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THE SEAT BELT DEFENSE: A NEW APPROACH

I. INTRODUCTION

The annual statistics reflecting carnage and mutilation on our nation's highways continue to increase in astronomical proportions.[1] It is a highly publicized assertion that this unnecessary loss could be substantially reduced by the judicious use of automobile seat belts and harnesses.[2] Recent congressional and state legislation, achieved through forceful lobbying,[3] has required the unwilling automotive industry to install a number of safety devices designed to protect the lives and limbs of America's drivers and passengers. For example, the list of requirements includes, in addition to seat belts and harnesses,[4] specially tested tires,[5] windows,[6] and brakes.[7] As of this date, however, neither Congress nor any state legislature has required unwilling drivers or occupants of vehicles[8] to wear seat belts. While automobile occupants have been legislatively given the opportunity to protect themselves, few have seen fit to take advantage of it.[9]

In the past few years courts and commentators have wrestled sporadically and unsuccessfully with the legal effect of the failure to wear seat belts. Among the proposed solutions to the problem are the applicability of such defenses as contributory negligence[10] and assumption of the risk.[11] These solutions, however, have been heavily discounted or even totally disregarded by the majority of the courts.[12] There exists, however, one avenue of inquiry which legal writers have only superficially examined, but which is finding

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1. Over the three year period, 1963-66, automobile fatalities increased by 10,000 as injuries increased by 300,000. National Safety Council, Accident Facts 40 (1964-1967 eds.).

2. Id. at 53.

3. See, e.g., R. Nader, Unsafe at Any Speed (1965); J. O'Connell & A. Meyers, Safety Last—An Indictment of the Auto Industry (1966).

4. National Traffic and Motor Safety Act of 1966, 15 U.S.C. § 1381 (Supp. IV, 1969); 15 C.F.R. pt. 9 (1968).

5. 15 U.S.C. § 1421 (Supp. IV, 1969).

6. 49 C.F.R. § 393.60 (Supp. 1969).

7. 49 C.F.R. § 393.40 (Supp. 1969).

8. It should be noted that this Act refers only to 1968 and later model vehicles. 15 C.F.R. § 9.11 (Supp. 1969). A few earlier auto models were covered by state regulations, the citations to which may be found in Walker & Beck, Seat Belts and the Second Accident, 34 Ins. Counsel J. 349, 356-61 (1967).

9. The incidence of seat belt use has been estimated at 5% in 1962, 9% in 1964, 20% in 1966, and 25% in 1967. National Safety Council, Accident Facts 53 (1963-1967 eds.).

10. See text accompanying notes 30-52 infra.

11. See text accompanying notes 15-29 infra.

12. Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966); Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. App. 1966); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1966); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct. 1968).

increasing favor in the courts.[13] This theory, alternatively called "avoidable consequences" or "mitigation of damages",[14] appears to have the potential of reducing the problem to manageable proportions.

II. Failure to Wear a Seat Belt as an Affirmative Defense

A. *Assumption of the Risk*

An argument infrequently raised but particularly relevant to the seat belt situation is that plaintiff-driver's or passenger's failure to "buckle up" may constitute a known and voluntary assumption of the additional risk of injury.[15] Indeed, defendant's counsel may take solace from the fact that the reasonableness or unreasonableness of plaintiff's conduct is irrelevant, and that he does not have the difficult task of showing that plaintiff's failure to wear a seat belt was unreasonable—a showing necessary to sustain the defense of contributory negligence.[16] "[A]ssumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man, however unaware, unwilling, or even protesting the plaintiff may be."[17] However, as a practical matter, assumption of the risk demands that the plaintiff have a subjective appreciation of the risk.[18] Thus, a difficult burden of proof would present itself to the defendant, since neither hindsight

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13. See Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Civ. App. 1968).

