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The question of whether a plaintiff in an automobile personal injury action should be precluded from recovering for the full extent of his injuries because he failed to use an available seat belt remains an unsettled issue in automobile litigation. In its infancy, the so-called "seat belt defense" was used by defense counsel to establish that plaintiff was negligent per se or contributorily negligent, and hence barred from recovering for his injuries. These theories, however, were largely rejected by the courts. Subsequently, the seat belt defense was introduced to lower plaintiff's recovery on the theory that he had failed to mitigate damages. The courts disagreed sharply on the mitigation theory, and most eventually rejected it.

Nevertheless, the seat belt defense has refused to die. It has found its way

1 The so-called "seat belt defense" relieves the negligent defendant in an automobile injury case from liability for those injuries to the plaintiff which would not have occurred had plaintiff used an available seat belt. Thus, where a passenger is thrown against the windshield and injured in an accident, he may not recover for those injuries if the defendant shows by expert testimony that use of a seat belt would have prevented the passenger from hitting the windshield.

2 "Seat belt," as referred to in this note, means those safety restraint devices commonly used in passenger vehicles, including both the "lap" belt and the shoulder harness.

3 The first known application of the seat belt defense occurred in Stockinger v. Dunisch (Sheboygan County [Wis.] Cir. Ct. 1964), discussed in 5 For The Defense 79 (1964).


from the traditional automobile collision case, the basis of which lies in negligence, into the realm of strict products liability. Furthermore, in at least two cases, an enterprising defendant has attempted to use seat belt evidence offensively to gain indemnification on a theory of imputed negligence.

To date, the seat belt defense has been ruled upon by only thirteen of the highest state courts. Five state legislatures have statutorily excluded seat belt evidence from admission in personal injury actions. There remain, however, thirty-two states and the District of Columbia whose legislature and highest

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The second context in which seat belt evidence is used pertains to the issue of "product misuse." Again, there is conflicting authority on this issue. Courts refusing to admit evidence of non-use to establish product misuse state that because this type of misuse is foreseeable, the defense is unavailable. See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

On the other hand, some courts refuse to find as a matter of law that non-use is foreseeable. In these jurisdictions seat belt evidence is admissible and the question of foreseeability is left for the jury to determine. See Melia v. Ford Motor Co., 534 F.2d 795 (6th Cir. 1976); General Motors Corp. v. Walden 406 F.2d 606 (10th Cir. 1969); Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978).

For a general discussion of the seat belt defense in product liability actions, see Palumbo, Unpublished Memorandum (May, 1980) (copy on file at The Notre Dame Lawyer office).

7 Latta v. Siek, 60 A.D.2d 991, 401 N.Y.S.2d 937 (1978). In Latta, the defendant sought indemnification from the mother of the plaintiff child claiming that the mother's failure to fasten her daughter's seat belt required her to indemnify the defendant for those injuries the daughter received due to non-use of the seat belt. The child through her parents had already sued and recovered from the defendant. The court found that since a daughter could not directly recover from her mother, no action for indemnity could lie whereby the child would indirectly, through the defendant, recover from her parent.

In Williams v. Chrysler Motor Company, 271 So. 2d 551 (La. App. 1972), the plaintiff Linda Birch Williams was a passenger in an auto driven by her husband. The plaintiff was riding in the front seat and a second guest, Homer M. Waller, was sitting in a rear seat with an unfastened seat belt. When the accident occurred, the rear passenger, Waller, was thrown forward, hitting the front seat, which collapsed and injured the plaintiff. Mrs. Williams sued Chrysler stating that the defective safety latch on the seat permitted the seat to collapse when hit by the rear passenger. Chrysler then brought suit against the rear passenger seeking indemnification for his negligence in failing to wear a seat belt. The Court of Appeals of Louisiana found that no cause of action was stated under Louisiana law because it was not negligent to fail to use a seat belt.


The status of the seat belt defense can be summarized as follows:

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8 states | 20 states | 8 states | 15 states

* Capital letters indicate that the seat belt defense has been ruled upon by the highest state court.

** Iowa, Maine, Minnesota, Tennessee and Virginia have enacted legislation which prohibits the introduction of the seat belt defense.


c In Becnel v. Ward, 286 So. 2d 731 (La. App. 1973), the court appeared to favor the admission of seat belt evidence to mitigate damages where defendant causally connected the non-use with the aggravation of injuries.

d In Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 273 (1967), the Supreme Court of Maryland strongly intimated that it would, if faced with the issue in the future, favor the admission of seat belt evidence on the question of damages.

e The only definitive rulings by courts construing Mississippi law have been in the federal courts. In Glover v. Daniels, 310 F. Supp. 750 (N.D. Miss. 1970) the court found that seat belt evidence was admissible to mitigate damages but prohibited its admission in the case where no causal connection between the injury and non-use was shown. Cf. Peterson v. Klos, 426 F.2d 199 (5th Cir. 1970) (taking a less favorable view toward admissibility). In D. W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (1974), the Supreme Court of Mississippi found insufficient evidence to sustain a jury instruction on the seat belt defense. The court's decision, however, did not specifically address the admissibility of the seat belt defense.


g In Smith v. Oregon Agricultural Trucking Ass'n, 272 Or. 156, 535 P.2d 1371 (1975), the Oregon Supreme Court strongly suggested that the seat belt defense was inadmissible on the question of damages.

the abundance of literature on the defense, most of which was written in the
decade following its origin, a thorough investigation and analysis of the
defense appears warranted in light of further developments in case law and
legislation.

