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CONTRIBUTORY NEGLIGENCE AND THE DISABLED CLAIMANT

Town of Port Hedland v. Reece William Hodder by next friend Elaine Georgina Hodder (No. 2)[1]

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I. INTRODUCTION

One of the fundamental aspects of the defence of contributory negligence is that it is objective in nature. Thus, when assessing the question of whether a claimant's failure to take care of his own safety contributed to the damage which he suffered, the court asks what a reasonable claimant would have done in the relevant circumstances. The only universally accepted variation to this rule applies in the case of children, in relation to whom an age-appropriate albeit otherwise objective standard is imposed. Other categories of claimants are generally judged by purely objective criteria—even where, as in the case of those with physical or mental disabilities, such criteria may be wholly unrealistic.

While the potential injustice of this approach has long been recognised, there have been relatively few occasions on which the courts have seriously considered the possibility of change. Recently, however, in *Hodder*, the Court of Appeal of Western Australia considered at some length the case for adopting a more flexible standard in determining whether a disabled claimant has been guilty of contributory negligence.

II. THE FACTS OF *HODDER* AND THE DECISION OF THE TRIAL JUDGE

In *Hodder*, the claimant, Reece Hodder, had been born with cerebral palsy and an intellectual disorder. He was almost blind, profoundly deaf and virtually unable to speak, and he suffered from spastic diplegia, as well as other conditions. When Mr. Hodder was 23 years old, he was taken by members of his family to a public swimming pool in Port Hedland, Western Australia. There he climbed onto one of eight diving blocks at the shallow end of the pool and dived into the water, striking

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1 [2012] WASCA 212 [*Hodder*]. No notice of appeal to the High Court of Australia was lodged within the requisite period after the decision.

his head on the bottom of the pool. He was rendered quadriplegic, and subsequently brought an action in negligence against the Town of Port Hedland ("the Town"), which owned the pool, as well as the Young Men's Christian Association of Perth ("the YMCA"), which managed it. The trial judge found that the Town had been negligent in placing the diving blocks, which amounted to an invitation to dive, at the shallow end of the pool. He also found that the YMCA had been negligent in failing to provide proper supervision or adequate warning signs, but concluded that these breaches had made no material contribution to Mr. Hodder's injuries, and that the Town therefore bore sole responsibility for the damages payable, which were set at $6.5 million. However, the judge felt compelled to reduce this sum by 10% to take account of Mr. Hodder's contributory negligence in having dived into the shallow end of the pool. This he assessed on an objective basis without reference to Mr. Hodder's disabilities. The Town appealed against both the finding that it had been negligent and the finding that the YMCA's negligence had not contributed to the damage. It also argued that Mr. Hodder's damages ought to have been reduced by more than 10%.

III. The Decision of the Court of Appeal

In the Court of Appeal of Western Australia, all three judges (Martin C.J., McLure P. and Murphy J.A.) upheld the finding of negligence against the Town and confirmed the finding that the YMCA's negligence had not been material.

On the contributory negligence issue, all recognised that the applicable standard is generally an objective one, in which respect they alluded to the seminal decision of the High Court of Australia in *Joslyn v. Berryman*.[2] They noted McHugh J.'s reference in that case to Lord Macmillan's famous observation in *Glasgow Corporation v. Muir*[3] that the use of an objective test in determining negligence "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question",[4] and McHugh J.'s conclusion that, for the same reason, the "test of contributory negligence is an objective one."[5]

All three judges also recognised that the objective nature of the test is varied in the case of children to the extent that it is, in the words of McHugh J. in *Joslyn*, "tailored to the age of the child"[6]—as evidenced by the decision of the High Court of Australia in *McHale v. Watson*.[7] Martin J.A., however, went further, arguing that this variable

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2 [2003] HCA 34 [*Joslyn*]. The case involved a claimant who, after driving his car when severely intoxicated, changed places with the defendant, who was also intoxicated. The defendant lost control of the car, causing an accident in which the claimant was seriously injured. The case was referred to in *Hodder*, *supra* note 1, by Martin C.J. at para. 197 *et seq*.; McLure P. at para. 284 *et seq*.; Murphy J.A at para. 331 *et seq*.

3 [1943] 1 A.C. 448 (H.L.).

4 *Ibid.* at 457.

5 *Supra* note 2 at para. 32, quoted by Martin C.J. in *Hodder*, *supra* note 1 at para. 197.

