1970

Symposium: The Seat Belt Defense in Practice - The Seat Belt Defense: State of the Law

John J. Kircher
Marquette University Law School, john.kircher@marquette.edu

Publication Information
John J. Kircher, Symposium: The Seat Belt Defense in Practice - The Seat Belt Defense: State of the Law, 53 Marq. L. Rev. 172 (1970)

Symposium. The Seat Belt Defense in Practice

THE SEAT BELT DEFENSE—STATE OF THE LAW

JOHN J. KIRCHER*

INTRODUCTION

The question of whether a plaintiff in an automobile personal injury action should be barred from recovery or have his damages reduced because he failed to make use of available automotive seat belts has been under consideration for less than a decade.[1] Despite the recent origin of the "seat belt defense," a good deal of attention has been given to the topic in law reviews and other legal periodicals.[2] The nature and elements of the defense were fully explained in a Defense Research Institute monograph on the subject.[3] However, some misconceptions as to the status of the case law construing it appear to have developed since the original monograph was published. The purpose of this article is to analyze the case law and re-examine the nature and elements of the seat belt defense as they relate to the cases.

It should be noted that the general term "seat belt" refers to many restraint devices other than the familiar lap belt. The term as used herein includes the shoulder strap-lap belt combination, which is standard on newer vehicles, as well as such less frequently used devices as the harness type of restraint. The seat belt defense is equally applicable to all automobile restraint devices currently available, as well as those which may be developed in the future.

Thirty-six reported decisions have been found in which the defense was considered, but these were concerned with the law of only twenty-three jurisdictions.[4] Therefore, at least as far as "appellate" courts are concerned, the seat belt defense has not been considered in over one-half of the jurisdictions. The highest appellate courts of only five states and one Canadian province have been called upon to consider the de-

---

* Associate Research Director, Defense Research Institute, Milwaukee, Wisconsin, B.A., Marquette University, 1960; J.D., Marquette University Law School, 1963, member, Milwaukee, Wisconsin State, and American Bar Associations.

[1] The origin of the defense can be traced to the case of Stockinger v. Dunisch, Cir. Ct., Sheboygan Co., Wisconsin (1964). *See* 5 FOR THE DEFENSE 78 (1964)

[2] *See* Bibliography at 227 *infra.*

[3] J. Kircher, The Seat Belt Defense, (Defense Research Institute Monograph, Sept. 1967).

[4] *See* Table of Cases at 226 *infra*

fense with three of these approving it,[5] two rejecting it,[6] and one failing to consider its merits due to other factors involved in the case[7]

There are basically three approaches which a defendant may take in urging a court to adopt the seat belt defense:

1. It may be alleged that the plaintiff's failure to make use of an available seat belt constitutes negligence *per se* thus barring him from recovery.
2. It may be alleged that in not making use of an available seat belt, the plaintiff did not conform to the general standard of conduct which would be followed by a reasonable man of ordinary prudence under similar circumstances, and therefore:
   a. He should be found guilty of contributory negligence and be barred from all recovery; or
   b. He should not be allowed to recover damages for those injuries which belts would have prevented and have his damages diminished for those injuries which belts would have made less severe.

It would be meaningless and misleading merely to list the cases on the subject in categories labeled "defense accepted" or "defense rejected." In the majority of cases the courts have either considered only one of the possible approaches to the defense or have not found it necessary to consider the merits of the defense because of other factors in the case. In the latter grouping are included those cases in which the pleadings did not raise the defense;[8] the fact that the plaintiff was not using belts was not established;[9] the evidence did not establish that the injuries would have been prevented or made less severe by belt use;[10] or the court was not asked to instruct the jury on the seat belt issue.[11] While in each of these latter cases the defendant did not prevail in his attempt to perfect the defense, the assertion that these cases rejected every possible approach to the defense would be a gross exaggeration. With these cases now properly classified, it becomes important to examine the decisions which have reached the merits of at least one ap-

[5] Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967); Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Yuan v. Farstad, 62 W.W.R.(n.s.) 645 (B. C. 1967).

[6] Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Robinson v. Lewis, 457 P.2d 483 (Ore. 1969).

[7] Brown v. Bryan, 419 S.W.2d 62 (Mo. 1967).

[8] Lentz v. Schafer, 404 F.2d 516 (7th Cir. 1968).

[9] Fontenot v. Fidelity & Cas. Co. of N.Y., 217 So. 2d 702 (La. App. 1969); Schomer v. Madigan, 120 Ill. App.2d 107, 225 N.E.2d 620 (1970).

[10] Barry v. Coca-Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Bertsch v. Spears, 20 Ohio App.2d 137, 252 N.E.2d 194 (1969); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967); Jones v. Dague, 252 S.C. 261, 166 S.E.2d 99 (1969); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Myles v. Lee, 209 So. 2d 533 (La. App. 1968); Simpson v. Renman, Civ. No. 332 (N. D. Ind., October 25, 1967); Tom Brown Drilling Co. v. Nieman, 418 S.W.2d 337 (Tex. Civ. App. 1967); Turner v. Pfluger, 407 F.2d 648 (7th Cir. 1969); Glover v. Daniels, 310 F. Supp. 750 (E. D. Miss. 1970).

[11] Brown v. Bryan, note 7 *supra*.

proach to the defense so as to be able to determine what the courts have actually said on the subject.

