August 1983
Final Report

DOT-HS-806-443

ɔrtment
ɔortation
ɜl Highway
Safety
Administration

Non-Use of Motor Vehicle Safety Belts as an Issue in Civil Litigation

David Westenberg

David Westenberg, Consultant
213 Summer Street
Somerville, MA 02143

Contract No. DOT-TSC-NHTSA-83-3

Technical Report Documentation Page

1. Report No.	2. Government Accession No.	3. Recipient's Catalog No.
DOT HS 806 443		

4. Title and Subtitle

NON-USE OF MOTOR VEHICLE SAFETY BELTS AS AN ISSUE IN CIVIL LITIGATION

5. Report Date: August 1983

6. Performing Organization Code:

7. Author's: David A. Westenberg

8. Performing Organization Report No.: DOT-TSC-NHTSA-83-3

9. Performing Organization Name and Address:

David Westenberg, Consultant
213 A Summer St.
Somerville, MA 02143

10. Work Unit No. (TRAIS):

11. Contract or Grant No.: DTRS-57-83-80339

12. Sponsoring Agency Name and Address:

U.S. Department of Transportation
National Highway Traffic Safety Administration
Washington, D.C. 02590

13. Type of Report and Period Covered:

Final Report

Jan. - Apr. 1983

14. Sponsoring Agency Code: NRD-41

15. Supplementary Notes

* Under contract to: U.S. Department of Transportation
Research and Special Programs Admin.
Transportation System Center
Cambridge, MA 02142

16. Abstract

The current and potential role of the "safety belt defense" in civil litigation is studied. The paper presents an overview of the safety belt defense, including an evaluation of current precedent. Based on interviews with leading motor vehicle civil litigation practitioners, the paper describes how the safety belt defense is used in practice. Trial strategies of both plaintiffs' and defense attorneys, selected from a cross-section of states, are explored and contrasted. The potential impact of safety belt use statutes and areas for expansion of the safety belt defense are highlighted. The use and impact of the safety belt defense in out-of-court settlements (where most tort litigation is resolved) is analyzed. Observations and suggestions for promoting increased judicial acceptance and wider use by attorneys of the safety belt defense are offered, although more research needs to be conducted to determine whether the possibility of a reduction in recoverable damages, via the safety belt defense, encourages people to use their safety belts. Interspersed throughout the paper, actual trial and settlement examples are documented to illustrate the points being made.

17. Key Words	18. Distribution Statement
Safety Belts, Safety Belt Defense, Safety Belt Non-Use, Legal Incentives, Out-Of-Court Settlements, Damages Reductions	DOCUMENT IS AVAILABLE TO THE U.S. PUBLIC THROUGH THE NATIONAL TECHNICAL INFORMATION SERVICE, SPRINGFIELD, VIRGINIA 22161

19. Security Classif. (of this report)	20. Security Classif. (of this page)	21. No. of Pages	22. Price
UNCLASSIFIED	UNCLASSIFIED		

Form DOT F 1700.7 (8-72) Reproduction of completed page authorized

METRIC CONVERSION FACTORS

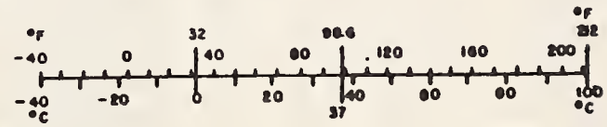
Approximate Conversions to Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
in	inches	*2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
	AREA			
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	square miles	2.6	square kilometers	km^2
	acres	0.4	hectares	ha
	MASS (weight)			
oz	ounces	28	grams	g
lb	pounds	0.45	kilograms	kg
	short tons (2000 lb)	0.9	tonnes	t
	VOLUME			
tsp	teaspoons	5	milliliters	ml
Tbsp	tablespoons	15	milliliters	ml
fl oz	fluid ounces	30	milliliters	ml
c	cups	0.24	liters	l
pt	pints	0.47	liters	l
qt	quarts	0.95	liters	l
gal	gallons	3.8	liters	l
ft^3	cubic feet	0.03	cubic meters	m^3
yd^3	cubic yards	0.76	cubic meters	m^3
	TEMPERATURE (exact)			
	Fahrenheit temperature	5/9 (after subtracting 32)	Celsius temperature	°C

*1 in = 2.54 (exactly). For other exact conversions and more detailed tables, see NBS Misc. Publ. 286, Units of Weights and Measures, Price $2.25, SD Catalog No. C13.10:286.

Approximate Conversions from Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
mm	millimeters	0.04	inches	in
cm	centimeters	0.4	inches	in
m	meters	3.3	feet	ft
m	meters	1.1	yards	yd
km	kilometers	0.6	miles	mi
	AREA			
cm^2	square centimeters	0.16	square inches	in^2
m^2	square meters	1.2	square yards	yd^2
km^2	square kilometers	0.4	square miles	mi^2
ha	hectares (10,000 m^2)	2.5	acres	
	MASS (weight)			
g	grams	0.035	ounces	oz
kg	kilograms	2.2	pounds	lb
t	tonnes (1000 kg)	1.1	short tons	
	VOLUME			
ml	milliliters	0.03	fluid ounces	fl oz
l	liters	2.1	pints	pt
l	liters	1.06	quarts	qt
l	liters	0.26	gallons	gal
m^3	cubic meters	35	cubic feet	ft^3
m^3	cubic meters	1.3	cubic yards	yd^3
	TEMPERATURE (exact)			
°C	Celsius temperature	9/5 (then add 32)	Fahrenheit temperature	°F



PREFACE

The research and writing of this paper was sponsored by the National Highway Traffic Safety Administration (NHTSA), Office of Driver and Pedestrian Research (NRD-41).

As part of NHTSA's ongoing effort to understand and articulate the role that various institutions could play in encouraging the use of motor vehicle safety belts, this paper analyzes the potential role of the legal system in providing incentives for safety belt use. The use and impact of the "safety belt defense" at trial and in out-of-court settlements (where most tort litigation is resolved) is studied, both through appellate precedent and actual experience, in the hope that further judicial acceptance of the safety belt defense and its use by practitioners would encourage the public to wear available safety belts.

The research for this paper was conducted during January through April of 1983.

A very special acknowledgment is due the many attorneys who discussed at length their experiences with the safety belt defense. Without their cooperation, this paper would not have been possible.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The so-called "safety belt defense" involves an attempt by the defendant in a motor vehicle civil lawsuit to prove that the plaintiff's non-use of an available safety belt caused or enhanced the plaintiff's injuries and that therefore the plaintiff's recoverable damages should be reduced or barred.

The general contours of the safety belt defense can be summarized as follows. First, the defendant must file a proper pleading in response to the plaintiff's suit. Second, the defendant must prove that the plaintiff failed to engage the available safety belt. Third, the defendant must introduce evidence showing a causal relationship between the safety belt non-use and the enhanced injuries. This ordinarily requires expert testimony by a person or persons trained in accident reconstruction, biomechanics, engineering and/or medicine. Next, the defendant must seek an appropriate jury charge that instructs the jury as to the legal consequences of any facts the jurors find. Finally, the jury reaches its verdict (sometimes through answers to special interrogatories), which includes a determination of the plaintiff's damages and a reduction thereof, if any, for safety belt non-use, and the court enters judgment on the verdict.

Successful use of the safety belt defense at trial can result in damages reductions ranging up to one hundred percent. Even assuming the defendant's liability, reductions for safety belt non-use that are exacted during out-of-court settlement rarely go as high as fifty percent. Reductions of ten to thirty percent are most common. This is because even in the most clear-cut case the potential success of the safety belt defense at trial is tempered by the jury's discretionary powers and the plaintiff's attorney's trial tactics.

Only five states (California, Illinois, New York, South Carolina and

Wisconsin) have appellate court precedent for use of the safety belt defense in personal injury litigation. The safety belt defense is widely used at trial in California, New York and Wisconsin, but much less so in the other two states. Attorneys from Illinois and South Carolina theorized that this is due to weaker appellate precedent, unfavorable rules of evidence and unreceptive juries.

The law of twenty-two states remains unsettled as to the use of the safety belt defense. This void represents a positive opportunity for attorneys, government agencies and all parties interested in public safety to promote further judicial acceptance of the safety belt defense.

Twenty-four jurisdictions have rejected the safety belt defense. Of these, twelve have spoken through their highest state appellate court, seven through an intermediate appellate court and five through their state legislature. Arguments for rejecting the safety belt defense in order of prevalence are: the lack of a traditional tort doctrine to justify it; the absence of a statutory or common law duty to use a safety belt; the assertion that the matter is best left to the legislature; questions as to the efficacy of safety belts; the fact that a strong majority of Americans fail to buckle up; the desire to follow an early trend of appellate courts rejecting the safety belt defense; practical implications and problems with trial administration; the notion that the safety belt defense is unfair to injured plaintiffs; and the question of discrimination between plaintiffs because not all vehicles are required to be equipped with safety belts.

Safety belt use statutes could be of pervasive importance to recognition and use of the safety belt defense because they would eradicate the courts' three strongest objections to the safety belt defense (absence of applicable doctrine, no duty and matter for the legislature). There are existing state laws mandating safety belt use by child passengers (thirty-four jurisdictions),

school bus drivers (seven states), all school bus occupants (one state), driver training vehicle occupants (one state), firefighting vehicle occupants (one state) and "public service" vehicle drivers (one state), as well as a federal regulation requiring safety belt use by drivers of vehicles used in interstate commerce. These use statutes have not bolstered the acceptance or use of the safety belt defense because of statutory limitations and practical constraints on some of the laws, and because the remaining statutes comprise an extremely small proportion of the nation's vehicle occupants. Use statutes enacted in the future, if covering a significant segment of the population and lacking similar constraints, can be expected to exert a positive influence on judicial recognition of the safety belt defense.

Motor vehicle manufacturers long have incurred liability for injuries resulting from accidents caused by negligence in the design or assembly of their vehicles. The safety belt defense can be used in these "product liability" cases the same way that it is used in other civil litigation. More recently, courts have imposed liability on vehicle manufacturers in "crashworthiness" lawsuits. The crashworthiness doctrine permits recovery from the vehicle manufacturer for injuries over and above those caused by an initial collision if such additional injuries are attributable to a defect in the vehicle design or assembly. Although to date only nine states have allowed the safety belt defense in crashworthiness cases, the thirty-four jurisdictions that recognize the crashworthiness doctrine constitute a large potential arena for expansion of the safety belt defense.

Defense attorneys in the three states where the safety belt defense is widely used have developed a sophisticated procedure for raising and profiting from it. After responding to the plaintiff's lawsuit with the requisite pleading, the next step, during pre-trial and discovery, is routinely to

determine whether a safety belt was available and used at the time of the accident, and to gather and preserve evidence relating thereto. During jury selection, the defense attorney will attempt to identify and select jurors who will believe the safety belt testimony and vote for a reduction in damages. The next step is to present proof at trial. Regardless of the type of expert testimony that is required by each state, it usually is the key link in proving the safety belt defense. The cost of safety belt experts is commensurate with the cost of other experts, but availability appears to be more of a problem. Some defense attorneys reported good success with local college professors of engineering and biomechanics, but other attorneys prefer to opt for the scarcer "national" experts. Vehicle manufacturers frequently retain "captive" experts who testify in defense of many of the particular manufacturer's product liability and crashworthiness lawsuits. With regard to medical testimony, the problem is that the sympathies of the best available expert -- the physician who treated the plaintiff -- tend to be adverse to the defendant's cause. Regardless of which experts testify, the force of safety belt evidence usually can be bolstered with demonstrative evidence, such as NHTSA films of simulated crashes. During closing arguments, the defense attorney will emphasize that safety belts are provided for the safety of vehicle occupants, that they do no good unless used, and that the plaintiff's injuries could have been reduced or avoided if he/she had expended the minimal effort required to engage the available safety belt. Finally, the defense attorney will seek a favorable jury charge.

Plaintiffs' attorneys employ a number of strategies to fight and diminish the impact of the safety belt defense. The plaintiff's attorney will move to strike it from the defense pleading, if required therein, or make a motion in limine seeking to prevent reference at trial to the availability or use of

safety belts. It is the hope of the plaintiff's attorney that his/her client was using the available safety belt at the time of the accident, or at least that the plaintiff will claim he/she was buckled up. If the plaintiff's safety belt non-use is established by the defense, the plaintiff's attorney will attempt at trial to excuse the non-use. Here enter arguments that the safety belt was not working or that the plaintiff did not see it. A related tactic is for the plaintiff's attorney to argue to the jury that although a working safety belt was available, in this particular instance, his/her client could not have been expected to use it. This argument has succeeded in the cases of pregnant women, obese persons and in other more unusual situations. One strategy that always is available to the plaintiff's attorney is the "counter-expert," who will testify that had the plaintiff been using the safety belt, he/she would have sustained different injuries. The universally used and apparently most effective rebuttal to the safety belt defense is to introduce evidence (sometimes NHTSA statistics) of, and argue to the jury, the simple fact that the vast majority of Americans do not use available safety belts.

More than ninety percent of motor vehicle tort litigation is resolved out-of-court. The role of the safety belt defense in out-of-court settlements derives from the ultimate availability of the defense at trial. In negotiations, the defense attorney can use the safety belt defense to reduce the plaintiff's demands only it there is a credible threat of its use at trial. Thus, attorneys from California, New York and Wisconsin (the states with the strongest appellate support for the safety belt defense) reported that in an appropriate case the plaintiff's non-use of a safety belt can be a significant factor in reducing the settlement amount. On the other hand, attorneys in states which have rejected the safety belt defense find that it is of little or no import in settling lawsuits.

In states which permit the safety belt defense at trial, its availability is not determinative when negotiating. Other factors which tend to bolster its influence in out-of-court settlements are: if the defendant's behavior was unintentional and the plaintiff is "undeserving"; if the plaintiff is seeking a large amount of damages (in most product liability and crashworthiness cases, there is more latitude for negotiation); governing rules of civil procedure which permit "full disclosure"; the presence and participation of a judge; a shortfall between the defendant's insurance coverage and the damages sought by the plaintiff; if the defense attorney has relatively more bargaining strength or experience; and if the plaintiff's case is particularly vulnerable at trial to the safety belt defense. Factors with an a priori indeterminate influence include negotiation techniques and the personalities of the parties.

The weakest factual patterns for the plaintiff at trial (because of ease of proof), and thus the most vulnerable to settlement reductions, are the classic head injury/windshield and ejection cases. In general, the less a case resembles the head injury/windshield and ejection prototypes, the stronger is the plaintiff's negotiating position. With the polar case of exclusively soft tissue injuries -- bruises, strains, back and neck pains and non-demonstrable discomfort -- it appears that regardless of the plaintiff's failure to buckle up his/her attorney need not concede a lower settlement figure because of the safety belt defense.

The safety belt defense can be a powerful tool for reducing the defendant's exposure to tort judgments and settlements. More research needs to be conducted to determine whether the possibility of a reduction in recoverable damages, via the safety belt defense, actually encourages people to use their safety belts. Assuming that vehicle occupants react to this incentive, increased judicial recognition and use by attorneys of the safety belt defense should be promoted.

Legislatures should be encouraged to enact mandatory safety belt use laws covering, if not the general population, at least those classes of persons who are most vulnerable in accidents or who bear responsibility for the safety of others. Safety belt use should be required for child passengers, the occupants of driver training vehicles, emergency vehicles and public service vehicles, and for the drivers of vehicles for hire. At a minimum, states should repeal existing statutory barriers to the use of the safety belt defense. At the federal level, safety belt use should be mandated and enforced in all government vehicles and in vehicles used in interstate commerce. Government contractors could be required to mandate safety belt use in their vehicles used in connection with contract performance.

Not only would these statutes and regulations directly encourage safety belt use, but by facilitating use of the safety belt defense they might add an indirect incentive to buckle up.

Efforts should be made to remove any vestiges of doubt as to the efficacy of safety belts. Public education programs should be expanded. Institutional channels, such as insurance companies, schools (especially driver training courses), law enforcement agencies and governmental units, should be exploited. New research reaffirming the utility of safety belts should be financed, publicized and made available to defense attorneys and legal associations.

Some defense attorneys, especially those not living near metropolitan areas and who do not belong to the national defense attorney associations, might be aided by a geographical listing of available experts. Finally, to reduce the need for extensive expert testimony, trial judges should be urged to take judicial notice when appropriate.

I. INTRODUCTION

The goal of this paper is to provide insight into the current and potential role of motor vehicle safety belt non-use in civil litigation. Nearly all inquiry into the so-called "safety belt defense" has focused on it as an academic issue to be analyzed solely through appellate precedent. This paper attempts to develop an understanding of how the safety belt defense is used by practicing attorneys, and to articulate the link between precedent and practice.

The paper begins with an overview of the safety belt defense, including an evaluation of current appellate precedent. Based on interviews with leading motor vehicle civil litigation practitioners, this paper then seeks to adduce and describe how the safety belt defense is used in practice. Trial strategies of both plaintiffs' and defense attorneys, selected from a cross-section of states, are explored and contrasted. The potential impact of safety belt use statutes and areas for expansion of the safety belt defense are highlighted. Next, the use and impact of the safety belt defense in out-of-court settlements (where most tort litigation is resolved) is studied. The paper concludes with some observations and suggestions for promoting increased judicial recognition and wider use by attorneys of the safety belt defense.

Interspersed throughout the paper, actual trial and settlement examples are documented to illustrate the points being made.

The anticipated audience of this paper includes both practicing attorneys and laypersons. Apologies are extended if at times the former find this paper overly explanatory and the latter find it abstruse.

II. THE SAFETY BELT DEFENSE: AN OVERVIEW

Contours of the Safety Belt Defense

The so-called "safety belt defense" involves an attempt by the defendant in a motor vehicle civil lawsuit[1] to prove that the plaintiff's non-use of an available safety belt caused or enhanced the plaintiff's injuries and that therefore the plaintiff's recoverable damages should be reduced or barred.

