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Galaske v. O'Donnell, [1994] 1 S.C.R. 670

**Karl Thomas Galaske, an infant suing by his  
Guardian *ad Litem*, Elizabeth Moser**

*Appellant*

v.

**Erich Stauffer, Florence Horvath, Columcille  
O'Donnell and Bourgoin Contracting Ltd.**

*Respondents*

and between

**Karl Thomas Galaske, an infant suing by his  
Guardian *ad Litem*, Elizabeth Moser**

*Appellant*

v.

**Erich Stauffer, Florence Horvath, Columcille  
O'Donnell, Bourgoin Contracting Ltd.  
and Mala Galaske as Representative *ad Litem*  
of the Estate of Peter Helmut Galaske, Deceased**

*Respondents*

**Indexed as: Galaske v. O'Donnell**

File No.: 23109.

1993: December 3; 1994: April 14.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Major JJ.

on appeal from the court of appeal for british columbia

*Torts -- Negligence -- Motor vehicles -- Seat belts -- Duty of care -- Eight-year-old child injured in motor vehicle accident -- Child not wearing seat belt at time of accident -- Whether general duty of care owed by driver of vehicle to passengers includes duty to take reasonable steps to ensure that passenger under 16 years of age wears seat belt -- If so, whether duty negated by presence of parent of child.*

The appellant, who was eight years old at the time, went with his father to visit the respondent S, a family friend. It was decided that they would go in the respondent's new truck to visit his vegetable garden, which was about a mile and a half from the residence. The truck was fitted with seat belts for all the occupants of the front seat. The appellant sat in the middle between his father and the respondent. The respondent did not suggest that his passengers put on their seat belts because he did not wish to take the "fathership" away from his friend. He readily conceded that if the young appellant had been in the vehicle alone with him he would have insisted that he wear the seat belt. He further agreed that he was aware of the importance of seat belts as a safety factor. The route to the vegetable garden required the respondent to drive by an intersection that he knew to be dangerous. At that intersection, through no fault of his own, his truck was struck by another vehicle. The two passengers were thrown from the vehicle as a result of the impact. The father was killed and the child received serious injuries rendering him paraplegic. The evidence was clear that if seat belts had been worn, no serious injuries would have been suffered by either of the passengers. The trial judge concluded that it was not unreasonable for the respondent to expect that the appellant's father was the appropriate person to exercise control over him and to ensure that he wore a seat belt. He therefore found that there was no duty of care owed by the respondent to the appellant with respect to the use of the seat belt. As a result the respondent could not be found to have been negligent. The Court of Appeal upheld the judgment.

*Held* (Sopinka and Major JJ. dissenting): The appeal should be allowed.

*Per L'Heureux-Dubé, Gonthier and Cory JJ.:* A driver of a motor vehicle owes a duty of care to his passengers to take reasonable steps to prevent foreseeable injuries, and that duty of care extends to ensuring that passengers under 16 years of age wear their seat belts. Passengers and drivers have a duty to ensure their own safety in a car by wearing seat belts, and a failure to do so will result in an assessment of contributory negligence. Children under 16 require guidance and direction from parents and older persons, which must extend to ensuring that they wear their seat belts. Two or more people may bear that responsibility, but one of those responsible must always be the driver of the car. A driver taking children as passengers must accept some responsibility for the safety of those children. The driving of a motor vehicle is a licensed activity that is subject to a number of conditions, and obligations and responsibilities flow from the right to drive. Quite apart from any statutory provisions, the general public knowledge of the vital importance of seat belts as a safety factor requires a driver to ensure that young people make use of them. While the requirement in the British Columbia *Motor Vehicle Act* that drivers ensure that passengers under age 16 wear their seat belts is subsumed in the general law of negligence, it can be taken as a public indication that the failure of a driver to ensure that children in the vehicle are wearing seat belts constitutes unreasonable conduct. It may also be taken as indicating that such a failure on the part of the driver demonstrates conduct which falls below the standard required by the community and is thus negligent.

The duty of a driver to ensure that young passengers wear their seat belts is not negated by the presence of a parent in the car. The presence of a parent may mean that the responsibility is shared but it cannot negate the duty owed by the driver to the passenger under the age of 16. The relationship between driver and passenger is such that the driver's negligent actions or negligent failure to act can lead to injuries to the passengers. Further, it is well established and clearly foreseeable that harm may well result from the failure to wear a seat belt just as much as it may result from negligent driving.

The trial judge and the Court of Appeal were in error in failing to recognize that the duty of care owed by the driver of the motor vehicle to young passengers continued to exist despite the presence of a parent in the vehicle. That is an error of law that should be corrected by an appellate court. The definition of the standard of care is a mixed question of law and fact that will be for the trial judge to determine. The extent of the duty owed by the driver of a vehicle to a child passenger when a parent is present will undoubtedly vary with the circumstances.

*Per La Forest J.:* The responsibility for ensuring that infant passengers use their seat belts must always be borne at least in part by the driver. Not only is the driver in control of the vehicle; for purposes of distributing loss in the event of accident, the driver is most often the insured. Here the respondent owed a duty of care to take some action concerning the appellant's use of a seat belt. The standard of care owed is what kind of action was reasonable under all the circumstances, an

issue that is for the trial judge to determine. However, the mere fact that the respondent thought about the situation and then decided to do nothing is insufficient in law to meet that standard.

*Per McLachlin J.:* The trial judge found no duty relationship between the respondent driver and the appellant, and this was an error of law. His express words "I find there was no duty of care" are confirmed by the absence following this finding of the sort of analysis of all the facts and circumstances which is typical of determination of the standard of care. The standard of care is for the trial judge to determine on the evidence, and may vary from case to case. While, in general, insistence that passengers wear seat belts is a reasonable measure, circumstances may arise where a trial judge might conclude otherwise.

