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Introduction

In *Miller v. Miller*[1] the Supreme Court of North Carolina rejected the safety belt defense. The purpose of this paper is to carefully analyze that decision and point to its errors lest other courts, looking no further and relying upon it as authority, fall into similar error.

Had the North Carolina court made a more detailed analysis, it would have found logical solutions to the problems it saw in the application of the defense. The arguments raised by the authorities upon which the court relied most heavily, and which shaped the final outcome of the decision, have been shown to be without foundation.[2]

Negligence Per Se

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 safety belts and the plaintiff did not use the belt that was available. She further alleged that the plaintiff would not have been injured if he had used the belt. The trial court struck the defense and an appeal was taken.

In its consideration of the safety belt defense, the court first looked at its state safety belt statute.[3] The question was whether the statute made the failure to use an available belt contributory negligence as a matter of law. The North Carolina statute, like those in many other states,[4] only requires the installation of safety belts in all autos sold after a certain time. The court concluded that a mere installation act could not be considered a safety statute, making nonuse of available belts contributorily negligent *per se.* This conclusion follows the reasoning of other courts which have considered the subject and agrees with the reasoning of the proponents of the defense.[5]

The court then turned to consider whether the nonuse of an available safety belt could be considered as contributory negligence under the standards of the common law. It stated:

> The conclusion that a motorist is negligent whenever he rides upon the highway with his seat belt unbuckled can be supported only by the 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. . . .[6]

The fallacies in this statement are obvious. The proponents of the defense do not claim that it is negligent *per se* to fail to use an available safety belt or that a reasonably prudent person would *never* travel the highway without one.[7] The infinite variety of situations which may arise to affect human behavior makes it impossible

[1] 160 SE2d 65 (NC 1968).

[2] For a critical analysis of the arguments raised against the application of the safety belt defense, see DRI Monograph, "The Seat Belt Defense" (Sept 1967).

[3] NC Gen Stat § 20-135.2 (Supp 1965).

[4] For a list of the state statutes requiring installation of auto safety belts, see "The Seat Belt Defense" note 2 supra at 21.

[5] Id at 12.

[6] Note 1 supra at 68.

[7] "The Seat Belt Defense" note 2 supra at 12.

to fix definite rules, in advance, for all conceivable human conduct.[8] This is why the standard of the reasonable man of ordinary prudence was adopted at common law. It is true that courts have, from time to time, declared certain conduct to be negligent *per se*. For example, at least one court has held that the driver of a moving vehicle who falls asleep at the wheel is negligent as a matter of law.[9] However, as the court in *Miller* failed to recognize, there may be situations in which a reasonably prudent person *would* travel upon the highway without using an available belt. A person whose physician advised against such use because of recent abdominal surgery or pregnancy could hardly be considered prudent if that advice were disregarded. In the safety belt situation, it seems more workable to leave the determination of contributory negligence with the jury, under the standard of care of the reasonable man of ordinary prudence, than to set a hard, fast rule of conduct to which there could be so many exceptions. For as one author has stated:

> Such rules may be useful to fix a standard for the usual, normal case, but they are 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.[10]

Safety Belt Acceptance

The court digressed from its consideration of contributory negligence for a time to discuss public acceptance of safety belts. It 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 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. . . .[11]

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 educational campaigns on record regarding the effectiveness of safety belts. A person cannot listen to the radio or watch television for long without having some form of "Buckle Up For Safety" message presented to him. The American Medical Association, National Safety Council, General Federation of Women's Clubs, Auto Industries Highway Safety Committee, numerous unions, professional societies, as well as other service clubs and civic groups have been active in campaigns directed at public acceptance and use of safety belts.[12]

Evidence that the public does appreciate the effectiveness of safety belts comes from a recent survey of over 1,700,000 cars conducted by the Auto Industries Highway Safety Committee.[13] In the cars which had belts installed, only 10.3 per cent of the persons surveyed said that they never used belts under any circumstances. While the responses of the persons who claimed belt use some or all of the time may be questioned, such a response does indicate that those persons recognized the value of belt use.

In view of all of this it seems strange that the court would accept an unsupported statement that the real usefulness of safety belts has not become public knowledge.

