Neutral Citation Number: [2020] EWHC 2210 (QB)

Case No: QB-2019-000905

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 August 2020

Before :

HIS HONOUR JUDGE ROBINSON sitting as a Judge of the High Court

- -

Between :

Mr Lyum Roy Campbell **(A protected party who proceeds by his father and litigation friend Donald Campbell)**	**Claimant**
- and -	
Advantage Insurance Company Ltd	**Defendant**

- -
- -

John Ross QC (instructed by **Novum Law**) for **The Claimant**

Christopher Kennedy QC (instructed by **Keoghs LLP**) for **The Defendant**

Hearing dates: 11-13 March 2020

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Approved Judgment

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His Honour Judge Robinson:

Introduction

1. In the early hours of 9 August 2016, the Claimant and Aaron Brown were driven by Aaron's brother, Dean Brown, to the Moo Moo night club in Cheltenham. I shall refer to the Brown brothers by their first names. The car was a three-door hatch back Seat Ibiza. All three drank alcohol in the club. There came a time when the Claimant, who was clearly drunk, was assisted out of the club by Aaron and Dean and placed in the front passenger seat of Dean's car. He leaned out of the car to be sick on the ground. Aaron and Dean returned to the club to continue drinking.

2. About an hour or so later, Aaron and Dean left the club, returned to the car and got into it. Aaron was in the rear off side passenger seat. The Claimant was still in the front passenger seat. The car would not start. Aaron got out of the car to return to the club to find some jump leads. When he returned, the car had gone. At 3.53am the car drove headlong into an articulated lorry. Dean was killed outright. The Claimant had somehow moved from the front passenger seat into the rear of the car. He survived the crash but sustained extremely serious injuries. He brings this claim for damages for those injuries and other losses arising out of the accident. Primary liability is admitted. Contributory negligence is alleged:
   (1) The Claimant knowingly allowed himself to be driven by Dean, whom it is alleged the Claimant knew or ought to have known was not fit to drive by reason of his intoxicated state: *Owens v Brimmell* [1977 QB] 859;
   (2) The Claimant did not wear a seat belt: *Froom v Butcher* [1976] QB 276.

3. It is trite law that the burden of proof rests with the Defendant. By order made on 16 July 2019, Master Cook directed that the issues of liability and causation be tried separately from the issue of quantum. This is the Judgment on those preliminary issues.

The Evidence

4. Tragically, before the trial began, Aaron took his own life. Before he died he provided written witness statements to the solicitors for the Claimant and for the Defendant.

5. The Claimant is in a minimally conscious state and is clearly unable to give evidence on his own behalf.

6. The written lay evidence on behalf of the Claimant comprised:
   (1) Donald Campbell, Claimant's father, dated 7 December 2017;
   (2) Aaron Brown, dated 3 December 2017 and 26 June 2018;

(3) Sophie Gallagher, former girlfriend of the Claimant, dated 6 September 2019;
(4) Martyn Keen, Firefighter (Station Manager), dated 3 September 2019;
(5) Matthew Bailey, Paramedic: response to a "Request for crew statement" dated 12 July 2017.

7. The main written evidence on behalf of the Defendant comprised:
(1) Aaron Brown, dated 8 May 2018;
(2) Thomas Mason, driver of the articulated lorry: statement to the police dated 23 August 2016;
(3) Post Mortem Report (Dean Brown) dated 11 October 2016;
(4) Forensic Toxicology Report (Dean Brown) dated 4 October 2016.

8. As might be expected, there were also police generated statements and reports relating to this major road traffic incident.

9. Written and oral evidence was given by experts on behalf of both parties:
Collision Investigation
(1) Stephen Jowitt, (Claimant)
(2) Stephen Henderson, (Defendant)

Medical
(3) Dr Steven Allder, Consultant Neurologist (Claimant)
(4) Mr David Skinner, Consultant in Emergency Medicine (Defendant)

The Evidence and Findings of Fact

10. In making findings of fact I have had regard to the entirety of the written and oral evidence, and such documents as were relied upon.

11. It is inevitable that in some instances my findings comprise inferences from evidence which I accept.

12. The statements of Donald Campbell and Aaron Brown enable me to determine the sequence of events that preceded the drive to the club.

13. The Claimant was born on 8 August 1985. Monday 8 August 2016 was the Claimant's 31st birthday. He had also been interviewed that day for a job with an insurance company. Donald Campbell says he was "sure he had got it". It is likely that the Claimant had been celebrating both that news and his birthday.

14. The Claimant arrived at his father's house between 8.30pm and 9.00pm. His father was of the opinion he had been drinking. He had with him a bottle of champagne and a bottle of brandy. At approximately 10.00pm, Dean arrived.

Donald Campbell did not notice any indication that Dean had been drinking or taking cannabis. Dean refused drinks offered by the Claimant. Donald Campbell thinks that the Claimant and Dean left the house at about 10.30pm.

15. Aaron, in his first statement, says that the Claimant and Dean arrived unannounced at Aaron's house at about 11.00pm. It was obvious to him that the Claimant had been drinking. In his second statement Aaron says that the three men left for the Moo Moo club in Cheltenham "between about 10 to 11.30pm". The club is about a 20 to 25 minutes drive away. Having regard to the timings given by Donald Campbell and by Aaron in his first statement, I find it likely that Dean and the Claimant did arrive at Aaron's house at about 11.00pm and left by 11.30pm. Dean was driving. The car was parked in a side street about five minutes walking distance from the club. I find it likely that they entered the club not later than midnight.

16. The three men occupied a booth at the club. All three men drank alcohol. I deal more fully with this below.

17. There came a time when it was obvious that the Claimant was very drunk. Aaron had seen him knock over a table and that the "bouncers were taking him out of a door of the club". Dean and Aaron followed the Claimant out of the club and took hold of him "as he couldn't stand on his own". They walked him to the car, with Dean holding the Claimant on one side and Aaron on the other. The only estimate of the time when this occurred is contained in Aaron's first statement: "at about 1am or 2am". When they reached the car, the Claimant was put in the front passenger seat. The door was open. The Claimant leaned out and, according to Aaron, he "was then really sick". Mr Kennedy QC submits in his skeleton argument that it is relevant to the issue of the Claimant's capacity that he had "enough presence of mind to lean out of the passenger door so that he was sick on the ground rather than in the car". I shall consider the issue of capacity below.

18. The Claimant was asleep before the car door was closed. At this point there is a conflict between the account given by Aaron in his first statement and that given in his second and third statements concerning whether the Claimant wore a seat belt. In his first statement, he says "I didn't need to put his [seat] belt on as he wasn't going anywhere." Later he says: "Lyum was never in a fit state to put his seat belt on for himself, or to get himself into the car on [h]is own, he needed us to help him".

19. In his second statement he says: "I put the seatbelt on him and remember seeing him slouch forward. He then fell asleep …".

20. In his third statement he says: "I put his seatbelt on him whilst we were thinking about going back into the club." He also repeated, verbatim, the passage in his first statement concerning the Claimant's inability "to put his seat belt on for himself".

21. Aaron signed his first statement in December 2017, about 16 months after the accident. The other two statements were signed in May 2018 and June 2018 respectively. There is no way to reconcile the conflicting accounts. Aaron does not in his second and third statements seek to address the inconsistency. It does not seem to me to be likely that Aaron's memory of the night in August 2016 was significantly, or any, more reliable in December 2017 than in May and June 2018.