This note is divided into three parts. Part one examines the various
theories used to introduce seat belt evidence, including two “hybrid” theories
heretofore unexamined. Part two summarizes the arguments favoring and op-
posing the admission of seat belt evidence. This section attempts to “do the
research” for the lawyer and suggest those arguments which a court, sitting in
a case of first impression, is likely to find persuasive. Part three critically
analyzes the seat belt defense and concludes that seat belt evidence should be
inadmissible except in extraordinary cases.

I. Theories Supporting the Introduction of Evidence
of Non-Use of a Seat Belt

A. The Mitigation Theory

Under the mitigation theory, evidence of the plaintiff’s failure to use a seat
belt is directed toward the issue of damages rather than the issue of liability.
This appears to be the most appropriate use of such evidence and is the theory
which most courts admitting seat belt evidence have favored. Proponents of
the mitigation theory argue that, since a defendant is liable only for those
damages which he proximately caused, he should not be responsible for in-
juries resulting from the plaintiff’s failure to use a seat belt.

Defense counsel advancing the mitigation theory have employed several
different approaches. Under one approach the defendant pleaded that the
plaintiff, in failing to fasten his seat belt, violated his duty to exercise ordinary
care for himself and was therefore contributorily negligent. Defendant further
pleaded that plaintiff’s negligence totally barred him from recovery or, in the
alternative, barred him from recovering for those injuries attributable to non-
use of the seat belt. As courts uniformly rejected the argument that failure to
use a seat belt totally barred recovery, the defendant was limited to pleading
contributory negligence for purposes of reducing damages.

A second approach used to introduce seat belt evidence is premised upon


12 See note 4 supra and cases cited therein.


14 See note 3 supra and cases cited therein.
the doctrine of avoidable consequences. Although this doctrine usually applies only to post-accident conduct, Dean Prosser suggests that it is nothing more than a rule of damages applicable whenever damages can be accurately apportioned to their respective causes. Thus a plaintiff is barred from recovering for those injuries which he could have avoided by wearing a seat belt.

A third approach used to introduce seat belt evidence is based upon the Restatement (Second) of Torts. Comment c to section 465 of the Restatement (Second) dealing with the causal relation between the harm and plaintiff's negligence, states that damages may be apportioned 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.

A fourth approach used to introduce seat belt evidence to mitigate damages is available in those states which have adopted the doctrine of comparative negligence. Since comparative negligence is geared toward apportioning damages between parties according to fault, seat belt evidence aids the jury in determining the degree of fault of the respective parties. Several courts, both favoring and opposing the seat belt defense, suggest that admission of seat belt evidence constitutes an implicit adoption of comparative negligence.

15 The doctrine of avoidable consequences is a rule of damages which denies a plaintiff recovery for any damages which can be avoided by reasonable conduct. The rule traditionally applies to a situation where a legal wrong has occurred, but some damages attributable to that wrong can still be avoided. For cases which have admitted seat belt evidence under this approach, see Pritts v. Lowery Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975) (applying Pennsylvania law); Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); Kavanaugh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966).


17 RESTATEMENT (SECOND) OF TORTS § 465, comment c (1965).


In Amend, the Supreme Court of Washington examined the effect of the adoption of comparative negligence principles on prior Washington decisions involving the seat belt defense. Prior to Amend v. Bell, seat belt evidence was inadmissible to establish contributory negligence or to mitigate damages. Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1970).

The defendant in Amend argued that under the doctrine of comparative negligence, evidence of the plaintiff's failure to use a seat belt was admissible on the question of damages. The court, however, disagreed stating:
State courts following a "hybrid" comparative negligence rule must determine whether the jury may consider seat belt evidence in apportioning fault, or whether it may consider such evidence solely to reduce or mitigate plaintiff's damages. The following example makes clear the need for the distinction. Georgia's comparative negligence statute provides that a plaintiff may recover for damages attributable to the defendant's negligence as long as the plaintiff's negligence does not exceed the defendant's. Georgia's courts could interpret this statute in either of two ways: (1) as allowing the jury to compare plaintiff's fault for his injury with defendant's fault for the accident, or (2) as allowing the jury to determine the defendant's liability for injury to the plaintiff, and reducing those damages by the percentage of injury attributable to plaintiff's non-use. Under the first interpretation, if a jury found that the defendant was seventy percent at fault for the accident, and that the plaintiff's non-use of the seat belt was responsible for seventy-five percent of his injuries, the plaintiff could be barred from any recovery. In this case, the plaintiff's seventy-five percent fault for the injury exceeds defendant's seventy percent fault for the accident, and according to the "hybrid" rule, the plaintiff could not recover. Under the second interpretation, if seat belt evidence was restricted to mitigating plaintiff's damages, plaintiff would be entitled to recover twenty-five percent of the damages attributable to defendant's negligence. Assuming plaintiff's injuries amount to $100,000, the defendant, because he is seventy percent at fault for the accident is liable for $70,000. However, this amount is reduced by seventy-five percent, the percentage of injury attributable to plaintiff's non-use of his seat belt or $52,500. Therefore, plaintiff recovers $17,500.

B. Negligence Per Se

A second theory is available to defendants who seek to admit seat belt evidence to establish that the plaintiff was negligent per se. This defense arises in those few instances where a statute expressly requires the plaintiff to wear his seat belt. Some states, for example, require the use of seat belts by the driver...
and passengers in school buses, emergency vehicles, and other designated vehicles. Where a plaintiff violates such a statute and his failure to use a seat belt substantially aggravates his injury, he may be found to be negligent per se. On the other hand, statutes requiring the installation of seat belts in new vehicles are uniformly held insufficient to support a finding of negligence per se, on the ground that such statutes are directed toward the manufacturer rather than the occupant-user of the belt.

