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New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, and the Basis of Damage Reduction under the Seat Belt Defense

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I. INTRODUCTION

The seat belt defense in an automobile personal injury case reduces the damages for which the defendant is responsible, because the plaintiff's failure to wear a seat belt caused a portion of plaintiff's damages.[1] Consideration of the seat belt defense raises two basic questions—whether jurisdictions should allow the defense[2] and, if so, what impact the defense should have on the plaintiff's recovery.[3] Recently enacted mandatory seat belt use statutes[4] and the installation of air bags in many 1990 model automobiles[5] will create additional seat belt defense issues in the near future.

During the last twenty years, several courts have adopted the seat belt defense[6] and several have rejected it.[7] Since 1986

1. *See infra* notes 6, 7. Many law review articles have dealt with the seat belt defense. *See, e.g.*, Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172 (1970); Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613 (1967); Westenberg, *Buckle Up or Pay: The Emerging Safety Belt Defense*, 20 SUFFOLK U.L. REV. 867 (1986); Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319 (1986) [hereinafter *A Compromise*]; Note, *Reallocating the Risk of Loss in Automobile Accidents by Means of Mandatory Seat Belt Use Legislation*, 52 S. CAL. L. REV. 91 (1978) [hereinafter *Reallocating the Risk*]; Note, *Self-Protective Safety Devices: An Economic Analysis*, 40 U. CHI. L. REV. 421 (1973) [hereinafter *Self-Protective Safety Devices*]; Note, *The Failure to Use Seat Belts as a Basis for Establishing Contributory Negligence, Barring Recovery for Personal Injuries*, 1 U.S.F. L. REV. 277 (1967); Note, *Seat Belt Negligence In Automobile Accidents*, 1967 WIS. L. REV. 288 (1967).

2. *See infra* text accompanying notes 42-162.

3. *See infra* text accompanying notes 163-299.

4. *See infra* note 31. The statutes are discussed *infra* text accompanying notes 121-52, 221-45.

5. *See infra* text accompanying note 52.

6. *See* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1563-64

(D. Vt. 1985); Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986); Law v. Superior Court, 157 Ariz. 147, 157, 755 P.2d 1135, 1145 (1988); Harlan v. Curbo, 250 Ark. 610, 612, 466 S.W.2d 459, 460-61 (1971) (by implication); Franklin v. Gibson, 138 Cal. App. 3d 340, 342-43, 188 Cal. Rptr. 23, 24-25 (1982); Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 449 (Fla. 1984); Cannon v. Lardner, 185 Ga. App. 194, , 363 S.E.2d 574, 576 (1987), *vacated in pt., aff'd in pt.*, 258 Ga. 332, —, 368 S.E.2d 730, 732 (1988); Wemyss v. Coleman, 729 S.W.2d 174, 179 (Ky. 1987); Lowe v. Estate Motors Ltd., 428 Mich. 439, 449, 410 N.W.2d 706, 721 (1987); Dunn v. Durso, 219 N.J. Super. 383, 386-87, 530 A.2d 387, 389 (1986); Spier v. Barker, 35 N.Y.2d 444, 449, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974); Dahl v. BMW, 304 Or. 558, 564, 748 P.2d 77, 81 (1987) (en banc); Foley v. City of West Allis, 113 Wis. 2d 475, 478, 335 N.W.2d 824, 827 (1983) (how to allocate damages); *see also* Annotation, *Nonuse of Automobile Seatbelts as Evidence of Comparative Negligence*, 95 A.L.R.3d 239, 242-47 (1979) (citing cases accepting view that nonuse constitutes negligence); Annotation, *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence*, 92 A.L.R.3d 9, 29-35 (1979) (noting cases in which defense established or not); Annotation, *Non Use of Seat Belt as Failure to Mitigate Damages*, 80 A.L.R.3d 1033, 1041-47 (1977) (summarizing views accepting and rejecting consideration of seat belt use in damages calculations).

The conceptual problem of the seat belt defense was raised earlier in *Mahoney v. Beatman*, 110 Conn. 184, 147 A. 762 (1929), in which the plaintiff drove his automobile at an excessive speed, and the defendant negligently drove into it. *Id.* at 186, 147 A. at 764. The plaintiff's speed did not cause the collision, but it did increase the damages. The court held that the plaintiff could recover for all the damages he had suffered. *Id.* at 200, 147 A. at 768.

Another area in which this issue has been raised is the motorcycle helmet defense. The development of this defense has paralleled that of the seat belt defense. An early case rejecting the motorcycle helmet defense based its holding on an analogy to the seat belt defense. Rogers v. Frush, 257 Md. 233, 242, 262 A.2d 549, 553 (1970). For a later case adopting the motorcycle helmet defense, see *Halvorson v. Voeller*, 336 N.W.2d 118, 121 (N.D. 1983) (accepting argument for mitigating damages based on helmet nonuse); *see also* Annotation, *Failure of Motorcyclist to Wear Protective Helmet or Other Safety Equipment as Contributory Negligence, Assumption of Risk, or Failure to Avoid Consequences of Accident*, 40 A.L.R.3d 856, 856-57 (1971) (citing *Rogers v. Frush* as sole case on the issue).

7. *See* Britton v. Doehring, 286 Ala. 498, 504, 242 So. 2d 666, 671 (1970); Churning v. Staples, 628 P.2d 180, 181 (Colo. Ct. App. 1981); Lipscomb v. Diamiani, 226 A.2d 914, 918 (Del. Super. Ct. 1967); McCord v. Green, 362 A.2d 720, 722 (D.C. 1976); Quick v. Crane, 111 Idaho 759, 780, 727 P.2d 1187, 1208-09 (1986); Clarkson v. Wright, 108 Ill. 2d 129, 131, 483 N.E.2d 268, 268 (1985); State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981); Raterree v. Bartlett, 238 Kan. 11, 18, 707 P.2d 1063, 1069 (1985); Kopischke v. First Continental Corp., 187 Mont. 471, 492-94, 610 P.2d 668, 679 (1980); Welsh v. Anderson, 228 Neb. 79, 83, 421 N.W.2d 426, 428-29 (1988); Jeep Corp. v. Murray, 101 Nev. 640, 645-46, 708 P.2d 297, 303 (1985) (stating defense inapplicable in strict liability case); Miller v. Miller, 273 N.C. 228, 232-37 160 S.E.2d 65, 68-71 (1968); Bendner v. Carr, 40 Ohio App. 3d 149, 153, 532 N.E.2d 178, 182 (Ohio Ct. App. 1987); Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 62 (Okla. 1976); Grim v. Betz, 539 A.2d 1365, 1367 (Pa. Super. Ct. 1988); Keaton v. Pearson, 292 S.C. 579, 580, 358 S.E.2d 141, 141 (1987); Carnation Co. v. Wong, 516 S.W.2d 116, 116-17 (Tex. 1974); Amend v. Bell, 89 Wash. 2d 124, 132-34, 570 P.2d 138, 143 (1977) (holding seat belt defense invalid because seat belts not required in cars).

alone, six courts have adopted it and five have rejected it.[8] Courts that have rejected the seat belt defense have done so for a variety of theories, reasoning that there is no duty to wear a seat belt,[9] that the plaintiff need not anticipate the defendant's negligence,[10] that the majority of the community does not wear seat belts,[11] that the seat belt defense differs from traditional defenses,[12] and that the seat belt defense creates substantial administrative problems.[13] Courts that have adopted the seat belt defense have done so because the failure to wear a seat belt may be negligent and plaintiffs should bear responsibility for damages caused by their negligence.

When the seat belt defense is at issue, the damages suffered by plaintiffs fall into two categories. This Article will refer to one category of damages, the damages plaintiffs would have suffered even if they had worn seat belts, as primary damages. This Article will refer to the other category of damages, the damages plaintiffs would have avoided had they worn seat belts, as exacerbation damages.[14]

Jurisdictions that reject the seat belt defense make defendants responsible for all the damages that plaintiffs suffer.[15] Some jurisdictions that adopt the seat belt defense permit plaintiffs to recover only those damages that they would have suffered had they worn seat belts; in other words, plaintiffs are

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8. *See supra* notes 6, 7.
9. *See infra* note 42 and text accompanying notes 42-49.
10. *See infra* note 56 and text accompanying notes 56-61.
11. *See infra* note 62 and text accompanying notes 62-66.
12. *See infra* note 98 and text accompanying notes 98-107.
13. *See infra* note 153 and text accompanying notes 153-62.
14. In *Waterson v. General Motors Corp.*, 111 N.J. 238, 241, 544 A.2d 357, 358 (1988), the New Jersey Supreme Court refers to those damages the plaintiff could have avoided by wearing a seat belt as *seat belt* damages rather than "exacerbation" damages. The term *seat belt* damages is confusing because these damages were not caused by the seat belt, but by the plaintiff's failure to wear a seat belt.