22. I do not attach much weight to the fact that Aaron has twice said he put the seat belt on the Claimant, and only once said he did not. It would be surprising if Aaron altered his account of this matter between May and June 2018.

23. On balance I consider it more probable than not, and I so find, that Aaron put the seat belt on the Claimant. It would have made sense to take that step to provide some degree of support for the Claimant as he slept.

24. Aaron and Dean then went back into to club. They continued to drink. Aaron thinks they remained in the club for about an hour. When they came out and went to the car, Aaron got into the rear offside passenger seat. The Claimant was still asleep or passed out. Aaron, in his second statement, says: "I can't be sure but believe that Lyum was still wearing the seatbelt". Mr Ross QC submitted that this is insufficient evidence to establish that the Claimant was wearing his seat belt. I have found that the Claimant was left in the car with his seat belt on. I see no reason to suppose that the Claimant woke up whilst Dean and Aaron were in the club and undid his seatbelt. I find that the Claimant was wearing his seat belt when Aaron and Dean returned to the car.

25. The car would not start. Aaron got out of the car to go back to the club to see if he could borrow some jump leads. Dean must have got out of the car to allow Aaron to get out of the rear offside seat. In his second statement Aaron says he thinks he was "in the club" for about 15 minutes. It is not clear if by that he means he was away from the car for 15 minutes or whether, given that the walking distance from car to club is five minutes, he was away for 25 minutes. Little if anything turns on that. When Aaron returned to the place where the car had been parked, it had gone. Aaron went home in a taxi.

The Collision

26. Dean's car was driven head-on into an articulated lorry. The lorry was on its correct side of the road. It is probable that Dean had fallen asleep at the wheel, but it is not necessary to make a finding of fact on that issue. The collision site was approximately 9.3 miles from the club. The car had been driven towards Oxford, which is in the opposite direction to the location of the Claimant's house. Given that the collision occurred at 3.53am it is probable that the car was driven away at about 3.30am or shortly thereafter, which corroborates the estimate of Aaron that he and Dean left the club at some point between about 3.00am and 3.30am; probably closer to 3.00am given that Aaron went back to the club to look for jump leads.

27. The closing speed of vehicles at impact was very high:
    (1) The speed of the lorry was between 43 mph and 45 mph;
    (2) The speed of the car was between 56 mph and 69 mph;
    (3) The closing speed was between 99 mph and 114 mph.

28. Dean was killed instantly. The forensic toxicology report prepared for the Coroner showed that:
    (1) Dean had used cannabis at some time before his death. It was not possible to determine when Dean had last used the drug.

    (2) However, the high concentration of tetrahydrocannabinol-carboxylic acid (THC-COOH) found in the post-mortem blood was suggestive of "heavy and/or regular use".

    (3) Studies have suggested that impairment in driving can extend for up to 24 hours after the drug is used.

    (4) Ethanol (alcohol) was detected in the post-mortem blood sample. Post-mortem microbial action does produce ethanol, but typically less than 50mg/dl. The concentration of ethanol in the sample of post-mortem blood was 176mg/dl. The legal driving limit is 80mg/dl in "life blood".

    (5) Various studies have demonstrated that impairment of driving ability is significantly increased when cannabis and alcohol is used together compared with their use alone.

29. Neither Dean nor the Claimant were wearing seat belts at the moment of collision. The Collision Reconstruction experts agree that the Claimant was most probably lying across the rear seats at the time of the collision.

30. They also noted very heavy loading on the rear of the driver's seat as a consequence of the loading by the unrestrained Claimant.

31. The head and torso of the Claimant appear to have made contact with the rear of the driver's seat.

The Claimant's Position in the Car

32. The question obviously arises: how did the Claimant come to be in the rear of the car? I accept that when Aaron left the car to go back to the club, the Claimant was still asleep and in the front passenger seat with his seat belt on.

33. Possibilities include:
    (1) The Claimant woke up and unilaterally, and voluntarily, decided to change positions in the car. If that is the case, he could have done so completely on his own or done so with the assistance of Dean;
    (2) Dean decided to move the Claimant into the rear seat.

34. If the Claimant changed position on his own, without assistance from anyone, he would have had to have performed the following manoeuvres:
    (1) undone his seat belt;
    (2) got out of the car;
    (3) moved the front seat forward;
    (4) got into the rear seat;
    (5) closed the front door from his position in the rear seat.

35. That seems to me to be unlikely in the extreme. Whilst I accept that the Claimant had been asleep in the car for a while, I find it to be unlikely that he could have sobered up sufficiently to execute those manoeuvres on his own.

36. It is far more likely, and I so find, that Dean assisted him into the back seat.

37. Can it be determined whether the change of position was the Claimant's idea or the Defendant's idea? I consider that it can. Dean had already allowed Aaron into the rear offside seat, got in himself, tried to start the car, failed, got out of the car and let Aaron out of the rear seat. It is probable that Dean moved the driver's seat forwards to allow Aaron to get out, but I cannot rule out the possibility that Aaron moved the driver's seat forward on his own, even though it is notoriously difficult for a rear seat passenger to accomplish this procedure. But it does not seem to me that anything turns on this.

38. At this point, Dean was out of the car. If he got back in, he would have to get out again when Aaron got back, move his own seat forwards again, allow Aaron into the back, move the seat back again and get in himself.

39. I consider it far more likely, and so find, that it was Dean's idea to move the Claimant from the front passenger seat to the rear of the car. If he did that,

Dean could get back in the car. Aaron, when he returned, could arrange the positioning of the jump leads, either himself or with the help of the driver of the assisting car. Dean would have to be in the car to turn the ignition key anyway. Once the car was started, all Aaron would have to do was get in the front passenger seat and the car could be driven away.

40. I ask myself whether I have moved from the zone of reasonable inference into the hinterland of speculation. I am satisfied I have not. It is far more likely that Dean should have decided to move the Claimant into the back than it is for the Claimant to have decided to move to the back. He was safely in the front seat, with a seat belt on. There was no motive to move.

41. I have also considered whether Dean could have formulated the idea to move the Claimant from the front to the back of the car. I appreciate that Dean was very drunk and was also under the influence of cannabis. But he did manage to drive for nine miles or so without incident. He may have been driving badly (I do not know), but what is clear is that he managed to keep his car on the road for that distance. That, in my judgment, demonstrates a degree of cognitive and physical co-ordination sufficient for him to have had the idea that moving the Claimant from the front to the back was a good idea, and to have assisted the Claimant into the back.

42. I am unable to find with sufficient certainty whether the Claimant woke spontaneously before Dean began the process of assisting the Claimant into the back of the car or whether Dean roused the Claimant. However, I am driven to find that the Claimant was awake when he was being moved from the front to the back of the car. The Claimant is 1.82 metres (just under 6 feet) tall and weighed 75 kg (11 stones 11 lbs). I find it would not have been possible for Dean to have moved the Claimant if he had remained asleep.