14. See Walker & Beck, supra note 8, at 355.

15. See Comment, Contributory Negligence for Failure to Use a Seat Belt, 47 Ore. L. Rev. 204 (1968).

16. An argument advanced against the application of assumption of risk in seat belt situations is that the plaintiff is entitled to rely upon the defendant's performance of his duty to drive in a reasonable and prudent manner. See Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922); Silverman v. Ulrika Realty Corp., 239 App. Div. 194, 267 N.Y.S. 360 (1st Dep't 1933); Siragusa v. The Swedish Hosp., 60 Wash. 2d 310, 373 P.2d 767 (1962). In so relying on that duty, plaintiff does not assume any risk in entering upon the highways. "The plaintiff takes a risk voluntarily . . . where the defendant has the right to face him with the dilemma of 'take it or leave it'—in other words, where defendant is under no duty to make the conditions of their association any safer than they appear to be." 2 F. Harper & F. James, The Law of Torts § 21.3, at 1174 (1956) (emphasis deleted) (footnote omitted). See also W. Prosser, Torts § 67, at 467 (3d ed. 1964) [hereinafter cited as W. Prosser]: "The defendant may be under a legal duty, which he is not free to refuse to perform, to exercise reasonable care for the plaintiff's safety, so that the plaintiff has a corresponding legal right to insist on that care. In such a case it is commonly said that the plaintiff does not assume the risk. . . ."

17. W. Prosser § 67, at 452.

18. 8 Am. Jur. 2d Automobiles and Highway Traffic § 526 (1963) outlines the requirements for assumption of risk as applied to automotive guests: "(1) a hazard or danger . . . (2) knowledge and appreciation of the hazard . . . and (3) acquiescence or willingness . . . to proceed in the face of danger."

knowledge[19] nor the knowledge of the reasonably prudent man[20] is determinative. "The standard to be applied is, in theory at least, a subjective one, geared to the particular plaintiff and his situation, rather than that of the reasonable man of ordinary prudence who appears in contributory negligence."[21] However, "[t]he plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him"[22]—as are certain risks apparent to all adults.[23] Consequently, if the defendant could demonstrate widespread public cognizance of the saving effect of seat belts, he might not be required to demonstrate the plaintiff's subjective appreciation of the risk.[24] Although courts have reacted to this argument in opposite ways,[25] the final norm must be public awareness of the added risk caused by the failure to wear a seat belt[26]—an awareness that can only be measured by their actual use or non-use. However, the statistics presently belie the existence of any such appreciation.[27] It is also important to note that the application of the doctrine of assumption of the risk, like contributory negligence,[28] would effect an absolute bar to recovery. Such a result would be inconsistent with the present trend of apportionment of damages to their respective causes.[29]

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19. Miller v. Miller, 273 N.C. 228, 231, 160 S.E.2d 65, 68 (1968).

20. Comment, Seat Belts and Contributory Negligence, 12 S.D. L. Rev. 130, 138 (1967).

21. W. Prosser § 67, at 462.

22. Id. at 462-63.

23. Comment, Should Failure to Wear a Seat Belt Constitute a Defense?, 10 Ariz. L. Rev. 523, 531 (1968).

24. Id.

25. See, e.g., Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966), in which it was stated: "Further research is requested and required. . . . [T]he plaintiff and defendant could each have argued on the merits of the use of seat belts, but each argument would necessarily have been conjectural and of doubtful propriety. . . . We think the trial court properly stated the correct conclusion when he [sic] said, in effect, that defendant had not shown, except by conjecture, that the use of the seat belts would have prevented the injury complained of." Id. at 51. But see Bentzler v. Braun, 34 Wis. 2d 362, 386-87, 149 N.W.2d 626, 640 (1966): "[I]t is obvious that, on the average, persons using seat belts are less likely to sustain injury and, if injured, the injuries are likely to be less serious. On the basis of this experience, 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."

26. Note, 71 W. Va. L. Rev. 37, 42-43 (1968).

27. See note 9 supra.

28. See note 51 infra.

29. It has also been suggested that in a driver-passenger suit, "since the driver was aware of the failure of the passenger to use the seat belt, he knew of the position of peril" and had the "last clear chance" of preventing his passenger's injuries. Annot., 15 A.L.R. 3d 1428, 1431 (1967).

