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The Seat Belt Defense—An Exercise in Sophistry

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DEFENSE attorneys have recently proposed the "seat belt defense" as a new basis for defeating injury claims. It would allow the defendant, and thus his liability insurance carrier, to escape liability for injuries suffered by the plaintiff in a collision caused by the defendant's negligence. This result would theoretically occur whenever the plaintiff was not wearing a seat belt at the time of the collision. The contention is that failure to wear a seat belt constitutes contributory negligence. The syllogism proceeds as follows:

(1) The standard of conduct to which a plaintiff must conform for his own protection in order to avoid contributory negligence is the conduct of a reasonable man under similar circumstances.
(2) A reasonable man knows of the risk of being involved in a collision and of the protection afforded by seat belts.
(3) Therefore, a motorist who fails to wear a seat belt has not conformed to the conduct of a reasonable man and is guilty of contributory negligence.

The argument is superficially plausible, but fallacious. Nevertheless, as New York Justice Manuel Levine stated in a recent address:

> It needs no ingenious exercise of forevision to reach the conclusion that the legal problems arising from the failure to wear available seat belts will be dealt with both by the attorneys and the courts. I have been reliably informed by representatives of an insurance company which operates nationally that orders have gone out to every investigator to ascertain whether, at the time of the accident, seat belts were available and whether they were being used. [1]

To date, most trial courts have refused to allow the proposed defense and two recent appellate court decisions have repudiated it.[2]

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[1] Address by Justice Manuel Levine, American Trial Lawyers Ass'n Convention, July 25, 1966, Los Angeles, California.

[2] Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966); Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. App. 1966).

However, a few favorable rulings at the trial level,[3] and a few pro-defense articles,[4] continue to give the seat belt defense proponents some encouragement. Plaintiff-lawyers cannot safely assume that every trial judge will recognize the fallacies inherent in the seat belt defense argument without the aid of some analysis.

Questions of—Safety—Causation—Duty

Ever since the recent exposure of the auto-manufacturers' lack of concern for the safety of motorists, these manufacturers have tried to shift the blame for the highway slaughter onto the injured victims themselves. In hopes of avoiding some of the criticism, the manufacturers point out that according to most statistics only about 15 per cent of the nation's motorists use seat belts even though they have been offered as optional equipment for several years. Although it is difficult to ascertain the accuracy of such statistics, it is at least clear that the use of seat belts has not become the habit and custom of the average motorist.

Moreover, there exists a considerable controversy as to the real value of seat belts. In the comprehensive study conducted by Motor Vehicle Research, Inc., hundreds of controlled crashes at various speeds with dummies simulating the human body placed in various positions with and without seat belts were observed by specially located cameras, and it was concluded that the standard waist type seat belts can cause more, rather than less, injuries in many crash conditions.[5] Other researchers have reached the conclusion that the

[3] Stockinger v. Dunisch (Cir. Ct. Sheboygan Cnty., Wis. 1965); Busick v. Budner (Cir. Ct. Milwaukee Cnty., 1965).

[4] *Seat Belt Defense*, 7 Defense Research Inst., For the Defense, Feb. 1966; Note, *Automobile Seat Belts: Protection for Defendants as Well as for Motorists*, 38 So. CAL. L. REV. 733 (1965).

The author of the latter article points out that it may be contended that failure to use a seat belt is negligence per se in those states which have statutes requiring the installation of seat belts. *E.g.*, CAL. VEHICLE CODE § 27304; WIS. STAT. 347.48 (1963). He notes, however, that the California statute applies only to new cars sold at retail in California after January 1, 1964, and comments: "[I]t is arguable that the legislature did not intend any such duty to arise as to all motorists, but only to those using vehicles included within the statute." *Id.* at 735-36.

This author did not take into consideration the question of whether or not a defendant is within the class of persons intended to be protected by the statute. He did not consider the dual standard for determining negligence but instead assumed: "[T]he question of reasonable care is virtually the same in proving negligence as in proving contributory negligence for violation of safety equipment statutes " *Id.* at 735. He failed to recognize that the law allows the plaintiff to assume that others upon the highway will obey the laws until put on specific notice to the contrary.

[5] 1 MOTOR VEHICLE RESEARCH, INC., Rep. No. 3 (1958).

use of seat belts is limited in value.[6] Therefore, whether or not the use of waist type seat belts is desirable remains at best speculative. Until more definitive answers are available the defense that the plaintiff is guilty of contributory negligence in not wearing a seat belt is subject to the objection that such a defense is pure conjecture.