43. Where was the Claimant positioned in the rear of the car? It is unlikely that he would have moved from the near side to the offside. There was no need to. It seems to me to be most likely that he got into the nearside rear seat. Of course, given that the Claimant slumped to his right side and he was unrestrained, there is always the possibility that when he was asleep there was some movement towards the offside, but whether that happened and if so to what extent I am unable to determine.

Capacity of the Claimant

44. Two issues arise:
    (1) Did the Claimant have capacity to consent to being moved into the back seat of the car?
    (2) Did the Claimant have capacity to consent to being driven by Dean?

The two are to some extent linked. There would be no reason to consent to moving into the back of the car if the Claimant did not want to be driven.

45. The following provisions of the Mental Capacity Act 2005 are relevant:

Section 1 - The Principles

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

…

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

Section 2 – People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to a matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to-

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of the Act must be decided on the balance of probabilities.

Section 3 – Inability to make decisions

(1) For the purpose of section 2, a person is unable to make a decision for himself if he is unable-

(a) to understand the information relevant to his decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of-
(a) deciding one way or another, or
(b) failing to make the decision.

46. Inexorably linked to the issue of capacity is the Claimant's state of awareness generally and specifically his knowledge of Dean's level of intoxication.

47. The only lay evidence of the Claimant's state of awareness and of Dean's intoxication comes from Aaron.

48. There is no evidence that Dean drank anything before he arrived at Aaron's house. In his second statement, Aaron says: "I cannot recall clearly, but I think that we all had a couple of drinks at my house before heading out." Although the Claimant had been drinking already, if Dean did drink at Aaron's house, the Claimant must have been aware of it. Given my finding that Dean and the Claimant arrived at Aaron's at around 11.00pm and left for the club not later than 11.30pm, there would not have been much time for drinking at Aaron's.

49. At the Moo Moo club, all three men were drinking. In his first statement, Aaron says they had at least three bottles of champagne and that Aaron bought "at least 20 shots". He says that "Dean and Lyum would have bought more drinks". In addition, he recalled that earlier in the evening "we had been drinking Tequila with Lyum".

50. In his second statement Aaron says that they all had the same amount of alcohol to drink. He thought they had two bottles of champagne, shots, and brandy and coke.

51. The Claimant's awareness of what Dean drank is limited to the time before the Claimant was helped from the club. After that, the evidence is that he was asleep in the car. He may have been aware that Dean and Aaron had left him and gone back to club, but there is no, or no reliable, evidence from which I can make any finding that he knew for how long they had gone or how much more each of them had to drink.

52. Aaron is a little inconsistent in his recollections of how much was drunk by the three men whilst they were together. However, whatever the true amount, it was clearly a lot, comprising, at the very least, champagne and numerous shots.

53. Aaron, in his third statement, says that as the Claimant was being put in the front seat: "There was only a very short conversation with him, getting him back into the car as he was in no fit state to talk and by the time we closed the door Lyum has passed out".

54. By the time the Claimant was put into the front seat of the car, he had spent all evening with Dean and must have been aware that Dean had drunk a great deal of alcohol.

55. When Dean and Aaron returned to the car, the Claimant had been asleep for a time, probably for around an hour or so. I have already found that the Claimant was awake when Dean began the process of moving the Claimant into the back of the car. I must determine whether, on the available evidence the Claimant was:
    (1) able to and did consent to that change of position in the car; and
    (2) was able to and did consent to being driven in the car; and
    (3) was aware that Dean would be driving; and
    (4) was aware that Dean's ability to drive was impaired by reason of the alcohol he had consumed.

56. The starting point is the presumption of capacity. Further, capacity is time specific and issue specific. It seems to me relevant that when Aaron headed back to the club the Claimant had been asleep for, as I have found, around an hour.

57. In my judgment the evidence of previous consumption of alcohol by the Claimant is insufficient to displace the presumption of capacity to consent to moving position into the back of the car. With specific reference to the functional test in Section 3 of the 2005 Act:
    (1) The information relevant to the decision is simple. It involved the Claimant getting out of the front of the car and getting into the back. I reject any proposition that the Claimant could not understand what was happening.

    (2) The process was continuous, so that there can have been no difficulty in retaining the information.

    (3) The use of that information must have been part and parcel of the process of moving. In my judgment the Claimant, at the very least, was probably aware of what was happening. There is necessarily no evidence of the Claimant objecting to the change of position in the car.

(4) Communication of the decision to assent to the proposal to move position is provided by the fact that the Claimant did in fact change position and the absence of evidence of any opposition.

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.

59. The Claimant knew that the car belonged to Dean and that he would be the only one likely to drive it. The available evidence does not point to the Claimant being incapable of being aware of that at the time he changed position in the car.

60. Lastly, the available evidence does not point to the Claimant being incapable of being aware of the amount of alcohol that Dean had consumed, or that such quantity would have impaired Dean's ability to drive safely. The Claimant must have been aware of Dean drinking at Aaron's house. He must have been aware of the amounts of alcohol consumed by all three men in the club whilst the Claimant was in the club. Consequently, I find that the Claimant was aware that Dean had consumed so much alcohol that his ability to drive safely was impaired.

61. The decisions made by the Claimant may well be characterised as unwise. Anecdotally, it is by no means unusual for people who have drunk alcohol to make unwise decisions. Late night on-line shopping for unwanted and unnecessary items; posting inappropriate messages on social media are but two examples of well documented examples of unwise decision making by persons who are under the influence of alcohol.

62. I am aware, of course, that when Dean did drive away from the club it was in a direction away from where the Claimant lived. I am unable to say why that should have been, but it does not seem to me to invalidate my conclusions on the Claimant's capacity on the specific issues which I have considered.

63. The relevant case law is straightforward. The leading case is *Owens v Brimmell* [1977] QB 857. Having reviewed the authorities Watkins J said (pages 866G-867A):

> "… [I]t appears to me that 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 quantities as is likely to impair to a dangerous degree that driver's capacity to drive properly and safely. So too 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. Whether this principle can be relied upon successfully is a question of fact and degree to be determined in the circumstances out of which the issue is said to arise."

At page 864C he cited Lord Denning's dictum in *Froom v Butcher* [1976] QB 286, 289:

> "Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man he might hurt himself …"

64. Mr Kennedy also relied upon *Booth v White* [2003] EWCA Civ 1708. In that case, the Claimant accepted a lift from the Defendant, who had spent part of the day drinking with the Claimant. However, the Claimant was not in a position to say how much alcohol in total the Defendant had consumed before accepting a lift with him. Whilst the Defendant was driving he lost control of the car and crashed the car. The Claimant sustained injury. Primary liability was admitted. When tested for his alcohol intake after the accident, the Defendant was found to have 62 microgrammes of alcohol in 100 millilitres of breath, which is nearly twice the legal limit.

65. The Claimant himself admitted that before accepting lift from the Defendant, he had himself consumed between 10 and 15 pints of lager during the day. In evidence he said it was "closer to 15". He also accepted that at the time he elected to be driven by the Defendant, he was incapable of making any reliable judgment for his own safety. Finally, the Claimant accepted that if he had asked the Defendant how much the Defendant had drunk that day, the Defendant would have given an honest answer, and that it would have been sensible to have asked such a question.

66. The Court of Appeal recorded, it seems without disapproval, that:

> "10 … [The Judge] accepted that Mr Booth could not rely on his own drunkenness and, in determining whether he had failed to take reasonable care for his own safely, he should approach the case by assessing what a reasonable man in Mr Booth's shoes would have done."