C. New Theories

Seat belt evidence has been held admissible in certain limited situations under two “hybrid” theories. These theories represent a compromise between the “polar” theories, under which the courts have either permitted or absolutely refused the admission of seat belt evidence.

The first theory might well be termed the “exceptional circumstances” theory. As its name implies, evidence of a plaintiff’s failure to use a seat belt is admissible where exceptional circumstances suggest that the plaintiff should have exercised extraordinary care by wearing a seat belt. This theory was first alluded to in Miller v. Miller, a case often cited for its rejection of the seat belt defense. In Miller, the North Carolina Supreme Court stated:

Conceivably a situation could arise in which a plaintiff’s failure to have his seat belt buckled at the time he was injured would constitute negligence. It would, however, have to be a situation in which the plaintiff, with prior

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24 Statutes which affirmatively require a person to use a seat belt include: ALA. CODE § 16-27-6 (1975) (school bus drivers must wear a seat belt while transporting school children); CAL. VEH. CODE § 27304 (West 1971) (driver and passengers in driver’s training vehicle must wear seat belts); CAL. VEH. CODE § 27305 (West 1971) (firefighting vehicles must be equipped with a seat belt for each passenger for use); ILL. ANN. STAT. ch. 95½, § 12807 (Smith-Hurd Supp. 1980) (school bus driver must wear a seat belt); ME. REV. STAT. ANN. tit. 29, § 2014 (1964) (operator and passengers in school bus must wear seat belts while in motion); MASS. ANN. LAWS ch. 90, § 7B (Michie/Law. Co-op 1980) (school bus driver must wear a seat belt); MINN. STAT. ANN. § 169.44 (West 1980) (school bus driver must wear a seat belt); N.Y. VEH. & TRAF. LAW § 383 (4-a) (Mckinney 1970) (school bus driver must wear a seat belt); OKLA. STAT. ANN. tit. 70, § 24-121 (West 1972) (school bus driver must wear a seat belt); R.I. GEN. LAWS § 31-23-41 (1968) (operators of buses and authorized emergency vehicles must use a seat belt); VA. CODE § 46.1-287.2 (1980) (school bus driver must wear a seat belt).

25 In a number of early cases, it was argued that statutes requiring the installation of seat belts into passenger vehicles created a statutory duty for automobile occupants to wear seat belts. Typically these statutes stated that for every seating position available, there should be installed a seat belt “for use.” The courts, however, uniformly rejected this argument. See note 3 supra.


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.\textsuperscript{27}

The court hypothesized that such a situation might arise where “the defendant-driver tells the plaintiff-passenger to buckle his seat belt because the door on his side has a defective lock and might come open at any time.”\textsuperscript{28}

The “exceptional circumstances” theory was expanded in \textit{Remington v. Arndt},\textsuperscript{29} where the Connecticut Superior Court stated:

\begin{quote}
[A]fter a journey has begun, circumstances may arise theoretically where due care will require a passenger to anticipate an accident and to take appropriate action if he has the opportunity to do so. Suppose, for example, the operator should warn the passenger, during the course of the journey, to fasten his seat belt because the brakes or the steering mechanism had suddenly become unreliable. In a case such as that, the same principle which might bar the action in cases where the passenger’s trauma is directly related to the failure to fasten the seat belt would be applicable in mitigation of the plaintiff’s damages.\textsuperscript{30}
\end{quote}

It appeared for a time as if the Connecticut courts had adopted the “exceptional circumstances” theory, but a recent decision has cast considerable doubt on such a conclusion.\textsuperscript{31}

Nevertheless, the “exceptional circumstances” theory appears to be available at least to drivers who are sued by their passengers. The \textit{Miller} court suggested that the theory should also be available to drivers sued by passengers in other vehicles.\textsuperscript{32} Indeed, there is no reason why the theory should not be extended to embrace other “exceptional circumstances,” such as where the passenger is aware that the driver of the car in which he is riding is not totally reliable.\textsuperscript{33}

At least one court has suggested a second “hybrid” theory, which distinguishes between the admissibility of seat belt evidence in non-fatal collisions and its admissibility in “wrongful death” actions. In \textit{Noth v. Scheurer},\textsuperscript{34} the United States District Court for the Eastern District of New York, construing New York law, stated:

\begin{quote}
In accident cases involving the failure to wear seat belts, there is a distinction to be made between causes of actions for injuries and causes of actions for wrongful death. The utilization of the seat belt in the latter case conceivably might have prevented the extreme result of death and the cause of action arising therefrom, whereas in the former case its use would only have reduced the
\end{quote}

\textsuperscript{27} \textit{Id.} at \textit{—}, 160 S.E.2d at 70.

\textsuperscript{28} \textit{Id.}


\textsuperscript{30} \textit{Id.} at 292, 259 A.2d at 146.

\textsuperscript{31} See Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (1975) (holding the seat belt defense unavailable to show contributory negligence). See also note 10 \textit{supra.}

\textsuperscript{32} 273 N.C. at \textit{—}, 160 S.E.2d at 70.

\textsuperscript{33} For example, exceptional circumstances arguably arise where the passenger is aware that the defendant/driver has been drinking or is tired or for some reason is driving too fast. See the discussion in section III of this note, \textit{infra}, which suggests a method of applying the “exceptional circumstances” theory.
extent and degree of the injuries. This is a highly speculative question which if considered, would be a question for the jury, imposing a heavy burden of proof upon the defendant.35

The Noth decision would permit defendants in wrongful death actions to introduce expert testimony uncategorically showing that use of seat belts would have prevented the death. A defendant meeting this burden would defeat a plaintiff's cause of action for wrongful death.

