Date: 20010403
Docket No.: CA 162820 & 164324

NOVA SCOTIA COURT OF APPEAL

[Cite as: Fowler v. Schneider National Carriers Ltd., 2001 NSCA 55]

Freeman, Roscoe and Bateman, JJ.A.

BETWEEN:

SCHNEIDER NATIONAL CARRIERS LIMITED, a body corporate, and MICHAEL MAGOON

Appellants

- and -

ROBERT LLOYD FOWLER, KIM FOWLER and CENTRAL EQUIPMENT LIMITED, a body corporate

Respondents

BETWEEN:

ROBERT LLOYD FOWLER and KIM FOWLER

Appellants

- and -

SCHNEIDER NATIONAL CARRIERS LIMITED, a body corporate, and MICHAEL MAGOON

Respondents

REASONS FOR JUDGMENT

Counsel:	Scott C. Norton, for Schneider National Carriers Limited and Michael Magoon W. Dale Dunlop, for Robert Lloyd Fowler, Kim Fowler and Central Equipment Limited
Appeal Heard:	January 11, 2001
Judgment Delivered:	April 3, 2001
THE COURT:	Appeal of appellants is allowed. Appeal of respondents is dismissed without costs as per reasons for judgment of Freeman, J.A.; Roscoe and Bateman, JJ.A. concurring.

FREEMAN, J.A.:

[1] The appellant, Robert Lloyd Fowler, was driving an 18-wheel tractor and low bed trailer loaded with agricultural equipment in the eastbound lane of the Trans-Canada Highway between Hartland and Woodstock, New Brunswick on December 30, 1994. The respondent's tractor-trailer rig, traveling light with a van-type trailer, approaching from the opposite direction, was caught by the wind and jack-knifed, crossing the road in front of him and blocking it. Mr. Fowler suffered serious and permanently disabling injuries in the violent collision.

[2] A civil jury rejected the respondent's defence of inevitable accident. The respondent has not appealed from the finding that negligence on the part of the respondent driver, Michael Magoon, was the sole cause of the accident.

[3] However the jury found that Mr. Fowler was not wearing a seat belt and held him 42.5 per cent at fault for his own damages. He has appealed, not from the finding he was wearing no seat belt, but from the apportionment of fault, on the following grounds:

> 1. Did the respondents adduce evidence at trial by which a jury, properly instructed and acting reasonably, could conclude that the appellant's failure to wear a seat belt substantially contributed to the severity of his injuries?
>
> 2. Was the jury's apportionment of fault reasonable on the basis of the evidence presented at trial?

[4] Mr. Fowler is a resident of Nova Scotia and the case was heard in the Supreme Court of this province, applying the law of New Brunswick. Tort law and the contributory negligence statutes are essentially the same in both provinces.

[5] Section 5 of New Brunswick's **Contributory Negligence Act,** R.S.N.B. 1973, c. C-19, which is identical with s. 5 of the Nova Scotia **Contributory Negligence Act,** R.S.N.S. 1989, c. 95. provides:

> 5. In every action, the amount of damage or loss, the fault, if any, and the degree of fault are questions of fact.

[6] Pursuant to s. 3 of the Nova Scotia **Act** and s. 1 of the New Brunswick **Act** the jury's duty was to apportion fault for the damages Mr. Fowler suffered, not causation of the accident itself:

> 3. (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

[7] This is the statutory basis for considering a plaintiff's failure to wear a seat belt, resulting in more severe injuries, as fault to be apportioned.

[8] Mr. Fowler suffered injuries around his left eye and to the left side of his head causing brain damage that left him with a memory deficit. He lost consciousness in the crash and could not remember the actual occurrence, or whether he was wearing his seat belt, as he said was his custom. There was a badly comminuted fracture of bones in the area of his right knee that eventually required fusion of the knee. His right foot received a "Lis Franc" fracture, named for a surgeon in the Napoleonic wars who identified the characteristic double break in bones of the foot which occurred when soldiers were thrown from a horse with one foot caught in the stirrup. There was a "mild" or "moderate" compression fracture involving his first lumbar vertebrae and a lateral fracture to one rib, as well as numerous lacerations and abrasions. Mr. Fowler was left permanently disabled by the brain, knee and spinal injuries.

The First ground of Appeal: Contributory Negligence

[9] The first ground of appeal relates to the affirmative answer to the second jury question:

> Was there negligence on the part of the Plaintiff Robert Fowler that caused or contributed to the damages suffered by him?

[10] The only negligence alleged against Mr. Fowler was his failure to wear his seat belt.