*Per Sopinka and Major JJ. (dissenting):* While the respondent owed the appellant a duty of care, the courts below found such a duty and determined as a finding of fact that the standard of care imposed by that duty had been met. The trial judge stated that he found there was no duty of care owed, but it is apparent in the context of the whole of his oral reasons that this statement was intended to refer to the standard, and not to the duty, of care. The Court of Appeal, in confirming the trial judge's decision, also referred to the duty of care while meaning the standard. The standard of care involves questions of law and fact, and the formulation and application of the standard may be influenced by the presence of a statutory obligation, as existed in this case. Appellate courts must not interfere with findings of fact, whether by judge or jury, if there was evidence capable of supporting the decision, or unless there has been a palpable and overriding error. Here the trial judge reached his conclusion after a careful review of the law and evidence. As there is nothing in the record to suggest that he committed a palpable and overriding error, his decision is not subject to reversal on appeal.

## Cases Cited

By Cory J.

**Referred to:** *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Hall v. Hebert*, [1993] 2 S.C.R. 159; *Donoghue v. Stevenson*, [1932] A.C. 562; *Froom v. Butcher*, [1975] 3 All E.R. 520; *Jackson v. Millar*, [1972] 2 O.R. 197 (H.C.), rev'd [1973] 1 O.R. 399 (C.A.), rev'd [1976] 1 S.C.R. 225; *Dodgson v. Topolinsky* (1980), 125 D.L.R. (3d) 177; *Pugliese v. Macrillo Estate* (1988), 67 O.R. (2d) 641; *Thurmeier v. Bray* (1990), 83 Sask. R. 183; *Ohlheiser v. Cummings*, [1979] 6 W.W.R. 282; *Keller v. Kautz* (1982), 20 Sask. R. 420; *Rinas v. City of Regina* (1983), 26 Sask. R. 132; *Berube v.*

*Vanest*, [1991] O.J. No. 1633 (QL); *Horsman v. Bulmer* (1987), 42 C.C.L.T. 220; *Schon v. Hodgins*, [1988] O.J. No. 743 (QL); *Gervais v. Richard* (1984), 48 O.R. (2d) 191; *Stamp v. The Queen in right of Ontario* (1984), 47 O.R. (2d) 214; *Beaver v. Crowe* (1974), 49 D.L.R. (3d) 114; *Wallace v. Berrigan* (1988), 47 D.L.R. (4th) 752; *Holstein v. Berzolla*, [1981] 4 W.W.R. 159; *Ducharme v. Davies* (1981), 12 Sask. R. 137 (Q.B.), aff'd in part [1984] 1 W.W.R. 699 (Sask. C.A.); *Shaw Estate v. Roemer* (1982), 51 N.S.R. (2d) 229; *Yuan v. Farstad* (1967), 62 W.W.R. 645; *Earl v. Bourdon* (1975), 65 D.L.R. (3d) 646; *Gagnon v. Beaulieu*, [1977] 1 W.W.R. 702; *Aujla v. Christensen*, [1992] B.C.J. No. 860 (QL); *Pharness v. Wallace*, [1987] B.C.J. No. 2393 (QL), aff'd [1989] B.C.J. No. 2112 (QL); *Bentzler v. Braun*, 149 N.W.2d 626 (1967); *Mortensen v. Southern Pacific Co.*, 53 Cal. Rptr. 851 (1966); *Da Costa v. Da Costa*, [1993] B.C.J. No. 1485 (QL); *Arnold v. Teno*, [1978] 2 S.C.R. 287; *McCallion v. Dodd*, [1966] N.Z.L.R. 710; *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.

By Major J. (dissenting)

*Le Lievre v. Gould*, [1893] 1 Q.B. 491; *Canadian National Railway Co. v. Vincent*, [1979] 1 S.C.R. 364; *DesBrisay v. Canadian Government Merchant Marine Ltd.*, [1941] S.C.R. 230; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Benmax v. Austin Motor Co.*, [1955] A.C. 370; *Warren v. Coombes* (1979), 142 C.L.R. 531; *Lewis v. Todd*, [1980] 2 S.C.R. 694; *Migliore v. Gerard* (1987), 42 D.L.R. (4th) 619.

### **Statutes and Regulations Cited**

*Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 217(6).

### **Authors Cited**

Fleming, John G. *The Law of Torts*, 8th ed. Sydney: Law Book Co., 1992.

Linden, Allen M. *Canadian Tort Law*, 5th ed. Toronto: Butterworths, 1993.

Todd, Stephen M. D., ed. *The Law of Torts in New Zealand*. Sydney: Law Book Co., 1991.

APPEAL from a judgment of the British Columbia Court of Appeal (1992), 67 B.C.L.R. (2d) 190, 13 B.C.A.C. 143, 24 W.A.C. 143, affirming a decision of Harvey J. dismissing the appellant's action against the respondents Stauffer and Horvath. Appeal allowed, Sopinka and Major JJ. dissenting.

*Romano F. Giusti*, for the appellant.

*Avon M. Mersey* and *Michael J. Sobkin*, for the respondents Erich Stauffer and Florence Horvath.

The following are the reasons delivered by

LA FOREST J. -- I have had the advantage of reading the reasons of my colleagues, Justice Cory, Justice McLachlin and Justice Major, and I have reached the same conclusion as Cory J.