Professor Twerski refers to those damages that the plaintiff would have suffered even if the plaintiff had worn a seat belt as "first collision" rather than "primary" damages and to those damages that the plaintiff could have avoided by wearing a seat belt as "second collision" rather than "exacerbation" damages. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297, 327 (1977). The term *second collision injuries* is somewhat confusing because the plaintiff's failure to wear a seat belt will not in all cases be the cause of all of the injuries resulting from the second collision—the collision of the plaintiff with the car. In many cases, the plaintiff would have suffered some of these damages even if wearing a seat belt.
15. *See, e.g.*, cases cited *supra* note 7.

not entitled to recover any exacerbation damages.[16] This Article will refer to that type of seat belt defense as the no-exacerbation-damage-recovery seat belt defense.

This Article argues that both the rule imposing the entire responsibility for exacerbation loss on the defendant—the rejection of the seat belt defense—and the rule imposing the entire responsibility for exacerbation damages on the plaintiff—the no-exacerbation-damage-recovery seat belt defense—are unfair. The rules are both unfair because of what Professor William Prosser called in another context "the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone."[17]

One can illustrate the unfairness of both of these rules by considering the quite common case in which the plaintiff would not have suffered any injuries if the plaintiff had worn a seat belt and, therefore, all of the personal injuries of the plaintiff are exacerbation damages.[18] Under these facts, in a jurisdiction that rejects the seat belt defense, the defendant is responsible for all of the plaintiff's damages. Such a rule is similar to a rule that would not allow either contributory negligence or comparative negligence as a defense—the defendant is given full responsibility for damages that the plaintiff's failure to take reasonable precautions caused. Under the suggested facts, in a jurisdiction that applies the no-exacerbation-damage-recovery seat belt defense, the plaintiff receives no recovery. That defense is similar to the contributory negligence defense, which forty-four jurisdictions have rejected[19]—the defendant is not re-

16. Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984); Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974). For a discussion of these cases, see *infra* text accompanying notes 167-88.

17. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953).

18. In both *Spier*, 35 N.Y.2d at 448, 323 N.E.2d at 166, 363 N.Y.S.2d at 918, and *Pasakarnis*, 451 So. 2d at 450, for example, the plaintiff's injuries consisted entirely of exacerbation damages. In those cases, the unfairness of a rule that does not allow a plaintiff to recover any damages that a negligent defendant caused is fairly obvious. In cases in which there are primary damages, however, the unfairness of the seat belt defense rule is clouded by the fact that courts allow the plaintiff to recover primary damages. The fact that courts allow the plaintiff to recover damages that the plaintiff's failure to wear a seat belt did not cause does not justify denying recovery of other damages that both the defendant's negligence and the plaintiff's failure to wear a seat belt caused.

19. Only Alabama, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia retain contributory negligence. *See* Cooter & Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1067 n.2 (1986).

quired to pay for any of the plaintiff's damages, even though the defendant's negligent operation of the vehicle caused those injuries.

The seat belt defense some jurisdictions have adopted allows the jury to determine what effect the plaintiff's failure to wear a seat belt will have on the plaintiff's recovery.[20] The jury resolves what should be an issue of law—what form of the seat belt defense to apply. Such a rule will yield inconsistent verdicts, many of which will not be based on the factors that courts should assess in setting damages.[21]

Mitigation cap statutes, adopted in three states, limit reduction of the plaintiff's recovery under the seat belt defense to a small portion—one to five percent—of the plaintiff's damages.[22] Such statutes create a low cap on damage reduction that is inconsistent with principles of comparative fault.[23] In addition, the mitigation cap statutes apply only to front-seat occupants and may draw an unreasonable distinction between front and back-seat occupants.[24]

Courts should adopt a seat belt defense that is consistent with the principles of comparative fault. Under comparative fault, courts divide responsibility for damages caused by both the negligence of plaintiffs and the negligence of defendants based on their respective degrees of culpability. Courts reduce the plaintiffs' recovery by that percentage of responsibility assigned to them.[25] If courts apply the principles of comparative fault to the seat belt defense, defendants will be responsible for all of plaintiffs' primary damages—those damages the plaintiffs would have suffered had they worn seat belts—and courts will apportion responsibility for exacerbation damages based on the relative fault of the parties. Under this proposed system, the trier-of-fact first should determine the plaintiff's exacerbation damages; that is, the amount of damages the plaintiff would have avoided had the plaintiff worn a seat belt.[26] Second, the trier-of-fact should determine what percentage of the fault that is responsible for those exacerbation damages to allot to the

20. *See infra* notes 164-65 and accompanying text.
21. *See infra* text accompanying notes 211-20.
22. *See infra* note 34.
23. *See infra* text accompanying notes 221-27.
24. *See infra* note 228 and text accompanying notes 228-36.
25. *See* Li v. Yellow Cab Co. of Calif., 13 Cal. 3d 804, 828-29, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Scott v. Rizzo, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981).
26. *See infra* text accompanying notes 251-66.

plaintiff's failure to wear a seat belt.[27] The court should reduce the plaintiff's exacerbation damage recovery by that percentage of fault allotted to the plaintiff's failure to wear a seat belt.

The issues raised by the seat belt defense require jurisdictions to evaluate the underlying principles of the tort system. If a jurisdiction bases its decision on policies of compensation and risk spreading, it will reject the seat belt defense because defendants are more likely than plaintiffs to have insurance that will provide full compensation for a plaintiff's loss, and insurance premiums spread the risk of loss to all who purchase liability insurance.[28] If a jurisdiction bases its decision on a cheapest cost avoider/economic efficiency theory, it will adopt

27. *See infra* text accompanying notes 267-75.

28. Kleist, *supra* note 1, discusses a risk spreading approach to the seat belt defense, at 616-19. Under the risk spreading theory, courts impose liability on a defendant when the defendant has a means of spreading the cost of the injury through society and the plaintiff has no means of spreading the loss. *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). The justification for the risk spreading theory is that it is better for all of society to bear a small cost than for a few to bear what may be overwhelming losses. Under the risk spreading theory, the torts system acts as an insurance plan for injuries caused by those who can spread the loss. Everyone pays premiums into the system through higher prices for products, services, and insurance. When people are injured, they recover benefits in the form of personal injury damages.

The seat belt defense leaves some injured plaintiffs without compensation for very severe injuries. Some of these plaintiffs may have health insurance plans that will pay for their medical expenses or employee benefit plans that will pay for their lost wages, but many will not have such benefits. Defendants who drive negligently, however, are likely to have automobile liability insurance protection. If jurisdictions reject the seat belt defense, plaintiffs will recover compensation for the losses that they have suffered from the defendants' insurance companies. Liability insurance premiums will be a bit higher for everyone, but those who are injured will be compensated.

Risk spreading through the tort system creates certain inequities, however. Those who receive benefits do not receive benefits based on what they have paid. If a jurisdiction rejects the seat belt defense, plaintiffs can recover for all of their injuries, including those damages that their failure to wear a seat belt caused. The liability insurance premiums are higher for everyone under this system than they would have been if the jurisdiction had accepted the seat belt defense. Assume a poor laborer and a wealthy professional, each with similar driving records. Each pays the same amount of automobile liability insurance. Assume that each is permanently disabled in an automobile collision both because of the negligence of a defendant and because of failure to wear a seat belt. If the jurisdiction rejects the seat belt defense, each will be able to recover for the permanent disability. The wealthy professional, however, will receive substantially greater benefits because the professional's future earning capacity will be much greater. The laborer paid the same amount into the system in premiums, but the laborer's benefits are substantially less. This system spreads the risk, but spreads it unjustly. If a legislature wanted to create a fair risk-spreading system, it could create a system in which one pays

the no-exacerbation-damage-recovery seat belt defense, because plaintiffs, by buckling their seat belts, can avoid exacerbation damages at the cheapest cost.[29] If a jurisdiction bases its deci-

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into the system an amount commensurate with what one may draw from the system.

Courts generally have not followed risk spreading as a goal of tort law when it conflicts with other goals of the tort system. Those cases in which courts apply comparative fault to strict products liability illustrate the failure to follow risk spreading. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 390, 575 P.2d 1162, 1172 (1978) (extending comparative fault to actions founded on strict products liability); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 712 (5th ed. 1984). If risk spreading were the controlling justification for products liability, defenses based on the plaintiff's conduct would not apply. The risk of injury to the plaintiff who is at fault as well as to the plaintiff who is not at fault could be spread throughout society. The risk that one will be injured by a defective product could be spread throughout society by rejecting defenses based on a plaintiff's conduct, and yet the strong trend is toward the application of comparative fault to strict products liability cases. *See id.* Cases such as *Daly* indicate that courts see the assignment of responsibility for loss based on the relative fault of the parties, as advocated by this Article, as a more important goal of the tort system than risk spreading.

