CITATION: Stewart v. The Corporation of the Township of Douro-Dummer, 2018 ONSC 4009
COURT FILE NO.: CV-11-4156
DATE: 20180626

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Kelly Stewart and Jacob Stewart

Plaintiffs

AND:

The Corporation of the Township of Douro-Dummer, The Corporation of the Township of Otonabee-South Monaghan, Christopher Yaxley, Liftlock Coach Lines Limited, Jeremiah Ryan, Jerry Ryan and Novex Insurance Company

Defendants

BEFORE: **Ricchetti, J.**

COUNSEL: J. Stolberg and J. O'Dell for Novex Insurance Company

D. Zuber for Christopher Yaxley and Liftlock Coach Lines Limited

HEARD: May 7, 8, 9, 10, 11, and 14, 2018

REASONS FOR JUDGMENT

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THE PROCEEDING

THE BACKGROUND TO THE MVA

[1] This motor vehicle accident occurred on Sunday, November 28, 2010 at approximately 2:18 a.m. It was a cold, snowy night. The roads were wet, possibly icy.

[2] Kelly Stewart ("Mr. Stewart") and three other men had been to a stag and doe party at a restaurant/bar. There had been considerable consumption of alcohol that evening. At about 2 am,

Mr. Stewart, his son Jacob Stewart, Jeffrey Gazen and Doug Burrows decided to go home by a taxi cab. A taxi cab was called. The four men were intoxicated. Mr. Stewart was very intoxicated.

[3] Yaxley ("Mr. Yaxley") was the taxi cab driver. Liftlock Coach Lines Limited ("Liftlock") was the owner of the taxi cab. Mr. Yaxley and Liftlock are hereafter jointly referred to as "Yaxley".

[4] Mr. Yaxley accepted the fare. Mr. Stewart sat in the front passenger seat of the taxi cab. The other three men sat in the rear seat of the taxi cab.

[5] As Mr. Yaxley was driving towards the passengers' destination, at about 2:18 a.m., the Ryan vehicle drove through a stop sign. The Ryan vehicle "t-boned" the taxi cab. The taxi cab hit several poles and slid down an embankment. This was a very serious motor vehicle accident. (the "MVA").

[6] The passengers in the taxi cab were hurt. Mr. Stewart was seriously hurt.

[7] Numerous actions were commenced regarding this MVA.

THE SETTLEMENTS AND THE AGREEMENT

[8] By the time this proceeding got to trial, only one issue remained to be decided. The sole issue to be tried was whether Yaxley has any joint and several liability for the injuries sustained by Mr. Stewart.

[9] The issue to be decided impacts Novex Insurance Company ("Novex"), the insurer who provided uninsured and underinsured insurance to Mr. Stewart.

[10] The parties entered into a written agreement regarding the issue to be tried (the "Agreement"). The Agreement set out certain agreed facts:

a) Yaxley did not cause or contribute to the MVA;

b) Mr. Stewart was not wearing a seatbelt at the time of the MVA; and

c) Mr. Stewart's injuries were more serious than they would have been had he been wearing a seatbelt at the time of the MVA;

THE ISSUE

[11] The sole issue is whether there is any liability on Yaxley for Mr. Stewart's failure to wear a seatbelt. The determination of this issue depends on whether Mr. Yaxley owed a duty of care to ensure Mr. Stewart buckled his seat belt during the fare. If there was such a duty, whether Yaxley met the appropriate standard of care.

THE EVIDENCE CALLED AT TRIAL

[12] Novex called the following witnesses:

a) Mark Alexandre Paquette (collision reconstruction expert);

b) Mark Mussington (police officer);

c) Robert Stodola (Ford Motor Company representative);

d) Dr. Michael Corbett (forensic toxicologist); and

e) Jason Hope (police officer);

[13] Yaxley called the following evidence:

a) Christopher Yaxley (video-taped evidence);

b) Elaini Stewart nee Johnson (Jacob Stewart's now wife);

c) Jacob Stewart (rear passenger); and

d) Jefferey Gazen (rear passenger);

[14] There was also evidence read from Mr. Stewart's examination for discovery.

COMMENTS ON THE EVIDENCE

REAR PASSENGERS

[15] Some of the trial evidence, led by both parties, dealt with whether the rear passengers of the taxi cab were seat belted at the beginning of the trip, during the trip and at the time of the MVA.

[16] In my view, whether some or all of the rear passengers of the taxi cab were seat belted before, during the trip or at the time of the MVA does not assist the determination of the issue to be decided.

[17] In any event, I would have found that it could not be determined whether the rear passengers were seat belted on at the time of the MVA and I would have found that the rear passengers had their seat belts buckled when the taxi cab left the restaurant/bar.

[18] I come to the first determination because the police could not determine whether the rear passengers were wearing seat belts at the time of the MVA. The report from MEA Forensic Engineering ("MEA") could not determine whether the rear passengers were wearing seat belts. Mr. Paquette, relying on the police and MEA reports, came to a different conclusion on the same issue. For the reasons set out below, I would not accept Mr. Paquette's opinion on this issue.

[19] I come to the second determination because I accept the evidence of Elaina Stewart that she ensured and was satisfied that all four men were buckled before the taxi cab left the restaurant/bar.

MR. PAQUETTE'S TESTIMONY

[20] Mr. Paquette is a collision reconstruction expert. Mr. Paquette opined that Mr. Stewart was not wearing a seat belt at the time of the MVA. This is an agreed fact in the Agreement.

[21] As stated above, the balance of Mr. Paquette's testimony relates to whether the rear passengers had their seat belts buckled at the time of the MVA. This evidence does not assist on the issue to be decided.

[22] In any event, I do not accept Mr. Paquette's opinion regarding the rear passengers. Mr. Paquette did not attend to personally observe the taxi cab after the MVA. Mr. Paquette did not have the benefit of going to the MVA scene to see the manner of the collision or observe what the taxi cab hit prior to sliding down the embankment. Mr. Paquette relied on photos, notes of the police officers and an MEA forensics' report. Both the police and MEA forensics' report concluded that they could not determine whether the rear seated passengers were wearing seat belts at the time of the MVA. Yet, Mr. Paquette appeared to have done little or nothing to attempt to investigate how or why the police and MEA had come to a different conclusion than he did. Mr. Paquette relies heavily on the lack of "loading marks" on the rear seatbelts straps in the Yaxley taxi cab. Mr. Paquette concluded that "loading marks" would be present if the seatbelts had been engaged in a severe accident such as this. Since there are no "loading marks" on the seat belts, Mr. Paquette concluded that the seat belts were not used by the rear passengers at the time of the accident. However, in cross-examination Mr. Paquette admitted that the existence of "loading

marks" are conclusive that the seatbelts were used in an accident but the non-existence of "loading marks" are not necessarily conclusive that seat belts were not in use at the time of the accident. Therefore, it is difficult to rely on Mr. Paquette's conclusion that he arrived at based on the lack of "loading marks" on the rear passenger seat belts.

DR. CORBETT'S TESTIMONY

[23] Dr. Corbett testified that, at the time of the MVA, Mr. Stewart had a blood alcohol level of between 223 to 327 mg of alcohol in 100 ml of blood. Mr. Stewart was very intoxicated.

MR. YAXLEY'S TESTIMONY

[24] Mr. Yaxley gave clear, believable evidence. I find it reliable. He did not exaggerate or give evidence that was biased in his favour. I accept his evidence.

ELAINA STEWART'S TESTIMONY

[25] As set out below, I accept the evidence of Elaina Stewart. Elaina Stewart's evidence was unshaken in cross-examination.

[26] The inconsistencies in Elaina Stewart's evidence suggested by Novex's counsel relate to minor, largely irrelevant matters and do not go to the heart of her evidence - Mr. Stewart was wearing a seat belt at the time the taxi cab left the restaurant/bar.

[27] When cross-examined as to why she could be so certain that the four men were buckled, Elaina Stewart explained a friend died because he was not buckled. This was a very credible explanation for her clear recollection of her significant evidence on ensuring the four men were buckled when they left the restaurant/bar. I accept her evidence.

JACOB STEWART'S TESTIMONY

[28] There are inconsistencies in Jacob Stewart's testimony.

