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**FAILURE TO WEAR SEAT BELTS
AS CONTRIBUTORY NEGLIGENCE:
THE DEVELOPMENT OF THE WISCONSIN RULE**

THE GENERAL STATUS OF THE LAW

The increase of automobile traffic and the attendant increase in the number of motor vehicle accidents over the past several years has caused great concern among the members of both state and federal legislatures. Federal interest in highway improvement as well as the recently established Federal Safety Standards, illustrate the interest of Congress in doing all that is possible to insure the safety of the motoring public. State legislatures have taken similar steps to provide the safest possible roads and vehicles. Among these state measures have been the introduction of statutes requiring the installation of seat belts in all new cars sold to state residents. Presently 31 states have such laws.¹

Wisconsin pioneered in this legislation and placed the statutory mandate on all automobiles beginning with 1962 models.² This statute also prohibits removal of the belts once installed in a vehicle. Chapter 347³ also makes it unlawful to sell such inadequately equipped vehicles

¹ CAL. VEHICLE CODE §27309 (Supp. 1966); CONN. GEN. STATS. ANN. §14-100a (Supp. 1966); GA. CODE ANN. tit. 68 §1801 (Supp. 1966); ILL. ANN. STAT. ch. 95½ §217.1 (Supp. 1966); IND. STAT. ANN. tit. 47 §2241 (1966); IOWA CODE ANN. §321.445 (1966); KAN. STAT. ANN. ch. 8 §§8-5, 135 (Supp. 1965); ME. REV. STAT. ANN. tit. 29 §1368-A (Supp. 1966); MD. ANN. CODE art. 66½ §296A (1967); MASS. ANN. LAWS ch. 90 §7 (Supp. 1966); MICH. STAT. ANN. tit. 9 §9.2410(2) (Supp. 1965); MINN. STAT. ANN. ch. 169 §169.685 (Supp. 1966); MISS. CODE ANN. tit. 30 §8254.5 (Supp. 1966); MO. ANN. STAT. ch. 304 §304.55 (Supp. 1966); MONT. REV. CODE ANN. tit. 32 §32-21-150.1 (Supp. 1965); NEB. REV. STAT. ch. 39 §39-7, 123.05 (Supp. 1965); N.J. STAT. ANN. tit. 39 §39:3-76.2 (Supp. 1966); N.M. STAT. ANN. ch. 64 §64-20-75 (Supp. 1965); N.Y. VEHICLE & TRAFFIC LAW §383(a)(g) (Supp. 1966); N.C. GEN. STAT. ch. 20 §20-135.2 (Supp. 1965); N.D. CODE ANN. ch. 39-21 §39-21-41.1 (Supp. 1965); OHIO REV. CODE ANN. tit. 45 §4513.26.2 (Supp. 1966); OKLA. STAT. ANN. tit. 47 §47-12-413 (Supp. 1966); ORE. REV. STAT. tit. 39 §483.482 (Supp. 1965); R.I. GEN. LAWS ANN. §31-23-39 (Supp. 1966); TENN. CODE ANN. tit. 59 §59-930 (Supp. 1966); VT. STAT. ANN. tit. 23 §4(29) (Supp. 1965); VA. CODE tit. 46 §46.1-309.1 (Supp. 1966); WASH. REV. CODE ANN. tit. 46 §46.37.510 (Supp. 1966); W. VA CODE ANN. ch. 17C art. 15 §43 (Supp. 1966); WIS. STAT. §347.48 (1965).

² Wis. Laws ch. 521 (1961). This statute was amended in 1963 by ch. 448 and presently appears as WIS. STAT. §347.48 (1965): SAFETY BELTS. (1) SAFETY BELTS REQUIRED. It is unlawful for any person to buy, sell, lease, trade or transfer from or to Wisconsin residents at retail an automobile, which is manufactured or assembled commencing with the 1962 models, unless such vehicle is equipped with safety belts installed for use in the left front and right front seats thereof, and no such vehicle shall be operated in this state unless such belts remain installed.

(2) TYPE AND MANNER OF INSTALLING. All such safety belts must be of a type and must be installed in a manner approved by the motor vehicle department. The department shall establish specifications and requirements for approved types of safety belts and attachments thereto. The department will accept, as approved, all seat belt installations and the belt anchor meeting the society of automotive engineers' specifications.