NEGLIGENCE *Per Se*

If one thing has become clear about the seat belt defense as a result of decided cases, it is that, absent a statute making belt use mandatory, courts will not find a person guilty of contributory negligence as a matter of law for non-use. This view has been taken by all of the courts that have considered this particular approach to the defense.[12]

In 1967 there were thirty-two states which had statutes requiring the installation of seat belt equipment in new vehicles.[13] More state action regarding seat belt installation was, without doubt, precluded by the enactment of the Federal Motor Vehicle Safety Standards which became effective on January 1, 1968.[14] One of the standards mandates the installation of an approved set of seat belts for each seat position in a new vehicle, thus making the number of belts dependent upon the vehicle's passenger capacity.[15] Neither the federal standards nor the state statutes, except for very limited situations,[16] makes the use of available seat belts mandatory for vehicle passengers. Although legislation for general, mandatory use has been proposed,[17] apparently only one municipality has enacted an ordinance to this effect.[18]

The view of the courts on the issue of whether a seat belt installation statute makes non-use negligence *per se* is well illustrated by the Wisconsin case of *Bentzler v. Braun*.[19] Even though the court approved

---

[12] Bentzler v. Braun, note 5 *supra;* Bertsch v. Spears, note 10 *supra;* Dillon v. Humphreys, 56 Misc.2d 211, 288 N.Y.S.2d 14 (Sup. Ct. 1968); Cierpisz v. Singleton, note 10 *supra;* Jones v. Dague, note 10 *supra;* Kavanagh v. Butorac, note 10 *supra;* Miller v. Miller, note 6 *supra;* Remington v. Arndt, 28 Conn. Super. 289, 259 A.2d 145 (1969); Robinson v. Lewis, note 6 *supra;* Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Tom Brown Drilling Co. v. Nieman, note 10 *supra.*

[13] For a list of state installation statutes, see The Seat Belt Defense, note 3 *supra* at 21.

[14] 32 Fed. Reg. 2408 (1967).

[15] *Id.* at 2415, Standard No. 208, S.3.1.

[16] *See, e.g.,* CAL. VEH. CODE § 27304 (SUPP. 1970) (use required of driver and passengers in training vehicle); R. I. GEN. LAWS ANN. § 31-33-41 (1968) (use required of drivers of every "jitney, bus, private bus, school bus, trackless trolley coach, and authorized emergency vehicle, when operated upon a highway"). A very recent and important development was announced in a July 8, 1970 press release of the Federal Highway Administration. New regulations of the agency require installation of seat belts at the driver's seats of all buses, trucks and truck tractors used in interstate commerce which are built after July 1, 1971. Older vehicles—manufactured after January 1, 1965—must be retrofitted with seat belts by July 1, 1972. The regulations further provide for *mandatory* use of the seat belt while such a vehicle is being driven.

[17] *See, e.g.,* Defense Research Institute Special Report, Responsible Reform—A Program to Improve the Liability Reparation System at 10 (Oct. 1969).

[18] In 1966 the city of Brooklyn, Ohio enacted an ordinance requiring all persons riding in motor vehicles operated within the city to make use of available seat belts. *See* 10 FOR THE DEFENSE 27 (1969).

[19] Note 5 *supra.*

of another approach toward the defense, it rather summarily dismissed the negligence *per se* argument:

> It seems apparent that the Wisconsin legislation, which does not require by its terms the use of seat belts, cannot be considered a safety statute in a sense that it is negligence *per se* for an occupant of an automobile to fail to use available seat belts.[20]

Since other courts have dismissed this approach to the defense with the same sort of dispatch, it is apparent that defense counsel will be wasting his time in attempting to have a court rule that non-use in the face of a mere installation statute is negligence as a matter of law. This was the position taken by the first DRI monograph on the subject:

> The conclusions reached by these courts seem reasonable. Without a showing of more legislative intent than is presented by a mere installation statute, it would appear that there is presently no legislative standard of conduct as to seat belt use.[21]

It should be noted, however, that in those few instances noted earlier in which mandates for belt use have been made law, the negligence *per se* approach would have merit.

In addition to legislative standards of conduct as set forth in so-called "safety statutes," courts have, on their own, established certain standards of conduct and made deviation from them negligence as a matter of law. One example is the ruling that falling asleep behind the wheel of a moving vehicle is negligence *per se*.[22]

The theory that a court will adopt a rule that the non-use of available belts is negligence as a matter of law appears to lead to the same dead-end as does the use of a similar argument based upon an installation statute.[23] The rejection of this argument seems reasonable. A hard and fast rule on the effect of the use or non-use of seat belts would be ill-advised due to the many circumstances which arise in auto travel:

> Such rules may be useful to fix a standard for the unusual, normal case, but they a hindrance to any just decision in the large number of unusual situations presenting new factors which may affect the standard. A standard which requires only conduct proportionate to the circumstances and the risk seldom, if ever, can be made a matter of absolute rule.[24]

Common Law Rules

With the first approach to the seat belt defense disposed of—at least as far as the current state of the law is concerned—we may now

[20] 34 Wis.2d at 385, 149 N.W.2d at 639.
[21] The Seat Belt Defense, note 3 *supra* at 12.
[22] *See, e.g.*, Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962).
[23] *See, e.g.*, Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966); Kavanagh v. Butoric, note 10 *supra;* Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. 1967).
[24] W. Prosser, Torts § 37 at 212 (3d ed. 1964).

turn to the consideration which courts have given to the argument that, *under the circumstances of a given case,* a reasonable man of ordinary prudence would have made use of available belts.

Before the cases which have considered this matter can be examined, it should be noted that five legislatures have attempted to preclude the courts of their states from ever considering the issue. In seat belt installation statutes that have been enacted in Iowa, Maine, Minnesota, Tennessee and Virginia are to be found provisions that the failure to use seat belts shall not be considered as negligence, or that proof of the lack of their use is inadmissible in any civil action for personal injury damages.[25] In addition to showing the foresight of legislators in these states who are also members of the plaintiff's bar, the fact that these provisions were deemed necessary strongly indicates that without them, non-use would be considered contributory negligence. Legislators are not prone to engage in perfuctory exercises in the enactment of statutes that have the proverbial trapdoor in a rowboat. Unless the validity of these statutory prohibitions is to be attacked, any assertion of the seat belt defense in these five states is subject to being stricken.