6 *Ibid*.

7 (1966) 115 C.L.R. 199 (H.C.A.) [*McHale*], as referred to in *Hodder* by Martin C.J., *ibid*. at para. 180 *et seq*.; McLure P. at para. 276 *et seq*.; Murphy J.A. at para. 326 *et seq*. In *McHale*, a twelve-year-old boy was held not to be negligent when a sharpened rod which he had thrown during a game hit a nine year-old girl in the eye after ricocheting off a post. Although not referred to by the Court of Appeal in *Hodder*, similar decisions can be found in English law. See *e.g.*, *Mullin v. Richards* [1998] 1 W.L.R. 1304

standard was not confined to children, and that it must be capable of application in other contexts. Referring to the trial judge's reluctant conclusion that he must apply a purely objective test when assessing Mr. Hodder's conduct, his Honour observed:[8]

> The harshness, injustice and unfairness in this approach is manifest. It assumes a miracle of biblical proportions and requires the court to assess the question of contributory negligence in some parallel universe in which the blind can see, the deaf can hear, the lame can walk or even run, and the cognitively impaired are somehow restored to full functionality.

In attempting to establish a basis for extending the principles applicable to children to other special types of claimants (and in particular those suffering from disabilities), Martin C.J. referred to a number of English and Australian cases—including *Daly v. Liverpool Corporation*,[9] *R. and W. Paul (Limited) v. Great Eastern Railway Company*,[10] and *Cotton v. Commissioner for Road Transport and Tramways*[11]—in which a more individually-tailored approach to determining contributory negligence appeared to have been espoused. While he acknowledged that McHugh J. in *Joslyn* (citing Kitto J. in *McHale*) had considered that a variable standard relating to the capability or otherwise of an individual would be inconsistent with existing law, and would "impose on tribunals of fact the almost insuperable task of determining what standard of care the [claimant] was 'in fact capable of'",[12] he took a different view. Firstly, he observed that the statement of Lord Macmillan in *Glasgow Corporation v. Muir* about the need for a purely objective test had been made in

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(C.A.), in which a fifteen-year-old defendant was held not liable to a friend whom she injured during a mock fight with plastic rulers. In addition, a number of English cases dealt specifically with the issue of a child claimant's contributory negligence, most notably *Gough v. Thorne* [1966] 1 W.L.R. 1387 (C.A.), in which a thirteen-year-old claimant was held not to be contributorily negligent when she was hit by a car being driven at excessive speed after she crossed the road without checking when waved across by a lorry driver. (Compare this decision with that of *Morales v. Ecclestone* [1991] Road Traffic Reports 151 (C.A.), in which an eleven-year-old who was injured when he ran into the road without looking had his damages reduced by 75%.) For a Singapore case involving contributory negligence by a child, see *e.g.*, *Ang Eng Lee v. Lim Lye Soon* [1985-1986] S.L.R.(R.) 931 (C.A.) [*Ang Eng Lee*]. In that case, the majority of the Court of Appeal held that an eight-year-old boy was capable of being contributorily negligent when crossing the road, but due to his young age, damages were reduced by only 30%.

8 *Hodder*, *supra* note 1 at para. 156.

9 [1939] 2 All E.R. 142 (Liverpool Hilary Assizes) [*Daly*]. In *Daly*, which involved an elderly woman who had been struck by a bus, Stable J. suggested (at 143) that a pedestrian who was "old and slow and a little stupid," would not have to be subject to a "hypothetical standard of care" and that the law would simply require a person to do his or her "reasonable best when… walking about."

10 (1920) 36 T.L.R. 344 (K.B.D.) [*R. and W. Paul*]. In *R. and W. Paul*, a plea of contributory negligence failed with respect to the death of a stone-deaf workman who was hit by a train during a shunting operation in a railway yard.

11 (1942) 43 N.S.W. St. R. 66 (S.C.) [*Cotton*]. In *Cotton*, a case where a six-year-old was struck by a bus, Jordan C.J. stated (at 69) that he was "not aware of any case in which a person [had] been held to be guilty of contributory negligence through the application of some arbitrary general standard, notwithstanding that he had been as careful as he could." Martin C.J. also referred to the more recent case of *Button v. Melray Investment Pty. Ltd.* [2000] ACTSC 20, which involved an 86-year-old visually impaired man who tripped on a stair in the defendant's café, in spite of a warning sign. In deciding the case, Higgins J. observed (at para. 69) that the man's "inadvertence was in truth, more understandable and excusable rather than less because of the issue as to his eyesight."