The responsibility for ensuring that infant passengers use their seat belts must always be borne at least in part by the driver. Not only is the driver in control of the vehicle; for purposes of distributing loss in the event of accident, the driver is most often the insured. I would differentiate more sharply than Cory J. does between the duty of care (a question of law) and the standard of care (a question of mixed law and fact), though I confess that the distinction may at times be elusive. In the present case, the respondent driver owed a duty of care to take some action concerning the appellant's use of a seat belt. The standard of care owed by the respondent is what kind of action was reasonable under all the circumstances, an issue that is for the trial judge to determine. However, the mere fact that the respondent thought about the situation and then decided to do nothing is, in my view, insufficient in law to meet that standard.

For these reasons, I would dispose of the appeal in the manner proposed by Cory J.

The judgment of L'Heureux-Dubé, Gonthier and Cory JJ. was delivered by

CORY J. -- The issue raised on this appeal is whether the general duty of care owed by the driver of a car to his passengers includes a duty to take reasonable steps to ensure that a passenger under 16 years of age wears a seat belt. If it is found that such a duty exists then it must be determined whether that duty is negated by the presence of a parent of the child.

### Factual Background

On August 17, 1985, Karl Galaske, then eight years of age, together with his father Peter came to visit Erich Stauffer, a friend of the family of many years.

It was decided that Karl and his father would go in Erich Stauffer's new truck to visit his vegetable garden, which was located a mile and a half from Stauffer's residence. The truck was fitted with seat belts for all the occupants of the front seat. Karl sat in the middle between his father and Erich Stauffer.

Mr. Stauffer did not suggest that his passengers put on their seat belts. He omitted doing so because, in his words, he did not wish to take the "fathership" away from his friend Peter Galaske. He readily conceded that if young Karl had been in the vehicle alone with him he would have insisted that he wear the seat belt. It was only the presence of the father which prevented him from requiring that the seat belt be worn. He further agreed that he was aware of the importance of seat belts as a safety factor. This resulted, in part, from instructions that he had received from the Ministry of Highways. As well, he had been stopped on no less than three occasions with regard to seat belts. On the first occasion, he had been warned by the police of the necessity of wearing his seat belt. On the second, he had received a ticket for failing to wear his seat belt. On the third, he was the driver of the car when his wife received a ticket for failing to wear her seat belt.

The decision not to insist upon Karl wearing his seat belt had tragic results. The route to the vegetable garden required Stauffer to drive by an intersection that he knew to be dangerous. At that intersection, through no fault of his own, his truck was struck by another vehicle, driven by the defendant O'Donnell. The Galaske father and son were thrown from the vehicle as a result of the impact. Peter Galaske was killed and Karl Galaske received serious injuries rendering him paraplegic.

### The Courts Below

*The Trial Division*

The trial judge held that the accident itself was caused solely by the negligence of the defendant O'Donnell. He then considered whether the respondent Stauffer could be held responsible for the failure to ensure that Karl Galaske had worn his seat belt. The evidence was clear that if seat belts had been worn, no serious injuries would have been suffered by either of the passengers.

The trial judge accepted the respondent's evidence that he was aware that seat belts should be worn to reduce injuries. However, the respondent was not aware of the specific provisions of s. 217(6) of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, which prohibits the driving of a motor vehicle unless seat belts are worn by children under 16 years of age. The trial judge considered that the case of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, established the principle that a breach of the provisions of s. 217(6) did not in itself give a right of recovery. He decided that the statutory formulation of the duty did not, in the circumstances of this case, define a specific standard of reasonable conduct. Lastly, he determined that the liability of the driver should be determined in light of the surrounding circumstances. He concluded that it was not unreasonable for Stauffer to expect that Karl's father was the appropriate person to exercise control over him and to ensure that he wore a seat belt. He therefore found that there was no duty of care owed by the defendant Stauffer to the infant plaintiff with respect to the use of the seat belt. As a result Stauffer could not be found to have been negligent.

*The Court of Appeal* (1992), 67 B.C.L.R. (2d) 190, 13 B.C.A.C. 143, 24 W.A.C. 143

The Court of Appeal agreed with the conclusions of the trial judge. The majority noted that what was of significance was the presence of the father in the vehicle and the friendly and close relationship which existed between Stauffer and the father. This was sufficient to justify the conclusion that there was no liability resting upon Stauffer.

Locke J.A. agreed with the conclusions of the majority but observed that the accident occurred in 1985 when seat belt legislation was not as prominent as it was at the time of the appeal. He stated that if the accident had happened at the time of the appeal, his conclusion would have been different.

Analysis

The issues that arise in this case can, I think, be resolved upon an application of the classic principles of tort law.

Basically, a defendant can only be found liable if it is established, first, that he owed a duty of care to the plaintiff and, second, that he was in breach of that duty and failed to exercise the standard of care of a reasonable person placed in the same circumstances. Let us first consider the concept of the duty of care.

### *The Existence of a Duty of Care, Generally*

In *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11, Wilson J. paraphrased the two-stage test formulated in *Anns v. Merton London Borough Council*, [1978] A.C. 728, for determining whether a duty of care existed. She did so in these words:

(1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

This approach has been quoted with approval in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and *Hall v. Hebert*, [1993] 2 S.C.R. 159. This is the basis upon which a determination should be made as to whether there is a sufficiently close relationship between the parties to establish that a *prima facie* duty of care is owed by one party (the defendant) to another party (the plaintiff). The principle was set out in *Donoghue v. Stevenson*, [1932] A.C. 562, at p. 580, in these classic words:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I

ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Is there then a sufficiently close relationship between the driver of a motor vehicle and his passengers to establish a *prima facie* duty of care? I think that there undoubtedly is such a relationship. A driver owes a duty of care to his passengers to take reasonable steps to prevent foreseeable injuries. For example, a driver must comply with the rules of the road; a driver must exercise reasonable caution in the operation of a motor vehicle; a driver must not operate a motor vehicle that is known to be mechanically defective, for example without brakes or headlights or an adequate steering mechanism. The next question to be resolved is this: should that duty of care extend to ensuring that passengers under 16 years of age wear their seat belts?