In summary, there are several avenues available to a defendant seeking to introduce seat belt evidence. First, the defense is sometimes available to mitigate damages for plaintiff's injuries which were aggravated by his non-use of a seat belt. This defense can be shaped in terms of contributory negligence, avoidable consequences, the Restatement (Second) section 465 defense, or comparative negligence. Second, a statute may permit the defendant to argue negligence per se. Finally, it may be possible to argue that "exceptional circumstances" placed the plaintiff on notice of an impending risk, or that the wrongful death sued upon was caused by the decedent's failure to use a seat belt rather than by the defendant's negligence.

II. Arguments Favoring and Opposing the Seat Belt Defense

A. Arguments in Favor of the Seat Belt Defense

The availability of arguments supporting the seat belt defense depends to some degree on the theory used to introduce the defense. Nonetheless, the following arguments support, at least to some extent, all of the theories discussed above.

1. Plaintiff's Duty of Care

Perhaps the most compelling argument available to the defendant is premised upon the plaintiff's duty to exercise ordinary care to protect himself from harm. Arguably, an automobile occupant's duty to exercise such care requires him to wear a seat belt so as to avoid or mitigate injury to himself.36

35 Id. at 85. Other cases which intimate that a distinction may be proper in the application of the seat belt defense to death actions as opposed to personal injury actions include: Vizzini v. Ford Motor Co., 72 F.R.D. 132 (E.D. Pa. 1976); Coker v. Ryder Truck Lines, 287 Ala. 150, 249 So. 2d 810 (1971), Uresky v. Fedora, 27 Conn. Supp. 498, 245 A.2d 393 (1968).

In Vizzini, a products liability action, the court noted:

"Permitting a seat belt defense in mitigation of damages in a death case would lead to other procedural problems. The Wrongful Death and Survival Acts are premised on a person actually dying. Allowing a seat belt defense might prevent the plaintiff from recovering certain elements of damages, such as funeral expenses, even though such damages clearly were sustained."

"...[T]his is an especially inappropriate case for such a defense, because it is a death case based on products liability."
72 F.R.D. at 138, 139.
The standard of care which one must exercise is that which the ordinary and reasonably prudent person would exercise under similar circumstances. The question is primarily one of reasonableness, and a defendant can make a persuasive argument that plaintiff’s failure to use a seat belt was unreasonable. Statistics overwhelmingly support this argument. For example, the National Safety Council asserts that the use of seat belts would reduce serious injuries arising from automobile accidents by thirty-three percent, and could save up to twelve thousand lives annually. Although it is often stated in rebuttal that most drivers and passengers do not use seat belts, this argument is not persuasive. The fact that a majority of people act in a certain manner does not make such action reasonable. The standard of care which one must exercise is not necessarily exemplified by the action of the majority, particularly when the majority’s actions involve unnecessary risks. Interestingly, the percentage of individuals neglecting seat belts has decreased in recent years, an indication that the public is gradually recognizing the utility of seat belts.

Furthermore, it does not appear that a valid reason for non-use of seat belts exists. Although the likelihood of an accident is relatively small, the opportunity for serious injury arising from an accident is too great to justify non-use of seat belts by one who merely dislikes the restraint. It is unlikely that seat belt use will actually increase injuries. For example, the probability that a car involved in an accident will catch fire or be submerged is less than one percent. Medical studies show that seat belt use is more advantageous than non-use. The argument exonerating non-use is thus unpersuasive.

Defense counsel use two approaches to introduce seat belt evidence on the issue of due care. The first, and more successful, approach is to offer seat belt evidence on the general issue of plaintiff’s duty to exercise ordinary care. Seat belt evidence seems sufficiently relevant on this issue to be considered by the jury. A second approach, successfully employed in Bentzler v. Braun, is to argue that plaintiff has a common law duty to wear a seat belt. This approach has not been favored, even by those jurisdictions admitting seat belt evidence. Nonetheless, defense counsel may find it worthwhile, and in some instances necessary, to resort to this approach.

47 34 Wis. 2d 362, 149 N.W.2d 626 (1967).
2. Non-Use as Proximate Cause of Injury

A second argument supporting the admission of evidence of plaintiff's non-use of a seat belt focuses upon causation. A negligent party may be liable either when (1) his negligence is the proximate cause of the accident or other event from which the injury resulted; or (2) his negligence is the direct and proximate cause of the injuries. While a plaintiff can rarely avoid a collision by using his seat belt, such use would ordinarily prevent or lessen the plaintiff's injury. The defendant can therefore argue that the plaintiff proximately caused and may not recover for that portion of his injuries which a seat belt would have prevented.

The principle that a tortfeasor is responsible only for that which he proximately causes and not for that which the plaintiff could reasonably have avoided favors the admissibility of seat belt evidence. To incorporate this principle into a seat belt defense, the tortfeasor must introduce expert testimony establishing a causal connection between non-use of the seat belt and the aggravation of injuries.48

In *Glover v. Daniels*,49 the United States district court addressed the issue of seat belt non-use from the perspective of proximate causation. "As a beginning," the court stated, "it is proper to note the definition of 'proximate cause' as adopted by the [Mississippi Supreme] Court."50 The court found that under Mississippi law proximate causation related to the injury rather than the event, and that a jury instruction on the seat belt defense was permissible where substantial evidence showed that the plaintiff's failure to fasten the seat belt was causally connected to his injuries.51 Because the court found that the defendant failed to establish a causal connection, it did not have to determine if the seat belt instruction correctly stated the law of Mississippi.52 Nevertheless, the approach taken by the court in *Glover* is available to a defendant attempting to assert the seat belt defense. Where failure to use a seat belt aggravates plaintiff's injuries, defendant is not liable for those injuries which are the proximate result of plaintiff's non-use.