The court seemed impressed by a National Safety Council estimate which set the use of safety belts by all passenger car occupants at between 20 and 25 percent. "If the foregoing statistics be correct," the court stated, "the average man does not customarily use his seat belt."[14] Statistics on cigarette sales since the publication of the Surgeon General's report on the confirmed link between cigarette smoking and lung cancer also seem to indicate that the average man is not heeding the warning contained therein. It is just this 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

[8]Prosser, Torts § 32 at 153 (3d ed 1964).

[9]Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis2d 91, 118 NW2d 140 (1962).

[10]Prosser, note 8 supra § 37 at 212.

[11]Rothe, "Seat Belt Negligence in Automobile Accidents," 1967 Wis L Rev 288, 296.

[12]16 Am Jur Proof of Facts, "Seat Belt Accidents," § 4 at 357 (1965).

[13]Sixth Annual Seat Belt Installation and Use Survey, Auto Industries Highway Safety Committee (1966).

[14]Note 1 supra at 69.

community customs and usages often result from the kind of inadvertence, carelessness, indifference and corner-cutting that is normally associated with negligence.[15] Custom is not conclusive simply because it is a custom; it must meet the challenge of "learned reason," and be given only the evidentiary weight that the situation deserves.[16] If this were not the case, the North Carolina court could have decided the issue simply by determining how many of its number customarily made use of their safety belts.

Safety 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. It began with the following statement:

> *Many people* fail to use them because of the fear of entrapment in a burning or submerged car. [emphasis added][17]

The writer is unaware of any authoritative survey of public opinion which would support such an unqualified statement. Likewise, the authority cited by the court for this premise[18] is silent as to the source of such a general statement of fact. However, such a fear is not founded in fact, irrespective of whether it does exist or is as widespread as believed by the court. The report of a study on this subject[19] indicates that fire occurs in only two-tenths of one percent of all injury producing accidents, and submersion in only three-tenths of one percent. It also noted that a person wearing a safety belt may have a better chance for survival in those types of accidents. The report pointed to the fact that a belted person stands a better chance of remaining conscious after the collision and thereby is better able to remove himself from danger.

Throughout the decision the court quotes at great length, and with apparent approval, from an article highly critical of the safety belt defense written by a plaintiffs' attorney, J. Murry Kleist.[20] In discussing the effectiveness of safety belts, the court quotes Kleist's statement that belts are of limited value and may cause more injuries than they prevent. Kleist, in turn, cites three studies to support that position. Two of these studies[21] discuss the medical aspects of the safety belt as a cause of injury. These studies, contrary to the position Kleist attributed to them, conclude that while safety belts may cause some injury, usually in high speed collisions, those injuries would have been more severe if belts had not been worn. 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.[22]

Kleist's third authority[23] based his conclusions as to the limited effectiveness of safety belts upon experiments involving simulated collisions conducted prior to 1958. The early origin of this study and the fact that numerous, more recent studies[24] have come to completely opposite results point to its limited usefulness. Kleist did not see fit to distinguish the more recent studies or, for that matter, the fact that the organized Plaintiffs' Bar has advocated the full use of safety belts.[25]

It would seem strange that thirty-two states and the federal government would require the installation of safety belts in all new autos[26] if, as claimed by Kleist, they were of limited value or could cause more rather than less injuries in many crash conditions. In fact, a recent report of a 15-year study conducted by the Automotive Crash Injury Research (ACIR) of Cornell University claims that the risk of

[15]Prosser, note 8 supra § 33 at 170.

[16]Ibid.

[17]Note 1 supra at 69.

[18]Annot., "Automobile Occupants' Failure To Use Seat Belt as Contributory Negligence," 15 ALR3d 1428, 1430 (1967).

[19]Gagen, "Seat Belts: No Longer Why, But Why Not?," 38 Today's Health No 7 at 26 (July 1960).

[20]Kleist, "The Seat Belt Defense — An Exercise In Sophistry," 18 Hastings L J 613 (1967).

[21]See Rubovits, "Traumatic Rupture of the Pregnant Uterus from 'Seat Belt' Injury," 90 Amer J Obst & Gyec 828 (1964); Fisher, "Injury Produced by Seat Belts, Report of 2 Cases," 7 J of Occupational Medicine 211 (1965).

[22]Fisher, note 21 supra.

[23]White, "The Role of Safety Belts in the Motorist's Safety," 9 Clinical Orthopedics 317 (1957).

