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Judgment: approved by the Court for handing down | *Delivered:* **18/1/06**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

SEAMUS BRENDAN ELLIOTT (A MINOR)
BY HIS FATHER AND NEXT FRIEND DANIEL ELLIOTT

Plaintiff;

-and-

GEOFFREY LAVERTY

Defendant;

DANIEL ELLIOTT

Third Party.

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Higgins J

[1] On 9 November 1994 the minor plaintiff was a front seat passenger in a Nissan Urvan driven by his father (the Third Party) when it was in collision with a Nissan Micra motor car driven by the defendant as a result of which the plaintiff sustained serious injuries. The van was being driven along Tullaghan's Road near Dunloy village, when the motor car emerged from a side road side road on the Third Party's right hand side and collided with the front offside of the van. The van was pushed to its left, travelled down a four foot embankment, through a fence and came to rest in a private garden. Both the plaintiff and the Third Party were injured. The plaintiff was taken to Coleraine Hospital and eventually to the Royal Hospital for Sick Children in Belfast. The police arrived after the plaintiff had been removed by ambulance from the scene to hospital. The investigating officer found the windscreen

was missing from the vehicle, but that both seat belts in the front of the van were in working order and in the recoiled position.

[2] The particulars of personal injuries in the statement of claim disclose that the plaintiff suffered -

> a displaced supracondlylar fracture of the left femur;
> a displaced sub-trochancteric fracture of the right femur
> a comminuted, displaced supracondylar fracture of the left humerus and
> numerous lacerations to the scalp and numerous abrasions to his lower legs; and
> a significant head injury resulting in epileptic problems.

His left elbow is now misshapen with a varus deformity of up to 15 degrees and he suffers from slight loss of flexion. He has residual scarring at the fracture sites where pins required to be inserted.

[3] The defence to the statement of claim denied liability but alleged the plaintiff was guilty of contributory negligence. The defendant was convicted of careless driving.

[4] The plaintiff was born on 4 January 1986 and at the time of the accident was eight years and ten months. The writ was issued on 20 March 1997 and the statement of claim was delivered on 2 December 1997. The defence was served on 22 December 1998. On 17 November 2000 the defendant obtained an order on consent for disclosure of the plaintiff's hospital and medical notes. A notice for further and better particulars dated 7 January 2002 was sent to the plaintiff's solicitors. The Notice required the plaintiff to furnish further and better particulars of certain matters arising out of the Statement of Claim. The second matter in the Notice was in these terms –

> 2. State whether or not the plaintiff was wearing a seat belt.

On 5 February 2002 the plaintiff replied –

> "2. Although not absolutely certain of the fact, the plaintiff's next friend believes that the plaintiff was wearing a seat belt."

The plaintiff's next friend was his father, the Third Party.

[5] On 4 February 2002 the defendant obtained leave to issue and serve a Third Party Notice on the plaintiff's father. In the Third Party Notice, dated 12 February 2002, the defendant claimed to be indemnified against the plaintiff's claim or to receive such contribution as the court should seem

meet, on the ground that the plaintiff's personal injuries, loss and damage was caused by the Third Party's negligence and breach of duty in and about the driving, management and control of his van and his negligence in and about the protection and control of the plaintiff to whom he owed a duty of care.

[6] The Third Party statement of claim was served on 30 October 2002. This alleged negligence and breach of duty by the Third Party "in and about the driving, management and control of a motor car (sic), CBZ 7642 and the negligence of the Third Party in and about the care, protection and control of the plaintiff who was at the time eight years of age and to whom the Third Party owed a duty of care". The particulars of negligence allege negligence against the Third Party in respect of his driving of the van. In addition the particulars of negligence included the following –

> causing and permitting the plaintiff to be injured;
> causing and permitting the plaintiff who was eights years old to sit in the front passenger seat of his vehicle;
> causing and permitting the plaintiff to be unrestrained inside his vehicle;
> failing to ensure that the plaintiff wore a properly secured seat belt at all relevant times;
> causing and permitting the plaintiff to be ejected through the front windscreen of his car by reason of the Third Party's failure to ensure that the plaintiff was wearing a properly secured seat belt at the relevant time.