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48 There are two basic requirements to laying a foundation for the seat belt defense. First, it must be established that the seat belt was "available" for the plaintiff to use. The exact meaning of this requirement has not been addressed. Clearly, the defense is not available where the automobile has no seat belts installed. When, however, seat belts are fastened behind the seat or tucked in back of the seat, it is unclear if this would constitute a situation in which seat belts were "unavailable." See also discussion in Spier v. Barker, 35 N.Y.2d 444, 449 n.2, 323 N.E.2d 164, 167, 363 N.Y. S.2d 916, 920 (1974). The second and most important requirement to laying a foundation for the seat belt defense is the establishment of a causal connection between the failure of the plaintiff to use a seat belt and the increase or aggravation in injuries received. This requirement can be met by offering expert testimony to establish that the plaintiff's injuries either would not have occurred or would have been less extensive had plaintiff used a seat belt. It has been suggested that to establish a prima facie case that the failure to use a seat belt caused all or a definable portion of plaintiff's injuries, the following should be considered: (1) the particular crash behavior of the subject vehicle, (2) the trajectory of the claimant's body in the accident; (3) the relationship of the vehicle crash events to occupant kinematics; (4) the particular injuries suffered; (5) the trajectory which a restrained occupant would have taken; and (6) the extent of lesser injuries which the restrained occupant would have sustained as a result of the impacts he would have made with the vehicle. Bowman, *Practical Defense Problems—The Trial Lawyer's View*, 53 Marq. L. Rev. 191, 197-202 (1970).

50 Id. at 760.
51 Id.
52 Id. at 761.
3. Maximum Safety at Minimal Inconvenience

A third argument for the admission of seat belt evidence finds support in the reasoning of the Court of Appeals of New York in *Spier v. Barker*. According to this argument, the unusual opportunity for an automobile occupant to maximize his safety by wearing a seat belt requires a court to consider seat belt evidence in a special light. Neither the doctrine of avoidable consequences nor the rule requiring mitigation of damages ordinarily applies until after the accident or event attributable to the defendant’s negligence has occurred. Seat belts provide plaintiffs with such an exceptional opportunity to maximize their safety prior to an accident at such minimal inconvenience, however, that these doctrines may justly be applied to pre-accident conduct whose causal connection to the injury can be readily shown. As the court in *Spier* stated:

We concede that the opportunity to mitigate damages prior to the occurrence of an accident does not ordinarily arise, and that the chronological distinction, on which the concept of mitigation of damages rests, is justified in most cases. However, in our opinion, the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages prior to the accident.

Because plaintiff had this unusual opportunity, the *Spier* court permitted the jury to consider evidence of plaintiff’s non-use of an available seat belt in determining whether plaintiff exercised due care to avoid or mitigate injury to himself.

4. Miscellaneous Support

Two other arguments in addition to those discussed above support the seat belt defense. The first of these is the public policy argument. The enactment of seat belt installation statutes by a number of states as well as the federal government is strong evidence of legislative recognition of the importance of seat belt use. Although these statutes do not impose a duty upon automobile occupants to use seat belts, they clearly evidence legislative intent to encourage such use. Indeed, a number of these statutes expressly state that seat belts be installed in the driver’s seat and every passenger’s seat “‘for use.’” The extensive media campaigns urging the public to “buckle up for safety” also undergird the argument that public policy requires automobile occupants to exercise due care by using seat belts.

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54 See notes 70-71 infra and accompanying text.
57 Id. at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920.
58 See notes 24-25 supra and accompanying text.
59 See note 25 supra. See also Comment, The Failure to Use Seat Belts as a Basis for Establishing Contributory Negligence, Barring Recovery for Personal Injuries, 1 U.S.F. L. Rev. 277 (1967) (discussion of statutes using language “equipped with” in contrast to those stating “‘for use’”).
A second miscellaneous argument in support of the seat belt defense is based on general tort theory. The procession of tort law from contributory to comparative negligence evidences a trend to apportion damages according to respective faults, and to avoid "all or nothing" judgments. Regardless of the magnitude of defendant's negligence, a plaintiff's deliberate disregard of public policy and willingness to risk not using seat belts should not go unreprimanded. It would be difficult to contend that plaintiff is without some fault for his injuries. Thus, consideration of seat belt evidence is, according to general tort theory advocating apportionment of damages, properly within the jury's province. The seat belt defense would likely result in neither substantial lost damages to the plaintiff nor a windfall to the defendant, as each juror may consider the plaintiff's exercise of ordinary care in light of his own experience, which is typically that of frequent non-use.

B. Arguments Against the Seat Belt Defense

A number of states have been reluctant to permit the use of seat belt evidence to mitigate damages. At least twenty jurisdictions have declared, either judicially or legislatively, that failure to use a seat belt may not be considered in mitigation of damages. At least eight other states have forbidden the admission of evidence of the plaintiff's non-use of his seat belt on the issue of contributory negligence. Thus, more than half of the jurisdictions in the United States have rejected the seat belt defense in some form. This section summarizes the arguments against the use of seat belt evidence.

1. Non-Use Merely Furnishes the Condition for Injury

The most obvious argument against the seat belt defense is that the plaintiff's failure to use a seat belt does not contribute to the cause of the accident. This argument has been discussed previously in terms of proximate causation. The plaintiff's failure to use a seat belt merely subjects him to the risk of receiving more severe injuries. In no way, however, could seat belt use prevent a tortfeasor from negligently acting so as to place the plaintiff in a position of extreme peril. At most, the plaintiff's failure to use a seat belt furnishes a condition making injury possible. It does not contribute to or cause the accident.