12 *Joslyn*, *supra* note 2 at para. 34.

the context of the standard of care owed to others rather than to oneself, and that the position of tortfeasor and victim were not precisely equivalent.[13] Secondly, he considered that, in referring only to the views of Kitto J. in *McHale*, McHugh J. in *Joslyn* had not taken into account the views of the other two judges, and in particular Menzies J., who had suggested that allowances should be made for physical defects or incapacities.[14] And thirdly, he could not see that it would necessarily be "an almost insuperable task" to determine a claimant's capabilities: indeed he concluded that in the case at hand such a determination was a "relatively simple"[15] one to make.

Martin C.J. acknowledged that current law had to be interpreted in the light of s. 5K of the *Civil Liability Act 2002* of Western Australia (which was inserted pursuant to the *Civil Liability Amendment Act 2003*[16]), under which a claimant was to be judged by the standard of "a reasonable person" in his position and on the basis of what he "knew or ought to have known" at the time.[17] This embodied the recommendation in the *Ipp Report*[18] that the test of whether a person has been contributorily negligent should be "whether a reasonable person in [that person's] position would have taken precautions against the risk of harm to himself or herself," in which respect "the standard… is the same as that applicable to the determination of negligence."[19] His Honour considered that the report, which pre-dated the common law decision in *Joslyn*, could be seen either as neutral on the question of whether a claimant's physical defects should be taken into account, or—since it referred at one point to "not… ignoring the identity"[20] of the claimant—it could even be seen as indicating that objectively identifiable physical characteristics should be relevant. The primary characteristic relevant to this case was Mr. Hodder's visual disability. In the absence of binding authorities from the High Court of Australia or relevant decisions of his

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[13] In this respect, Martin C.J. referred to the judgment of Mason J. in *The Commissioner of Railways v. Ruprecht* (1979) 142 C.L.R. 563 at 570 (H.C.A.), who observed that contributory negligence is not the same as negligence, since it "exposes the actor to the risk of injury without necessarily exposing others to risk."

[14] "Any person under a disability is only required to take such reasonable care for his own safety as his capabilities permit.": *McHale*, *supra* note 7, Menzies J. at 223.

[15] *Hodder*, *supra* note 1 at para. 199.

[16] No. 58 of 2003 (W.A.).

[17] *Civil Liability Act 2002* (W.A.) [*CLA* (*WA*)]. Section 5K provides:

(1) The principles that are applicable in determining whether a person is liable for harm caused by the fault of the person also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose—

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

Similar legislation has been enacted throughout Australia.

[18] Austl., Commonwealth, Panel for the Review of the Law of Negligence, *Review of the Law of Negligence*: *Final Report* (Canberra: n.s., 2002) (chaired by David Ipp J.) [*Ipp Report*].

[19] *Ibid*. at 12, Recommendation 30. It is difficult to reconcile this with Martin C.J.'s conclusion (*supra* text accompanying note 13) that a tortfeasor and a victim should not necessarily be judged by the same standard.

[20] *Ibid*. at para. 8.12.

own court,[21] he examined a number of post-*Ipp* cases from New South Wales,[22] two of which—*Russell v. Rail Infrastructure Corporation*[23] and *Smith v. Zhang*[24]—dealt specifically with disabled claimants. In *Russell*, Bell J. had extended to an adult who suffered from a slight intellectual disability the modified standard of care for contributory negligence applicable to children,[25] having been persuaded that McHugh J.'s statement in *Joslyn* about the objective nature of contributory negligence was inconsistent with *Cook v. Cook*[26] and *Gala v. Preston*[27]—both High Court of Australia decisions in which, in the context of actions for negligence, a variable standard of care had been recognised on the part of defendant drivers to passengers who were aware of their impaired capacity. In *Smith*, which involved an elderly woman who was injured while crossing the road, Meagher J.A. had suggested that, when determining the standard of a reasonable person under both the relevant legislation and the common law as represented by *Joslyn*, it was "necessary to have regard to the [claimant's] age, poor sight and physical infirmities."[28] On the basis that the decision in *Russell* and the dictum of Meagher J. in *Smith* supported his construction of the *Ipp Report* and the *CLA (WA)*, and that no other cases were inconsistent with it, Martin C.J. concluded that the trial judge had been wrong not to take account of Mr. Hodder's disabilities. When those disabilities—including, most relevantly, his visual impairment—*were* taken into account, Mr. Hodder had not failed to take care of his own safety, and the trial judge's finding of contributory negligence must be set aside.

