew he had drunk a substantial amount. Moreover there was no evidence that the Claimant ought to have realised that his capacity to drive was impaired through the consumption of alcohol.
- 47 The trial Judge and the Court of Appeal rejected the Defendant's contention that the Claimant should (in the circumstances of the case) have questioned the Defendant on how much he had to drink before travelling with him. To accept this contention would involve an extension of the previously accepted obligation of a prospective passenger beyond merely requiring him to assess whether a driver who has been drinking was safe to drive the car. As Brooke LJ put it, "*the law would take a wrong turning if we were to require an interrogation in this type of case, of the type that [counsel for the Defendant] has suggested.*"
- 48 In **Gleeson v Court [2007] EWHC 2397**, the court considered the situation of a Claimant whose contributory negligence involved allowing himself to be carried in the boot of a car (there being too few seats for the number of passengers) and in accepting a lift from a drunk driver. The Judge found that the Claimant should have known that Defendant had drunk too much to drive.
- 49 Taking the two factors separately, the Judge considered that, in permitting himself to be driven by a driver who was adversely affected by alcohol, the Claimant's damages would have been subject a reduction of 20% (following **Owens v Brimmell**). Travelling in the boot was approximately as blameworthy as travelling without wearing a seatbelt and should lead to a reduction of 25% (following **Froom v Butcher**). However, one could not simply aggregate the two to make a reduction of 45% because to do so would fail to reflect that the accident itself was caused by the Defendant's fast and bad driving whilst affected by alcohol. The Judge considered the just and equitable reduction to be 30%.
- 50 It is worth noting that, in **Pitts v Hunt [1990] 3 All ER 344**, where the Claimant pillion passenger accepted a lift as part of a joint enterprise with the Defendant driver to drive dangerously and was injured in consequence, his claim was held to be barred by the doctrine *ex turpi causa non oritur actio*. The Claimant would have been guilty of

manslaughter had the Defendant struck and killed a pedestrian, given the nature of their enterprise. The Court of Appeal however commented that, had the passenger's claim not been defeated by this plea, the appropriate reduction for his taking part in a dangerous illegal enterprise was only 50%.

Helmets

- 51 In **O'Connell v Jackson [1972] 1 QB 270**, a motor cyclist who was not wearing a helmet was injured as a result of the Defendant's negligence. He would have suffered some of his injuries in any event. Edmund-Davies LJ, giving the judgment of the Court stated: "*...it is only in that last field of additional injuries and damage that the contributory negligence of the Claimant has any relevance. It is not possible on the evidence to measure the extent of that field and then apportion that measure between the blameworthiness and causative potency of the acts and omissions of the parties. We can only cover the two stages in one stride and express the responsibility of the Plaintiff in terms of a percentage of the whole. Giving the best consideration we can to the whole matter, we assess the responsibility of the Plaintiff in terms of 15% of the whole...*"
- 52 In **Capps v Miller [1989] 2 All ER 333**, the Claimant wore a helmet but did not secure it with the chin strap. He suffered injuries as a result of the Defendant's negligence which would have been less had the helmet been secured. The Court of Appeal concluded that the correct deduction for his contributory negligence in not securing the strap was 10%.
- 53 What of the pedal cyclist who does not wear a helmet? In **Smith v Finch [2009] EWHC 53**, the Claimant cyclist was injured as a result (on the Judge's finding) of negligent riding by a motorcyclist, when he overtook the Claimant at high speed, riding too close to the Claimant. The Claimant was not wearing a helmet, even though the 2004 version of the Code, in force at the time of the accident, recommended to cyclists that "*you should wear a cycle helmet which conforms to current regulations.*" There was evidence before the court that such helmets provide protection against some types of injuries at certain speeds.