CAUSE OF THE ACCIDENT

In considering various aspects of the defense, several courts have found it necessary to note that plaintiff's failure to wear seat belts could not be considered to be a cause of the accident at issue.[26] This might appear to some to be an academic observation, since in only a few rare instances could non-use be a cause of the collision. However, the fact that lack of belt use did cause the collision is important in some jurisdictions. In *Remington v. Arndt,*[27] the court rejected the idea that non-use amounted to contributory negligence which would bar the action:

> It is, therefore, obvious that the defendant cannot claim that the plaintiff was contributorily negligent in the sense that his conduct was a contributing cause of the collision between the Arndt vehicle and the defendant's vehicle. The defendant's claim is, rather, that the plaintiff's conduct caused the plaintiff to sustain injuries which he would not have sustained if he had fastened his seat belt. The distinction between these two phases of a plaintiff's alleged negligence has been long recognized in this state.[28]

The court went on to cite the case of *Smithwick v. Hall & Upson Co.,*[29]

[25] IOWA CODE ANN. § 321.445 (1970); ME. REV. STAT. ANN. ch. 29 § 1368A (SUPP. 1970); MINN. STAT. ANN. § 169.85 (Supp. 1970); TENN. CODE ANN. § 59-930 (1968); VA. CODE ANN. § 46.1-309.1 (1967).

[26] Barry v. Coca-Cola Co., note 10 *supra;* Dillon v. Humphreys, note 12 *supra;* Fontenot v. Fidelity & Cas. Co. of N.Y., note 9 *supra;* Lawrence v. Westchester Fire Ins. Co., 213 So. 2d 784 (La. App. 1968); Miller v. Miller, note 6 *supra;* Myles v. Lee, note 10 *supra;* Noth v. Scheurer, 285 F. Supp. 81 (E.D. N.Y. 1968); Remington v. Arndt, note 12 *supra;* Turner v. Pfluger, note 10 *supra.*

[27] Note 12 *supra.*

[28] 28 Conn. Super. at ____, 259 A.2d at 145.

[29] 21 A. 924 (Conn. 1890).

in which it was held that to defeat recovery, the conduct of the plaintiff must contribute to the happening of the event which caused the injury and not merely increase or add to the extent of the loss. In *Smithwick* the court did note that an act which increases the amount of loss or damage may effect the amount of damages recovered. However, in *Remington,* the court did not reach that issue because it was only considering a demurrer to a narrowly defined defense:

> He has, instead, relied upon the bare allegation that the plaintiff was negligent in that he failed to fasten his seat belt and that injury. At the trial, the defendant's proof might be limited to the narrow allegation that the plaintiff did not fasten his seat belt, negligence to "specify the negligent acts or omissions on which he relies." Proof of this narrow allegation would not constitute proof of negligence, and, accordingly, the present allegations in the second defense do not spell out an omission to act, which, without proof of other unalleged circumstances, would bar the action or mitigate damages.[30]

Therefore, this case cannot be classified as rejecting the seat belt defense, but only one of its limited aspects. Other cases have also raised the point that, for recovery to be defeated in a seat belt situation evidence would have to establish that failure to make use of belts was a cause of the collision.[31] These cases would point to the need for defense counsel to plead the seat belt defense in such a manner as to allege that belt use would have prevented or reduced the severity of the injuries, and thus, assert that damages should be reduced. The need for this approach to the defense would appear obvious even in those contributory negligence states in which the distinction between cause of the collision and cause of the injuries is not recognized. The courts in these states appear loath to completely bar a plaintiff's recovery based on the seat belt defense, even if perfectly pleaded and clearly proved—especially in those cases in which belts could have prevented only some injury but not all.[32]

CAUSE OF INJURIES—REDUCTION OF DAMAGES

From what has been discussed thus far, it is clear that defense counsel will have very limited success in attempting to use the seat belt defense to completely bar the plaintiff's recovery.[33] However, even in

[30] 28 Conn. Super. at _____, 259 A.2d at 146.

[31] Barry v. Coca-Cola Co., note 10 *supra;* Noth v. Scheurer, note 26 *supra.* Both noted but did not decide whether, if properly raised by pleadings and established by proof, damages could be reduced because non-use increased the severity of the injuries.

[32] *See, e.g.,* Brown v. Kendrick, note 23 *supra;* Dillon v. Humphreys, note 12 *supra;* Lawrence v. Westchester Fire Ins. Co., note 26 *supra;* Lipscomb v. Diamiani, note 23 *supra;* Miller v .Miller, note 6 *supra;* Robinson v. Lewis, note 6 *supra;* Romankewiz v. Black, note 12 *supra;* Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969).

[33] *But see* General Motors v. Walden, 406 F.2d 606 (10th Cir. 1969) (instruction that failure to wear seat belts may constitute total bar upheld).

those jurisdictions in which contributory negligence is a complete bar to recovery, it appears that one approach to the seat belt defense remains open. It is dependent upon the ability to plead and *prove* that non-use by the plaintiff increased the extent of his injuries and damages. This approach also has utility in comparative negligence states but, for the sake of clarity, its application there will be considered separately.[34]

In contributory negligence states it appears that there are two possible avenues upon which to pursue a defense which is closely akin to mitigation of damages. The first is under what has been referred to as the doctrine of avoidable consequences. Prosser describes the rule in the following terms:

> Closely allied to the doctrine of contributory negligence is the rule of "avoidable consequences," which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. Both rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests, and both require of him only the standard of the reasonable man under the circumstances.[35]

The other approach is known as the "apportionment of damages" rule. This is to be found in the Restatement which, after discussing avoidable consequences, states:

> Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation.[36]

The distinction between the avoidable consequences and "apportionment of damages" appears to be merely artificial.[37]

The possibility of some form of damage reduction being applied to a seat belt non-use situation has been noted in a number of decisions. In most, the courts found it unnecessary to rule on the merits of the

---

[34] See page 188 *infra.*

[35] W. PROSSER, TORTS 433 (3d ed. 1964).

