Neutral Citation Number: [2021] EWCA Civ 1698

Case No: B3/2020/1995 & B3/2020/1995(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE GRAHAM ROBINSON QC
[2020] EWHC 2210 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

- -

Between :

LYUM ROY CAMPBELL **(a protected party who proceeds by his father and litigation friend DONALD CAMPBELL)**	**Appellant/ Claimant**
- and -	
ADVANTAGE INSURANCE COMPANY LIMITED	**Respondent/ Defendant**

John Ross QC (instructed by **Novum Law)** for the **Appellant/ Claimant**
Christopher Kennedy QC and Matthew Snarr (instructed by **Keoghs LLP**) for the **Respondent/Defendant**

Hearing date : 19 October 2021

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Approved Judgment

Lord Justice Dingemans:

Introduction

1. The appeal in this very sad case raises a short but interesting point of law about whether a claimant can rely on his own drunkenness, and consequential lack of insight, either to avoid a finding of contributory negligence or to reduce the apportionment of responsibility for his contributory negligence.

2. In the early morning of Tuesday 9 August 2016 Mr Lyum Campbell, the Claimant, then aged 31 years, was an unrestrained back seat passenger in a three-door Seat Ibiza motor car being driven by Mr Dean Brown, who was insured by Advantage Insurance Company Limited, the Defendant ("Advantage"). In the evening of Monday 8 August 2016 and in the early hours of Tuesday 9 August 2016 Mr Lyum Campbell had been celebrating with his friends Mr Dean Brown and Mr Dean Brown's brother, Mr Aaron Brown. They had all been drinking at the Moo Moo nightclub in Cheltenham which was some 9.3 miles from the site of the collision.

3. At the time of the collision Mr Dean Brown was driving the Seat Ibiza motor car on the A40 in the direction of Oxford from Cheltenham. At 0353 hours Mr Dean Brown crossed on to the wrong side of the road and collided with a lorry being driven in the opposite direction. It was a high speed collision with a combined closing speed between the two vehicles of between 99 and 114 mph.

4. The collision had tragic consequences for Mr Lyum Campbell, Mr Dean Brown and Mr Aaron Brown. Mr Lyum Campbell's head collided with the back of the driver's seat and he suffered catastrophic brain damage. His father, Mr Donald Campbell, now acts as his litigation friend. Mr Dean Brown was killed in the collision. Mr Aaron Brown was not in the car at the time of the collision, and although he provided witness statements in this action, he took his own life before the hearing of the trial below.

5. Liability for Mr Lyum Campbell's claim for damages arising from the accident was admitted by Advantage. Advantage contended, however, that Mr Lyum Campbell's damages should be reduced for contributory negligence in that: (1) he was not wearing a seat belt; and (2) he had allowed himself to be driven by Mr Dean Brown when Mr Dean Brown had obviously been drinking to excess at the nightclub.

6. The trial on the issue of contributory negligence was heard on 11, 12 and 13 March 2020 before His Honour Judge Robinson sitting as a Judge of the High Court ("the judge"). Although there was a full police investigation and report there was an absence of direct evidence. This was because Mr Dean Brown was dead and Mr Lyum Campbell was, because of his catastrophic injuries, unable to give evidence. Mr Aaron Brown had given witness statements to both the solicitors acting on behalf of Mr Lyum Campbell and on behalf of Advantage. As Mr Aaron Brown had died before the trial, his statements to the solicitors were admitted as hearsay evidence.

7. By a judgment dated 14 August 2020 the judge found that Mr Lyum Campbell was not wearing a seat belt, but that the failure to wear the seat belt had no causative effect, because the evidence as a whole, including some expert collision investigation and expert medical evidence, showed that Mr Lyum Campbell would probably have

suffered the catastrophic head injuries that he had suffered in any event. No deduction was made for contributory negligence on this account. This is not an issue on this appeal.

8. The judge, however, found that Mr Lyum Campbell should have appreciated that Mr Dean Brown had drunk too much alcohol to be fit to drive, and he assessed Mr Lyum Campbell's contributory negligence at 20 per cent. This appeal challenges the judge's findings both that there was contributory negligence and that the reduction of damages should be 20 per cent.