[11] The respondents called Dr. Harry Smith, a highly qualified expert from

San Antonio, Texas with doctorates and impressive experience in both engineering and medicine. He was engaged in December, 1999, some five years after the event, and reconstructed the crash events from reports and photographs available to the jury and this court. Dr. Smith testified that if Mr. Fowler had been wearing his seat belt he would have received some injuries but they would not have been as severe as those he actually suffered. He considered the fact that Mr. Fowler was ejected from the cab of his truck as "very good primary evidence" that he was not wearing his seat belt. It was the ejection which caused, not the head injuries, but the L-1 spinal compression fracture when he landed on his buttocks.

[12] Dr. Smith reduced the forces at work in the crash, the "kinematics", to principles understandable by Newton's laws of motion. He described the cab shearing off its mounts and rotating clockwise while Mr. Fowler's primary motion would have been in a forward direction. Because the cab was rotating he did not strike the windshield, which remained unbroken as it moved away from him to his right. The damage to Mr. Fowler's knee would have resulted from his going forward into the dash or steering column. His head would have struck the "A" pillar at the left side of the cab. He would have been ejected from either the left window or the left door, which would have popped open. His Lis Franc fracture would have resulted from his foot being trapped by the brake or clutch pedals or the buckling of the floor pan.

[13] The appellant's counsel, W. Dale Dunlop, attacked Dr. Smith's evidence head-on, arguing that it did not constitute evidence capable of discharging the burden on the respondent to prove that Mr. Fowler would not have been so seriously injured if he had been restrained by a seat belt. While he acknowledged the heavy burden on an appellant appealing from a jury's findings of fact, he made similar arguments before this court.

[14] Dr. Smith's report contained the following conclusions:

> 3. If Mr. Fowler had been restrained, he would not have come forward relative to his cab during the frontal collision component and to a degree of engineering and medical certainty the right lower extremity injuries would not likely have occurred.
>
> 4. If Mr. Fowler had been restrained, he would not have flexed over his steering wheel during the frontal collision and to a degree of engineering and medical certainty the left facial fractures would not likely

have occurred.

5. If Mr. Fowler had been restrained, he would not have been ejected and thus any aggravation of already incurred injuries or creation of injuries from ejection, i.e., L1 compression fracture, would not have occurred.

6. If Mr. Fowler had been restrained his injuries would likely have been limited to those associated with lap and shoulder harness belt forces such as one or more of the following: rib fractures, sternal fractures, clavicular fractures, anterior inferior iliac wing contusions, chest contusions, and lower pelvic contusions of soft tissues overlying bone.

[15] Mr. Dunlop considered the degree of certainty expressed by Dr. Smith to be overstated in light of the violence of the crash. He supported this view by referring to the same photographs of the vehicles after the crash which had been reviewed by Dr. Smith. Some had been taken at the accident scene and some were taken later in a storage depot. They show that Mr. Fowler's truck was virtually demolished, and that significant damage occurred in the space Mr. Fowler would have occupied while driving.

[16] Mr. Dunlop also reviewed the photos with one of the first witnesses at the scene, Robert Patenaude, who saw the actual vehicles moments after the impact. Mr. Patenaude, who had served ten years in the navy and was training as a marine electrician, is a volunteer fireman and has received training in that capacity. He was proceeding eastwardly between Hartland and Woodstock immediately ahead of Mr. Fowler's rig. He passed Mr. Magoon's westbound rig and his rear-view mirror darkened when it went across the highway and into the ditch just behind him. He stopped and went back when he no longer saw Mr. Fowler's rig behind him. He estimated he arrived at the scene about three minutes after the crash. When he went around the Schneider's tractor-trailer, which was blocking the road, he saw the Fowler vehicle. "It was mangled. It looked like it had been blown up, almost." He looked for the driver and found him lying on the side of the road, moaning and semi-conscious. Asked to describe Mr. Fowler's truck, he testified:

A. Basically, there was nothing left. There was -- the engine was all torn apart. It was just hanging there. There was hardly anything left of the seat. I didn't see any -- like you could see right in. There was no doors or anything like that. There was -- it was completely demolished. So when I didn't see anybody was there, I started looking around.

> Q. Was there enough room, from what you saw, for a person to fit into the driver's side of the cab?
>
> A. Fit in there the way it was there?
>
> Q. Yes.
>
> A. No way. No way.
>
> Q. Why was that?
>
> A. There was -- everything was just demolished. It was to the point where if you had of gotten too close you probably would have seen the truck -- or if you had of touched anything, it would probably just fell off. I mean, it was a wreck. That's basically -- I mean, you can't -- there's no way somebody would have survived that if they were still inside. No way.
>
> Q. Are you sure about that?
>
> A. Oh, definite. There's no doubt.

[17] Mr. Fowler's truck was not the "cab-over" design in which the driver is seated above the engine and transmission. Rather the engine and its components were under the hood ahead of the cab. Dr. Smith agreed with an estimate that the front of the truck projected about ten feet ahead of the driver. The photographs show virtually nothing left in front of the windshield except tangled metal. In Dr. Smith's view the cab rode ahead over the engine after it sheared off, tilted, so the left corner of the windshield was within a foot or two of the ground, which seems to be visible through the door in front of the demolished seat, where the driver's feet would ordinarily have been resting on the floor pan. Mr. Dunlop suggested that what would have happened to a person strapped to the demolished seat remains a matter of conjecture.