³ WIS. STAT. §347.03 (1965).

and places additional responsibility for statutory violation upon the owner for knowingly causing or permitting the operation of an improperly equipped vehicle on a highway.⁴ Many other states have since followed suit in passing seat belt statutes, although none of these states, except perhaps that of Illinois,⁵ makes the use of these devices mandatory.

Even though none of these statutes compels use, it is obvious that the intent behind the passage of these statutes was to provide a safer vehicle for sale to the public. Widely publicized studies of auto accidents have shown that the presence of some sort of restraining device would have made a crucial difference in the severity of injuries sustained in many automobile collisions.⁶ It would seem, therefore, that state legislatures enacted seat belt laws so as to place at the disposal of their resident motorists a means of reducing traffic fatalities and serious injuries. In most states apparently no thought was given to imposing a sanction upon motorists who did not wear available belts. It seems equally apparent that little thought was given to the possible effect of a motorist's failure to wear seat belts on his civil recovery for personal injuries.⁷

However, the advent of these statutes has given rise to an interesting series of personal injury cases in which the plaintiff's failure to use seat belts has been raised, with varying degrees of success, as an affirmative defense. A review of a few of these cases illustrates that certain legal problems are presented when such a defense is used. In the South Carolina case of *Sams v. Sams*⁸ the defendant alleged the plaintiff's failure to wear seat belts as an affirmative defense. The trial court order granting the plaintiff's motion to strike this defense was overruled by the supreme court. While the court took no position on the merits of the defense it held that the defendant should be allowed to plead and prove it if he could. In the Florida case of *Brown v. Kendrick*⁹ such an affirmative defense was stricken by the trial court and affirmed by the appellate court. There was no Florida law requiring installation or use of these devices, and the court ruled that the defendant had not shown, except by conjecture, that the use of seat belts would have prevented the injury complained of. The court's concern with a defense based on conjecture is odd in light of the fact that striking the

⁴ WIS. STAT. §347.04 (1965).

⁵ ILL. ANN. STAT. ch. 95½, §217.1 (1963).

⁶ Huelke, Grabb, Dingman, *Facial Injuries in Automotive Accidents*, American Association for Automotive Medicine (Oct. 1964); Huelke, *Auto Accidents and the Dentist*, 20 J. of Oral Surgery, Anesthesia and Hospital Dental Service Authorities 332 (July 1962); Huelke, Gikas, *Determination of Seat Belt Effectiveness for Survival in Fatal Highway Collisions*, 7th Stapp Car Crash Conference (1965).

⁷ IOWA CODE ANN. §321.445 (1966).

⁸ 148 S.E. 2d 154 (S.C. 1966).

⁹ 192 So. 2d 49 (Fla. Dist. Ct. App. 1966).

defense precluded the defendant from introducing evidence to establish that the injury would have been prevented if the belts were used.

A Texas district court that dealt with a similar set of facts sustained a jury finding that 95% of the plaintiff's injuries would have been avoided had he worn his seat belt.¹⁰ Expert testimony was presented during the trial to establish the causal connection between the injuries sustained and the failure to wear seat belts.

THE SEAT BELT DEFENSE IN THE WISCONSIN TRIAL COURTS

Wisconsin trial courts have recently dealt with several cases in which the defense of failure to use seat belts was interposed. In a Sheboygan circuit court case the court read Section 347.48 to the jury and recognized in its instructions to them that:

Since the statute which I have just quoted requires that, commencing with the 1962 models, all automobiles bought, sold, leased, traded, or transferred from or to Wisconsin residents at retail be equipped with safety belts installed for use in the left front and right front seats thereof; it must be clear that the statute contemplates the use of such belts when the car is equipped with them by the driver in the left front seat and the passenger in the right front seat whenever such driver or passenger or both, have the duty to exercise ordinary care for their own safety.¹¹

The court then went on to instruct on the duty of ordinary care and the special verdict asked whether the plaintiff's failure to wear seat belts, on the facts presented, was a breach of that duty. The jury found that the plaintiff was 10% negligent. Under Wisconsin's comparative negligence statute the plaintiff's award was then reduced by 10%.

In Milwaukee County, a request for the admission into evidence of the failure to use seat belts was permitted in the case of *Busick v. Budner*.¹² The court instructed the jury on the statute and then stated:

The law does not require operators of automobiles to use safety belts. However, in passing on the question as to whether or not the plaintiff, Kathleen Busick was negligent for failing to use the safety belt you may take into consideration the fact that the automobile was equipped with safety belts and that a safety belt was available for use by her.