B. *Contributory Negligence*

An argument more frequently invoked in seat belt litigation is that the plaintiff's failure to use a readily available seat belt amounts to contributory negligence.[30] "Contributory negligence is conduct which involves an undue risk of harm to the actor himself."[31] Two alternative approaches have been formulated to apply the doctrine of contributory negligence. Statutory negligence, sometimes referred to as negligence "per se,"[32] is based upon the fact that all new production automobiles[33] and the majority of later models[34] are required to be equipped with seat belts. Proponents of statutory negligence insist that this recent legislation should be construed to require not only installation of the belts by manufacturers and dealers, but also their *use* by the occupants of vehicles.[35] The courts, however, have been unanimous in rejecting this proposition. For instance, a New York court recently held in *Dillon v. Humphreys*[36] that: "In enacting the statute, the Legislature provided certain specifications for seat safety belts sold and installed in certain vehicles. If it was the legislature's intent that failure to use available seat belts shall be a bar to recovery in an action for personal injuries sustained as a result of an automobile collision, they would have said so. The statute neither implies such intention nor provides for the enforcement of seat belt use. It is not incumbent upon the courts to ignore fundamental principles of tort liability to enforce such use."[37] Thus, to establish statutory negligence it is necessary to determine the intent of the legislatures in enacting the statute.[38] There is no proof that Congress or the state legislatures, by explicitly requiring installation, impliedly required *use* of seat belts.[39] In line with recent safety campaigns,[40] it is more likely that they merely desired to provide the driver or occupant of a motor vehicle with the opportunity to "buckle up."[41]

On the other hand, it is contended that common law contributory negligence views the plaintiff's non-use of a seat belt as a failure to exercise reasonable care for his own safety. This defense has won the approval of some courts.[42]

30. See, e.g., Comment, supra note 20, at 39.

31. W. Prosser § 64, at 428.

32. Id. § 33, at 202.

33. See note 4 supra.

34. See note 8 supra.

35. Comment, Seat Belt Legislation and Judicial Reaction, 42 St. John's L. Rev. 371, 390 (1968).

36. 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct. 1968).

37. Id. at 214, 288 N.Y.S.2d at 18.

38. W. Prosser § 35, at 196-97.

39. Comment, supra note 35, at 384.

40. Comment, supra note 15, at 206.

41. Note, Seat Belt Negligence in Automotive Accidents, 1967 Wis. L. Rev. 288, 290.

42. Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

The theory as applied to seat belts was first suggested by the Supreme Court of Wisconsin in *Bentzler v. Braun*:[43]

"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 that there is a duty, based on the common-law standard of ordinary care, to use available seat belts independent of any statutory mandate. . . .

While it is apparent that these statistics cannot be used to predict the extent or gravity of injuries resulting from particular automobile accidents involving persons using seat belts as compared to those who are not using them, it is obvious that, on the average, persons using seat belts are less likely to sustain injury and, if injured, the injuries are likely to be less serious. On the basis of this experience, 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. A person riding in a vehicle driven by another is under the duty of exercising such care as an ordinarily prudent person would exercise under similar circumstances to avoid injury to himself."[44]

Naturally, the applicability of this theory is predicated upon the presumption that seat belts are of actual value to a car occupant's safety.[45] While many courts still refuse to make this assumption,[46] the time may be fast approaching when public and judicial awareness of the effectiveness of seat belts will create a "common-law standard of ordinary care, to use available seat belts independent of any statutory mandate."[47]

43. 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

44. Id. at 385-87, 149 N.W.2d at 639-40.

45. It has been argued that wearing a seat belt will cause the wearer to become entrapped within the car in an accident, thus preventing an escape from fire or explosion. However, wearing a seat belt increases one's chances of remaining conscious after an accident so that he may escape, while reducing the chances of further injury by being thrown from the vehicle onto a hard surface. See Toth, How Knowledgeable a Driver Are You?, Reader's Digest, Sept., 1968, at 157. It is further contended that seat belts themselves cause injury because of the increased pressure from the belts upon the wearer at the moment of impact. Kliest, The Seat Belt Defense—An Exercise in Sophistry, 18 Hastings L.J. 613, 616 (1967). However, most medical authority is not in agreement. 16 Am. Jur. Proof of Facts, Seat Belt Accidents § 5 (1965). See also Note, supra note 41, at 292 n.12. That seat belts have a positive value in limiting vehicular injury was indicated by a comprehensive statistical analysis of seat belt effectiveness, reported in R. Nader, supra note 3, at 113; J. O'Connell & A. Meyers, supra note 3, at 102-03.