[18] Dr. Smith testified that the cab's structural integrity remained basically intact. He said the seat belt would have stretched a few inches but Mr. Fowler

was:

> . . . not going to make it into the dash, not going to make it into the wheel and he's not going to make it into the A-pillar. Can you still get injuries that way? Sure. And we'll perhaps discuss those a little further. Can

> he still get injuries to his lower extremities from crumpling metal? Sure. But he's not going to come into the dash with his right leg in particular and create that badly, multipally comminuted fracturing of the proximal tibia. There won't be that kind of force.

[19] Dr. Smith's analysis suggests Mr. Fowler would have been dumped from the cab, through the broken side window or the popped-open door, as the final forces of the impact were playing out. Mr. Patenaude located the place where he found Mr. Fowler, lying on the side of the road, a significant distance behind the cab. That would be consistent with ejection much earlier in the unfolding crash scenario than Dr. Smith's theory could account for. Dr. Smith suggested the impact would have driven the respondents' truck ahead, but he acknowledged the question was "problematic."

[20] Dr. Reginald Yabsley, a veteran orthopaedic surgeon and a professor at Dalhousie Medical School since 1985, a frequent expert witness in Nova Scotia courts, was qualified for the appellant to give expert opinion on injury causation analysis.

[21] He was asked "What can you tell us in general terms about the ability to understand the forces on the body in accidents of this nature?"

> A. Well, I can understand an attempt to try and understand what happened, but aside from the general principles of the accident -- and that's again outside my field with respect to accident reconstruction -- I would have a lot of difficulty knowing specifically exactly how each of these injuries occurred. There are a number of possibilities for almost all of them. There just are.
>
> Q. All right. And I'm going to get into that later. Now, Dr. Smith recorded the injuries, and then you go on. Number three, you state how Dr. Smith concluded if he'd been restrained, he wouldn't have come forward and he probably wouldn't have had his lower, right extremity injuries. You say this is a possibility. So certainly that might have been something that happened.
>
> A. In a perfect situation where there was no encroachment upon his living space within the cab, and had his seat belt worked perfectly, then I do agree.
>
> Q. Okay. But when you say it's a possibility, are there other

possibilities as to how those injuries might have occurred?

A. Well, I looked at the photographs, and I think they were the same that Dr. Smith had, and it was very hard for me to tell about -- I really couldn't -- about the floor boards, the fire wall and the front. But basically the whole front had been wiped out. And I suspect there was significant damage to that area, but I don't know how much. But encroachment through that area could very easily have produced these same type of injuries. That's certainly possible.

Q. Okay. Perhaps you can -- let's assume that Mr. Fowler is belted in properly. How would the encroachment cause it? Perhaps you can just elaborate on that, doctor.

A. Sure. The floor board or the fire wall being pushed in could have a direct injurious force against his foot and produced the Lis Franc fracture trapping it under the pedal of the brake or the clutch or what have you. I don't know, but certainly the fire wall or the anterior part of his cab could have come back and directly injured his knee and broken the bone. That happens.

Q. Have you seen that?

A. Yes. I mean, it does happen, too, by a person coming forward when their seat belts don't work properly. So there are possibilities. It isn't just one way to break a bone.

. . .

Q. . . . Now, Dr. Smith testified that he was not aware of any case where a belt had ever failed. What is your experience, doctor, in that regard?

. . .

A. Well I mean, I've been involved in cases where the seat belt has failed, where it either hasn't -- it seems to have worked or hasn't deployed properly, it hasn't triggered and held the person back. I've, over the years, been involved in cases where it's torn free of the floor board, the mountings, or even the shoulder hinge portion. And I'm aware but I can't give you details, of course, because it's not my field, but there have been modifications to the mountings and moorings. And I think this has been in the popular press over the years to improve and prevent that from happening.

. . .

Q. Now, with respect to the L-1 fracture, Dr. Smith has speculated that it came from being -- landing when he was ejected. And I gather you say that's a possibility.

> A. Absolutely.
>
> Q. Are there other ways that might have happened?
>
> A. Yes. Again, the hyperflexion force. It could have happened at almost any point, and when you get an accident like this, our standard theories seem to go out the window and get nullified. It's so hard to know.
>
> Q. Why do you say that, Doctor?
>
> A. Well, because there are so many complicated forces working at the time and as a follow through from the accident. The initial impact, then the secondary effect, and then finally the final incident where the body comes to rest. So there are many [inaudible], for sure in these accidents, and it's hard to know quite where. It's not like somebody falling out of a building and landing on the pavement.