The judgment below

9. The judge set out the evidence and findings of fact. The judge recorded that Mr Aaron Brown had provided two witness statements to the Claimant's solicitors and one witness statement to the Defendant's solicitors. These statements were in all material respects consistent with each other (although there was an immaterial inconsistency about whether a seat belt had been put on Mr Lyum Campbell when he first returned to the Seat Ibiza motor car after visiting the nightclub).

10. Mr Donald Campbell had given evidence about events earlier in the evening on Monday 8 August 2016. The judge recorded that 8 August 2016 was Mr Lyum Campbell's 31st birthday and he was also celebrating a successful interview for a job. The judge found that Mr Lyum Campbell arrived at his father's house between 8.30 pm and 9 pm, and Mr Lyum Campbell had been drinking. At about 10 pm Mr Dean Brown had arrived and they left at about 10.30 pm. At that stage there were no signs that Mr Dean Brown had been drinking or taking cannabis.

11. Mr Lyum Campbell and Mr Dean Brown then went to Mr Aaron Brown's house, arriving at about 11 pm. Mr Aaron Brown noted that Mr Lyum Campbell had been drinking. They left for the nightclub, which was about a 20-25 minute drive away, at about 11.30 pm. The judge found that there was not much time for drinking at Mr Aaron Brown's house.

12. The Seat Ibiza motor car was parked in a back street about a 5 minute walk away from the nightclub. The judge found that Mr Lyum Campbell, Mr Dean Brown and Mr Aaron Brown arrived at the nightclub "not later than midnight". All three men drank alcohol equally at the nightclub in a booth at the club. The judge recorded the evidence that the men had had at least two bottles of champagne and at least 20 shots shared between them. There was also reference to Tequila and Brandy.

13. At about 1 am or 2 am on Tuesday 9 August 2016 Mr Lyum Campbell was very drunk. He had knocked over a table and the bouncers were taking him out of the nightclub. Mr Dean and Mr Aaron Brown took hold of Mr Lyum Campbell because he couldn't stand on his own. They walked him back to the Seat Ibiza motor car. They put Mr Lyum Campbell in the front passenger seat but he then leaned out of the car door and was then "really sick". Mr Lyum Campbell then sat back and was asleep, or as Mr Aaron Brown put it in his third statement had "passed out", before the car door was closed. There was a difference between Mr Aaron Brown's first witness statement to the Claimant's solicitors on the one hand, and his second witness statement to the Claimant's solicitors and his first witness statement to the Defendant's solicitors on the

other hand about whether Mr Aaron Brown had put a seatbelt on Mr Lyum Campbell at that stage. The judge found, at paragraph 23 of the judgment, that it was more likely than not that Mr Aaron Brown had put the seatbelt on Mr Lyum Campbell. Nothing turns on that finding in any event.

14. After leaving Mr Lyum Campbell in the Seat Ibiza motor car Mr Dean Brown and Mr Aaron Brown went back to the nightclub and continued to drink. About an hour later they came back to the Seat Ibiza motor car. Mr Aaron Brown got into the back seat (he must have got in through the driver's door because Mr Lyum Campbell was still in the front passenger seat of the three door Seat Ibiza motor car). Mr Dean Brown then tried to start the car but it would not start. Mr Aaron Brown got out and went back to the nightclub to see if he could borrow jump leads off a friend. He was away for about 15 to 25 minutes, but when he returned to the car, Mr Dean Brown and Mr Lyum Campbell had gone. Mr Aaron Brown then got a taxi home.

15. The judge then set out the circumstances of the collision. The forensic toxicology report showed that Mr Dean Brown had used cannabis at some time before his death, but it was not possible to put a time on that consumption. The concentration suggested "heavy and/or regular use" of cannabis. There was in addition 176 mg/dl concentration of alcohol in Mr Dean Brown's blood, and the legal limit is 80 mg/dl.

16. In paragraph 32 of the judgment the judge asked the question "how did the claimant come to be in the rear of the car" at a time after Mr Aaron Brown had left to get jump leads and before he had returned 15 to 25 minutes later to find the Seat Ibiza motor car gone. The judge found that there were two possibilities: either Mr Lyum Campbell had woken up and decided to change positions in the car; or Mr Dean Brown had decided to move Mr Lyum Campbell into the back seat.