[29] He "believed" all four men were wearing seat belts that night. He testified he saw seat belt type injuries on Mr. Stewart at the hospital. However, this is inconsistent with the agreed fact that Mr. Stewart did not have his seat belt on at the time of the MVA. This raises questions regarding the reliability of Jacob Stewart's testimony.

[30] Jacob Stewart's evidence was also inconsistent, at times, as to his location in the rear seat of the taxi cab during the taxi ride.

[31] I have concerns regarding Jacob Stewart's testimony. However, Jacob Stewart's evidence did not impact on the ultimate decision in this case.

JEFFEREY GAZEN'S TESTIMONY

[32] Like Jacob Stewart's evidence, Jefferey Gazen's evidence does not impact on the ultimate decision in this case.

MR. KELLY STEWART'S TESTIMONY

[33] Mr. Stewart suffered extensive injuries, including head injuries. He was hospitalized for a considerable time.

[34] During his examination for discovery on October 7, 2013, Mr. Stewart stated he was wearing a seat belt. He stated he had bruises where the seat belt had been buckled over his body at the MVA. Yet, the parties agreed Mr. Stewart was not buckled at the time of the MVA. This is a significant discrepancy.

[35] The above leads me to conclude that Mr. Stewart's testimony is not reliable.

THE EXCLUSION OF NOVEX's BIOMECHANICAL REPORT

[36] During the course of the trial, Novex's counsel sought to introduce a newly obtained expert report from biomechanical engineers. The purpose of this late expert report was to introduce expert biomechanical evidence that the rear passengers in the taxi cab were not wearing seat belts at the time of the MVA.

[37] This late expert report sought to contradict the evidence of certain of the rear passengers who testified (or were going to testify) that they were belted and had sustained injuries consistent with wearing seat belts at the time of the MVA.

[38] This court ruled that it would not grant leave under Rule 53.08 of the *Rules of Civil Procedure*, R.R.R. 1990, Reg. 144 to introduce this late expert report. This court advised counsel it would provide reasons in its judgment for this ruling. These are those reasons.

[39] Novex's counsel, like other counsel, confirmed months ago they were ready to proceed to trial. Expert reports were exchanged between counsel. Parties relied on the exchanged expert reports to prepare for trial. Parties relied on the exchanged expert reports for the examination and cross-examination of witnesses.

[40] Nevertheless, Novex chose to retain and instruct its biomechanical expert to prepare an expert report after this trial started. This was a short trial and the late expert report was delivered to Yaxley's counsel on or about the third day of trial.

[41] Novex was the party who first introduced the issue of whether the rear passengers were seat belted at the time of the MVA. It did so during the examination in chief of its first witness,

Mr. Paquette. Novex knew that Mr. Paquette was not a biomechanical engineer and could not give biomechanical expert evidence sought to be introduced through the late expert report. The same biomechanical engineers had previously provided an expert report for Novex on the use of Mr. Stewart's seat belt at the time of the MVA but the experts did not do a biomechanical injury analysis for the rear passengers. The biomechanical experts received their instructions to prepare their late report after Mr. Paquette (and some other witnesses) had completed giving evidence at this trial.

[42] It is the responsibility of Novex's counsel to comply with service of an expert's report under the *Rule of Civil Procedure*. It failed to do so as it relates to this late expert's report. It was Novex's responsibility to serve and file their expert reports in advance of trial if it was going to or needed to rely on a particular expert report. Moreover, given that Novex was going to lead evidence regarding the rear passengers' seat belt use at the time of the MVA, it should have known it would require a biomechanical expert report given that Mr. Paquette was not qualified to give such an opinion.

[43] To permit Novex to introduce this expert report at this time would result in a lengthy delay, Yaxley's counsel would have to retain their own expert to review and respond to Novex's late expert report. The delay would be months. In my view, this would be an undue delay.

[44] In addition, prejudice exists in these circumstances. Yaxley's counsel had already cross-examined Mr. Paquette and numerous other witnesses based on the existing expert reports on whether the rear passengers were seat belted at the time of the MVA. I am satisfied that submitting the late expert report would prejudice Yaxley.

[45] Finally, this evidence only goes to impeaching the evidence of Elaina Stewart and possibly the other rear passengers' testimony. But there are several problems with this:

a) This late expert report will not afford evidence as direct evidence or the basis for an inference on the issue to be decided. As I have stated above, whether the rear passengers were seat belted at the time of the MVA will not assist in determining the issue at trial;

b) Elaina Stewart's evidence only deals with the whether the four men were seat belted when they left the restaurant/bar and *not* when the MVA occurred, a considerable time later. The late expert report does not really contradict Elaina Stewart's evidence since her evidence only relates to the time when the taxi cab left the restaurant/bar and the late expert report relates to the time of the MVA. What, if anything, regarding buckling or unbuckling of seat belts, which may have occurred in between these two time periods is not clear from the evidence; and

c) The collateral fact rule provides that evidence introduced solely to impeach the credibility of a witness(es) is not admissible. See *The Law of Evidence in Canada*, Third Edition, Bryant, Lederman, Fuerst, Lexis Nexis, page 13, para. 1.40.

[46] I conclude the late expert report on whether the rear passengers were seat belted at the time of the MVA is a collateral issue. Whether the rear passengers were seat belted at the time of the MVA does not assist on the issues to be decided – namely, did Yaxley owe a duty of care to Mr. Stewart and did he fail to meet the appropriate standard of care? I am not persuaded that it is sufficiently beneficial to the trial process to admit this expert's report. In *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, the Supreme Court adopted and explained the trial judge's gatekeeper role:

> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.
>
> (emphasis added)

[47] Novex's right to a fair trial is not impacted by the exclusion of this late expert report.

[48] Given the late expert report's lack of assistance to this court on the issues to be decided and the prejudice to Yaxley, the admissibility of the late report is neither necessary nor warranted.

[49] Leave was not granted to permit Novex to rely on this late expert report.

THE FACTS

[50] Elaina Stewart was a part owner of the restaurant/bar where the stag and doe party was held that night.

[51] While she had had a few drinks that evening, she was not intoxicated. When it was time for the four men to leave, Elaina Stewart, arranged for her future husband, her future father-in-law and two friends to take a taxi home. She knew they were intoxicated and tired.

[52] A taxi cab was called.

[53] Elaina Stewart ensured that the four men got into the Yaxley taxi cab. She ensured that the taxi cab driver received payment for the fare. She ensured the taxi driver had the destination address.

[54] Elaina Stewart saw Mr. Stewart get into the front seat of the taxi cab and buckle his seat belt. She saw Jacob Stewart put his seat belt on. Mr. Burrows was very intoxicated so Elaina Stewart put his seatbelt on for him. She saw Mr. Gazen put his seat belt on. Elaina Stewart checked to make sure everyone was seat belted before the taxi cab left the restaurant/bar.

[55] When the taxi cab left, Elaina Stewart needed to salt the area as it was freezing. Since she had to be back at the restaurant/bar early in the morning, she decided to sleep in her office that night.

[56] Mr. Yaxley knew that the four men he picked up were intoxicated. Mr. Yaxley did not check or take any steps to ensure that the four passengers were seat belted. Mr. Yaxley couldn't be "100%" sure whether Mr. Stewart was buckled. During the trip, Mr. Stewart was going in and out of consciousness/sleeping.

[57] Mr. Yaxley's understanding is that it is an adult's responsibility to get buckle their seat belt in his taxi cab.

[58] The taxi cab has a "belt minder" system that is a chime goes off and a light flicks on the dashboard when the front driver and front passenger are not buckled. The "belt minder" stops making a chime after 5 minutes. It should also be noted that the "belt minder" system can be disabled for a particular trip or disabled permanently. There is no evidence whether either was done in the Yaxley taxi cab.

[59] As for the front passenger's seat, Mr. Yaxley testified that he did not recall the belt minder "going off" as a result of Mr. Stewart's failure to be seat belted. However, had it gone off, Mr. Yaxley would have requested Mr. Stewart to put on his seat belt to avoid the annoying noise of the chime. The fact that Mr. Yaxley does not recall the chime going off and telling Mr. Stewart to do his seat belt when he left the restaurant/bar is consistent with Elaina Stewart's evidence that Mr. Stewart was seat belted when the taxi cab left the restaurant/bar.