[22] Dr. Yabsley said "There's always some degree of play in even a well-working seat belt. They would slip and slide and twist and rotation, and these devices don't hold you - I'm a seat belt believer, but there are limits to what they're capable of doing."

[23] He was asked if any of Mr. Fowler's injuries were consistent with him having worn a seat belt.

> A. Yes. If there were encroachment upon his cab space, then certainly his foot and knee or tibial injuries were consistent with that. I think it's certainly possible and very reasonable that his L-1 -- his fractured vertebrae could have occurred with a seat belt. . . . I think the rib fracture is consistent with a shoulder belt injury. . . . So there's a good chance he would have been less severely injured, but I think it's almost certain that he would have suffered some significant injuries.

[24] Mr. Dunlop was under no illusions as to the difficulty of his task in inviting this court to overturn the finding of a jury on a question of fact, whether Mr. Fowler would have been as seriously injured had he been wearing a seat belt. This would require a determination there was no evidence supporting this verdict; clearly, there is some evidence. There was no substantial departure by Dr. Smith from his strongly expressed opinions in cross-examination. This was reinforced by the evidence of Dr. Yabsley when he acknowledged there was a good chance Mr. Fowler would have been less severely injured in a seat belt, though he would still

have suffered significant injuries.

[25] The deference owed by a court of appeal to the factual findings of a jury was stated by Flinn, J. of this court in **Eng v. Medjuck** (1999), N.S.C.A. No. 138.

> The role of this Court in reviewing the factual findings of a jury is clear. In **Cameron v. Excelsior Life Insurance Co.** (1981), 35 N.R. 213 the majority of the Supreme Court of Canada approved of the opinion of Justice Hart of this Court when he said ((1981), 32 N.S.R. (2d) 668) at p. 704:
>
> > ... The jury had the opportunity of observing all of these witnesses and deciding which part of the evidence they would accept. In my opinion it is not for this court to disagree with their findings when there is some evidence upon which they could have reached the conclusion that they did.
> >
> > Even though we as judges might reach a different conclusion than the jury did at this trial it would not be proper for us to set aside this verdict as being against the weight of evidence because it cannot be said that it was so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.
>
> Similarly, in **Wawanesa Mutual Insurance Co. v. MacIsaac** (1983), 60 N.S.R. (2d) 124 (N.S.S.C.A.D.), Justice Jones of this Court, said:
>
> > This court has no power to disagree with a jury finding when there is some evidence upon which they could have reached the conclusion that they did. (See **Cameron v. Excelsior Life Insurance Company**). There was a substantial conflict in the evidence in this case and the issue of credibility was for the jury.
> >
> > As there was evidence to support the jury's verdict, this court has no right to intervene and accordingly the appeal is dismissed with costs.

[26] The trial judge explained the second question to the jury as follows:

> Now, I can tell you that counsel acknowledge that if there was any contributory negligence by Mr. Fowler, it consisted not in his manner of driving but his alleged failure to wear a seat belt. So to answer this Question No. 2 on the subject of contributory negligence on the part of the Plaintiff leads to a subset of the following two questions. They're not printed there, but I'll tell you what they are, and in fact you've heard them addressed already by counsel. The first question, the threshold question, is was Mr. Fowler wearing his seat belt or was he not. And if not, would his injuries have been less severe if he had been wearing one?

[27] In my view this instruction properly explains what the jury must find to answer the second question in the positive. The question is whether Mr. Fowler's injuries would have been "less severe" had he been wearing a seat belt, not whether they would have been "substantially lessened" as expressed in the first ground of appeal. "Substantially lessened" would suggest a higher standard, but both terms are vague and general. The threshold for engaging the concept of contributory negligence in the seat belt context is low. The jury was properly instructed and there was some evidence before it by which it could have found, on a balance of probabilities, that Mr. Fowler's injuries would have been less severe if he had been wearing a seat belt. I would dismiss the first ground of appeal.

The Second Ground: Apportionment of Fault

[28] The second ground of appeal, "was the jury's apportionment of fault reasonable on the basis of the evidence presented at trial?" is more problematic. It is here that the trial judge's instructions were inadequate, causing the jury to go astray. The apportionment of 42.5 per cent negligence against the appellant is unreasonable, far higher than existing precedents. It is not only unsupportable by the evidence presented at trial - as the law is applied in Canada there could be no evidence capable of supporting so high a level of contributory negligence in a seat belt case. Mr. Fowler did not cause the accident - Mr. Magoon did. Even if the lack of a seat belt made "all the difference" to the seriousness of Mr. Fowler's injuries, the liability apportioned against him should not have exceeded 25 per cent. A cap of 25 per cent has become so deeply embedded in Canadian jurisprudence that New Brunswick, at least, has made it a statutory rule, but too recent to be of assistance to Mr. Fowler.