17. The judge set out the manoeuvres that Mr Lyum Campbell would have needed to undertake to move into the back seat on his own. The judge found it to be "unlikely that he could have sobered up sufficiently to execute those manoeuvres on his own". The judge held, at paragraph 36 of the judgment that "it is far more likely, and I so find, that Dean assisted him into the back seat". The judge considered it far more likely that it was Mr Dean Brown's idea to move Mr Lyum Campbell into the back seat so that Mr Aaron Brown could get into the front passenger seat of the three door Seat Ibiza motor car on this return. The judge recorded that Mr Lyum Campbell was just under 6 feet and weighed 11 stones 11 pounds and that he must have been awake as he was being moved, because it would not have been possible for Mr Dean Brown to move him into the back of the Seat Ibiza motor car without his assistance.

18. The judge had questioned at paragraph 40 of the judgment whether he had moved "from the zone of reasonable inference into the hinterland of speculation. I am satisfied that I have not".

19. At paragraph 44 the judge addressed the issue of the capacity of Mr Lyum Campbell asking whether Mr Lyum Campbell had capacity to consent to being moved and capacity to being driven by Mr Dean Brown. The judge referred to the provisions of the Mental Capacity Act 2005 and recorded the principle set out in section 1(2) that "a person must be assumed to have capacity unless it is established that he lacks capacity". The judge set out the very considerable amounts of alcohol which had been drunk by

all three men and by Mr Lyum Campbell but found that the evidence of previous consumption of alcohol by Mr Lyum Campbell was "insufficient to displace the presumption of capacity". The judge held that the decision to get from the front to the back of the Seat Ibiza motor car was simple, and Mr Lyum Campbell must have been aware of what was happening.

20. The judge found, in paragraph 58, that "if the claimant had capacity to consent to a change of position in the car, then in my judgment he also had capacity to consent to being driven in the car." The judge held that the move was consistent only with Mr Lyum Campbell consenting to remaining in the car as it was driven away by Mr Dean Brown. The judge found, at paragraph 60, that this was at a time when Mr Lyum Campbell was aware that Mr Dean Brown "had consumed so much alcohol that his ability to drive safely was impaired".

21. The judge then referred to relevant case law before considering whether if, contrary to the findings of fact that he had made, Mr Lyum Campbell was unable to make his own assessment of Mr Dean Brown's fitness to drive. He held "adopting the objective test … I must assess what a reasonable man in the Claimant's shoes would have done … the reasonable man … is able to make an assessment of the driver's fitness to drive … he would have made such assessment and would inevitably have concluded that Dean had consumed so much alcohol that his ability to drive safely was impaired".

22. In the light of these findings of fact the judge said "Having regard to my findings of fact, and the applicable law, it is inevitable that … I must make a finding of contributory negligence against the Claimant".

23. The judge then considered and rejected a finding of contributory negligence for failing to wear a seat belt in paragraphs 75 to 147 of the judgment. This was because the judge could not find that wearing a seat belt would have made any difference to the outcome.

24. The judge finally turned to consider the degree of contributory fault in relation to the finding that Mr Lyum Campbell was contributorily negligent for allowing himself to be driven by Mr Dean Brown after Mr Dean Brown had been drinking. The judge referred to other cases and assessed the contribution at 20 per cent.

The respective cases on appeal

25. Ten grounds of appeal are advanced on behalf of Mr Lyum Campbell. As John Ross QC, acting on behalf of Mr Donald and Mr Lyum Campbell acknowledged, there was an overlap between the grounds. In written and oral submissions Mr Ross submitted that the judge had wrongly applied a test of capacity under the Mental Capacity Act 2005 and had reversed the burden of proof in relation to the issue of contributory negligence. The judge had made findings of fact which were based on impermissible speculation having regard to the known unknowns and unknown unknowns in this case. The judge had wrongly applied an objective test when assessing whether Mr Lyum Campbell was guilty of contributory negligence. In that regard Mr Ross referred to *McPherson v Whitfield* [1996] 1 Qd. 474, a decision from the Queensland Court of Appeal, Australia, where the Court said that passengers who had agreed to be driven by a drunk driver were not at fault if they could not appreciate the implications of their agreement to be driven by the drunk driver at the time of agreeing to be driven. Mr