67. The allegation of contributory negligence failed in that case because the Claimant's wife gave unchallenged evidence to the effect that she had

observed the Defendant shortly before the Claimant got into his car and that he had appeared "normal, fine". Brooke LJ, giving the lead Judgment of the Court of Appeal, with which the other two members agreed, said (emphasis added):

> "20 … The law requires the passenger to make an assessment of the driver when deciding whether, in the interests of his own safety he should have a lift. The judge relied on Mrs Booth's evidence and *the assessment that her husband would have made if he had been fit to make it*."

68. What if, contrary to my finding of fact, the Claimant was unable to make his own assessment of Dean's fitness to drive, and such inability was the result of self-induced intoxication? In my judgment, adopting the objective test advocated in *Booth v White*, I must assess what a reasonable man in the Claimant's shoes would have done. In my judgment, the reasonable man in this instance is a man who is able to make an assessment of the driver's fitness to drive. In my judgment, had the Claimant been able to make an assessment of Dean'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.

69. Having regard to my findings of fact, and the applicable law, it is inevitable that I must find that I must make a finding of contributory negligence against the Claimant. I will deal with the percentage amount of that contribution later.

70. Mr Ross sought to argue that the Claimant clearly lacked capacity to consent to anything. He relied upon a dictum of Martin Spencer J in *Spearman v Royal United Bath Hospitals NHS Foundation Trust* [2017] EWHC 3027. The Claimant suffered from Type 1 diabetes which had developed at about age 11. He sustained brain damage following a road traffic accident when he was in his early 20s which led to a personality change.

71. The index event giving rise to his claim for damages from the Defendant Trust arose from the Claimant suffering a hypoglycaemic attack of such severity that he was taken to hospital by ambulance. It was thought that the attack arose from the inability of the Claimant to cook a meal for himself because his oven had broken. Whilst at the hospital the Claimant gained access to a flat roof from which he fell to the ground, sustaining serious injuries. The Judge found that the Defendant was liable. The issue of contributory negligence on the part of the Claimant then fell to be determined. The Judge found that only the fourth allegation was live: "Climbed over the safety fence surrounding the roof terrace and/or jumped from the roof terrace".

72. His Lordship held:

> "74. In relation to the fourth allegation, in my judgment that is negatived by the Claimant's state of mind, as I have found it to be. Whether as a result of the ongoing effects of the hypoglycaemic attack or the effects of the pre-existing brain injury or a combination of the two, the Claimant did not appreciate the danger he was in, in climbing the fence, just as he had not appreciated the position he was putting himself in when he cleaned his shotgun at Terminal 1 of Heathrow Airport. Just as a young child is not guilty of contributory negligence in running out into a road where the child is so young as not to appreciate the danger of so doing, so too where a person's state of mind is such that, whether temporarily or permanently, they do not appreciate that they are putting themselves in danger and it cannot be said that they should have so appreciated. Otherwise, that would be to penalise a person for being ill or of unsound mind, and the law does not do that."

73. It seems to me that the situations which Martin Spencer J had in mind did not include self-induced intoxication. His reference to the law not penalising "a person for being ill or of unsound mind" does not in my judgment include persons who have got themselves deliberately drunk.

74. It might be argued that the difference in approach lies in the distinction between non-feasance and mis-feasance, but at all events it seems to me to be thoroughly unattractive that a mildly drunk person might be guilty of contributory fault for making an unwise decision whereas a person who had deliberately consumed so much alcohol that they are unable to appreciate the foolishness of their decision is in a better position in law. This does not seem to me to represent the law as it applies to decisions whether to accept a lift from a drunk driver, where an element of objectivity applies.

Failure to Wear a Seat Belt – the Law

75. The leading case is *Froom v Butcher* to which reference has already been made in a slightly different context. Lord Denning MR, in a judgment with which the other members of the Court of Appeal agreed, summarised his conclusions at pages 295G to 296F:

> "Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be? It is proper to inquire whether the driver was grossly negligent or only slightly negligent? Or whether the failure to wear a seat belt was entirely inexcusable or almost forgivable? If such an inquiry could be easily undertaken, it might be as well to do it. … In most of these cases the liability of the driver is admitted, the failure to wear a seat is admitted, the only question is: what damages should be

> payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases. Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such cases the damages will not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such a case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."

At page 296 E-F Lord Denning MR said:

> "Under the Highway Code a driver may have a duty to invite his passenger to fasten his seat belt; but adult passengers possessed of their faculties should not need telling what to do. If such passengers do not fasten their seat belts, their own lack of care for their own safety may be the cause of their injuries."

76. Mr Kennedy also referred me to *J v Wilkins* [2001] RTR 19 (CA) at [18] and *Patience v Andrews* [1983] RTR 447 in support of the propositions first that a court should not ordinarily step outside the suggested ranges and secondly that the court should not engage in speculating what injuries might have been sustained, but were not, if a seat belt had been worn.

77. The primary submission of Mr Ross is that the Claimant was so incapacitated through alcohol ingestion that he could not properly decide whether to enter the car, much less decide whether to activate a seat belt. Therefore, argues Mr Ross, it was the responsibility of Dean to ensure that the Claimant was wearing a seat belt before he drove off.

78. He referred me to *Pasternak v Poulton* [1973 1 WLR 476 and *Hughes v Williams* [2013] EWCA Civ 455, [2013] PIQR P17 in support of the proposition that in certain circumstances it is the driver of the vehicle that has the duty to ensure that the passenger is seat belted.

79. In *Pasternak v Poulton* the Plaintiff was the front seat passenger in a car driven by the Defendant which crashed by reason of the Defendant's negligent driving. Neither was wearing a seatbelt. Kenneth Jones J held (pages 482H – 483B):

> "In my judgment the duty to take reasonable care for her [the plaintiff's] safety which he [the defendant] owed to the plaintiff involved not merely a duty to drive and to control the car itself with reasonable care and skill but also involved the taking of some step directed to seeing that the plaintiff wore the seat belt which was fitted to the car. What steps the driver must take depend on all the facts of the case but here, at the very least, the duty of care which the defendant owed to the plaintiff involved either demonstrating the existence of and the need for the use of a safety belt by simply wearing his own, or at least pointing out to the plaintiff the existence of the seat belt and explaining to her in only a very few words that it was there for her to use. He did, as he frankly confessed, nothing in relation to the wearing of seat belts either by himself or by his passengers. In my judgment in so conducting himself he was negligent."

80. His Lordship held that in the circumstances the Plaintiff was guilty of contributory negligence in failing to wear a seat belt only to the extent of 5%.