[29] While, in my view, the judge should have called attention to the 25 per cent cap, I consider it a more serious error to have failed to instruct the jury that the

fault of the defendants in causing the accident was much greater than that of the appellant in neglecting his own safety.

[30] After the passage quoted above the trial judge continued with his instructions on question No. 2 and the apportionment questions, nos. 3 and 4. I have added emphasis to those portions of his instructions to which I shall return later:

> Now, this is the so-called seat belt defence. It's raised by the Defendants in an attempt to establish that there was contributory negligence on the part of the Plaintiff, contributory negligence that caused or contributed to his own injuries or the extent of his injuries. In order to succeed in this defence, again the onus or the burden of proof is on the Defendants. It's their burden to discharge. It's their evidentiary burden to discharge, and the standard of proof once again is the balance of probabilities. Now, I tell you, ladies and gentlemen, that under New Brunswick law, as in Nova Scotia, occupants of motor vehicles are required to wear seat belts. And I've already recounted the evidence on this issue in my earlier summaries of the evidence relating to Mr. Fowler's evidence about his habit of wearing one, corroborated by his wife as a matter of practice, and up against that is the evidence of Dr. Smith who formed the opinion from is injury causation analysis, the opinion that Mr. Fowler was not wearing his seat belt. Dr.Yabsley was unable to say with any certainty whether he was or wasn't wearing one. But that is a finding of fact for you to make based on a balance of probabilities with the burden of proof resting on the Defendants. Now, let me go to the second subset question. If he wasn't wearing the seat belt, would his injuries have been more severe, or to put it another way, if he was not wearing a seat belt, would his injuries have been less severe than had he been wearing one. Now again, on that question, you have to weigh and assess the evidence of the two experts and the opinions they gave. And so it is the expert evidence that you're going to have to go on in dealing with that question. Now, Drs. Smith and Yabsley had somewhat different opinions on the extent of the injuries that Mr. Fowler likely would have sustained if he'd been wearing a seat belt that had kept him restrained in his cab. These opinions will have to be weighed by you as I previously instructed and it's up to you to decide whose evidence, whose opinion evidence is entitled to be given the greater weight. Now again, to deal with the burden of proof on this, if the Defendants failed to satisfy you on a balance of probabilities that Mr. Fowler neglected to wear his seat belt, or if he was not, that his injuries would have been less severe, then this defence of contributory negligence on the part of the Plaintiff must fail. Similarly, if you weigh the evidence evenly on this point, both for and against the Defendants, again the burden of proof has not been discharged and the defence of contributory negligence must fail.

> Now, let me move now to Question No. 3. It's getting easier and we're getting shorter. Again, ladies and gentlemen, if your answer to Question No. 2 is "no", that there was no contributory negligence on the part of Mr. Fowler, then you don't go any further. But if, on the other hand, you say, yes, you do find that there was contributory negligence on the part of Mr. Fowler for not having worn his seat belt and that his injuries would have been less severe had he been wearing one, then you've got to go on to this Question 3, and you've got to decide whether it's possible for you to establish the degree or percentage of negligence of each party. That's what we call apportionment of liability, and let me explain that concept to you, apportionment of liability. In any given case, there can be two or more proximate causes of an injury, thereby each contributing to that injury. And if you so find that there were two or more causes of the injury, then you must apportion fault in proportion to the degree in which each party's fault contributed to the injury. I'm going to repeat that. If you find there were two or more causes of an injury -- in this case, if you find there was negligence by the Defendants in the operation of the vehicle and if you find that Mr. Fowler was not wearing his seat belt and would have been less seriously injured had he worn it -- then you apportion the fault by percentages in proportion to the degree in which each party's fault contributed to the injury. And as I just alluded to, that apportionment is done by assigning percentages of fault, which can be in any split as long as it adds up to 100 per cent, of course. So ladies and gentlemen, it is then for you to decide as a question of fact the comparative degrees of fault. If you get this far -- if you get to Question 3 depending on your earlier answers, it's then for you to decide as a question of fact the comparative degrees of fault that should be assigned to each party. And if you can do that, then you will answer Question 4 accordingly, which is the split. But I should add that one of our provincial statutes, the Contributory Negligence Act, provides that:
>
> > If having regard to all the circumstances of the case, it's not possible to establish different degrees of fault, then the liability shall be apportioned equally. Nonetheless, you should earnestly endeavour to assign comparative degrees of negligence which caused the injuries.
>
> If you do have a true impasse on what the apportionment should be and you can't make that determination, it is open to you to find the parties equally at fault.

[31] The overall effect of these instructions was to place the negligence of the appellant with respect to his own safety on an equal footing with that of the

negligent driver who caused the accident. The principle is well established that "the negligent driver must bear by far the greater share of responsibility" - Lord Denning, **Froom v. Butcher**, [1975] 3 All E.R. p. 520.