[36] RESTATEMENT (SECOND) TORTS § 465, Comment c (1965); the black letter rule on apportionment of damages is set forth at § 433A of the Restatement as follows:

§ 433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms or

(b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

[37] See page 188 *infra.*

matter.[38] The reason these courts took no action was that other factors in the case made consideration and decision unnecessary.[39]

There are other cases in which courts have considered the merits of the damage reduction approach. In *Barry v. Coca-Cola Co.*,[40] the court rather summarily dismissed the avoidable consequences rule as being inapplicable to a seat belt non-use situation, but intimated that the "apportionment of damages" rule might be applied under proper circumstances. In *Kavanagh v. Butorac*,[41] which is often erroneously cited as having completely rejected the defense, the court stated:

> We recognize possibility of the doctrine [avoidable consequences] applying in some future date and in some matter where the circumstances are clearer than the instant case in showing that some part of the injury would not have occurred except for the fact that plaintiff failed to avoid the consequence of the tort by not fastening his seat belt.[42]

There are three cases in which the courts have held that the jury should consider the non-use of seat belts in relation to the damage issue, as opposed to the issue of liability. In none of them, however, did the courts specify whether this approach should follow avoidable consequences or the "apportionment of damages" rule. In *Mount v. McClellan*,[43] the court stated:

> The use, or non-use of seat belts, and expert testimony if any, in relation thereto, is a circumstance which the trier of facts may consider, together with all other facts in evidence, in arriving at its conclusion as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain. However, this element should be limited to the damage issue of the case and should not be considered by the trier of facts in determining the liability issue.[44]

Courts in Texas[45] and Connecticut[46] have taken similar views.

There are courts which have rejected the possible application of damage reduction to a seat belt non-use situation. Some have ruled against the use of the avoidable consequences doctrine and have also found that a reasonable man of ordinary prudence would not make use

---

[38] Bertsch v. Spears, note 10 *supra;* Cierpisz v. Singleton, note 10 *supra;* Dillon v. Humphreys, note 12 *supra;* Fontenot v. Fidelity & Cas. Co. of N.Y., note 9 *supra;* Jones v. Dague, note 10 *supra;* Noth v. Scheurer, note 26 *supra;* Remington v. Arndt, note 12 *supra;* Schomer v. Madigan, note 9 *supra;* Simpson v. Renman, note 10 *supra;* Glover v. Daniels, note 10 supra.

[39] In many cases there was no evidence to show a causal connection between non-use and the injuries sustained.

[40] Note 10 *supra.*

[41] *Id.*

[42] 140 Ind. App. at 149, 221 N.E.2d at 830.

[43] 91 Ill. App.2d 1, 234 N.E.2d 329 (1968).

[44] *Id.* at 5, 234 N.E.2d at 331. *See also* Sams v. Sams, note 5 *supra;* Husted v. Refuse Removal Service, 26 Conn. Super. 494, 227 A.2d 433 (1967).

[45] Sonnier v. Ramsey, 424 S.W.2d 648 (Tex. Civ. App. 1968).

[46] Uresky v. Fedora, 27 Conn. Super. 498, 245 A.2d 393 (1968).

of available belts unless put on notice of some special specifiic peril not normally associated with ordinary vehicular travel.[47] Two have taken only the latter position.[48] Since the *sine qua non* of the damage reduction phase of the seat belt defense is the finding that a reasonable man of ordinary prudence would wear available belts,[49] the reasoning common to these cases must be carefully examined. This can be done by an analysis of the case of *Miller v. Miller*[50] which is clearly the lead case in opposition to the defense.

In *Miller* the plaintiff was a passenger in his own car. It entered a sharp curve, left the road and overturned. The plaintiff received a back injury as a result of the collision and commenced an action against the driver of his car. As part of her answer, the defendant alleged that the vehicle was equipped with seat belts and the plaintiff did not use the set of belts that was available for him. She further alleged that the plaintiff would not have been injured had he used the available belts. The trial court struck the defense, precluding the introduction of any evidence to support it and an appeal was taken.

In considering the safety belt defense the North Carolina Supreme Court first looked at the question of whether the state's seat belt installation statute made non-use negligence *per se*. It ruled that the installation statute did not create such a result.[51] As noted previously,[52] this approach is reasonable both under a mere installation statute and in the face of a claim that the court should establish a judicial standard that non-use always amounts to negligence as a matter of law. However, the court used this ruling to proceed further:

> The conclusion that a motorist is negligent whenever he rides upon the highway with his seat belt unbuckled can be supported only by a premise that no reasonably prudent person would travel the highway without using an available seat belt. If this be true, every failure to use an available seat belt would be negligence per se. . . .[53]

The fallacies in this statement are obvious. The proponents of the seat belt defense do not claim that a motorist is negligent *whenever* he rides without belts or that non-use is negligence *per se* or, for that matter, that a reasonable man of ordinary prudence would *never* travel

---

[47] Lipscomb v. Diamiani, note 23 *supra;* Miller v. Miller, note 6 *supra;* Romankewiz v. Black, note 12 *supra;* Woods v. Smith, note 32 *supra.*

[48] Dillon v. Humphreys, note 12 *supra;* Robinson v. Lewis, note 6 *supra.* For earlier decisions interpreting Oregon law on the seat belt defense, see Robinson v. Bone, 285 F. Supp. 423 (D. Ore. 1968); Siburg v. Johnson, 439 P.2d 865 (Ore. 1968).

[49] *See* W. PROSSER, note 35 *supra.*

[50] Note 6 *supra; Romankewiz, Woods* and *Robinson,* notes 47 and 48 *supra,* all rely on reasoning of Miller. *See* Kircher, *Miller v. Miller: The Safety Belt Defense,* 35 INS. COUNSEL J. 432 (1968).