- 54 The Judge found that the failure to wear a helmet might expose the cyclist to risk of greater injury, that it was not sensible to fail to wear a helmet and thus that a cyclist who does not wear a helmet runs the risk of a finding of contributory negligence.
- 55 However on the scientific evidence, the Judge concluded that the Claimant's head hit the ground at faster than 12mph and that the wearing of a helmet in such circumstances would have made no difference to the injuries that the Claimant suffered. Indeed, even if the speed had been lower than 12mph, the Judge was not persuaded that the Claimant's particular injuries would have been avoided – there was a lack of medical evidence to allow him to reach that conclusion.
- 56 There is a clear parallel with the decision of Cox J in **Stanton v Collinson** – the failure of the Defendant to call medical evidence prevented it from discharging the burden of proving the causative effect of the Claimant's unreasonable failure. This difficulty for the Defendant may well lead to a reluctance to agree to a split trial, in particular where the allegation of negligence relates to a failure to use protective equipment.

Pedestrians

- 57 In an accident involving pedestrians and motor vehicles, the contributory negligence of pedestrians is rarely assessed to be more than 50%. In **Eagle v Chambers [2003] EWCA Civ 1107**, the Claimant was a pedestrian who walked along a dual carriageway in Great Yarmouth whilst drunk. The Defendant, driving along the road, struck her. He failed a roadside breath test but was not found to be above the drink driving limit at the police station. At first instance, the Claimant's contributory negligence was assessed at 60%, the Judge commenting that the Claimant, whilst drunk and emotional, had placed herself in a dangerous situation.
- 58 On appeal, the Court of Appeal substituted a finding of 40% contributory negligence. The point is made in the judgement that, while the pedestrian may be more blameworthy than the car driver, they are highly unlikely to be more causatively potent, given that a car is potentially a dangerous weapon. Hale LJ, giving the judgment of the Court, said *"It is rare indeed for a pedestrian to be found more responsible than*

a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle.” On the facts of the case, the pedestrian had been visible and seen by other road users. She had not staggered or suddenly changed direction. Hence the Judge’s finding could not be sustained.

Self-harm and suicide

- 59 Where a Defendant is in breach of a duty to take reasonable care to prevent an act of self-harm (including suicide), the act of self-harm is liable to be found to be caused both by the breach of duty of the Defendant and the acts of the injured/dead person himself, such that the Claimant will establish liability but there will be a finding of contributory negligence. Thus, in **Reeves v Metropolitan Police Commissioner [2000] 1 AC 360**, the failure of police officers to take steps to prevent a prisoner, Martin Lynch, who was known to be at risk of attempting suicide, from hanging himself through the wicket hatch of the cell door was held to be a cause of Mr. Lynch’s death for which the Commissioner was liable. Mr. Lynch himself, who was “of sound mind,” was found to have had responsibility for his own life and to have caused his own death. Contributory negligence was assessed by the House of Lords at 50%.
- 60 The decision in that case turned significantly upon the finding that Mr. Lynch was “of sound mind” (a finding that made Lord Hoffman “uneasy”). What of the suicide of the person whose state of mind is impaired?
- 61 In **Corr v IBC Vehicles Ltd [2008] UKHL 13**, the deceased suffered a serious accident at work in which he nearly died and in fact lost an ear. He subsequently developed post traumatic stress disorder and committed suicide. The Defendant, his employer, admitted negligence in the claim brought by his estate, but denied liability under the Fatal Accidents Act to his dependents on the ground that the deceased’s suicide fell outside the ambit of the duty of care and/or was not reasonably foreseeable. They further argued that the deceased’s act of suicide broke the chain of causation and/or was amounted to an act of contributory negligence.

62 The Defendant failed on all three arguments in the House of Lords. Suicide arising from severe depression was not a different kind of harm than personal injury and his lack of responsibility due to depression was caused by the Defendant's breach of duty. Accordingly, the injury lay within the scope of the duty. As to the other defences raised, that the deceased's suicide was not reasonably foreseeable and/or that it broke the chain of causation and/or that the deceased was guilty of contributory negligence, the House of Lords held that they did not apply on the facts of the case though a Defendant might in appropriate case avail itself of them.

