Noteworthy

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Contributory Negligence for Failure to Wear a Seatbelt: Clarification by the Court of Appeal

by Richard Horak

In the recent decision of ***Snushall v. Fulsang*** [2005] O.J. No. 4069, the Ontario Court of Appeal has clarified the law relating to contributory negligence for failing to wear a seatbelt. It is now clear that a jury is to be instructed that any such award should fall within a range of zero to 25%; the Court of Appeal strongly endorsed the view expressed by the trial judge that "most cases" fall into the lower end of the range i.e. between 5% and 10%.

While the facts in ***Snushall*** are somewhat unusual, it is clear that the court's comments apply on a more general basis. In ***Snushall*** the Plaintiff was wearing a lap belt, but was not wearing an available shoulder belt. The jury found the Plaintiff 35% contributorily negligent for failing to wear the shoulder belt.

The trial judge had instructed the jury that the negligence of the Defendants in the operation of their motor vehicles was the cause of the accident and the primary cause of the injuries suffered by the Plaintiff, with the result being that the negligence that caused the accident was "the most blameworthy". If the jury found the Plaintiff guilty of contributory negligence, the trial judge instructed the jury that the Plaintiff's responsibilities should be assessed "on a lesser degree". The jury was advised that the degree of contributory negligence can range between 5% and 25%, with most cases in the 5%-10% range, but the jury was advised that they were not bound by this range.

In considering the jury verdict on the issue of contributory negligence the Court of Appeal began its analysis by considering when a jury verdict could be interfered with. The court noted that a verdict should not be set aside unless it is "so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially

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[1] *Olmstead v. Vancouver-Fraser Park District* [1975] 2 S.C.R. 831

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could have reached it".[1] In determining the jury's assessment as to the degree of contributory negligence, an analogy was drawn to the assessment of damages. If an award of damages is too high or low by 50%, an Appellate Court may interfere.[2] An Appellate Court is not to determine the correct award for damages, but is only to determine whether the award is "beyond the scope of anything that could be accepted as reasonable".[3]

Justice Juriansz, who wrote the judgment for a unanimous court, concluded that the jury's assessment of contributory negligence was "beyond the scope of anything that could be accepted as reasonable on the record in this case. It is outside the usual and appropriate range of contributory negligence for failing to wear a seatbelt and exceeds an appropriate and just result by more than 50%. It is worth noting that the jury did not follow the clear guidance of the trial judge as to the proper range into which the verdict should fall, and assessed contributory negligence at a higher percentage than that urged by Defendant's counsel in his closing address."

The court was careful to note that in the ***Snushall*** case the only element of contributory negligence was failure to wear a seatbelt. In cases where the Plaintiff's negligence has other components, it is conceivable that the award for contributory negligence could be somewhat higher.

The court emphasized the distinction between the Defendant's negligence which "caused" the injuries because it initiated the sequence of events that led to the accident and the contributory negligence of the Plaintiff for failing to wear a seatbelt. Justice Juriansz noted that "the failure to wear a seatbelt "causes" injuries in the sense that the failure to use a prophylactic "causes" pregnancy ... the failure to wear a seatbelt may be said to be a "cause" of the Plaintiff's injuries only in the sense that it contributes to the extent of the injuries suffered".

This distinction is legally significant in that the negligence of the Defendant results in a breach of the general tort duty, but the failure to wear a seatbelt is not a tort, but rather simply an example of an individual failing to protect himself or herself from the torts of others. Accordingly, even if the evidence were to show that, had the Plaintiff been wearing a seatbelt, he or she would have suffered <u>no</u> injuries, it would not be appropriate to find the Plaintiff 100% at fault for the damages.

In explaining this distinction the court referred to its own decision in ***Heeney v. Best***[4]. In the ***Heeney*** case the Defendants were negligent in causing a car accident which led to a power failure at the Plaintiff's barn, where chickens were being raised. Although the Plaintiff had an alarm which was designed to alert him to a power failure, he did not have it activated at the time of the incident. Justice MacKinnon (A.C.J.O.) compared the contributory negligence of the Plaintiff with the failure to wear a seatbelt, stating as follows:

> "The greater fault was clearly that of the respondent. The sole cause of the interruption

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2 *Howes v. Crosby* (1984) 45 O.R. (2nd) 449 (C.A.)