Ross submitted that, properly analysed, the decision of Watkins J in *Owens v Brimmell* [1977] QB 859 was consistent with that approach because he contemplated a finding of contributory negligence on the part of a passenger only if the passenger accepted the lift knowing that the driver had consumed alcohol so that it would impair his driving or the passenger had known that he would be given a lift and then drunk to excess so that he could not form any assessment of the driver's impaired ability to drive. Mr Ross submitted that the judge had not found that there was a prior agreement in this case, and that the finding of contributory negligence should be set aside. Mr Ross submitted that, in any event, the judge had wrongly assessed Mr Lyum Campbell's contributory negligence too highly at 20 per cent.

26. Mr Kennedy QC on behalf of Advantage, submitted that the judge had had to address the issue of the Mental Capacity Act 2005 because of the way in which capacity had been raised in the Particulars of Claim. The findings made by the judge were not impermissible speculation, the judge had specifically reminded himself of the need to avoid speculation and the findings were rooted in the known facts. The test for contributory negligence was an objective one. The High Court in Australia in the case of *Joslyn v Berryman* [2003] HCA 34 had disapproved of the line of cases including *McPherson v Whitfield* and had approved the orthodox approach set out in *Morton v Knight* [1990] 2 Qd. 419 which had applied an objective test to the drunk passenger who agreed to travel with a drunk driver. Mr Kennedy submitted that the cases in England and Wales, including *Owens v Brimmell,* had taken an objective approach, and this Court should endorse that approach. The judge's assessment at 20 per cent was a matter for the judge and, if anything, it had been too low rather than too high.

27. I am very grateful to Mr Ross and Mr Kennedy, and their respective legal teams, for their helpful written and oral submissions. It is apparent that the following matters are in issue on the appeal: (1) whether the judge had wrongly applied a test of capacity under the Mental Capacity Act 2005 and reversed the burden of proof in relation to the issue of contributory negligence; (2) whether the judge's findings of fact were properly made; (3) whether the judge wrongly applied a test of the objective reasonable, competent and prudent passenger when Mr Lyum Campbell was too intoxicated to be held responsible for his actions; and (4) whether the judge's assessment of 20 per cent contributory negligence should be reduced.

A proper reference to the Mental Capacity Act 2005 (issue one)

28. It appears that the judge raised the issue of the Mental Capacity Act 2005 with the parties at the beginning of the trial because of the terms of the Particulars of Claim. At paragraph 8(12) it had been pleaded that Mr Dean Brown had placed Mr Lyum Campbell in the rear seat "well-knowing that the Claimant was unable to reach a capacitous or informed decision as to whether he wished be driven away from the position outside the club by Dean Brown". In the light of the statement of case it was not surprising that the judge decided to address the formal position under the Mental Capacity Act 2005.

29. Section 1 of the Mental Capacity Act 2005 establishes relevant principles which apply for the purposes of the Act. These principles include: "(2) A person must be assumed to have capacity unless it is established that he lacks capacity." As was noted in the submissions before the Court this provision mirrors the common law position set out in

Masterman-Lister v Jewell [2002] EWCA Civ 1889; [2003] 1 WLR 1511 at paragraph 17 where it was said "it is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved".

30. In these circumstances where the issue of capacity had apparently been put in issue on behalf of Mr Lyum Campbell, the judge cannot be criticised for addressing the issue of capacity. The judge's treatment of the issue was in accordance with the express terms of the Mental Capacity Act 2005. All that the judge did was to point out that a person is presumed to have capacity until the contrary is proved, and this did not amount to an impermissible reversal of the burden of proof in relation to the issue of contributory negligence.