46. See note 25 supra.

47. 34 Wis. 2d 362, 385, 149 N.W.2d 626, 639. At present, public opinion, assuming actions are valid criteria of opinions, does not appear to favor such a standard. A recent nationwide poll of two million motorists by the Auto Industries Highway Safety Committee reports that 24% do not wear seat belts on even long trips. Comment, The Failure to Use Seat Belts as a Basis for Establishing Contributory Negligence Barring Recovery for Personal Injury, 1 U. San Francisco L. Rev. 277, 279 n.13 (1967). Figures gathered by the National Safety Council present a similar picture, supra note 9. See also 16 Am. Jur. Proof of Facts, Seat Belt Accidents § 3 (1965); N.Y. Post, Oct. 21, 1968, at 8, col. 1.

Nevertheless, such a defense, whether based upon the common law or statute, would have a startling effect upon the plaintiff's recovery. In those few advanced jurisdictions which espouse comparative negligence,[48] the result would be an apportionment of both fault and damages, and the plaintiff would recover only that amount which the negligent acts of the defendant proximately caused.[49] In seat belt cases, this would include all property damage and any personal injury which it is proven could not have been prevented by the use of seat belts. However, in those states in which contributory negligence is a complete bar,[50] the plaintiff would recover nothing.[51] Undoubtedly this harsh result has been the chief reason for the lack of acceptance of contributory negligence for failure to wear an available seat belt.[52]

III. Failure to Wear a Seat Belt as an Element of Damages: The Doctrine of Avoidable Consequences

The doctrine of avoidable consequences, or failure to mitigate damages, has also been proposed to cover the seat belt situation.[53] The application of avoidable consequences results in a denial of recovery for any damages which could have been avoided by the reasonable conduct of the plaintiff.[54] "The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may yet be averted, and bars recovery only for such damages."[55]

Increased education as to the value of seat belts could persuade potential jurors among the public to surrender their traditional excuses for non-use of the safety belts, and to consider the question of the value of seat belts objectively. See note 25 supra.

48. Five states have statutorily adopted comparative negligence with its concomitant apportionment of liability and damages. See Ark. Stat. Ann. § 27-1730.1 (1947); Ga. Code Ann. § 105-603 (1968); Miss. Code Ann. § 1454 (1942); Neb. Rev. Stat. § 25-1151 (1964); S.D. Code § 47.0304-1 (Supp. 1960); Wis. Stat. Ann. § 331.045 (1958). A unique common law system of comparative negligence, known as the doctrine of remote contributory negligence, has evolved in Tennessee. See Stinson v. Daniel, 220 Tenn. 70, 78, 414 S.W.2d 7, 10 (1967) (contributory negligence will not bar recovery in an action based on gross or wanton negligence unless contributory negligence is also gross or wanton). In Illinois an attempt had been made by case law to abolish the defense of contributory negligence as a complete bar to recovery. See Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), rev'd, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

