OUTER HOUSE, COURT OF SESSION

OPINION OF T G COUTTS

Sitting as a Temporary Judge

in the cause

MICHAEL ALEXANDER HOGG

Pursuer;

against

SHEENA CARRIGAN

Defender:

Pursuer: McEachran, Q.C.; McKay & Norwell, W.S.

Defender: Moore, Solicitor; HBM Sayers

5 January 2001

[1]The pursuer was seriously injured in a road accident. The circumstances were that the deceased William Patrick Carrigan drove his vehicle across the central reservation of a dual carriageway and collided with the pursuer's vehicle head on. The defender has admitted that the accident was caused by the fault and negligence of the deceased. In Answer 4 the defender claims that the pursuer would not have suffered the loss, injury and damage he condescended on had he been wearing, as he ought to have done, a seat belt. He was thrown from the vehicle. He admits he was not wearing a seat belt. The defender pleads that the pursuer's loss injury and damage was caused entirely by the pursuer's own fault and negligence and also a case of contributory negligence.

[2]On the motion roll senior counsel for the pursuer sought *interim* damages. He produced a schedule of damages indicating a total value of the claim he proposed, he said, ultimately to put to a jury of £54,400. It is unnecessary for me to go into detail of the significant injuries sustained by the pursuer but he had a fracture of his right jaw, lost teeth, has facial scarring, had a fracture of his right ankle and left small toe. Having regard to the injuries detailed in the medical reports produced, it was my view that the pursuer could not fail to obtain a finding of total damages of less than £30,000. I made an *interim* award of damages of £12,000.

[3]The defender opposed an award of any *interim* damages. He maintained that although there was an admission of fault in relation to the accident, there was not an admission of liability to make reparation and that in any event the potential award of contributory negligence for failure to wear a seat belt was bound to be substantial.

Counsel for the pursuer argued that the pursuer was entitled under Rule 43.9(3) heads (a) or (b) to an *interim* award.

[4]Rule 43.9(3) reads:

"On a motion... the Court may, if satisfied that - (a) the defender has admitted liability to the pursuer in the action, or (b) if the action proceeded to proof the pursuer would succeed in the action on the question of liability without any substantial finding of contributory negligence on his part... ordain that the defender

make an *interim* payment to the pursuer in such amount as he thinks fit, not exceeding a reasonable proportion of the damages which in the opinion of the Court, are likely to be recovered by the pursuer."

[5]Mr McEachran's argument was that sub-paragraph (a) applied in that liability had been admitted for the accident and the matter of a seat belt was merely whether the defender could establish any diminution in the quantification of damage for that reason. In this case also, he said, the pursuer maintained that had he been wearing a seat belt his injuries would in fact have been worse.

[6]As a subsidiary argument under (b) the pursuer contended that in the light of the *dicta* in *Froom* v *Butcher* 1976 1 QB 286 and the *dicta* of Lord Denning at 295:-

"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."

Lord Denning continued to opine that if injuries were less severe than if a seat belt had been worn, damages attributable to the failure should be reduced by 15% with 25% at the top of the range. *Froom* v *Butcher* has not been overruled or distinguished and has been followed thereafter. Accordingly, in a seat belt case the pursuer is bound to obtain damages and the amount of contributory negligence however quantified does not eliminate that matter unless it could be said to be 100%. Although the defender so pled that was not the probable result of this action.

[7]In his submission the solicitor advocate for the defender reiterated that there had not been an admission of liability merely an admission of fault for the accident and that that did not square with the categoric terms of the rule in sub-paragraph (a). There had not been an admission of liability to make reparation.

[8]In relation to sub-paragraph (b) the contention was that *Froom* v *Butcher* was an old case pronounced at a time when the wearing of seat belts was not compulsory. The current thinking would not support limiting damages to 25% in an appropriate case and, whereas here, the pursuer was thrown out of his vehicle and sustained his injuries by his being so thrown, damages could amount to a very high proportion indeed and certainly a substantial finding of contributory negligence was foreseeable. He drew my attention to proceedings in England in a case *Hitchins* v *Berkshire County Council* in which a Deputy Judge of the High Court was so bold as to express some difficulty in following the logic of Lord Denning's figure of 25%. He said that had he not felt bound by it, he would have agreed that 50% was appropriate. He granted leave to appeal but in the appeal court the pursuer accepted 50% and the matter was settled. There was accordingly no discussion of *Froom* v *Butcher* in the Court of Appeal but the decision was illustrative of the proposition that there could well be findings of above 25%. That would make them substantial. This was the more so if the case were to go to a jury as Mr McEachran had indicated because a jury could well find that the injuries sustained by the pursuer were indeed contributed to by his own failure to wear a seat belt by as much as 80% or more.

[9]In my opinion consideration could well be given to rephrasing the rule 43.9 radically. Sub-paragraph (a) does not make it clear whether it is liability to make reparation or whether it is an admission of fault that is meant. However, the matter does not rest entirely on pleadings because the Court may, if satisfied that the defender has admitted liability, (presumably as opposed to a categoric admission) ordain *interim* payment. In the present case because it is a seat belt case and because there is no answer to the negligent driving of the deceased, I an satisfied that the defender has admitted liability. The question of how far that takes the pursuer in relation to the award of *interim* damages is at large for the Court.

[10]However, even if I were wrong about that, I would not consider that, in a seat belt case, and whether or not the 25% mentioned by Lord Denning remains good and sound law, that an award of even 50% in relation to contributory negligence was in the circumstances of this case a substantial finding. It appears to me that the pursuer is bound to obtain damages from the defender. The only question is the amount of the likely damages and whether and if so what proportion should be awarded at the *interim* stage. I accordingly

translated these views into an award of £12,000 *ad interim* which in my view is less than one half of the damages which are likely to be recovered in any forum.