The general contours of the safety belt defense can be described as follows. First, the defendant must file a proper answer in response to the plaintiff's suit. Pleading requirements vary greatly by state. In New York, the safety belt defense must be pleaded as an affirmative defense;[2] California and Wisconsin civil procedure requires only a general negligence response.[3] Second, the defendant must prove that the plaintiff failed to

---

(1) As used throughout this paper, the phrase "personal injury" lawsuit refers to a tort action where the plaintiff alleges that the defendant's negligence has caused some harm to the plaintiff. The phrase "personal injury" lawsuit includes a product liability lawsuit brought against the vehicle manufacturer alleging that the manufacturer's negligence has caused an accident. Personal injury lawsuits are to be distinguished from suits, herein called "crashworthiness" claims, where the plaintiff sues the vehicle manufacturer for injuries which were enhanced after the initial collision because of a defect in the vehicle design or assembly. See infra pp. 28-34. The phrase "civil litigation" or "civil lawsuit" refers to both personal injury and crashworthiness claims.

(2) In pleading, an affirmative defense is new matter which. assuming the plaintiff's complaint to be true, constitutes a defense to it. Under the Federal and many state Rules of Civil Procedure, all affirmative defenses must be raised in the responsive pleading (the answer to the complaint) or they are deemed to be waived. See infra Example 2.

(3) In contrast to the requisite specificity of an affirmative defense. a general negligence response is a general denial of the plaintiff's complaint and a general statement that the plaintiff's own conduct has caused or contributed to his/her injuries. The safety belt defense need not be specifically raised.

engage the available safety belt. Third, the defendant must introduce evidence showing a causal relationship between the safety belt non-use and the enhanced injuries. This ordinarily requires expert testimony by a person or persons trained in accident reconstruction, biomechanics, engineering and/or medicine. Next, the defendant must request that the judge charge the jury as to the legal consequences of any facts the jurors adduce from this expert testimony.(4) Jury instructions differ among states, and even between courts in the same jurisdiction. Special interrogatories are frequently used.(5) Finally, the jury reaches its verdict, which includes a determination of the plaintiff's damages(6) and a reduction thereof, if any, for safety belt non-use, and the court enters judgment on the verdict. Jurors are free, of course, to give little or much weight to the safety belt evidence, and introduction of the safety belt defense does not ensure that the plaintiff's damages will be reduced.(7)

It is clear that mere invocation at trial of the words "safety belt" will not limit the plaintiff's recovery. Successful use of the safety belt defense is fraught with difficulties, and the trial attorney can be stymied at any step

---

(4) The jury charge (or jury instructions) is the final address by the judge to the jury before it begins to reach a verdict, in which he/she sums up the case and instructs the jury as to the rules of law which apply to the case's various issues and which the jury must observe. See infra Example 3.

(5) Special interrogatories (or special verdicts) are written questions on one or more issues of fact submitted to the jury, the answers to which are necessary to reach a verdict. See infra Examples 1 and 2.

(6) The plaintiff's damages are compensation for his/her personal injuries. Elements of damages can include: lost earnings, medical expenses, out-of-pocket expenses, physical pain and suffering and mental distress. The jury usually does not make a precise allocation between categories of damages, but awards a single figure.

(7) See infra Example 3.

described above. The case law is replete with such examples.(8) Nonetheless, the safety belt defense has been employed successfully at trial in many cases.

Example 1.

Facts: The facts in the early case of Vernon v. Droeste(9) present the classic safety belt situation. The plaintiff's car collided nearly head-on with the defendant's car which was attempting a left turn. The defendant, who was using his safety belt, was slightly dazed but uninjured. The plaintiff, who was not wearing the safety belt installed in his car, was propelled forward through the windshield. He suffered facial lacerations, a cut knee and a bruised elbow.

Pleading: The defendant pleaded as a defense the plaintiff's failure to use his safety belt:

> Further pleading in the alternative. If further answer be necessary, Defendant alleges that the Plaintiff at the time and place in question had available for his use

---

(8) See, e.g., Lentz v. Schafer, 404 F.2d 516 (7th Cir. 1968) (safety belt defense not raised in the pleadings): Baker v. Knott, 494 P.2d 302 (Okla. 1972) (same); Fontenot v. Fidelity and Casualty Co., 217 So.2d 702 (La. Ct. App. 1969) (plaintiff's non-use of available safety belt not established); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967) (causal relationship linking safety belt non-use to enhanced injuries not shown); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967) (same); Bertsch v. Spears, 20 Ohio App. 2d 137, 252 N.E.2d 194 (1969) (same); Parise v. Fehnel, 267 Pa. Super. 79, 406 A.2d 345 (1979) (same); Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970) (same); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966) (same); Brown v. Bryan, 419 S.W.2d 62 (Mo. 1967) (defendant failed to request the trial court to instruct the jury as to the legal consequences of safety belt non-use).

(9) District Court. Brazos County, Texas, 85th Judicial District. Judge John M. Barron (June 9, 1966) (unpublished) (information obtained from case discussion in Comment, Seat Belts and Contributory Negligence, 12 S.D.L. Rev. 130 (1967), and from court documents and telephone conversations with John M. Lawrence, III, Bryan, Texas, attorney for the defendant). Later Texas appellate decisions have repudiated the safety belt defense. See infra Appendix A.

and had knowledge of the existence of a seat belt and shoulder strap or harness and while knowing the purpose of such a safety device, knowingly and voluntarily refused or omitted to affix such safety strap and harness to his body so as to prevent forward movement and resulting injuries.

Defendant further alleges that had the Plaintiff worn the seat belt and shoulder strap or harness, such safety device would have prevented the forward movement of his body to such an extent that no part of his body would have contacted the dash, steering wheel and/or windshield and consequently would have prevented the very injuries complained of by this Plaintiff and failure of the Plaintiff to wear such device constituted a willful exposure to a known danger and further that such failure to wear said harness constituted negligence and such negligence was the proximate cause of the injuries complained of and further that such failure to wear said seat belt and harness was a negligent, intentional and voluntary failure to mitigate the injuries and damages complained of.

Trial: The defendant showed that the plaintiff was not using his safety belt at the time of the accident. The defendant retained an engineering professor from Texas A&M University who, after examining the plaintiff's vehicle and reconstructing the accident, testified that use of the safety belt would have held the plaintiff away from the windshield.

Jury Charge and Verdict: The jury's findings were expressed through the following special interrogatories and answers:

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that the Plaintiff Albert E. Vernon's failure to wear the safety harness with which the Volvo automobile was equipped was a failure to exercise that degree of care that would have been exercised by an ordinary prudent person under the same or similar circumstances?

Answer We do or We do not.

Answer: We do.

If you have answered special issue

No. 12 We do and only in that event, then answer the following special issue No. 13.

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that such a failure, if any, was a proximate cause of the Plaintiff Albert E. Vernon's injuries?

Answer We do or We do not.

Answer: We do.

If you have answered the foregoing special issue No. 13 We do and only in that event, then answer the following special issue No. 14.

SPECIAL ISSUE NO. 14

What percentage of Plaintiff Albert E. Vernon's injuries would have been avoided if he had been wearing the safety harness with which the Volvo automobile was equipped at the time of the collision in question?

Answer in percentages, if any, or none.

Answer: 95%.

Judgment: Under Texas law of contributory negligence.(10) the plaintiff was completely barred from recovering any damages. The case was not appealed.

Example 2.

Facts: In the case of Constantino v. Town of Babylon,(11) the plaintiff was a passenger in a car which left the road and struck a tree at high speed. The plaintiff suffered a compound skull fracture with devastating depressed brain injuries and various head and face lacerations when he was flung into the car's windshield. Two ounces of his brain tissue were destroyed during surgical removal of glass fragments. The plaintiff sued the driver, alleging

---

(10) Texas has since adopted comparative negligence. See Infra note 27.

(11) Supreme Court (New York's trial court), Suffolk County, New York (October 1980) (unpublished) (information obtained from telephone interview with Alan E. Congdon, Garden City, New York, attorney for the defendant, and brief of defendant-appellant on appeal).

that excessive speed and a defective headlight caused the accident, and the town in which they were driving, on the theory that "titanic" potholes in the roadway contributed to the driver losing control of the car.

Pleading: The defendants pleaded the safety belt defense as an affirmative defense:

> AS AND FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, ON INFORMATION AND BELIEF:
>
> That the alleged injuries and damages were caused and brought about wholly or in part by plaintiff's own culpable conduct.
>
> AS AND FOR A SECOND, SEPARATE AND PARTIAL DEFENSE IN MITIGATION OF DAMAGES ON INFORMATION AND BELIEF:
>
> That the plaintiff failed to make use of seat belts in the car plaintiff occupied.
> That by reason thereof, plaintiff's damages were aggravated and enhanced.
> That plaintiff is barred from recovery for that part of damages which would have been prevented by wearing a seat belt.

Trial: The plaintiff's non-use of an available safety belt was shown at trial. The defense introduced the expert testimony of an engineer and the plaintiff's own physician. The engineer testified as to the plaintiff's movement upon collision and his probable movement had he been buckled up, to the effect that safety belt use would have prevented the plaintiff from striking the windshield. The physician testified that had the plaintiff not struck the windshield, he would not have suffered his brain, head and face injuries.

Jury Charge and Verdict: The jury was advised that they were to debate the question of the safety belt defense only after they had resolved the questions of liability and the amount of damages sustained by the plaintiff.

The jury's findings and verdict were expressed through the following special verdicts and answers:

> Question 4: (a) The total damages sustained by the plaintiff, Edward Constantino, in the amount of $1,000,000.
> (b) If you find that some of Edward Constantino's damages would not have been sustained wearing a seat belt, write in here the amount included in (a) which he would not have sustained. The amount is FIVE HUNDRED THOUSAND DOLLARS.
> (c) The amount of (a) less amount of (b) equals your verdict. The amount written is FIVE HUNDRED THOUSAND DOLLARS.

Judgment: Judgment was entered for $500,000 on the jury verdict. The defendant-driver's insurance paid $100,000 of the judgment. The defendant-town was liable for the remaining $400,000. While an appeal to the Supreme Court, Appellate Division[12] was pending, the town settled for $350,000.

Example 3.

Facts: In Coryell v. Conn,[13] the plaintiff was a passenger in a car driven by her husband. The defendant's vehicle crossed over the highway dividing line and struck the plaintiff's car head-on. Both drivers were using safety belts and sustained only minor injuries. The plaintiff, who was not using her safety belt, was thrown forward into the dashboard. She suffered a fractured sternum and a soft tissue injury to her right knee.

Pleading: The defendant responded with a general negligence pleading.

Trial: The plaintiff admitted not wearing the available safety belt. The plaintiff, who was five foot four inches tall and weighed 175 pounds at the

---

(12) The Supreme Court. Appellate Division is New York's intermediate appellate court.

(13) 88 Wis. 2d 310, 276 N.W.2d 723 (1979) (affirming trial court decision of Circuit Court, Oneida County, Wisconsin, Judge Ronald D. Keberle).

time of the accident, said she did not use the safety belt because it was tight and uncomfortable. After examining the plaintiff's car and its safety belts, an accident reconstruction engineer testified for the defense that if the plaintiff had been using her safety belt, her chest and knee would not have struck the dashboard. The defense also introduced a photograph of the plaintiff's car's dashboard with a sticker attached to it which said "Safety belt use required in this vehicle." The plaintiff denied that the sticker was in the car while she and her husband owned it.

Jury Charge: The following jury instruction was given:

> Now, as the rules of law apply to the plaintiff, Ruth Coryell, you are instructed in considering whether or not she was negligent, that you may take into consideration the facts in this case that show that the vehicle in which she was riding was equipped with safety belts and that they were available for use by her. You will determine under all the credible evidence and reasonable inferences from the evidence in this case whether the failure of Ruth Coryell to use the safety belt was an omission to take a precaution for her safety and amounted, under the circumstances, as failure on her part to exercise ordinary care for her own safety.

Jury Verdict: The jury found that the plaintiff was not negligent in failing to use the available safety belt. She was awarded $15,000 in damages, with no reduction for safety belt non-use.

Judgment: The court entered judgment for $15,000 on the jury verdict. The judgment was affirmed by the Wisconsin Supreme Court.

Example 3 makes clear that the success of the safety belt defense is subject to the jury's findings. A jury has broad power to nullify or (mis)interpret the evidence. Except in rare instances, the safety belt defense

cannot be expected to reduce the plaintiff's damages as a matter of law;[14] it is vulnerable to jury discretion.

Example 4.

Facts: In Foley v. City of West Allis,[15] the plaintiff was riding in the right front seat of a vehicle. The defendant's car made a sudden left turn and collided head-on with the vehicle in which the plaintiff was a passenger. The unbelted plaintiff was thrown into the dashboard and suffered knee and lower leg injuries.

Pleading: The defendant pleaded as follows:

> Now comes the defendant and for its first affirmative defense it alleges that any injury or damages that may have been sustained by the plaintiff were caused and contributed to as the direct and proximate result of her want of ordinary care for her own safety.

Trial: The defendant introduced the testimony of a local engineer who had conducted safety belt research and had worked for the National Safety Council. After examining the vehicle in which the plaintiff was riding and reconstructing the accident, the engineer testified that if the plaintiff had been using her safety belt, she would not have struck the dashboard.

Jury Charge: The jury received instructions similar to those in Example 3 above.

---

(14) "As a matter of law" means that the issue cannot go to the jury. The jury's role is limited to finding facts; once factual issues are resolved, the jury applies the law as instructed by the judge.

(15) No. 469-970, Circuit Court. Milwaukee County, Wisconsin. Judge Harold B. Jackson, Jr. (July 1981) (unpublished) (information obtained from telephone interviews with John U. Schmid, Jr., Milwaukee, Wisconsin, attorney for the defendant).

Jury Verdict: The jury assessed the plaintiff's damages at $10,000, but found her seventy percent at fault for failing to wear her safety belt.

Judgment: Under Wisconsin's "50-50" comparative negligence system,(16) the plaintiff was barred from receiving any damages. An appeal is pending.(17)

Current Status of the Safety Belt Defense

These four examples illustrate how the safety belt defense is used at trial. The prevalence of its use is difficult to ascertain because state trial court decisions are rarely published. Although it seems certain, based on attorney interviews, that the safety belt defense is widely used in those jurisdictions which have appellate decisions endorsing its use, and that it is rarely if ever used in those jurisdictions where appellate courts or legislatures have rejected it, a large number of jurisdictions belong to neither category. In these states, when the defendant raises the safety belt defense, the plaintiff usually will contest its admissibility. The trial court can strike it from the defense pleading, if required therein, or refuse to permit the introduction of safety belt evidence. Alternatively, at its discretion, the trial court can permit the defendant to attempt to prove the safety belt defense. If the trial court's decision is not appealed, there will be no published record. Therefore it is important to understand that although

---

(16) Under a "50-50" comparative negligence system, the plaintiff cannot recover if his/her negligence exceeds that of the defendant. See Infra Appendix C.

(17) The trial court decision was affirmed by the Wisconsin Court of Appeals. 109 Wis.2d 685, 325 N.W.2d 737 (Wis. Ct. App. Sept. 27, 1982) (unpublished limited precedent opinion) (available on LEXIS, Wisconsin library). The Supreme Court of Wisconsin has agreed to review the case (No. 81-1747) to determine whether pure comparative negligence principles, see Infra Appendix C, should govern "passive" negligence, such as negligence in failing to use a safety belt. The case will be heard in the fall of 1983.

a given state has no published appellate decisions construing the propriety of the safety belt defense, this does not imply by any means that the defense has never been raised at a trial in that state. Rather, it indicates that although defense attorneys may have attempted to use it at many trials, sometimes successfully, none of these trials has gone to judgment and been appealed.(18) The lesson to be learned is that published appellate opinions do not necessarily reflect fully what the state of the law is at the trial level.

With this caveat, Appendix A sets out a complete and detailed summary of the current status of the safety belt defense in motor vehicle personal injury litigation. The most striking conclusion is that the state of the law is unsettled in so many states. This is somewhat surprising because defense attorneys have been raising the safety belt defense since at least 1964.(19) This might be explained by the fact that the states with no published opinions on point(20) are the least heavily populated, and because some "no-fault" vehicle insurance schemes forbid lawsuits unless the victim's personal injuries exceed a specified threshold. A number of other states, although having appellate cases concerning the safety belt defense, have dealt with it only tangentially or have reached contradictory or uncertain results. Overall, the

---

(18) A very large percentage of cases are settled after the commencement of trial, i.e., after evidentiary rulings on the safety belt defense have been made, but before final judgment. See also infra p. 35. There will be no published record of such a case or its final disposition.

(19) The first known use of the safety belt defense was in Stockinger v. Dunisch, No. 981, Circuit Court. Sheboygan County, Wisconsin. Judge F.H. Schlichting (October 9, 1964) (unpublished) (reported at 5 For The Defense 79 (1964) and 7 For The Defense No. 6 (June 1966)), where the jury reduced the plaintiff's damages by ten percent for her failure to use the available safety belt.

(20) A case is said to be "on point" with regard to a specified issue when it reaches a definite holding with regard to that issue.

status of the safety belt defense is unsettled in twenty-two states.[21]

Of the twenty-four jurisdictions which have rejected the safety belt defense in personal injury lawsuits, seven have spoken through an intermediate appellate court[22] while the highest state appellate court has remained uncommitted. There has been no indication that the twelve state high courts[23] and five state legislatures[24] which have refused to allow the safety belt defense will reverse their stance. Nonetheless, it would be an exaggeration to say that each of these twenty-four jurisdictions has rejected every possible variation of the defense.[25] The bottom line is that there remains much law to be made by the able defense attorney.

Appellate courts which have rejected the safety belt defense have used a variety of arguments. In order of frequency these arguments include:[26]

---

(21) Alaska, Arkansas, Connecticut, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, West Virginia and Wyoming. See infra Appendix A.