[60] A taxi driver is not required by law to be buckled. Mr. Yaxley used a "dummy belt" to prevent the belt minder from going off with respect to the driver's seat.

[61] During the taxi cab ride, one of the rear passengers said he was going to be sick. Mr. Yaxley pulled over. This was an unscheduled stop. The rear passenger got out. He returned to the taxi cab a short time later. There is no evidence that Mr. Stewart got out of the taxi cab at this unscheduled stop or that Mr. Stewart unbuckled his seat belt at this time. Prior to continuing with the fare, Mr. Yaxley did nothing to ensure that Mr. Stewart was or remained seat belted.

[62] Mr. Yaxley continued to drive the four men to their destination. Within minutes of the unscheduled stop, while driving with the right of way through an intersection, Jeremiah Ryan drove through a stop sign and hit the taxi cab broadside. The taxi cab hit several poles, went down an embankment and came to a stop.

[63] Mr. Stewart was seriously hurt.

THE POSITION OF THE PARTIES

[64] Novex submits that Yaxley owed a duty of care to Mr. Stewart because it was apparent to Mr. Yaxley that Mr. Stewart was intoxicated (and therefore a vulnerable individual who could not care for himself). The alleged duty of care owed is to ensure Mr. Stewart was and remained seat belted:

a) When they left the restaurant/bar;

b) After the unscheduled stop to permit one of the rear passengers to exit the vehicle; and

c) During the balance of the fare, including when the MVA occurred.

[65] Yaxley submits that a taxi driver owes no such duty of care to adult passengers, such as Mr. Stewart, whether intoxicated or not, to ensure that they buckle their seat belts and remain seat belted during the fare.

THE LAW

[66] There are several statutory provisions in Section 106 of the *Highway Traffic Act,* R.S.O. 1990, ch. 8 that may bear on the responsibility of passenger's use of seatbelts.

> (3) Every person who is at least 16 years old and is a passenger in a motor vehicle on a highway shall,
>
> (a) occupy a seating position for which a seat belt assembly has been provided; and
>
> (b) wear the complete seat belt assembly as required by subsection (5).
>
> (4) No person shall drive on a highway a motor vehicle in which there is a passenger who is under 16 years old unless,
>
> (a) that passenger,
>
> (i) occupies a seating position for which a seat belt assembly has been provided, and
>
> (ii) is wearing the complete seat belt assembly as required by subsection
>
> or
>
> (b) that passenger is required by the regulations to be secured by a child seating system or child restraint system, and is so secured.

[67] The above legislation came before the Provincial Legislature on December 4, 2006. One of the amendments proposed to the legislation was "....to ensure that the responsibility remains with the driver of the vehicle for those occupying the vehicle. We believe that there should be consequences for the driver, regardless of the age of the occupants, if he or she chooses to operate a vehicle with unrestrained passengers." This amendment was *not* adopted by the Provincial Legislature.

Canadian Authorities

[68] The parties agree that there is no Canadian authority on this point. However, Novex submits that authorities, such as *Galaske v. O'Donnell*, [1994] 1 SCR 670, while dealing with different issues than the case at bar, have already established a driver owes a duty to vulnerable passengers to ensure that passengers are seat belted.

United Kingdom Authorities

[69] In the United Kingdom, it may be that, unless there are "special circumstances", drivers are not required to ensure that adult passengers with full mental and physical capacity wear seat belts. It would appear there is a general reluctance by the courts to find a driver responsible to ensure that a passenger wears and maintains his seat belt.

[70] In *Froom v. Butcher*, [1976] 1 QB 286 CA Lord Denning held that "[u]nder the Highway Code a driver may have a duty to invite his passenger to fasten his seat belt: but adult passengers possessed of their faculties should not need telling what to do. If such passengers do not fasten their seat belts, their own lack of care for their own safety may be the cause of their injuries."

[71] In *Ivy Una Eastman v. South West Thames Regional Health Authority*, 1991 WL 839415, the Supreme Court of Judicature, Court of Appeal (Civil Division) summarized the state of the law on seatbelts as follows:

> Over the years, Parliament has seen fit, by statute and delegated legislation, to impose obligations upon drivers and passengers of motor vehicles in relation to seat belts. But Parliament has never seen fit to impose any requirement upon anyone to exhort the wearing of seat belts save the person who is obligated to wear the seat belt. In other words, there is no statutory obligation upon the driver of the motor vehicle to exhort his passenger to use a seat belt, assuming that they are there to be used. That is subject to only one exception, where children are concerned. [Emphasis added.]

[72] In *Ivy Una Eastman*, the High Court of Justice, Queens Bench Division, the court absolved the ambulance driver of all liability for the passenger's failure to wear his seat belt. The court found that, absent "very special circumstances, there is no duty on the driver to exhort passengers to wear a seat belt".

[73] At the Court of Appeal, Lord Justice Legatt found that, if the defendants did owe any duty to passengers to wear a seat belt, it would be "amply discharged by the provision of seat belts together with a notice enjoining passengers in the ambulance to wear them." While the Court left the door open to finding that there could be a possible duty on drivers to urge passengers to wear seat belts in "special circumstances," the Court did not provide any guidance on what constitutes special circumstances.

[74] In *Murphy v. East Ayrshire Council*, [2011] ESOH 136, the court had to deal with a wheelchair bound passenger. At para. 95 where the Court stated:

> I am not persuaded that any duty was incumbent upon the defenders' employees to monitor or supervise Mr Murphy during the journey in order to ensure that his seat belt remained fastened. Approaching the matter at a general level, I accept the defenders' submission that there was no positive duty incumbent upon their employees to monitor and if necessary enforce the wearing of a seat belt by persons of full age and capacity whom they were accompanying on journeys to and from the day centre.

[75] In *Murphy v. East Ayrshire Council,* 2012 S.L.T. 1125 (a related case the prior mentioned case), the court held "there [is] no duty in law, on the part of [defendant drivers], to supervise [plaintiffs] during every journey or to intervene, against [plaintiffs'] will, to fasten [their] seat belt." The case involved a wheelchair bound passenger who was strapped in by a taxi driver and accompanied by two care workers. In finding that the care workers were not liable for the passenger's injuries after he fell out of his chair when the taxi braked sharply, the Extra Division stated:

> Even if the occurrence [of the passenger unfastening his seatbelt] had been more frequent, the Lord Ordinary would still have been entitled to the conclusion that it did not amount to a failure to take such care on the part of the defenders or their care workers that they had not monitored

> the seat belt status of a person of full mental capacity. It appears that, in fact, the person who strapped the wheelchairs to the floor and ensured that the seat belts were fastened was the driver of the minibus, who was an employee of the taxi firm. This was not something that the care workers themselves did. There is no reason to place such an obligation upon them or to add a further task of monitoring the state of the seat belts throughout the journey. The care workers were there, at least in the case of Mr Murphy, to ensure that his lack of mobility was addressed when required. There was no apparent reason why they ought to have guarded against other eventualities unconnected with his mobility and thus the scope of their normal duties.

United States of America Authorities

[76] Generally, individual state legislation requires front-seat passengers to use a safety belt but does not impose a duty on the driver to require a passenger over 16 or 18 years old (depending on the state) to use a seat belt.

[77] In *Stewart v. Taylor*, 193 A.D.2d 1078, at 1078 the court noted that "a vehicle operator has no duty to require a passenger 16 years or older to use a safety belt or to ensure that the passenger is restrained by a safety belt before operating the vehicle."

[78] In *Poole v. Janeski*, 259 N.J. Super. 83, at 86 the court stated: "Despite these policy considerations, the relevant portions of the seat belt statute, N.J.S.A. 39:3-76.2a and 39:3-76.2f, do not place responsibility on the driver to make sure passengers are secured unless the passenger is under five years old where a special harness is required or between five and eighteen years of age. As to all others the statute is silent... Therefore, it appears reasonable to conclude under the doctrine of *expressio unis estexclusioalterius*, that the Legislature did not intend to make the driver responsible for the fastening of seatbelts on passengers over 18 years of age". In *Jones v. Schabron*, 113 P.3d 34, at paras. 8, 24 the court noted that "[The district court] held that Schabron did not have a duty to require adult passengers to wear seatbelts... The record supports the trial court's conclusion."