[51] See cases cited at note 12 *supra.*

[52] See discussion at page 174 *supra.*

[53] 273 N.C. at _____, 160 S.E.2d at 68.

the highway without belts. What the court in *Miller* failed to realize is that there may be circumstances under which a reasonable man of ordinary prudence *would* travel on the highway without having his available belts buckled. A person whose physician cautioned against use because of recent abdominal surgery or pregnancy would hardly be considered prudent if this advice was not followed. What the proponents of the defense have claimed is that a reasonable man of ordinary prudence would make use of belts in most instances, but that the matter should be left to the trier of facts to decide because of the many circumstances involved in highway travel which would make a hard and fast rule unworkable.[54]

Seat Belt Acceptance

The court in *Miller* then set out to establish that a reasonable man of ordinary prudence would not make use of seat belts unless put on notice of some special and specific peril not normally associated with ordinary vehicular travel. It first considered the question of the public acceptance of seat belts as a safety device and quoted, with apparent approval, the statement of a student law review author:

> [T]he issue of the social utility of the use of seat belts is definitely not clarified in the minds of the public and the courts. Doubts remain as to whether seat belts cause injury, and the real usefulness of the seat belt in preventing injuries has not become public knowledge.[55]

The court's acceptance of such a statement at face value is almost as incomprehensible as the reason which led the student author to make it. One would have to be deaf and blind to be unaware that the public has been exposed to one of the greatest safety education campaigns on record regarding the effectiveness of seat belts. Radio, television, the printed media and bill boards all carry some form of the "Buckle Up For Safety" message with regularity.

Evidence that the public does appreciate the effectiveness of safety belts as a safety device comes from a survey of drivers and occupants in over 1,700,000 cars which was conducted by the Auto Industries Highway Safety Committee.[56] In the cars which had belts installed, only 10.3 percent of the persons questioned said that they never used belts under any circumstances. While some might question the honesty of respondents, their answers surely would have been different if they were not convinced that belts had any utility. In view of this it is strange that the court would accept a statement, particularly an unsupported one, that the real usefullness of seat belts has not become public knowledge.

---

[54] The Seat Belt Defense, note 3 *supra* and discussion at page 176 *supra*.
[55] *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 296.
[56] Sixth Annual Seat Belt Installation and Use Survey, Auto Industries Highway Safety Committee (1966).

The *Miller* court seemed impressed with one National Safety Council estimate which set the use of seat belts by all passenger car occupants at between 20 and 25 percent. "If the foregoing statistics be correct," said the court, "the average man does not customarily use his seat belt."[57] Whether the statistics are correct or nearly so is immaterial in this context. Statistics on cigarette sales since the issuance of the Surgeon General's report on smoking and cancer, and continuing publicity thereafter, would indicate that the average smoker is not heeding the "Smoking Kills" warning. Would the North Carolina court (irrespective of the fact that it is in a tobacco state) use those statistics to say that a person who starts to smoke or continues smoking in the face of the conclusive evidence on the cancer link is acting as would a reasonable man of ordinary prudence under the circumstances? It is just the propensity of the "average" man to adopt an "it can't happen to me" approach toward his own safety that gives strength to the view that community customs and usages often result from the kind of inadvertence, carelessness, indifference and corner-cutting that is normally associated with negligence.[58] Custom is not conclusive simply because it is custom; it must meet the challenge of "learned reason," and be given only the evidentiary weight that the situation deserves.[59] If this were not the case, the North Carolina court could have decided the issue by simply polling its members to determine how many customarily used seat belts. The fact that certain members of the court may not ordinarily use belts could have had a bearing on the outcome of the case—no one likes to be forced to declare his own habits unreasonable.

Seat Belt Effectiveness

The court next turned its consideration to the question of the effectiveness of safety belts in preventing injury and death resulting from auto accidents. The claim that seat belts are not effective or might themselves be dangerous is by far the weakest attack against the defense. The effectiveness of belts has been clearly demonstrated.[60] Not much time needs to be devoted here to the subject as a result. However, it is important to note the strategy employed by the court in its attempt to discount the effectiveness of belt use.

> The court began with the following statement:
> *Many people* fail to use them because of the fear of entrapment in a burning or submerged car.[61] [emphasis added].

The writer is unaware of any authoritative survey of public attitudes

---

[57] 273 N.C. at _____, 160 S.E. 2d at 69.
[58] W. PROSSER, note 24 *supra*, § 33 at 170.
[59] *Id.*
[60] *See* Huelke, *Practical Defense Problems—The Expert's View*, page 203 *infra*; Snyder, *The Seat Belt as a Cause of Injury*, page 211 *infra*; The Seat Belt Defense, note 3, *supra* at 7.

which supports such an unqualified assertion. Likewise, the authority cited by the court for this premise is silent as to the source of such a general statement of fact.[62] However, to whatever extent such fear may exist, it is unfounded. A report of a study of this subject indicates that fire occours in only two-tenths of one percent of all injury-producing accidents, and submersion in only three-tenths of one percent.[63] It also noted that a person wearing a seat belt in these types of accidents may have a better chance of survival than one who is unbelted. The report points to the fact that a person wearing a belt is more likely to remain conscious after the collision and is thereby in a better position to remove himself from the area of danger.