(22) Arizona. Delaware, Florida, Michigan. Missouri, New Mexico and Ohio. See infra Appendix A.

(23) Alabama. Colorado. District of Columbia. Idaho, Indiana, Kansas, Montana, North Carolina, Oklahoma, Oregon, Texas and Washington. See infra Appendix A.

(24) Iowa, Maine, Minnesota, Tennessee and Virginia. See infra Appendix A.

(25) A number of courts have rejected one or more, but not all, of the following approaches to the safety belt defense: safety belt non-use as contributory negligence (see infra note 27) barring recovery; mitigating the plaintiff's damages (see infra note 28) because of safety belt non-use; and safety belt non-use as evidence of comparative negligence (see infra note 99). In addition, every appellate court has rejected the argument that safety belt non-use, in light of statutes mandating safety belt installation but not use, is negligence per se (see infra pp. 24-25). See infra Appendix A and accompanying notes for examples.

(26) See infra Appendix A and accompanying notes for examples of each.

1. Doctrine. The safety belt defense does not conform readily with the traditional tort doctrines of contributory negligence,[27] avoidable consequences[28] or assumption of risk,[29] and it violates the notion that the defendant "takes the plaintiff as he finds him."[30]

2. No Duty. Closely related to doctrinal objections is the argument that there can be no negligence unless the plaintiff has violated a statutory or common law duty. Most courts have held that there is not a common law duty to use an available safety belt, and that a statutory duty cannot be

---

(27) Contributory negligence is negligent conduct by the plaintiff concurring with the defendant's negligence to cause the plaintiff's injuries. Under the common law, contributory negligence is a total bar to recovery. Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). Most courts have argued that this harsh result cannot flow from the plaintiff's failure to use an available safety belt because such failure was not a concurring cause of the accident. Comparative negligence has replaced contributory negligence in most states. See infra note 99 and Appendix C.

(28) The doctrine of avoidable consequences (also called mitigation of damages) imposes a duty on the injured plaintiff to exercise reasonable diligence and ordinary care to minimize his/her damages after the defendant has injured him/her. See City of Duncan v. Nicholson, 118 Okla. 275, 247 P. 979 (1926) (plaintiff barred from recovering for those injuries which he could have prevented by seeking medical aid shortly after the accident). Most courts have held that this doctrine applies only to post-accident conduct, whereas the failure to buckle up occurs before the accident. The sole exception is New York, where the safety belt defense initially was permitted under the rubric of this doctrine. See infra Appendix A, note 21. See also Recent Development, Spier v. Barker, 3 Hofstra L. Rev. 883 (1975).

(29) Under the doctrine of assumption of risk, the plaintiff cannot recover if he/she voluntarily, with knowledge and appreciation of the risk, exposes himself/herself to a dangerous condition which subsequently causes or contributes to his/her injury. The defendant cannot prevail under this doctrine because in order to appreciate the risk of safety belt non-use, it is argued, the plaintiff must anticipate another's (the defendant's) negligence in causing an accident. Such anticipation is not required under the common law; one is entitled to assume the due care of others. This doctrine is in general disfavor because of its harshness and has been abolished in many states.

(30) The notion that the defendant "takes the plaintiff as he finds him" means that once the defendant's liability is resolved, he/she must pay all of the specific plaintiff's damages. In other words, if the defendant is liable for disabling a high wage earner he/she will have to pay more damages, ceteris paribus, than if he/she is liable for disabling an unemployed person.

inferred from the existence of statutes requiring the installation, but not use, of safety belts.

3. Matter for the Legislature. To penalize the plaintiff for not buckling up, it is said, is a matter of public policy properly reserved for legislative bodies.

4. Efficacy of Safety Belts. Many courts have questioned the utility of safety belts as true safety devices. It is argued that in some instances safety belts may inflict more harm than they prevent. A popular concern is the possibility of being trapped in a burning or submerged vehicle.

5. Common Practice. Courts have noted that the vast majority of vehicle occupants do not use available safety belts.

6. Majority Rule. After an early trend of inadmissibility developed, some courts chose simply to align themselves with what was perceived to be a majority rule of rejecting the safety belt defense.

7. Practicality and Trial Administration. The practical implications of allowing the safety belt defense have given courts pause. It is argued that the defense would unduly increase the length and expense of trials, as a battle of experts is likely to ensue. In addition, submitting the safety belt defense to the jury would encourage rampant speculation as to what might have happened. Finally, courts have pondered whether allowance of safety belt evidence would imply that every conceivable safety device (head rest, helmet, etc.) must be used.

8. Fairness. Courts have argued that it would be unfair to reduce the innocent plaintiff's damages because he/she did not use an available safety belt. The negligent defendant would receive an undeserved windfall because he/she fortuitously injured an unbuckled plaintiff.

9. Invidious Distinction. Some courts have thought that the safety belt defense would create an invidious distinction between vehicle occupants because the possibility of a reduction in damages exists only when the vehicle is equipped with safety belts, and not all vehicles are required to have safety belts.

In only five states is the safety belt defense clearly permitted in a motor vehicle personal injury lawsuit: California, Illinois, New York, South Carolina and Wisconsin. In each of these states the safety belt defense is limited to the jury's consideration of damages,(31) and it cannot come into play until the plaintiff has established that the defendant is liable to him/her for damages. The New York Court of Appeals stated well this rule in Spier v. Barker:(32)

> We today hold that nonuse of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider, in light of all the other facts received in evidence. In arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain . . . However, as the trial court observed in its charge, the plaintiff's nonuse of an available seat belt should be strictly limited to the jury's determination of the plaintiff's damages and should not be considered by the triers of fact in resolving the issue of liability. Moreover, the burden of pleading and proving that nonuse thereof by the plaintiff resulted in increasing the extent of his injuries and damages, rests upon the defendant. That is to say. the issue should not be submitted to the jury unless

---

(31) But see Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982), infra Example 9 and Appendix A, note 21.

(32) 35 N.Y.2d 444, 449-50, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974). The New York Court of Appeals is New York's highest state court.

> the defendant can demonstrate, by competent evidence. a causal relationship between the plaintiff's nonuse of an available seat belt and the injuries and damages sustained.

As a practical matter, however. restricting the use of the safety belt defense to the issue of damages begins to merge into liability when a jury concludes that safety belt non-use caused all of the plaintiff's injuries.(33) And in a state, such as South Carolina or Wisconsin, which allows the safety belt defense under a "50-50" comparative negligence regime,(34) a jury finding that the plaintiff's non-use of an available safety belt amounted to more than one-half of the total fault causing his/her injuries will bar all recovery.

The Impact of Use Statutes

In contrast to installation statutes,(35) safety belt use statutes are of potentially pervasive importance to the safety belt defense. A safety statute represents a legislative decree of a standard of conduct to which all persons must comport their behavior; it establishes a duty to behave in a specified manner. Violation of a safety statute is negligence per se.(36) In such a

---

(33) These cases are difficult to uncover because state trial court decisions ordinarily are not published, but they do exist. See Tome v. Buitrago, 75 A.D.2d 521, 426 N.Y.S.2d 1008 (1980) (upholding jury's one hundred percent reduction in plaintiff's damages because of safety belt non-use). See also Uribe v. Armstrong Rubber & Tire Co., 55 A.D.2d 869, 390 N.Y.S.2d 419 (1977) (affirming eighty-five percent reduction in plaintiff's damages, from $150,000 to $22,500, because of safety belt non-use).

(34) See supra note 16 and Example 4.

(35) See supra pp. 21-22.

(36) Restatement (Second) of Torts §285(a) and §469 (1965); W. Prosser, The Law of Torts §36 (4th ed. 1971) (noting some limitations on the doctrine). See Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920) (J. Cardozo). A very few courts hold that a statutory violation is never more than evidence of negligence which goes to the jury. See W. Prosser, The Law of Torts §36 (4th ed. 1971).

case, in order to prevail the plaintiff (or defendant) need show only the existence of a valid statute, that the defendant (or plaintiff) violated it and that such violation resulted in the harm complained of; the question of negligence is not an issue for the jury. A safety belt use statute would eradicate the courts' three strongest objections to the safety belt defense: Doctrine, because the doctrine of negligence per se would apply; No Duty. because a statutory duty to buckle up would exist; and Matter for the Legislature, because the legislature would have approved by inference the safety belt defense.(37)

There are no general mandatory safety belt use statutes in the United States,(38) although at least twenty-nine foreign nations have such laws.(39) However, there are existing state laws which require particular classes of vehicle drivers or occupants to use a safety belt or similar restraint system. These safety belt and child passenger restraint use statutes are set out in Appendix B.

---

(37) See supra pp. 21-22.

(38) The city of Brooklyn, Ohio enacted a mandatory safety belt use ordinance in 1966 which is still in effect (Codified Ordinances of the City of Brooklyn §37.25). Werber, A Multi-Disciplinary Approach to Seat Belt Issues, 29 Cleve. St. L. Rev. 217, 239 n.103 (1980). However, even if an appropriate case were to arise in this city, the safety belt defense would be confronted with unfavorable Ohio precedent. See infra Appendix A.

Puerto Rico has had since 1974 a mandatory safety belt use law encompassing all vehicle occupants. P.R. Laws Ann. tit. 9, §1212 (1976). See Canales Velazquez v. Rosario Quiles. 107 P.R. Dec. 757 (1978).

As of this writing, a proposed bill (S. 227a) requiring safety belt use by all persons over age three has passed the Rhode Island Senate and is pending in the House of Representatives.

(39) Australia, Austria, Belgium, Bulgaria, the Canadian provinces of British Columbia, Ontario, Quebec and Saskatchewan, Czechoslovakia, Denmark, England, Finland, France. Greece. Hungary. Iceland, Israel. Japan. Luxembourg, Malawi, Malaysia, Netherlands, New Zealand, Norway, Portugal, South Africa, Soviet Union, Spain, Sweden. Switzerland, West Germany and Yugoslavia. American Seat Belt Council (ASBC), International Seat Belt and Child Restraint Use Laws (1981) (supplemented with telephone conversation with Michael R.

Thirty-four jurisdictions currently have child passenger restraint use laws,[40] and it is anticipated that more states will follow.[41] Eight states have statutes requiring school bus drivers[42] (and in one instance, school bus passengers[43]) to use safety belts. Use of safety belts is mandated for driver training vehicle occupants,[44] firefighting vehicle occupants[45] and "public service" vehicle drivers,[46] in one state each. At the federal level, a Bureau of Motor Carrier Safety (BMCS) regulation requires that drivers of motor vehicles used in interstate commerce use available safety belts.[47]

For a variety of reasons these statutes have not bolstered the acceptance or use of the safety belt defense. At least twenty-five of the thirty-four jurisdictions with child passenger restraint use laws include statutory provisions that violations are not to be considered as evidence of

---

Cloney, ASBC Secretary); Legislative Note, Seat Belt Legislation: An End to Cruel and Unusual Punishment, 42 Sask. L. Rev. 105, 105 (1977).

(40) As of April 29, 1983: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia and Wisconsin. See infra Appendix B.

(41) Child passenger restraint legislation is pending in an additional fourteen states, according to Marian T. Tomassoni, Program Analyst, Traffic Safety Programs, NHTSA.

(42) Alabama, Illinois, Maine, Massachusetts, Minnesota, New York, Oklahoma and Virginia. See infra Appendix B.

(43) Maine. However, there is no statutory requirement that passenger safety belts be installed in school buses. See infra Appendix B.

(44) California. See infra Appendix B.

(45) California. See infra Appendix B.

(46) Rhode Island. See infra Appendix B.

(47) 49 C.F.R. §392.16 (1982). BMCS is an agency of the Federal Highway Administration, which in turn is part of the Department of Transportation.

negligence. or that non-use is inadmissible in all civil actions, or both.[48] Another refuses to recognize a child's tort action against his/her parents for negligent supervision.[49] Most of the child passenger restraint use statutes, in addition, are inapplicable in some contexts.[50] These limitations mean that defense attorneys wishing to raise the safety belt defense receive little aid from state child passenger restraint use laws.

The safety belt use statutes covering school bus drivers, driver training vehicle occupants, firefighting vehicle occupants and "public service" vehicle drivers have not been eviscerated with similar limitations, but they comprise an extremely small number of the nation's motor vehicle occupants. Finally, there has never been a BMCS enforcement proceeding brought against an unbuckled interstate trucker.[51]

---

(48) Five of the statutes were so recently enacted that the author of this paper has not been able to obtain copies in order to determine their specific provisions and limitations.

(49) Latta v. Siefke, 60 A.D.2d 991, 401 N.Y.S.2d 937 (1978). The effect of this holding is that an injured child, whose parents are suing on his/her behalf, cannot be penalized with a reduction in damages because of his/her parents' non-compliance with New York's child passenger restraint use statute. See infra Appendix B.

It seems likely that other states also will hesitate to penalize a child with reduced compensation because of his/her parents' violation, and that the future role of the safety belt defense as applied to child passenger restraint use laws will be limited to a reduction in those damages, if any, that are recoverable by the child's parents on their own behalf.

(50) Examples include nonresidents, vehicles operated for hire, and when the child's parents or guardian is "providing for the personal needs of the child."

(51) Telephone conversations with Neill L. Thomas, Chief, Development Branch, BMCS. According to Mr. Thomas, the practical constraint on enforcement of the BMCS safety belt regulation is that it is enforceable only by a criminal action brought by the Department of Justice against the motor carrier (the non-user's employer).

To date, these safety belt and child passenger restraint use statutes have played virtually no role in the safety belt defense. Use statutes enacted in the future, if covering a significant segment of the population and lacking similar constraints, can be expected to exert a positive influence on judicial recognition of the safety belt defense.(52)

The Safety Belt Defense in Product Liability and Crashworthiness Litigation

Motor vehicle manufacturers long have incurred liability for injuries resulting from accidents caused by negligence in the design or assembly of their vehicles.(53) The safety belt defense can be used in these "product liability" cases the same way it is used in other civil litigation. More recently, courts have imposed liability on vehicle manufacturers in "crashworthiness" (also called "second collision") lawsuits.(54) THe crashworthiness doctrine permits recovery from the manufacturer for injuries over and above those caused by an initial collision if such additional injuries are attributable to a defect in the vehicle design or fabrication.

The theory underlying the crashworthiness doctrine is that the manufacturer has a duty to design and build a vehicle which is reasonably safe

---

(52) Congress in 1981 removed one financial incentive for state level mandatory safety belt use legislation by amending 23 U.S.C. §402(j) to eliminate the Secretary of Transportation's authority to increase a state's highway safety funds by twenty-five percent of its highway-aid apportionment if the state has enacted a mandatory safety belt use statute. Pub. L. No. 97-35, §1107(d), 95 Stat. 626 (1981).

(53) See MacPherson v Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (J. Cardozo). MacPherson is "one of the few landmark cases in the history of our law," and has been accepted by every jurisdiction in the United States. C. Gregory, H. Kalven and R. Epstein, Cases and Materials on Torts 370 (3d ed. 1977).

(54) See generally Hoenig, Resolution of "Crashworthines" Design Claims, 55 St. John's L. Rev. 633 (1981); Foland, Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases, 16 Washburn L.J. 600 (1977).

for its intended use: The possibility of a vehicle being involved in an accident is a foreseeable "use" for which the vehicle must be reasonably safe. The claimant in this type of case does not allege that the defect caused the accident, only that it enhanced the resultant injuries. For example, if the plaintiff's vehicle collided head-on with another vehicle at high speed and the plaintiff was thrown from the vehicle because of a defective door lock, he/she could recover under this doctrine from his/her vehicle's manufacturer (and perhaps the seller) for those injuries he/she suffered as a result of the defective lock. He/she could not recover from the manufacturer for injuries sustained in the initial collision, although perhaps he/she could sue the driver of the vehicle with which he/she collided.

The crashworthiness doctrine traces to the seminal decision of Larsen v. General Motors Corp.,(55) and has been followed in at least thirty-four states.(56) The minority rule, as stated in Evans v. General

---

(55) 391 F.2d 495 (8th Cir. 1968).

(56) Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978); Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976) (District of Columbia law); Ford Motor Co. v. Evancho, 327 So.2d 201 (Fla. 1976); Friend v. General Motors Corp., 118 Ga. App. 763, 165 S.E.2d 734 (1968); Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976); Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974) (Illinois law); Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (Indiana law); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (Iowa law); Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971); Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (Kentucky law); Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974) (Louisiana law); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974); Smith v. Ariens Co., 375 Mass. 620, 377 N.E.2d 954 (1978); Rutherford v. Chrysler Motors Corp., 60 Mich. App. 392, 231 N.W.2d 413 (1975); Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir.), cert. denied, 426 U.S. 907 (1976) (Missouri law); Brandenburger v. Toyota Motor Sales, 162 Mont. 506, 513 P.2d 268 (1973); Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974); Huddell v. Levin. 395 F. Supp. 64 (D.N.J. 1975), vacated, 537 F.2d 726 (3d Cir. 1976); (New Jersey law); Bolm v. Triumph Corp., 41 A.D.2d 54, 341 N.Y.S.2d 846. aff'd, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973); Isaacson v. Toyota Motor Sales, 438 F. Supp. 1 (E.D.N.C. 1976) (North Carolina law); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); Anton v. Ford Motor Co., 400 F. Supp.

Motors Corp.,[57] holds to the contrary that a manufacturer owes no duty to build an "accident-proof" vehicle, and that the "intended purpose" of a vehicle does not include participation in accidents. The Evans viewpoint is adhered to in only two states,[58] and Evans itself has been overruled.[59] The thirty-four jurisdictions which recognize the crashworthiness doctrine constitute a large potential arena for expansion of the safety belt defense.