63 Lord Mance had this to say (at paragraphs 64 to 66):

*"...At one extreme is a case such as **Reeves** where (surprising though it might seem) the evidence was that Mr. Lynch was of sound mind when he killed himself. In those circumstances, suicide could be said to be a purely voluntary act...your Lordships' House decided that there were in reality two proximate causes of the death, namely the negligence of the police and Mr. Lynch's choice to kill himself and it was effectively impossible to say, at least on the facts of that case, that the suicide was more attributable to one cause than to the other.*

At the other extreme, in my view, would be a case where the deceased's will and understanding were so overborne by his mental state, which had been caused by the Defendant, that there could be no question of any real choice on his part at all, because he had effectively lose his personal autonomy altogether. In effect, in that type of case, the deceased does not really appreciate what he is doing when he kills himself, and he had no real control over his action. In such a case, as the deceased would have no real choice, there would therefore be no real 'fault' on his part for his suicide; consequently there would be no reduction for contributory negligence.

In my judgment, there will be cases in the middle where the deceased, while not of entirely sound mind, can be said to have a degree of control over his emotions and actions and will appreciate what he is doing when he kills himself. In other words, there will be cases where a person will have lost a degree of his personal autonomy, but it will not by any means have been entirely lost."

Causation

64 In **Ryan v St George v Home Office [2008] EWCA Civ 1068**, the Claimant was a prisoner with a history of abusing drugs and alcohol. Whilst on a top bunk in his cell,

he suffered a withdrawal seizure that caused him to fall from the bunk and suffer a head wound, with consequent epilepsy and brain injury.

65 The Defendant was found liable at first instance, primarily on the ground of its negligence in allocating the Claimant a top bunk when they knew of his history of withdrawal seizures.

66 The trial Judge found the Claimant to be at fault for his lifestyle of alcohol and drug abuse and addiction, reducing damages for 15% in respect therefore.

67 The Court of Appeal held that the Judge was entitled to find that the Claimant was at fault in becoming addicted to drugs and alcohol, on the basis that he must have known of the risk to his health from his abuse of such substances. However it accepted the Claimant's argument that the addiction was not a potent cause of the injury. "*It was too remote in time, place and circumstance and was not sufficiently connected with the negligence of the prison staff.*" Applying the words of Lord Birkenhead in **Admiralty Commissioners v SS Volute [1922] 1 AC 129**, it was not "*so much mixed up with the state of things*" brought about by the Defendant's negligence as to be a potent cause of the injury.

68 In the course of argument in the Court of Appeal, counsel for the Defendant accepted that a person who, through his own fault, suffers injury requiring medical treatment (such as the alcoholic suffering cirrhosis of the liver or the smoker suffering lung cancer) and who was then the victim of negligent medical treatment would not have his damages reduced for his conduct that brought him to need medical treatment in the first place – "*the Claimant's fault in smoking or consuming alcohol over a period of time is not a potent cause of the injury suffered as a result of the negligent medical treatment.*"

69 The Court of Appeal went on further to hold that it would not be just and equitable to reduce the Claimant's damages in any event, given that he had presented himself to those in authority as suffering and addiction and the authority had assumed a responsibility for the Claimant's welfare.

Clinical Negligence

- 70 It is clear that the line of argument in **Ryan St George v Home Office** will frequently prevent a body with responsibility for the welfare of ill people from invoking the doctrine of contributory negligence to reduce damages in the ground that the ill-health results from Claimant's own actions. The car driver who negligently crashes and injures himself will not have his damages reduced for any subsequent injury resulting from want of care in his treatment at hospital, though of course the hospital will not be liable for the injuries that he would have suffered in any event through his negligence in crashing the vehicle.
- 71 There are however circumstances in which a patient's want of care for his own well-being will lead to a reduction in his damages. In **Pidgeon v Doncaster HA [2002] Lloyd's Rep Med 130**, the Claimant was negligently informed in 1988 that a smear test for cervical cancer was normal when in fact it showed pre-cancerous growth abnormalities. In 1997 a further test showed that she had cancer. In the intervening 9 years she had been advised on 7 occasions orally and on 4 occasions by letter that she required a further test but she had not done so because she found it painful and embarrassing. The judge, His Honour Judge Bullimore, held that her failure did not break the chain of causation because she did not know that she had cancer and had been positively reassured by the 1988 test. The judge found that there was a qualitative difference between a claimant indulging in behaviour against a background of known vulnerability and a claimant failing to take steps which may well reveal a condition, where she had previously been reassured that it was not present.
- 72 As regards contributory negligence, the Judge considered the Claimant's failure to undergo testing, against a background of warnings from her general practitioner as to the desirability of undergoing them to have been a cause of the failure to treat her cancer at an earlier stage and to have shown unreasonable care for her own health and welfare. Her damages were reduced by two-thirds to reflect contributory negligence.