29. A cheapest cost avoider/economic efficiency approach to the seat belt defense is advocated in *Reallocating the Risk*, *supra* note 1, at 139-51; and *Self Protective Safety Devices*, *supra* note 1, at 433-40. Both authors base their positions on Professor Calabresi's economic analysis. Calabresi has argued that the proper tort rule is the efficient rule—the rule that causes the lowest sum of accident costs and prevention costs. *See* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84-85 (1975). The goal is not to avoid all accidents, but rather to encourage people to participate in activity that creates risks that are justified in terms of their costs. The resulting number of accidents will be efficient. Calabresi argues that society should place liability on the cheapest cost avoider, that person who can avoid the accident at the cheapest cost. Then, that person can make the economically efficient decision whether or not to avoid the risk. If the cheapest cost avoider calculates that the safety precautions cost more than the risk of harm, the cheapest cost avoider will not employ the safety measure. If the cheapest cost avoider's calculations are correct, the efficient result is achieved. If the cheapest cost avoider calculates that the safety precautions cost less than the value of the risk of harm, the cheapest cost avoider will employ the safety measure. Because the decisionmaker is the cheapest cost avoider, the method adopted generally should be the most efficient method of avoiding the harm.

In the context of the seat belt defense, the cheapest cost avoider will be the party that generally could avoid the risk of exacerbation damages at the least cost. The calculation is complicated by two factors. First, there is not an easily calculated market value for either buckling a seat belt or driving with greater care. Second, the safety steps available to the plaintiff and those available to the defendant do not avoid the same harm. Plaintiffs can use seat belts and avoid the exacerbation damages. Defendants cannot avoid all exacerbation damages unless they stop driving. Driving more safely will avoid causing some exacerbation damages and will avoid other damages as well.

It is possible to identify roughly the cheapest cost avoider in the seat belt

sion on a comparative fault/corrective justice theory, it will adopt the seat belt defense proposed in this Article, one that divides responsibility for exacerbation damages based on the relative fault of the parties.[30]

Within the last few years, twenty-nine states and the District of Columbia have enacted statutes requiring seat belt use.[31] Some of these statutes prohibit the introduction of the

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defense cases by comparing the cost to plaintiffs of avoiding exacerbation damages with the cost to defendants of avoiding a similar amount of damages. Plaintiffs can avoid exacerbation damages by buckling their seat belts. According to National Highway Traffic Safety Administration studies, 12,000 to 15,000 lives could be saved annually if all vehicle occupants used seat belts. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1986). What cost would defendants have to incur to achieve a similar savings? The National Safety Council estimates that 450 to 600 lives could be saved if the speed limit on rural interstate highways were 55 mph rather than 65 or 70 mph. *Id.* Obviously, the cost to drivers of taking steps that would save the number of lives that would be saved if occupants used seat belts (12,000-15,000) would be enormous. It is thus easy to conclude that the plaintiff in the seat belt case is the cheapest cost avoider. Under such an ecomomic efficiency theory, jurisdictions would adopt the no-exacerbation-damage-recovery seat belt defense.

The economic efficiency argument for the no-exacerbation-damage-recovery seat belt defense, however, assumes that vehicle occupants will learn of the seat belt defense rule and that the rule will encourage them to use their seat belts. It is doubtful that many people know the seat belt defense rule in their jurisdiction. Further, if people did know the seat belt defense rule, it is doubtful that such knowledge would affect their behavior. If the fear of injury does not cause people to use seat belts, it is unlikely that the fear of reduction in damage recovery for collision injuries will cause them to buckle seat belts.

30. *See* Cooter & Ulen, *supra* note 19, at 1095-96.

31. The states with mandatory usage laws are: California, CAL. VEH. CODE § 27315 (West Supp. 1989); Colorado, COLO. REV. STAT. § 42-4-236 (Supp. 1987); Connecticut, CONN. GEN. STAT. ANN. § 14-100a (West 1987); District of Columbia, D.C. CODE ANN. §§ 40-1601-1607 (1986); Florida, FLA. STAT. ANN. § 316.614 (West Supp. 1989); Hawaii, HAW. REV. STAT. § 291-11.6(d) (1985); Idaho, IDAHO CODE § 49-764 (Supp. 1988); Illinois, ILL. ANN. STAT. ch. 95 1/2, para. 12-603.1 (Smith-Hurd Supp. 1988); Indiana, IND. CODE ANN. § 9-8-14-1 to 14-6 (Burns 1987); Iowa, IOWA CODE ANN. § 321.445 (West Supp. 1988); Kansas, KAN. STAT. ANN. § 8-2501-2507 (Supp. 1987); Louisiana, LA. REV. STAT. ANN. § 32:295.1 (West Supp. 1988); Maryland, MD. TRANSP. CODE ANN. § 22-412.3 (1987); Michigan, MICH. COMP. LAWS ANN. § 257.710e (West Supp. 1988); Minnesota, MINN. STAT. § 169.686 (1988); Missouri, MO. ANN. STAT. § 307.178 (Vernon Supp. 1989); Montana, MONT. CODE ANN. § 61-13-101 to 106 (1987); New Jersey, N.J. STAT. ANN. § 39:3-76.2(a)-(k) (West Supp. 1988); New Mexico, N.M. STAT. ANN. §§ 66-7-370 to 373 (Supp. 1987); New York, N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 1986); North Carolina, N.C. GEN. STAT. § 20-135.2A (Supp. 1988); Ohio, OHIO REV. CODE ANN. § 4513.263 (Anderson Supp. 1988); Oklahoma, OKLA STAT. ANN. tit. 47, §§ 12-416 to 420 (West 1988 & West Supp. 1989); Pennsylvania, PA. STAT. ANN. tit. 75, § 4581 (Purdon Supp. 1988); Tennessee, TENN. CODE ANN. §§ 55-9-603 to 610 (1988) (repealed effective June 30, 1990); Texas, TEX. REV. CIV. STAT. ANN. art. 6701d, § 107C (Vernon Supp. 1989); Utah, UTAH CODE ANN. §§ 41-6-181 to 186 (Supp. 1987); Virginia, VA.

statute to establish that failure to wear a seat belt is negligent.[32] Other statutes either prohibit the seat belt defense[33] or limit reduction of the plaintiff's damages to a small percentage of those damages.[34] Still other mandatory use statutes do not mention the seat belt defense.[35] It may be that courts will treat a violation of these mandatory use statutes that do not mention

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CODE ANN. § 46.1-309.2 (Supp. 1988); Washington, WASH. REV. CODE ANN. § 46.61.688 (1987); Wisconsin, WIS. STAT. ANN. § 347.48 (West Supp. 1988). For a discussion of these statutes, see *infra* text accompanying notes 124-49.

32. The following jurisdictions specifically prohibit the introduction of their mandatory use statutes to establish that the plaintiff's failure to use a seat belt is negligent: California, CAL. VEH. CODE § 27315(j) (West Supp. 1989); District of Columbia, D.C. CODE ANN. § 40-1607 (1986); Florida, FLA. STAT. ANN. § 316.614(10) (West Supp. 1989); Illinois, ILL. ANN. STAT. ch. 95 1/2, para. 12-603.1(c) (Smith-Hurd Supp. 1988); Indiana, IND. CODE ANN. § 9-8-14-5 (Burns. 1987); Maryland, MD. TRANSP. CODE ANN. § 22-412.3(h) (1987); Montana, MONT. CODE ANN. § 61-13-106 (1987); New Mexico, N.M. STAT. ANN. § 66-7-373B (Supp. 1987); Ohio, OHIO REV. CODE. ANN. § 4513.263(G) (Anderson Supp. 1988) (providing that seat belt usage may be admitted into evidence only in claims involving product liability); and Virginia, VA. CODE ANN. § 46.1-309.2E (Supp. 1988). For a discussion of these statutes, see *infra* text accompanying notes 140-42.