The defence of the Third Party denied all the allegations of negligence alleged.

[7] On 12 November 2004 the plaintiff's claim was settled in the sum £60,000 and costs. The defendant now seeks a declaration that he is entitled to an indemnity or contribution and judgment for same in respect of that amount and costs, or a contribution towards same. The defendant's allegations relating to the manner in which the third party was driving were not pursued and the only issue raised at the trial was whether the plaintiff was wearing a seat belt at the time of the accident or not.

[8] On 15 November 1994 the Third Party made a statement to the police. The last sentence reads -

> "I can't honestly remember if me or Seamus were wearing seatbelts but we normally do."

The Coleraine Hospital notes record "? wearing seat belt; ? went through windscreen".

[9] The damage to the van was extensive. There was extensive frontal damage particularly to the front offside. The front offside wheel was driven in and under the body of the van and was buckled. There was no major damage to the near side front or inside the van opposite the front passenger seat. According to the police accident investigator both front seat belts were in the recoiled position. There was interior damage on the driver's side. The driver (the plaintiff's father and Third Party) suffered ankle injuries, broken ribs and cuts to his head. The Nissan Micra sustained extensive damage to the front, the front nearside and the rear near side. The front nearside was twisted towards the offside and the roof was split and kinked.

[10] Mr R Wallace FRCS, the consultant orthopaedic surgeon in his last report stated –

> "One would have to accept that had this young man been wearing a properly fitted seatbelt, the likelihood of injury would have been greatly diminished. There would of course have been seatbelt restraint injury to the chest and he could have suffered a soft tissue straining injury to the neck. Recovery from both of these injuries would have been likely. Where the limbs flail around within the vehicle in such an accident, bony injury does occur from time to time, but one would not have expected the significant head injury which presumably happened as he broke the windscreen exiting the vehicle. Furthermore, the risk of humeral fracture and factures to both femora would also have been considerably reduced by the wearing of seatbelts. There may have been some bony injury, depending on the circumstances of the forces within the vehicle affecting the position of the limbs, but it is reasonable to accept that the extent of the bony injury sustained is likely to have bee significantly less had seatbelts been worn."

[11] In his evidence Mr Wallace FRCS said that a properly fitted seat belt would significantly reduce the chances of femoral fracture. He hoped it would prevent such injury. He was unable to take the same view of the fracture to the humerus. His evidence was that the arm can flail around in an accident, as he stated in his report, and be injured even when the injured party is restrained. He was of the opinion that if the plaintiff had been restrained parts of the vehicle on the passenger side would have been pushed in around him in order to cause the femoral fractures. In his view the likelihood of injury would be reduced by a properly fitted seat belt. He considered that it would be speculation to comment on how the injuries

recorded were in fact sustained, if the plaintiff had gone through the windscreen.

[12] Dr S J Rattenbury is a Seat Belt specialist and has been investigating road traffic accidents since 1974. A significant part of his work involves matching damage to the vehicles, inside and out, with injuries sustained. He reviewed the manner in which the accident occurred from the damage to the vehicles. He concluded that the occupants of the van would have been moved forwards and to the right in the impact and would have continued in that movement until they hit something or were restrained. In his experience it is possible for a restrained passenger to sustain a fracture to the femur in a road traffic accident, but it is a less likely occurrence. Where it does occur it is usually caused by part of the structure of the vehicle being driven back onto the passenger's knee. To cause such an injury the structure would require to be driven back about 6 to 8 feet. Such an injury is more likely to occur to a driver than a passenger, particularly a young passenger who would be further away from the facia. He agreed with Mr Wallace that a restrained passenger could sustain an injury to the arm but it would be unlikely that he would sustain a fracture above the elbow, as happened in this case. Having reviewed the circumstances of the accident and the injuries to the plaintiff he was of the opinion that the plaintiff was not wearing a seat belt at the time of the collision.