[24]"The Seat Belt Defense" note 2 supra, Bibliography at 37.

[25]ATLA Monograph, "Stop Murder By Motor" at 9 (Jan 1966).

[26]"The Seat Belt Defense" note 2 supra at 6

death alone for unbelted motorists is 30 percent greater and that the risk of death or serious injury combined is about 50 percent greater.[27]

If safety belts are not effective in preventing injury and death resulting from motor vehicle accidents, then the National Safety Council, American Medical Association, American Trial Lawyers Association, Defense Research Institute, the Congress of the United States, the legislatures of thirty-two states, numerous researchers, as well as many other organizations which promote the installation and use of safety belts, are either incompetent or the naive victims of one of the greatest hoaxes ever perpetrated on the American public.

In the final analysis, a review of all the studies of the effectiveness of safety belts supports 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.[28]

The Reasonable Man

The court in *Miller* returned to its consideration of contributory negligence and safety belts to determine if a person failing to make use of an available belt could be held guilty of contributory negligence under the standard of the common law — the reasonable man of ordinary prudence. It concluded that if such a situation would exist:

> It would, however, have to be a situation in which the plaintiff, with prior knowledge of a specific hazard — one not generally associated with highway travel and one from which a seat belt would have protected him — had failed or refused to fasten his seat belt.[29]

The court found, that absent such a situation, there would be no standards by which it could be said that the use of safety belts was required on one trip and not another.

Applying the Common Law Standard

In view of the court's reluctance to find, as did the Wisconsin court,[30] that there is a common law duty based upon standards of ordinary care to wear available safety belts, it is important to analyze the safety belt situation in relation to the common law standard. At common law, the plaintiff is required to conform to the same general standard of conduct as would be followed by a reasonable man of ordinary prudence under similar circumstances.[31] This is at best a shorthand method of determining whether particular conduct is contributorily negligent because more comes into the bargain before such a determination can be made. In determining what a reasonable man would have done, the reasonableness of the risk which the plaintiff 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.[32]

Previous discussion shows the effectiveness of safety belts and that a person involved in an auto accident is less likely to sustain serious injury if he is using a belt. Previous discussion also indicates that these facts have been made known to the motoring public. Therefore, in a safety belt situation, the question becomes whether a reasonable man of ordinary prudence, considering the probability of being involved in an auto accident and the probable severity of harm to himself as a result of such an accident, would make use of an available safety belt 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" answer 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 pre-

[27]Reported in the Milwaukee Sentinel (Apr 19 1968).

[28]Bentzler v. Braun, 34 Wis2d 362, 386, 149 NW2d 626, 640 (1967).

[29]Note 1 supra at 70.

[30]Bentzler v. Braun, note 29 supra.

[31]Prosser, note 8 supra § 64 at 429.

[32]Ibid.

cautions to avoid a possible future harm.[33] However, 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.[34] If the question is considered objectively, one must admit that the probability of being involved in an auto accident on any given trip is appreciable but not great. Statistics for the year 1966 indicate that there were approximately 96,000,000 registered motor vehicles, 102,000,000 licensed drivers, and 2,000,000 persons suffering death or personal injury as the result of auto accidents.[35] Thus, while accidents, injuries and deaths may be on the increase, our highways still present a relatively safe and convenient means of travel.[36] Therefore, it would seem that, standing alone, the probability of being involved in an auto accident is not great enough to cause the reasonable man of ordinary prudence to fasten his safety belt.

Although the probability of being involved in an auto accident on any given trip is not great, it would seem unwise to say that the probability is not appreciable. State and federal legislation for safer roads, cars, driver education, periodic auto inspection, implied consent laws, stricter licensing policies, and a multitude of other auto 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 loss. The auto accident and its effects have indeed become a national problem.

Probable Severity of Harm

The Kleist article, previously mentioned, criticized the safety 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, removed the need to take protective measures such as fastening the safety belt. In *Miller,* the court also made note of the rule in North Carolina, similar to other states, that a person is entitled to assume others will use due care for his safety and their own.[37]

Arguments such as these disregard several important factors. If a risk is an appreciable one and the possible consequences are serious, mathematical probability alone does not control the determination of whether or not the 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.[38] As noted earlier, although the probability of being involved in an accident on any given auto trip is not high, it certainly is appreciable. The grave consequences of auto accidents involving high-powered automobiles, capable of great speeds, are matters of common knowledge of which the courts have taken judicial notice.[39]

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 likelihood of its occurrence, reasonable care may demand that occasional negligence, common among all men, be anticipated.[40]

The argument that one need not use an available safety belt because he may assume that others will exercise proper care likewise presupposes that all auto accidents are caused by the negligence of some person other than the plaintiff. This is obviously not the case.