### *The General Duty Resting on All Occupants of a Car to Wear Seat Belts*

It has long been recognized that all occupants of a motor vehicle have a duty to wear their seat belts. In his excellent text *Canadian Tort Law* (5th ed. 1993), Justice Linden carefully reviewed the cases involving the use of seat belts. He observed that Canadian courts have recognized that passengers and drivers have a duty to ensure their own safety in a car by wearing seat belts. A failure to do so will result in an assessment of contributory negligence against that person. The author notes that where the seat belt defence was rejected, there was no evidence that the failure to wear the seat belt caused or aggravated the injury. That is certainly not at issue in this case.

The reasoning of Lord Denning in *Froom v. Butcher*, [1975] 3 All E.R. 520, at pp. 525-27, has often been cited in support of the need to wear seat belts. There he stated:

#### *The sensible practice*

It is compulsory for every motor car to be fitted with seat belts for the front seats. The regulations so provide. They apply to every motor car registered since 1st 1965. In the regulations seat belts are called, in cumbrous language, 'body-restraining seat belts.' A 'seat belt' is defined as 'a belt intended to be worn by a person in a vehicle and designed to prevent or lessen injury to its wearer in the event of an accident to the vehicle . . .'

Seeing that it is compulsory [*sic*] to fit seat belts, Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault; and he has only himself to thank for the consequences.

Much material has been put before us about the value of wearing a seat belt. It shows quite plainly that everyone in the front seats of a car should wear a seat belt. Not only on long trips, but also on short ones. Not only in the town, but also in the country. Not only when there is fog, but also when it is clear. Not only by fast drivers, but also by slow ones. Not only on motorways, but also on side roads. . . .

. . .

Quite a lot of people, however, think differently about seat belts. Some are like Mr. Fromm here. They think that they would be less likely to be injured if they were thrown clear than if they were strapped in. They would be wrong.... In determining responsibility, the law eliminates the personal equation. It takes no notice of the views of the particular individual; or of others like him. It requires everyone to exercise all such precautions as a man of ordinary prudence would observe....

. . .

Other people take the view that the risk of an accident is so remote that it is not necessary to wear a seat belt on all occasions; but only when there are circumstances which carry a high risk. . . . I cannot accept this view either. You never know when a risk may arise. It often happens suddenly and when least anticipated, when there is no time to fasten the seat belt. Besides, it is easy to forget when only done occasionally. But, done regularly, it becomes automatic. Every time that a car goes out on the road there is the risk of an accident. Not that you yourself will be negligent. But that someone else will be. That is a possibility which a prudent man should, and will, guard against. He should always, if he is wise, wear a seat belt.

. . .

Lastly, there are many people who do not wear their seat belts, simply through forgetfulness or inadvertence or thoughtlessness. . . . The case for wearing seat belts is so strong that I do not think the law can admit forgetfulness as an excuse.

These reasons are as sensible and compelling in 1994 as they were in 1975, and should have been in 1985.

The courts in this country have consistently deducted from 5 to 25 percent from claims for damages for personal injury on the grounds that the victims were contributorily negligent for not wearing their seat belts. This has been done whenever it has been demonstrated that the injuries would have been reduced if the belts had in fact been worn.

The following cases provide but a few examples of the application of this principle: *Jackson v. Millar*, [1972] 2 O.R. 197 (H.C.), rev'd on another point [1973] 1 O.R. 399 (C.A.), rev'd [1976] 1 S.C.R. 225; *Dodgson v. Topolinsky* (1980), 125 D.L.R. (3d) 177 (Ont. H.C.); *Pugliese v. Macrillo Estate* (1988), 67 O.R. (2d) 641 (H.C.); *Thurmeier v. Bray* (1990), 83 Sask. R. 183 (Q.B.); *Ohlheiser v. Cummings*, [1979] 6 W.W.R. 282 (Sask. Q.B.); *Keller v. Kautz* (1982), 20 Sask. R. 420 (Q.B.); *Rinas v. City of Regina* (1983), 26 Sask. R. 132 (Q.B.); *Berube v. Vanest*, [1991] O.J. No. 1633 (Ont. Ct. (Gen. Div.)); *Horsman v. Bulmer* (1987), 42 C.C.L.T. 220 (N.B.C.A.); *Schon v. Hodgins*, [1988] O.J. No. 743 (Dist. Ct.); *Gervais v. Richard* (1984), 48 O.R. (2d) 191 (H.C.); *Stamp v. The Queen in right of Ontario* (1984), 47 O.R. (2d) 214 (C.A.); *Beaver v. Crowe* (1974), 49 D.L.R. (3d) 114 (N.S.S.C.T.D.); *Wallace v. Berrigan* (1988), 47 D.L.R. (4th) 752 (N.S.S.C.A.D.); *Holstein v. Berzolla*, [1981] 4 W.W.R. 159 (Q.B.); *Ducharme v. Davies* (1981), 12 Sask. R. 137 (Q.B.), aff'd in part [1984] 1 W.W.R. 699 (Sask. C.A.); *Shaw Estate v. Roemer* (1982), 51 N.S.R. (2d) 229 (N.S.S.C.A.D.).