49. W. Prosser § 66, at 447.

50. All states not mentioned in note 48 supra are required to find contributory negligence as a complete bar.

51. See, e.g., Delaney v. Philhern Realty Holding Corp., 280 N.Y. 461, 21 N.E.2d 507 (1939).

52. Comment, supra note 35, at 392; see note 86 infra.

53. Comment, supra note 20, at 139-40.

54. C. McCormick, Damages § 33, at 127 (1935).

55. W. Prosser § 64, at 433.

The majority of commentators[56] and courts[57] have argued that the above definition is all-inclusive and that the doctrine of avoidable consequences can only be logically invoked *after* the legal wrong has occurred. Under such a view the theory is inapplicable in seat belt cases, since the failure to "buckle up" invariably occurs before the defendant's negligent act. However, such a construction of the doctrine is not always proper and the time-sequence problem can be alleviated in either of the following ways. The most obvious solution is to disregard the so called all-inclusive definition by creating a legal fiction that the plaintiff's failure to buckle-up occurred after the accident caused by the defendant's negligence.[58] This would be in line with the purpose of a legal fiction as stated by Learned Hand: "When the law adopts a fiction, it is, or at least it should be, for some purpose of justice."[59] While the plaintiff and the defendant are both the proximate causes of the ultimate results of the accident, only one will bear its full legal brunt.[60] Although not expressly calling it a legal fiction, an appellate court in Texas in effect created just that when it noted the time-sequence difficulty but decided to ignore it.[61] An appellate court in Illinois, when faced with the same dilemma in another seat belt case, took the same course as did the Texas court.[62]

While the employment of a legal fiction is a simple solution to the time-sequence problem, it is unnecessary, as the doctrine of avoidable consequences has already been expanded to cover prior or contemporaneous unreasonable conduct on the plaintiff's part.[63] Cases on seat belts,[64] and others analogous to the seat belt situation,[65] have considered plaintiff's unreasonable conduct as an element properly reducing plaintiff's recovery to the extent that his

56. See, e.g., Kliest, supra note 45, at 620-21; Comment, The Seat Belt Defense—The Sophist's Escape, 41 Temp. L.Q. 126 (1967).

57. Kavanagh v. Butorac, 221 N.E.2d 824, 830 (Ind. App. Ct. 1967); Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968).

58. Sonnier v. Ramsey, 424 S.W.2d 684, 689 (Tex. Civ. App. 1968); see Note, 38 S. Cal. L. Rev. 733, 739 (1965).

59. In re Walter J. Schmidt & Co., 298 F. 314, 316 (S.D.N.Y. 1923).

60. It is obvious that the primary consideration in such a case should be the extent that plaintiff contributed to his own injury. Comment, supra note 20, at 139.

61. Sonnier v. Ramsey, 424 S.W.2d 684, 689 (Tex. Civ. App. 1968).

62. Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329, 331 (1968).

63. W. Prosser § 64, at 433.

64. Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329; Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Civ. App. 1968).

65. Cf. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866) (defendant liable for damages of collision but plaintiff liable for those damages enhanced by his failure to have more than one helper with him); O'Keefe v. Kansas City W. Ry., 87 Kan. 322, 124 P. 416 (1912) (plaintiff's damages from a fall were increased by his prior intoxication, even though the intoxication did not contribute to his fall); Gould v. McKenna, 86 Pa. 297 (1878) (recovery of damages caused to plaintiff's wall by the negligent flow of water from the defendant's roof were diminished by the plaintiff's failure to build a sound wall). See also Note, 22 Minn. L. Rev. 410 (1938).

injuries were aggravated by his unreasonable conduct. Unreasonableness is to be judged by the standard of the reasonably prudent man and not by statistics[66] depicting the actions of some members of the community.[67] "The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him with any member of the very jury who are to apply the standard; he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment."[68]

It must be stressed that even though language of liability is sometimes employed,[69] the doctrine of avoidable consequences is solely applicable to the issue of damages.[70] Injury might flow directly from the wrongful act of the defendant, but if some of the damages could reasonably have been avoided by the plaintiff, the doctrine will prevent them from being added to the amount of the recovery.[71] A distinction is thus made between damages proximately caused by the collision initiated by the defendant's negligence and further damage resulting from the plaintiff's failure to wear a seat belt.[72]

Avoidable consequences would demand apportionment by the trier of the facts between injuries proximately caused by the collision and those incurred by the absence of seat belts. Most jurisdictions have been reluctant to apportion.[73] Besides judicial inertia and survival of tradition,[74] Dean Prosser attributes their reluctance to a number of causes. The first is the "indivisability of any single injury and lack of any definite basis for apportionment."[75] This does not appear to be a viable argument against apportionment in seat belt cases. The results of scientific experiments,[76] run under different conditions, combined with expert engineering and medical testimony on the effects of the speed of the vehicles, the angle of impact, the weight of the occupants,

66. See note 9 supra.

67. W. Prosser § 32, at 153-68.

68. Id. at 154.

69. 22 Am. Jur. 2d Damages § 30 (1965).