Recent publicity campaigns by the National Safety Council and other groups have advised motorists to "watch out for the other guy," and have emphasized the fact that a motorist should not rely on the assumption that others will obey the law. Advertisements in the press and on radio and television have warned motorists that if they do not take precautions and choose to 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 safety groups would seem to be evidence of the fact that a reasonable man of ordinary prudence should appreciate the risk involved in automobile travel. Similar

[33]Restatement (Second) Torts, § 466, comment g at 514 (1965).

[34]Prosser, note 8 supra § 31 at 149.

[35]National Safety Council, "Accident Facts" at 40 (1967 ed).

[36]Rothe, note 11 supra at 295.

[37]Note 1 supra at 70.

[38]Prosser, note 8 supra § 31 at 151.

[39]E.g., McConville v. State Farm Mut. Ins. Co., 15 Wis2d 374, 378, 113 NW2d 14, 19 (1962).

[40]Prosser, note 1 supra § 33 at 174.

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 more safe and less likely to suffer serious injury if he wears his safety belt.[41]

Although the final determination of whether or not a reasonable man of ordinary prudence would use an available safety belt under the circumstances of the particular case is for the jury, a defendant should be allowed to plead and prove that the plaintiff was guilty of contributory negligence for failing to use an available belt. As was stated by the Wisconsin court:

> While we agree with those courts that have concluded that it is not negligent *per se* to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belt in the vehicle, we 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.[42]

This argument is supported by the fact that the legislatures of five states,[43] in enacting seat belt installation statutes, found it necessary to provide that the failure to use safety belts shall not be considered as negligence, or that proof of the lack of their use is inadmissible in any civil action seeking damages for personal injuries.

While the proponents of the safety belt defense do not claim that it is negligent *per se* to fail to use an available safety belt, they do claim that absent known conditions making it imprudent to use belts, a reasonable man of ordinary prudence would use them in every situation.

Causation

The North Carolina court expressed concern over the ability of litigants in a case involving safety belts to be able to present competent proof that the injuries would or would not have occurred had belts been worn. It 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.[44]

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.[45]

The sciences of medicine and accident reconstruction are not strangers to the courtroom. It is at best highly speculative for an attorney or court, not skilled or schooled in these sciences, to attempt to surmise what experts will be able to establish after having studied the physical evidence. In a case involving a low-speed, rear-end collision, would it be a matter of conjecture for a qualified expert to say that, had an available lap belt and shoulder harness combination been worn, the plaintiff would not have struck his head on the windshield, dashboard, or any other object within the vehicle? In a case in which all of the occupants of a vehicle are belted except one, and in which that unbelted person is ejected from the car, sustaining serious injury while all other occupants go uninjured, would it be a matter of conjecture for a qualified expert to say that had an available belt been used the unbelted person would have escaped injury?

Research indicates that scientists can determine whether injuries and death could have been prevented in accidents had belts been employed.[46] Unquestionably, cases will arise in which experts will be unable to determine what effect safety belt use would have had in preventing injury. In such a case the trial court could prevent the jury from considering the safety belt defense. Proper instructions could be given

[41] Bentzler v. Braun, note 29 supra.

[42] Id at 385, 149 NW2d at 640.

[43] Iowa Code § 321.445 (1966); Me Rev Stat Ann C 29 § 1368A (Supp 1966); Minn Stat § 169.685 (Supp 1966); Tenn Gode Ann § 59-930 (Supp 1966); Va Code Ann § 46.1-309.1 (Supp 1967).

[44] Note 1 supra at 73.

[45] Kleist, note 20 supra at 615.

[46] E.g., Huelke & Gikas, "Causes of Deaths in Automobile Accidents," 203 JAMA 1100 (Mar 25 1968) reports a study of 177 motor vehicle accident deaths. The researchers concluded that 40% of those killed would have survived if lap belts were worn and an additional 13% if lap belt and shoulder harness combinations were used by the persons killed.

to caution the jury that the proof was insufficient for them to consider the matter.