[32] In my view it was a misleading direction to instruct the jury that "it is the expert evidence that you're going to have to go on" in dealing with the contributory negligence question, at least in regard to apportionment, and in suggesting it was a matter of which expert they believed. They should have been told to consider all of the evidence in light of their own experience and common sense. This would have meant taking into account the evidence of Mr. Patenaude, who appears to have been a disinterested and objective observer, and an assessment of the photographic evidence. The jury would have no difficulty concluding that Mr. Fowler could not have passed through the chaos of such a devastating accident unscathed, with or without a seat belt. No witness suggested that he could have. They would have recognized the difficulty of attempting to predict beyond a balance of probabilities whether his inevitable injuries would have been so much less severe he would not have been disabled. In the context of damage awards, the practical significance of less severe injuries lies in whether they would have been disabling. If Mr. Fowler was to be disabled in any event, whether he wore a seat belt made no difference.

[33] In fairness to the trial judge, before instructing the jury he canvassed counsel for their views as to whether he should tell the jury the range of percentages of contributory negligence found in other cases involving the failure to wear seat belts. Where lack of a seat belt is the sole source of contributory negligence, I am not aware of any Canadian case in which the plaintiff's fault has been apportioned at more than 25 per cent. Frequently it is much lower. Counsel for the defendant objected to any statement of the apportionment range by the trial judge. Mr. Fowler's counsel acquiesced in the belief it would be analogous to stating a range for damages. I do not agree with this view, for money matters are within the daily experience of all jurors while the apportionment of liability for failure to wear a seat belt is essentially a technical creation of the law outside the ordinary experience of individuals. I am aware of no principle that would make it improper for the jury to have such information. In any event, acquiescence by counsel does not relieve this court of its duty to ensure the jury was properly instructed.

[34] If the range was not to be stated, the trial judge should at the very least

have instructed the jury that if it had not been for the respondents' negligence no harm would have come to Mr. Fowler, seat belt or not, and that the respondents' portion of the liability should therefore be substantially greater.

[35] The model jury charge for the seat belt defence in **Civil Jury Charges**, W.D. Griffiths (C.I.A.J.), 1995, includes the following:

> Members of the jury, it will be evident to you that the negligence of the defendant (or both parties) in the operation of his motor vehicle (or their motor vehicles) was the cause of the accident, and the primary cause of the injuries suffered by the plaintiff. That negligence which caused the accident is the most blame-worthy. Therefore, if you conclude the plaintiff was guilty of contributory negligence, in failing to wear his seat belt, you should assess his responsibility for his own injuries, on a lesser degree. The percentage of blame for the omission to wear a seat belt will depend on the extent you are satisfied this failure caused or aggravated his injuries.

[36] The equivalent model charge in **Civil Jury Instructions**, B.C. Continuing Legal Education Society, (**CIVJI 6.02**) is less detailed:

> There is no fixed limit with respect to the percentage of blame you may find against (the plaintiff) for failure to wear a seat belt. However, should you find (the defendant) negligent, you should keep in mind that (the plaintiff) would not have been injured at all except for (the defendant's) carelessness.

[37] The failure to point out the more serious nature of the defendants' negligence was exacerbated by the instruction, without more, that "the apportionment is done by assigning percentages of fault, which can be in any split as long as it adds up to 100 per cent."

[38] It would also have been confusing to the jury to have been told that the **Contributory Negligence Act,** (supra) provided for degrees of fault to be apportioned equally, without explaining how this could apply to the seat belt situation, when the fault of the respondents as defendants was by its nature more blameworthy than the plaintiff-appellant.

[39] After finding negligence on the part of both the defendant and the plaintiff that caused or contributed to Mr. Fowler's injuries, the jury answered "yes" to the

question whether they found it possible to establish the degree or percentage of negligence of each. The final question was "what is the percentage or degree of the negligence of each." The answer was

Answer:	Defendants	57.5%
	Robert Fowler	42.5%

[40] One of the earliest and most persuasive pronouncements on the seat belt defence was by Lord Denning in **Froom v. Butcher**, (supra). The case was decided when the law in England required cars to be equipped with seat belts but did not require drivers or passengers to wear them. (For purposes of apportioning fault, it is immaterial whether the use of seat belts is mandatory or voluntary. What is relevant is whether the use of a seat belt would have resulted in less severe injuries.) Lord Denning discussed various opinions, then current, concerning their use, and concluded that "a prudent man . . . should always, if he is wise, wear a seat belt."

[41] In a case from British Columbia involving responsibility for making a child passenger wear a seat belt, **Galaske v. O'Donnell**, [1994] 1 S.C.R. 670, Cory, J. writing for the majority, quoted Lord Denning's reasons and said they were "as sensible and compelling in 1994 as they were in 1975, and should have been in 1985."