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63 See note 10 supra.
64 Id.
66 See notes 48-52 supra and accompanying text.
2. The Defendant's Windfall

The logical extension of the previous argument is that if the plaintiff did not contribute to the event resulting in his injury, the defendant is not entitled to relief from liability for that which he alone has caused. It would be patently unfair to reduce the recovery of the plaintiff, whose injuries were sustained in an accident for which he was in no way responsible. The seat belt defense would soon result in windfalls to tortfeasors who would pay only partially for the harm their negligence caused.

3. Pre-Accident Conduct Does Not Require Mitigation

A third argument against the seat belt defense is that the duty to avoid the consequences of another's negligence and to mitigate one's damages does not arise until after the accident and injury have occurred. Under the doctrine of avoidable consequences, the injured plaintiff is required to exercise reasonable care not to aggravate his injuries following the negligence of the defendant. Plaintiff's pre-accident conduct was traditionally judged according to the doctrine of contributory negligence, which required him to exercise ordinary and reasonable care for his own safety. Where plaintiff's actions did not contribute to the cause of the accident, he was not contributorily negligent. Because the use of seat belts does not contribute to the cause of the accident, plaintiff's non-use cannot violate his duty to exercise ordinary care for his safety. To attempt to use the doctrine of avoidable consequences on a pre-accident theory is to require the plaintiff to refrain from aggravating his injuries before they have ever occurred. Plaintiff's pre-accident duty, however, is not to mitigate future injuries, but only to act so as not to cause the accident. For this reason, then, the avoidable consequences doctrine is not applied to such pre-accident conduct as failure to use a seat belt.

4. No Duty to Use a Seat Belt Exists

The question remains whether automobile occupants have a duty to wear seat belts. Most courts have held that no duty to wear a seat belt exists. A
plaintiff is entitled to presume that the defendant will exercise ordinary care and refrain from negligent conduct. Courts have consequently been reluctant to impose a common law duty to wear a seat belt, since such a duty would require the plaintiff to anticipate the defendant’s negligence. This offends traditional notions of tort law.

Furthermore, no common law duty should arise if the plaintiff can justify his failure to wear a seat belt. Industry and government may extol the benefits of seat belts, but they cannot compel the general public to use these devices. Indeed, in 1974, Congress repealed its controversial mandatory seat belt interlock system legislation, and the automotive industry has yet to agree upon the most effective safety system to employ in motor vehicles. The general public’s failure to perceive the utility of seat belts justifies to some extent a plaintiff’s unwillingness to make use of the devices. Additionally, automobile occupants may decline to wear seat belts due to fear of entrapment. Though statistics suggest that the likelihood of entrapment is slim, one need not look far in the case reporters to identify numerous instances where it has occurred.

In addressing the question of plaintiff's duty to wear seat belts, most courts are quick to point out that no state has enacted a statute requiring the general public to use seat belts while driving. These courts often suggest that the legislature is the proper forum for imposing such a duty upon the plain-

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77 In McCord v. Green, 362 A.2d 720 (D.C. 1976), the District of Columbia Court of Appeals addressed the utility of seat belts and the hesitance of an individual to wear them. In McCord, the plaintiff passenger sued both the host driver and the driver of a second car involved in an intersection collision. Rejecting the availability the seat belt defense, the court stated:

In our view, this observation [regarding the utility of seat belts] lacks factual foundation, particularly the statement that the seat belt "has never been shown to worsen an injury, but, on the contrary, has prevented more serious ones." A moment’s reflection shows that this assertion cannot possibly be true. Numerous fatalities occur in automobile collisions when one car, forced off a bridge or waterside highway, plunges into a river or is overturned and set ablaze. Obviously the victims would have had a much greater chance of surviving had they not been trapped in the submerged or burning car by buckled seat belts. There is no doubt, of course, that seat belts do provide protection to belted occupants of cars in a head-on collision or cars braked to a screeching halt, as the belt-wearer may be prevented from lurching forward against the steering wheel, dashboard, or windshield.

These are not the only kinds of accidents which can happen to automobiles. Judicial notice may be taken of the fact that a heavy majority of the appeals which reach this court are concerned with litigation over intersectional collisions. In such cases the protective value of a seat belt is dubious, for many an occupant pinned down by his belt beside a door bashed in by a broadside impact, could suffer injuries which would not have occurred had he been thrown free. In the very case we are considering, the host driver might have been badly hurt had he put on his seat belt that night, for his testimony describes the side of his car as being crushed by the force of defendant Green’s vehicle. Consequently, even though intersectional collisions may occur with enough frequency to be called a foreseeable incident of city driving, whether or not a seat belt will do more harm than good to the victims of such an accident is unpredictable.

Id. at 723.
77 See notes 24-25 supra and accompanying text.
78 See note 72 supra (citing cases for support).
79 Five jurisdictions have legislatively prohibited the introduction of seat belt evidence in personal injury actions. See note 9 supra.
Thus, a plaintiff can persuasively argue that he has neither a statutory nor a common law duty to wear a seat belt.

5. Management of the Defense and Other Technical Problems

Other arguments against the seat belt defense center around the courts’ ability to manage seat belt evidence and the manner in which the jury considers it. An often stated reason for rejecting the defense is that a jury comparing damages caused by the non-use of a seat belt with damages caused by the defendant’s negligence would necessarily speculate in apportioning liability. A counterargument is that expert evidence can reduce the need to speculate and that jurors must often make complex decisions involving the apportionment of damages.