Neither McLure P. nor Murphy J.A. agreed with Martin C.J.'s conclusion that it was legitimate to take account of Mr. Hodder's disabilities. Both placed considerable weight on the objective and impersonal standard in contributory negligence laid down

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[21] Under the principles enunciated in *Australian Securities Commission v. Marlborough Gold Mines Limited* (1993) 177 C.L.R. 485 (H.C.A.) and *Farah Constructions Pty. Ltd. v. Say-dee Pty. Ltd.* [2007] HCA 22, an intermediate court faced with no binding decision of the High Court of Australia and no relevant decision of its own should not generally depart from decisions of appellate courts from other Australian jurisdictions unless convinced that they are wrong.

[22] These included *Doubleday v. Kelly* [2005] NSWCA 151; *Consolidated Broken Hill Ltd. v. Edwards* [2005] NSWCA 380; *Waverley Council v. Ferreira* [2005] NSWCA 418; *Gordon Martin Pty. Ltd. v. State Rail Authority of New South Wales* [2009] NSWCA 287; *Council of the City of Greater Taree v. Wells* [2010] NSWCA 147; and *Taheer v. Australian Associated Motor Insurers Ltd.* [2010] NSWCA 191. In New South Wales, the recommendations in the *Ipp Report*, *supra* note 18, are embodied in the *Civil Liability Act 2002* (N.S.W.), the relevant section in terms of contributory negligence being s. 5R.

[23] [2007] NSWSC 402 [*Russell*]. Unlike the other cases to which Martin C.J. referred, *Russell* was a decision of a trial court, not an appellate court.

[24] [2012] NSWCA 142 [*Smith*].

[25] In *Russell*, *supra* note 23, the claimant was injured when she climbed through a gap in a fence onto the side of a slow-moving goods train.

[26] [1986] HCA 73 [*Cook*]. In *Cook*, the High Court of Australia held that exceptional facts could alter the relationship between a driver and a passenger so as to impose a different standard of care.

[27] [1991] HCA 18. In *Gala v. Preston*, the plurality held that an injured passenger's claim against the driver of a stolen car must fail because in the special and exceptional circumstances, neither participant could reasonably have expected the driver to drive according to normal standards of competence and care.

[28] *Smith*, *supra* note 24 at para. 22. In *Smith*, the trial judge had reduced the damages of the 83 year-old claimant, who had a pronounced stoop, a limp and poor vision, by 75%. In the Court of Appeal of New South Wales, Meagher J.A. and Tobias A.J.A. both held that the reduction should be lowered to 60%, while Macfarlan J.A. would have lowered the reduction still further, to 35%. Only Meagher J.A. accorded any significance to the particular infirmities of the claimant, and even he observed (at para. 32) that she should have stopped before stepping onto the roadway.

in *Joslyn*, and its subsequent acceptance without reservation by the High Court of Australia in *Imbree v. McNeilly*;[29] both agreed that the only exception to the objective and impersonal standard was an age-appropriate exception for children under the principle espoused in *McHale,*[30] in which respect they noted McHugh J.'s specific rejection in *Joslyn* of the more individually-tailored propositions in cases such as *Daly*[31] and *Cotton*;[32] both referred to the fact that Bell J.'s application of *McHale* to an adult with a mild intellectual disability in *Russell* had been largely influenced by the decision of the High Court of Australia in *Cook*, which (as Martin C.J. himself had acknowledged) had since been overruled by *Imbree*;[33] and both considered that s. 5K of the *CLA (WA)* had to be read as imposing a purely objective approach to determining both negligence and contributory negligence[34] (on which basis Murphy J.A. also dismissed the significance of the dictum of Meagher J.A. in *Smith*).[35]

In addition, Murphy J.A. observed that *Daly*, *Cotton* and most of the other cases in which a variable standard appeared to have been employed were products of the period when contributory negligence was a full defence which, if successfully pleaded, deprived a claimant of any compensation. In the middle of the 20th century, all major jurisdictions had introduced legislation to make contributory negligence a partial defence,[36] reducing rather than expunging damages, and since that time there had been far less justification for departing from a purely objective approach.[37]

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[29] [2008] HCA 40 [*Imbree*]. In *Imbree*, the High Court of Australia overruled *Cook*, *supra* note 26, holding that in all circumstances the standard of care applied to an inexperienced driver is the normal standard of a reasonable driver. See discussion in *Hodder*, *supra* note 1, McLure P. at para. 290; and Murphy J.A. at paras. 332, 333.