Notwithstanding the present uncertainty in this area, the plaintiff's legal position as a result of a collision caused solely by defendant's negligence should be considered. Assuming merely for the sake of argument that wearing seat belts would reduce injuries in 75 per cent of all collisions, the motorist, when he enters his car, cannot be assured that the collision he might have will not be one of the 25 per cent in which the seat belt might increase the degree of injury In any given collision, no doctor can say exactly what injuries would have been suffered had the victim been wearing a seat belt as compared to those he suffered without it. There are too many unknown variables such as exact number, degree, direction, duration, and kinds of forces that might have been acting in any given accident to answer the question with any accuracy The problem is further complicated when one considers the effect of these forces in conjunction with the positions of potential obstacles such as dashknobs, turn signal levers, etc. When a motorist gets into a car he undoubtedly has a general knowledge that accidents can and do happen, but he obviously does not know if, how, when, or where it may happen. In such circumstances it does violence to one's sense of justice to say that the innocent injured victim must bear the risk of a wrong guess. It is therefore not surprising that the law has not yet placed upon the plaintiff a duty to wear seat belts.

The premises upon which the seat belt defense is based create the false inference that the plaintiff, in order to avoid the bar of contributory negligence, must protect himself against the mere future possibility that someone, sometime, somewhere, may negligently collide with him. To the contrary, the plaintiff, until put on notice of a specific act of negligence, has the right to assume that other persons upon the highways will not be negligent and therefore need not truss himself up in every known safety apparatus before proceeding on the highway

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[6] Fisher, *Injury Produced by Seat Belts, Report of 2 Cases*, 7 J. OF OCCUPATIONAL MEDICINE 211 (1965); Rubovits, *Traumatic Rupture of the Pregnant Uterus from "Seat Belt" Injury*, 90 AM. J. OF OBSTETRICS AND GYNECOLOGY 828 (1964); White, *The Role of Safety Belts in the Motorist's Safety*, 9 CLINICAL ORTHOPEDICS 317 (1957). In Brown v. Kendrick, 192 So. 2d 49, 51 (Fla. Dist. Ct. App. 1966) the court stated: "The problem of the seat belts is coming to be more in the public eye today There has been and still exists controversy over the safety feature of seat belts." See 16 AM. JUR. PROOF OF FACTS, SEAT BELT ACCIDENTS § 52 (1965).

The rule is so fundamental that it has been adopted as a uniform instruction in California[7] and Washington[8] with slight variations in the wording. The California instruction places a condition upon the plaintiff's right to assume that others will obey the law. However this condition arises only when the plaintiff becomes aware of some *specific* negligence on the part of another driver at which time he has the duty to use reasonable care to avoid a collision even though he may have previously been completely free from contributory negligence.[9]

For policy reasons, which will be discussed later, a different rule may apply to a defendant in a similar situation. Since the current trend in the law is to impose a stricter duty on one to exercise reasonable care to avoid harm to *another*,[10] the defendant is not necessarily entitled to assume that others will obey the laws. A defendant may be liable for all of the consequences following his negligent act, including the intervening negligence of a third person, if, in the light of common experience, such consequences were not highly extraordinary or unforseeable.[11] Thus, a defendant railroad was held to have an affirmative duty to take reasonable care to protect its employees against the foreseeable risk of another's negligence.[12]

Contributory Negligence—Public Policy

The desire to compensate injured persons and effect a wide and efficient distribution of accident losses is the major force shaping tort

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[7] 1 CALIFORNIA JURY INSTRUCTIONS CIVIL No. 138 (1956). It reads: "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate an accident which can be occasioned only by a violation of law or duty by another." [However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty.]

[8] KING COUNTY UNIFORM CODE, Instruction No. 40. It reads: "A person using the highway has the right to assume that other persons thereon will obey the traffic laws, and he has the right to proceed upon such assumption until he knows, or in the exercise of reasonable care should know, to the contrary." See Kelsey v. Pollock, 59 Wash. 2d 796, 370 P.2d 598 (1962); Green v. Floe, 28 Wash. 2d 620, 183 P.2d 771 (1947).

[9] 2 HARPER & JAMES, TORTS § 22.10, at 1229 (1956).