33. The mandatory use statutes in the following states provide that evidence of the plaintiff's failure to use a seat belt is not admissible in civil actions: Connecticut, CONN. GEN. STAT. ANN. § 14-100a(c)(4) (West 1987); Kansas, KAN. STAT. ANN. § 8-2504(c) (Supp. 1987); North Carolina, N.C. GEN. STAT. § 20-135.2A(d) (Supp. 1987); Oklahoma, OKLA. STAT. ANN. tit. 47, § 12-420 (West 1988); Tennessee, TENN. CODE ANN. § 55-9-604 (1988) (repealed effective June 30, 1990); Texas, TEX. REV. CIV. STAT. ANN. art. 6701d, § 107C(j) (Vernon Supp. 1989); Utah, UTAH CODE ANN. § 41-6-186 (Supp. 1987); Washington, WASH. REV. CODE ANN. § 46.61.688(6) (1987). Maine, which does not have a mandatory use statute, also has rejected the seat belt defense. ME. REV. STAT. ANN. tit. 29, § 1368-A (1978). For a discussion of these statutes, see *infra* text accompanying notes 137-39.

In the following states, it is unclear whether the statute prohibits the seat belt defense in cases in which the plaintiff's failure to wear a seat belt is a violation of the mandatory use statute, or merely prohibits the defendant from using the statute to establish the seat belt defense: District of Columbia, D.C. CODE ANN. § 40-1607 (1986); Illinois, ILL. ANN. STAT. ch. 95 1/2, para. 12-603.1(c) (Smith-Hurd Supp. 1988); Maryland, MD. TRANSP. CODE ANN. § 22-412.3(h) (1987); Montana, MONT. CODE ANN. § 61-13-106 (1987); Nevada, NEV. REV. STAT. § 484.641(4) (Supp. 1987); New Mexico, N.M. STAT. ANN. § 66-7-373B (Supp. 1987); Ohio, OHIO REV. CODE ANN. § 4513.26.3(G)(2) (Anderson Supp. 1987); Pennsylvania, PA. STAT. ANN. tit. 75, § 4581(e) (Purdon Supp. 1988); and Virginia, VA. CODE ANN. § 46.1-309.2E (Supp. 1988). For a discussion of these statutes, see *infra* text accompanying notes 143-47.

34. IOWA CODE ANN. § 321.445 4(b)(2) (West Supp. 1988) (5%); MICH. COMP. LAWS ANN. § 257.710e(5) (West Supp. 1988) (5%); MO. ANN. STAT. § 307.178 sec. 3(2) (Vernon Supp. 1988) (1%); *cf.* WIS. STAT. ANN. § 347.48(g) (West Supp. 1988), discussed *infra* at note 250. For a discussion of the mitigation statutes, see *infra* text accompanying notes 221-45.

35. IDAHO CODE § 49-764 (Supp. 1987), and MINN. STAT. § 169.686 (1988).

the seat belt defense as negligence *per se*.[36] In addition, mandatory use statutes may cause the majority of the community to use seat belts. This may aid the seat belt defense indirectly, because courts may admit the general community practice of using seat belts as evidence that failure to wear a seat belt is negligent, and juries are likely to view a deviation from community practice as negligence.[37]

To further complicate the seat belt defense, a substantial number of American vehicles will include air bags beginning with the 1990 model year.[38] Air bags alone, however, provide substantially less protection than a combination of air bag and seat belt use.[39] Manufacturers, the federal government, and the news media warn the public that people should wear seat belts, even in vehicles equipped with air bags.[40] An issue many courts will face in the near future is whether to apply the seat belt defense to a plaintiff who fails to wear a seat belt when sitting in a seat protected by an air bag.[41]

Part II of this Article will consider whether courts and legislatures should adopt the seat belt defense. It will consider whether the failure to wear a seat belt constitutes negligence, whether the failure to use a seat belt in a car equipped with an air bag constitutes negligence, and whether the seat belt defense is consistent with traditional rules of tort law. In addition, Part II will evaluate the impact of new mandatory seat belt use statutes on the seat belt defense and consider whether the seat belt defense is worth the administrative problems that accompany it. Part III will consider how courts divide responsibility for damages under the seat belt defense and will propose that courts reduce plaintiffs' recovery of those damages that the

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36. The Supreme Court of Idaho has expressly reserved the question of the effect of the Idaho statute on the seat belt defense in that state. Quick v. Crane, 111 Idaho 759, 781 n.7, 727 P.2d 1187, 1209 n.7 (1986).

37. *See infra* text accompanying notes 141-42.

38. *See infra* text accompanying note 73.

> Air bags are fabric cushions that are very rapidly inflated with gas to cushion the occupant and prevent him or her from colliding with the vehicle interior when a crash occurs that is strong enough to trigger a sensor in the vehicle. (Generally, the bag will inflate at a barrier equivalent impact speed of about 12 miles per hour.)

U.S. DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC AND SAFETY ADMINISTRATION, FEDERAL MOTOR VEHICLE SAFETY STANDARD NO. 208 OCCUPANT CRASH PROTECTION 9 (1984) [hereinafter NHTSA STANDARD].

39. *See infra* text accompanying notes 76-85.

40. *See infra* text accompanying notes 90-93.

41. For a discussion of the impact air bags are likely to have on the seat belt defense, see *infra* text accompanying notes 73-97.

plaintiffs could have avoided by wearing a seat belt, based on their relative fault in failing to wear a seat belt.

II. ADOPTION OF THE SEAT BELT DEFENSE

A. A DUTY TO WEAR A SEAT BELT?

Some courts reject the seat belt defense because they find no duty to wear a seat belt.[42] These courts require defendants to show that plaintiffs have a duty to wear seat belts based on an analogy to the common tort law requirement that the plaintiff show that the defendant owed a duty to the plaintiff.[43] In order to establish a *prima facie* case, the plaintiff normally must establish that the defendant owed a duty to exercise reasonable care for the safety of the plaintiff.[44]

When courts require that defendants show that plaintiffs have a duty to buckle up, however, courts are using the term *duty* in an unusual manner. When plaintiffs fail to buckle their seat belts, one could say that they have violated a duty only to themselves.[45] Speaking of a duty to oneself, however, strains the meaning of the term. Duty is a term of relationship. A duty is something that one person owes to another. It would also be absurd to argue that plaintiffs owe a duty to other drivers to wear seat belts so that other drivers will not be liable for

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42. *See* Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970); Clarkson v. Wright, 108 Ill. 2d 129, 133, 483 N.E.2d 268, 270 (1985); State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981); Raterree v. Bartlett, 238 Kan. 11, 18, 707 P.2d 1063, 1069 (1985); Kopischke v. First Continental Corp., 187 Mont. 471, 492, 500, 610 P.2d 668, 679, 683 (1980); Welsh v. Anderson 228 Neb. 79, 82-83, 421 N.W.2d 426, 428-29 (1988); Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968); Keaton v. Pearson, 292 S.C. 579, 580, 358 S.E.2d 141, 141 (1987); Amend v. Bell, 89 Wash. 2d 124, 132, 570 P.2d 138, 143 (1977).

43. *Amend v. Bell*, 89 Wash. 2d at 132, 570 P.2d at 143, states:

> The premise upon which negligence rests is that an actor has a legally imposed duty .... The question then is whether the court should impose a standard of conduct upon all persons riding in vehicles equipped with seat belts. We think we should not.

Id.

44. Controversy exists over to whom the defendant owes the duty of reasonable care. The New York Court of Appeals, in an opinion written by Justice Cardozo, held that the duty of reasonable care is owed to those foreseeably injured. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). Justice Andrews, in a widely-followed dissent, argued that the duty of reasonable care is owed to the whole world. *Id.* at 350, 162 N.E. at 103.

45. The court in *Dunn v. Durso*, 219 N.J. Super. 383, 399, 530 A.2d 387, 395 (1986), makes this argument, stating, "The 'duty' imposed does not refer to an obligation of conduct directed toward another person. Rather, the duty pertains to conduct that involves an unreasonable risk of harm to the actor himself." *Id.*

as great an amount in damages if they injure the plaintiffs.[46]

Although some courts have concluded that plaintiffs violate a duty by failing to wear a seat belt,[47] the better solution to the duty problem is for courts to find that there need not be a duty to buckle up as a requirement for the seat belt defense. The duty question in seat belt cases arises because of an inappropriate application to the seat belt defense of principles drawn from the question of defendants' responsibility for injuries caused by their negligence. The closer analogy, however, is between the seat belt defense and contributory or comparative negligence. As *Prosser and Keeton on the Law of Torts* says in the context of contributory and comparative negligence:

> Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty, unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of the plaintiff's own negligence.[48]

As with the contributory and comparative negligence defenses, there should be no duty requirement for the seat belt defense.[49]

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46. *See infra* text accompanying note 48.