81. It is stated in the head note to *Froom v Butcher* that *Pasternack v Poulton* was "approved". However, in *Madden v Quirke* [1989] 1 W.L.R. 702, Simon Brown J (as he then was) was of the view that Lord Denning MR, in *Froom v Butcher*, had disapproved the relevant part of the judgment of Kenneth Jones J in *Pasternack v Poulton*. Having recited the passage in *Froom v Butcher* at page 296 E-F dealing with the Highway Code, Simon Brown J said this at page 708 B-E:

> "That approach is surely inconsistent with an unbelted passenger's claim against the driver based upon the latter's failure to encourage or insist upon the belt being worn. I refer, of course, as did Lord Denning MR, to passengers other than infants or patients. It seems to me moreover that the Court of Appeal there impliedly disapproved that part of the decision in *Pasternack v Poulton* … in which Kenneth Jones J had held that the driver's
>
> > 'want of care operated not merely in the field of controlling and driving the car, but also in the field of failure to wear a seat belt, that is, in the very same field as that in which the plaintiff's want of care alone had effect.'
>
> The driver's duty was there stated, at pp. 482-483, at the very least to involve:
>
> > 'either demonstrating the existence of and the need for the use of a safety belt by simply wearing his own, or at least pointing out to the plaintiff the existence of the seat belt and explaining to her in only a very few words that it was there for her to use.'
>
> The plaintiff's contribution in that, the first reported seat-belt case, was assessed accordingly at only 5 per cent. But of course that case concerned a 1971 accident and already by 1975 the Court of Appeal

> clearly considered that an adult passenger can and should look after himself."

82. I respectfully agree with the reasoning of Simon Brown J concerning the applicability of the dicta of Kenneth Jones J in *Pasternack v Poulton*.

83. The issue then is a factual one. To use the language of *Froom v Butcher* and *Madden v Quirk*, the issue is whether Claimant was, at the material time, a passenger who was possessed of his faculties; a passenger who was neither infant or patient. In modern parlance, the issue is whether at the material time the Claimant had capacity to decide whether or not to wear a seat belt.

84. Having already found that the Claimant had capacity to decide to move from the front of the car to the rear of the car, I also find, by parity of reasoning, that he did have capacity to decide whether or not to wear a seat belt. I find that he chose not to do so.

85. I have not ignored the evidence of Sophie Gallagher. In her witness statement she says that whenever she drove the Claimant, he sat in the front passenger seat and he always wore his seat belt. I accept that. But that history does not assist me on this issue of capacity and the decision made by the Claimant on this occasion not to wear his seat belt in the near side rear seat of the car.

86. I have considered whether Dean owed a duty to the Claimant to help him, or at least to encourage him, to fasten his seat belt, given that it was Dean's idea that the Claimant move from the front to the rear of the car. In my judgment that approach is unnecessarily paternalistic. The Claimant did not have to consent to move from the front to the rear of the car. Having so consented, it was for the Claimant to fasten his seat belt. If he was physically able to move from into the rear of the car, even with assistance, he was in my judgment physically able to accomplish the fairly simple task of putting a seat belt on.

87. Thus the factual enquiry concerns what effect the failure to wear a seat belt had on the nature and extent of the Claimant's injuries. Mr Ross argues that it had no effect. Mr Kennedy argues that had the Claimant been wearing a seat belt, his injuries would have been materially less severe, such that the case falls within the 15 per cent reduction bracket identified by Lord Denning MR.

88. Determination of this issue is a matter of evidence.

Failure to Wear a Seat Belt – the Expert Evidence

89. Mr Stephen Jowitt and Mr Stephen Henderson gave their evidence back to back followed by Dr Steven Allder and Mr David Skinner, also back to back.

90. I have already determined that the Claimant was probably seated in the rear near side passenger seat but was slumped towards the off side, most likely with his head on the rear offside passenger seat, having regard to his height of nearly 6 feet.

91. There was a large measure of agreement between the engineers recorded in their joint statement:

(1) The Claimant was most probably lying across the rear seat at the time of the collision.

(2) The collision between the vehicles was an offset frontal collision whereby the front offside of the car struck the front offside of the tractive unit of the lorry. The degree of overlap between the vehicles was explored in oral evidence.

(3) The front of the car under-ran (passed below) the front of the tractive unit. There was direct contact damage on the offside part of the front of the roof of the car.

(4) There was a very high level of crush of the area in which Dean was sitting. The degree of crush and the collapse of the driver's seating area "lies well beyond that which occurs in the Regulatory front offside crash test when a car collides with a deformable barrier at about 40 mph".

(5) The closing speed of the two vehicles was between 99 mph and 114 mph.

(6) As a result of Dean being unrestrained at the moment of collision, there was "very heavy" loading on the rear of the driver's seat.

(7) The line of force of the collision would have been principally fore-aft, in which case the Claimant would have reacted to the collision by moving almost directly forwards. He would have struck "the rear of the driver's and/or front passenger's seat depending on how he was positioned". Given my finding concerning the position of the Claimant in the car, I find that he most likely struck the driver's seat.

(8) The driver's seat had been affected by loads from two directions. The load from the front was caused by "the intrusion of the structures ahead of the driver", which I take to be a reference to the offset collision causing extensive damage to the car such that the structures of the car were forced into the driver's space, forcing the driver's seat to move backwards. The load from the rear was consequential upon the Claimant striking the rear of the driver's seat.

(9) Following on from the last point, had the Claimant been restrained in the rear offside seat, the impact loads on the rear surface of the driver's seat would have been less and the driver's seat would have lain in a more rearwards position than was noted at the times that the engineers inspected the car.

(10) The final point of agreement in the section of the joint statement headed "Points of Agreement" is important and I quote it in full (emphasis added):

> "We agree that, as a conventionally positioned rear seat occupant, restrained by a seat belt, [the Claimant] would have been exposed to *the probability that his head struck the rear of the driver's or front passenger's seat,* depending on where he was sitting."

92. I accept that evidence. I have determined that the Claimant occupied the rear nearside passenger seat. As will become clear below, when considering the oral evidence of the engineers, I also find that had the Claimant been restrained by a seat belt in that position it is probable, and I so find, that his head would have struck the back of the front passenger seat.

93. There are further points of agreement, which are recorded in the section headed "Points of Disagreement":

(1) The effectiveness of a correctly worn seat belt would depend on the Claimant's lateral position across the car. The offside position had the greatest potential to cause injury, whilst the nearside position had the least potential. "This is because the collision forces were greater towards the offside of the vehicle, due to the offset nature of the collision. The greater level of intrusion towards the offside of the vehicle would also have had a similar, but probably a lesser effect."

(2) The main stiff structures at the front of the car did not engage directly with the tractive unit. It was noted that this was a severe impact. Despite this, the engineers were of the opinion that if the Claimant had been correctly restrained, the severity of the forces applied to his body would have been reduced "to an unknowable degree". There would have been a corresponding reduction in the rotational acceleration of the Claimant's head, compared to a situation in which the entire front structures of the car fully engaged with the tractive unit at the same impact speed.

(3) Further to the above, the car pitched forward sufficiently for the roof of the car to contact the front of the tractive unit. The rotational movement of the car comprised in the pitching forward of the car

> "would have reduced the rotational acceleration of [the Claimant's] head to an unknowable degree" compared to a situation in which the car remained approximately horizontal during the collision.

94. There were significant areas of disagreement. Some of those areas concerned the mechanism of causation of the Diffuse Axonal Injury (DAI) to the brain sustained by the Claimant, which were more fully explored in oral evidence and, in my judgment, largely overtook the contents of the joint statement. Other areas of disagreement are summarised below:

(1) Mr Jowitt was of the opinion that even if restrained, the Claimant "would have been exposed to the potential for significant head contact injury".