[79] Like the United Kingdom, there are some authorities that leave open the possibility for the Court to recognize that drivers have a duty to their passengers to make sure they was wearing seat belts.

[80] On the other hand, several courts, such as the District Court of Appeal of Florida, Fifth District, in *Bonds v. Fleming* 539 So.2d 583, at 585, explicitly found that drivers do not have a legal duty to ensure that their intoxicated passengers are seat belted:

> We find nothing ... to support the proposition that, as against a plaintiff passenger, an intoxicated driver is less entitled to rely on a seat belt defense than is a sober driver. Because he is held to an adult standard of care when entrusted with an automobile, Bonds [the plaintiff passenger] should have known his voluntary inebriation would diminish his appreciation for automobile safety measures including the use of a seat belt. Our holding that Fleming was not under a duty to fasten Bonds's seat belt is consistent with the public policy expressed within Florida's Safety Belt Law, section 316.614, Florida Statutes (1988). Enacted after this suit was initiated and thus technically inapplicable, the statute, nonetheless, requires front seat passengers over 16 years of age to buckle up, but the driver is not accountable nor negligent if the passenger fails to do so. See § 316.614(5), (10). It must be remembered that the seat belt defense goes only to the issue of damages, not liability for the accident. [Emphasis added.]

[81] Similarly, in *Collins v. Thomas*, 182 Vt. 250, at paras. 14-19 the Supreme Court of Vermont disagreed with the plaintiff's argument that the driver had failed to exercise reasonable care after volunteering to drive the intoxicated plaintiff because he failed to secure the plaintiff's safety "either by having him sit in the cab wearing a seatbelt, or, at least, by stopping the truck after realizing that he was in a precarious position in the bed of the vehicle."

Australian Authorities

[82] This issue appears to have first been dealt with by the Australian courts in *Lerga v. Susa*, [1991] ACTSC 105 where the intoxicated passenger, not wearing his seat belt, died in a MVA. The court discussed the negligence of a driver's duty:

> [39] As to the first consideration, the answer would very much depend, in the circumstances of this case, on whether the deceased was too drunk to have operated the seat belt. The driver may have contributed to the lack of use of the seat belt by his

> passenger by failing to ensure the seat belt was done up. The extent of that failure might well have been affected by the driver's relative sobriety.
>
> ...
>
> [43]In the present case, a prudent driver, knowing his or her passenger to be intoxicated, would have an enhanced duty to ensure that the passenger was safely positioned in the vehicle. That would include the proper engagement of the seat belt. It would be no excuse for the driver to claim that he or she was too intoxicated to carry out that duty.
>
> [48] To assess the culpability of the deceased in failing to wear a seat belt, it is important to assess the relative states of intoxication of the driver and the passenger. It is not known whether the deceased and the defendant were drinking together or separately. It is not known if the defendant appeared intoxicated. It is not known whether the deceased was even conscious when he first entered the defendant's motor vehicle.
>
> [49] This lack of information makes it more difficult for there to be an adverse finding against the deceased. However, that makes it even less appropriate to allow the defendant now to raise that issue...
>
> ...
>
> [85] In this case, as I have noted, the lack of seat belt can be proved, but evidence as to the degree of lack of care attributable to that omission is tenuous and uncertain. The evidence of causal relationship of that omission to the death of the deceased is entirely absent. [Emphasis added; citations omitted.]

[83] No negligence was found on the part of the driver. However, this case suggested that a duty on a driver might be imposed to ensure that intoxicated passengers wear seat belts. *Lerga* has not been cited by any other Australian court.

[84] The Australian legislative authorities subsequently passed the following legislation making it clear that a driver owes no duty of care solely because the passenger is intoxicated:

Civil Liability Act 2002, (NSW)

> 49(1)The following principles apply in connection with the effect that a person's intoxication has on the duty and standard of care that the person is owed:
>
> (a) in determining whether a duty of care arises, it is not relevant to consider the possibility or likelihood that a person may be intoxicated or that a person who is intoxicated may be exposed to increased risk because the person's capacity to exercise reasonable care and skill is impaired as a result of being intoxicated,
>
> (b) a person is not owed a duty of care merely because the person is intoxicated,

> (c) the fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person.
>
> (2) This section applies in place of a provision of section 74 of the Motor Accidents Act 1988 or section 138 of the Motor Accidents Compensation Act 1999 to the extent of any inconsistency between this section and the provision.

[85] Section 3B(2)(f) of the *Civil Liability Act* provides that s. 49 applies to motor accidents. This appears to be an explicit overriding of the court's statement in *Lerga* that "a prudent driver, knowing his or her passenger to be intoxicated, would have an enhanced duty to ensure that the passenger was safely positioned in the vehicle.

[86] These statutory provisions suggest it is unlikely that Australian courts will find any positive duty on defendant drivers to ensure that intoxicated passengers are properly seat belted.

THE ANALYSIS

[87] Novex submits there is a recognized duty of care on a driver to ensure that adult passengers are seat belted when there is a special relationship and vulnerability on the part of the adult passenger. Novex suggests this "special relationship" arises from the fact that the defendants are the driver and owner of a taxi cab and the vulnerability arises because the adult passenger, Mr. Stewart, was visibly intoxicated.

IS THE DUTY SUGGESTED BY NOVEX A NEW DUTY OR THE EXTENSION OF A DUTY ALREADY RECOGNIZED AT LAW?

[88] Novex relies specifically on para. 13 of *Galaske* which provides:

> 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?

[89] The difficulty with this submission is that the court in *Galaske* was considering whether a duty of care is owed by a driver to a passenger under 16 years of age. Neither a taxi cab nor vulnerability due to intoxication were at issue in *Galaske.*

[90] *Galaske* does provide that every passenger has a duty of care to buckle their own seat belts. See *Galaske* paras. 14-21 and specifically at para. 22 where the Supreme Court concluded:

> 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.

[91] I am not persuaded that *Galaske* establishes that there exists a duty owed on a taxi driver (or any driver) to ensure an adult passenger is seat belted, whether or not the adult passenger is vulnerable due to intoxication.

[92] Novex also submits that this "existing" or "established" duty of care was recognized in *Colebank v. Kropinske*, 2002 BCSC 436. The circumstances in *Colebank* were unusual as described in para. 2:

> The circumstances are somewhat unusual. The plaintiff and the defendant, Daniel Kropinske, who was then 22 years old, were romantically involved. They had travelled from their home in Salmon Arm on the afternoon of May 27th to Vernon. Between approximately 3:30 p.m. on the 27th and midnight on the 28th, the plaintiff drank five or six bottles of beer and five or six coolers. Moreover, she shared two joints of marijuana with the defendant. On leaving Vernon to begin the homeward trip to Salmon Arm, the plaintiff refused to put her seatbelt on. This was not the first time that she had done so. During the course of the journey, the defendant says that the plaintiff told him, "I bet you I could jump out of this car, roll, and walk home." On several occasions, the plaintiff asked the defendant to stop the car and let her out. The defendant refused to do so because of the real risk to her safety if she were alone on or near a highway, in the middle of the night, and intoxicated. The defendant continued to drive at approximately 90 kilometres per hour and closely watched the plaintiff. When he saw her put her hand on the door handle, he told her to stop. Approximately two minutes later, the plaintiff opened the door and leaned out. The defendant grabbed her and pulled her back into the vehicle. The plaintiff first pushed her weight onto the defendant and then reversed the force of her movement toward and outside the door such that her head, one leg, and half of her body were out the door of the car. The defendant had a grip on her arm and for an instant, the plaintiff seemed to recognize her peril when she told the defendant, "Please don't let go." However, the defendant lost his grip with the result that the plaintiff fell out. He immediately stopped, backed up, picked up the plaintiff, and took her to the hospital.

[93] The plaintiff in *Colebank* relied on Cory J.'s statement in *Galaske* at page 686:

> The driver of a car is in a position of control...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.
>
> (emphasis added)

[94] It should be noted that this passage was taken from the Cory J.'s section entitled "The Duty Owed by a Driver to Ensure that Passengers Under 16 Wear Seat Belts" and after Cory J. had concluded that a driver, accepting children as passengers, must accept some responsibility for the safety of those children.