47. Dunn v. Durso, 219 N.J. Super. 383, 400, 530 A.2d 387, 395 (1986); Bentzler v. Braun, 34 Wis. 2d 362, 385, 149 N.W.2d 626, 639 (1967); *see also* Franklin v. Gibson, 138 Cal. App. 3d 340, 344, 188 Cal. Rptr. 23, 25 (1982) ("We do not intend to establish a duty to wear seat belts . . . ."); Dahl v. BMW, 304 Or. 558, 564, 748 P.2d 77, 80 (1987) (en banc) (examining "weaknesses inherent in . . . 'no duty' conclusions"); *cf.* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1564 (D. Vt. 1985) (finding that "the lack of any statutorily or judicially created duty to wear one's seat belt does not preclude a court from admitting this as evidence on the question of negligence"); Lowe v. Estate Motors Ltd., 428 Mich. 439, 456, 410 N.W.2d 706, 713 (1987) (same).

48. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 453 (5th ed. 1984) [hereinafter PROSSER & KEETON].

49. Some states that in the past have rejected the seat belt defense because they found no duty to buckle a seat belt may find such a duty in one of the recently enacted statutes requiring seat belt use. *See supra* notes 31-36 and accompanying text; *infra* text accompanying notes 129-30; *see also* Quick v. Crane, 111 Idaho 759, 781 n.7, 727 P.2d 1187, 1209 n.7 (1986) (expressly reserving question of whether new seat belt law creates defense). Some courts that rejected the seat belt defense on the no duty basis stated that it was for the legislature to establish such a duty. *See* State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981); Miller v. Miller, 273 N.C. 228, 238, 160 S.E.2d 65, 73 (1968); Keaton v. Pearson, 292 S.C. 579, 580, 358 S.E.2d 141, 141 (1987).

B. SEAT BELT USE AND THE STANDARD OF REASONABLE CARE

1. The Reasonable Person

The question whether failure to use a seat belt is negligent can be analyzed under traditional negligence concepts. The standard of reasonable care requires one to act as an ordinary reasonable person, taking into consideration the burden of any available safety precautions, the probability of loss if one does not take a precaution, and the loss that one might suffer if one does not take a precaution.[50] As Judge Learned Hand noted, negligence can be expressed in mathematical terms. One is negligent if one fails to take a precaution for which the burden of precaution is less than the foreseeable probability that injury will occur, times the loss that might occur if the safety precaution is not taken.[51]

In the seat belt context, the plaintiff is negligent under the Hand formula if the burden of buckling and wearing a seat belt[52] is less than the probability that the plaintiff will suffer injury due to the failure to wear a seat belt, times the injury that the plaintiff's failure to wear a seat belt may cause. The probability that an automobile collision will occur is fairly small, but the loss that the plaintiff might suffer due to the failure to wear a seat belt is great, and the burden of buckling a seat belt is quite small.[53]

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50. *See e.g.*, PROSSER & KEETON, *supra* note 48, at 170-73 and sources cited therein.

51. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

52. The cost of using an available seat belt includes four components: risk assessment, attentiveness, tactile inconvenience and physical effort, and aesthetic loss. Risk assessment costs are incurred by each potential user in ascertaining whether driving creates a substantial risk of personal injury that could be significantly reduced by using a seat belt. . . . [D]issemination of information [through safety campaigns about the value of seat belts] clearly reduces the risk assessment costs that potential seat belt users incur. Attentiveness costs are created by attempts to remind the user to employ the seat belt and to make the use routine. . . . The costs of tactile inconvenience and actual physical effort are, respectively, the value of whatever discomfort may be caused by wearing seat belts and the energy expended in buckling them. Aesthetic loss is a residual category of undefinable unpleasantness that some automobile occupants apparently associate with the use of seat belts.

Self-Protective Safety Devices, *supra* note 1, at 429 (footnotes omitted).

53. Dunn v. Durso, 219 N.J. Super. 383, 400, 530 A.2d 387, 396 (1986). It is, of course, only foreseeable danger that one must consider under the standard of reasonableness. *See id.* at 399, 530 A.2d at 396 (applying Learned Hand

The substantial reduction of the risk of injury that results from seat belt use is well established and well known. The U.S. Department of Transportation's National Highway Traffic and Safety Administration recently evaluated and compiled data from three seat belt studies and concluded that when a person is in the front seat of a vehicle, use of a lap/shoulder belt reduces the risk of death by forty to fifty percent and the risk of moderate to critical injury by forty-five to fifty-five percent.[54] Other studies indicate that the use of a lap belt by a back-seat passenger reduces the risk of death by 17 to 50 percent.[55] The importance of seat belt use has been highly publicized in "buckle up for safety" programs. Based on this

formula to seat belt defense); Lowe v. Estate Motors Ltd., 428 Mich. 439, 461-62, 410 N.W.2d 706, 715 (1987) (same); Spier v. Barker, 35 N.Y.2d 444, 452, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 922 (1974) (same). The argument that it is unforseeable that failure to buckle a seat belt might cause one to suffer serious injury is untenable in light of the highly publicized seat belt studies and the "Buckle Up For Safety" campaigns during the last twenty years. In cases adopting the seat belt defense, many courts have explicitly recognized the effectiveness of seat belts. *E.g.*, *Spier v. Barker* at 452, 323 N.E.2d at 168, 363 N.Y.S.2d at 922 ("there can be no doubt whatsoever as to the efficiency of the automobile seat belt in preventing injuries"); Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984) ("evidence for the effectiveness of safety belts in reducing deaths and injury severity is substantial and unequivocal"). Legislative battles over laws requiring seat belt use also have increased the awareness of the value of seat belt use.

54. U.S. DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, FINAL REGULATORY IMPACT ANALYSIS, AMENDMENT TO FEDERAL MOTOR VEHICLE SAFETY STANDARD 208 PASSENGER CAR FRONT SEAT OCCUPANT PROTECTION IV-1 to 4 (1984) [hereinafter NHTSA ANALYSIS]. This analysis was used in the development of regulations that will require automatic seat belts or air bags in all new vehicles in the United States beginning in September 1989 unless certain requirements are met. For additional results of the analysis and a list of the studies on which it is based, see *infra* notes 76-85 and accompanying text.

55. Kahane, *Fatality and Injury Reducing Effectiveness of Lap Belts for Back Seat Occupants*, SOCIETY OF AUTOMOTIVE ENGINEERS, RESTRAINT TECHNOLOGIES: REAR SEAT OCCUPANT PROTECTION 45 (1987). An evaluation of accidents that occurred between 1975 and 1986 reported in the Fatal Accident Reporting System, involving nearly 500 rear seat occupants, found rear seat lap belts provide a 17 to 26 percent reduction in fatalities. *Id.* at 47. The same study evaluated Pennsylvania accident records from 1982-85 and found a 37 percent reduction in serious or fatal injuries. *Id.* at 51. Dalmotas & Krzyzewski, *Restraint System Effectiveness as a Function of Seating Position*, SOCIETY OF AUTOMOTIVE ENGINEERS, RESTRAINT TECHNOLOGIES: REAR SEAT OCCUPANT PROTECTION 75 (1987), found a 20-30 percent reduction in fatalities for adults and a 40-50 percent reduction for children based on a study of accidents in various Canadian provinces. *Id.* at 92. Campbell, *The Effectiveness of Rear-Seat Lap-Belts in Crash Injury Reduction*, SOCIETY OF AUTOMOTIVE ENGINEERS, RESTRAINT TECHNOLOGIES: REAR SEAT OCCUPANT PROTECTION 9

substantial risk reduction, it is difficult to argue that a reasonable person will not make use of an available seat belt.

(1987), found a 25 percent fatality reduction based on a study of North Carolina crashes between 1979 and 1985. *Id.* at 9-10.

An earlier study by the National Transportation Safety Board (NTSB) of 26 frontal crashes, NATIONAL TRANSPORTATION SAFETY BOARD, SAFETY STUDY—PERFORMANCE OF LAP BELTS IN 26 FRONTAL CRASHES, Report No. PB86-917006 (1986) (cited in Kahane, *supra*, at 45) [hereinafter NTSB STUDY], called into question the effectiveness of rear seat lap belts. The study suggested that rear seat lap belts actually may increase the risk of abdominal injuries. Kahane, *supra*, at 45. Kahane's study of the Pennsylvania records helps to explain the difference between the findings of the NTSB study and the other researchers. The Pennsylvania records are especially helpful, because they identify not only seat location and severity of injuries, but also identify the part of the body that was injured and whether the collison was frontal or nonfrontal. *Id.* at 45-46. Kahane found that rear seat lap belts are much less effective in frontal collisions than nonfrontal collisions. He found that the risk of serious injury from a nonfrontal crash is reduced by 55 percent when an occupant wears a rear seat belt, but that the risk of serious injury from a frontal crash is reduced by only 17 percent. *Id.* at 50. Kahane states:

> The principal reason that lap belts are not as effective in frontal crashes, however, is that even unrestrained back seat occupants have lower injury risks than unrestrained drivers, due to the relatively safe environment which the rear passenger compartment offers in those crashes. But the back seat has no safety advantage in the nonfrontal crashes . . .