[30] *Hodder*, *ibid.*, McLure P. at para. 298; and Murphy J.A. at paras. 334-336. While recognising that an age-appropriate standard was applied to children (both in the tort of negligence and in the defence of contributory negligence), Murphy J.A. rejected any analogy between them and disabled persons. For further discussion, see *infra* text accompanying note 46 *et seq*.

[31] *Supra* note 9.

[32] *Supra* note 11.

[33] *Hodder*, *supra* note 1, McLure P. at para. 291; and Murphy J.A. at para. 344. Martin C.J. had suggested, at para. 245, that—notwithstanding *Imbree*, *supra* note 29—*Russell*, *supra* note 23 still stood for the proposition that there were circumstances in which particular characteristics could be taken into account. However, as Murphy J.A. noted at para. 344, the decision in *Russell* had been influenced by a suggestion in the ninth edition of Fleming, *The Law of Torts* (John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998)) at 321 that a person's mental or physical disability might have some bearing on the relevant standard of care—a suggestion which had been removed from the tenth edition (Carolyn Sappideen & Prue Vines, eds., *Fleming's The Law of Torts*, 10th ed. (Sydney: Lawbook Co., 2011) at para. 12.160).

[34] *Hodder*, *ibid.*, McLure P. at para. 297; and Murphy J.A. at para. 372.

[35] His Honour observed, *ibid*. at para. 379, that insofar as the *dicta* in *Smith*, *supra* note 24, suggested that the section was to be read in conformity with the variable test favoured by Menzies J. in *McHale*, *supra* note 7: "it seems to me, with respect, to be a departure from the statutory test".

[36] The relevant legislation in Western Australia is the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (W.A.). Similar legislation exists in other states. See *e.g.*, *Law Reform (Miscellaneous Provisions) Act 1965* (N.S.W.), s. 9; *Wrongs Act 1958* (Vic.), s. 26; *Law Reform Act 1995* (Qld.), s. 10; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (S.A.), s. 7; *Wrongs Act 1954* (Tas.), s. 4; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 102; *Law Reform (Miscellaneous Provisions) Act* (N.T.), s. 16. For the position in the U.K. and Singapore, see the *Law Reform (Contributory Negligence) Act, 1945* (U.K.), 8 & 9 Geo. VI, c. 28, and the *Contributory Negligence and Personal Injuries Act* (Cap. 54, 2002 Rev. Ed. Sing.).

[37] *Hodder*, *supra* note 1 at para. 306 *et seq*.

Both McLure P. and Murphy J.A. thus concluded that Mr. Hodder's conduct must be judged by the same standard as that of ordinary users of the pool. However, while Murphy J.A. agreed with the trial judge that ordinary users of the pool would not regard the presence of the blocks as an invitation to dive into the shallow end, and thus found Mr. Hodder to have been contributorily negligent,[38] McLure P. considered that some ordinary users might not be familiar with the relevant risks. She therefore joined Martin C.J. in holding that Mr. Hodder's damages should not be reduced to take account of any contributory negligence—albeit for reasons unconnected with an attenuated standard of self-preservation.[39]

IV. Discussion

The decision in *Hodder* is of wider interest than either its provenance or its outcome might suggest. The judgments of McLure P. and Murphy J.A. offer confirmation of the generally objective standard of care by which contributory negligence is assessed, while the judgment of Martin C.J. highlights the problems inherent in this approach, specifically in relation to the level of care required of a disabled claimant.

We live in an age which makes increasing provision for persons with disabilities, and one in which Martin C.J.'s impassioned reference to the harshness of judging a disabled person by a standard which he cannot possibly meet strikes a chord. However, the law cannot be swayed by rhetoric or emotion, but must look impartially at both sides of the equation. The question is whether, given the inevitability of injustice being done either to the disabled claimant who is unable to circumvent risks which his non-disabled counterpart could avoid or to the defendant who injures such a claimant, there are sufficiently strong arguments to shift that injustice from the claimant (whose damages are reduced under the objective analysis) to the defendant (on whom additional liability would fall if the law were to recognise an attenuated standard of self-preservation). In seeking an answer to this question, it is, of course, important to remember that—unlike criminal law, where the focus is primarily on the wrongdoer—tort law, as a branch of civil law, is two-sided, and that responsibility is "*to* someone as well as *for* something."[40]