Failure to use available seat belts as a defense in an auto personal injury case has gained further recognition from Wisconsin's trial court judges. In December of 1966 the Wisconsin Board of Circuit Court Judges adopted the following model jury instruction:

¹⁰ *Vernon v. Droeste*, Dist. Ct., Brazos County, Texas, No. 17205 (Jan. 9, 1966).

¹¹ *Stockinger v. Dunisch*, Cir. Ct., Sheboygan County, Wis., (1964).

¹² *Busick v. Budner*, Cir. Ct., Milwaukee County, Wis., No. 381-602 (Dec. 1965).

No. 1277 SAFETY BELT. FAILURE TO USE

In passing on the question as to whether or not
 was negligent, you may take into consid-
 eration the facts that the automobile was equipped with safety
 belts and that they were available for use by him.

You will determine, under all the credible evidence and rea-
 sonable inferences from the evidence in this case, whether the
 failure of to use the safety belt was
 an omission to take a precaution for his safety, and amounted,
 under the circumstances, to a failure on his part to exercise
 ordinary care for his own safety.¹³

CONTRIBUTORY NEGLIGENCE JURISDICTION

In jurisdictions in which contributory negligence is a complete bar
 to recovery, as opposed to a comparative negligence statute such as
 Wisconsin's, a seat belt defense may have some inherent difficulty.
 There may be some reluctance to completely bar recovery to a person
 whose failure to wear available seat belts contributed to his injuries.
 This may be thought of as a rather harsh result,¹⁴ especially since a
 plaintiff's failure to buckle up could not be held to be a cause of the
 accident. Nevertheless, Dean Prosser notes that the defense of contribu-
 tory negligence is generally allowed when the plaintiff's negligence "has
 been a substantial factor in causing his injury."¹⁵

It would seem that there is another doctrine, much like contributory
 negligence, which might be available in such a case. It would merely
 reduce the plaintiff's damages rather than bar recovery. This is the
 doctrine of *avoidable consequences*. Prosser notes that the concepts of
 contributory negligence and avoidable consequences are alike in all
 respects, except for the fact that the former is generally thought to take
 place *before* there has been any damage to, or invasion of plaintiff's
 rights, while "the rule of avoidable consequences comes into play *after*
 a legal wrong has occurred, but while some damages may still be
 averted, and bars recovery only for such damages."¹⁶ He notes that this
 distinction often becomes rather tenuous and that:

In a limited number of situations, the plaintiff's unreasonable
 conduct, although it is *prior* or *contemporaneous*, may be found
 to have caused only a separable part of the damage. In such a
 case, even though it is called contributory negligence, the appor-
 tionment will be made.¹⁷

Prosser further recognizes that "a more difficult problem is pre-
 sented when the plaintiff's prior conduct is found to have played no

¹³ Wis. Jury Instructions—Civil, No. 1277 (1966).

¹⁴ PROSSER, LAW OF TORTS 428 (3d ed. 1964); Comment, 12 S.D. L. Rev. 130, 134 (1967).

¹⁵ PROSSER, LAW OF TORTS 431 (3d ed. 1964).

¹⁶ *Id.* at 433 (emphasis added).

¹⁷ *Ibid.*

part in bringing about an impact or accident, but to have aggravated the ensuing damages."¹⁸ The choice here seems to be either to grant or deny an apportionment. Prosser clearly states that he favors the balancing of fault and an apportionment between the parties, at least when "the extent of aggravation can be determined with any reasonable degree of certainty. . . ."¹⁹

It has been further urged in prior articles that another apportionment might be necessary in a seat belt case. This is the apportionment between the injuries to the plaintiff for his non-use of the seat belt which would reduce the amount of damages which a negligent defendant would have to pay for personal injuries, and as an entirely separate item, the amount due plaintiff for damage to his vehicle.²⁰ It would seem that where the plaintiff has not been responsible for this item and he can prove a fixed amount of damage there would be no problem. That is to say, the automobile damage could be handled as an element of special tort damage and remain in a separate category apart from the seat belt issue. In the practical handling of such a problem it would seem to be likely that the amount due for auto damage might be stipulated.

THE NEED FOR EXPERT TESTIMONY

Thus it appears that it is at least possible in a contributory negligence jurisdiction to argue for this more equitable balancing of the fault which caused plaintiff's injuries. Of course expert testimony would be needed in order to establish both the fact that non-use was causal and the degree to which it was a cause of the enumerated injuries.²¹ Such testimony would probably have to go beyond the scope of medical testimony concerning the nature of the injuries. The testimony of an expert in the study and reconstruction of traffic accidents would be needed in order to establish that certain injuries were directly attributable to motion and impact which seat belts would have restrained.