[13] In 1994 it was an offence for a person, without reasonable excuse, to drive a motor vehicle on a road when a child under the age of 14 years was in the front of the vehicle and not wearing a seat belt – see Article 129 A of the Road Traffic (NI) Order 1981, as inserted by the Road Traffic (Seat Belts) (NI) Order 1982, (now Article 24 of the Road Traffic (NI) Order 1995).

[14] On the evening in question the Third Party, accompanied by the plaintiff, went to the home of Martin Coyle, who is the plaintiff's godson as well as a friend and work colleague of the Third Party. The plaintiff was left in Mr Coyle's home while the Third Party and Mr Coyle delivered furniture to a relative. On returning to Mr Coyle's home the van was driven into the yard. Mr Coyle went to the house and fetched the plaintiff. Mr Coyle said he brought the plaintiff to the van, lifted him into the seat and secured the seat belt around him. The Third Party then drove off. The scene of the accident was about 10 miles from Mr Coyle's home. The Third Party did not give evidence.

[15] It was contended by the defendant that the evidence of Mr Coyle was invention and that the reality was that the plaintiff was not wearing a seat belt throughout the journey home. Mr Coyle said he fastened the seat belt as he knew that the plaintiff would not do so himself. It was suggested by the defendant that it was unlikely that Mr Coyle's evidence was true; otherwise answer 2 in the replies to the notice for further and better particulars, quoted

above, would have been a positive averment that the plaintiff was restrained by a seat belt. It was submitted by Mr Lyttle QC that it was negligence for a driver to permit a child to travel in the front of a vehicle unrestrained. He submitted further that the line of authority in cases of contributory negligence in which damages awarded to unrestrained passengers were reduced by 15 – 25 per cent no longer applied and that the amount of reduction was now at large.

[16] Mr M Maxwell who appeared for the Third Party submitted that Mr Coyle's evidence should be accepted and, if so, no indemnity or contribution would be warranted. He submitted that if the seat belt was fastened at the start of the journey it would be a harsh judgment to find the Third Party guilty of negligence and that no reduction should be made. He submitted that the seat belt could have been interfered with by the plaintiff without the driver's knowledge, particularly as it was dark at the time.

[17] In Froom v Butcher 1975 3 AER 520 it was decided that a plaintiff's damages could be reduced for failing to wear a seat belt. The plaintiff was the driver of a vehicle involved in a collision with another vehicle, which was wholly the fault of the other driver. At first instance the judge declined to reduce the damages due to the failure of the plaintiff to wear a seat belt. On appeal that decision was reversed and the damages were reduced by 20%. It was held that if the injuries would have been prevented altogether the reduction should be 25% but if the evidence showed that the injuries would merely have been a good deal less the damages should be reduced by 15%. Lord Denning gave the judgment of the court. This was the first case involving seat belts to come before the Court of Appeal. There had been many decisions at first instance and these were reviewed by Lord Denning. They revealed a sharp difference of opinion among judges as to whether the failure to wear a seat belt amounted to contributory negligence. Lord Denning observed, that in cases involving issues relating to seat belts the injured plaintiff, if a passenger, is in no way to blame for the accident. It is entirely the fault of the driver either of the vehicle in which the plaintiff was a passenger or the driver of another vehicle. He went on to say at page 291 –

> "The question is not what was the cause of the accident. It is rather what was the cause of the damage. In most accidents on the road the bad driving, which causes the accident, also causes the ensuing damage. But in seat belt cases the cause of the accident is one thing. The cause of the damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt. If the plaintiff was to blame in not wearing a seat belt, the damage is in part

the result of his own fault. He must bear some share in the responsibility for the damage: and his damages fall to be reduced to such extent as the court thinks just and equitable. In Admiralty the courts used to look to the causes of the damage: see The Margaret [1881] 6 P.D. 76. In a leading case in this court, under the Act of 1945, we looked to the cause of the damage: see Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291, 326. In the crash helmet cases this court also looked at the causes of the damage: see O'Connell v. Jackson [1972] 1 Q.B. 270. So also we should in seat belt cases.