Although only five states have appellate precedent for introduction of the safety belt defense in personal injury litigation, there is a strong and growing trend to permit its use in crashworthiness cases. Safety belt evidence can be introduced in crashworthiness litigation for a number of purposes. It can be used in the same way and for the same purpose as in personal injury litigation, that is, the manufacturer can assert the safety belt defense for the purpose of reducing the plaintiff's recoverable damages attributable to his/her enhanced injuries from the vehicle defect.

1270 (S.D. Ohio 1975) (Ohio law); McMullen v. Volkswagen of America, 274 Or. 83, 545 P.2d 117 (1976); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969) (Pennsylvania law); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (Rhode Island law); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Engberg v. Ford Motor Co., 87 S.D. 196. 205 N.W.2d 104 (1973); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973); Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974); Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) (Virginia law); Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974); Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1975); Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978).

(57) 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966) (Indiana law).

(58) McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D.W. Va. 1971), aff'd, 472 F.2d 240 (4th Cir.), cert. denied, 412 U.S. 940 (1973) (West Virginia law); Walton v. Chrysler Motor Corp., 229 So.2d 568 (Miss. 1969).

(59) Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (Indiana law).

Example 5.

In Calazzo v. Volkswagenwerk, A.G.,(60) the plaintiffs were the driver and passenger of a van struck in the rear by another vehicle traveling at high speed. The collision caused the van to turn over and the plaintiffs were ejected. The plaintiffs sued the van's manufacturer, alleging that a defective door latch assembly resulted in their ejection and their ejection-related enhanced injuries. The plaintiffs' expert testified that they would not have been ejected but for the defective door latch. The defendant's expert testified, and the plaintiffs' expert conceded, that the plaintiffs would not have been ejected had they been using their available safety belts. The jury found that the plaintiffs were entitled to a total of $950,000 in damages, of which $650,000 was due to the negligence of the driver (a co-defendant) of the vehicle which rear-ended the plaintiffs' van. The jury reduced the plaintiffs' damages by twenty-five percent, to $712,500, because of their failure to use their safety belts.(61)

Evidence of safety belt availability and non-use has been held admissible to show the presence of a compensating safety device and the non-defectiveness of the vehicle as a unified whole.(62) This seems to be a particularly

---

(60) 468 F. Supp. 593 (E.D.N.Y. 1979), aff'd with respect to the safety belt issue and rev'd in part, 647 F.2d 241 (2d Cir. 1981) (New York law).

(61) See also Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1373 (E.D. Va. 1978) (Virginia law) (evidence of safety belt non-use admissible for purpose of mitigation of damages in crashworthiness case); Breault v. Ford Motor Co., 364 Mass. 352, 305 N.E.2d 824 (1973) (leaning toward admissibility if causal connection established). But see Vizzini v. Ford Motor Co., 72 F.R.D. 132 (E.D. Pa. 1976) (Pennsylvania law) (inadmissible); Seese v. Volkswagenwerk, A.G., 648 F.2d 833 (3rd Cir. 1981) (North Carolina law) (same); Daly v. General Motors Corp., 20 Cal. 3d 725, 745, 575 P.2d 1162, 1174, 144 Cal. Rptr. 380, 392 (1978) (same).

(62) See Daly v. General Motors Corp., 20 Cal. 3d 725, 746, 575 P.2d

appropriate use of safety belt evidence because the plaintiff is challenging the overall integrity of the vehicle, and the safety belt is an essential part of the total safety environment provided by the manufacturer. To hold otherwise would create the illogical situation where the manufacturer can be held liable for providing a defective safety belt, as in the case where the plaintiff recovered from the manufacturer for injuries sustained when her safety belt broke during a ninety mile per hour collision,(63) but, in other situations, the manufacturer cannot attempt to exonerate itself with evidence that it provided working safety belts.

Evidence of safety belt non-use has been held admissible for the purposes of showing that by not wearing the available safety belt, the plaintiff "misused" the product (the vehicle) and assumed the risk of injury from non-use.(64) Finally, a manufacturer has been permitted to attempt to prove that non-use of the available safety belt, and not the vehicle defect. was the proximate cause of the plaintiff's injuries.(65)

1162, 1174-75, 144 Cal. Rptr. 380, 392-93 (1978); Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368, 1371 (E.D. Va. 1978) (Virginia law); Binion v. General Motors, Inc., No. 80-1998, slip op. (5th Cir. April 8, 1981) (per curiam) (Texas law); McElroy v. Allstate Ins. Co., 420 So.2d 214 (La. Ct. App. 1982).

(63) Austin v. Ford Motor Co., 86 Wis. 2d 628, 273 N.W.2d 233 (1979). See also Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) (upholding $650,000 verdict for deaths caused by defective safety belts).

(64) See Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978); Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (Nebraska law); General Motors Corp. v. Walden, 406 F.2d 606 (10th Cir. 1969) (Arizona law). But see Daly v. General Motors Corp., 20 Cal. 3d 725, 745, 575 P.2d 1162, 1174, 144 Cal. Rptr. 380, 392 (1978).

(65) Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981) (New Jersey law).

Thus, the law of at least nine states has been held to be consistent with the safety belt defense in crashworthiness cases.(66) Three of these nine states have rejected the safety belt defense in personal injury litigation.(67) Of the five states with appellate support for the safety belt defense in personal injury litigation, only one has rejected it in crashworthiness cases, and this rejection is not total.(68) In addition, defense counsel in Massachusetts, Michigan and Washington indicated that despite the absence of appellate precedent in their states, they have succeeded in introducing safety belt evidence in crashworthiness cases. It seems likely that in the future more jurisdictions will permit the safety belt defense in crashworthiness litigation because, as one commentator observed, this presents "the single most compelling area for [its] recognition...."(69)

The potential impact of the safety belt defense in product liability and crashworthiness litigation is enormous. Multimillion dollar judgments abound in these cases, and a mere ten or twenty percent reduction in damages can be worth hundreds of thousands of dollars. For example, in the case of Hall v. General Motors Corp.,(70) the plaintiff recovered $4,750,000 in damages for quadriplegia suffered when his five-month-old car veered unexpectedly across the road and struck a tree. In Dorsey v. Honda Motor Co.,(71) the driver

---

(66) Arizona, California, Colorado, Louisiana, Nebraska, New Jersey, New York, Texas and Virginia (but see Infra Appendix A, note 27). See supra notes 60, 61, 62, 64 and 65.

(67) Arizona, Colorado and Texas. See Infra Appendix A.

(68) California. See supra notes 61, 62 and 64.

(69) Werber, A Multi-Disciplinary Approach to Seat Belt Issues, 29 Clev. St. L. Rev. 217, 250 (1980).

(70) 647 F.2d 175 (D.C. Cir. 1980).

(71) 655 F.2d 650 (5th Cir. 1981).

and his wife recovered a $5,825,000 judgment from their imported subcompact car's manufacturer for brain damage sustained in a head-on collision with a standard-sized car. In these and similar cases, appropriate use of the safety belt defense could reduce significantly a manufacturer's exposure to tort judgments and settlements.

III. THE SAFETY BELT DEFENSE IN PRACTICE

The vast majority of civil lawsuits are settled out-of-court. An estimated ninety to ninety-nine percent of all motor vehicle civil lawsuits are settled before final judgment (some are settled during the trial but prior to a jury verdict). Thus, it is obvious that a particular legal rule, such as the safety belt defense, can be of far broader significance than a survey of appellate and trial decisions would indicate. This section analyzes the role of the safety belt defense in out-of-court settlements. Because the role of the safety belt defense in negotiating an out-of-court settlement is inextricably related to the actual use of the defense at trial, this section also makes reference to trial practice and techniques.

Methodology

The first step in this portion of the study was to identify leading practitioners who specialize in motor vehicle civil litigation. Defense attorneys were identified with the aid of the Defense Research Institute (DRI) in Milwaukee, Wisconsin.(72) Plaintiffs' attorneys were identified with the help of the Association of Trial Lawyers of America (ATLA) in Washington, D.C.(73)

---

(72) Founded in 1960, DRI is closely aligned with the International Association of Insurance Counsel, the Federation of Insurance Counsel and the Association of Insurance Attorneys. DRI is the nation's largest association of defense attorneys. Current membership consists of more than 10,000 defense attorneys in civil practice and over 600 corporate members such as insurance companies and manufacturers. DRI is dedicated to the purpose of increasing the "professional skill...and knowledge of the [tort] defense lawyer."

(73) ATLA's 50,000 members make it the largest organization of plaintiffs' counsel in the United States. ATLA's professional predilection is spelled out in its credo. which provides in part: "[E]specially to advance the cause of those who are damaged in person or property and who must seek redress therefore."

After initial contacts were made, the most important source of further leads was "networking" -- each attorney who was contacted invariably suggested several others.

Attorneys were chosen from states that represent all positions on the safety belt defense. Attorneys were identified from one state which has statutorily barred the defense.(74) Next come the states which have rejected the safety belt defense by appellate decision. Attorneys were selected from five states in this category.(75) Attorneys were identified in all five states which apparently have endorsed use of the safety belt defense.(76) Finally, attorneys were chosen from five states where the status of the defense is unsettled.(77)

A total of forty-four attorneys (and two judges) from sixteen states were selected.(78) Each was interviewed by telephone in January and February of 1983 in conversations ranging in length from ten minutes to more than an hour. Some attorneys were contacted several times. The defense attorneys generally were partners at leading defense firms in their cities, with an exclusive or substantial insurance company and motor vehicle manufacturer client pool. The plaintiffs' attorneys were about equally divided between solo and firm

---

(74) Minnesota. See Infra Appendix A.

(75) Arizona, Indiana, Michigan, Texas and Washington. See Infra Appendix A.

(76) California, Illinois, New York, South Carolina and Wisconsin. See Infra Appendix A.

(77) Connecticut, Georgia, Massachusetts, New Hampshire and New Jersey. See Infra Appendix A.

(78) Because a number of attorneys requested anonymity, and to prevent the potentially embarrassing attribution of quotations to particular attorneys, no attorneys will be identified by name in this paper. Anyone desiring futher information should contact the author of this paper.

practice. Each attorney devotes or did devote all or a substantial portion of his/her professional practice to motor vehicle civil litigation. Average experience of all attorneys interviewed was twenty-three years, with a range of four to fifty-three years.

This sample does not comprise a scientifically chosen random sample. The approach was more in the nature of a focus group interview, albeit individually conducted. The results reported below represent the consensus impressions which emerged after dozens of interviews covering several weeks. When inconsistencies or contradictions appeared, attorneys were contacted again and the issue was pursued until the vagaries were resolved. Of course, this was not always possible given the geographical and professional breadth of the sample. Nonetheless, care was taken to avoid reporting personal biases and misbeliefs which lack a reasonable basis in broader experience.

General Observations

In the first instance, it is clear that the role of the safety belt defense in out-of-court settlements derives from the ultimate availability of the defense at trial. In negotiations, the defense attorney can use the safety belt defense to reduce the plaintiff's demands only if there is a credible threat of its use at trial. Thus, in Minnesota and other states which have statutorily barred the safety belt defense, defense counsel usually find it an impotent tool.(79) Similarly, in a case where it is clear that the plaintiff's non-use was not a factor in the injuries he/she received -- for example, when

---

(79) Although even in these states, defense attorneys stated that the plaintiff's safety belt non-use can be of "psychological" importance when settling. Furthermore, counsel from Minnesota reported that questions as to the constitutionality of the Minnesota statute as applied to crashworthiness cases had allowed safety belt non-use to be a factor reducing the plaintiff's demands in such a case.

the plaintiff was severely burned in the fire which ensued after her stopped car was rear-ended by the defendant's car -- the defense attorney will gain nothing if he/she attempts to raise the safety belt defense during negotiations. In cases where it appears that safety belt non-use may have enhanced or caused the plaintiff's injuries, but both parties realize that the defense attorney will not attempt to prove the safety belt defense at trial because to do so would not be cost-effective, the safety belt defense is likely not to be a factor in settlement. For example, defense counsel in New York reported instances where the plaintiff sought relatively small damages, or the incremental increase in injury severity from safety belt non-use appeared so small, that it would cost more at trial to prove the safety belt defense than would be saved. Therefore, even though the safety belt defense is permissible in New York, it sometimes can be cheaper to settle than to litigate.(80)

In those jurisdictions which have appellate decisions disfavoring the safety belt defense, it is likely to be of limited importance when settling. Defense attorneys in these states noted two exceptions. If the particular factual pattern of the case and expected trial use of the safety belt defense can be distinguished from existing state precedent, safety belt non-use can be a factor in reducing the amount of disposition. An example is the defense attorney in Indiana who claimed to have successfully invoked the safety belt defense in negotiation of a case which appeared likely to fit within the favorable dictum of Kavanagh v. Butorac.(81) Second, even in these states, defense counsel believe that the plaintiff's safety belt non-use is an

---

(80) See infra Example 9.

(81) See infra Appendix A, note 9.

intangible psychological factor which concerns plaintiffs' attorneys, and tends to reduce demands.

The greatest potential for using the safety belt defense as a negotiating tool is in those states which have judicially endorsed its use at trial. Two overall exceptions to this must be mentioned. The first is that regardless of a state's appellate position regarding the safety belt defense in personal injury lawsuits, defense counsel are likely to be more successful in reducing settlement amounts in crashworthiness cases than in personal injury cases. This is because more jurisdictions permit the safety belt defense in crashworthiness cases than in personal injury cases and, because the damages sought usually are much higher, there is more latitude for negotiation and a greater likelihood that the defendant will find it cost-effective to attempt to prove the safety belt defense at trial. This exception holds true even in states, such as Michigan and Washington, where there is no judicial precedent for use of the safety belt defense in a crashworthiness case and there has been an explicit rejection of its use in personal injury cases.(82)

The second exception is that a lack of bargaining power, due to either attorney inexperience or incompetence, can override the force of the safety belt argument in a given state. This means that in a state where there is limited precedent, or even negative precedent, for the use of the safety belt defense, experienced counsel can forcefully bring the issue to bear on a plaintiffs' attorney who does not know the law, or is unable to evaluate realistically the implications of using the safety belt defense at trial. and thereby extract a concession otherwise unobtainable from a veteran attorney. One defense attorney reported, almost proudly, that he once brought a

---

(82) See supra pp. 28-34 and Infra Appendix A, notes 16 and 28.

plaintiff's demands down by one-half by threatening to use the safety belt defense at trial, when in fact the state's highest appellate court recently had disposed of such possibility. The flip side is represented by the inexperienced attorney who knew of the possibility of its use, but refused to acknowledge that it could cost his client anything. This plaintiff's attorney foolishly forced the case to trial. his adversary reported, and received less after the jury knocked off forty percent for safety belt non-use than he could have received in a settlement.

Not surprisingly, the role of the safety belt defense in out-of-court settlements turned out to be strongest in those five jurisdictions -- California, Illinois, New York, South Carolina and Wisconsin -- which have appellate precedent for its use at trial. An examination of its role in out-of-court settlements must begin with an appreciation of its use at trial in these states from both the defendant's and plaintiff's perspective. Although it would appear from the published decisions that the safety belt defense is on relatively equal footing in each of these states, differences in its actual use at trial quickly emerged during attorney interviews.

Defense Strategies

It appears that the safety belt defense is most widely used in New York, Wisconsin and California, and much less so in Illinois and South Carolina. Defense attorneys in the former three states have developed a sophisticated procedure for raising and profiting from the safety belt defense.

The process begins with the defense pleading. New York defense attorneys reported that it is pleaded as an affirmative defense as a matter of course in every motor vehicle civil lawsuit. One leading defense firm on Long Island goes so far as to plead it in every one of the approximately five hundred such

cases it handles each year, even if at the time of pleading it is unknown whether the plaintiff was using an available safety belt or whether any non-use contributed to the severity of his/her injuries. In California and Wisconsin, on the other hand, the safety belt defense need not be pleaded affirmatively, and the defense attorney will not raise it until and unless he/she learns of its applicability to the facts of the particular case.

The next step, during pre-trial and discovery procedures,(83) is routinely to determine whether a safety belt was available and, if so, whether it was used at the time of accident. Although the plaintiff's favorable admission to these inquiries is desirable, it is not critical. Defense attorneys reported that the science of accident reconstruction has advanced to the point where the plaintiff's lie to these questions frequently can be exposed. This is less of a problem in Wisconsin because, unlike in New York, police reports usually indicate whether safety belts were available and used. The degree of diligence concerning safety belts exercised by the defense attorney during this pre-trial phase depends on the type of accident and the injuries sustained. In a case where the plaintiff was thrown through the windshield or ejected from the vehicle, safety belt non-use usually can be inferred, and the defense attorney finds it well worth his/her while to confirm this fact and preserve evidence thereof. In contrast, if the plaintiff suffered a soft tissue injury (such as a whiplash), or is seeking recovery for

---

(83) Discovery refers to pre-trial devices that are used by one party to obtain facts and information about the case from the other party in order to assist preparation for trial. The Federal and all state Rules of Civil Procedure provide for some degree of discovery. Examples of discovery devices (which not all states provide for) are written and oral depositions, written interrogatories, production of documents or things, permission to examine property, physical and mental examinations and requests for admissions. The Federal Rules of Civil Procedure discovery provisions (Fed. R. Civ. P. 26-37) are said to embody a spirit of "full disclosure" by permitting extensive discovery.

minor injuries caused by contact with the vehicle's interior, the defense counsel might decide not to pursue actively the safety belt issue.

If it still appears that the safety belt defense will be raised at trial, the defense attorney will attempt during jury selection to identify and select jurors who are likely to believe the safety belt testimony and vote for a reduction in damages. If the trial judge allows this type of inquiry during voir dire,(84) it can be crucial to the defense attorney: Nothing could be a more total defeat than to go to all the trouble and expense of pleading the defense, introducing safety belt evidence and expert testimony, getting an appropriate jury charge and then sitting helplessly while the jury eschews a damages reduction. The goal here is to select jurors who usually use their safety belts, but since this will be unattainable (because the plaintiff's attorney is seeking exactly the opposite), it is acceptable if each juror has, or says he/she will have. an open mind on the issue.