Throughout *Miller* the court quotes at great length and with apparent approval from an article highly critical of the seat belt defense written by J. Murry Kleist who specializes in plaintiffs' litigation.[64]

In discussing the effectiveness of seat belts, the court quotes Kleist's comment that belts are of limited value and may cause more injuries than they prevent. Kleist, in turn, cites three authorities to support that position. Two of the authorities discuss the medical aspects of the seat belt as a cause of injury.[65] Contrary to the position which Kleist attributes to them, these studies conclude that while seat belts may cause some injuries (usually in high speed collisions), the injuries sustained would have been more severe had belts not been used.[66] In fact, the author of one of the studies cited by Kleist states:

> It does not reasonably follow that the use of restraining devices should be discarded because they can cause injury. This blanket condemnation is favored by those who are uninformed or do not choose to use seat belts.[67]

Kleist's third authority[68] based his conclusions as to the effectiveness of seat belts upon experiments involving simulated collisions conducted prior to 1958. The early origin of this study and the fact that numerous, more recent studies have come to completely opposite results point to its limited value.[69] Kleist did not see fit to distinguish the more re-

---

[61] 273 N.C. at _____, 160 S.E.2d at 69.
[62] Annot., Automobile Occupants' Failure to Use Seat Belt as Contributory Negligence, 15 A.L.R.3d 1428, 1430 (1967).
[63] Gagen, *Seat Belts: No Longer Why, But Why Not?*, 38 TODAY'S HEALTH 26 (1960).
[64] Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L. J. 613 (1967).
[65] Rubovits, *Traumatic Rupture of the Pregnant Uterus from "Seat Belt" Injury*, 90 AM. J. OBST. & GYN. 828 (1964); Fisher, *Injury Produced by Seat Belts, Report of 2 Cases*, 7 J. OF OCCUPATIONAL MED. 211 (1965).
[66] See also Snyder at page 211 *infra*.
[67] Fisher, note 64 *supra*.
[68] White, *The Role of Safety Belts in the Motorist's Safety*, 9 CLINICAL ORTHOPEDICS 317 (1957).
[69] *See* J. Kircher, The Seat Belt Defense, note 3 *supra* at 37; Snyder page 211 *infra*.

cent studies or, for that matter, the fact that the organized plaintiff's bar has advocated full seat belt use by motorists.[70]

It seems strange that the legislatures of thirty-two states, the Congress of the United States and even the plaintiff's bar would advocate installation or use of seat belts if, as claimed by Kleist, they were of limited value or could cause more rather than fewer injuries in many crash conditions. In the final analysis, a review of all the studies of the effectiveness of seat belts supports the wisdom of the position taken by the Wisconsin Supreme Court:

> While it is apparent that . . . statistics cannot be used to predict the extent or gravity of injuries resulting from particular automobile accidents involving persons using seat belts as compared to those who are not using them, it is obvious that, on the average, persons using seat belts are less likely to sustain injury and if injured, the injuries are likely to be less serious.[71]

Applying The Reasonable Man Standard

With the initial phases of the *Miller* opinion disposed of, the heart of the issue can be reached—is there a common law duty, based on the standard of the ordinary man of reasonable prudence, to make use of available seat belts? Can the damage reduction approach to the defense be used in this regard? As noted earlier, *Miller* rejected this approach.

In determining what a reasonable man would have done under the circumstances, the reasonableness of the risk that a party incurred by his conduct is judged by weighing the importance of the interest he is seeking to advance against the probability that his conduct may cause him harm and the probable severity of that harm.[72] Seat belts are clearly an effective safety device and this information is common public knowledge. Therefore, in a seat belt situation, the question becomes whether a reasonable man of ordinary prudence possessed of this knowledge and considering the probability of being involved in an accident and the probable severity of the harm to himself as a result of such an accident would make use of available belts for his own protection.

ACCIDENT PROBABILITY

Is the probability of being involved in an accident on any given trip so great that, standing alone, the reasonable man of ordinary prudence, after considering the probability, would use an available seat belt?

An unqualified "yes" to such a question would only beg it. It is possible for a person to be found guilty of contributory negligence for failing to take precautions to avoid a possible future harm.[73] However,

---

[70] Stop Murder by Motorists at 9 (American Trial Lawyers Association Monograph, January 1966).
[71] Bentzler v. Braun, 34 Wis. 2d at 386, 149 N.W.2d at 640.
[72] W. PROSSER, note 24 *supra*, § 64 at 429.
[73] RESTATEMENT (SECOND) TORTS § 466, comment *g* (1965).

a person is not expected to guard against harm from those events which it is not reasonable to anticipate, or which are so unlikely to happen that the risk, although recognizable, would commonly be disregarded.[74] Although most auto trips do not result in accidents, still the probability of an accident occurring is real. It is this probability that gives rise to a duty to use reasonable means to avoid or mitigate the harm that may result from an accident. The probability of an accident is illustrated by the fact that state and federal legislation for safer roads, cars, driver education, periodic vehicle inspection, implied consent laws, stricter licensing policies, and a multitude of other safety-oriented legislation all point to the growing concern over auto accidents and their toll in loss of life as well as human suffering and economic damage. The auto accident and its effects have indeed become a national problem.[75]

Severity of Harm

The Kleist article, previously mentioned, attacked the seat belt defense on two basic points. He contends that the remote probability of being involved in an auto accident and the fact that a person has the right to assume that others will exercise proper care, remove the need to take protective measures such as fastening a seat belt. In *Miller,* the court also made note of the fact that a person is entitled to assume others will use due care for his safety and their own.[76]

Arguments such as these disregard several important factors. If a risk is an appreciable one and the possible consequences are serious, mathematical chance alone does not control the determination of whether a risk can be reasonably run. As the gravity of the possible harm increases, the apparent likelihood of the occurrence of the harm need be correspondingly less.[77] Car-train collisions are far less frequent than are collisions between autos, yet the prudent motorist proceeds over a grade crossing with care to observe if a train is near. As noted earlier, the probability of being involved in an auto accident on any given trip is appreciable. The grave consequences of auto accidents involving high-powered vehicles capable of great speeds are matters of common knowledge of which the courts have taken judicial notice.[78]

Similarly, the position that one may assume that others will exercise proper care is not absolute. Generally, when the risk is slight, a person may proceed under this assumption; however, when the risk becomes serious, either due to the gravity of possible harm or the likeli-

---

[74] W. Prosser, note 24 *supra,* § 31 at 149.

[75] Evidence of the merit of this statement is found in the fact that Congress authorized the Department of Transportation to conduct a two-year, $1.6 million study of the present auto reparation and insurance systems. Pub. L. No. 90-313 (May 22, 1968).

[76] 273 N. C. at ———, 160 S.E.2d at 70.