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? Is it 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 easily be undertaken, it might be as well to do it. In Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291, 326, the court said that consideration should be given not only to the causative potency of a particular factor, but also its blameworthiness. But we live in a practical world. In most of these cases the liability of the driver is admitted, the failure to wear a seat belt 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 case the damages should 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 enough 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 case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."

[18] Mr Lyttle QC submitted that the ' percentage reduction rule' as laid down in Froom v Butcher no longer applies. He relied on an unreported decision in Hitchens v Berkshire County Council (June 2000) which is cited in Bingham & Berryman's Motor Claim Cases at paragraph 4.45. In that case a taxi driver was driving home from work when his taxi overturned on a slippery road. He was not wearing a seat belt and was ejected from the car sustaining injuries from which he died. The evidence was that if he had been wearing a seat belt his injuries would have been very minor and he would have survived the accident. A claim was brought on behalf of the driver's widow and child. The defendant argued that damages should be reduced beyond the 'percentage reduction rule' in Froom v Butcher. At the time of the accident it was not compulsory for a driver to wear a seat belt. At first instance the judge stated that if he had been unfettered by authority he would have made a finding of contributory negligence of not less than 50% and perhaps as high as 60/70%. However in view of the authorities he made a finding of 15% contributory negligence. The defendants appealed. Before the appeal was heard the defendants made an offer of 50% of the damages which was accepted by the plaintiff and, as the case involved a child, this settlement was approved by the Court of Appeal. The commentary in Bingham & Berryman suggests that the defendants offered a 50% reduction for contributory negligence. However an article in the Journal of Personal Injury Law suggests that the case was compromised on a 50/50 basis, not because of a reduction of 50% for contributory negligence, but because of the uncertainty of the claim on primary liability, which was based on an allegation that the local council had failed to clear ice from the road. The author states that plaintiffs should continue to use Froom v Butcher as authority, exceptional cases apart, that a reduction of 25% should be regarded as the maximum where a plaintiff is proved not to have been wearing a seat belt. I consider the reasons put forward in the article in the Journal of Personal Injury Law to be the more likely rationale for the outcome in the Court of Appeal, though it may have involved both.

[19] There are a number of cases in which the approach suggested in Froom v Butcher has been adopted. They are mostly cases of contributory negligence, unlike the instant case. Here the defendant is alleging that the Third Party is a joint tortfeasor and seeks indemnity or a contribution from

the Third Party under sections 1 and 2 of the Civil Liability (Contribution) Act 1978. Section 2 (1) provides that the amount of contribution shall be such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage in question. Section 2(1) contains the same words 'just and equitable', as were used in the Law Reform (Miscellaneous Provisions) Act (NI) 1948, relating to reductions for contributory negligence.