70. Atlantic Coast Line Ry. v. Wallace, 61 Fla. 93, 54 So. 893 (1911); Shewry v. Heurer, 255 Iowa 147, 121 N.W.2d 529 (1963); Brown v. Kroger Co., 358 S.W.2d 429 (Mo. App. 1962).

71. Dark v. Brinkman, 136 So.2d 463 (La. App. 1962); Faire v. Burke, 363 Mo. 562, 252 S.W.2d 289 (1952); Consolidated Box Co. v. Penn, 15 Misc. 2d 705, 180 N.Y.S.2d 831 (Sup. Ct. 1958); Gould v. McKenna, 86 Pa. 297 (1878); Hurzthal v. St. Lawrence Boom Lumber Co., 53 W. Va. 87, 44 S.E. 520 (1903).

72. Comment, supra note 20, at 130.

73. W. Prosser § 64, at 433-34.

74. Id. at 445.

75. Id.

76. R. Nader, supra note 3, at 113; J. O'Connell & A. Meyer, supra note 3, at 103. See also 16 Am. Jur. Proof of Facts, Seat Belt Accidents §§ 26-42 (1965).

etc.,[77] could tell the jury, within workable perimeters, how much the plaintiff actually contributed to his own injury. The burden of proof for the defendant would be a heavy one,[78] as the courts have noted, and if insufficiently met, the court would have the option of excluding it from the jury's consideration.[79]

Distrust of the jury's bias and unreliability has also been cited by Dean Prosser as a major reason why courts hesitate to apportion.[80] However, juries often informally apportion on their own.[81] No matter how crude or unformulistic a jury's apportionment may be, it is most often a closer approach to substantial justice than is a total denial of recovery for the plaintiff, or complete liability on the defendant.[82] In addition, the court's power to set aside a verdict could act as a check upon the unreliable jury.[83] The effect of applying avoidable consequences to the seat belt situation would be virtually the same as if comparative negligence were employed; there would be an apportionment of damages to their respective causes.[84] Recent case law seems

77. Other factors that an expert witness might be able to consider were suggested by a New Jersey court: "It would have to be based upon a hypothetical question of detailed specificity, strictly tailored to the facts proved with respect to the kind of seat belt used, its adjustment, the distance of the passenger from, let us say, the windshield. . . ." Barry v. Coca Cola Co., 99 N.J. Super. 270, 275, 239 A.2d 273, 276 (Super. Ct. 1967).

78. Siburg v. Johnson, 439 P.2d 865, 871 (Ore. 1967); Tom Brown Drilling Co. v. Nieman, 418 S.W.2d 337, 340 (Tex. Civ. App. 1967); Bentzler v. Braun, 34 Wis. 2d 362, 383, 149 N.W.2d 626, 638 (1967). See also Cierpisz v. Singleton, 247 Md. 215, 227, 230 A.2d 629, 635 (1967).

79. The court did just this in Lipscomb v. Diamiani, 226 A.2d 914, 915 (Del. Super. Ct. 1967) where the only evidence offered was a newspaper editorial on the value of seat belts. Dean Prosser writes: "Where a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it may be expected that the division will be made. Where no such basis can be found, and any division must be purely arbitrary, there is no practical course except to hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it." W. Prosser § 42, at 248.

80. W. Prosser § 66, at 445.

81. See Blum & Kalven, Public Law Perspectives On A Private Law Problem—Auto Compensation Plan, 31 U. Chi. L. Rev. 641, 648-50 (1964).

82. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 476 (1953).