WISCONSIN HAS DEVELOPED A FLEXIBLE RULE

There is another argument for an apportionment of damages which would seem to be peculiarly adaptable to the existing scheme of Wisconsin statutes. It could be argued that the Wisconsin seat belt statute established a minimum standard of care for motorists who have belts available for use, even though use is not made mandatory by the law.

Clearly the legislature did not require the installation of seat belts for the sake of esthetic beauty. It seems obvious that the legislature, faced with an annually increasing highway accident and death toll, con-

¹⁸ *Ibid.*

¹⁹ *Id.* at 434.

²⁰ Comment, 12 S.D. L. Rev. 130, 134 (1967).

²¹ Comment, 38 So. Cal. L. Rev. 733, 737 (1965). See also Comment, 1967 Wis. L. Rev. 288.

sidered that the installation and use of seat belts would help to reduce this rate. By analogy, the purpose of the seat belt act might be compared to the interpretation of the Wisconsin licensing code set out in *McConville v. State Farm Mut. Auto. Ins. Co.*:

The state licenses motor vehicle operators in the public interest. An applicant must satisfy an examiner of his ability to read and understand highway signs, his knowledge of traffic laws, and demonstrate his ability to exercise ordinary and reasonable control of a motor vehicle. These requirements evince a legislative policy to impose the same minimum standards of operation of automobiles upon all drivers.²²

Prosser bolsters this argument when he states :

The standard of conduct required of a reasonable man may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community from which it is negligence to deviate.²³

Thus if a person can be penalized for removing these seat belts once installed in a vehicle, it would appear that he should not recover for personal injuries which could have been prevented or made less severe by their use.

There may have been many reasons why the legislature did not compel the use of seat belts. It may have been concerned with setting up a double standard for pre and post 1962 autos. However, the legislature must have been impressed, as was the Wisconsin Supreme Court, with facts similar to those presented in a 1964 article which stated :

The use of seat belts lowered the 1964 accident toll by about 750 deaths. Only 30% of passenger cars have seat belts installed and these are used 50% of the time. Full installation and use of seat belts could reduce deaths by 5,000 annually and serious injuries by one third. It has been shown that many of these deaths are caused by persons in the car striking portions of the car or being thrown out of the car by serious impact.²⁴

Under these circumstances and given a statute which itself imposes no sanctions for the failure to use seat belts, it would seem that the court had to speak to clear up this ambiguity.²⁵

This is not to say that a finding of negligence *per se* is proper in a case where seat belts were not worn and injuries ensued. Such a position would be unreasonable in light of studies which have shown that in some automobile accidents the use of seat belts would have had no effect

²² 15 Wis. 2d 374, 383, 113 N.W. 2d 14, 19 (1962).

²³ PROSSER, LAW OF TORTS 191 (3d ed. 1964).

²⁴ *Stop Murder by Motor*, America Trial Lawyers Association monograph, Jan., 1966.

²⁵ *Farmers Mut. Auto. Ins. Co. v. Gast*, 17 Wis. 2d 344, 348, 117 N.W. 2d 347, 350 (1962).

on diminishing the injuries.²⁶ There may also be circumstances in which because of a recent medical operation, pregnancy or the like, the use of seat belts might be dangerous. The Wisconsin Supreme Court in the case of *Bentzler v. Braun*²⁷ construed the Wisconsin seat belt statute to concur with this view when it stated that:

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.²⁸

However, studies reveal that in the majority of auto accidents seat belts would have a significant effect in reducing injuries and death.²⁹ This being the situation, it would seem that a rule which would permit the admission of the fact of non-use into evidence would be in order. Of course, there would have to be evidence which would establish whether the injuries complained of could have been prevented or reduced by seat belt use. Balanced against the plaintiff's rebutting evidence presented in similar fashion, a more accurate picture of the relative faults of the two parties could then be presented. It would then be for the jury to decide whether the non-use did in fact contribute to the plaintiff's injuries.

In Wisconsin the next step would then be to apportion the negligence of the parties under the comparative negligence statute.³⁰ This is precisely the procedure which the courts in Wisconsin which have tried such cases have allowed.