(2) After referring to various studies, he concluded that the Claimant "*may* have suffered the same level of internal head harm as is recorded" (emphasis added).

(3) Mr Henderson thought that if the Claimant's head had struck the rear of the seat in front of him, the seat back would have flexed forwards under loading. He also noted that the rear of the seat was padded. These factors together would have afforded some protection to the Claimant's head. Mr Jowitt agreed with the generality of the proposition, but noted that the impact performance of rear front seats had not been the subject of regulatory testing and was therefore unknown.

95. There was also a large measure of agreement between the medical experts recorded in their Joint Statement, although over a fairly narrow compass:

(1) The principal question was:

> "had [the Claimant] been wearing a seat belt (properly fitted 3 point harness) at the time of the accident ... would he have suffered less severe injuries than he in fact suffered, principally, the devastating brain injury."
>
> I agree with that observation.

(2) It is likely that the massive deceleration which resulted from the impact was the likely cause of the DAI.

(3) Such a decelerative force was likely to have been produced when the Claimant's head had struck the solid structures within the car.

96. Areas of disagreement were:

Dr Allder

(1) Even if the Claimant had been wearing a seatbelt, "it is likely … his injuries would not have been reduced".

(2) Even if the Claimant had been wearing a seat belt "he is likely to have suffered the head strike" resulting in the brain injury suffered by the Claimant.

Mr Skinner

(3) If the Claimant had been wearing a 3 point harness "his injuries would have been significantly less severe and that it was *quite possible* that he would not have suffered the devastating brain injury" (emphasis added).

(4) The wearing a properly fitted seat belt "would have substantially reduced the decelerative force suffered by the Claimant and was likely to have prevented a head strike which was the cause of his brain injury".

97. When compiling their reports, none of the experts knew that the Claimant was nearly six feet tall. They first learned of this fact during the trial.

98. In cross examination Mr Jowitt said that in his opinion it was "almost inevitable" that the Claimant's head would have made contact with the seat even if he had been restrained. Mr Kennedy referred him to paragraph 3.47 of his report when he wrote:

> "If [the Claimant] was a restrained rear seat occupant, it is my view that he would have been exposed to a very high level of deceleration, and that his head *might have* struck the rear surfaces of the driver's seat during the collision phase" (emphasis added).

Mr Kennedy asked: what was the "might not have"? Mr Jowitt said that this might be the case if the passenger was a very short person, explaining that when he wrote his report he did not know the height of the Claimant. He made the point that at paragraph 2.18 of the joint statement he and Mr Henderson had agreed on the word "probably" as used in the passage already cited:

> "We agree that, as a conventionally positioned rear seat occupant, restrained by a seat belt, [the Claimant] would have been exposed to *the probability that his head struck the rear of the driver's or front passengers seat,* depending on where he was sitting" (emphasis added).

99. There were questions about the front passenger seat. Mr Jowitt said that it was probably not properly latched from the start of the journey, and I agree with that. He was asked whether, if the Claimant had been a rear near side seat belted passenger, his head would have struck the front passenger seat. He said

that seat would have been farther away and the potential for a head strike would have been reduced. Further, because there was nobody sitting in the front passenger seat, the seat would have moved forwards in the event of a head strike.

100. Mr Henderson was asked a similar question by Mr Ross. He said that the Claimant's head "would have hit the [front] passenger seat now I know his height of six feet".

101. Thus I have no hesitation is finding that even if the Claimant had been wearing a seat belt in the rear near side passenger seat, his head would have struck the front passenger seat.

102. There was an issue concerning the degree of overlap or offset between the fronts of the two vehicles when they collided. This was relevant to the interpretation of regulatory offside collision tests. Mr Jowitt was content to accept that an offset of 40% was appropriate on such tests. He disagreed with the proposition that the offset between the car and the tractive unit in this case was in the order of 10%. He referred to a photograph at figure 14 of his report, taken from the roof of the car. He thought the degree of overlap "looked like" 30% to 40%. He was referred to photographs 25 and 26 in Mr Henderson's report. Mr Jowitt said it looked as if 30% of the lorry had been damaged. He also observed that if the overlap had been only 10% the engagement between the two vehicles would have been minor and the car "would have continued beyond the lorry". In fact, the car was "repulsed and that is not the result of a narrow overlap".

103. Mr Henderson, agreed that the degree of offset was greater than 10%, but he said it was not as much as 40%. In re-examination, he thought the damage to the lorry was over about a quarter of its width and that the car had been damaged "less than half the width of its roof; about 20% to 30%". He explained that in an offset collision there is rotation which affects the level of the operative forces. He also agreed that the stiff structure of the car was not engaged and that the stiffness of the lorry was such that it was likely that the car stopped and was pushed backwards. He agreed that there would have been a "stunning amount of force on the car and not much on the lorry".

104. Doing the best I can, there seems to be some meeting of minds concerning an overlap of about 30%, which is the finding I make. I also find that the car was probably pushed backwards, and it appears that there was also a degree of rotation.

105. The key issue is the effectiveness of seat belts in a collision involving forces of the magnitude present in this collision. There is no regulatory testing data dealing with collisions such as this one.

106. In regulatory testing, the speed change at the point of collision is referred to as the delta-V. Regulatory testing with a partial offset is performed with a delta-V of 40 mph (about 64 kph). In this case, as has already been mentioned, the closing speed was between 99 mph and 114 mph but, as Mr Jowitt fairly observed in his report (paragraph 4.22), this was an offset collision so the speed change was lower than the closing speed. However, it was far higher than anything reported during regulatory testing, and Mr Henderson accepted that the car was probably pushed backwards.

107. Dr Allder made reference to a paper published in December 2010 by Heller et al entitled "The Effect of Frontal Collision Delta-V and Restraint Status on Injury Outcomes". Data held by the National Automotive Sampling System (NASS) from the Crashworthiness Data System (CDS) over a period of 11 years from 1997 to 2007 was analysed. Injuries sustained in road traffic collisions were categorised by reference to the Abbreviated Injury Scale (AIS) published by the Association for the Advancement of Automotive Medicine. AIS-3 relates to "serious" injuries. The proposition was that in collisions with a delta-V greater than 60 kph (37.5 mph) persons are at a similar or increased risk for AIS-3+ injuries when utilising restraining systems (such as air bags and seat belts) when compared to an unrestrained occupant.

108. It emerged in oral evidence that Dr Allder had misinterpreted some of the data. The data set was much smaller than he had thought, comprising only 18 events over seven injury categories. He agreed that those might comprise only 2 or 3 head injuries. Mr Jowitt had reviewed the paper and agreed with Mr Henderson's analysis that the paper did not have a lot of value for this accident. Mr Skinner was also of the view that the paper did not help the Court in its determinative process. I accept those views and agree with them. I have not found it of value in seeking to determine whether the Claimant's injuries would have been less severe if he had been wearing a seat belt.

109. Mr Jowitt was, however, of the opinion that there comes a point when the forces involved in a collision are so great that the wearing of a seat belt "does not help".

110. In re-examination he explained that the backs of front seats are not designed to mitigate head strikes. Whether more or less damage is caused to the head depending on where the head strikes the seat is, according to Mr Jowitt, an "uncharted area". However, he did make the point that the seat backs are rigid and that the soft padding does nothing to limit loads.

