PI DEFENDANT SEMINAR 2013

CONTRIBUTORY NEGELIGENCE
WORKSHOP PROBLEM 3

Scenario and Discussion

Abi was driving her **father** and **mother** and sister to the shops, when her car was hit head-on by an insured driver.

Abi's seat was closer to the steering wheel than she needed, because her sister, who is shorter, had been borrowing the car. Abi was comfortable driving but would usually be 3-4" further back. She was wearing a seatbelt but hit her head on the steering wheel, suffering a head injury. If the seat had been 3" further back she would not have been injured.

Dad was sitting in the front seat without a belt. He felt claustrophobic wearing a seatbelt, and often felt'puffy'/wheezy when he did. He did not like to bother his busy GP with such things. Dad suffered injuries to his hands as he tried to brace himself on the dashboard, which then crumpled towards him. If he had been wearing a seatbelt, he would probably have suffered some bruising to his chest and might have suffered whiplash, but he would have avoided nasty hand injuries.

Mum is obese. She was sitting in the rear for safety. She was not wearing a seat belt because she did not think that she could not get the belt around her. She suffered a neck injury, and knee injury. The knee injury would have been prevented by wearing a seatbelt.

After the accident, Mum is told that her knee injury is going to recover much more slowly, and may even worsen if she does not lose some weight. She queries what to do and her GP tells her exactly how to cut down on her unhealthy diet. He also gives her the option of having a modest procedure to staple her stomach, which is likely to help her reduce her weight considerably.
Mum declines the procedure and despite some efforts, she continues to eat her unhealthy diet (she blames the stress of the accident and seeing Dad in pain), actually puts on a stone in 24 months after the accident, so that her knee worsens:

- converting the 30% possibility of a replacement in 10 years into a probability;
- from the second anniversary after the accident, increasing her annual care (and DIY) claims by £1,000 per year.

Which of the family members is contributory negligent, why, and to what degree? Would you answers differ if Mum tried to put the seatbelt on, but was unable to do so?

Notes

Abi is not contributorily negligent. She is not obliged to drive a specific distance from the steering wheel. She was wearing a seatbelt.

Dad is probably contributorily negligent. The onus is on the Defendant to prove contributory negligence, but in the absence of a seat belt, the focus shifts back to dad. He will bear an evidential burden of explaining to the satisfaction of the Court the medical reason why he was not wearing the belt.

Was he entitled not to wear a seatbelt? On what grounds? It is possible if he had seen his GP he would have been given a certificate absolving him of the need to wear a seatbelt. (Discuss the basis of such certification).

> MacKay v Borthwick [1982] SLT 265 (short journey and pursuer persuaded Court belt would have pressed on a hiatus hernia;
>
> Condon v Condon [1978] RTR 483 Claimant proved (with medical evidence) that she had a phobia in relation to seat belts and escaped contributory negligence .

The injuries he *might* have suffered if wearing a seatbelt are irrelevant in assessing his contributory negligence. The bruising is difficult to evaluate but very probably irrelevant as well.
If he fails to prove it was reasonable not to wear the belt, his hand injuries would have been *avoided* in which case his contributory negligence in relation to them will be 25%: Froom v Butcher [1976] 1 QB 286, at 295. If they would have been reduced, the deduction would be 15%.
It is interesting to note that the 'rules of thumb' in Froom reflect Lord Denning's comment that:

> "The question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side which would be hotly disputed."

There may well be cases in which it is, in fact, well "worth" (and proportionate to) undertake that inquiry.

Note also Traynor v Donovan [1978] CLYB 2612: no deduction where different but equally serious injuries would have been suffered if a seatbelt had been worn (but Sheldon J was not referred to Froom).

Note also 15% contributory negligence – ie equivalent of 'no belt' contributory negligence - where Claimant agreed to travel in the boot: Gleeson v Court [2008] RTR 10

Mum did not try the seatbelt. However, she asserts that she would not have been able to wear the belt. Once the Defendant proves that she was not wearing the belt, she will bear an evidential burden of proving that she *could not* have done so. This will require expert evidence concerning the make/model vehicle etc.. If Mum could not have worn the belt, she will not be found contributorily negligent.

If the evidence is that she could have worn it, then she will be contributorily negligent in relation to the injury which would have been affected (the knee injury) – reducing *relevant damages* by 25%.
Mum is unlikely to be obliged to undertake the stapling operation to mitigate her loss (but see Thomas v Bath DHC [1995] PIQR Q19 – there may be possible arguments for a yet further percentage reduction if the evidence was that she might contemplate the surgery in the future.
It is strongly arguable (and a matter of fact for the Court) that she could and should have maintained her weight, or lost weight, and that not to do so is 'conduct' contributory negligence: Spencer v Wincanton Holdings [2009] EWCA Civ 1404.

As regards a worsening medical picture, the Claimant's failing as regards her weight may well (subject to the stress argument) be an obvious failing, with predictably significant consequences, which she could have avoided with relative ease.

As contributory negligence involves considering blameworthiness and causation the Court will have to consider all of the circumstances in which Mum's weight gain has taken place. It seems likely that she may well face some finding of 'conduct' contributory negligence in relation to the *extra loss* causatively related to that failure. If so, her damages will be reduced by a *further* percentage to reflect her failing.

In other words, the Court will make two deductions from her damages, the first a generic percentage relating to the seatbelt, the second specifically relating to the impact on the knee injury of her weight gain.