The same principle has been applied in British Columbia, as the following cases demonstrate: *Yuan v. Farstad* (1967), 62 W.W.R. 645 (B.C.S.C.); *Earl v. Bourdon* (1975), 65 D.L.R. (3d) 646 (B.C.S.C.); *Gagnon v. Beaulieu*, [1977] 1 W.W.R. 702 (B.C.S.C.); *Aujla v. Christensen*, [1992] B.C.J. No. 860 (S.C.); *Phariness v. Wallace*, [1987] B.C.J. No. 2393 (S.C.), aff'd [1989] B.C.J. No. 2112 (C.A.).

The decision of Munroe J. in *Yuan* appears to be one of the first Canadian decisions to hold that occupants of a car have a duty to wear a seat belt. That is to say, there is a duty of care resting upon occupants of a motor vehicle to wear a seat belt. The accident in that case occurred in

1966 in a residential area of the city of Vancouver. The following prescient statements made by Munroe J. at pp. 651-53, in my view, are a correct expression of the principles applicable to the wearing of seat belts.

It is the submission of the defendants that the deceased, by his failure to use his seat belt, failed to use reasonable care or to take proper precautions for his own safety and thereby contributed to his own injuries. If that is so, the defence of contributory negligence must succeed: See *Nance v. B.C. Electric Ry.* (1951) 2 WWR (NS) 665, [1951] AC 601, 67 CRTC 340, reversing [1950] 1 WWR 797, 65 CRTC 237; *Car & Gen. Insur. Corpn. v. Seymour* [1956] SCR 322 affirming (*sub nom. Seymour v. Maloney*) 36 MPR, at 360; *Prior v. Kyle* (1965) 52 WWR 1, varying (1964) 47 WWR 489 (B.C.C.A.).

In support of such submission the defendants called as witnesses Capt. E. T. Corning, retired captain of the Seattle police force, and Dr. Peter Fisher, a Seattle physician and surgeon and specialist in internal medicine. Each of these men has made a study of the effectiveness of seat belts in safeguarding motorists from injuries. Their qualifications and experience entitle them to give opinion evidence. Capt. Corning has investigated hundreds of automobile accidents. Based upon his experience and studies, he is firmly of opinion that lap seat belts, when worn, do tend to lessen the severity of injuries in most automobile accidents. Based upon personal observations made at race tracks as well as other studies made by him, Dr. Fisher is of opinion that a lap seat belt will prevent ejection from a vehicle and will lessen the severity of any steering wheel injury because it prevents body displacement.

. . . Based upon the evidence of these two experts, which was uncontroverted, and based upon the general knowledge of mankind, it is clear, and I find, that lap seat belts are effective in reducing fatalities and minimizing injuries resulting from automobile accidents. I adopt the view of Frankfurter, J. who once said, "there comes a point where this court should not be ignorant as judges of what we know as men."

...

In the face of such knowledge, and despite the apparent absence of any Canadian precedents upon the matter, I am of opinion that a reasonable and prudent driver of a motor vehicle in a city would and should make use of a seat belt provided for his use. I am not

unmindful of the fact that in driving without having his seat belt done up, the deceased was committing neither a crime nor any breach of statute. He was lawfully entitled to drive without using his seat belt, but that is not determinative of the issue as to whether or not in so doing he failed to take proper precautions for his safety and thus contributed to his injuries. If he did so fail the defendants are entitled to be relieved of some degree of responsibility for the resulting injuries, as is provided by the *Contributory Negligence Act*.

Munroe J. further supported his decision on the basis of American cases which found that a duty to wear a seat belt could be based upon common-law standards of care. He referred to *Bentzler v. Braun*, 149 N.W.2d 626 (Wis. 1967) and to the California District Court of Appeal in *Mortensen v. Southern Pacific Co.*, 53 Cal. Rptr. 851 (1966).

These cases demonstrate that since 1968 courts in Canada have properly recognized that the exercise of reasonable care requires occupants of a motor vehicle to wear seat belts. This is true whether a vehicle is being driven on a highway or in the city, over a long or a short distance. The cases correctly reflect the dictates of common sense. Long before 1985, when this accident occurred, it was a reasonable requirement that seat belts be worn.

#### *The Duty Owed by a Driver to Ensure That Passengers Under 16 Wear Seat Belts*

There is therefore a duty of care owed by an occupant of a car to wear a seat belt. This duty is based upon the sensible recognition of the safety provided by seat belts and the foreseeability of harm resulting from the failure to wear them. What then of children in a car? Children under 16, although they may contest it, do require guidance and direction from parents and older persons. This has always been recognized by society. That guidance and protection must extend to ensuring that those under 16 properly wear their seat belts. To the question of who should assume that duty, the answer must be that there may be two or more people who bear that responsibility. However one of those responsible must always be the driver of the car.

A driver taking children as passengers must accept some responsibility for the safety of those children. The driving of a motor vehicle is neither a God-given nor a constitutional right. It is a licensed activity that is subject to a number of conditions, including the demonstration of a minimum standard of skill and knowledge pertaining to driving. Obligations and responsibilities flow from the right to drive. Those responsibilities must include some regard for the safety of young passengers. Children, as a result of their immaturity, may be unable to properly consider and provide for their own safety. The driver must take reasonable steps to see that young passengers

wear their seat belts. This is so since it is foreseeable that harm can result from the failure to wear a seat belt, and since frequently, a child will, for any number of reasons, fail to secure the seat belt.

The driver of a car is in a position of control. The control may not be quite as great as that of the master of a vessel or the pilot of an aircraft. Nevertheless it exists. Coexistent with the right to drive and control a car is the responsibility of the driver to take reasonable steps to provide for the safety of passengers. Those reasonable steps must include not only the duty to drive carefully but also to see that seat belts are worn by young passengers who may not be responsible for ensuring their own safety.