Id. at 50, 52. It is therefore not surprising that in the NTSB study, which only examined frontal crashes, the lap belt was not found to be very effective.

Kahane's study of the Pennsylvania data also supports the NTSB study's suggestion that lap belts increase the likelihood of abdominal injuries. Kahane found that the use of lap belts in the back seat *increased* the risk of serious torso (thorax and abdomen) injuries by 86 percent, but that it decreased the risk of serious injuries to the head by 63 percent, to the neck and back by 49 percent, and to arms and legs by 55 percent. *Id.* at 50. The important factor, of course, in determining whether a reasonable person in the back seat will wear a seat belt is the overall effectiveness of lap belts in preventing injury from any type of collision. Plaintiffs cannot know at the time they choose whether or not to buckle a seat belt whether they will be in a frontal or nonfrontal collision or what type of injury they are likely to suffer. As to the overall effectiveness of rear-seat lap belts, Kahane found, based on the Pennsylvania records, that use of a back-seat lap belt reduces the risk of serious or fatal injury by 37 percent. *Id.* at 51.

The argument that a plaintiff who is in a back seat is negligent for failing to wear a lap belt is not as strong as the argument that the plaintiff in the front seat is negligent, because the risk of injury to one seated in a back seat without a seat belt is less than the risk of injury to one seated in a front seat without a seat belt, and lap belts create a risk of abdominal injury. Courts, however, have not drawn a distinction between front and back seat occupants in the seat belt defense cases. Some courts have applied the seat belt defense to back seat plaintiffs, but have not discussed whether a distinction between front and back seat occupants is justified. *See, e.g.*, Lowe v. Estate Motors Ltd., 428 Mich. 439, 410 N.W.2d 706 (1987); Heiser v. Chastain, 6 Ill. App. 3d 552, 556, 285 N.E.2d 601, 604 (1972) (implying that seat belt defense might have been available against plaintiff injured in back seat, if record had established that

2. Should Plaintiffs Anticipate Defendants' Negligence?

Some courts have rejected the seat belt defense because they do not want to require plaintiffs to anticipate the negligence of defendants.[56] There are, however, strong arguments against rejecting the seat belt defense on that basis.[57]

First, the position that the plaintiff need not anticipate the defendant's negligence is inconsistent with other well-established rules of law. Exposing a plaintiff to the risk that the negligence of another will cause the plaintiff harm can constitute negligence.[58] Crashworthiness or second accident products liability cases hold that the manufacturer of an automobile has a duty to build a car that will provide the occupants with reasonable protection from injury after a collision occurs.[59] The manufacturer must anticipate the danger of collision, and, of course, collisions often will occur through the negligence of another.

Second, the rule that one need not anticipate the negli-

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use of seat belt would have mitigated damages). *American Auto. Ass'n v. Tehrani*, 508 So. 2d 365 (Fla. Dist. Ct. App. 1987), appears to be the only case to address the question whether the seat belt defense should be limited to front seat plaintiffs. The *Tehrani* court merely says:

> As a matter of logic [the seat belt defense] rule must necessarily apply to a failure to use any available seat belt in a car, not merely those in the front seat.

Tehrani, 508 So. 2d at 370.

In light of what appears to be the substantial value of the use of lap belts in the back seat, it is appropriate to apply the seat belt defense to back seat plaintiffs as well as well front seat plaintiffs. As noted *infra* at text accompanying note 67, in jurisdictions that adopt the seat belt defense, the defendant must persuade the trier-of-fact that the plaintiff was negligent in failing to wear a seat belt. The studies that indicate that there is less risk of injury when one fails to wear a seat belt in the back seat than in the front seat, and that lap belts create a risk of abdominal injuries, may enable some back seat plaintiffs who failed to wear lap belts to persuade the trier-of-fact that they were not negligent in failing to use a seat belt.

56. *See, e.g.*, Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d. 666, 675 (1970); Clarkson v. Wright, 108 Ill. 2d 129, 133, 483 N.E.2d 268, 270 (1985); Amend v. Bell, 89 Wash. 2d 124, 133, 570 P.2d 138, 143 (1977).

57. *See, e.g.*, Dahl v. BMW, 304 Or. 558, 565, 748 P.2d 77, 81 (1987) (en banc) ("Anticipation of the dangers which are a part of driving on Oregon's roads is a 'part of the uniform standard of behavior by the hypothetical reasonable, prudent man.' " (quoting Cutsforth v. Kinzua Corp., 267 Or. 423, 430, 517 P.2d 640, 643 (1973))).

58. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 302A (1965). "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person." *Id.*

59. *See infra* note 111 and accompanying text.

gence of another has a well-recognized exception—plaintiffs have the duty to protect themselves once they know of a specific risk.[60] It is common knowledge that highway travel will expose one to the risk of negligent driving by others. Public information campaigns that encourage people to "drive defensively" and campaigns that warn of the dangers caused by drunk drivers explicitly inform the public of the danger that others will drive negligently. People who travel on the highway should know of the risk that others will be negligent and should take steps to avoid harm.

Finally, failure to wear a seat belt is probably negligent, even if plaintiffs are not required to anticipate the negligence of others. When plaintiffs travel on the highway, they are not just risking the danger that they will be injured due to the negligence of another. They also risk the danger that they will be injured in an accident in which no one is negligent or in which they themselves are negligent. The burden of buckling a seat belt is so small that the failure to use a seat belt is probably negligent even if that burden is compared only with the risk that the plaintiff will be injured due to an accident that is not caused by someone else's negligence.[61]

3. Community Practice Not To Wear Seat Belts

Some courts have rejected the seat belt defense because the majority of citizens do not wear seat belts.[62] In observational surveys conducted by the Department of Transportation's National Highway Traffic Safety Administration in nineteen cities nationwide in 1983, only fourteen percent of drivers and approximately eight and a half percent of front right passengers

60. *See, e.g.*, Junker v. Ziegler, 113 Ill. 2d 332, 338, 498 N.E.2d 1135, 1137 (1986) (noting that, although there is no duty to anticipate the negligence of another, there is a duty to protect oneself once danger becomes known).

61. *Cf. supra* text accompanying notes 50-53 (describing Hand's mathematical terms for expressing negligence).

62. In *Amend v. Bell*, 89 Wash. 2d 124, 133, 570 P.2d 138, 143 (1977), the court stated, "[I]t is a fact and persuasive that the majority of motorists do not habitually use their seat belts." *See also* McCord v. Green, 362 A.2d 720, 725 (D.C. 1976) ("[T]o hold that failure to use a seat belt amounts to negligence assumes that the usual practice of car drivers and passengers is to use these devices. Statistics on the subject refute any such assumption."); Kopischke v. First Continental Corp., 187 Mont. 471, 495, 610 P.2d 668, 680 (1980) (quoting Amend v. Bell, 89 Wash. 2d 124, 133, 570 P.2d 138, 143 (1977)); Miller v. Miller, 273 N.C. 228, 238, 160 S.E.2d 65, 73 (1968) (doubting that rule denying all recovery to plaintiffs who failed to buckle their seat belts would increase use of seat belts).

were wearing seat belts.[63] Nevertheless, the fact that the majority of citizens do not use seat belts does not mean the failure to wear a seat belt is reasonable. Generally, a practice may serve as evidence that the practice is reasonable, but does not establish as a matter of law that the practice is reasonable.[64] As Justice Holmes said:

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.[65]

Consequently, the fact that the majority of citizens do not use seat belts should not be the basis for rejection of the seat belt defense.

Moreover, states that base their rejection of the seat belt defense on nonuse of seat belts by the majority may need to reevaluate their rejection of the defense in light of increased seat belt use following the enactment of mandatory seat belt use laws. Such seat belt statutes are likely to push seat belt use well above fifty percent.[66]

4. The Plaintiff's Negligence: An Issue of Fact or Law?

The jurisdictions that allow the seat belt defense all consider the question whether the failure to wear a seat belt is negligent as an issue for the trier-of-fact.[67] No jurisdictions consider the failure to wear a seat belt negligent as a matter of law. Generally, courts hold that a practice is negligent as a matter of law only if the practice is so clearly negligent that reasonable persons would have to conclude that it is negligent.[68]

Courts are understandably reluctant to label a practice as

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63. NHTSA ANALYSIS, *supra* note 54, at V-2.

64. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 193-96.

65. Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903); *see also* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.) (citing "precautions so imperative that even their universal disregard will not excuse their omission"), *cert denied*, 287 U.S. 662 (1932).