The next step is to present proof at trial. In New York, the expert testimony of both an engineer (or accident reconstructionist) and a physician, or a person trained in both fields, is required. The engineer testifies as to the plaintiff's movements during the accident and the movements he/she would have made had he/she been using a safety belt. The physician then testifies as to the medical consequences of the engineer's testimony. In California, the testimony of an engineer is not needed if the plaintiff was ejected; medical testimony as to the consequences of this ejection will suffice. In Wisconsin. medical testimony is not needed if engineering testimony establishes that a particular movement, such as contact with the dashboard or ejection from the vehicle, would have been prevented by

---

(84) Voir dire refers to the pre-trial questioning and challenging of potential jurors.

CHART 38A.

LIQUID AND GAS PIPELINE LEAKS/FAILURES, 1972 - 1982

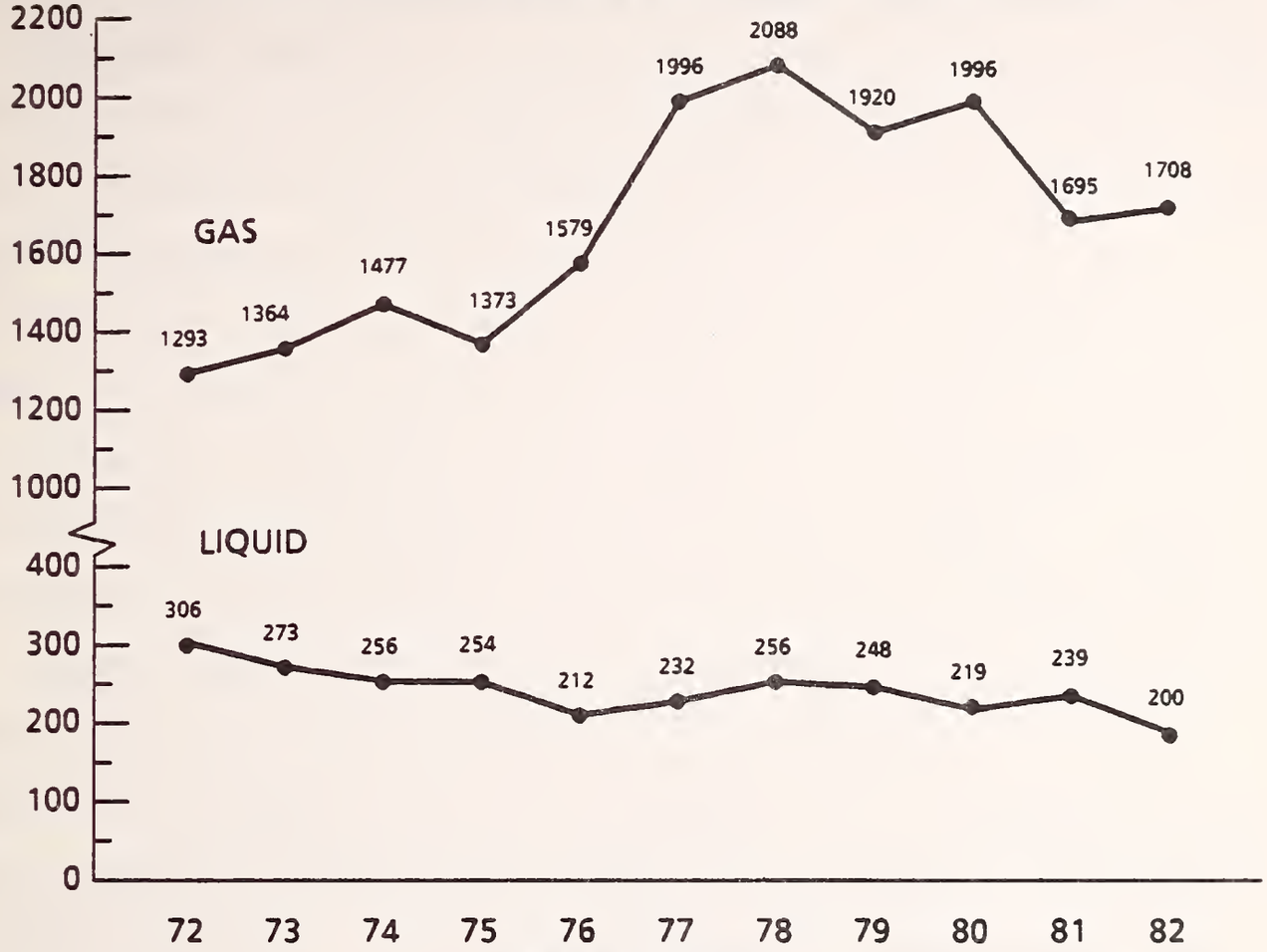
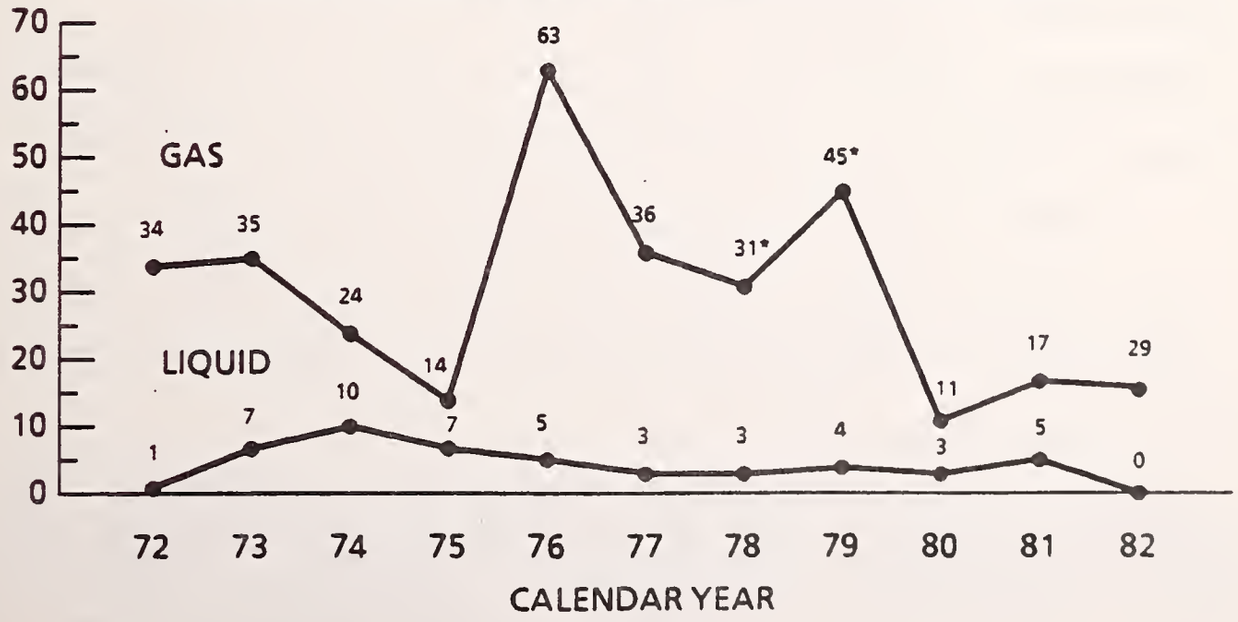


CHART 38B.

LIQUID AND GAS PIPELINE FATALITIES, 1972 - 1982



* Includes preliminary notification of Pipeline leaks via telephonic reports.

SOURCE: Liquid Pipeline: DOT F7000-1 Pipeline carrier accident report.
Gas Pipeline: DOT F7100.1, F7100.2 and telephone reports.
RSPA, DMT-63.

the safety belt. All of the plaintiff's injuries are presumed to have been caused by non-use, and the plaintiff has the burden of demonstrating otherwise.

This expert testimony is the key link in proving the safety belt defense, and its cost and availability usually will determine whether the defense counsel attempts to perfect the safety belt defense in a particular case. Most defense attorneys agreed that the cost of these experts is commensurate with the cost of other experts. A typical fee is sixty-five to eighty-five dollars an hour, plus expenses. Thus, in a case requiring twenty hours of preparation and two days of trial attendance and testimony by each of two experts, the cost would be roughly $5,400 plus expenses.(85) The defense attorney will abandon the safety belt defense if he/she does not expect to save at least this much.

In some respects expert availability seems to be more of a problem. Professional experts who have made trial testimony a career are as much a problem with the safety belt defense as elsewhere. New York defense attorneys seem to believe that there are only a few credible experts with outstanding "national" reputations. New York attorneys reported dissatisfaction with local college professors because they are inexperienced and do not project well to a jury. On the other hand, California defense attorneys claim good success in using engineering and biomechanics professors (some retired) from Stanford, U.C.L.A. and U.S.C. Vehicle manufacturers frequently retain "captive" experts who testify in defense of many of the particular manufacturer's product liability and crashworthiness suits. With regard to medical testimony. the problem is that the sympathies of the best available expert -- the physician

---

(85) This assumes an average fee of seventy-five dollars an hour and eight hours per day of trial attendance and testimony. and does not include the cost of any increase in attorney time. The expenses can be substantial if an expert is brought in from another part of the country. Expenses would include, at a minimum, transportation, housing and meals.

who treated the plaintiff -- tend to be adverse to the defendant's cause. If the plaintiff's doctor does testify, he/she is likely to claim that the safety belt effects a "trading" of injuries, i.e., that it prevents some injuries but inflicts others.

Regardless of the expert testimony that is presented, defense attorneys agreed that the force of the safety belt evidence can be bolstered with demonstrative evidence. Some defense attorneys reported using NHTSA films of simulated crashes to dramatize the general effectiveness of safety belts.

During closing arguments, defense counsel will emphasize that safety belts are provided for the safety of vehicle occupants, that they do no good unless used, and that the plaintiff's injuries could have been reduced or avoided if he/she had expended the minimal effort required to engage the available safety belt.

Jury instructions should describe the legal consequences of the safety belt evidence. The defense attorney usually is allowed suggestive input and will seek a favorable jury charge from the judge.(86)

Finally, special interrogatories can be useful in focusing the jury's attention on the safety belt non-use.(87) Of course, this specificity also requires the jury consciously to reduce the plaintiff's damages for non-use, and with due regard to the equities of a particular case. the defense attorney may conclude that this is undesirable. Special interrogatories regarding safety belt non-use generally are not used in Wisconsin.

Notwithstanding the legal admissibility of the safety belt defense in these states, there may be cases where it appears that the safety belt defense

---

(86) See supra Example 3 and jury charge in Spier v. Barker, supra pp. 23-24.

(87) See supra Examples 1 and 2.

could be proved, but the equities are so strongly against the defendant that it is unlikely a jury would reduce the plaintiff's damages. An example is the case in New York where the plaintiff was orphaned when the drunken defendant's vehicle killed the plaintiff's parents. The plaintiff's parents' deaths probably resulted from safety belt non-use, but the defense attorney concluded it would be futile and even counterproductive to push the point at trial.

In contrast to its widespread use in California, New York and Wisconsin. the safety belt defense seems to be of only academic interest in Illinois and South Carolina practice. This is puzzling, but perhaps is partially due to a small sample size of attorneys. Chicago defense attorneys reported they rarely defend cases with appropriate factual patterns; the safety belt defense has little application to low-speed accidents. It is possible that defense attorneys in rural southern Illinois, with a greater proportion of high speed traumatic accidents, have had more opportunity to use the defense. One attorney added that Illinois rules of evidence tend to favor eyewitness testimony over accident reconstruction experts. South Carolina defense attorneys reported only infrequent use of the safety belt defense because they believe that juries simply ignore it. One attorney theorized that the independent spirit of South Carolinians rebels at the notion of being told to buckle up. In addition, South Carolina judicial precedent is the weakest of the five states.

The Plaintiff's Response

Plaintiffs' attorneys employ a number of strategies to fight and diminish the impact of the safety belt defense. When the defendant pleads the safety belt defense, the plaintiff's attorney will move to strike it from the pleadings. Alternatively, he/she will make a motion in limine seeking to

prevent reference at trial to the availability or use of safety belts.(88) Assuming the trial is in one of the states permitting the safety belt defense, or one of the uncommitted jurisdictions and the trial judge at his/her discretion allows the defense attorney to proceed with the safety belt defense, these motions will fail.

During pre-trial and discovery, and at trial, the plaintiff's attorney will want to avoid damaging admissions by his/her client. Thus, it is the attorney's hope that the plaintiff was using his/her safety belt at the time of the accident, or at least that the plaintiff will claim he/she was. One New York plaintiffs' attorney claimed that ninety percent of his clients use their safety belts. When the unlikelihood of this, in light of national safety belt use statistics, was pointed out, he hedged: "Ninety percent of my clients say they used the seat belt.... They know the law; there's been a lot of publicity around here about reduced recoveries.... They know what to say. We don't encourage them to lie, but we point out implications." This message came across from several plaintiffs' attorneys, although others were less frank.

If the plaintiff admits not using the safety belt, or the defense can establish non-use regardless of the plaintiff's memory. the plaintiff's attorney will try at trial to excuse the non-use. Here enter arguments that the safety belt was not working, or that the plaintiff did not see the belt, or that it had slipped behind the seat. A related ploy is for the plaintiff's attorney to argue to the jury that although a working safety belt was available, in this particular instance, his/her client could not have been expected to use it. This strategem has succeeded in the cases of persons who were too obese to wear the safety belt; a woman who could not buckle up

---

(88) A motion in limine is a pre-trial motion for a protective order against prejudicial questions and statements.

because of a phobia against being constrained which stemmed from being trapped in an elevator as a child (psychiatric testimony was used); and pregnant women. In general, however, these arguments are only applicable under unusual circumstances.

Plaintiffs' attorneys reported that two particular strategies are by far the most effective. The first is the "counter-expert" (perhaps the plaintiff's physician), who will testify that had the plaintiff been using the safety belt. he/she would have sustained different injuries. One attorney told of bringing in a so-called expert in a head-on collision case who testified that if the plaintiff had been wearing his lap belt, he would have avoided banging his head on the windshield, but he would have "torn his guts out." Alternatively, safety "experts" usually can be found to testify that in general the safety belt is a mixed blessing. As medical and scientific evidence of the efficacy of safety belts has continued to increase, and with the advent of the lap/shoulder combination safety belt, the impact of this "counter-expert" technique appears to have faded somewhat. Plaintiffs' attorneys emphasized, however, that it is frequently worth a try. especially if some jurors harbor fears of entrapment in a burning or submerged vehicle.

The universally used and most effective rebuttal to the safety belt defense, according to plaintiffs' attorneys, is to introduce evidence of, and argue to the jury, the simple fact that the vast majority of Americans do not use their safety belts while in a motor vehicle. Notwithstanding the fact that as a matter of law, common practice is not conclusive as to what constitutes reasonable behavior, this argument apparently sways many jurors. It is especially ironic that plaintiffs' attorneys love to use NHTSA statistics which indicate an overall safety belt use rate of only ten to fifteen percent. One plaintiffs' attorney said he does not waste money on safety experts, he simply

gets in front of the jury and in effect says: "Ladies and gentlemen, official government statistics show that only about twelve percent of the American public wear their safety belts. My client merely failed to do what most everyone fails to do. How can anyone say this is 'unreasonable'?" Considering the strong likelihood that a majority of the jurors fail to buckle up, it is not surprising that this technique is sometimes successful.

The Settlement Process

The above description of plaintiffs' and defense attorneys' treatment at trial of the safety belt defense is the backdrop against which the out-of-court settlement process rests. As explained above, the safety belt defense plays no part in settling a lawsuit unless there is a credible threat of its use at trial; this section will concentrate on those states and situations where this threat exists.

Negotiating an out-of-court settlement is a complicated, dynamic process. A multitude of factors interact to determine the final case disposition. No single factor is conclusive, ordinarily, and in retrospect it frequently is not possible to isolate the impact of a single variable. In states which permit the safety belt defense at trial, its availability is not determinative when negotiating. The other factors which influence its role in out-of-court settlements are: the egregiousness of the defendant's behavior (was he/she drunk?); the damages sought; the amount of the defendant's insurance coverage (as a practical matter, few suits are brought against an individual defendant seeking damages in excess of the defendant's insurance coverage); the relative bargaining strength and experience of the attorneys; the presence or absence of a judge; the personalities of the parties; negotiation techniques; and, most importantly. the type and strength of the plaintiff's case.

Attorneys who were interviewed tended to provide only general insights into the role of the safety belt defense in out-of-court settlements. When pressed for details, some attorneys related specific examples. Attorneys from the three states where the safety belt defense is widely used at trial agreed that in an appropriate case the plaintiff's non-use of the available safety belt can be a significant factor in reducing the settlement amount. Its greatest influence is felt in a case where it has already been established that the plaintiff failed to use his/her safety belt, and it is clear that this non-use contributed to his/her injuries.

Example 6.

A Wisconsin defense attorney reported a case in which he defended the driver of an overtaking vehicle which struck the plaintiff's car from behind and to the left. The unbuckled plaintiff, who was a passenger in the right front seat, was ejected from the car and suffered a broken leg and significant knee injuries. The driver of the car in which the plaintiff was riding was using a safety belt and suffered only bruises. The plaintiff sought $100,000 in damages.

Sensing that it would be worthwhile to use the safety belt defense at trial, the defense attorney retained a biomechanical engineer who, after examining the plaintiff's car, concluded that safety belt use would have prevented her ejection. Pursuant to Wisconsin civil procedure, this expert was deposed pre-trial by the plaintiff's counsel. The plaintiff's attorney therefore knew before trial the substance of the defense expert's testimony.

At their first settlement conference, the defense attorney played up the safety belt angle. The plaintiff's attorney did not argue the point, and the parties subsequently settled for $70,000 immediately prior to the opening of

trial. The defense attorney attributed the $30,000 reduction in damages to the safety belt defense which was bolstered by the expert's opinion.