However, in a case such as *Miller,* where the court is only considering whether the defense asserted in the pleadings is susceptible to demurrer, the propriety of a court speculating as to what competent experts could establish is highly questionable.

Contributory Negligence As A Complete Bar

Finally, the North Carolina court expressed concern over the use of the safety belt defense, because it felt that it would be harsh and unsound for a plaintiff to be denied all recovery merely because of his failure to fasten a safety belt. In North Carolina causal contributory negligence on the part of the plaintiff is a complete bar to his recovery.

In states such as North Carolina in which causal contributory negligence is a complete bar to recovery, some injustice may result if a plaintiff is totally denied recovery for the failure to use an available safety belt. This would be true in those cases in which the plaintiff suffers injuries which could have been prevented through safety belt use and those which could not have been so prevented. The solution to this problem may lie in the application of the doctrine of avoidable consequences. This doctrine denies recovery to the plaintiff for those damages which could have been avoided through reasonable conduct.[47]

A distinction has been made, however, and it is generally held that contributory negligence operates when the plaintiff's conduct, prior to the accident, caused or contributed to his injuries. Avoidable consequences comes into play after the legal wrong has been committed, but while some damage may still be prevented.[48] In *Miller,* the court noted this distinction and expressed the view that the safety belt situation does not fit the doctrine of avoidable consequences because the failure to fasten the safety belt occurs before the negligent act which causes the collision.

However, a telling argument has been made for the position that the distinction between contributory negligence and avoidable consequences is artificial and places too much importance on the time of impact as a cut-off point where one stops and the other begins.[49] It has been suggested that the better approach would be to allow the plaintiff to recover for those damages which he could not have prevented and to bar recovery for those damages which could have been prevented without the formality of making a distinction between the application of contributory negligence and avoidable consequences.[50]

One author has suggested that avoidable consequences could be applied to a seat belt situation.[51] This possibility was also recognized in the case of *Kavanagh v. Butorac.*[52] In that case the court noted the pre- and post-accident distinction regarding contributory negligence and avoidable consequences. However, the court stated:

> We recognize the possibility of the doctrine (avoidable consequences) applying in some future date and in some matter where the circumstances are clearer than the instance case in showing that some part of the injuries would not have occurred except for the fact that plaintiff failed to avoid the consequences of the tort by fastening his seat belt.[53]

The reason why the doctrine of avoidable consequences has never been applied to a situation involving pre-accident conduct on the part of the plaintiff may lie in the fact that safety belts present the first unique method by which affirmative action may prevent injuries as opposed to merely preventing the occurrence which produces them. This rule and its application to a safety belt situation will produce a more equitable result than would the application of a rule which would completely bar recovery. The latter approach places too much emphasis on unwarranted formalism and gives importance to the time of injury, which really should have no importance in fact or law.

In the recent Illinois decision of *Mount v. McClellan*[54] the court adopted the approach that there is a duty based upon common law standards of ordinary care to use available safety belts independent of any statutory mandate. It recognized that

[47]Prosser, note 8 supra § 64 at 433.
[48]Ibid.
[49]Id at 434.
[50]Ibid.
[51]Levine, "Legal Problems Arising from Failure to Wear Seat Belts," Transcript ATLA 20th Annual Convention, 519 at 527 (1966).
[52]221 NE2d 824 (Ind App 1966).
[53]Id at 830.
[54]234 NE2d 329 (Ill App 1968).

the use or nonuse of safety belts, and expert testimony in relation thereto, is a matter which the trier of fact 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 be likely to sustain. However, the court held that the seat belt consideration should be limited to the issue of damages only and should not be considered by the trier of fact in determining the liability issue. Unlike the North Carolina court, it saw no problem in the application of the safety belt defense to this issue.

Conclusion

The proponents of the safety belt defense do not claim that the complete use of belts would eliminate all injuries and deaths from motor vehicle accidents. They do claim, however, that safety belts have been conclusively proved to be a significant factor in the reduction of the carnage on our highways. Safety belts may cause some injuries, but it has been shown that these occur in the types of collisions in which the person would have been more seriously injured, or even killed, had belts not been used at all. It is indeed unfortunate that the North Carolina court chose to ignore these facts.