66. Figures compiled by the NHTSA indicate that in the seventeen countries that have passed mandatory seat belt use laws, seat belt use has jumped to an average of 66% and remained high. NHTSA STANDARD, *supra* note 38, at 56-57.

67. *See, e.g.*, Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986); Franklin v. Gibson, 138 Cal. App. 3d 340, 342-43, 188 Cal. Rptr. 23, 24 (1982); Lowe v. Estate Motors Ltd., 428 Mich. 439, 462, 410 N.W.2d 706, 715-16 (1987); Dunn v. Durso, 219 N.J. Super. 383, 401, 530 A.2d 387, 396-97 (1986); *see also* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1564 (D. Vt. 1985).

68. *See* PROSSER & KEETON, *supra* note 48, at 217 ("A decision of an appellate court that under certain circumstances . . . conduct is clearly negligent

negligent *per se*. Nevertheless, the burden of buckling a safety belt is so slight, the risk of not buckling is so great, and that risk is now sufficiently well known,[69] that courts should consider the failure of a plaintiff to use a seat belt under ordinary circumstances[70] negligent as a matter of law. Justice Cardozo warned of: "[T]he need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged."[71] However, we have had substantial experience with seat belts and the evidence of their effectiveness is overwhelming. On this issue, therefore, defendants should not be subject to a jury determination that might be influenced by jury sympathy or the jurors' own practices concerning seat belt use.[72]

5. Failure to Use a Seat Belt When Protected by an Air Bag

In the near future, air bags will be a common feature in a substantial percentage of American automobiles. Beginning with the 1990 models, all Chrysler automobiles will have air bags on the driver's side, all Ford Lincoln Continentals will have air bags for both the driver and front seat passengers, and air bags will be available on eleven other Ford models.[73] It is likely that air bags will be a standard feature on all American vehicles within a few years. No reported cases have dealt with the question of whether the seat belt defense applies when a plaintiff who is protected by an air bag fails to use a seat belt. It is likely that there will be a substantial number of such cases in the near future.

. . . establishes a precedent for other cases. . . . To that extent it may define the standard of reasonable conduct which the community requires.").

69. *See supra* text accompanying notes 50-55.

70. For a discussion of whether failure to wear a seat belt while in a seat that is protected by an air bag is negligent, see *infra* text accompanying notes 73-97.

71. Pokora v. Wabash Ry. Co., 292 U.S. 98, 105, (1934); *see also* PROSSER & KEETON, *supra* note 48, at 217-19 (discussing decisions as precedential rules of law).

72. Although courts instruct jurors that they are to judge the plaintiff by the standard of the reasonable prudent person, jurors are likely to be influenced by their own behavior. Studies indicate that in countries that do not have mandatory seat belt use laws, the majority of people do not wear seat belts. NHTSA STANDARD, *supra* note 38, at 56-57.

73. *McNeil/Lehrer Newshour* (PBS television broadcast, June 22, 1988).

a. *The Reduction of Risk Provided by Air Bags and Seat Belts*

Experts generally agree that air bags will function well in frontal collisions involving speeds up to forty-five miles per hour.[74] Air bags will provide little or no protection in rear end collisions, however, and there is uncertainty about the amount of protection they will provide in side or angle impacts, in rollover crashes, and in catastrophic frontal crashes.[75]

Seat belts plus air bags provide substantially more protection than air bags alone. In 1984, the Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") evaluated and compiled data[76] from several seat belt[77] and air bag[78] studies. NHTSA expresses the effectiveness of seat belts and air bags by stating the percentage reduction in risk of death or injury when a seat belt or air bag is used compared with the use of neither device.[79] When air bags alone protect occupants, risk of occupant death is reduced by twenty to forty percent.[80] When air bags and lap/shoulder belts protect occupants, however, the risk of death is reduced by forty-five to fifty-five percent.[81] The effectiveness of lap/shoulder belts alone, air bags alone, and air bags with lap/shoulder belts is as follows:

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74. NHTSA ANALYSIS, *supra* note 54, at IV-81.

75. *Id.*

76. The analysis of these studies is part of the basis for the Department of Transportation's regulation requiring mandatory passive restraints in vehicles beginning with the 1990 models unless states with a total of two-thirds of the United States population adopt mandatory seat belt use laws. *See* NHTSA STANDARD, *supra* note 38, at 1.

77. The seat belt studies from which data were evaluated and compiled were the National Crash Severity Study; the 1979 to 1982 National Accident Sampling System, and the Restraint System Evaluation Project. NHTSA ANALYSIS, *supra* note 54, at IV-3 to IV-4. The NHTSA's analysis of the studies and data, as well as its analysis of other studies, is contained in *id.*, IV-3 to IV-16.

78. The NHTSA prepared four separate studies using different methodologies. *Id.* at IV-47 to IV-48. The results of these studies are presented at *id.* IV-47 to IV-77. NHTSA also evaluated three other studies, Wilson & Savage, *Restraint System Effectiveness—A Study of Fatal Accidents*, PROCEEDINGS: AUTOMOTIVE SAFETY ENGINEERING SEMINAR (June 20-21, 1973) (conducted by General Motors Safety Research and Development Laboratory), cited *id.* at IV-77; Grush, Henson & Ritterling, *Restraint System Effectiveness*, Report No. S-71-40, Ford Motor Company, Automotive Safety Affairs Office (September 21, 1971), cited *id.* at IV-79; and Huelke, et al., *Effectiveness of Current and Future Restraint Systems in Fatal and Serious Injury Automobile Crashes*, SAE 790323 (1979), cited *id.* at IV-80.

79. *Id.* at IV-1.

80. *Id.* at IV-2.

81. *Id.*

Injury	Percentage Reduction in Risk When Compared With No Safety Device[82] Manual Lap/ Shoulder Belt	Air Bag Alone	Air Bag With Lap/ Shoulder Belt
Fatalities[83]	40-50	20-40	45-55
Moderate to Critical[84]	45-55	25-45	50-60
Minor[85]	10	10	10

b. *Effect of Air Bags on the Seat Belt Defense*

Protecting with an air bag a seat occupied by a plaintiff alters two factors in the calculation of whether failure to wear a seat belt is negligent. These factors are the risk of harm and the foreseeability of the risk of harm.[86]

As discussed previously,[87] when reasonable people sit in a seat that is not protected by an air bag, they will weigh the burden of buckling the seat belt against the foreseeable risk of harm. Although front seat occupants may not specifically know that if they buckle their seat belts their risk of death is reduced by forty to fifty percent,[88] public information campaigns and warnings on vehicles and owners manuals have informed the public sufficiently of the reduction in risk provided by seat belts that reasonable people will buckle their seat belts.

The calculation of reasonable people who sit in seats protected by air bags is somewhat different. The air bag alone reduces the risk of death by twenty to forty percent, but the addition of a lap/shoulder belt reduces the risk of death by forty-five to fifty-five percent.[89] This is a sufficient increase in the reduction of risk, when compared with the small burden of buckling up, that if reasonable people know of the reduction of risk, they are likely to use seat belts, even in seats protected by air bags.

82. This chart is adapted from a chart appearing at *id.*

83. In the NHTSA chart, the severity of injury is expressed in terms of the Abbreviated Injury Scale (AIS). *Id.* Fatality (AIS injury level 6) indicates that the injury is "[m]aximum, currently untreatable." *Id.* at IV-3.

84. Moderate to critical injuries range from AIS injury level 5, "[c]ritical (e.g., major spinal cord injury, critical organ injuries)," *id.*, to AIS injury level 2, "[m]oderate (e.g. simple fracture)." *Id.*

85. AIS injury level 1, "[m]inor (e.g., simple cuts or bruises)". *Id.*

86. *See infra* text accompanying notes 92-95.

87. *See supra* text accompanying notes 50-55.

88. *See supra* text accompanying note 82.

89. *See id.*

Under a negligence standard, however, the plaintiff is only required to consider the *foreseeable* risk of harm. A person sitting in a seat protected by an air bag must consider the foreseeable risk of injury from failure to buckle a seat belt. Those who purchase vehicles with air bags should be on notice that they should buckle their seat belts, because vehicles equipped with air bags come with warnings in operator's manuals.[90] Other occupants of vehicles equipped with air bags, however, may not be on notice of the limitations of air bags. There have not yet been extensive safety campaigns emphasizing the importance of buckling seat belts in cars with air bags.[91] By the time the 1990 models are sold, however, the public will probably know the importance of seat belt use in vehicles protected by air bags. Warnings that people protected by air bags should continue to use seat belts accompanied announcements that the 1990 models would include air bags.[92] Department of Transportation publicity about air bags emphasizes the importance of continuing to use seat belts.[93] The marketing of the 1990 models is likely to include substantial publicity about the safety of air bags,[94] and this publicity will probably include warnings about the continued importance of safety belt use.[95]

Although courts may allow the seat belt defense in cases in which plaintiffs were protected by air bags, some juries may not find that the failure to buckle seat belts under those circum-

90. The vast majority of people who are protected by an air bag probably will be owners, because most 1990 vehicles that are equipped with air bags will provide air bags only on the driver's side. *See supra* text accompanying note 73.