Not all negotiations end as quickly as in Example 6. Wisconsin civil procedure, which emulates the "full disclosure" spirit of the Federal Rules of Civil Procedure, is conducive to pre-trial settlement because both sides know what to expect at trial. In contrast, New York procedural rules do not allow the pre-trial discovery of expert testimony unless the expert possesses information not ascertainable by others (for example, a civil engineer takes measurements of a building, which then burns down). This means that in New York the defense attorney's pre-trial threat to use the safety belt defense at trial is just that -- an inchoate threat -- and the negotiations might not fully respond to it.

Example 7.

A New York defense attorney described a case in which his client was the driver of a car which veered out of control on a turn and crashed into a guardrail. The plaintiff was a passenger in the front seat of the car and was not wearing the available safety belt. The plaintiff, who was thrown through the right front door and suffered moderate to severe injuries, filed suit seeking $250,000 in damages.

At the first negotiation session, the defense attorney stated that he planned to use the safety belt defense at trial. The plaintiff's attorney pooh-poohed it and stuck to his demands. The parties had several more settlement meetings, but could not reach agreement, so the case went to trial. After the plaintiff established the defendant's liability. the defense attorney introduced expert testimony which showed that the plaintiff's non-use of the safety belt had caused her ejection and thus a substantial portion of her

injuries. The plaintiff's attorney did not challenge this testimony. Before the damages issue went to the jury, the parties settled for $200,000.

Negotiation techniques can bolster the impact of the safety belt defense in out-of-court settlements. Defense attorneys seem to enjoy greater success when they determine the negotiating rules. Several defense attorneys said that, if possible, they concentrate on reaching agreement on a dollar figure, and then they demand a given percentage reduction for the plaintiff's safety belt non-use. This effectively results in double discounting because most attorneys agreed that non-use has a subconsciously depressing impact on the plaintiff's demands. Of course plaintiffs' attorneys resist this. Experienced plaintiffs' counsel are upfront about the safety belt issue (assuming it clearly applies) and will admit that it is going to cost their clients something. On the other hand, if there is some uncertainty as to whether the plaintiff was buckled up, or whether non-use enhanced his/her injuries, the plaintiff's attorney will not budge, and settlement is unlikely until more facts are established. In New York, this can mean during the trial.(89)

The weakest factual patterns for the plaintiff at trial (because of ease of proof), and thus the most susceptible to settlement reductions, are the classic head injury/windshield and ejection cases. When bringing claims for these types of accidents, plaintiffs' attorneys said they felt very "vulnerable." Indeed, unless the equities otherwise favor the plaintiff (as in the case of a speeding, drunken defendant), one plaintiffs' attorney said that if the defense attorney raises the safety belt issue during negotiation of such a case, he "almost ha[s] to give up on the facts because you can't negotiate from a losing position." In this situation it seems best for the plaintiff's

---

(89) See supra Example 7.

attorney to avoid a straight discussion of the safety belt non-use and to change the argument to money: "let's talk dollars, not fault." In general, the less a case resembles the head injury/windshield and ejection prototypes, the stronger is the plaintiff's negotiating position. With the polar case of exclusively soft tissue injuries -- bruises, strains, back and neck pains and non-demonstrable discomfort -- it appears that regardless of the plaintiff's safety belt non-use his/her attorney need not concede a lower settlement figure because of the safety belt defense.

Even in the worst case scenario, however, the role of the safety belt defense in settling should be put in perspective. All attorneys agreed that settlement reductions rarely go as high as fifty percent, assuming the defendant's liability, and that the truly large reductions ordinarily can be extracted only at trial.(90) This is because even in the most clear-cut case the potential success of the safety belt defense at trial is tempered by the jury's discretionary powers.(91) Rather than give up one-half or two-thirds at the outset, the plaintiff usually will prefer to rely on his/her attorney's wiles in arguing the case to the jury, as described above. The defense attorney and his/her client recognize this as well. In effect, the safety belt defense at settlement tends to operate within a reduction band of ten to thirty percent. Within this range it nearly becomes a form of insurance. The plaintiff's attorney feels "vulnerable" and is "psychologically" influenced by his/her client's non-use, so he/she is willing to exchange the certainty of a twenty or thirty percent reduction during settlement to avoid the possibility of no recovery at trial. Likewise, the defense attorney prefers the certainty of a significant "gain" for his/her client to the difficulty and expense of a

---

(90) See supra note 33; but see infra Examples 8 and 9.

(91) See supra Example 3.

full-blown safety belt defense which might net nothing. This process breaks down when either party makes unrealistic demands, underscoring why experienced attorneys who know what a case is "worth" tend to settle when inexperienced counsel in the same case would go to trial.

Although as a general rule settlement reductions rarely are as dramatic as can be found at trial, counterexamples exist.

Example 8.

In the early case of Sams v. Sams,(92) the plaintiff was a passenger in a car driven by her defendant-husband. Only two weeks previously the husband had had safety belts installed in their car. The plaintiff alleged that her husband negligently drove the car off the road, causing her to strike the windshield and suffer grievous facial injuries. There was some evidence that both parties had been drinking. The plaintiff sued her husband for $20,000 in damages (the extent of his insurance coverage), although her medical expenses alone exceeded this figure. In his response, the defendant attempted to plead the safety belt defense, but the trial court struck it from his pleading. The plaintiff rejected a settlement offer of $10,000. The defendant appealed the striking of the safety belt defense from his pleading, and the Supreme Court of South Carolina reversed and remanded the case, holding that the merits of the safety belt defense should be decided at trial in light of all the facts and circumstances. Before the trial was held, the parties settled for $2,500.

This eighty-seven and one-half percent diminution perhaps can be best explained by the fact that neither attorney knew what to expect at trial. In

---

(92) 247 S.C. 467, 148 S.E.2d 154 (1966) (additional information obtained from telephone interviews with Rufus M. Ward, Spartanburg, South Carolina, attorney for the defendant).

this nascent stage of the safety belt defense, it sometimes was regarded as a variant of contributory negligence -- it was thought to go to the issue of liability -- and was not viewed as a theory of mitigation of damages.(93) Fearing no recovery at trial, the plaintiff in Sams grabbed what she could get. Even today, however, in an unusual case where safety belt non-use caused the accident or so obviously caused all of the plaintiff's injuries that such non-use will go to the issue of liability, near total settlement reductions can occur.

Example 9.

In the recent case of Curry v. Moser,(94) plaintiff Curry and defendants Moser and Cleary (all of whom were employed by the Internal Revenue Service) were traveling to work. Curry was riding in the front passenger seat of Moser's car, with Cleary following in her own car behind the Moser vehicle. Curry was sitting sideways in her seat, resting her left arm on the back of the seat while she talked with another passenger who was in the rear seat. She was not using the available safety belt. As the Moser vehicle turned narrowly into a left northbound lane, the Cleary vehicle made a wider turn into the adjacent right northbound lane. Somehow during the turn, the front passenger door of Moser's car opened and Curry fell out on to the roadway. She landed directly in the path of Cleary's car which then struck her. Curry testified that she did not lean on the door and that she touched neither the door nor any other part of the car's interior as she fell out.

At trial, the judge refused to admit safety belt evidence on the issue of liability. During the bifurcated damages phase of the trial, the safety belt

---

(93) See, e.g., Kleist, The Seat Belt Defense -- An Exercise in Sophistry, 18 Hastings L.J. 613 (1967).

(94) 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982).

defense was raised. The jury determined that plaintiff Curry's damages were $50,000. In response to an interrogatory, the jury found that all of the plaintiff's damages were sustained as a result of her safety belt non-use. Nonetheless, the jury reduced Curry's damages only to $26,250.

The Supreme Court, Appellate Division reversed because of this inconsistent verdict and remanded the case for retrial. The court went on to hold that in this unusual case, on remand, there be a joint trial on the combined issues of liability and damages. Thus, notwithstanding the customary New York rule requiring bifurcated trials, the court held that in the new trial the safety belt defense could go to the issue of liability. Alternatively, the jury in the new trial could find the co-defendants liable but agree with the first jury that safety belt use would have prevented one hundred percent of Curry's damages. In either event, it appeared that the plaintiff would receive much less than her $50,000 in damages.

Before the new trial, plaintiff Curry settled with defendant Moser for $2,000 and defendant Cleary for $4,000. This amounted to eighty-eight percent less than what the first jury found to be her damages. Defense counsel believe that had the case gone to retrial the plaintiff would have received nothing, but it was cheaper to pay the $6,000 than to go to trial and present a full safety belt defense.

One final observation involves the impact of a judge's participation in the settlement process. States vary in the degree to which a judge is permitted or required to take an active role in settlement. In California, "mandatory court supervised settlement conferences" are held. From talking to attorneys and judges who have participated in these settlements, it appears that the safety belt defense can be a greater force when it is institutionalized in the settlement process.

One judge, who has conducted settlement seminars for other judges, appears to have elevated the process to an art. He reported that his approach is to meet separately with each attorney and his/her client. He discusses the case frankly, pointing out its merits and weak spots, and gives an objective estimate of what recovery can be expected. When appropriate, he raises the safety belt issue and suggests that an adjustment be made. Because he has presided over many trials raising the same points, and has participated in the negotiation of hundreds of settlements, his opinion carries great credibility. He has found that litigants tend to respect his suggestions, and usually settle for a figure near his target. To the extent that the judicial imprimatur removes trial uncertainty, each party finds it is in his/her interest to settle. In this judge's settlement experience, safety belt reductions typically run from fifteen to twenty-five percent.

The same qualifications noted above apply here.(95) The truly large reductions are not reached by settlement, but are fought over at trial. And if one party is unrealistically obstinate, no settlement will occur. Both qualifications were illustrated in a recent unsuccessful settlement in which this judge participated.

Example 10.

The plaintiff sought $100,000 in damages for injuries he suffered as a result of the defendant's negligent driving. In the mandatory settlement conference, the plaintiff and his attorney were advised by the judge that based on his experience the case was worth $75,000 to $85,000. The plaintiff agreed to accept a settlement as low as $75,000. The judge repeated in private to the

---

(95) See supra pp. 52-53.

defendant and her attorney his best guess of the case's value. The defense disagreed, believing that the safety belt defense could knock off at least fifty percent. Consequently, the defendant refused to settle for more than $50,000. The case went to trial. The jury verdict was $85,000.

The California system cannot change the fact that plaintiffs' attorneys rarely will concede a reduction in excess of fifty percent, even in what appears to be an appropriate case. The system does seem, however, to remove the "imperfect information" barrier to fair and realistic safety belt reductions in settlement. Of course, the success of such a settlement system depends a great deal on the integrity and skill of the trial judges who are pegging case values.

IV. PROMOTING THE SAFETY BELT DEFENSE

The safety belt defense has not received widespread judicial acceptance to date. Only five states have appellate precedent for its use in personal injury litigation. Although a larger number of states permit the safety belt defense in crashworthiness cases, it is not the majority rule. On the other hand, the law of twenty-two states is unsettled as to the propriety of the safety belt defense in personal injury lawsuits, and nearly forty states have yet to consider its use in crashworthiness litigation.(96) This void represents a positive opportunity for attorneys, government agencies, and all parties interested in public safety(97) to promote further forensic recognition of the safety belt defense. To this end, each of the arguments made by courts which have rejected the safety belt defense can and should be rebutted.(98)

In the early seventies, the search for a doctrinal justification for the safety belt defense quickly focused on comparative negligence.(99) It was widely thought that the safety belt defense would sweep into favor as states

---

(96) See supra Section II and infra Appendix A.

(97) This assumes that a given tort rule, such as the safety belt defense, affects behavior. The validity of this assumption is a topic beyond the scope of this paper. See generally Cramton, Driver Behavior and Legal Sanctions: A Study of Deterrence, 67 Mich. L. Rev. 421 (1969); G. Calabresi, The Costs of Accidents 244-73 (1970); P. Atiyah, Accidents, Compensation and the Law 556-68 (3d. ed. 1980). Compare O'Connell, Taming the Automobile, 58 Nw. U.L. Rev. 299, 311-12 (1963) (arguing that tort law deters very little accident-causing or injury-enhancing behavior) with Lawton, Psychological Aspects of the Fault System As Compared With the No-Fault System of Automobile Insurance, 20 U. Kan. L. Rev. 57, 58-64 (1971) (arguing that a fault- and personal liability- based system maximizes deterrence).

(98) See supra pp. 21-23.

(99) In contrast to contributory negligence, see supra note 27, comparative negligence generally calls for a reduction in the plaintiff's damages in proportion to his/her fault, relative to that of the defendant, in bringing about the harm.

shifted from contributory to comparative negligence: "[T]he advent of the comparative negligence standard ... will ineluctably lead to the adoption of the seat belt rule as a significant element of the damage apportionment equation."(100) This assertion was only half correct. Some form of comparative negligence has been embraced in forty-one states(101) and in several areas of federal law,(102) but it has had virtually no impact on the safety belt defense. Of the seven states which have faced the merits of the safety belt defense under comparative negligence principles, six have rejected it.(103) The contrary seventh, Wisconsin, was the first state to decide the question.(104) The other six courts have reasoned that whether it is called "contributory" or "comparative," it is still negligence, and there can be no negligence absent some duty to buckle up. One solution to doctrinal arguments is for courts, in all jurisdictions, to acknowledge the valid doctrinal bases for admission of safety belt evidence.

---

(100) Hoglund and Parsons, Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law, 50 Wash. L. Rev. 1, 14-15 (1974); Miller, The Seat Belt Defense Under Comparative Negligence, 12 Idaho L. Rev. 59 (1975).

(101) See infra Appendix C.

(102) Federal law has adopted comparative negligence in the following areas: general maritime law, United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Federal Employers' Liability Act, 45 U.S.C.A. §53 (1972); Jones Act (relating to personal injury actions by seamen or their representatives), 46 U.S.C.A. §688 (1975); Death on the High Seas Act, 46 U.S.C.A. §766 (1975); the Federal Tort Claims Act, 28 U.S.C.A. §2674 (1965) and Eisenhower v. United States, 216 F. Supp. 803 (E.D.N.Y. 1963), aff'd, 327 F.2d 663 (2d Cir.), cert. denied, 377 U.S. 991 (1964).

(103) Churning v. Staples, ___ Colo. App. ___, 628 P.2d 180 (1981); Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (1975); Lafferty v. Allstate Ins. Co., 425 So.2d 1147 (Fla. Dist. Ct. App. 1982); Taplin v. Clark, 6 Kan. App. 2d 66, 626 P.2d 1198 (1981); Kopischke v. First Continental Corp., ___ Mont. ___, 610 P.2d 668 (1980); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977). See infra Appendix A.

(104) Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

Dean Prosser recognized that the safety belt situation does not fit conveniently within traditional tort doctrines when he wrote:(105)

> A more difficult problem is presented when the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages. In such a case, [some courts] have apportioned the damages, holding that the plaintiff's recovery will be reduced to the extent that they have been aggravated by his own antecedent negligence. This would seem to be the better view, unless we are to place an entirely artificial emphasis upon the moment of impact, and the pure mechanics of causation. Cases will be infrequent, however, in which the extent of aggravation can be determined with any reasonable degree of certainty, and the court may properly refuse to divide the damages upon the basis of mere speculation.

The Restatement of Torts adopts a similar view:(106)

> §433A. Apportionment of Harm to Causes
>
> (1) Damages for harm are to be apportioned among two or more causes where
> (a) there are distinct harms, or
> (b) <u>there is a reasonable basis for determining the contribution of each cause to a single harm</u>.
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Explanatory comment c to §433A provides in part:

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

---

(105) W. Prosser, <u>The Law of Torts</u> §65 (4th ed. 1971).

(106) Restatement (Second) of Torts §433A (1965) (emphasis supplied).

> properly refuse to permit the apportionment on the basis of mere speculation.

The Prosser and Restatement apportionment rules are consistent with what the safety belt defense stands for. Non-use of an available safety belt ordinarily does not entitle the defendant as a matter of law to a reduction in the plaintiff's damages, but the defendant is given the opportunity to demonstrate to the jury's satisfaction that the plaintiff's conduct contributed to the harm he/she suffered.

Judicial ramblings concerning duty and common practice lack a defensible foundation in logic or law. It is true that absent a mandatory safety belt use law there can be no violation of a statutory duty and hence no negligence *per se*, but has the "reasonable man" of common law negligence been forgotten? When a young child darts in front of a speeding car, it hardly can be said he/she was acting "reasonably" because there is no statute forbidding the act and because it is common practice for children to run carelessly onto streets. Simply stated, it cannot responsibly be argued that in 1983 the vast majority of motor vehicle occupants do not know of the incontrovertible safety value of motor vehicle safety belts. Persons who fail to expend the minimal effort required to engage the safety belt cannot be said to be acting reasonably and should not be rewarded for their nonfeasance. Sixteen years ago, after a review of the (at that time) less conclusive literature, the Supreme Court of Wisconsin held what should be obvious:(107)

> While we agree with those courts that have concluded that it is not negligence *per se* to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belts in the vehicle, we nevertheless conclude

---

(107) Bentzler v. Braun, 34 Wis. 2d 362, 385, 386-87, 149 N.W.2d 626, 639, 640 (1967).

> that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.
> ....
> ...On the basis of [accident statistics], and as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts.

Furthermore, common practice is not dispositive of what constitutes reasonable behavior. The fact that a majority of people act in a certain way does not make that action reasonable. This is especially true when the majority's behavior involves unnecessary risks;(108) Prosser termed such behavior "customary negligence."(109) The common law standard of reasonableness is an aspirational standard -- how people ought to act. Judge Learned Hand made this clear:(110)

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

Other arguments for rejection of the safety belt defense are readily disposed of. Segregating safety belt injuries is at least as "practical" as the other areas -- comparative negligence and contribution among joint

---

(108) 65 C.J.S. Negligence §16 (1966); 57 Am. Jur. 2d Negligence §78 (1971).

(109) W. Prosser, The Law of Torts §33 (4th ed. 1971).