[95] There are other significantly distinguishing aspects in the *Colebank* facts. See para. 17:

> I find the defendant knew or should have known of the risk that the plaintiff would impetuously exit the car while it was moving. He failed to discharge his statutory duty to ensure that she was seatbelted (although I accept that this played a relatively small role in what happened), and he provided her with alcoholic beverages and marijuana, knowing that when she was intoxicated, the plaintiff could be uncontrollable. However, while the previous conduct of the plaintiff, which I have described, should have alerted the defendant to the risk, I do not find that her previous conduct was any more than unpredictable. Nor do I find that the defendant should have stopped the car and permitted the plaintiff to exit. It was late at night, the plaintiff was intoxicated, and there was a greater and foreseeable risk of harm to her outside the car than in. However, the defendant did drive too fast in all of the circumstances that were known to him, and he should have slowed his rate of speed below the posted speed.
>
> (emphasis added)

[96] In my view, *Colebank* does not establish the existence of the duty of care submitted by Novex. *Colebank* is one of those cases where the defendant provided the plaintiff with alcohol and marijuana, knew of the risk from previous encounters, and the defendant was driving too fast. The issue of whether the driver owed a duty to ensure the plaintiff was buckled in the absence of these aggravating factors was not considered, discussed or decided by the court in *Colebank*.

[97] Novex also relies on *Wang v. Horrod,* (1998) 48 B.C.L.R. (3d) 199 (C.A.). This case involves a passenger hurt on a bus. During the bus trip, Ms. Wang decided to get up to remove her coat. The bus moved forward. Ms. Wang fell and was seriously injured. There was nothing unusual about the way the bus started. Seat belts were not an issue in this case. The court proceeded to conduct its analysis on the basis that there was a duty of care. This naturally arose from the transit authorities own policies requiring the bus driver to be aware of and ensure passenger safety. The central issue was whether the driver breached the standard of care.

[98] There are no seat belts on a bus. Intoxication was not at issue. This case does not assist Novex's submission.

Conclusion

[99] A duty of care owed by a taxi driver to a visibly intoxicated adult passenger (or otherwise vulnerable adult passenger) has not been previously recognized by Canadian courts.

ONUS

[100] The onus is on Novex to establish that a *prima face* duty of care exists in this case. See *Childs. v. Desormeaux*, 2006 SCC 18 at para. 13.

[101] If Novex establishes a *prima facie* duty exists in this case, then the onus is on Yaxley to establish that there are residual policy reasons why this duty should not be recognized. See *Childs* at para. 13.

DOES A TAXI CAB DRIVER OWE A DUTY OF CARE TO ENSURE VISIBLY INTOXICATED PASSENGERS ARE SEAT BELTED?

[102] There are certain indisputable facts known (or should be known) to all adult passengers, who get into a vehicle cab:

a) being a passenger in a vehicle always carries with it a risk of an accident and consequent injury, which accident is not necessarily dependent on the negligence of the driver;

b) a passenger who does not wear a seat belt, may/will likely suffer more serious injuries if the vehicle is an accident; and

c) every adult passenger in a vehicle has a legal duty to wear a seat belt.

[103] The facts in this case include:

a) it was readily apparent to Yaxley, when he arrived to pick up the adult passengers, that Mr. Stewart was highly intoxicated when he got into the taxi cab;

b) Yaxley took no active steps to ensure that Mr. Stewart was seat belted when he left the restaurant/bar;

c) Mr. Stewart was seat belted when he left the restaurant/bar;

d) Yaxley took no steps during the fare to the destination to ensure that Mr. Stewart remained buckled during the fare;

e) Mr. Stewart was not seat belted when the MVA occurred; and

f) There is no evidence as to when or how Mr. Stewart came to be unbuckled before the MVA.

[104] As the alleged duty has not previously been recognized in Canada, an *Anns v. Merton London Borough Council*, [1978] A.C. 728 analysis (as refined in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537)) is required.

[105] The three requirements for the finding of a duty of care are:

a) reasonable foreseeability;

b) sufficient proximity; and

c) the absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity.

[106] Since *Cooper*, both reasonable foreseeability and proximity— the latter expressed in *Cooper* as a distinct and more demanding hurdle than reasonable foreseeability — must be proven in order to establish a *prima facie* duty of care. See *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] 2 S.C.R. 855 at para. 34.

[107] The Supreme Court in *Rankin (Rankin's Garage & Sales) v. JJ,* 2018 SCC 19 described the rationale for the first two requirements as follows:

> [22] The rationale underlying this approach is self-evident. It would simply not be just to impose liability in cases where there was no reason for defendants to have contemplated that their conduct could result in the harm complained of. Through the neighbour principle, the defendant, as creator of an unreasonable risk, is connected to the plaintiff, the party whose endangerment made the risk unreasonable: E. J. Weinrib, "The Disintegration of Duty", in M. S. Madden, ed., *Exploring Tort Law* (2005), 143, at p. 151. The wrongdoing relates to the harm caused. Thus, foreseeability operates as the "fundamental moral glue of tort", shaping the legal obligations we owe to one another, and defining the boundaries of our individual liability: D. G. Owen, "Figuring Foreseeability" (2009), 44 *Wake Forest L. Rev.* 1277, at p. 1278.
>
> [23] In addition to foreseeability of harm, proximity between the parties is also required: *Cooper*, at para. 31. The proximity analysis determines whether the parties are sufficiently "close and direct" such that the defendant is under an obligation to be mindful of the plaintiff's interests: *Cooper*, at para. 32; *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165, at para. 24. This is

> what makes it just and fair to impose a duty: *Cooper*, at para. 34. The proximity inquiry considers the "expectations, representations, reliance, and the property or other interests involved" as between the parties: *Cooper*, at para. 34. In cases of personal injury, when there is no relationship between the parties, proximity will often (though not always) be established solely on the basis of reasonable foreseeability: see *Childs*, at para. 31.

Reasonable Foreseeability

[108] Assessing reasonable foreseeability entails asking whether the injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).

[109] The issue to be decided is whether it was reasonably foreseeable that Mr. Stewart would be injured (or more seriously injured) as a result of not wearing a seat belt in the taxi cab.

I. Nonfeasance vs. Misfeasance

[110] There is an important distinction to be drawn based on whether a duty of care alleged negligent act is "nonfeasance" or "misfeasance".

[111] As stated by the Supreme Court in *Childs*:

> 31 Foreseeability is not the only hurdle Ms. Childs' argument for a duty of care must surmount. "Foreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care": G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 320. Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant* has *directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.
>
> ....
>
> 34 A positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity. Three such situations have been identified by the courts. They function not as strict legal categories, but rather to elucidate factors that can lead

> to positive duties to act. These factors, or features of the relationship, bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist.
>
> 35 The first situation where courts have imposed a positive duty to act is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls: .....
>
> 36 The second situation where a positive duty of care has been held to exist concerns paternalistic relationships of supervision and control, such as those of parent-child or teacher-student: .....
>
> 37 The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: *Dunn v. Dominion Atlantic Railway Co.* (1920), 1920 CanLII 67 (SCC), 60 S.C.R. 310; *Jordan House Ltd. v. Menow*, 1973 CanLII 16 (SCC), [1974] S.C.R. 239; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 1998 CanLII 14826 (ON SC), 39 O.R. (3d) 487 (Gen. Div.). In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category: *Stewart v. Pettie*.
>
> 38 Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materializing. In the example of the parent or teacher who has assumed control of a vulnerable person, the vulnerability of the person and its subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk. The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public.
>
> [66] The *Anns/Cooper* test ensures that a duty of care will only be recognized when it is fair and just to do so. As such, it is necessary to approach each step in the test with analytical rigour. While common sense can play a useful role in assessing reasonable foreseeability, it is not enough, on its own, to ground the recognition of a new duty of care in this case.
>
> (emphasis added)

[112] Clearly, the duty of care suggested by Novex is a positive duty. The alleged duty of care does not fall within the first two "positive duty" categories described by the Supreme Court in *Child's*. As for the third "positive duty" category, it is true that taxi drivers provide a public service.