In my view, quite apart from any statutory provisions, drivers must accept the responsibility of taking all reasonable steps to ensure that passengers under 16 years of age are in fact wearing their seat belts. The general public knowledge of the vital importance of seat belts as a safety factor requires a driver to ensure that young people make use of them. I would observe that this same conclusion was reached by Paris J. in *Da Costa v. Da Costa*, [1993] B.C.J. No. 1485 (S.C.). He too concluded that there is a duty owed by a driver to ensure that children are wearing their seat belts. The statutory provisions pertaining to seat belts must now be considered.

### *The Effect of the Motor Vehicle Act*

Section 217(6) of *Motor Vehicle Act* reads as follows:

**217.** ...

- (6) A person shall not drive on a highway a motor vehicle in which there is a passenger who has attained age 6 but is under age 16 and who occupies a seating position for which a seat belt assembly is provided unless that passenger is wearing the complete seat belt assembly in a properly adjusted and securely fastened manner.

In *The Queen in right of Canada v. Saskatchewan Wheat Pool*, *supra*, the issue was whether a breach of the *Canada Grain Act*, S.C. 1970-71-72, c. 7, by delivery of infested grain out of a grain elevator conferred upon the Canadian Wheat Board a civil right of action against the Saskatchewan Wheat Pool for damages. No allegation of negligence at common law was put forward. The notion of a nominate tort of statutory breach giving rise to recovery simply on proof of breach of the statute was rejected. So too was the argument that an unexcused breach of a statute constituted negligence *per se* which would lead to an automatic finding of liability. The Court, in

the clear and convincing reasons delivered by Dickson J. (as he then was), took the position that proof of a statutory breach which causes damages may be evidence of negligence. Further, it was held that the statutory formulation of the duty may, but not necessarily will, afford a specific or useful standard of reasonable conduct.

It follows that the statutory requirement pertaining to seat belts is subsumed in the general law of negligence. However, the statute can, I think, be taken as a public indication that the failure of a driver to ensure that children in the vehicle are wearing seat belts constitutes unreasonable conduct. Further, it may be taken as indicating that such a failure on the part of the driver demonstrates conduct which falls below the standard required by the community and is thus negligent. In this case, the legislation is simply another factor which can be taken into account by the Court in the course of determining whether the failure to ensure children in the car are wearing seat belts constituted negligent behaviour on the part of a driver.

It is clear that the breach of a statutory provision is not conclusive of liability. Yet the existence of the section does provide further support for finding that a duty of care rests on the driver to take all reasonable steps to see that seat belts are worn by children. The statute reflects the public importance placed on safety measures and a societal concern for promoting the safety of children. It is, as well, a public recognition that children often require the help and supervision of adults, particularly in ensuring that when they are passengers in a vehicle, they are made reasonably safe.

*Is the Driver's Duty of Care Negated by the Presence of a Parent?*

The duty of a driver to ensure that young passengers wear their seat belts is well established. It then must be asked whether the presence of a parent in the car negates this duty of care owed by the driver. The trial judge and the Court of Appeal took the position that the presence of the parent in the car removed or terminated the duty of care owed by the driver. In support of that position, the respondent relies on the decisions of this Court in *Arnold v. Teno*, [1978] 2 S.C.R. 287, at p. 311, and of the New Zealand Court of Appeal in *McCallion v. Dodd*, [1966] N.Z.L.R. 710, at p. 721. In my view, these decisions simply indicate that there may be a joint responsibility or duty of care resting upon both a parent and a third party. The presence of a parent in the car may mean that the responsibility is shared but it cannot negate the duty owed by the driver to the passenger under the age of 16.

The driver of a car owes a duty of care to a child who is a passenger. For example, the driver must obey the rules of the road and drive carefully whether a parent is present or not. That duty of care is owed and continues to be owed by a driver to all child passengers, irrespective of

their parents' presence. The relationship between driver and passenger is such that the driver's negligent actions or negligent failure to act can lead to injuries to the passengers. Further, it is well established and clearly foreseeable that harm may well result from the failure to wear a seat belt just as much as it may result from negligent driving.

Again, as I have said, the driver of a car is in a position of control. The driver's control remains even in the presence of a child passenger's parent. The responsibility of the driver to take reasonable steps to provide for the safety of passengers flows, in part, from this control and it includes not only a duty to drive carefully but also to take reasonable steps to ensure that seat belts are worn by young passengers who may not be able to ensure their own safety.

In my view, there is a duty of care resting upon a driver of a motor vehicle to ensure that the seat belts of young passengers are in place. That duty exists whether or not a parent of the child is in the car. The presence of the parent does no more than indicate that the duty of care or responsibility towards the child may be shared by both the parent and the driver.

It is true that the conclusion I have reached is one of public policy which imposes a positive duty. That in itself is not novel. The need to impose a positive duty on a party was recognized by this Court in *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, and in *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186. This decision is no more than an attempt to provide reasonable care for the safety of children.

There will undoubtedly be those who will decry the decision on the ground that it may lead to an increase in vehicle insurance premiums. The cold fiscal response to that criticism is to observe that this same decision will result in a far greater saving in health care premiums by reducing the cost of health care required for seriously injured children who are victims of injuries which result from the failure to wear a seat belt. Yet far more important than any financial benefits which may flow from the decision is the fostering of the safety of children. In this case, if seat belts had been worn, there can be no doubt that the appellant could have led a fulfilling and useful life. If the fixing of responsibility on a driver to ensure that young passengers wear seat belts saves one child from death or devastating injury then all society will have benefited.

The trial judge and the Court of Appeal were in error in failing to recognize that the duty of care owed by the driver of the motor vehicle to young passengers continued to exist despite the presence of a parent in the vehicle. That is an error of law that can and should be corrected by an appellate court.