No impermissible speculation (issue two)

31. It is important to acknowledge that this was a case where, as a result of the tragic consequences of the collision and its continuing effects, there was no evidence either from Mr Lyum Campbell or Mr Dean Brown and there was no oral evidence from Mr Aaron Brown. There was hearsay evidence from Mr Aaron Brown, but there was an absence of evidence from the time when Mr Aaron Brown left his brother Mr Dean Brown and Mr Lyum Campbell at the Seat Ibiza motor car until the time of the collision. Thereafter the results of the forensic investigations were obtained which showed that Mr Dean Brown was the driver and that Mr Lyum Campbell was the unrestrained passenger in the rear of the Seat Ibiza motor car.

32. The judge was well aware of the limitations of the evidence. The judge identified the two ways in which Mr Lyum Campbell could have got into the back of the car in his judgment, and he gave clear and convincing reasons for finding that Mr Lyum Campbell must have been helped by Mr Dean Brown into the back of the car. It is not apparent that it would have helped the case on behalf of Mr Lyum Campbell if the judge had made the other possible finding, namely that Mr Lyum Campbell changed position on his own. This is because it would have shown that Mr Lyum Campbell was capable of making a decision about whether to be driven by Mr Dean Brown.

33. Mr Ross, on behalf of Mr Lyum Campbell, suggested that the judge should have considered other possibilities, for example a group of persons coming along the back street in Cheltenham where the Seat Ibiza motor car had been parked and assisting Mr Dean Brown in moving an unconscious Mr Lyum Campbell into the back seat of the Seat Ibiza motor car. In my judgement such a possibility was entirely speculative. This is because there was no evidence of any such group, and it was extremely unlikely that a group of persons would have been walking along the back street of Cheltenham at that time of night, let alone that such a group should stop and move a comatose man into the back seat of the Seat Ibiza motor car so that an obviously drunk person could drive him away. In any event the layout of the three door Seat Ibiza motor car meant that even in such an improbable scenario it is more likely than not that Mr Lyum Campbell would have had to be awake and assist the move. As it was the judge's findings of fact were soundly based on the known facts and reasonable inferences drawn from those facts. The fact that there were, as Mr Ross put it, "unknown unknowns" and "known unknowns", the latter including why Mr Dean Brown drove the wrong way from Cheltenham towards Oxford and not the right way towards the respective homes of Mr Dean Brown and Mr Lyum Campbell, did not prevent the judge from making the

findings of fact that he did. There is nothing to show that there were any justiciable errors of the type contemplated by *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5; [2014] FSR 29 made by the judge in his decision making which would entitle this court to interfere with the findings of fact.

An objective test for assessing contributory negligence of a passenger (issue three)

34. At common law if fault on the part of the claimant contributed to the damage of which he complained, contributory negligence operated as a complete defence. The harshness of the common law was modified in some respects by the doctrine of the "last opportunity". The Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act") modified the common law and introduced an apportionment of loss. Section 1 of the 1945 Act, so far as is material, provides:

> "(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 …"

35. Section 4 of the 1945 Act is the interpretation section and so far as is material it provides that: "`fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

36. The test of whether a person has breached a duty of care in negligence is an objective standard. The standard normally set "is that of a reasonable and prudent man", see Clerk & Lindsell on Torts, Twenty Third Edition, at 7-157. This is the objective standard applied to Mr Dean Brown when judging his driving of the Seat Ibiza motor car. Advantage would not have been able to defend these proceedings on the basis that Mr Dean Brown would not have crossed the road and driven into the oncoming lorry if he had not drunk so much alcohol (and did not attempt to do so). As a matter of principle, it is not obvious why a different standard should be applied to Mr Lyum Campbell when assessing whether there was any contributory negligence on his part when he agreed to be driven by Mr Dean Brown. The fact that Mr Lyum Campbell would not have agreed to be driven by Mr Dean Brown if he had been sober does not assist him if an objective standard is applied.

37. Mr Ross is right that there was a line of authorities in Australia, exemplified by the decision in *McPherson v Whitfield* ,which suggested that if a person became intoxicated in circumstances "where no reasonably foreseeable specific risk to his safety should have been apparent to him. If, in these circumstances, while lacking relevant conscious awareness he is placed into or induced to enter into the car of an intoxicated driver he should not on that account be held responsible for a failure to take reasonable care for his own safety." That line of authorities, however, co-existed with another and different line of authorities, exemplified by *Morton v Knight,* which applied an objective test of the reasonable man to the passenger, holding that the claimant was not relieved or

excused by self-intoxication from the consequences of his conduct and could not rely on drunkenness for not taking the same care of himself as when he was sober.