Smoking and lung cancer

73 The Courts have twice recently considered the issue of contributory negligence in a smoker who suffered lung cancer. In **Badger v Ministry of Defence [2005] EWHC 2941**, the deceased, a boilermaker, was exposed to asbestos during the course of his employment with the Defendant. He smoked around 20 cigarettes per day during the period 1958 to 2002. He died of lung cancer. Both his exposure to asbestos (for which the Defendant admitted liability) and his smoking contributed to his risk of contracting lung cancer in a cumulative fashion as follows:

73.1 A person who had never smoked with no history of asbestos exposure had a 0.3% chance of developing lung cancer (the “base risk”);

73.2 A long-term smoker of 20 cigarettes per day with no history of asbestos exposure had a 3% chance of developing lung cancer (10 times the base risk);

73.3 A person who had never smoked but had been exposed to sufficient asbestos to cause asbestosis had a 1.5% chance of developing lung cancer (3 times the base risk);

73.4 A long-term smoker of 20 cigarettes per day who had been exposed to sufficient asbestos to cause asbestosis had a 15% chance of developing lung cancer (10 times 3, i.e. 30 times the base risk).

74 Thus, though both smoking and asbestos exposure contributed to the risk of the Claimant developing lung cancer, the smoking was more causatively potent.

75 As to blameworthiness, the trial Judge in **Badger**, having heard considerable evidence on the issue, concluded that, by 1971 (when health warnings were first put on cigarette packets), it was foreseeable to the reasonably prudent person that smoking risked damaging one’s health. A reasonably prudent person with knowledge of these warnings would have stopped smoking by around the mid-1970s, though Mr Badger’s fault was clearer from 1987 when he was specifically “advised” about his smoking on a lung examination.

76 Had he stopped smoking, the combined risk (both from asbestos exposure and smoking) of the deceased contracting lung cancer was put as follows:

Deceased stops smoking in 1969 – 3.5%

Deceased stops smoking in 1979 – 6.5%

Deceased stops smoking in 1989 – 11%

77 Given that not all of the period of smoking was culpable and that in any event the Defendant was significantly blameworthy in exposing the deceased to asbestos when the risks associated with the substance were known, Stanley Burnton J assessed his contributory negligence at 20%.

78 In **Shortell v Bical (Lawtel, 16/5/08)**, Mackay J considered the case of a deceased man who was exposed to asbestos during his working life and developed lung cancer. He had smoked around 20 cigarettes per day during his adult life until 1985 (he was born in 1932, so this implies around 35 years of smoking).

79 The case deals mainly with the issue of the causation of the Claimant's lung cancer, the trial Judge accepting the Claimant's case that the exposure to asbestos had more than doubled his risk of lung cancer and that therefore the exposure to asbestos was causative of lung cancer.

80 As regards contributory negligence, Mackay J considered the decision in **Badger v Ministry of Defence**. The evidence did not enable him to assess the causative effect of the culpable smoking (it only demonstrated the overall increase in risk due the entirety of the smoking). Moreover, he did not consider that the issue could be determined by a mathematical approach of the risk factors, not least because that failed to take into account the issue of blameworthiness. He ultimately assessed contributory negligence at 15%.