*Standard of Care or the Extent of the Duty Owed by the Driver*

The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

The extent of the duty owed by the driver of a vehicle to a child passenger when a parent is present will undoubtedly vary with the circumstances. Although the duty will always exist, the extent of it will vary infinitely. For example, a 17 year old driving a car with an eight year old and his father, who is an old friend of the family, may well owe a much smaller duty of care to the child than the father. On the other hand, the driver of a motor vehicle who is driving home a mother who is an employee and her child may have a significantly higher degree of responsibility for the child. The difference in degree of responsibility will vary widely, depending on the circumstances of each case. That degree of responsibility will have to be determined in this case.

Disposition

In the result, the appeal is allowed. The question of the degree of contributing negligence of Stauffer should be remitted to the trial judge for determination at the same time as the determination is made as to whether there was any negligence on the part of the infant Karl Thomas Galaske or the late Peter Helmut Galaske or both. The appellant should have his costs in this Court and throughout.

The reasons of Sopinka and Major JJ. were delivered by

MAJOR J. (dissenting) -- I have read the reasons of my colleague Justice Cory and respectfully disagree with his conclusion. I agree that a duty of care was owed by the respondent Erich Stauffer to the appellant Karl Galaske, but have concluded that the courts below found such a duty and determined as a finding of fact that the standard of care imposed by that duty had been

met. In fact, the respondent Stauffer conceded that he owed a duty of care to the appellant Galaske, and, in my opinion, the trial judge and Court of Appeal reached the same conclusion.

The pivotal point to this appeal, then, is whether the trial judge properly identified the duty of care as a separate issue from the standard of care. Both the trial judge and Court of Appeal recognized the distinction between the duty of care as a question of law and the standard of care as a finding of fact.

The trial judge, following his finding of a duty of care, properly instructed himself on the standard of care and after reviewing the evidence, concluded, as a finding of fact, that the respondent's actions were not negligent. He stated:

The remaining question for determination is whether the [respondent] Stauffer is guilty of negligence which contributed to the cause of the damages suffered by the infant [appellant].

In my view, if there is liability on the part of the [respondent] Stauffer for the loss and damages suffered by the infant [appellant], such liability must be based upon his failure to ensure that the infant [appellant] was wearing the lap-type seatbelt with which the vehicle was provided before driving his vehicle and categorizing such failure as negligence contributing to the cause of such loss and damages.

and later:

In my view in the particular circumstances of this case, it was not unreasonable for the [respondent], Stauffer to expect that the infant [appellant's] father was the person to exercise control over the conduct of his son. I consider the obligations of the [respondent] Stauffer and the infant [appellant's] father on this occasion were accurately reflected by the words of the [respondent] Stauffer when he said he did not want to take the fatherhood away from Peter, referring to the [appellant's father]. On these facts, I find there was no duty of care owed by the [respondent] Stauffer to the infant [appellant] with respect to the use of the seatbelt and it cannot be said, therefore, that the [respondent] Stauffer was guilty of contributory negligence.

It is clear that the trial judge found that a duty of care existed and that it had been met for the reasons given by him. That he found a duty of care is obvious from the findings of fact that he relied on in concluding that the duty had been discharged.

I recognize that the trial judge in the concluding sentence of the last quoted paragraph stated: "On these facts, I find there was no duty of care owed by the [respondent] Stauffer to the infant [appellant]". While this would, at first blush, suggest that he had concluded there was no duty of care, it is apparent in the context of the whole of his oral reasons that this statement was intended to refer to the standard, and not to the duty, of care. To attach another meaning to it is inconsistent with the tenor of his reasons. It is an example of the ease by which one element of an action in negligence (duty) can without care be interchanged with language borrowed from another element (standard of care).

It was necessary for the trial judge to consider the issue of negligence only if he determined as he did that the respondent owed a duty of care. As Lord Esher M.R. stated in *Le Lievre v. Gould*, [1893] 1 Q.B. 491, at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them".

The Court of Appeal, in confirming the trial judge's decision, also referred to the duty of care while meaning the standard. I think the ambiguity in the meaning of that phrase is clarified by its content. There was too much time spent by both of the courts below on the standard of care to conclude they had neglected to find that a duty of care existed. It is at most loose terminology.

The standard of care involves questions of law and fact. Professor Fleming in *The Law of Torts* (8th ed. 1992), at p. 106 states:

It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained.

This Court has affirmed that division of labour: *Canadian National Railway Co. v. Vincent*, [1979] 1 S.C.R. 364.

The judge, as a matter of law, must determine, in general terms, the obligation imposed upon the defendant. The standard imposed by the common law is that of the reasonable person in like circumstances. Having established the standard of care in general terms, it is then a finding of fact to determine, in the context of a particular case, the obligation imposed on the defendant, and to determine whether or not that obligation was met. See *DesBrisay v. Canadian Government Merchant Marine Ltd.*, [1941] S.C.R. 230, at p. 236.

The formulation and application of the standard of care may be influenced by the presence of a statutory obligation as existed in this case. In *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, the relevance of a statutory duty to an action in negligence was considered. Dickson J. (as he then was) summarized the law (at pp. 227-28) as follows:

1. Civil consequences of breach of statute should be subsumed in the law of negligence.
2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
3. Proof of statutory breach, causative of damages, may be evidence of negligence.
4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

It has long been accepted that appellate courts must not interfere with findings of fact, whether by judge or jury, if there was evidence capable of supporting the decision (*Canadian National Railway Co. v. Vincent, supra*), or unless there has been a palpable and overriding error. See, e.g., *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89.