[10] *Ibid.*

[11] Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955); Morrison v. Medaglia, 287 Mass. 46, 191 N.E.2d 133 (1934); Hall v. Coble Dairies, Inc., 234 N.C. 206, 67 S.E.2d 63 (1951); Jones v. American Fid. & Cas. Co., 210 S.C. 470, 43 S.E.2d 355 (1947); Palin v. General Constr. Co., 47 Wash. 2d 246, 287 P.2d 325 (1955); McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953). See RESTATEMENT (SECOND), TORTS §§ 442-43, 447 (1965).

[12] Mortenson v. Southern Pac. Co., 245 A.C.A. 248, 53 Cal. Rptr. 851 (1966).

law today [13] The courts and legislatures have reflected this social policy by expanding the basis for liability on the one hand and restricting the traditional defenses to liability on the other.[14] Compensation for the injured has been facilitated by the growth of the family car doctrine,[15] the expansion of vicarious liability,[16] and the development of strict liability in products cases.[17] At the same time, the defenses of contributory negligence, assumption of risk, and interspousal and governmental immunity have been restricted and whittled away [18] The simultaneous expansion of the scope of negligence and the narrowing of the scope of contributory negligence is noted by Professors Harper and James:

> Since the advent of the automobile there has been a growing realization that the plight of the uncompensated accident victim presents a grave social problem The matter of compensation to victims therefore has been increasingly recognized by courts, legislatures, and the public as a matter of serious social concern transcending individual hardship [T]he tendency of juries and even courts for some time has been to find fault more and more easily in order to afford compensation wherever the present concept could be stretched to allow it.[19]

> There are ever growing limitations on the kinds of actions in which the defense [of contributory negligence] will be permitted. . Under the formal structure of tort law the concept of negligence is to be found on both sides of the scale in these cases. This holds out a specious appearance of symmetry that has beguiled many a commentator into supposing that the concept has or should have pretty much the same connotation on either side. A moment's reflection, however, will show that this would be most surprising if it were true. The shift in outlook toward accident liability that has taken place over the last century has led to an ever increasing expansion of the

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[13] See generally 2 HARPER & JAMES, *op. cit. supra* note 9, § 22.1, PROSSER, TORTS § 43, at 258 (3d ed. 1964); James, *Imputed Negligence and Vicarious Liability: The Study of a Paradox*, 10 U. FLA. L. REV. 48 (1957); James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360 (1958); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156 (1951); Small, *The Effect of Workmen's Compensation Trends on Agency-Torts Concepts of Scope of Employment*, 10 NACCA L.J. 21 (1953); Wolfstone, *Imputation of Contributory Negligence*, in 1 PERSONAL INJURY LIABILITY 241 (C.E.B. 1966).

[14] Wolfstone, *supra* note 13, at 241.

[15] 2 HARPER & JAMES, *op. cit. supra* note 9, § 26.15, at 1419-21.

[16] *Id.* § 26.1, at 1361-64.

[17] PROSSER, *op. cit. supra* note 13, § 97, at 672-74. See generally Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1967).

[18] See generally PROSSER, *op. cit. supra* note 13, §§ 64, 67, 116, 125.

[19] 2 HARPER & JAMES, *op. cit. supra* note 9, § 26.5, at 1370-71. (Footnotes omitted.)

> concept of negligence where that will lead to compensating an accident victim for his loss. It would be strange indeed if there had been a concomitant expansion of the negligence which would cut that compensation off. Every practical man knows this has not been the case. What has emerged has been a double standard which in all candor ought to be recognized.[20]

Illustrative of this trend toward a double standard in determining negligence or contributory negligence are cases holding that contributory negligence will not be imputed to bar a recovery even though in the same circumstances, the negligence would be imputed to facilitate recovery.[21] The reasoning in support of the abolition of the so-called "both ways test" in the area of vicarious liability is apropos in the case of seat belts. As stated in *Johnson v. Los Angeles-Seattle Motor Express, Inc.*,[22] the policy which justifies expanding liability does not justify expanding contributory negligence:

> The practical necessity for imposing liability on an owner in cases which do justify the doctrine of imputed liability is not present in the situation where the owner is an injured passenger in his own car. The two-way test of the Restatement does not commend itself as either useful or necessary. Its only virtue, as pointed out in Harper and James , is that it is logical and symmetrical. Important legal rights ought to have better footing than mere architectural symmetry.[23]

Even before the modern trend toward enhancing an injured victim's chance of compensation, the doctrine of contributory negligence was assailed as unjustifiably harsh and unduly strict. The idea that the slightest degree of contributory negligence should operate as a complete bar to recovery regardless of the degree of negligence of the defendant has long been considered unpalatable by legal scholars.[24] Moreover, since in most jurisdictions contributory negligence is an affirmative defense which must be pleaded and proved by the defendant,[25] it is highly unlikely that the jury, the trier of facts, will enthusiastically espouse a defense which will completely defeat an otherwise wholly innocent victim.