But there are the limits as to the responsibilities of a taxi cab driver/service. In *Deloitte* the Supreme Court described the limitations on such rights and duties:

> [31] Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility — that is, of the purpose for which the representation was made or the service was undertaken — necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care (Weinrib; A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 293-94). This principle, also referred to as the "end and aim" rule, properly limits liability on the basis that the defendant cannot be liable for a risk of injury against which he did not undertake to protect (*Glanzer*, at pp. 275 and 277; *Ultramares*, at pp. 445-46; *Haig*, at p. 482). By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Fullowka*, at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence.
>
> (emphasis added)

[113] Imposing a positive duty to ensure adult intoxicated passengers are and remain buckled in a taxi cab, in light of existing legal responsibilities for all adults to buckle their seat belts in vehicles and the voluntary creation of the risk by the adult becoming intoxicated, is an unnecessary and unprincipled extension of the scope of any duty which a taxi driver owes to adult intoxicated passengers.

II. Conclusion on Foreseeability

[114] I accept that it is reasonably foreseeable that an accident might occur while an adult is a passenger is in the taxi cab. As a result, it is reasonably foreseeable that an unbuckled adult passenger might be injured (or more seriously injured) if an MVA occurred.

[115] However, I am not persuaded that this is one of those circumstances where it is has been recognized to impose a positive duty of care or that it is appropriate to impose such a positive duty.

Sufficient Proximity of Relationship

[116] The plaintiff must also establish a sufficiently proximate relationship warranting the imposition of a care of duty as suggested.

[117] The fact that a motor vehicle accident and possible injury to unbelted adult passengers is reasonably foreseeable is *not always*, by itself, sufficient to impose a duty even when there is reasonable foreseeability of personal injury. See *Deloitte* at para. 23. Proximity of relationship is a more demanding hurdle for Novex to establish.

[118] Assessing proximity entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law". "The proximity inquiry considers the "expectations, representations, reliance, and the property or other interests involved" as between the parties". See *Cooper*, at para. 34.

[119] Novex submits there is sufficient proximate relationship between Yaxley and Mr. Stewart because:

a) Mr. Yaxley is the taxi driver;

b) Liftlock provides taxi services to the public;

c) Yaxley seeks and welcomes paying passengers;

d) Taxi service companies encourage intoxicated passengers to use their taxi service;

e) Yaxley carries on a commercial enterprise;

f) Mr. Stewart was one such paying adult passenger of the Yaxley taxi service; and

g) Yaxley was hired to transport Mr. Stewart safely to a destination in the taxi cab.

Expectations, Representations, Reliance in this case

*I. There is no evidence of any **expectation** by Mr. Stewart that Yaxley is to protect him from injury by ensuring he was and would remain buckled during the fare*

[120] Mr. Stewart gave no evidence on this issue. Mr. Yaxley's evidence did not touch on this issue.

[121] Novex's submission essentially would require this court to infer such an expectation of all intoxicated adult passengers who enter taxi cabs. There is no evidentiary basis to find such an expectation or to infer such an expectation arises, either generally or specifically by Mr. Stewart.

[122] In this case, there is no evidence that Mr. Stewart, as a result of his self-induced intoxication, expected that the taxi driver would take steps to protect him from injury in the event of an accident.

*II. There is no evidence of any **representation** by Yaxley that it would take steps to protect Mr. Stewart from injury by ensuring he was and would remain buckled during the fare*

[123] A taxi driver does not, without something more, assume a responsibility that an adult passenger is and remains buckled simply by accepting the fare.

[124] In this case there is no evidence of any representation, express or implied, that Yaxley would, if Mr. Stewart was intoxicated, take steps to protect Mr. Stewart from injury by ensuring he was and would remain seat belted during the fare.

*III. There is no evidence of **reasonable reliance** by Mr. Stewart that Yaxley would ensure he was and would remain buckled during the fare*

[125] Reasonable reliance is an important factor. As described in *Childs*:

> 40 Finally, the theme of reasonable reliance unites examples in all three categories. A person who creates or invites others into a dangerous situation, like the high-risk sports operator, may reasonably expect that those taking up the invitation

> will rely on the operator to ensure that the risk is a reasonable one or to take appropriate rescue action if the risk materializes. Similarly, a teacher will understand that the child or the child's parents rely on the teacher to avoid and minimize risk. Finally, there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.

[126] There is no evidence of reasonable reliance by Mr. Stewart. Can reasonable reliance be inferred in these circumstances? In my view, no.

[127] Reasonable reliance cannot be inferred in this case because the dangerous situation was not caused or contributed to by Yaxley. At the heart of this case, the dangerous situation was created by Mr. Stewart by his voluntary intoxication. Mr. Stewart put himself at risk of injury in the event of an accident.

[128] Reliance that the taxi driver will ensure the intoxicated adult passenger will be and remain seat belted during the fare cannot be inferred simply because an intoxicated adult hires a taxi cab late at night at a bar. What can be reasonably inferred is that the taxi driver will drive safely and the taxi cab is a safe vehicle. This would include having seat belts available for the adult passenger's use, if the adult passenger so chooses.

[129] As stated above, the law obligates all adult passengers to buckle their seat belt in a vehicle. Absent evidence which demonstrates reliance by the intoxicated adult passenger and a representation of acceptance of that responsibility by the taxi cab driver (explicitly or implicitly), the obligation and responsibility on an adult passenger to buckle his seat belt cannot justifiably and unilaterally be imposed on the taxi driver.

[130] The question becomes even more specific. Is there any evidence that Mr. Stewart reasonably relied on Yaxley to ensure he remained buckled during the fare? The simple answer is no.

[131] In any event, the facts demonstrate that, Mr. Stewart did not rely on Mr. Yaxley to buckle his seat belt. He buckled the seat belt himself.

[132] I do not find there is evidence of any reasonable reliance by Mr. Stewart, explicitly or implicitly, that Mr. Yaxley would take steps to guard Mr. Stewart's safety by ensuring he buckled his seat belt and remained buckled during the fare.

IV. Adult Passenger's ***Autonomy***

[133] An adult passenger's autonomy is a factor to be considered in determining whether there is a proximate relationship. The Supreme Court described this in *Childs*:

> 39 Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to perform a sport safely from participating or, when a risk materializes, to attempt a rescue. Similarly, the publican may be required to refuse to serve an inebriated patron who may drive, or a teacher be required to take positive action to protect a child who lacks the right or power to make decisions for itself. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.

[134] Adult passengers, even intoxicated adult passengers, have the right not to get buckled or remain buckled in a taxi cab during the fare. There is nothing that Mr. Yaxley could do to "force" or "ensure" Mr. Stewart to buckle his seat belt and remain buckled during the entirety of the fare.

Conclusion on Proximity

[135] In this case, I am not satisfied that Novex has established on a balance of probabilities that there is a sufficiently proximate relationship between Yaxley and Mr. Stewart.

Conclusion on Prima Facie Care of Duty

[136] As a result, given my concerns regarding imposition of a positive duty and the lack of a sufficient proximate relationship, I do not find that Novex has established a *prima facie* duty of care that Yaxley ensure that Mr. Stewart was buckled and remained buckled during the fare.

Residual Policy Considerations

[137] Assuming that I am wrong and a *prima facie* duty of care has been established by Novex, I would conclude, for the following reasons, there are residual policy considerations which would negate the imposition of a duty of care on Yaxley as alleged by Novex.

[138] Where a *prima facie* duty of care is recognized, the analysis advances to stage two of the *Anns/Cooper* framework. Here, the question is whether there are "residual policy considerations", outside the relationship of the parties, which negate the imposition of a duty of care. See *Cooper*, at para. 30. The onus is on Yaxley to establish that such residual policy considerations exist.

[139] The Supreme Court in *Deloittes* described this part of the analysis as follows:

> [40] What, then, remains to be considered at the second stage of the *Anns/Cooper* framework? In *Cooper*, this Court identified factors which are external to the relationship between the parties, including (1) whether the law already provides a remedy; (2) whether recognition of the duty of care creates "the spectre of unlimited liability to an unlimited class"; and (3) whether there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In this way, the residual policy inquiry is a normative inquiry. It asks whether it would

> be better, for reasons relating to legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case.