It is clear that the defendant must offer expert evidence to establish the causal connection between non-use of a seat belt and aggravation of an injury. Since the plaintiff would most likely attempt to counter the defendant’s experts by calling experts on his own behalf, the seat belt defense creates another tort arena for a battle of safety and medical experts. The trial court faces a balancing problem. It must permit sufficient expert testimony to allow the defendant to make his case, yet prevent a battle of experts. In the end, a court should consider the delay, confusion and difficulties arising from a battle of experts in deciding whether to permit a defendant to introduce the seat belt defense.

A second technical problem with the seat belt defense is that it is unclear when a duty to wear seat belts arises. Ordinary prudence does not require all automobile occupants to buckle up routinely. Clearly, a pregnant woman need not wear a seat belt and risk injury to her unborn child. But what about children, or the handicapped? It may not be possible to establish a duty to wear seat belts without making arbitrary distinctions. As a result, the fairness of the defense may become suspect, and its utility diminished.

A final managerial problem with the seat belt defense concerns its expansion. The courts are split as to whether the defense is available in strict prod-

83 See note 46 supra.
87 In another sense, the application of the seat belt defense is troublesome and unfair in that it only applies to plaintiffs injured in cars equipped with seat belts. Effectively, the plaintiff in the equipped vehicle is penalized for his actions. See Britton v. Doehring, 287 Ala. 498, 242 So. 2d 666 (1970); Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972).
ucts liability actions. If the defense is available to mitigate damages in negligence actions, what justifies its exclusion on the issue of damages in strict liability or even intentional tort actions? If the defense is to be expanded, it is necessary that its scope be defined in a principled fashion.

In summary, the argument against the seat belt defense takes many forms. Seat belt evidence might be excluded on the grounds that there is no duty to wear seat belts, that non-use could not have caused the accident sued upon, that defendants might otherwise enjoy a windfall, that the defense conflicts with traditional tort doctrines, or that management of the defense is excessively complex.

III. A Suggested Approach to the Seat Belt Defense

Dean Prosser states that the seat belt defense presents one of the “more difficult problems” in the law of torts, because it operates to limit plaintiff’s recovery on the grounds that his prior conduct, while unrelated to the event which caused the injury, played a material part in aggravating the ensuing damages. An even greater difficulty arises, however, because the defense allows a defendant to escape liability for his negligent and harmful conduct merely because hindsight suggests that the plaintiff could have reduced his injuries by acting in advance of defendant’s negligence. In light of the passive nature of plaintiff’s “negligence,” it is difficult to justify denying him full compensation for his injury.

In assessing the validity of the seat belt defense, factual circumstances in which automobile accidents generally arise must be examined. It seems clear that few automobile occupants anticipate that they will be involved in an accident. Indeed, the probability that an automobile driver or passenger will be involved in an accident on any specific occasion is very low.

Most people would admit that it is safer to use seat belts than to ignore them. Statistics suggest, however, that most people do not feel that the utility of wearing a seat belt is worth the inconvenience. Because the plaintiff does not believe that an accident will happen to him, he does not appreciate the added measure of safety provided by the seat belt.

The question then, in light of the above observations, is whether or not it is unreasonable for an individual to fail to use a seat belt. Although the injured plaintiff does not enter the courtroom without some fault, it stretches the point to describe his conduct as “unreasonable.” Comparative negligence apportions liability according to the respective faults of the parties. But plaintiff’s fault, by itself, does not result in any harm or injury until defendant’s subsequent negligence places the plaintiff in the position of peril from which his in-

88 See note 6 supra.
89 Id.
91 See discussion in 16 AM. JUR. PROOF OF FACTS, Seat Belt Accidents § 5 (1965).
92 This is evidenced by the large sector of the public which does not wear seat belts. See note 40 supra.
juries eventually arise. Though the plaintiff is not blameless, his culpability is so slight that he should not be penalized for his failure to use a seat belt.

A survey of the numerous seat belt cases leaves the impression that many courts are reluctant to allow a defendant substantially to escape liability for his negligent conduct by virtue of the seat belt defense. On the other hand, these same courts seem unwilling to absolve the plaintiff of his respective blame for failing to use the seat belt. Many courts might permit the jury to mitigate plaintiff’s damages were it not for the substantial windfall available to the defendant.

The real problem before a court considering the seat belt defense arises from the comparison of the plaintiff’s passive conduct, characterized by his “omission” of seat belt use, with the defendant’s active conduct, characterized by his “commission” of a tortious act. Comparing these dissimilar types of conduct is extraordinarily difficult, and must be performed cautiously.

The Restatement (Second) of Torts sheds some light on these types of conduct and on how the question of seat belt evidence might be settled. A plaintiff’s failure to use a seat belt is a force contributing to the injury which the plaintiff receives. The defendant’s subsequent negligence is an intervening force which creates the event from which plaintiff’s injuries arise. The question is whether defendant’s negligence supersedes the plaintiff’s. Sections 440 and 441 of the Restatement define superseding and intervening forces, respectively. Comment b to section 441 addresses the nature of conduct exemplified in the seat belt situation:

The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor [the plaintiff] is liable for [his own] harm are usually, although not exclusively, cases in which the actor’s negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor’s negligence is often called passive negligence, while the [other] person’s negligence, which sets the intervening force in active operation, is called active negligence.


94 For a contrasting discussion of passive negligence in the seat belt situation, see Miller, The Seat Belt Defense Under Comparative Negligence, 12 Idaho L. Rev. 59, 63-65, 66-68 (1975).

In Hernke v. Coronet Ins. Co., 72 Wis.2d 170, 240 N.W.2d 382 (1972), the court specifically labeled plaintiff’s non-use as passive negligence and found that the seat belt defense was available to mitigate damages.