38. In *Joslyn v Berryman* the High Court of Australia endorsed the *Morton v Knight* line of authorities. Having reviewed the competing lines of authority McHugh J. said "if a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication". The objective test was applied by all the other judges in the High Court. Gummow and Callinan JJ giving joint reasons said "a person in the position of Mr Berryman ought to have known, and in fact would have known (if he had not precluded himself from knowing by his own conduct) that Ms Joslyn's capacity must have been impaired, and probably grossly so, by the amount of alcohol she had drunk …". Kirby and Hayne JJ in separate judgments relied on specific provisions of the Motor Accidents Act in New South Wales which supported an objective test.

39. The issue of contributory negligence for a drunken passenger accepting a lift from a drunk driver was considered in England and Wales in *Owens v Brimmell*. The passenger and driver had been on a pub crawl and had both drunk eight to nine pints of beer. On the way home the driver hit a lamp post and the passenger suffered serious injuries. A reduction of 20 per cent for contributory negligence was made. Reference was made to earlier authorities where the defence of a voluntary assumption of risk had been considered. Watkins J was unable to find any earlier case from England and Wales which had considered the issue and he reviewed the approach taken to this issue in Australia, the United States and Canada. Watkins J. said at page 866H "… there is widespread and weighty authority for the proposition 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 is likely to impair to a dangerous degree that driver's capacity to drive … so, also, may a passenger be guilty of contributory negligence if he, knowing 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". In *Owens v Brimmell* Watkins J held that he thought it more likely that the claimant had, when commencing the pub crawl, given "little, if any, thought to the possible consequences of it, or were recklessly indifferent to them". He held that "this is a clear case on the facts of contributory negligence, either upon the basis that the minds of the plaintiff and the defendant, behaving recklessly, were equally befuddled by drink so as to rid them of clear thought and perception, or, as seems less likely, the plaintiff remained able to, and should have if he actually did not, foresee the risk …".

40. Mr Ross submitted that *Owens v Brimmell* had established only two bases for contributory negligence of a passenger, either an agreement to be driven later on before starting to drink with the driver or a decision by a passenger, who although having had some alcohol is still able to process the risks, to be driven by the driver who has been drinking. Mr Ross noted that the judge had not found that there was an agreement at the start of the evening that Mr Lyum Campbell would be driven home by Mr Dean Brown.

41. It is right that in *Owens v Brimmell* at page 866H Watkins J. did address the two bases for a finding of contributory negligence, but his judgment is not to be read as a statute restricting a finding of contributory negligence only to two specific situations, and indeed Watkins J. emphasised the fact sensitive nature of the inquiry. The fact that contributory negligence on the part of a passenger in such cases is not restricted only to those two situations appears in part from the decision itself in *Owens v Brimmell*. Watkins J expressly found it more likely that the passenger had not given thought to risks before the pub crawl started and by the end of it the passenger and driver were equally befuddled by drink so as to rid them of clear thought and perception but made a finding of contributory negligence.

42. The fact that drunkenness of the passenger will not avoid a finding of contributory negligence is part supported by references from other cases. In *Booth v White* [2003] EWCA Civ 1708; (2003) 147 SJLB 1367 at paragraph 10 Lord Justice Brooke repeated without comment the trial judge's proposition that the passenger "could not rely on his own drunkenness and, in determining whether he had failed to take reasonable care for his own safety, he should approach the case by assessing what a reasonable man in Mr Booth's shoes would have done".

43. It is established that 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. This principle, however, does not assist Mr Lyum Campbell. This is because Mr Lyum Campbell was an adult at the time of the collision. In my judgement the judge was right to judge his actions at the relevant time by the standards of a reasonable, prudent and competent adult. This conclusion accords with principle and the previous cases. A reasonable, prudent and competent man in Mr Lyum Campbell's position as he assisted Mr Dean Brown to move him from the front passenger seat to the back seat of the Seat Ibiza motor car would have appreciated that Mr Dean Brown had drunk too much to drive safely. The finding of contributory negligence was therefore properly made by the judge. For the same reasons the judge was right to make the assessment of apportionment of responsibility by using an objective standard of the reasonable, prudent and competent adult to judge both Mr Dean Brown and Mr Lyum Campbell's responsibility for the injuries suffered by Mr Lyum Campbell.