Martin C.J. was obviously of the opinion that the need to provide a disabled claimant with an adequate remedy for the wrong he has suffered does indeed justify recognition of an attenuated standard of self-preservation. Indeed he considered that there was a body of English and Australian jurisprudence which already supported this view. However, as Murphy J.A. observed, most of the cases on which Martin C.J. relied were from the period when a successful contributory negligence plea meant that a claimant got nothing. In modern law, a disabled person's failure to take appropriate precautions to protect his own safety—including measures to minimise the risks associated with his disability or infirmity—no longer destroys his

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[38] *Ibid*. at para. 388.

[39] *Ibid.* at para. 302.

[40] Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) at 50 [emphasis in original]. Cane continues (*ibid*.): "[t]he nature and quality of outcomes and their impact on the victim are central to the civil law paradigm because it is only by paying attention to them that we can give an adequate account of, and justification for, victim-oriented remedies".

claim.[41] For this reason, fewer judges now appear to be seriously uncomfortable with assessing a disabled claimant's conduct objectively, and authorities such as *Russell* (which was, anyway, only a trial court decision) and *Smith* therefore represent the exception rather than the rule. Moreover, as McLure P. and Murphy J.A. pointed out, the significance of *Russell* must now be called into serious question following the decision in *Imbree*, and in *Smith* only Meagher J.A. actually discussed the possibility of taking account of the claimant's condition when determining his contributory negligence.

It would not, however, be accurate to suggest that, aside from decisions such as *Russell* and Meagher J.'s dictum in *Smith*, the notion of an attenuated standard for the disabled is wholly without modern judicial support. For notwithstanding the particular problems inherent in assessing mental disabilities (which can vary even more subtly than the physical ones with which the court was predominantly concerned in *Hodder*), there is at least one situation—that of a prisoner who commits suicide while in custody—in which the English courts take account of a person's mental state in assessing his contributory negligence. Thus in *Kirkham v. Chief Constable of the Greater Manchester Police*,[42] the English Court of Appeal held that the police owed a duty of care to inform the prison to which a remand prisoner was being transferred that he was clinically depressed and suicidal. When they failed to do this and he took his own life, the court awarded damages to the prisoner's widow without even considering the possibility of a reduction for contributory negligence. In contrast, in the subsequent case of *Reeves v. Commissioner of Police of the Metropolis*,[43] the House of Lords, while also holding that a duty of care had been owed to a suicidal remand prisoner who killed himself in custody, nevertheless reduced the damages payable by 50% to take account of the fact that the prisoner was of sound mind when he took his own life.[44] Although *Kirkham* was not discussed in *Hodder*, and only Martin C.J. alluded to *Reeves* (and then only tangentially when citing the judgment of Bell J. in *Russell*), some English law commentators regard the prisoner-suicide cases—together with the old physical disability case of *Daly*—as supporting the proposition that claimants with either mental or physical disabilities should be judged by the standard of a reasonable person with those disabilities, and not by a purely objective standard.[45]

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[41] See *e.g.*, *Widdowson v. Newgate Meat Corporation* [1997] EWCA Civ 2763, in which a claimant suffering from a serious mental condition had his damages reduced by 50% on the basis that he failed to take care of his own safety in light of the limitations imposed by his disability.

[42] [1990] 2 Q.B. 283 [*Kirkham*].

[43] [2000] 1 A.C. 360 (H.L.) [*Reeves*].

[44] Lord Hoffmann, observed *ibid*. at 372: "[t]he apportionment must recognise that… the duty… is to demonstrate publicly that the police do have a responsibility for taking reasonable care to prevent prisoners from committing suicide. On the other hand, respect must be paid to the finding of fact that [the prisoner] "was 'of sound mind.'" Lord Hope of Craighead, *ibid.* at 383 *et seq*., referred to cases from the United States, including (at 384) *Champagne v. United States* 513 N.W.2d 75 (N. Dak. Sup. Ct. 1994), which recognised that a mentally ill patient who committed suicide should be held to a lower standard of self-care than one who was not mentally ill.