I. The law already imposes a duty on adult passengers to buckle in any vehicle

[140] The Provincial Legislature has already seen fit to impose a duty on adult passengers, and not drivers, to buckle their seat belts when they are in a vehicle. There are no exceptions, no limitations in the provisions of the *Highway Traffic Act*. The legislature expressly chose not to include a provision to make the drivers responsible that all adult passengers buckle their seat belts.

[141] Imposition of a common law duty as suggested would be inconsistent with what the Provincial Legislature, the representatives of the public, have chosen to impose at law.

[142] The common law also recognizes a duty on adult passengers to buckle their seat belts when they are in a vehicle. See *Galaske*. Consistent with this common law duty, contributory negligence is usually found on adult passengers who fail to buckle their seat belt in an MVA.

[143] Adult passengers have the right not to buckle their seat belts when they get into a taxi cab. They run the risk that, if an accident occurs and they are injured, their damages will be reduced because of their contributory negligence.

[144] There is an common sense inconsistency that passengers who are contributorily negligent for not buckling their seat belt can nevertheless point to the driver for not ensuring that they buckle the seat belt.

II. No valid societal reason to transfer the duty of care in these circumstances

[145] There is no dispute that a taxi cab driver owes no duty of care to an adult passenger who is not intoxicated.

[146] Imposing the duty of care on the taxi driver for an adult intoxicated passenger would amount to a unilateral transfer of the adult passenger's statutory and common law duty of care to buckle his seat belt to a taxi cab driver. Worst, this unilateral transfer of responsibility to the taxi cab driver only arises as a result of the self-induced intoxication of the adult passenger.

[147] No reasonable basis has been advanced by Novex why this transfer of responsibility should take place aside from the vulnerability of the intoxicated adult.

[148] Adults can self-induce intoxication. They can make a choice to consume alcoholic beverages to the point of intoxication. It is obvious that persons who choose to become intoxicated, as in this case, will be less able to care for themselves, make appropriate choices, or make safe decisions to protect them from harm when intoxicated. If an adult chooses to become intoxicated to the point that the adult cannot protect their own safety or carry out their responsibility in a taxi cab to buckle their seat belt, there is little reason why the law should find a duty and impose an obligation on a taxi cab driver to assume the responsibility and liability for the voluntarily intoxicated adult.

[149] I see no valid policy reason why this "transfer" of responsibility/liability should occur arising solely from the hiring of a taxi cab. There is no obvious societal benefit for this transfer of responsibility arising solely from the hiring of a taxi cab by an intoxicated adult passenger.

III. *A remedy already exists for the injuries suffered by Mr. Stewart*

[150] An adult passenger, regardless of whether he is intoxicated, has a remedy against a driver and owner of the vehicle who negligently causes a MVA.

[151] This remedy is not illusory. The law provides that all drivers and owners of vehicles must be insured. Further, as an additional safeguard, the law also provides for remedies for injured persons where the negligent motorist is uninsured. See generally *the Insurance Act* of Ontario.

[152] There are extensive rules of the road designed to prevent accidents. See generally, *The Highway Traffic Act*. Accidents generally do not occur absent a breach of the rules of the road or negligence. Liability and remedy can be visited upon the negligent driver and owner.

[153] As a result, existing law already provides a remedy to an adult passenger - a cause of action for those which are responsible through negligence for the MVA.

IV. No moral wrong committed by a taxi driver

[154] The law of negligence is intended to impose obligations on those persons where there is a general public sentiment for moral wrongdoing against the defendant. As stated at para. 10 of *Childs*:

> Lord Atkin recognized this problem in *Donoghue v. Stevenson*. He accepted that negligence is based on a "general public sentiment of moral wrongdoing for which the offender must pay", but distinguished legal duties from moral obligation: ". . . acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief" (p. 580).
>
> (emphasis added)

[155] There is no moral wrong committed by a taxi driver when he leaves it to the adult passenger to decide whether to buckle and remain buckled during the fare.

[156] Adult passengers are obliged to buckle their seat belts. There is no financial incentive or disincentive on a taxi driver as to whether the adult passenger chooses to wear a seat belt. A taxi

driver does not discourage the use of the seat belt. The seat belts are there as required by law. The adult passenger is free to use it or not use it.

[157] If the taxi driver drives safely and provides a safe taxi cab, in my view, there is no moral wrong committed by the taxi driver because the adult passenger, through their choice if they are sober or their inability to make a choice because of self-induced intoxications, does not to buckle their seat belt.

V. Carrying out the suggested duty of care would be unmanageable for taxi drivers

[158] If a duty of care as suggested were imposed on a taxi driver, the responsibility on the taxi driver could not be realistically and properly carried out by the taxi driver.

[159] The taxi driver would have to determine whether adult passengers are intoxicated; the extent of the intoxication; and whether the intoxication was such that the adult passenger is not capable of buckling their own seat belt. It is difficult to imagine how a taxi driver would manage this responsibility for each and every passenger.

[160] Taken further, if the taxi driver's responsibility is to all adult passengers who are "vulnerable", a taxi driver would have to manage this responsibility for any passenger with a mental or physical disability, or other possible cause of vulnerability such as drugs, illicit or otherwise. It is difficult to imagine how a taxi driver could carry out this responsibility, especially when the category of "vulnerable" adult passenger suggested is so broad.

[161] Turning now to the continuing responsibility suggested (that the taxi driver is responsible to ensure the adult passenger remains buckled), placing such a responsibility on a taxi driver is unwieldy and dangerous. Imposition of such a duty distracts the taxi driver from his primary

obligation: to drive safely. This puts the taxi driver, other passengers and users of the road at risk. This is not in society's interest to maintain road safety.

[162] Further, what the taxi driver is to do if the adult passenger unbuckles is problematic. Does the taxi driver pull over and stop the taxi cab? What if the taxi cab is on a controlled highway? What does the taxi driver do if the adult passenger refuses to wear the seat belt? Does the taxi driver evict the adult passenger? On a controlled highway? In the middle of the night? In a rural location?

[163] In my view, it would be difficult, dangerous and unmanageable for a taxi driver to properly and effectively carry out the suggested duty of care.

VI. The duty of care suggested could impact the safe use of alternate ways home for intoxicated persons

[164] If a taxi cab driver was required to make a "vulnerability" assessment of every adult passenger before accepting the fare, this might create a disincentive for taxi cab drivers to accept a fare for any adult passenger who might be intoxicated or otherwise appear vulnerable.

[165] This might create a disincentive for taxi drivers to accept fares for a passenger who might appear to be vulnerable. Such a disincentive would not be in society's interest.

[166] More specifically, it is not in society's interest to discourage taxi drivers from accepting adult intoxicated passengers late at night. Keeping intoxicated persons from driving vehicles is a serious societal problem. Impediments to intoxicated adult persons taking a taxi cab to their destination after drinking is not in society's interests.

VII. Duty in other Jurisdictions

[167] While not determinative, it is of assistance to consider whether such a duty of care on a taxi driver towards an intoxicated adult passenger has been recognized in other jurisdictions.

[168] As can be seen from above, the authorities in the United Kingdom and United States have not recognized the duty of care as alleged in this case and appear to be loath to extend any duty of care on a driver (including taxi drivers) to ensure that adult passengers are told to buckle their seat belts, are buckled and remain buckled.

[169] As for Australia, when such a duty of care was found by judicial authority, legislation was passed to ensure that voluntary intoxication, by itself, does not create the duty of care suggested in this case.

[170] In conclusion, there appears to me no foreign authorities which support a societal interest to impose the suggested duty of care on drivers towards adult passengers, even intoxicated adult passengers.

Conclusion on Residual Policy Considerations

[171] Even if a *prima facie* duty of care had been found, the residual policy considerations negate the imposition of a duty of care as suggested by Novex.

IF THERE IS A DUTY OF CARE, WHAT IS THE DUTY OWED BY THE TAXI DRIVER

[172] If I am wrong and there is a duty of care imposed on Yaxley to ensure Mr. Stewart was seat belted, what is expected of Yaxley in these circumstances?

