TONKES v. HODGKINSON[1]

We are not short of publicity concerning the advisability of wearing seat belts. Safety organisations, government departments, motoring associations and the like regale us with information on how many lives might have been saved if only drivers or passengers had been wearing safety belts. But as yet it is not compulsory in Australia to wear a seat belt; at the time of writing Victoria is contemplating such legislation.

In *Tonkes v. Hodgkinson* the plaintiff was injured in a collision between a motor car, in the front seat of which he was a passenger and of which the defendant was the driver, and another vehicle. The plaintiff sued the driver for damages for negligence causing personal injury. Reynolds J. found the driver to be negligent on the facts. The driver pleaded contributory negligence on the grounds that the plaintiff had not used the seat belt provided. He argued that if the plaintiff had used the belt his injuries would have been much less serious if indeed there would have been any injury at all. The plaintiff said he did not see the seat belts nor was he aware they were available. The defendant admitted that he did not advise the plaintiff to wear the belt. Reynolds J. held that contributory negligence had not been established.

No cases were referred to in the judgment. It seems that the case is the first to be reported in Australia on the subject of the failure to wear an available seat belt and its relation to contributory negligence.[2]

Geier v. Kujawa[3] was not available to the Court. In this English case the plaintiff, a girl of German nationality who spoke little English, was injured while travelling as a passenger in a car driven by the defendant. In her claim for damages against, *inter alia,* the defendant, the defendant contended, *inter alia,* that the plaintiff was contributorily negligent in not wearing a safety belt. Brabin J. held that the defendant had failed to prove that the plaintiff was contributorily negligent in not wearing a safety belt at the time of the accident. It appears that the defendant asked the plaintiff to wear the belt but she was unable to fix the locking device and he had said that he would show her later how to fix it. The matter was then forgotten.

---

1 (1970) 90 W.N. (Pt. 1) (N.S.W.) 753.

2 In Azzopardi v. Bois, [1968] V.R. 183 Adam J. discussed briefly the possibility of a passenger significantly aggravating his injuries by failing to wear a seat belt.

3 [1970] 1 Lloyd's Rep. 364.

Both cases are similar in that the driver consented to take the passenger without insisting that he wear a safety belt. In the Australian case the driver did not invite the passenger to wear the belt; in the English case the passenger was unable to fix the belt after the invitation had been made by the driver.

Two articles in American law reviews are of interest in view of the sparsity of Australian and English decisions.[4] It appears that in the United States there is no common law duty to wear seat belts in ordinary vehicular traffic.[5] The argument is that if it was the legislature's intention that failure to use available seat belts should be a bar to recovery in an action for personal injuries sustained as a result of an automobile collision, the legislature would have said so.[6] As in Australia and England, the statutory requirement is for installation only.

It is recognised that the possibility of there being a legal duty to wear a seat belt may apply in the future. But if there is no current duty to fasten a seat belt, such a failure cannot be held to be a breach of a duty to minimize damages.[7] However, it seems that in California and Ohio defendants may allege and prove that a plaintiff's non-use of a seat belt amounts to contributory negligence.[8]

It is probably only a question of time before seat belts become mandatory in all cars whether new or already on the road. The statistical evidence of their value is mounting. The next logical step is to make the wearing of the belt compulsory. It would be an easy law to enforce because a traffic officer can observe without difficulty whether drivers and passengers are wearing them. It may be more difficult to observe this use or non-use in fast-moving traffic but it could be a comparatively straight-forward task in city traffic. Once it is established that there is a statutory duty to wear belts then it is a further logical step to hold that failure to do so is a contributory factor in an action for damages.

The foreseeable changes in the statutory position do not answer the immediate question. If in *Tonkes v. Hodgkinson* the plaintiff had told the defendant to buckle up and he had not done so would his

---

4 (1970) 34 ALBANY L. REV. 593; and (1970) 6 WILLAMETTE L. J. 153.

5 Robinson v. Lewis, 88 Ore. Adv. Sh. 759; 457 P. 2d. 483 (1969); Bentzler v. Braun, 34 Wis. 2d. 362 (1967).

6 Dillons v. Humphreys, 288 N.Y.S. 2d. 14 (1968).

7 Miller v. Miller, 273 N.C. 228 (1968).

8 Truman v. Vargas, 275 Cal. App. 2d. 1105 (1969); Bertsch v. Spears, 20 Ohio App. 2d. 137 (1969).

plea of contributory negligence have been successful? Reynolds J. did not attempt to answer this point as it was not in issue. It would raise the question of proof. How could it be proved with any degree of reliability that failure to wear the belt resulted in more severe injury than would otherwise have been incurred? Expert evidence could be called but this must be speculative and conjectural. There is always the possibility that the wearing of a belt may have contributed to the seriousness of the injury, not reduced it.

In *Henwood v. Municipal Tramways Trust (South Australia)*[9] a passenger leaned out of a tram when feeling sick and his head struck two standards in succession in the middle of the street. There was a by-law which stated that passengers shall not lean out. There were a number of notices to this effect in the tram. The High Court held that the breach of the by-law was not in itself conclusive evidence of contributory negligence. When, or if, legislation is introduced making it compulsory for the driver and his front passenger to wear safety belts, it is to be hoped that the legislation will make it clear whether failure to wear a safety belt on the part of the passenger will or will not give rise to an action for damages should the driver drive negligently causing injury to the passenger. If a passenger in the front seat is under a statutory duty to wear a belt, fails to do so, and is injured due to the negligent driving of the driver, will the driver be able to claim that the passenger contributed to his own injuries in whole or in part? In the absence of express statutory guidance, will the Court take the view that the driver was responsible for ensuring that his front seat passenger did wear a safety belt? Perhaps the onus should be on the driver to insist that his front seat passenger does wear the belt provided and refuse to take him if he does not. Should he take a passenger who does not use the seat belt, it would be a valid argument that the driver has subjected the passenger to a risk to which he should not have subjected him.

It would be desirable for the legislation to state specifically that contributory negligence should not be pleaded as a defence by drivers who injure unstrapped front seat passengers. This would place the burden on drivers to make sure that their passengers did belt up. One's fear is that new legislation will be concerned primarily in making it an offence to not wear a seat belt and leave unresolved questions of civil liability for breach of that duty.

D.B.

---

[9] (1938) 60 C.L.R. 438.