[45] See *e.g.*, Nicholas J. McBride & Roderick Bagshaw, *Tort Law*, 3rd ed. (Edinburgh: Pearson Education Ltd., 2008) at 620, n. 27 [emphasis in original]:

> In judging whether [the claimant] acted reasonably, one asks whether a reasonable person of [his] age (*Yachuk v Oliver Blais Co. Ltd* [1949] AC 386, *Gough v Thorne* [1966] 1 WLR 1387 and in [his] physical condition (*Daly v Liverpool Corporation* [1939] 2 All ER 142) would have acted the way [he] did. Although there is authority to the contrary (*Baxter v Woolcombers Ltd.* (1963) 107 SJ

One way to justify an attenuated standard of self-preservation for persons with disabilities would—as discussed in *Hodder*—be to extend the reasoning which allows for a lower standard to be applied to children.[46] However, while it is tempting to draw an analogy between youth and disability, there are significant differences between the two. In *Hodder*, Murphy J.A., quoting McPherson J. in *Carrier v. Bonham*,[47] observed that unlike youth, disability is not "a stage of development through which all humanity is destined to pass."[48] All children are judged by the same objective, albeit age-appropriate, criteria. There is, moreover, a general awareness that less can be expected of children, and that adult members of society have an obligation to watch out for them. In contrast, the range of disabilities, both physical and mental, from which an adult may suffer is infinite, with many disabilities being difficult to identify and provide for. As McHugh J. observed in *Joslyn*, a disabled claimant's particular capabilities would have to be assessed on an individual basis, and not simply as part of a class.[49] While this need not prove an insuperable barrier to acceptance of an attenuated standard—at least outside Australia, where it seems the relevant legislation prevents it[50]—such a case-by-case assessment would be time-consuming and potentially sensitive, involving a level of inherent subjectivity which would doubtless leave many judges ill at ease.

A final note concerns the underlying assumption that the principles used in assessing contributory negligence are the same as those used in the tort of negligence. If one treats the two as inextricably linked (as appears to be the case under the Australian legislation),[51] this of course makes it even more difficult to argue for an attenuated standard of care for the disabled—since the introduction of a lower standard applicable to both claimants and defendants would result in disabled defendants being absolved from liability for harm which they caused to others. On the other hand, the English prisoner-suicide cases indicate a more nuanced approach, and one which suggests that—at least in jurisdictions without legislation mandating a single set of principles—it might, in appropriate circumstances, be possible to apply an attenuated standard of self-preservation to disabled claimants without necessarily linking this to a lower standard of care for disabled defendants.

V. Conclusion

While it is hard to disagree with Martin C.J.'s assertion in *Hodder* that a disabled claimant whose contributory negligence is assessed by a purely objective standard of self-preservation faces personal injustice, that does not necessarily lead to the

553), it is hard to believe that [the claimant's] mental condition will not also be taken into account in judging whether [he] acted unreasonably—so that if a reasonable person with [his] mental condition would have acted in the same way, [he] will *not* be found to have acted unreasonably.

The authors give as an example, the mentally ill prisoner who kills himself while in custody.

[46] A lower standard of care may also be applied in other circumstances, such as emergency situations (see *e.g.*, *Jones v. Boyce* (1816) 1 Stark. 493, 171 E.R. 540) or with respect to rescuers, but the analogy in these cases is less obvious.

[47] [2001] QCA 234 at para. 35.

[48] *Hodder*, *supra* note 1 at para. 334, quoting McPherson J.A. in *Carrier v. Bonham*, *ibid*.

[49] *Joslyn*, *supra* note 2 at para. 34.

[50] See *supra* note 17.

[51] *Ibid*.

conclusion that the law is wrong. In any number of situations, one party or the other draws the short straw. When it is not possible to do justice to both parties, we seek the least unjust solution, and that solution often involves adoption of the most objective approach. *Hodder*, as an Australian decision governed by statutory provisions not found elsewhere, may represent the more rigid end of the spectrum of objectivity in assessing contributory negligence. The English prisoner-suicide cases certainly suggest that, further along the spectrum, there is some potential for flexibility. However, it is extremely unlikely that any jurisdiction will adopt an across-the-board approach under which every claimant with a disability will be judged by the standard of a reasonable person with that disability. In Singapore, where to date the only case to have considered an attenuated standard of self-preservation involved a child,[52] it is matter of speculation whether the courts would be willing to apply a similar reasoning to a disabled claimant—although their generally cautious attitude and the paucity of authority from other jurisdictions suggests that this is unlikely.

[52] See *Ang Eng Lee*, *supra* note 7.