The question arises whether appellate courts should exhibit the same degree of deference to findings of fact by a judge alone as they would to findings by a jury. In England, Australia and New Zealand, an appellate court, while accepting a trial judge's general findings of fact, may nevertheless decide for itself whether or not the defendant was negligent. See *Fleming, supra*, at p.

310. See also *Benmax v. Austin Motor Co.*, [1955] A.C. 370 (H.L.); *Warren v. Coombes* (1979), 142 C.L.R. 531 (H.C.), and S. Todd, ed., *The Law of Torts in New Zealand* (1991), at p. 280.

This Court has been more protective of the role of the trial judge. In *Lewis v. Todd*, [1980] 2 S.C.R. 694, at p. 701, Dickson J. held that the decision of a trial judge should not be disturbed if he did not wrongly apply the standard of care, misapprehend the evidence, or commit a palpable and overriding error.

As already mentioned, the trial judge found that the respondent Erich Stauffer owed a duty of care to the appellant Karl Galaske but the trial judge also found that the respondent was not in breach of the standard of care, and therefore not negligent.

The trial judge thoroughly reviewed the evidence. He noted that the accident occurred in 1985, when s. 217(6) of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, prohibited a person from driving a motor vehicle unless child passengers wore seat belts. He also observed that the appellant's father, Peter Galaske, was seated next to his son in the cab of the respondent's truck, and he accepted the respondent's explanation as to why he refrained from instructing the appellant to wear his seat belt.

The trial judge considered the decision in *Migliore v. Gerard* (1987), 42 D.L.R. (4th) 619 (H.C.), in which O'Brien J. found that a father, who had violated a statutory requirement to ensure that his children wore seat belts, was not negligently responsible for injuries sustained by his children during an accident. In that case the decision was based in part on the fact that the use of seat belts was less prevalent at the time of the accident in 1981 than at the time of trial in 1987. In affirming the decision of the trial judge in the present case, Locke J.A., of the British Columbia Court of Appeal, expressed a similar view ((1992), 67 B.C.L.R. (2d) 190, at p. 196):

All allegations of negligence must be evaluated in their factual matrix. This accident occurred in 1985. In the context of that time, when seat belt legislation was not so much to the fore as today [in 1992], I cannot bring myself to differ from the trial judge. But if the accident had happened today, my answer would have been different.

The trial judge reviewed the decision of this Court in *Saskatchewan Wheat Pool*, *supra*, and concluded that:

- 1.A breach of the provisions of s. 217(6) does not, in itself, give a right of recovery merely on proof of breach.
- 2.The statutory formulation of the duty does not, in the circumstances of this matter, afford a specific standard of reasonable conduct.
- 3.Liability of the defendant driver should be determined by consideration of the particular circumstances --"the factors"-- and the standard of care expected of the driver in such circumstances.

An appellate court need not agree or disagree with the conclusion reached by the trial judge on the question of whether or not the respondent was negligently responsible for the injuries suffered by the appellant. The trial judge reached his conclusion after a careful review of the law and evidence. As there is nothing in the record to suggest that he committed a palpable and overriding error, his decision is not subject to reversal on appeal.

Accordingly, I would dismiss the appeal with costs.

The following are the reasons delivered by

MCLACHLIN J. -- Two different interpretations of the trial judge's reasons are urged upon us. The first holds that the trial judge found no duty relationship between the defendant driver and the child passenger. The second holds that the trial judge found a duty relationship, but found that the standard of care imposed by the reasonable person test was met on the facts.

The results vary, depending on which of these two versions one accepts. If the reasons are read as holding that there was no duty relationship, I would find them to be in error. It seems to me that the driver of a vehicle is almost always in a relationship of duty toward passengers. That relationship is not altered by the fact that another person -- in this case a parent -- may also be responsible for a passenger. On the other hand, if the reasons are read as holding that a duty existed, but that the requisite standard of care was satisfied, I would not interfere. As Justice Major states,

the question of the appropriate standard of care is fact-driven, and appellate courts generally will not interfere with the trial judge's conclusion unless the record does not support it.

I agree with Major J.'s statement of legal principle. Were I able to conclude with him that the trial judge found a duty of care and went on to find that the appropriate standard was met, I would dismiss the appeal. However, I cannot. It seems to me that the trial judge's express words -- "I find there was no duty of care" -- dispose of the matter. This is confirmed to my mind by the absence following the finding of no duty of the sort of analysis of all the facts and circumstances which is typical of determination of the standard of care. Having determined the case on the basis of the absence of a duty relationship, the trial judge did not find it necessary to go on to analyze whether the defendant adhered to the standard of the reasonable person in all the circumstances, nor consider the question of contributory negligence. Whatever the trial judge may have said about standard of care earlier in his reasons, the case seems to have been decided on the basis of the absence of a duty of care. On the view I take of the case, the matter must be remitted to the trial court for consideration of these issues.

I add this. The standard of care is for the trial judge to determine on the evidence. It may vary from case to case. It follows that it would be wrong to state as a categorical proposition that a driver's failure to require a child to wear a seat belt must always violate the standard required by the community, with the result that such a driver would always be negligent. While, in general, insistence that passengers wear seat belts is a reasonable measure, circumstances may arise where a trial judge might conclude otherwise. The availability of seat belts and the age of the child are factors which judges in other cases have considered, to name only two. Similarly the presence of a parent who has care and control of the child may figure in the determination of what was reasonable in all the circumstances of the case.

I would allow the appeal and remit the matter to the trial court for determination of whether the defendant's conduct fell below that required of a reasonable person in all the circumstances of the case, as well as the issue of contributory negligence.

*Appeal allowed with costs, SOPINKA and MAJOR JJ. dissenting.*

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