No interference with apportionment (issue four)

44. The apportionment of responsibility in contributory negligence is, like making findings of fact, very much a decision for the trial judge to make, see *Booth v White* at paragraph 20. In *Jackson v Murray* [2015] UKSC 15; [2015] AC 1399 the Supreme Court emphasised the limited basis on which a Court of Appeal could interfere with the trial judge's apportionment of responsibility. An appellate court could interfere only if the judgment exceeded the ambit where reasonable disagreement was possible and the court below had gone wrong. If the Court below has gone wrong then it is necessary to interfere to prevent proper deference to the trial judge becoming (to use the words of Kirby J in *Joslyn v Berryman*) an "unthinking application of restraint" and a "negation of the judicial duty".

45. In my judgement there is nothing to show that the judge's apportionment in this case was wrong. He considered carefully the respective facts and matters. The judge rightly identified Mr Dean Brown as the person who should bear the substantial part of responsibility. There is nothing to show that this assessment was wrong.

Conclusion

46. For the detailed reasons set out above: (1) the judge was entitled to find that Mr Lyum Campbell had capacity at the relevant time; (2) the judge's findings of fact were properly made; (3) the judge properly applied the test of a reasonable, prudent and competent person to assess the issue of contributory negligence; and (4) the judge was entitled to make a finding of a reduction of 20 per cent for contributory negligence. I would therefore dismiss this appeal.

Lord Justice Baker:

47. I agree that the appeal should be dismissed for the reasons given by Dingemans LJ. I also agree with the additional observations made by Underhill LJ in his judgment below.

Lord Justice Underhill:

48. As Dingemans LJ says, this is a very sad case, but I agree with him that the appeal must be dismissed. Although I do not believe that there is any difference between his reasoning and mine, because the fundamental issue is of some importance I will shortly give my reasons in my own words.

49. The primary question in any case where contributory negligence is in issue is whether the claimant took reasonable care for his or her own safety: that is too trite a proposition to require authority, but for a recent statement see *Gul v McDonagh* [2021] EWCA Civ 1503, per Nugee LJ at para. 31. In one sense, that is obviously an objective question, but the courts have recognised that in answering it it is necessary to take into account at least some characteristics of the individual claimant: age is an obvious example, but there may be others (see the discussion at paras. 3-83-84 of *Clerk & Lindsell on Torts*, 23rd ed).

50. In my view it is clear that the law in this jurisdiction has come down against treating the fact that the claimant is drunk as a characteristic that can be taken into account in deciding whether he or she took reasonable care for their own safety. Para. 4-53 of *Charlesworth & Percy on Negligence,* 14th ed, reads:

> "The excuse of drunkenness must be disregarded when considering contributory negligence. It is no excuse for failing to take reasonable care that the person in question was unable to take proper care, as a result of voluntary intoxication. A person the worse for drink cannot demand a higher standard of care than a sober person or plead drunkenness as an excuse for not taking the same care when drunk, as would have been taken when sober."

No authority of this Court is in fact cited for that proposition, but it seems to me plainly right in principle. I see no answer to the simple example given by McHugh J at para. 39 of his judgment in *Joslyn v Berryman* (referred to by Dingemans LJ at para. 38 above):

> "If an intoxicated pedestrian falls down a manhole that a sober person would have seen and avoided, it seems impossible to hold that the pedestrian was not guilty of contributory negligence because the pedestrian's condition prevented him or her from seeing the danger."