[77] W. Prosser, note 24 *supra,* § 31 at 151.

[78] *See, e.g.,* McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 382-83, 113 N.W.2d 14, 19 (1962).

hood of its occurrence, reasonable care may demand that occasional negligence, common among all men, be anticipated.[79]

The argument that belts need not be used because one has the right to assume that others will exercise proper care likewise presupposes that all auto accidents will be caused by negligence of someone other than the non-user. This is obviously not the case.

Recent highway safety campaigns by national groups have advised motorists to "watch out for the other guy." They have emphasized the fact that a motorist should not rely on the assumption that others will obey the rules of the road. Advertisements in the press, and on radio and television have warned motorists that if they do not take precautions and if they rely on the fact that they have the right of way, they may be in the right, but "dead right." All of the educational efforts of these various safety organizations would seem to be evidence of the fact that a reasonable man of ordinary prudence should appreciate the risk involved in automobile travel. Similar educational efforts regarding the effectiveness of safety belt use would also be evidence of the fact that a reasonable man of ordinary prudence should realize that he is much safer and less likely to suffer serious injury if he wears his belt.[80]

Although the final determination of whether a reasonable man of ordinary prudence would use an available seat belt under the circumstances of the particular case should be for the jury to determine, a defendant should be allowed to plead and prove that the plaintiff did not exercise ordinary care for his own safety and that this was a legal cause of his injuries and damages.[81] Although this view was rejected by the court in *Miller* and the few cases which follow that decision,[82] the preceding discussion has shown that the rulings in those cases were based upon a misinterpretation of the facts and the law involved in the defense.

Proving Causation

Even though it can be shown to the satisfaction of a court and jury that a reasonable man of ordinary prudence would have made use of available belts under the circumstances involved in the case at issue, more is needed for the damage reduction approach to the seat belt defense to be effective. The defendant must be able to prove that use of the available belts would have prevented the plaintiff's injuries and damages or would have made them less severe.[83]

---

[79] W. PROSSER, note 24 *supra*, § 33 at 174.
[80] Bentzler v. Braun, note 5 *supra*.
[81] Sams v. Sams, note 5 *supra*; Truman v. Vargas, 80 Cal. Rptr. 373 (Cal. App. 1969).
[82] Notes 47 and 48 *supra*.
[83] See notes 35 and 36 *supra*.

In *Miller* the court stated:

> Should the use of seat belts be required by law, there is little doubt that the testimony of professional safety experts would be made available to both plaintiff and defendant. Notwithstanding, it would probably remain a matter of conjecture to what extent a motorist's injuries are attributable to his failure to use a seat belt and whether, had it been used, other and different injuries would have resulted.[84]

Earlier in its opinion, the court quoted a similar statement by Kleist:

> In any given collision, no doctor can say exactly what injuries would have been suffered had the victim been wearing a seat belt as compared to those he suffered without it.[85]

It is, at best, the height of speculation for a court and an attorney not skilled or schooled in the sciences of medicine, accident reconstruction or biomechanics to attempt to surmise what experts will be able to establish after examining the physical evidence. Research indicates that scientists can determine whether injuries and deaths would have been prevented had belts been employed.[86] Unquestionably, some cases may arise in which experts will be unable to determine to a reasonable certainty what effect seat belt use would have had in preventing injury. In such cases the trial court could prevent the jury from considering the seat belt defense. In these situations proper instructions could be given to caution the jury that the proof was insufficient for them to consider the matter. However, in a case such as *Miller,* in which the court is only asked to consider whether what the defense asserted in the pleadings is susceptible to demurrer, the propriety of the court's speculation as to what competent experts could establish is highly questionable.

As noted earlier, a number of courts have indicated that some form of damage reduction approach might be applied in a non-use situation while others have not considered the merits of the approach because of other factors in the case.[87] These cases clearly indicate that juries will not be allowed to speculate on the causation issue.[88] Therefore, the defense should not be raised unless competent evidence is available. The manner of collecting and presenting this evidence will be discussed in subsequent sections of this symposium.[89]

Avoidable Consequences Distinction

Some courts have questioned whether the avoidable consequences rule can be used in a seat belt non-use situation because of the manner

---

[84] 273 N.C. at _____, 160 S.E.2d at 73.
[85] Kleist, note 64 *supra* at 615.
[86] See Huelke page 203 *infra.*
[87] Notes 38, 40, 41, 43, 45 and 46 *supra.*
[88] Sams v. Sams, note 5 *supra;* Husted v. Refuse Removal Service, note 44 *Supra.*
[89] See Bowman page 191 *infra* and Huelke page 203 *infra.*

in which the rule is customarily applied. They note that generally, contributory negligence applies to negligence on the part of the plaintiff before any damage or invasion of his rights has occurred, while avoidable consequences comes into play after a legal wrong has occurred but while some damage may still be averted.[90] Since the failure to make use of seat belts occurs before the collision when a trip is begun, they find trouble applying the avoidable consequences rule.

Prosser, while noting this customary distinction, believes it places an entirely artificial emphasis on the moment of impact and pure mechanics of causation.[91] He states:

> It is suggested, therefore, that the doctrines of contributory negligence and avoidable consequences are in reality the same, and the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not.[92]

It is suggested that this is the more reasonable and practical approach and that any difference or distinction between the avoidable consequences and the "apportionment of damages" approaches noted earlier is a matter of form than substance.