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[20] *Id.* § 22.4, at 1209-10.

[21] Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946); Weber v. Stokely-Van Camp, Inc., — Minn. —, 144 N.W.2d 540 (1966); Johnson v. Los Angeles-Seattle Motor Express, Inc., 222 Ore. 377, 352 P.2d 1091 (1960).

[22] 222 Ore. 377, 352 P.2d 1091 (1960).

[23] *Id.* at 387, 352 P.2d 1095.

[24] See 2 HARPER & JAMES, *op. cit. supra* note 9, §§ 22.1-.3; PROSSER, *op. cit. supra* note 13, § 64, at 428; ULMAN, A JUDGE TAKES THE STAND 104-07 (1933); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934).

[25] PROSSER, *op. cit. supra* note 13, § 64, at 426.

The seat belt defense, if allowed, would be a complete contradiction to the whole modern trend of tort law [26] It would expand the scope of contributory negligence beyond its broadest application. Even Justice Levine and the anonymous writer for the Defense Research Institute, were squeamish about attempting to fit the seat belt defense within the doctrine of contributory negligence, suggesting that apportionment of damages would be a more appropriate solution in seat belt cases:

> States which hold that contributory negligence is a complete bar to recovery could, however, recognize a different rule in seat belt liability cases. A distinction can be made between the negligent act of the defendant which caused the accident and the contributorily negligent act of the plaintiff by not wearing a seat belt which was a substantial contributing factor in causing his injuries. In a situation where plaintiff's prior conduct is found to have played no part in bringing about an impact or accident but has aggravated the ensuing damages, the better view is to reduce plaintiff's recovery to the extent that his damages have been aggravated by his own conduct.[27]

In the few jurisdictions that have adjudicated the specific factual problem presented in the quotation above (where the plaintiff's prior negligence has in no way caused the accident but has enhanced the damages), the courts are split.[28] Some courts have held that the plaintiff may recover the full measure of damages;[29] others have approved apportionment of damages[30] in cases where the plaintiff's concurrent negligence has been convincingly established.[31] It seems inconceivable in light of the present uncertainty respecting the value of seat belts and the highly speculative nature of any attempt to differentiate between injuries occurring with or without safety belts that courts would adopt the apportionment of damages defense to limit plaintiff's recovery.

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[26] See note 13 *supra* and accompanying text.

[27] *Seat Belt Defense*, Defense Research Inst., 7 For the Defense, Feb. 1966; Address by Justice Manuel Levine, American Trial Lawyer's Ass'n Convention, July 25, 1966, Los Angeles, California.

[28] PROSSER, *op. cit. supra* note 13, § 64, at 433-34.

[29] Mahoney v. Bateman, 110 Conn. 184, 147 Atl. 762 (1929); Hamilton v. Boyd, 218 Iowa 885, 256 N.W 290 (1934); Guile v. Greenberg, 192 Minn. 548, 257 N.W 649 (1934).

[30] Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1966); O'Keefe v. Kansas City Ry., 87 Kan. 322, 124 Pac. 416 (1912).

[31] In *Wright, supra* note 30, plaintiff's damages from runaway animals were increased by his negligent failure to have more than one helper. In *O'Keefe, supra* note 30, plaintiff's negligent intoxication at the time of the accident greatly enhanced the injuries caused by the negligence of defendant's servant. See PROSSER, *op. cit. supra* note 13, § 64, at 434 nn. 71-72.

Applicability of the Doctrines of Assumption of Risk and Avoidable Consequences

Occasionally, those who propose the seat belt defense, make reference to such doctrines as that of assumption of risk, and of mitigation of damages or avoidable consequences.