51. That principle must apply to the case of a person who is injured as a result of agreeing to be driven by a drunken driver. The best-known example in this jurisdiction is *Owens v Brimmell*, which Dingemans LJ summarises at para. 39 above. In the final passage which he quotes Watkins J states explicitly that the plaintiff was guilty of contributory negligence where he failed to appreciate the risk of being driven by the defendant because he was so "befuddled by drink ... as to rid [him] of clear thought and perception": I agree with Dingemans LJ that that principle goes wider than the case where two people go on a pub crawl in the understanding that one of them will drive the other home. There is no decision of this Court explicitly endorsing *Owens v Brimmell*; but, as Dingemans LJ notes (see para. 42 above), in *Booth v White* Brooke LJ apparently accepted the proposition that the claimant "could not rely on his own drunkenness" if he failed to appreciate a risk that he would have appreciated if sober.

52. In my view, therefore, the law applicable in this country is in conformity with that stated by McHugh J in *Joslyn v Berryman*. I would quote para. 38 of his judgment in full:

> "Hence, the issue is not whether a reasonable person in the intoxicated passenger's condition – if there could be such a person – would realise the risk of injury in accepting the lift. It is whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver's intoxication. If a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication."

53. It is important, however, to note McHugh J's reference to the passenger being, although intoxicated, "sober enough to enter the car voluntarily". A person who while unconscious through drink is put by friends or others into a car which is then driven by an (evidently) drunken driver will not be guilty of contributory negligence, because they have done no voluntary act: to put it another way, they will not have consented to being driven at all. However foolish it may be to drink yourself into a stupor, you cannot be treated as having consented to things that are then done to you while in that state. That is of course an extreme case: a person who is not totally unconscious may nevertheless be in a state where they are incapable of making a decision. The decision where exactly to draw the line between voluntary and involuntary conduct – between consent (even if drunken consent) and no-consent – in a particular case is a fact-sensitive question which must, within reasonable limits, be left to the judge.

54. Against that background, I turn to the facts of this case. If Dean Brown had driven off immediately after he and his brother first took the Claimant back to the car (see para. 13 of Dingemans LJ's judgment) I might, on the available evidence, have found it difficult to say that he had consented to being driven. He was too drunk to stand, and as soon as he had been put into the car and been sick, he "passed out". But that was not the basis on which the Judge decided the case. He focused on the position an hour or so later when Dean and Aaron came back to the car and Aaron then went back to the club to look for jump-leads (see para. 14). As Dingemans LJ summarises at paras. 16-17 above, the Judge found that during that period, and before the car was driven away, the Claimant moved from the front seat to the back. He found that that was probably Dean Brown's idea rather than the Claimant's and that the Claimant had not sobered up sufficiently to make the move without assistance; but, crucially, he found that he nevertheless had been woken and understood what was happening – see para. 19, summarising the careful reasoning at para. 57 of the judgment. The Judge continued, at para. 58:

> "If the Claimant had capacity to consent to a change of position in the car, then in my judgment he also had capacity to consent to being driven in the car. Having found that the Claimant must have known he was moving from the front of the car to the back of the car, I also find that this move is only consistent with the Claimant consenting to remaining in the car whilst it was driven away. If his intention had been to leave the car, before it was driven off, he would surely not have got into the back of it."

55. The Judge thus explicitly found that the Claimant had sobered up sufficiently to know what was going on and to get into the back of the car (albeit with assistance) preparatory to it being driven away by Dean Brown: he thus consented to being driven by Dean, and his conduct was voluntary. He also found that it would have been evident to a sober person that Dean Brown was too drunk to drive safely: see para. 21 above. That being so, taking the objective approach described above, as he did, the Claimant was contributorily negligent.

56. I can see nothing wrong in those findings or the Judge's analysis based on them. As regards "issue 1", I would not myself have found it necessary, or indeed particularly useful, to refer to the provisions of the Mental Capacity Act 2005, but Dingemans LJ explains at para. 28 why the Judge did so, and I agree with him that it did not involve him in any error of law. As regards "issue 2", I agree with Dingemans LJ (see paras. 31-33) that the Judge's findings of fact were open to him on the evidence: of course they were based on inference, but the inferences that he based on the Claimant's move from the front seat to the back were reasonable. As for "issue (3)", I have already summarised my understanding of the law, and it is clearly consistent with the approach taken by the Judge.

57. As regards "issue (4)", I agree with what Dingemans LJ says at paras. 44-45.