[20] In J (A Child) v Wilkins and Others 2001 PIQR 179 (P12) the plaintiff was a two year old girl who was injured in a road traffic accident when travelling on her mother's knee in the front passenger seat of a car driven by her aunt. The mother was wearing a lap and diagonal seat belt with the child secured by the lap portion of the belt. The other driver was wholly to blame for the collision. He joined the mother and the aunt as third parties on the basis that they had been negligent in failing to secure the plaintiff by way of a suitable seat restraint. The judge applied the principles in Froom v Butcher and found the driver of the other vehicle 75% responsible and the mother and aunt 25% responsible. He found the substantial responsibility for the damage suffered resulted from the defendant's driving. He also found that while there was a clear risk of injury from carrying the plaintiff on her mother's lap, the substantial risk of injury only arose once the defendant swerved on to the wrong side of the road. The defendant appealed on the basis that the 25% reduction did not reflect the gravity of the risk to the child when carried in this way and that the 25% figure should not be regarded as the absolute ceiling or as a rule of law. The appeal was dismissed. It was held that the judge had been entitled to apportion liability in the manner in which he had done because (1) there was no prohibition on a child travelling in the front of a vehicle; (2) while the child had not been secured with an appropriate restraint, she had not been entirely unrestrained; (3) while the expert had stressed that the use of a lap belt on its own without the diagonal belt could have devastating consequences where a child was being carried, there was no evidence that J's mother or her aunt had realised that that was the case or had deliberately taken that risk, and (4) the accident had been caused by the gross inattention of the other driver W. The principles adopted in assessing fault under the 1978 Act were similar to those adopted in assessing contributory negligence. Accordingly, the judge had been entitled to rely on the guidelines established in Froom v Butcher 1976 QB 286. These guidelines should apply unless there were exceptional circumstances, for example, where an adult had deliberately carried someone, especially a child, in the front seat of a vehicle without using any seat belt or other restraint at all. In the course of giving the judgment of the court Keene LJ said at page 182 –

> "11. Clearly, any consideration of the apportionment of liability between persons who are both liable for the same damage has to begin with the statutory test spelt out in section 2(1) of the 1978 Act.

That provides that the contribution recoverable by one such person from another:

> '... shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.'

……

13. It is, of course, right that Froom v. Butcher was a decision about a reduction in damages because of a claimant's contributory negligence--a decision, therefore, made under section 1 of the Law Reform (Contributory Negligence) Act 1945. It was not concerned as such with contribution as between joint tortfeasors or others liable for the same damage. Nonetheless, the similarity in the language used in section 2(1) of the 1978 Act and the wording of section 1 of the 1945 Act is striking; and there is no reason why the principles applicable under the two statutes should be different in cases where the facts are themselves similar.

14. That the same approach is to be adopted in both types of cases was implicit in the decision in Ingram v United Automobile Service Ltd [1943] KB 612. In any event, I agree with what was said by Simon Brown J. (as he then was) in Madden v Quirk [1989] 1 W.L.R. 702, at 707E, namely that the word 'responsibility' as used in section 2(1) of the 1978 Act 'involves considerations both of blameworthiness and of causative potency'. So, of course, does an assessment of the claimant's share in the responsibility for his damage under section 1 of the 1945 Act (see Davies v. Swan Motor Co. (Swansea) Ltd [1949] 2 K.B. 291, at 326). In those circumstances the learned deputy judge was not wrong to refer to, and to rely on, the decision in Froom v. Butcher. It was a decision which can provide valuable guidance in similar cases falling under the 1978 Act when an apportionment has to be made between defendants or, as in this case, Part 20 defendants.

15. Nor, in my view, can the judge be faulted for having described himself as "bound" by the decision in Froom v Butcher. I say that because it is clear from his judgment that he was prepared to, and did, consider to what extent the figure of 25 per cent suggested by Lord Denning had been exceeded during the 23 years since that decision, so as to see how readily the courts have been prepared to treat that figure as merely a guideline for the great majority of cases and how readily one should make an exception to it. The fact is that there has been no reported case of which counsel are aware where a passenger's failure to wear a seat belt has resulted in a finding of more than 25 per cent contributory negligence. I read the trial judge's comment as indicating simply that he saw the guidelines in Froom v Butcher as being applicable. In so doing, he did not go wrong.