(110) The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (Learned Hand, C.J.) (finding the entire barge industry negligent for not providing radios on board ship).

tortfeasors(111) to name two -- where jurors are asked to apportion damages. The safety belt defense places on the defendant the burden of separating the injuries; if this cannot be done, the issue will not be submitted to the jury.(112) The safety belt defense no longer can be said to create an invidious distinction because safety belts are available to virtually all vehicle occupants.(113) And what could be more fair than to require each party to an accident to bear the consequences of his/her own fault?

Although the arguments and tools for judicial recognition and trial use of the safety belt defense exist, an environment could be created that is conducive to its increased judicial acceptance and use by attorneys. These efforts should be concentrated in states that currently are undecided with regard to the safety belt defense.

Legislatures should be encouraged to enact mandatory safety belt use laws covering, if not the general population, at least those classes of persons who are most vulnerable in accidents or who bear responsibility for the safety of others. A majority of states have passed child passenger restraint use

---

(111) Under the principle of "contribution," a tortfeasor (a person who has committed a tort) against whom a judgment has been rendered is entitled to recover proportional shares of the judgment from other joint tortfeasors whose negligence contributed to the injury and who also were liable to the plaintiff.

(112) Prosser argued that an accident resulting in death never can be separated into constituent causes because "death cannot be divided or apportioned except by an arbitrary rule devised for that purpose." W. Prosser, The Law of Torts §52 (4th ed. 1971). According to the attorneys interviewed and the published appellate cases, there appears never to have been a successful use of the safety belt defense in a wrongful death lawsuit.

(113) National Safety Council, Accident Facts 53 (1982 ed.). In addition, there is authority for the proposition that a motor vehicle owner has a duty to equip his/her vehicle with safety belts if they have not been provided by the manufacturer. McMahon v. Butler, 73 A.D.2d 197, 426 N.Y.S.2d 326 (1980) (holding motorist negligent, as a matter of law, for failing to have safety belts installed in his car).

statutes; the minority should follow. State legislatures should consider requiring safety belt use for the occupants of driver training vehicles, emergency vehicles and public service vehicles, as some states have done, as well as for drivers of vehicles for hire.(114) Consistent with other restrictions on young drivers, who are involved in a disproportionate number of accidents, safety belt use could be mandated for drivers aged sixteen to eighteen years. At a minimum, states should repeal existing statutory barriers to the use of the safety belt defense.

At the federal level, safety belt use should be required and enforced in all government vehicles and in vehicles used in interstate commerce. Provisions could be inserted in government contracts to require all contractors (and sub-contractors) to mandate safety belt use in their vehicles used in connection with contract performance.

Not only would these statutes and regulations directly encourage safety belt use, but by facilitating use of the safety belt defense they might add an indirect incentive to buckle up.

Efforts should be made to remove any vestiges of doubt as to the efficacy of safety belts. Public education programs emphasizing safety belt effectiveness should be expanded; films of simulated crashes can be a powerful reminder of the consequences of non-use. Institutional channels, such as insurance companies, schools (especially driver training courses), law enforcement agencies and governmental units, should be exploited. Much of the existing medical and scientific evidence is dated. New research reaffirming the utility of safety belts should be financed, publicized and made available to defense attorneys and legal associations.

---

(114) Vehicles for hire include taxis, mass transit buses, chartered buses and limousines.

Some defense attorneys, especially those not living near metropolitan areas and who do not belong to the national defense attorney associations, might be aided by a geographical listing of available experts. Finally, to reduce the need for extensive expert testimony, trial judges should be urged to take judicial notice(115) when appropriate.

---

(115) Judicial notice is the act by which a court will, without the production of evidence, recognize the existence and truth of certain facts having a bearing on the case.

APPENDIX A

CURRENT STATUS OF THE SAFETY BELT DEFENSE IN MOTOR VEHICLE PERSONAL INJURY LITIGATION

Jurisdiction	Status	Leading Authority	Reasons[1]
Alabama	Inadmissible	Britton v. Doehring, 286 Ala. 498, 242 So.2d 666 (1970)[2]	1,2,3,4,6,7,8
Alaska	Unsettled	No cases on point[3]	--
Arizona	Inadmissible	Nash v. Kamrath, 21 Ariz. App. 530, 521 P.2d 161 (1974)	1,2,4
Arkansas	Unsettled	Harlan v. Curbo, 250 Ark. 610, 466 S.W.2d 459 (1971)[4]	--
California	Admissible	Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969); Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982)	--

---

(1) Reasons for rejecting the safety belt defense are as follows: 1. Doctrine; 2. No Duty; 3. Matter for the Legislature; 4. Efficacy of Safety Belts; 5. Common Practice; 6. Majority Rule; 7. Practicality and Trial Administration; 8. Fairness; 9. Invidious Distinction. See supra pp. 21-23.

(2) The Alabama Supreme Court in Britton refused to permit introduction of evidence of safety belt non-use for the purpose of mitigating damages. The court did not face and expressly reserved the questions of admissibility in wrongful death cases (as distinguished from suits for non-fatal injuries), and whether safety belt non-use may constitute contributory negligence completely barring recovery.

(3) In Spruce Equipment Co. v. Maloney, 527 P.2d 1295 (Alaska 1974), not involving a motor vehicle accident, the Supreme Court of Alaska generally favored the admission of evidence to apportion damages, asssuming there is an adequate evidentiary foundation.

(4) In Harlan, the Supreme Court of Arkansas held a trial court in error for instructing the jury that in considering the plaintiffs' negligence the jurors might take into account the plaintiffs' non-use of the available safety belts, when the only safety belt evidence introduced at trial was a statement that such belts were available and unfastened.

Colorado	Inadmissible	Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973); Churning v. Staples, ___Colo. App.___, 628 P.2d 180 (1981)(5)	1,5,8
Connecticut	Unsettled	(6)	--
Delaware	Inadmissible	Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967)	1,3,4,6,8
District of Columbia	Inadmissible	McCord v. Green, 362 A.2d 720 (D.C. 1976)	1,2,4,9
Florida	Inadmissible	Brown v. Kendrick, 192 So.2d 49 (Fla. Dist. Ct. App. 1966); Lafferty v. Allstate Ins. Co., 425 So.2d 1147 (Fla. Dist. Ct. App. 1982)(7)	1,4,8

---

(5) In Fischer, the Colorado Supreme Court rejected the safety belt defense for the purpose of mitigating damages or barring recovery under contributory negligence, but did not opine as to its use under comparative negligence. Subsequent to legislative adoption of comparative negligence in Colorado, see infra Appendix C, the Colorado Court of Appeals in Churning reaffirmed Fischer's continuing vitality under comparative negligence principles.

(6) Connecticut law is unclear. Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (1969), suggests that evidence of safety belt non-use may be introduced only when special circumstances exist which require the vehicle occupant to anticipate a collision or other mishap. This logic was followed in Tempe v. Giacco, 37 Conn. Supp. 120, 442 A.2d 947 (1981), in which the court allowed the introduction of the safety belt defense where the defendant alleged that the plaintiff failed to wear the available safety belt after being warned not to lean against the right door, which apparently had a defective lock, and the plaintiff subsequently fell through the door as the car made a left turn. Cf. Uresky v. Fedora, 27 Conn. Supp. 498, 245 A.2d 393 (1968) and Husted v. Refuse Removal Service, 26 Conn. Supp. 494, 227 A.2d 433 (1967) (the merits of the safety belt defense can only be properly considered by the introduction of evidence and the evaluation of that evidence at trial). On the other hand, the courts in Brown v. Case, 31 Conn. Supp. 207, 327 A.2d 267 (1974) and Clark v. State, 28 Conn. Supp. 398, 264 A.2d 366 (1970) refused introduction of safety belt evidence. After Connecticut adopted comparative negligence, see infra Appendix C, another Connecticut superior court struck, on the plaintiff's motion, the safety belt defense from the defendant's pleading. Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (1975). No appellate courts in Connecticut have considered the merits of this issue. The Connecticut Supreme Court has recently indicated that Connecticut law on the admissibility of the safety belt defense is unsettled. Delott v. Roraback, 179 Conn. 406, 426 A.2d 791 (1980).

(7) Although Florida has since adopted comparative negligence, see infra Appendix C, the Florida District Court of Appeals held in Lafferty that Brown still states Florida law. But see Insurance Co. of North America v. Pasakarnis, 425 So.2d 1141,

Georgia	Unsettled	(8)	--
Hawaii	Unsettled	No cases on point	--
Idaho	Inadmissible	Hansen v. Howard O. Miller, Inc., 93 Idaho 314, 460 P.2d 739 (1969)	1,7
Illinois	Admissible	Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Eichorn v. Olson, 32 Ill. App. 3d 587, 335 N.E.2d 774 (1975)	--
Indiana	Inadmissible	State v. Ingram, ___ Ind. ___, 427 N.E.2d 444 (1981)(9)	1,8
Iowa	Inadmissible	Iowa Code Ann. §321.445 (West Supp. 1982)(10)	--
Kansas	Inadmissible	Hampton v. State Highway Comm'n, 209 Kan. 565, 498 P.2d 236 (1972); Taplin v. Clark, 6 Kan. App. 2d 66, 626 P.2d 1198 (1981)(11)	1,2,4,8,9

1142 (Fla. Dist. Ct. App. 1982) (Schwartz, J., dissenting); Flanagan, The Seat Belt Defense: A Rational Rule for Florida, 1 Trial Advoc. Q. 8 (1981).

(8) The Georgia Court of Appeals has implied in dictum that evidence of non-use of an available safety belt, assuming the defendant's liability, could not be considered in measuring damages. Davis v. Calhoun, 128 Ga. App. 104, 195 S.E.2d 759 (1973).

(9) In Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966), the Indiana Court of Appeals refused to recognize the safety belt defense because of the lack of expert testimony at trial linking non-use to specifically enhanced injuries, but recognized the possibility of allowing the defense at some future date where the appropriate proof has been offered. This dictum was seized upon by many legal writers who assumed that, with competent expert testimony, the safety belt defense was available in Indiana. However, attorneys in Indiana have informed me that despite Kavanagh the prevailing view in the Indiana bar and judiciary was that the defense was not admissible, and that it was not known to have been introduced in any trials. Thus, it was no surprise in Indiana when the Supreme Court of Indiana disposed of the Kavanagh dictum and held in Ingram that the safety belt defense may not be used to limit the plaintiff's recovery.

(10) Iowa Code Ann. §321.445 provides in part that "[t]he fact of use, or nonuse, of seat belts by a person shall not be admissible or material as evidence in civil actions brought for damages."

(11) In Hampton, the Kansas Supreme Court disallowed the use of the safety belt defense under a contributory negligence regime. Kansas has since adopted comparative negligence, see Infra Appendix C, but the Court of Appeals of Kansas nonetheless has reaffirmed in Taplin the holding of Hampton.

Kentucky	Unsettled	No cases on point	--
Louisiana	Unsettled	(12)	--
Maine	Inadmissible	Me. Rev. Stat. Ann. tit. 29, §1368-A (West 1978)(13)	--
Maryland	Unsettled	Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967)(14)	--
Massachusetts	Unsettled	(15)	--
Michigan	Inadmissible	Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969)(16)	1,2,4,8,9

---

(12) Although Lawrence v. Westchester Fire Ins. Co., 213 So.2d 784 (La. Ct. App. 1968) and Fontenot v. Fidelity and Casualty Co., 217 So.2d 702 (La. Ct. App. 1969) held, mainly on doctrinal grounds, that safety belt non-use cannot be deemed to be such contributory negligence as will bar recovery, Fontenot and Becnel v. Ward, 286 So.2d 731 (La. Ct. App. 1973) appear to favor admission of the safety belt defense on the question of damages. In both Fontenot and Becnel, however, there was no proper proof at trial and therefore the issue was not squarely decided.

(13) Me. Rev. Stat. Ann. tit. 29, §1368-A provides in part: "In any accident involving an automobile, the nonuse of seat belts by the driver of or passengers in the automobile shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident."

(14) Maryland's Court of Appeals (its highest appellate court) held in Cierpisz that safety belt non-use is not contributory negligence. The opinion generally favored the admission of safety belt evidence on the question of damages, but since there had not been an offer of proof at trial, the court reserved judgment for "some future case." As of this writing, such case has not yet reached the Maryland appellate courts. However, because the court in Cierpisz strongly emphasized doubts as to the general utility of safety belts, there can be no certainty as to the holding in such "future case."

(15) In a crashworthiness case, the Supreme Judicial Court of Massachusetts has faced but not reached, because of an absence of proof at trial, the merits of the safety belt defense. Breault v. Ford Motor Co., 364 Mass. 352, 305 N.E.2d 824 (1973).

(16) The Michigan Supreme Court has since adopted comparative negligence, see Infra Appendix C, and Michigan law regarding the safety belt defense may be in a state of flux. See Seifert v. Anderson, No. 80-209579-NI, Circuit Court, Oakland County, Michigan, Judge Gene Schnelz (November 23, 1982) (unpublished) (denying the plaintiffs' motion to strike the safety belt defense from the defendant's pleading and the plaintiffs' motion in limine) (photocopy of decision available from author of this paper); Sullivan, The Seat Belt Defense Should Be Resurrected Under Pure Comparative Negligence, 61 Mich. B.J. 560 (1982).

Minnesota	Inadmissible	Minn. Stat. Ann. §169.685, subd. 4 (West Supp. 1982)(17)	--
Mississippi	Unsettled	(18)	--
Missouri	Inadmissible	Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970)(19)	1,2,4,8,9
Montana	Inadmissible	Kopischke v. First Continental Corp., ___Mont._ _, 610 P.2d 668 (1980)	1,2,3,5,6,7, 8,9
Nebraska	Unsettled	No cases on point	--
Nevada	Unsettled	No cases on point	--
New Hampshire	Unsettled	No cases on point	--
New Jersey	Unsettled	Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967)(20)	--

---

(17) Minn. Stat. Ann. §169.685, subd. 4 provides: "Proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle." Despite some agitation from the defense bar for repeal, this statute precludes consideration in Minnesota of the safety belt defense. See Bowman, Minnesota's Seat Belt Gag Should Be Abrogated, 38 Hennepin Law. 4 (May 1970).

(18) Two federal courts construing Mississippi law seem to have assumed that with competent causal evidence at trial, non-use of an available safety belt is admissible on the question of damages. Glover v. Daniels, 310 F. Supp. 750 (N.D. Miss. 1970); Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970). The Supreme Court of Mississippi found insufficient evidence to uphold a jury instruction on the safety belt defense in D.W. Boutwell Butane Co. v. Smith, 244 So.2d 11 (Miss. 1974), and at the same time noted grave doubts as to the efficacy of safety belts.

(19) Ostensibly decided under Illinois law, the Missouri Court of Appeals in Miller went to great pains to avoid the holding of Mount v. McClellan (see Illinois entry in above table), and therefore concluded that in the absence of controlling Illinois law, the court was free to decide this case as an issue of first impression under Missouri law.

(20) Although the court in Barry held on doctrinal grounds that non-use of a safety belt cannot bar recovery under the doctrine of contributory negligence, the opinion generally favored the admission of safety belt evidence on the issue of damages. Since there had been no expert testimony at trial as to the probable result had the plaintiff been buckled up, however, the court reserved judgment on this issue. New Jersey law remains unsettled. See Polyard v. Terry, 148 N.J. Super. 202, 372 A.2d 378 (1977).

New Mexico	Inadmissible	Selgado v. Commercial Warehouse Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975)	1,2,7,8
New York	Admissible	Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974)(21)	--
North Carolina	Inadmissible	Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968)	1,2,3,4,5,8,9
North Dakota	Unsettled	Kunze v. Stang, 191 N.W.2d 526 (N.D. 1971)(22)	--
Ohio	Inadmissible	Roberts v. Bohn, 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971), rev'd on other grounds, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972)	1,2,4,7,8,9
Oklahoma	Inadmissible	Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976)(23)	1,2,4,7,8,9

---

(21) New York's Court of Appeals held in Spier that the safety belt defense was admissible for the purpose of mitigating damages, but that such evidence must be strictly limited to the jury's determination of the plaintiffs' damages and should not be considered in resolving the issue of liability. The court noted, however, that this limitation did not embrace necessarily the case where safety belt non-use is alleged to have caused the accident. 35 N.Y.2d at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3. See supra pp. 23-24.

In a recent and important development, the Supreme Court, Appellate Division has focused on this footnote 3 and held that contrary to the general rule of Spier, defendants may sometimes raise the safety belt defense with respect to the issue of liability. In Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982), the court held that the plaintiff-passenger's failure to engage the available safety belt prior to the time that the front passenger door of the vehicle opened and the plaintiff fell onto the roadway where she was struck by a following vehicle could be considered by the jury in determining liability. Thus, notwithstanding the customary New York rule requiring bifurcated trials on liability and damages, the court ordered that on remand there be a joint trial on the combined issues of liability and damages. The case subsequently was settled before retrial. See supra Example 9. Although Curry might be limited to its unusual facts, its holding could be the cue to a future role for the safety belt defense in determining liability.

(22) In Kunze, the Supreme Court of North Dakota held that non-use of an available safety belt cannot constitute contributory negligence as a matter of law. The court did not consider the issue of the use of the safety belt defense in mitigation of damages. In addition, the doctrine of comparative negligence subsequently was adopted by the North Dakota legislature. Therefore, the law of North Dakota is best described as unsettled.