[173] In my view, even if the intoxicated adult passenger was a vulnerable person and a duty of care applied to Yaxley, the duty of care of the taxi cab driver would be to advise the adult

intoxicated passenger to buckle his/her seat belt at the commencement of the fare. In this case, if there was a duty of care on Mr. Yaxley to advise Mr. Stewart be buckled when he entered the taxi cab, Mr. Yaxley's failure to carry out his duty in a proper and reasonable manner caused no injury since, as I have found as a fact, Mr. Stewart was in fact buckled when the taxi cab left the restaurant/bar. There is no evidence that the chime indicating that the seat belt was or became unbuckled during the fare.

[174] For the reasons set out above, it would be unreasonable, and unsafe, to impose a standard of care requiring a greater or broader responsibility on a taxi driver.

[175] Specifically, I reject that any reasonable standard of care would have required Mr. Yaxley to ensure the continued use of Mr. Stewart's seat belt after the commencement of the fare. In the circumstances of this case, it would not have been reasonable to expect that Mr. Yaxley would, late at night, in a snowy, icy road conditions, monitor whether Mr. Stewart remained buckled during the fare. Driving safely in such conditions was and should remain his priority.

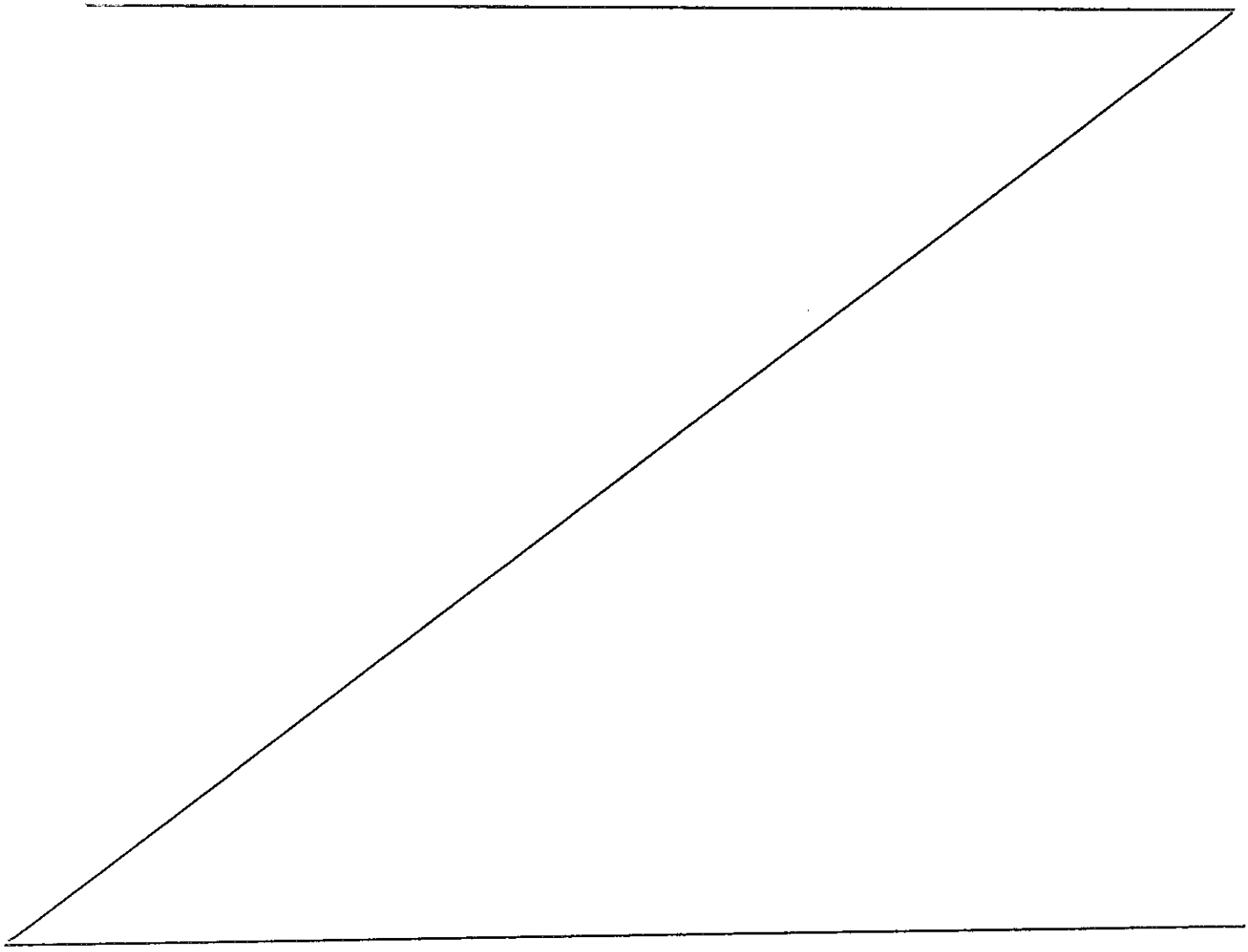
[176] I also reject Novex's submission that Mr. Yaxley should have ensured Mr. Stewart remained buckled after the unscheduled stop to let a rear passenger exit the taxi cab to get sick on the roadside. There is no evidence that Mr. Stewart did anything to suggest he got unbuckled at this stop. There is simply no evidence that would have caused Mr. Yaxley to once again check to see whether Mr. Stewart remained buckled.

[177] It is unclear from the evidence <u>when</u> Mr. Stewart unbuckled prior to the MVA. This is a major shortcoming in the evidence such that, even if this court had found there to be a duty of care on the taxi driver, the evidence would not have established that Mr. Yaxley breached his duty of care.

CONCLUSION

[178] I conclude that there is no positive duty on a taxi cab driver to ensure that vulnerable adult passengers are or remain buckled. As applied to this case, I find that there is no duty of care on Yaxley to have ensured that Mr. Stewart buckled his seat belt at the commencement of the fare and remained buckled during the entirety of the trip until the MVA.

[179] In any event, even if there had been a duty of care on Yaxley, the duty would have required Mr. Yaxley to advise Mr. Stewart to buckle his seat belt after he entered the taxi cab. In this case, Mr. Stewart was buckled when he got into the taxi cab. As such, Yaxley would not have breached any standard of care or caused any injury to Mr. Stewart from his failure to ensure Mr. Stewart was buckled at the commencement of the trip.

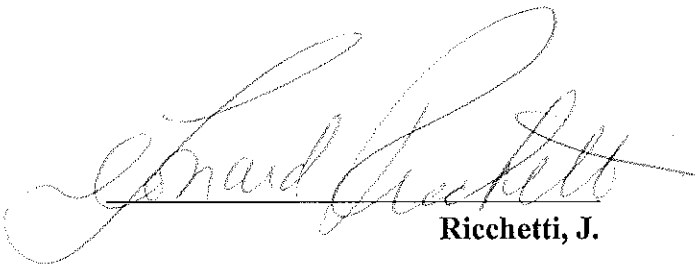


COSTS

[180] Any party seeking costs shall serve and file written submission on entitlement and quantum within three weeks of the release of these reasons. Written submissions shall be limited to 5 pages, with attached Costs Outline and any authorities.

[181] Any responding party shall have two weeks thereafter to serve and file responding submissions. Written submissions shall be limited to 5 pages with any authorities relied on attached.

[182] There shall be no reply submissions without leave.



Ricchetti, J.

Date: June 26, 2018

CITATION: Stewart v. The Corporation of the Township of Douro-Dummer, 2018 ONSC 4009
COURT FILE NO.: CV-11-4156
DATE: 20180626

ONTARIO
SUPERIOR COURT OF JUSTICE

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Kelly Stewart and Jacob Stewart, Plaintiffs

AND:

The Corporation of the Township of Douro-Dummer, The Corporation of the Township of Otonabee-South Monaghan, Christopher Yaxley, Liftlock Coach Lines Limited, Jeremiah Ryan, Jerry Ryan and Novex Insurance Company
Defendants

COUNSEL: J. Stolberg and J. O'Dell for Novex Insurance Company

D. Zuber for Christopher Yaxley and Liftlock Coach Lines Limited

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REASONS FOR JUDGMENT

Ricchetti, J.

Date of Release: June 26, 2018