83. See 30A Am. Jur. Judgments §§ 292-304 (1958). See also Restatement (Second) of Torts § 465, comment c (1965) which states: "Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation." See also Richardson on Evidence § 151 (9th ed. J. Prince 1964).

84. The exact procedure under case law would be as follows: The defendant would offer evidence that the plaintiff was not wearing an available seat belt as a fact mitigating damages. The court would then determine, according to the traditional rules of evidence, whether that fact is relevant in the particular case at bar. See Richardson on Evidence, supra note 83, at § 151. If the court considers it relevant, the defendant would then have

to indicate a trend toward solution of the problem through a consideration of damages and not through a consideration of liability.[85] This may be due to the courts' reluctance in non-comparative negligence jurisdictions to totally bar recovery by applying a defense such as contributory negligence or assumption of the risk,[86] or it might be due to a sincere belief that damages is the proper area in which to resolve the difficulty.[87] A third alternative is that the courts' attitude represents a judicial attempt to adopt a doctrine similar in result to comparative negligence, in light of the failure of the vast majority of state legislatures to abrogate the harshness of contributory negligence as a complete bar to recovery.[88]

IV. Conclusion

There is some suggestion that, since public policy is designed to compensate the plaintiff and to effect a wide and efficient distribution of losses[89] through an increased basis of liability[90] and a contraction of traditional defenses,[91] the availability of a new defense for failure to wear a seat belt would be undesirable.[92] Indeed, if the trend is to be opposed, many believe that only the legislature should do so.[93] However, this argument fails to recognize the

the burden of producing convincing medical and scientific proof of what injuries could have been avoided in the accident by the use of seat belts. See note 45 supra. The jury would then consider whether the burden has been met, and if in their opinion it has, would then determine what percentage of the injuries could have been avoided. The court would still have the prerogative to set the verdict aside if they felt it was excessive. See note 83 supra.

85. See note 13 supra.

86. The view of contributory negligence as complete bar to recovery has been heavily critized by the legal profession. See, e.g., Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U. Fla. L. Rev. 135 (1958); Nixon, Changing Rules of Liability in Automobile Litigation, 3 Law & Contemp. Prob. 476 (1936); Prosser, Comparative Negligence, supra note 82, at 443-44.

87. Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968) might be considered in regard to this. A year before the McCellan decision, an appellate court, in Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), rev'd, 40 Ill. 2d 193, 239 N.E.2d 445 (1968), had accepted the comparative negligence doctrine. Hence, the McClellan court already had an acceptable means by which to apportion. Yet, they did not do so and, while admitting the existence of a defense of contributory negligence for failure to wear a seat belt, decided that the answer resided in the area of damages. 91 Ill. App. 2d at 5, 234 N.E.2d at 331.

88. See note 86 supra.

89. 2 F. Harper & F. James, supra note 16, § 26.5, at 1370-71; Lessler, The Proposed Discard of the Doctrine of Imputed Contributory Negligence, 20 Fordham L. Rev. 156 (1951); see also note 86 supra.

90. See Johnson v. Los Angeles-Seattle Motor Express, Inc., 222 Ore. 377, 387, 352 P.2d 1091, 1095 (1960).

91. 2 F. Harper & F. James, supra note 16, § 22.2, at 1209-10.

92. Kliest, The Seat Belt Defense, supra note 45, at 616.

93. See Lipscomb v. Diamiani, 226 A.2d 914, 918 (Del. Super. Ct. 1967); Dillon v. Humphreys, 56 Misc. 2d 211, 215, 288 N.Y.S.2d 14, 19 (Sup. Ct. 1968). The Tennessee

unfairness of imposing total liability on the defendant for injuries which could have been avoided by the plaintiff. In the light of the availability of avoidable consequences to effect a fair and efficient distribution of liability through assignment of damages to their respective causes, a statute is unnecessary and case law may adequately deal with the situation.

Code provides that: "[I]n no event shall failure to wear seat belts be considered as contributory negligence. . . ." Tenn. Code Ann. § 59-930 (1968). Iowa, Maine, and Virginia have enacted statutes with similar provisions. See note 8 supra.