95 RESTATEMENT (SECOND) OF TORTS § 440 (1965) defines a superseding cause as “an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.”

96 RESTATEMENT (SECOND) OF TORTS § 441 (1965) defines an intervening force as follows:

(1) An intervening force is one which actively operates in producing harm to another after the actor’s negligent act or omission has been committed.

(2) Whether the active operation of an intervening force prevents the actor’s antecedent negligence from being a legal cause in bringing about harm to another is determined by the rules stated in §§ 442-453.

97 RESTATEMENT (SECOND) OF TORTS § 441, comment b (1965). Sections 440 and 441 are not totally analogous to the seat belt situation for these sections contemplate two negligent parties or forces acting to in-
Section 44298 lists those considerations which suggest the point in time when an intervening force becomes a superseding cause of the harm. Applying these considerations in the most common case, the defendant-driver's active negligence in causing the accident and plaintiff's injury would be an intervening and superseding cause of the harm incurred. The injury to the plaintiff would not normally occur absent the defendant's negligence. The plaintiff's conduct is excusable except in hindsight which suggests that he should have acted differently. The defendant's conduct is far more culpable than the plaintiff's. Thus, in accordance with the Restatement, the defendant's negligence is a superseding and intervening cause of the plaintiff's injury, and evidence of non-use of a seat belt is inadmissible.

However, as several courts have stated, certain situations may arise where a plaintiff's passive negligence rises to such a level that exclusion of evidence concerning that negligence cannot be justified. Peculiar circumstances apparent to the plaintiff may cast a different light on the reasonableness of his conduct. Thus, in the case of a passenger suing the host-driver, if the defendant had warned the plaintiff that his car had poor tires and steering, the plaintiff's failure to wear a seat belt would be a factor for jury consideration. In such a case, plaintiff's negligence arguably rises to a level of virtually "assuming the risk": the passive act of failing to buckle up is transformed into the affir-
mative act of refusing to buckle up.\textsuperscript{106} Applying the considerations listed in section 442, the Restatement (Second) of Torts, the plaintiff's conduct is no longer unjustifiable only in hindsight. Particular circumstances made the harm incurred foreseeable and plaintiff assumed the risk. The defendant's actions, though intervening, are no longer superseding. Both parties are jointly responsible for the harm that has befallen plaintiff; their respective faults are no longer grossly unequal. Under these circumstances, the seat belt defense should be available to the defendant to mitigate damages.

Conclusion

Under the theory set forth in the last section of this note, evidence of a plaintiff's failure to use a seat belt is admissible only when peculiar circumstances apparent to the plaintiff indicate that a seat belt should be used to protect the plaintiff from foreseeable harm. Ordinarily, a defendant-driver's negligence should be presumed to be a superseding cause of plaintiff's injuries, and seat belt evidence should be inadmissible. However, if the defendant can satisfy the court that unusual and extenuating circumstances existed which placed the plaintiff on notice of danger and effectively raised his "passive" conduct to the level of assuming the risk, then evidence of plaintiff's non-use should be admissible for the jury to consider in mitigating damages.

The "exceptional circumstances" approach represents a compromise between the two prevailing rules which either totally exclude seat belt evidence or allow the seat belt defense, with proper foundation, in all circumstances. This compromise approach does not create an absolute duty to wear a seat belt. It eliminates the "windfall" defense absent a showing of exceptional circumstances. This approach appears most equitable and has in fact been

\textsuperscript{106} The Montana Supreme Court recently addressed the issue of the seat belt defense in a case with facts ideally suited for the application of the "exceptional circumstances" theory. In Kopischke v. First Continental Corporation, No. 14810 (Sup. Ct. Mont. March 13, 1980), the plaintiff, Mrs. Kopischke, brought suit against the defendant used car dealer for its failure to inspect and repair defects in one of its used cars. The plaintiff argued that such defects were discoverable in the exercise of ordinary care. Mrs. Kopischke was injured when the right front stabilizer in the car which she had purchased from the defendant disconnected. When the car veered out of control across the road and rolled over, the plaintiff was severely injured.

Mrs. Kopischke knew beforehand that her car had numerous defects. She had noticed prior to purchasing the car that it had a tendency to veer to the left. Her mechanic had examined it and warned her that it was not "safe to drive." Furthermore, she had been cautioned against driving it by her husband. Nevertheless, she continued to drive the car against the advice of her husband and mechanic. The defendant, among other things, argued that plaintiff's non-use of a seat belt was to be considered by the jury for purposes of mitigating any damages they might award. The majority, after an extensive discussion of conflicting case precedent from other jurisdictions, held that in the absence of direction from the state legislature, the better rule was to deny the introduction of the seat belt defense.

Justice Harrison, however, dissented from the court's opinion on the seat belt defense. In many respects, his opinion called for at least the application of the "exceptional circumstances" theory, if not a broader theory. In the words of Justice Harrison:

If ever there was a case presented to this Court indicating the necessity of using seat belts, this is the case. The very fact that respondent and her husband, from the very time of purchase, had difficulties with the car and sought the advice of a friend who was a mechanic, indicates that respondent knew the car's condition and should have worn seat belts during any drive that she took in the car.

Under these circumstances, and considering the accident where she drove off the road and was thrown out of the car, there is no question that her failure to "belt up" contributed to the seriousness of her injuries.
recognized by several courts.\textsuperscript{107} Other courts would do well to adopt the "exceptional circumstances" approach. If they do, the question of the seat belt defense may well be settled once and for all.

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\textsuperscript{107} See notes 26-33 and 93 \textit{supra} and accompanying text.