111. On the issue of the force loads in this case, the engineers agreed that the crumple zone of the car was undamaged and had not been engaged. Instead, contact between the car and the tractive unit was with the stiff structures of the car, causing forces of much greater magnitude to be transmitted through the car. Mr Jowitt thought that the movement of the Claimant would have occurred within the space of one-tenth of a second. I accept that.

112. Mr Henderson was pressed on the issue of the extent to which wearing a seat belt would have reduced the seriousness of the injuries sustained by the Claimant. At paragraph 14.3 of his report Mr Henderson referred to the possibility of the Claimant's head striking the rear of the front seat ahead of him. When he wrote that paragraph he did not know the height of the Claimant, and it must now be read in the light of the fact that Mr Henderson accepts that there would have been a head strike. He wrote:

> "The severity of the collision was such that [the Claimant's] neck is likely to have flexed forward, possibly allowing his head to contact the rear of the set ahead of him. However, if contact did occur, the severity of any consequential head/face injuries is likely to have been much lower that the injuries he did suffer because most of his movement within the car would have been managed by the seat belt."

113. At paragraphs 14.7 and 15.2(f) of his report he wrote that in his opinion "a correctly worn seat belt is likely to have been effective at reducing the severity of the injuries that [the Claimant] suffered".

114. In cross-examination he accepted that he could not say what the nature of the injuries would have been likely to have been. He was asked if it was impossible to evaluate the differences. He said it was difficult to do so, and this applied to a head strike against the front passenger seat as well. Asked if it was possible to delineate between the consequences he said he could "not put numbers on it".

115. He agreed that the forces generated in the collision were of a magnitude beyond tests and common experience and that he (and I think no-one) had any experience of a seat belted adult in a rear seat being involved in a collision with a delta-V and forces of a similar magnitude to those generated in this collision.

116. In coming to his conclusion that wearing a seat belt would have made a difference, even given that the Claimant would have suffered a head strike, he said he relied upon extrapolating his experience gained from investigating low speed impacts. He agreed he had no other evidence to support his conclusion. He could not say what forces were required to trigger a DAI in a passenger.

He could not "put numbers" on the difference a correctly worn seat belt would have made.

117. In re-examination he was asked what material he had relied on in deciding that a seat belt would have made a difference. He said it was based on his experience of what he had seen in the course of examining about 1,000 vehicles. He thought that rotational forces reduced towards the nearside of the car, although he had previously agreed that a possible sequence of events was the striking of the tractive unit, followed by the car moving backwards, then tipping up and then rotating. In my judgment, the forces generated by the events before rotation must have been considerable and would have been experienced by the person located in the rear near side passenger seat.

118. Although both engineers sought to assist me in the mechanism of the cause of a DAI, I found the evidence of the medical experts to be of greater assistance.

119. Dr Allder is a Consultant Neurologist, appointed as such in 2004 at the Plymouth Hospitals NHS Trust. He left the NHS in August 2015 and has since been employed by Re:Cognition Health in Wimpole Street, London.

120. In 1993 Mr Skinner was appointed as the first Consultant in Accident and Emergency Medicine at the John Radcliffe Hospital in Oxford. He retired from the NHS in 2011, but upon retirement he was appointed "Emeritus Consultant in Emergency Medicine, Oxford". He continued to practice emergency medicine until 2016 when, as he says in his CV, he revoked his "Licence to Practice" with the GMC "after 41 years of continuous medical practice".

121. Dr Allder and Mr Skinner have brought to this case different areas of expertise.

122. When in active clinical practice, Mr Skinner led a team that dealt with patients who had been involved in major traumas, including road traffic accidents. He and his team received information from the ambulance crews including, if known, whether a seat belt had been worn. The task was to read the wreckage and try to interpret what injuries there may be in order to stabilise the patient. He made it clear in his report (paragraph 10) that he was not a spinal orthopaedic surgeon or neurosurgeon, but an "emergency medicine specialist who deals with these sorts of cases in the earliest stages of their assessment, diagnosis and resuscitation".

123. Dr Allder readily agreed in cross examination that he was not an accident and emergency surgeon or a neurosurgeon. As he put it, the acute stabilisation of trauma patients was not part of his work. He was asked by Mr Ross if he was

an appropriate expert for this case, given his lack of experience of trauma patients. He explained that medical professionals were becoming increasingly specialized, and that in terms of understanding the mechanism of the causation of DAIs "that is 50% of what I do every day".

124. Dr Allder explained the mechanism of the causation of DAI by reference to a standing person who is hit on the head which something heavy. There are three types of strain put on the brain:
   (1) At the point of impact, the skull hits the brain.
   (2) As the head and neck are pushed away, the brain lags behind so that the skull strikes the brain.
   (3) The brain continues to move and is halted by the structures tethering the brain to the skull, but unless the force is perfectly linear, this causes a rotational force.

125. It is the shearing forces that cause the axonal damage found in DAI.

126. Dr Allder then explained that the same three forces were at play in a standing person who trips and falls the ground.

127. In this case, the Claimant was accelerated forwards very fast so as to hit the back of the front seat, where his head underwent a massive decelerating force.

128. Both Dr Allder and Mr Skinner agreed that it is the decelerative force that is the key component in the mechanism of injury. Dr Allder said that the deceleration is the critical factor. Mr Skinner said that "it is the deceleration that kills you" and "it is the deceleration that causes the damage".

129. For Mr Skinner, the distance over which the deceleration took place is also important. He repeated the explanation given in his report concerning the difference in outcome between a crash into a tree by a motor cycle and a motor car, both at 60 mph. A motor cycle has no crumple zone, so the rider is thrown over the handlebars and decelerates from 60 mph to 0mph over about one inch (helmet thickness plus tree bark). The motor car has a crumple zone of around four or five feet, allowing a more gradual deceleration.

130. Mr Skinner said that if the Claimant had been wearing a seat belt there would have been a "ride down" distance such that the decelerative effect of the collision would have been reduced.

131. I see the force of the analogy. However, in this case, the crumple zone of the car was not engaged. Also the rear seat belts did not have pre-tensioners, unlike the front seat belts. Mr Henderson agreed that, depending on the amount of clothing worn, a pre-tensioned seat belt offers a greater degree of

protection than a rear seat belt. The point, as I understand it, is that a passenger wearing a seat belt without pre-tensioners would have been held fully in place at the instant of collision so that there would not have been any degree of forward movement to assist in the decelerative effect, subject to any stretching of the fabric of the belt. Mr Henderson agreed that in regulatory tests on front seat belted passengers with pre-tensioned seat belts at 40 kph, the head of the passenger comes close to the front windscreen.

132. Mr Jowitt referred to this collision as "an outlier" in that there is no comparable data available. Mr Skinner said that he had never seen the outcome of a collision identical to this one, although he said he was involved in a case similar to this which had not yet come to court.

133. He was asked questions concerning the developing field of DAI being caused without contact. He confirmed he did not feel qualified to comment on that. In my judgment it is not relevant in any event since I have found that there was a head strike in this case.

134. Mr Skinner was of the opinion that a seat belted person would have suffered some injury, but not the same as those suffered by the Claimant. However he, like Mr Henderson, could not give a degree by which any injury would have been lessened. He agreed that he relied upon the engineers for information concerning the amount of "give" in a seatbelt.