THE WISCONSIN SOLUTION

In the recent case of *Bentzler v. Braun*³¹ the Wisconsin court may have found a partial solution to the dilemma of the seat belt defense. There the plaintiff, while riding in a car equipped with seat belts, which she was not wearing, was injured in a rear end collision. She suffered severe facial injuries, the loss of teeth, a severe compound fracture of the right thigh and knee and a fracture of the lower left leg. Defense counsel requested the following instructions:

"The Klimmer automobile which the plaintiff, Janet Bentzler, was a passenger in, was equipped with a safety belt in the right front seat in which Janet Bentzler was riding at the time of the accident. If you find that the seat belt was in working order and that Janet Bentzler was not wearing the seat belt at the time of the accident, then you must find her negligent.

²⁶ *Medical Tribune*, Sept. 16, 1964.

²⁷ 34 Wis. 2d 362, 149 N.W. 2d 626 (1967).

²⁸ *Id.* at 385, 149 N.W.2d at 639.

²⁹ *Id.* at 386, 149 N.W.2d at 639.

³⁰ WIS. STAT. §895.045 (1965).

³¹ 34 Wis. 2d 362, 149 N.W. 2d 626 (1967).

"If you find the plaintiff, Janet Bentzler, negligent with regard to use of a safety belt you are then to determine if the use of a safety belt would have eliminated or reduced the injuries sustained. If you find that the injuries sustained would have been eliminated or reduced by use of a safety belt, then a failure to use a safety belt is a cause of the injuries and damages sustained."³²

This request as well as a request for a special verdict covering plaintiff's negligence for non-use was denied by the trial court. On the general question of plaintiff's negligence the jury found that she had been negligent but that her negligence was not the cause of her injuries. The Wisconsin Supreme Court upheld the trial court's action because apparently there was insufficient proof presented to show a causal relationship between plaintiff's failure to wear her belt and the injuries she sustained. However, the court at the same time cited the rule of *Theisen v. Milwaukee Auto. Mut. Ins. Co.*:

The test of the guest's negligence is whether under the circumstances he acted with the care a reasonably prudent man would have used under the circumstances. His negligence so determined is based on his duty to use ordinary care as a guest under the circumstances for his own safety.³³

With this the court then established the rule of reason which it desired to have followed in future seat belt defense cases. It stated:

The question, therefore, is not whether the guest's negligence contributed to the cause of the accident but, rather, whether it contributed to the injuries. In view of the Wisconsin statutes that the legislative mandate in regard to seat belts applies merely to installation and not to use, the failure to use available seat belts is a question for determination by the jury as in the case of any ordinary negligence, i.e., was the conduct a substantial factor in producing a result.

We therefore conclude that, in those cases where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard. A jury in such case could conclude that an occupant of an automobile is negligent in failing to use seat belts.³⁴

CONCLUSION

It is submitted that this is a reasonable rule which permits the plaintiff to introduce mitigating evidence to explain the non-use of seat belts for medical reasons or other extenuating circumstances. However, if there is to be a rule which properly places the fault upon he who was the cause of the harm, this evidence must be admitted. In Wisconsin, the comparative negligence statute further permits a balancing of the

³² *Id.* at 383, 149 N.W.2d at 638.

³³ 18 Wis. 2d 91, 106, 118 N.W. 2d 140 (1962).

³⁴ 34 Wis. 2d 362, 387, 149 N.W. 2d 626, 640 (1967).

interests of the parties so that fault may be properly placed. The final problem arises in the situation in which an injured party, by his failure to wear his seat belt, is proved to have been responsible for fifty per cent or more of his own injuries. In such a case, under Wisconsin law, he would receive no recovery. Perhaps the fairer solution in such a case, since the plaintiff's negligence was passive and not a cause of the accident but only of his own harm, would be an application of the doctrine of avoidable consequences.

Such a solution may be necessary in a situation involving a multiple car accident. Juries may have considerable difficulty in such a case with an apportionment of negligence. Not only would the driver's active negligence have to be compared as it relates to the cause of the accident but passive negligence of non-seat belt wearing claimants would also have to come into consideration. The difficulties of such a comparison might lead Wisconsin to adopt an avoidable consequence approach in seat belt cases.

It is submitted that such a method would work the greatest justice to all the litigants in such an action. The relative fault of all parties would be apportioned to a greater degree than ever before. Furthermore, by so acting the Wisconsin courts would be able to both encourage the use of seat belts and at the same time prevent the harsh results of a strict application of the law of comparative negligence to an untried area.

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