[42] Lord Denning discussed apportionment of responsibility as follows:

> 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 insofar 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 enquire whether the driver was grossly negligent or only slightly negligent? Or whether the failure to wear a seat belt was entirely inexcusable or almost forgiveable? If such an enquiry could easily be undertaken, it might be as well to do it. In **Davies v. Swan Motor Co** ([1949] 1 All E.R. at 632) we 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 enquiry 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 cases 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.
>
> . . . In the present case the injuries to the head and chest would have been prevented by the wearing of a seat belt and the damages on that account might be reduced by 25 per cent. The finger would have been broken anyway and the damages for it not reduced at all. Overall the judge suggested 20 per cent and Mr. Froom made no objection to it. So I would not interfere.

[43] In **Galaske,** (supra) Cory, J. did not specifically quote Lord Denning's remarks on apportionment but instead stated the Canadian practice:

> 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 own 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.

[44] Cory, J. listed what he called "but a few examples of the application of this principle." I propose to list the same cases but with an added notation to show the apportionment of contributory fault attributed to not wearing a seat belt in each case.

Jackson et al. v. Millar et al., [1972] 2 O.R. 197 - 10%

Dodgson v. Topolinsky (1980), 125 D.L.R. (3d) 177 (Ont. H.C.) - 15%

Pugliese v. Macrillo Estate (1988), 67 O.R. 641 (H.C.) - 20% (includes other factors.)

Thurmeier v. Bray (1990), 83 Sask. R. 183 (Q.B.) - 15%

Ohlheiser v. Cummings, [1979] 6 W.W.R. 282 (Sask Q.B.) - 25%

Keller v. Kautz (1982), 20 Sask. R. 420 - 15%

Rinas v. City of Regina (1983), 26 Sask. R. 132 - 25%

Berube v. Vanest, [1991] O.J. No. 1633 (Gen. Div.) - 15%

Schon v. Hodgins, [1988] O.J. No. 743 (District Ct.) - 20% (other factors present.)

Gervais et al. v. Richard et al. (1984), 48 O.R. (2d) 191 (H.C.) - 20% (plus a further percentage for other factors.)

Stamp v. The Queen in Right of Ontario (1984), 47 O.R. (2d) 214 (C.A.) - 15%

Beaver et al. v. Crowe et al. (1974), 49 D.L.R. (3d) 114 (N.S.S.C.T.D.) - 0%

Wallace v. Berrigan (1988), 47 D.L.R. (4^{th}) 752 (N.S.S.C.A.D.) - 20%

Holstein v. Berzolla, [1981] 4 W.W.R. 159 (Sask. Q.B.) - 15%

Ducharme v. Davies (1981), 12 Sask. R. 137, affirmed in part [1984] 1 W.W.R. 699 (C.A.) - 15%

Shaw Estate et al. v. Roemer et al. (1982), 51 N.S.R. (2d) 229 (A.D.) - 10%

Earl v. Bourdon et al. (1975), 65 D.L.R. (3d) 646 (B.C.S.C.) - 25%

Gagnon v. Beaulieu, [1977] 1 W.W.R. 702 (B.C.S.C.) - 25%

Aujla v. Christensen, [1992] B.C.J. No 860 (S.C.) - 25%

Pharness (Guardian ad litem of) v. Wallace, [1987] B.C.J. No. 2393 (S.C.) affirmed [1989] B.C.J. No. 2112 (C.A.) - 15% (plus 35% per cent for mixing "speed, beer and a car with defective brakes.")

[45] In 1996, more than a year after the accident, the New Brunswick **Insurance Act**, R.S.N.B. 1973 c. I-12, was amended to provide that in future accidents, when an injured party could not establish he or she was wearing a seat belt, damages would be reduced by 25 per cent unless the person establishes that failure to wear a seat belt did not contribute to the bodily injury or death.

[46] The New Brunswick provision appears to reflect, at least in part, the reasons of Denning, M.R. in **Froom v. Butcher,** (supra) where he proposed an arbitrary standard rather than an assessment of blameworthiness: "Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases."

[47] While that remark is directed to apportioning blameworthiness, it applies equally to apportionment based on the degree of seriousness of the injuries which can be attributed to failure to wear a seat belt.

[48] Lord Denning stated (as cited above):

> 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 cases 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 still would 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. (Emphasis added.)

[49] This reasoning makes particularly good sense in cases such as the present one, where the chaotic violence of a serious collision makes it futile to predict, with any pretense of certainty, how seriously a driver would be disabled by his injuries, with or without a seat belt. If there is actual evidence that the wearing of a seat belt would have made no difference, the damage award should not be reduced. If there is evidence showing that a seat belt would have made all the difference, that is, on the facts of the present case, if it could be shown that Mr. Fowler could probably have passed through the experience without suffering disability, then the award should be reduced by the full 25 per cent. The evidence in the present case upon which the jury found the injuries would have been less severe if Mr. Fowler had been wearing a seat belt would also support a finding that a seat belt would make "a considerable difference."

[50] In such a case, Lord Denning said, "I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."