135. He agreed, as has already been noted, that when he wrote his report and contributed to the joint statement, he did not know that the Claimant would have suffered a head strike even if seat belted. It was put to him that his opinion in the joint statement that wearing a seat belt "was likely to have prevented a head strike" now fell away. It plainly does.

136. In the joint statement Mr Skinner wrote that had the Claimant been wearing a seatbelt it was "quite possible" that he would not have suffered the devastating brain injury. He was taken to that passage and asked about the use of "quite possible" rather than the word "probable". His reply was that "the wording is as it is" which causes me to find that Mr Skinner is unable to say that wearing a seat belt would probably have avoided the devastating brain injury.

137. Cross examination ended with questions predicated upon me finding that there would have been a head strike. Mr Skinner said the speed at which the head would have struck the seat in front was critical. He maintained that such a head strike would not have been with the same decelerative force as with no seat belt. However, the degree in reduction of seriousness of the injuries was "unknowable".

138. In re-examination Mr Skinner said that every 10 to 14 days at the John Radcliffe Hospital a case involving similar speeds to those in this case would be seen. He would not have seen them all, but he was there for 18 years. He sought to justify his opinion that wearing a seat belt would have made a difference by reference to the experience of himself and his trauma team. He said that injurious force is the decelerative force suffered by the body.

139. It seems to me that Mr Henderson's general experience is that wearing a seat belt, in general, reduces injuries. However, it seems to me that it is just that – a generalisation. Lord Denning MR recognised the potential for factual situations where failure to wear a seat belt has made no difference to the outcome.

140. Similarly, Mr Skinner referred to the experience of himself and his trauma team in seeking to justify his opinion that wearing a seat belt reduces the deceleration of the head such that injuries sustained are less severe than if no seat belt is worn. But Mr Skinner was unable to give any indication of the degree or extent of any difference, other than the use of the words "substantial" and "significant".

141. The evidence is clear in this case that even if the Claimant had been wearing a seat belt his head would have struck the back of the front passenger seat. It also seems to me that the evidence shows that it is the head being struck that causes DAIs. It is not necessary to consider whether DAI can be caused even in the absence of a head strike.

142. I accept that the force with which the head is struck is a relevant factor, which is closely related to the decelerative force.

143. The evidence shows that it is "quite possible" that the Claimant would not have suffered this particular devastating brain injury, which is a long way short of establishing that the injury would have been avoided.

144. It may be that wearing a seat belt would have reduced the decelerative force and reduced the speed at which the head was travelling when it struck the seat. But would that have made a difference?

145. In my judgment it has not been established that wearing a seat belt would have sufficiently slowed the decelerative effect so that the extent of the consequences of what I find to be the inevitable DAI would have been diminished. It does not seem to me to be legitimate to extrapolate the results from relatively low speed impacts in regulatory testing to conclude that in this particular accident wearing a seat belt would have made any significant difference at all to the consequences of the head injury sustained by the

Claimant. The evidence does not show that wearing a seat belt would have made a "considerable difference" such that the Claimant's injuries would have been a "good deal less severe", to use the words of Lord Denning MR in *Froom v Butcher*.

146. I accept the submission of Mr Ross that this was a unique accident generating forces outside anyone's experience. It has been impossible to assess factors such as the deceleration rate, or the distance from the head of the Claimant's hypothetically seat belted body to the rear of the front passenger seat. Indeed, it was not until the trial that anyone knew the Claimant's height, and that in itself caused the engineers to conclude that there would have been a head strike.

147. I am unable to find that wearing a seat belt would have made any difference in outcome such as to enable me to make any reduction in damages by reason of the failure of the Claimant to wear a seat belt. There must come a point where the wearing of a seat belt does not make any difference to outcome, and it seems to me to be likely that such point was reached in this case.

Degree of Contributory Fault

148. In *Owens v Brimmell* the degree of contributory fault on the part of the Plaintiff was assessed at 20%.

149. Mr Kennedy submitted that I should determine the degree of contributory fault at a higher level in this case.

150. In *Meah v McCreamer* [1985] 1 All ER 367 Woolf J (as he then was) assessed the Plaintiffs proportion of blame at 25%. The Plaintiff had been working as a minicab driver. After finishing work, he went to a public house and started drinking. The Defendant was already there and, as the Judge found "had clearly been there for some time before he arrived". The Defendant then drove himself and the Plaintiff to a Country Club about 15 miles away. In evidence the Plaintiff said that he had left his own car behind because he knew they were going drinking. The Judge found that if the Plaintiff had not been affected by drink it would have been quite obvious to him that the Defendant was not in a fit state to drive. The quantity of alcohol in the Defendant's blood was 143mg/dl. The reading for Dean was 176mg/dl, but I reject the submission made by Mr Kennedy in his skeleton argument that this is the relevant figure for comparison purposes. That figure has not been adjusted to take account of the post-mortem production of alcohol resulting from microbial action, typically less than 50mg/dl. It is possible, since we do not know how much alcohol was produced by microbial action, but it is equally possible that Dean's reading was less if the microbial action alcohol was 33md/dl or more.

151. It seems to me implicit from the judgment of Woolf J that the Plaintiff, when he left his car behind and went to the club in the Defendant's car, that the Plaintiff was intending to be driven back by the Defendant.

152. In *Stinton v Stinton and The Motor Insurer's Bureau* [1993] P.I.Q.R. P135 Simon Brown J (as he then was) assessed the contribution at one-third. The Plaintiff and the first Defendant driver were brothers. The driver was uninsured, hence the involvement of the MIB. The brothers had arranged to go to a working men's club for a game of snooker. They drank moderately between about 7.30pm and 10.00pm. Then they went to a night club, arriving at about 11.00pm and staying until about 3.00am. The Judge was unable to make a finding concerning who had driven the car thus far during the day. The Judge found that the case "involves blameworthiness on the passenger's part to the greatest extent possible, short of direct participation in the driver's actual performance".

153. Once more it seems to me implicit in the judgment that the Plaintiff had intended all along to be driven home by his brother. The two men had also been in each other's company for the entire time that they had been drinking.

154. In this case, there is no evidence that there was an earlier agreement that Dean would drive the Claimant away from the club. Had it not been for the fact that the Claimant was put into the front seat of the car by Dean and Aaron it is quite possible that he would have gone home by taxi.

155. The Claimant must have known how much alcohol Dean had drunk up to the point where the Claimant was walked from the club to the car. Thereafter, he cannot have known how much more Dean had drunk. There is no evidence that the Claimant knew for how long he was left alone in the car whilst Dean and Aaron continued drinking in the club. There is no evidence concerning the Claimant's awareness of any behaviour exhibited by Dean during the process of the Claimant transferring from the front of the car to its rear.

156. Having regard to those matters, this is not a case where the Claimant and Dean were together for the entire duration when Dean was drinking. Further, it is likely that the decision of the Claimant to allow himself to be driven by Dean was taken without a great deal of thought, although I have found that the Claimant had capacity to, and did, make this decision.

157. In those circumstances it seems to me that contributory fault on the part of the Claimant is less than that found to be appropriate in the two cases relied upon by Mr Kennedy. In my judgment, the appropriate degree of contributory fault on the part of the Claimant is 20%.