16. Having said that, it is right to recognise that the Court of Appeal in Froom v Butcher put the various figures forward as suggestions or guidelines. That can be seen from the relevant passage from Lord Denning's judgment at p.296C-D:

17. Mr Main correctly submits that when those figures were put forward it was not compulsory as a matter of law to wear seat belts. It is now. On the other hand, the Court of Appeal there was aware that legislation to that effect was being contemplated. Reference is made to that in the judgment of Lord Denning at p.294C. So that was an aspect which was taken into account. A reading of that judgment shows that the Court of Appeal was not there seeking to put forward the figure of 25 per cent contribution as an absolute and immutable ceiling in every single case. But it clearly did wish to give guidance which would apply in the vast majority of cases, so that one could avoid what is described as an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed (see p.296B).

18. It follows that, while in principle there could be exceptional cases which fall outside the range suggested, one would expect such cases to be rare. That indeed has proved to be the situation. There is

value in having clear guidelines normally applicable, so as to aid parties in arriving at sensible settlements.

19. Such an exceptional situation might perhaps exist under the 1978 Act where an adult was deliberately carrying someone on his or her lap in the front seat of a vehicle with no seat belt or other fitted restraint being applied to the person, particularly if that person was a child. I can see an argument that the blameworthiness of that adult with a child on his or her lap could be assessed at more than 25 per cent since such a child (or, indeed, an older person) might be in a potentially more vulnerable position than would a person sitting directly on the front passenger seat in the normal way. The child is in closer proximity to the facia and windscreen of the car. No doubt factual and expert evidence would be required to establish that there was that greater vulnerability. But that is not this case, because here the Part 20 defendants were aware that the claimant was restrained by a lap belt, and indeed the mother had herself fitted it around the child.

20. In the present case the trial judge did not, in my judgment, treat the 25 per cent figure in Froom v Butcher as an absolute ceiling. Nor did he rely solely on that case, but exercised also his discretion under the 1978 Act independently of Froom v Butcher. He sought to arrive, as he said, at a just and equitable decision, bearing the responsibility of each of the parties in mind.

21. Was the judge clearly wrong or guilty of an error in principle in arriving at the conclusion which he reached? One accepts that the judge found that the terrible injuries to this young child would have been entirely, or virtually entirely, avoided had she been wearing an approved child restraint. But that does not undermine the apportionment arrived at below. The figure of 25 per cent contribution was put forward in Froom v Butcher for precisely those cases where the damage would have been prevented altogether by the wearing of a seat belt. It remains the fact that the defendant, driving his Volkswagen Golf, caused this accident. The injury suffered by this child was the result causally both of the defendant's

negligence and of that of the Part 20 defendants. That is the very reason why the 1978 Act is applicable.

22. In terms of blameworthiness, one has to bear in mind the following factors. First, as a matter of law, there is no prohibition on a child travelling in the front of a vehicle. Secondly, while the law does require a child of this age travelling in the front of a vehicle to have appropriate seat restraint, the mother had in fact put the lap part of her seat belt around the child. What she did did not comply with the law, but she did not leave the child wholly unrestrained. Thirdly, as it turned out, that action on her part, according to the expert, actually made the situation worse. However, there was no evidence that the mother or her sister were aware of that. Undoubtedly, as Mr Main has accepted, the mother thought that she was helping to protect her child by putting the lap belt around her. As Dr Rattenbury said, ordinary members of the public do not understand how dangerous such an action is. In the light of this case, they ought to be so advised; and those responsible for road safety may wish to give consideration to giving greater publicity about the risks attendant on such a situation. But as things stood, the blame to be attached to the mother and her sister must be limited by their lack of understanding of this risk--a lack which they shared with much of the public and which in that sense was objectively understandable. This was not merely a subjective ignorance on their part, but something shared by those who lacked expertise in such matters. Fourthly, I can see no basis for interfering with the judge's finding that the Part 20 defendants were not deliberately taking a risk. The evidence was such that he could properly make the finding which he did.

23. When all those factors are taken into account, it seems to me that one cannot say that the trial judge was clearly wrong or that he went wrong in principle in approaching the issue of apportionment in the way he did. The figures of 75 per cent and 25 per cent were, on the facts, a distribution of liability which he was entitled to arrive at, given the gross inattention of the defendant and the behaviour of the Part 20

defendants.