3 *Koukounakis v. Stainrod* (1995) 23 O.R. (3rd) 299 (C.A.)

4 (1979) 28 O.R. (2nd) 71 (C.A.)

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of power was the negligence of the respondent's driver. No negligence of the appellant contributed to that interruption. The appellant's position is somewhat analogous to that of an innocent motorist or motorcyclist (innocent in relation to the collision, that is) who, while without a seatbelt or helmet, is struck and injured by a negligent driver, where it is established that a seatbelt or helmet would have prevented some or all of the injuries suffered."

Justice MacKinnon made reference to the decision of Lord Denning in ***Froom v. Butcher***[5] wherein an exhaustive analysis of contributory negligence for failure to wear a seatbelt had been undertaken. As the Plaintiff's negligence had only contributed to his damages, but the Defendant was wholly to blame for the negligent act which caused the damage, the Plaintiff in ***Heeney*** was found to be contributorily negligent to the extent of 25%.

Justice Juriansz found it significant that in ***Heeney*** the evidence established that all of the chickens would have been saved if the alarm had been in operation, yet the Plaintiff's award of damages was reduced by only 25%. He also noted that Justice MacKinnon only quoted that portion of the ***Froom*** case in which Lord Denning suggested that the assessment of contributory negligence should be zero when the evidence was that none of the injuries would have been prevented by wearing a seatbelt and 25% when the evidence established that all of the injuries would have been prevented by wearing a seatbelt.

"The jury should be instructed that it was bound to return an award within a range that is reasonable i.e. 0%-25%, with the upper limit of the range being available only in those cases where the jury was satisfied that substantially all the damages could have been prevented by

Returning to the facts of ***Snushall***, Justice Juriansz indicated that he found the following evidence "especially pertinent":

1. The Plaintiff complied with the legislative requirement to wear the lap belt, but was not wearing the shoulder belt.

2. There was evidence that people tended to not wear the shoulder belt properly; if worn in the usual improper manner, the protection would have been reduced.

3. The evidence did not establish that wearing the shoulder belt would have prevented all of the Plaintiff's injuries.

Taking into account all the circumstances, Justice Juriansz indicated that the proper award of contributory negligence was 5%.

While the court noted that the instructions given by the trial judge to the jury were in accordance with the standard jury charge, this could be improved. It was suggested that it would be better to instruct the jury that while the Defendant's negligence (if found) was the sole cause of the injuries, the law permitted some reduction of damages if the Plaintiff failed

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[5] [1975] 3 ALL E.R. 520 (House of Lords)

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to take reasonable precautions to protect himself or herself. The jury should be instructed that it was bound to return an award within a range that is reasonable i.e. 0%-25%, with the upper limit of the range being available only in those cases where the jury was satisfied that substantially all the damages could have been prevented by wearing a seatbelt. The comment made by the trial judge, to the effect that most cases fell in the 5%-10% range, was considered to be “useful additional guidance for the jury”.

Conclusion

As a result of the ***Snushall*** decision, we anticipate that it will be difficult to obtain a

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The partners of Hughes Amys are very pleased to welcome Gerry Gill into the partnership. Gerry will be known to most of you, having worked at the firm as a student and since his call to the bar in 2002.

Mario Pietrangeli spoke on the issue of expert witnesses at the 2006 OBA Institute of Continuing Legal Education on a panel presentation titled, "Trial: Enjoy It-- It's Why You're in Business", on January 24, 2006.

Jack Fitch is one of the co-chairs of the Canadian Institute 6th National Summit on Institutional Liability for Sexual Assault and Abuse, being held on February 22 and 23, 2006.

On February 24, 2006 Jack Fitch will speak at an OBA program called "Your First Trial". His topic is "Opening Statements and Closing Argument".

Jack Fitch and Michael Teitelbaum participated in The Canadian Institute's "Auto Insurance Claims Litigation" conference on November 28-29, 2005. Jack's presentation was on making effective use of jury trials in auto insurance litigation. Michael was the moderator of a panel on recent case law and legislation, and he also spoke on two of the nine topics (the *Unger* decision and the possible effect of the elimination of mandatory retirement on auto insurance claims).

Michael Teitelbaum also gave a presentation on Recent Developments in the Law of CGL Exclusions at the December 5, 2005 Infonex conference on "Insurance Litigation Disputes"