COMPARATIVE NEGLIGENCE

The bulk of this paper has been involved with a discussion of the seat belt defense as it may be applied in those states in which contributory negligence is a complete bar to recovery. However, it is to be noted that the number of states using the comparative negligence rule is growing.[93] It appears that more states may abandon the contributory negligence complete bar rule in favor of comparative negligence.[94]

Since contributory negligence is not automatically a bar to recovery in a comparative negligence state, it is suggested that courts in those jurisdictions may be more kindly disposed toward the seat belt defense. In a comparative negligence state the defense will be aimed at damage reduction and the courts are familiar with this form of defense approach. The non-use of seat belts would be classified as passive negligence (a cause of injury or damage) as opposed to active negligence (a cause of the accident or collision).[95]

---

[90] *See, e.g.,* Barry v. Coca-Cola Co., note 10 *supra* at 276.
[91] W. PROSSER, note 24 *supra,* § 64 at 433.
[92] *Id.,* at 434.
[93] Arkansas, Georgia, Hawaii, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, South Dakota, Vermont, Wisconsin and Nebraska have comparative negligence rules. Puerto Rico and Canada also have comparative negligence rules.
[94] *See* Report of ABA Special Committee on Automobile Accident Reparations at 74 (June 1969): Defense Research Institute Special Report, Responsible Reform—A Program to Improve the Liability Reparation System at 23 (October 1969).
[95] Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure,* 18 DEFENSE L. J. 537, 548 (1969).

Only three cases have been found from comparative negligence jurisdictions in which the seat belt defense was considered. In each case the court either applied the defense to reduce damages or found that the defense could be applied in a proper case. The leading case is the Wisconsin Supreme Court decision of *Bentzler v. Braun*,[96] which has been discussed in previous sections of this paper. After a thorough examination of all of the considerations involved in the defense, the court concluded:

> While we agree with those courts that have concluded that it it not negligent *per se* to fail to use seat belts where the only statutory standard is one that requires installation of the seat belts in the vehicle, we nevertheless conclude that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.[97]

The court was quite clear, however, that for the defense to be applied so as to result in damage reduction under the state's comparative negligence rule, a causal connection between non-use and the plaintiff's injuries and damages would have to be established.

In *Kelley v. United States*,[98] the court applied Mississippi's comparative negligence rule and reduced the plaintiff's damage award by 50 percent because non-use increased the extent of injury:

> Significantly, neither Kelley nor his wife had their seat belts fastened, and it is clear that a fastened seat belt would have prevented Mrs. Kelley from receiving this extensive injury to her face, head and brain. She was surely guilty of contributory negligence on such occasion. . .[99]

The Canadian province of British Columbia also has a comparative negligence rule and in *Yuan v. Farstad*,[100] a damage award was reduced by 25 percent because a causal connection was established between non-use and injury. In that case the court followed the reasoning of *Bentzler*.

Seat Belts and the Plaintiffs' Bar

The writer could not conclude his consideration of the subject of seat belts without discussing the position of the plaintiffs' bar. At best, it is highly curious. At one and the same time plaintiffs' lawyers have criticized the seat belt defense and have questioned the effectiveness of seat belts as a safety device,[101] while the national organizations of plaintiff's lawyers have praised seat belts and urged their use by all motorists as a means of cutting our tragic highway death and injury tolls.[102] In

---

[96] Note 5 *supra*.
[97] 34 Wis. 2d at 385, 149 N.W.2d at 639.
[98] Civ. No. 4094 (S.D. Miss. 1967).
[99] *Id.*
[100] Note 5 *supra*.
[101] See Kleist, note 64 *supra*.
[102] Note 70 *supra*.

fact, the bi-monthly magazine of the plaintiffs' bar recently carried an editorial urging legislation which would make use of seat belts mandatory.[103]

Individual plaintiffs' lawyers have also seen that seat belts may create a situation favorable to a claimant in a personal injury case. In at least four cases the plaintiff has alleged negligence on the part of the defendant for failing to provide seat belts in his vehicle.[104] In another, the plaintiff tried to claim the fact that belts were used was conclusive, as a matter of law, of the fact that his deceased was in the exercise of ordinary care at the time of the accident.[105]

It is the attempt of the plaintiffs' bar to seek to have the best of all possible worlds that makes the work of the defense lawyer so interesting.

SUMMARY

From the foregoing discussion it may be seen that the only phase of the seat belt defense on which the law is settled is that, in the face of a mere installation statute, non-use of belts is not negligence *per se*. Contrary to the assertion of some, the number of courts which have rejected all phases of the defense is relatively small.[106] However, even here it may be improper to use the term "rejected all phases" since *Miller* and the cases which have followed it state that there may be a duty on the part of the plaintiff to use available belts if he is put on notice of some specific danger such as a car door which will not remain closed.[107]

There are a number of courts which have accepted one phase of the defense or have indicated that the defense could be applied in a proper case.[108] However, the vast majority of courts have never been called upon to consider the seat belt defense, or have been called upon to do so, but found this unnecessary because of other factors in the case. Therefore, at best, the law with regard to the seat belt defense can only be termed unsettled. Yet, from the cases which have been decided, it is clear that the best approach to the defense is to have it applied to reduce the plaintiff's damages. In this regard, it is crystal clear that competent and convincing evidence of the causal connection between non-use and the injuries and damages sustained is imperative:

> [T]he lifeblood of a legal theory is facts and if there are no facts supporting the theory, it is error to instruct on that theory.[109]

---

[103] *Stop Murder by Motorists*, 6 TRIAL 8 (1969-70).
[104] Forse v. Turner, 286 N.Y.S.2d 14 (Sup. Ct. 1968); Greyhound Lines, Inc. v. Superior Ct., 83 Cal. Rptr. 343 (Cal. App. 1970); Mortensen v. Southern Pacific Co., 53 Cal. Rptr. 851 (Cal. App. 1966); Tiemeyer v. McIntosh, 176 N.W.2d 819 (Iowa 1970). *See also* Bowman at page 196 *infra*, note 29.
[105] Deaver v. Hickox, 121 Ill. App.2d 465, 256 N.E.2d 866 (1970).
[106] Notes 47 and 48 *supra*.
[107] *Id.*
[108] Notes 40, 41, 43, 45, 46, 88, 96, 98, 100 *supra*.
[109] Shore v. Turman 63 Ill. App.2d 315, 321, 210 N.E.2d 232, 235 (1965).