It follows that, for my part, I would dismiss this appeal."

[21] Several matters can be gleaned from this authority and the passage quoted from the judgment of Keen LJ. Any apportionment of liability between joint tortfeasors, must begin with the statutory test. This provides that any contribution must be such as the court finds to be just and equitable having regard to the extent of the responsibility for the damage. There is no reason why the principles applicable to contributory negligence cases should not apply to joint tortfeasors. Froom v Butcher laid down guidelines for cases of contributory negligence. In cases in which the damage would have been prevented altogether by the wearing of a seat belt Froom v Butcher suggested a guideline maximum of 25%; it did not establish a ceiling of 25% that could not be breached. Exceptional cases might justify a reduction or contribution beyond 25%. In upholding the reduction of 25% in that appeal the Court of Appeal found that the application of the guidelines in Froom v Butcher was not incorrect and that the 25% reduction was within the discretion of the judge applying the just and equitable test.

[22] Guidelines are merely guidelines; they are not set in stone. Their application will vary according to the circumstances and the time. A much stricter attitude is taken to the wearing of seatbelts now than was taken twenty or more years ago and there is now a greater awareness of the protection afforded to drivers and passengers alike, through the wearing of seatbelts. Those factors in themselves should not lead to an increase in the guideline figures. The amount of reduction, contribution or indemnity is determined by the level of responsibility that some person, other than the driver of the vehicle responsible for the collision, has for the damage that has occurred. It may arise in very different circumstances which provide different levels of responsibility. The determination of the level of contribution arising from the degree of responsibility in a case involving lack of restraint is very different from the apportionment of responsibility between two drivers each responsible through their driving for a collision and resultant damage. In the former case only one party is responsible for the collision. The damage due to the lack of restraint arises only after the collision has been caused. Therefore the primary responsibility should invariably rest with the party responsible for the accident or collision, through the manner of their driving.

[23] It seems clear from the evidence of Dr Rattenbury and Mr Wallace FRCS that the plaintiff was not restrained by a seat belt at the time of the collision. There is no evidence of interference with the seat belt during the journey. Lack of restraint at the time of collision is more likely to arise from a failure to secure the seatbelt at the commencement of the journey, than from interference with it during the journey. The evidence of Mr Coyle is

undermined by the reply to Question 2 quoted above. If the plaintiff had been a properly restrained front seat passenger his injuries would not have been as severe. It was the responsibility of the adult driver to ensure that he was properly restrained at all times.

[24] The evidence in this case raises a number of issues to which there appear to be no answers; probably not unusual in such cases. There is no evidence where the plaintiff was found immediately after the collision or when the ambulance crew arrived at the scene. There is a presumption that he exited the vehicle, but no evidence that he did. Mr Wallace FRCS commented that femoral fractures were common in motor vehicle accidents prior to the compulsory use of seatbelts. Presumably not all those passengers were ejected from the vehicle. Mr Wallace FRCS thought the head injury occurred when the plaintiff broke the windscreen on exiting the van. The windscreen was missing. There is no evidence the windscreen was broken though there was glass and lots of debris on the road. The damage to the vehicles would suggest the impact was extremely forceful. The offside front wheel of the van was driven back and buckled. Regardless of the forces involved would a child of eight years have broken or dislodged the windscreen? Was the windscreen, which was found to be missing, dislodged by the force and direction of the impact between the two vehicles ? If so, did the plaintiff exit the vehicle almost simultaneously (if he did exit the vehicle) through the gap left by the already dislodged windscreen ? Or, did the plaintiff strike the windscreen and only exit the vehicle when it struck the embankment or was brought to a halt in the garden? In his statement the Third Party said he heard the plaintiff crying after the vehicle came to rest. Where was the plaintiff at that time ? The point of impact was some distance behind the area where the van came to rest.