[51] That is clearly his view of "a share of responsibility which will be just and equitable in the great majority of cases."

[52] An arbitrary apportionment is particularly appropriate in cases such as the present one, in which the extreme severity of the collision makes it difficult to predict results with any precision. It reflects the well understood statistical probability, on which the seat belt legislation is based, that a driver will fare better in an accident if he is restrained.

[53] **Froom v. Butcher,** (supra) has been widely accepted and approved in Canada and has acquired a settled place in our jurisprudence, as Cory, J.'s approving remarks in **Galaske,** (supra) make clear.

[54] Justice Allen M. Linden in **Canadian Tort Law**, Fifth Edition, states at p. 447:

> The leading Canadian decision on the seat belt defence is **Yuan v. Farstad** [(1967), 66 D.L.R. (2d) 295 (B.C.)]. Mr. Justice Munroe of the British Columbia Supreme Court found the defendant motorist entirely to blame for causing an auto accident which injured the plaintiff, Mrs. Yuan, and killed her husband, Dr. Yuan. Because Dr.Yuan, the driver of the blameless automobile, was not wearing an available seat belt at the time of the collision, he was ejected and fatally injured. Mrs. Yuan, who was a passenger in her husband's car had no seat belt available to her. . . . Mrs. Yuan was allowed to

> recover 100 per cent of her damages for her own personal injuries, but the award for the death of her husband was reduced by 25 per cent, because of his contributory negligence in failing to buckle up.
>
> . . . If the deceased had been wearing a seat belt, according to the judge, he would have suffered injury to his chest, but he would have been neither ejected nor killed.

[55] **Yuan v. Farstad**, (supra) provides the clearest, and most extreme, possible example of injuries entirely attributable to the failure to wear a seat belt. In those circumstances an apportionment of 25 per cent for contributory negligence was introduced into Canadian jurisprudence in 1967.

[56] Not one of the numerous cases cited by Justice Cory, from jurisdictions across the country, apportioned contributory negligence at greater than 25 per cent for failure to wear a seat belt. Most of the cases fit comfortably in a middle range, consistent with seat belts making a "considerable difference." This reflects the law in Canada, and the jury should have been instructed as to how to apply it.

[57] There is nothing in the evidence to suggest any blameworthiness in Mr. Fowler's conduct that would justify a finding that he was so much more seriously at fault than any other Canadian plaintiff who neglected to buckle up. In my view it was an egregious error requiring intervention by this court to hold him 42.5 per cent contributorily negligent. Apportionment of liability is by definition a matter of fact, but in this case it was not a matter of fact found by a properly instructed jury. As noted above, the jury instructions failed to distinguish between "by far the greater share of responsibility" which must be borne by the negligent driver, and that of an injured plaintiff whose negligence was not toward anyone to whom he owed a duty of care, but only with respect to his own safety.

[58] The standard of review was recently restated by Bastarache, J. in **Ingles v. Tutkaluk Construction Ltd.,** [2000] 1 S.C.R.298 at p. 338:

> The apportionment of liability is primarily a matter within the province of the trial judge. Appellate courts should not interfere with the trial judge's apportionment unless there is demonstrable error in the trial judge's appreciation of the facts or applicable legal principles.

[59] Here, there is demonstrable error in the jury's appreciation of the

applicable legal principles because they were not adequately instructed. In my view **Froom v. Butcher** is so widely accepted, so reasonable, and so clearly explained that I would consider Lord Denning's explanation of apportionment a sound model for a jury charge when failure to wear seat belts is in issue.

[60] The respondents initially appealed on an evidentiary ruling. Both appeals were heard together. I have referred to the Fowlers as appellants and Schneider National Carriers Limited and Michael Magoon as respondents, and treated the evidentiary appeal as a cross-appeal. Shortly before the trial Schneider National Carriers Limited and Michael Magoon had an accident reconstruction report prepared by Carmen Daecher, an expert residing in Pennsylvania, and applied for permission to file it late. The trial judge found it to be "lacking in any real scientific or engineering analysis or basis which would otherwise be outside the experience and knowledge of a jury" and for that reason dismissed the application for late filing. I would agree: the Daecher report would have been of little assistance to the jury, and the issue of its admittance has become moot. I would dismiss the Schneider National Carriers Limited and Michael Magoon appeal without costs.

[61] I would allow the appeal and set aside the jury's apportionment of liability on the basis that it is unreasonable and unsupported by legal principle. I would interpret the jury's findings that Mr. Fowler's injuries would have been less severe had he been wearing a seat belt as equivalent to a finding that a seat belt would have made a "considerable difference", following **Froom v. Butcher**. I would apportion the respondent's responsibility at 85 per cent and Mr. Fowler's at 15 per cent. The appellant should have costs on the appeal of 40 per cent of the costs at trial, plus disbursements.

Freeman, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.