(23) In Fields, the Oklahoma Supreme Court held safety belt evidence inadmissible in the product liability context. Although no cases have so held, it seems unlikely

Oregon	Inadmissible	Robinson v. Lewis, 254 Or. 52, 457 P.2d 483 (1969)(24)	2,4,8,9
Pennsylvania	Unsettled	(25)	--
Rhode Island	Unsettled	No cases on point	--
South Carolina	Admissible	Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Jones v. Dague, 252 S.C. 261, 166 S.E.2d 99 (1969)	--
South Dakota	Unsettled	No cases on point	--
Tennessee	Inadmissible	Tenn. Code Ann. §55-9-214(a) (Supp. 1982)(26)	--
Texas	Inadmissible	Carnation Co. v. Wong, 516 S.W.2d 116 (Tex. 1974)	--

---

that an Oklahoma appellate court would endorse the safety belt defense in a personal injury suit. Two federal courts construing Oklahoma law have reached this conclusion. Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969) and Henderson v. United States, 429 F.2d 588 (10th Cir. 1970) refused to admit safety belt evidence on the issue of contributory negligence.

(24) The Oregon Supreme Court held in Robinson that safety belt non-use cannot be considered to constitute contributory negligence. After Oregon adopted a comparative negligence scheme, see infra Appendix C, the Supreme Court of Oregon strongly suggested that safety belt non-use was not admissible on the issue of damages. Smith v. Oregon Agricultural Trucking Assoc., 272 Or. 156, 535 P.2d 1371 (1975).

(25) Two federal courts construing Pennsylvania law have admitted evidence of safety belt non-use on the question of damages if competent testimony establishes a causal connection between the non-use and injury enhancement, Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975), Benner v. Interstate Container Corp., 73 F.R.D. 502 (E.D. Pa. 1977), but the only Pennsylvania state appellate court which has faced the issue expressly refused to commit itself on the merits of the safety belt defense until presented with a suitable case. Parise v. Fehnel, 267 Pa. Super. 83, 406 A.2d 345 (1979).

(26) Tenn. Code Ann. §55-9-214(a) ends with this sentence: "Provided that in no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belt be considered in mitigation of damages on the trial of any civil action." In Stallcup v. Taylor, 62 Tenn. App. 407, 463 S.W.2d 416 (1970), the Tennessee Court of Appeals gave effect to this statute and rejected the safety belt defense. Similarly, the Tennessee Supreme Court invoked this statute to bar safety belt evidence in a crashworthiness suit. Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973). For a criticism of this statute and expression of the view that the safety belt defense should be viewed as a valid public policy tool to encourage greater use of a proven safety device, see Comment, The Seat Belt Defense -- A Valid Instrument of Public Policy, 44 Tenn. L. Rev. 119 (1976).

Utah	Unsettled	No cases on point	--
Vermont	Unsettled	No cases on point	--
Virginia	Inadmissible	Va. Code §46.1-309.1(b) (1980)(27)	--
Washington	Inadmissible	Derheim v. North Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977)(28)	1,2,3,4,5,6, 7,8,9
West Virginia	Unsettled	No cases on point	--
Wisconsin	Admissible	Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967)	--
Wyoming	Unsettled	(29)	--

---

(27) Prior to 1978, Va. Code §46.1-309.1(b) read: "Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence." Contrasting this statute with the Minnesota and Tennessee statutes (see supra notes 17 and 26), a federal court interpreted the Virginia statute to permit the introduction of safety belt evidence for the purpose of mitigation of damages. Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368 (E.D. Va. 1978). See Robinson and Cullen, Federal Court Rules Virginia Law Allows Evidence of Non-Use of Seat Belt, 13 U. Rich. L. Rev. 123 (1978). The plaintiffs' bar lobby reacted quickly, and in 1980 the Virginia statute was amended to add the clause "nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature" at the end of subsection (b).

(28) In Derheim, the Washington Supreme Court rejected the admissibility of the safety belt defense for a number of reasons. Five years later, after the state legislature had adopted the doctrine of comparative negligence, see infra Appendix C, the Washington Supreme Court in Amend again rejected the safety belt defense for any purpose, including reduction of damages.

(29) In Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978), the Supreme Court of Wyoming did not reach the merits of the safety belt defense in a crashworthiness case because the issue was not preserved for appeal (there was no offer of proof at trial).

APPENDIX B

EXISTING LAWS REQUIRING THE USE OF SAFETY BELTS
OR CHILD PASSENGER RESTRAINT SYSTEMS

State	Requirement(1)	Statute	Date Enacted	Statutory Limitations(2)
Alabama	School bus drivers	Ala. Code §16-27-6 (1977)	1969	None
	Child passengers	Ala. Code §32-5-222 (Supp. 1982)	1982	1
Alaska	None	--	--	--
Arizona	Child passengers	Ariz. H. 2312	4/19/83	N.A.
Arkansas(3)	Child passengers	Ark. H. 454	3/21/83	1, 2
California	Driver training vehicle occupants	Cal. Veh. Code §27304 (West 1971 and Supp. 1983)	1961	None
	Firefighting vehicle occupants	Cal. Veh. Code §27305 (West 1971 and Supp. 1983)	1963	None
	Child passengers	Cal. Veh. Code §27360 (West Supp. 1983)	1982	None
Colorado	None	--	--	--
Connecticut	Child passengers	Conn. Gen. Stat. Ann. §14-100a (West Supp. 1983)	1982	1, 2

---

(1) This column indicates the class of vehicle occupants which is covered by each statute. All statutes are in effect unless otherwise indicated (but see supra Text, note 48).

(2) The statutory limitations (other than sundry exceptions to the statute's coverage) which constrain the application of each statute to the safety belt defense are as follows:

1. The statute provides that non-use of the safety belt or child passenger restraint system shall not be considered to be negligence. For an example, see supra Appendix A, note 27.
2. The statute provides that non-use of the safety belt or child passenger restraint system shall be inadmissible in all civil trials. For an example, see supra Appendix A, note 17.

N.A. indicates that the information is not available as of this writing. See supra Text, note 48.

(3) Effective August 1, 1983.

Delaware	Child passengers	Del. Code Ann. tit. 21, §4199C (Supp. 1982)	1982	1, 2
District of Columbia	Child passengers	D.C. C. 4-434	3/9/83	1
Florida	Child passengers[4]	Fla. Stat. Ann. §316.613 (West Supp. 1983)	1982	1, 2
Georgia	Child passengers[5]	Ga. S. 59	4/1/83	1
Hawaii[6]	None	--	--	--
Idaho	None	--	--	--
Illinois	School bus drivers	Ill. Rev. Stat. ch. 95 1/2, §12-807 (Supp. 1982)	1974	None
	Child passengers[4]	Ill. H. 608	2/3/83	1, 2
Indiana	Child passengers[7]	Ind. S. 172	4/15/83	1
Iowa	None	--	--	--
Kansas	Child passengers	Kan. Stat. Ann. §8-1343 to -1347 (1982)	1981	1
Kentucky	Child passengers	Ky. Rev. Stat. Ann. §189.125 (Baldwin Supp. 1982)	1982	1, 2
Louisiana	None	--	--	--
Maine[8]	School bus occupants[9]	Me. Rev. Stat. Ann. tit. 29, §2014 (1978)	1973	None
Maryland	None	--	--	--

---

(4) Effective July 1, 1983.

(5) Effective July 1, 1984.

(6) Hawaii provides a state income tax credit for the purchase of a qualifying child passenger restraint system. Haw. Rev. Stat. §235-15 (Supp. 1982).

(7) Effective January 1, 1984.

(8) Maine has a child passenger restraint statute which provides only for a public education program.

(9) However, Maine does not require that passenger safety belts be installed in school buses.

Massachusetts	School bus drivers	Mass. Gen. Laws Ann. ch. 90, §7B (West Supp. 1982)	1971	None
	Child passengers	Mass. Gen. Laws Ann. ch. 90, §7AA (West Supp. 1982)	1981	1
Michigan	Child passengers	Mich. Comp. Laws Ann. §257.710d (West Supp. 1982)	1981	None
Minnesota	School bus drivers	Minn. Stat. Ann. §169.44, subd. 9 (West Supp. 1983)	1969	None
	Child passengers	Minn. Stat. Ann. §169.685, subd. 4 and 5 (West Supp. 1983)	1981	2
Mississippi	Child passengers(4)	Miss. H. 114	3/25/83	1
Missouri	None	--	--	--
Montana	Child passengers(7)	Mont. S. 22	3/22/83	N.A.
Nebraska	Child passengers	Neb. L. 306	4/25/83	N.A.
Nevada	None	--	--	--
New Hampshire	Child passengers(10)	N.H. H. 62	4/26/83	N.A.
New Jersey	Child passengers	N.J. A. 851	4/7/83	1, 2
New Mexico	Child passengers	N.M. S. 50	4/6/83	1
New York	School bus drivers	N.Y. Veh. & Traf. Law §383.4-a (McKinney 1970)	1969	None
	Child passengers	N.Y. Veh. & Traf. Law §1229-c (McKinney Supp. 1982)	1981	None
North Carolina	Child passengers	N.C. Gen. Stat. §20-137.1 (Supp. 1981)	1981	1
North Dakota	Child passengers(7)	N.D. H. 1587	3/15/83	1, 2
Ohio	Child passengers	1982 Ohio Legis. Serv. §4511.81 (Baldwin)	1982	1, 2

(10) Effective May 26, 1983.

Oklahoma	School bus drivers	Okla. Stat. Ann. tit. 70, §24-121 (West 1972)	1968	None
	Child passengers[11]	Okla. H. 1005	3/7/83	2
Oregon	Child passengers	Or. S. 293	4/20/83	N.A.
Pennsylvania	None	--	--	--
Rhode Island	Child passengers	R.I. Gen. Laws §31-22-22 (1982)	1980	1, 2
	Public service vehicle drivers[12]	R.I. Gen. Laws §31-23-41 (1982)	1962	None
South Carolina	Child passengers[4]	S.C. S. 37	2/15/83	1, 2
South Dakota	None	--	--	--
Tennessee	Child passengers	Tenn. Code Ann. §55-9-214(b) (Supp. 1982)	1977	1, 2
Texas	None	--	--	--
Utah	None	--	--	--
Vermont	None	--	--	--
Virginia	School bus drivers	Va. Code §46.1-287.2 (1980)	1973	None
	Child passengers	Va. Code §46.1-314.2 to -314.7 (Supp. 1982)	1982	1, 2
Washington	None	--	--	--
West Virginia	Child passengers	W. Va. Code §17C-15-46 (Supp. 1982)	1981	1
Wisconsin	Child passengers	Wis. Stat. Ann. §347.48(4) (West Supp. 1982)	1981	None[13]
Wyoming	None	--	--	--

(11) Effective November 1, 1983.

(12) "Public service vehicle" is defined by Rhode Island to include "[e]very jitney, bus, private bus, school bus, trackless trolley coach and authorized emergency vehicle."

(13) The Wisconsin child passenger restraint use statute provides that a violation thereof is admissible in a civil suit but is not negligence per se. See supra pp. 24-25.

APPENDIX C

CURRENT STATUS OF COMPARATIVE NEGLIGENCE

Jurisdiction	Status	Authority	Year Adopted	Type[1]
Alabama	Rejected	--	--	--
Alaska	Adopted	Kaatz v. State, 540 P.2d 1037 (Alaska 1975)	1975	Pure
Arizona	Rejected[2]	--	--	--
Arkansas	Adopted	Ark. Stat. Ann. §27-1763 to -1765 (1979)	1955	49-51

---

(1) The types of comparative negligence are:

(i) Pure comparative negligence means the plaintiff can recover damages in proportion to his/her degree of fault so long as he/she is not one hundred percent at fault. In theory, the defendant could be ninety-nine percent innocent and yet have to pay to the plaintiff one percent of the plaintiff's damages.

(ii) 49-51 comparative negligence means the plaintiff can recover damages in proportion to his/her degree of fault so long as his/her negligence is less than that of the defendant. If the plaintiff is thirty-five percent at fault, he/she collects sixty-five percent of his/her damages. If he/she is fifty percent or more at fault, he/she receives nothing.

(iii) 50-50 comparative negligence means the plaintiff can recover damages in proportion to his/her degree of fault so long as his/her negligence is less than or equal to that of the defendant. If the plaintiff is fifty percent at fault, he/she collects one-half of his/her damages. If he/she is fifty-one percent or more at fault, he/she receives nothing.

(iv) Slight/Gross comparative negligence establishes the non-quantitative test that the plaintiff can recover damages in proportion to his/her degree of fault so long as his/her fault is "slight" compared to the fault of the defendant.

For a detailed analysis of comparative negligence systems, see C.R. Heft and C.J. Heft, Comparative Negligence Manual (1978 and Supp. 1982).

(2) But see Zadro v. Snyder, 11 Ariz. App. 363, 464 P.2d 809 (1970) (in "close" case, jury can find defendant liable but reduce plaintiff's damages in consideration of plaintiff's contributory negligence).

California	Adopted	Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)	1975	Pure
Colorado	Adopted	Colo. Rev. Stat. Ann. §13-21-111 (1973 and Supp. 1982)	1971	49-51
Connecticut	Adopted	Conn. Gen. Stat. Ann. §52-572h (West Supp. 1982)	1973	50-50
Delaware	Rejected	--	--	--
District of Columbia	Rejected	--	--	--
Florida	Adopted	Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)	1973	Pure
Georgia	Adopted	Ga. Code Ann. §105-603 (1968)	(3)	49-51
Hawaii	Adopted	Haw. Rev. Stat. §663-31 (1976)	1969	50-50
Idaho	Adopted	Idaho Code §6-801 (1979)	1971	49-51
Illinois	Adopted	Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981)	1981	Pure
Indiana	Rejected	--	--	--
Iowa	Adopted	Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982)	1982	Pure
Kansas	Adopted	Kan. Stat. Ann. §60-258a (1982)	1974	49-51
Kentucky	Rejected	--	--	--
Louisiana	Adopted	La. Civ. Code Ann. art. 2323 (West Supp. 1983)	1979	Pure
Maine	Adopted	Me. Rev. Stat. Ann. tit. 14, §156 (1980)	1965	49-51
Maryland	Rejected	--	--	--
Massachusetts	Adopted	Mass. Gen. Laws Ann. ch. 231, §85 (West Supp. 1982)	1971	50-50
Michigan	Adopted	Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979)	1979	Pure

---

(3) Georgia's statute traces to the nineteenth century.

Minnesota	Adopted	Minn. Stat. Ann. §604.01, subd. 1 (West Supp. 1983)	1969	50-50
Mississippi	Adopted	Miss. Code. Ann. §11-7-15 (1972)	1910	Pure
Missouri	Rejected	--	--	--
Montana	Adopted	Mont. Code Ann. §27-1-702 (1981)	1975	50-50
Nebraska	Adopted	Neb. Rev. Stat. §25-1151 (1979)	1913	Slight/ Gross
Nevada	Adopted	Nev. Rev. Stat. §41.141 (1981)	1973	50-50
New Hampshire	Adopted	N.H. Rev. Stat. Ann. §507:7-a (Supp. 1979)	1969	50-50
New Jersey	Adopted	N.J. Stat. Ann. §2A:15-5.1 (West Supp. 1982)	1973	50-50
New Mexico	Adopted	Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981)	1981	Pure
New York	Adopted	N.Y. Civ. Prac. Law §1411 (McKinney 1976)	1975	Pure
North Carolina	Rejected	--	--	
North Dakota	Adopted	N.D. Cent. Code §9-10-07 (1975)	1973	49-51
Ohio	Adopted	Ohio Rev. Code Ann. §2315.19 (Page 1981)	1980	50-50
Oklahoma	Adopted	Okla. Stat. Ann. tit. 23, §13 (West Supp. 1982)	1973	50-50
Oregon	Adopted	Or. Rev. Stat. §18.470 (1979)	1971	50-50
Pennsylvania	Adopted	Pa. Stat. Ann. tit. 42, §7102(a) (Purdon 1982)	1976	50-50
Rhode Island	Adopted	R.I. Gen. Laws §9-20-4 (Supp. 1982)	1971	Pure
South Carolina	Adopted(4)	S.C. Code Ann. §15-1-300 (Law. Co-op 1977)	1962	50-50

(4) South Carolina's statute applies only to motor vehicle accidents.

South Dakota	Adopted	S.D. Codified Laws Ann. §20-9-2 (1979)	1941	Slight/ Gross
Tennessee	Adopted[5]	--	--	--
Texas	Adopted	Tex. Rev. Civ. Stat. Ann. art. 2212a (Vernon Supp. 1982)	1973	50-50
Utah	Adopted	Utah Code Ann. §78-27-37 (1977)	1973	49-51
Vermont	Adopted	Vt. Stat. Ann. tit. 12, §1036 (Supp. 1982)	1970	50-50
Virginia	Rejected[6]	--	--	--
Washington	Adopted	Wash. Rev. Code Ann. §4.22.010 (Supp. 1982)	1973	Pure
West Virginia	Adopted	Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979)	1979	49-51
Wisconsin	Adopted	Wis. Stat. Ann. §895.045 (West Supp. 1982)	1931	50-50
Wyoming	Adopted	Wyo. Stat. §1-1-109 (1977)	1973	49-51

---

(5) Although strictly not comparative negligence, Tennessee law apportions the plaintiff's recovery for "remote" contributory negligence and bars recovery for "proximate" contributory negligence. See East Tennessee V. & G. Ry. Co. v. Hull, 88 Tenn. 33, 12 S.W. 419 (1889); Frankenberg v. Southern Ry. Co., 424 F.2d 507 (6th Cir. 1970) (Tennessee law).

(6) But see Simpson v. Lambert Bros. Div. -- Vulcan Materials Co., 362 F.2d 731 (4th Cir. 1966) (under Virginia law, plaintiff's negligence which contributes only slightly or trivially to injury does not bar recovery).

APPENDIX D

REPORT OF NEW TECHNOLOGY

The work performed under this contract, while leading to no new technology, has led to a clearer understanding of the issue of non-use of automobile safety belts in civil litigation. The current and potential role of the "safety belt defense" is studied on a state-by-state basis. Information on proper pleading and credible evidence is presented, and successful safety belt cases are documented so that the safety belt defense may be more widely used by practicing attorneys, and more widely accepted by the courts. If widely publicized, the safety belt defense would provide an additional incentive for automobile drivers and occupants to wear safety belts.