The doctrine of assumption of risk is inappropriate in this context because it is well established that a plaintiff will not be deemed to have assumed the risk created by a breach of defendant's duty of reasonable care. A risk is voluntarily assumed within the meaning of the doctrine when the plaintiff, of his own free will, chooses to expose himself thereto under circumstances which do not vest him with a legal or moral right to do so.[32] The defense of assumption of risk arises only out of a specific relationship between the plaintiff and the defendant in which the former manifests his voluntary consent to relieve the latter of a duty owed him. It could hardly be said that when the plaintiff steps into his car he is relieving defendant of the duty to drive carefully, or that the plaintiff is consenting to "assume the risk" of defendant's negligent manipulation of his automobile. With or without a seat belt, the plaintiff is in fact requiring the defendant to use all due care to avoid harming him. Certainly it is as absurd to propose that the innocent driver is assuming the risk of any injuries caused to him when he drives without safety belts, as it would be to say that every commuter assumes the risk of the negligent driving of his neighbor when he chooses to drive to work. Therefore, when a defendant is under a duty to obey traffic laws and to drive in a reasonable and prudent manner, other motorists upon the highway are entitled to the protection afforded thereby, and are not deemed to have assumed any risk resulting from a violation thereof, even though they knowingly encounter the danger upon entering onto the highway.[33] In other words, although defendant may allege the seat belt defense in the language of assumption of risk, the defense must stand or fall upon determination of the applicability of contributory negligence.

The doctrine of avoidable consequences or mitigation of damages is also not applicable. Under this doctrine a plaintiff is denied recovery for damages which could have been avoided by reasonable conduct

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[32] See generally HARPER & JAMES, *op. cit. supra* note 9, § 21.3; PROSSER, *op. cit. supra* note 13, § 67.

[33] *Cf.* Alpz v. Leiberman, 233 N.Y. 16, 134 N.S. 703 (1922); Silverman v. Ulrika Realty Corp., 239 App. Div. 194, 267 N.Y.S. 360 (1933); Siragusa v. The Swedish Hosp., 60 Wash. 2d 310, 373 P.2d 767 (1962).

on his part *following* the occurrence of the defendant's negligence.[34] Actually, the doctrine of avoidable consequences is not a defense but merely a rule of damages by which certain particular items of loss may be excluded from consideration. It differs from either contributory negligence or apportionment of damages in that it arises only *after* the defendant's wrongdoing.

Conclusion

At the outset the proposed seat belt defense is negated by the criticisms expressed in *Brown v. Kendrick*:[35]

> The problem of the seat belts is coming to be more in the public eye today and there has been some legislative action with regard thereto. There has been and still exists controversy over the safety feature of the seat belts. The Florida Legislature has touched upon the subject only to the extent of requiring approval of the type to be used, if used The Congress of the United States has considered several bills pertaining to motor vehicle and highway safety but in neither bill as approved, has there been a mandatory use of seat belts. Further research is requested and required and a committee established therefore with directions to report back to the Secretary of Commerce. So, in this state of quandary, the 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 . Certainly, as pointed out by the appellee, the plaintiff's failure to fasten her seat belt was not such negligence as to contribute to the occurrence of the accident, nor to be the proximate contributing cause of the injury in the absence of a showing that the accident could have been avoided in the absence of such a negligent act.[36]

The legal fallacy in the argument given in support of the proposed defense is its failure to take into account the established rule that a motorist has a right to assume that others upon the highway will obey the traffic laws, and he need not take protective measures against the mere possibility of some future negligent act by another.

Various absurd conclusions can be envisioned if the logic of the seat belt defense reasoning were extended. There are innumerable protective measures, just as plausible as wearing a seat belt, that could be taken to guard against the future possibility of another's negligence. Would not a motorist be guilty of contributory negligence for failing to wear a shoulder harness, for failing to wear a crash helmet, for

[34] See generally McCormick, Damages § 33 (1935).

[35] Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966).

[36] *Id.* at 51. (Footnotes omitted.)

failing to drive an armored car, for failing to utilize all of these protective devices at the same time? The utility of these devices, as protective measures, are certainly as valuable as the use of seat belts. Yet if the plaintiff would not be contributorily negligent for failing to use any or all of these protective devices, why should he be barred for failing to wear a seat belt?

Perhaps the most serious criticism of the proposed seat belt defense is that it would constitute a complete repudiation of the public policy shaping tort law today It would not further the compensation of accident victims; to the contrary it would cut them off from compensation. It would not aid in distributing accident losses through the insurance of those whose conduct caused the accident; instead it would place the full burden on the injured individual and frustrate loss distribution. It would scarcely be an incentive for negligent drivers to drive more carefully; rather its effect would be to immunize the negligent driver from all liability for his negligent conduct which causes injury to anyone without a seat belt.