[25] Mr Wallace FRCS said it would be speculation to say how the injuries were caused. But there are questions unanswered relating to them. Were they all caused at once or by striking the windscreen or landing on a hard surface like the road or both ?. As Lord Denning observed in Froom v Butcher it is the responsibility for the damage which is important. Would the plaintiff have been as seriously injured if the windscreen had remained intact and he in the vehicle? What effect would it have on the level of responsibility if the windscreen was dislodged by the impact, when otherwise he would have remained in the vehicle and perhaps not have been injured as seriously ?.

[26] Mr Wallace FRCS commented on the frequency, prior to the seatbelt legislation, of femoral fractures in unrestrained passenger in vehicle accidents. He did not say those passengers exited the vehicles. Therefore it seems femoral fractures were not uncommon in unrestrained passengers who remained in the vehicle after impact. How did this plaintiff sustain two femoral fractures if he did not remain in the vehicle? It is probable if not certain that some of these questions cannot be answered. Two matters seem

clear – the plaintiff was eight years of age and the windscreen was missing. In the absence of other evidence I do not draw the inference that it was dislodged by the plaintiff striking it. That leaves a number of questions unanswered. There are probably similar unanswered questions in all cases alleging failure to be restrained by a seatbelt due to the uncertainty as to the causation of injuries. The statement of claim alleges that the Third Party caused or permitted the plaintiff to be unrestrained in the front seat. I prefer the view that he permitted that situation rather than caused it.

[27] It is against that evidence and background that the court has to consider the level of responsibility for the damage suffered by the plaintiff, that should be borne by the Third Party. It is a case for contribution, not indemnity. The comments of Lord Denning at page 296 in Froom v Butcher referred to above are relevant. By far the greater responsibility must lie with the negligent driver. In this case the defendant drove at night out of a side road onto the major road without stopping. He caused a serious accident in which three persons, including himself, were injured. The Third Party was under a duty to ensure that the minor plaintiff sitting in the front seat was properly restrained. He was in breach of that duty. As a tortfeasor he stands in a different position from a plaintiff who is guilty of contributory negligence. The latter has merely been careless for his own safety, whereas the joint tortfeasor has been in breach of a duty owed to another person, a duty now imposed by statute. The plaintiff was in the front seat and unrestrained. That should be regarded as taking a considerable risk with an eight year old child.

[28] The level of responsibility should be such as is just and equitable. The cases, in particular Froom v Butcher, recognise a distinction between accidents in which the damage would have been prevented altogether by the use of a seatbelt and others in which it would only have made a considerable difference. In the former cases Lord Denning suggested 25% reduction and in the latter case 15 % reduction. But these are only guideline percentages. I do not think this is a case in which it could be said that damage to the plaintiff could have been prevented altogether. This was a significant collision and impact. If the plaintiff had been restrained it would have made a considerable difference; but it is impossible to say what that difference would have been. If the evidence demonstrated that the plaintiff had struck the windscreen and exited the van along with it, thereby suffering all his injuries as a result of the lack of restraint I would consider a figure in excess of 25 % would be appropriate. However as I am not satisfied of that on the balance of probabilities I have to assess the appropriate contribution on the basis of what has been proved, against a background in which it is impossible to demonstrate how all his injuries were caused, a situation probably not uncommon in this type of case. Clearly the wearing of a seat belt would have made a difference. The contribution must be what is just and equitable on the basis of the respective responsibility for the damage, of the driver who caused

this accident and the third party who contributed to it, by permitting his son to sit in the front passenger seat unrestrained by a seat belt. I apportion the responsibility - 80% as against the driver of the motor car who caused the accident and 20% as against the third party. Therefore there will be judgment for the defendant against the third party for 20% of the damages awarded to the plaintiff and a similar contribution in respect of the costs of the plaintiff's action. There will be a declaration to that effect and judgment for the defendant accordingly.