91. Cases involving accidents that occur prior to extensive publicity about the importance of seat belt use in vehicles equipped with air bags also may raise questions such as whether the owner of a vehicle equipped with an air bag has a duty to warn occupants to buckle their seat belts.

92. *See, e.g., McNeil/Lehrer, supra* note 73.

93. *See, e.g.*, U.S. DEPARTMENT OF TRANSPORTATION NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION CONSUMER INFORMATION, RELEASE, AIR BAGS (October 1987), a sheet of information on air bags discussing operation, reliability, and cost. Only two portions of the text are in bold print. At the beginning: "An air bag should always be used in combination with safety belts." *Id.* At the end: "Again, remember to wear a safety belt too so that you are protected in all types of crashes." *Id.*

94. On the McNeil/Lehrer News Hour, Marianne Keller, identified as an auto analyst from a New York brokerage firm, suggested Chrysler's decision to be the first to provide air bags as standard equipment its 1990 models was a wise marketing action by Lee Iacocca. *McNeil/Lehrer, supra* note 73.

95. Otherwise, manufacturers will expose themselves to risk of products liability actions based on a failure to warn. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 697-98 (discussing failure to warn).

stances is negligent. Under the seat belt defenses presently recognized, the jury determines whether the failure to wear a seat belt constitutes negligence.[96] A jury may determine that it is not yet common knowledge that one should wear a seat belt in a vehicle equipped with an air bag and that to use a seat belt in such a situation is not negligent. Though this Article argues that the failure to wear a seat belt generally should constitute negligence as a matter of law,[97] there has been so little experience with air bags, and public knowledge concerning air bags is so limited, that it is probably appropriate for the trier-of-fact to determine whether the failure to wear a seat belt in a seat protected by an air bag is negligent.

C. Consistency of the Seat Belt Defense with Existing Rules of Law

Many courts have rejected the seat belt defense because it differs from the other defenses developed at common law.[98] Although the seat belt defense differs from contributory negligence, comparative negligence, and the avoidable consequences defenses, the principles underlying those defenses actually justify the seat belt defense.[99] The developing crashworthiness doctrine also has many similarities to the seat belt defense.[100] Adoption of the seat belt defense is more consistent with the underlying principles of the common law than rejection of the seat belt defense.

1. Contributory and Comparative Negligence

Initially, many courts rejected the seat belt defense by noting its differences from contributory and comparative negligence.[101] Contributory negligence is a complete defense that

96. *See supra* note 67 and accompanying text.

97. *See supra* text accompanying notes 68-72.

98. *See, e.g.*, Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970) (noting practical effect would be same result as "comparative negligence," which Alabama does not recognize); *see also* McCord v. Green, 362 A.2d 720, 722-23 (D.C. 1976) (noting courts that treat failure to use seat belts as contributory negligence are unduly impressed by belts' effectiveness); Miller v. Miller, 273 N.C. 228, 239-40, 160 S.E.2d 65, 73-74 (1968) (citing harshness of a rule that would deny plaintiff all recovery for failing to buckle belt); Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 62 (Okla. 1976) (refusing to require plaintiff to anticipate negligence of others).

99. *See infra* notes 101-07 and accompanying text.

100. *See infra* text accompanying notes 108-12.

101. *E.g.*, Britton v. Doehring, 286 Ala. 489, 508, 242 So. 2d 666, 675 (1970) (comparing to unrecognized doctrine of comparative negligence); Lipscomb v.

courts apply when the plaintiff's negligence causes the accident.[102] Under comparative negligence, when the plaintiff's negligence is a cause of the accident, the court reduces the plaintiff's recovery by the percentage of the fault attributed to the plaintiff.[103] The seat belt defense does differ from contributory and comparative negligence in that the seat belt defense applies when the negligence of the plaintiff prior to the accident causes only *a portion of* the injuries.

Despite that difference, it is inconsistent for courts to deny or reduce the plaintiff's recovery under contributory or comparative negligence when the plaintiff's negligence is a cause of the entire injury, while allowing the plaintiff full recovery when the plaintiff's negligence is a cause of a portion of that injury. Assume two cases. One plaintiff is driving slightly over a safe speed while wearing a seat belt and a second is driving safely but fails to wear a seat belt. Each is involved in a collision with a negligent defendant. Each plaintiff is severely injured as a result of the collision. Assume that if the plaintiff who failed to wear a seat belt had worn a seat belt, that plaintiff would have suffered only slight injury. The failure of the seat beltless plaintiff to wear a seat belt is a cause of the exacerbation damages, but in a jurisdiction that rejects the seat belt defense, a court would allow the plaintiff full recovery. In the other case, the speeding plaintiff's negligence is a cause of that plaintiff's injuries. In a contributory negligence jurisdiction, a court would deny that plaintiff any recovery and in a comparative negligence jurisdiction, a court would reduce that plaintiff's recovery based on that plaintiff's relative fault. Does anything justify the difference in treatment of the plaintiffs? The fact that the plaintiff's negligence caused *part* of the plaintiff's damages in the seat belt defense case and the fact that it caused all of the plaintiff's damages in the contributory or comparative negligence case does not justify the difference in treatment. In neither case should a court allow the plaintiff a full recovery of damages that the plaintiff negligently caused.

The seat belt defense is different from contributory and comparative negligence, but its difference concerns an insignifi-

Diamiani, 226 A.2d 914, 917 (Del. Super. Ct. 1967) (citing difficulty of applying such theories in seat belt situation); McCord v. Green, 362 A.2d 720, 723 (D.C. 1976) (refusing to equate failure to use belts with other types of contributory negligence); Miller v. Miller, 273 N.C. 228, 237-38, 160 S.E.2d 65, 73 (1968) (refusing to treat as contributory negligence).

102. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 451-52.

103. *See, e.g., id.* at 470-74.

cant factor: the seat belt defense applies in situations in which the plaintiff's negligence caused a part, rather than all of the plaintiff's damages. The seat belt defense is similar to contributory and comparative negligence in the most significant factor: it limits the plaintiff's recovery of those damages that the plaintiff's own negligence caused. Underlying contributory negligence, comparative negligence, and the seat belt defense is the principle that plaintiffs should be responsible for all or a portion of the loss caused by their negligence.[104]

2. The Avoidable Consequences Rule

Although some courts have rejected the seat belt defense because, unlike contributory or comparative negligence, the plaintiff's negligence causes only part of the plaintiff's injuries, courts deny plaintiffs recovery of that portion of their damages caused by their own negligence occurring after the accident under the avoidable consequences rule. Several courts that have adopted the seat belt defense have found an analogy between the seat belt defense and the avoidable consequences rule.[105]

Under the avoidable consequences or duty to mitigate rule, courts do not allow plaintiffs to recover for those damages that

104. Some courts and commentators have suggested that a seat belt defense is more consistent with comparative negligence than with contributory negligence. *See, e.g.*, Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970); Law v. Superior Court, 157 Ariz. 147, 151, 755 P.2d 1135, 1139 (1988); Kircher, *supra* note 1, at 188; Hoglund & Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law*, 50 WASH. L. REV. 1, 14-15 (1974). The seat belt defense is like comparative fault in that plaintiffs may be allowed recovery of only a part of their damages. Whether the seat belt defense is like comparative negligence in the more significant sense that responsibility for damages caused by the negligence of both the plaintiff and the defendant is shared based on the relative fault of the parties, depends on the type of seat belt defense. As discussed below, *infra* text accompanying notes 167-88, under a no-exacerbation-damages-recovery seat belt defense, the plaintiff is not allowed any recovery of damages caused by failure to wear a seat belt. Division of responsibility for these damages is not based on relative fault. Under the seat belt defense advocated in this Article, *infra* text accompanying notes 246-99, responsibility for that portion of the damages caused by the negligence of both the parties is divided based on their relative fault. The seat belt defense proposed in this Article is consistent with comparative fault. The no-exacerbation-damage-recovery seat belt defense is not.

105. *E.g.*, Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986); Spier v. Barker, 35 N.Y.2d 444, 451-52, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 921-22 (1974); *see* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1566-67 (D. Vt. 1985).

the plaintiffs could have avoided by exercising reasonable care *after* the initial injury. As *Prosser & Keeton* suggests:

> [The avoidable consequences rule] denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. . . . [It] comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages. Thus, if the plaintiff is injured in an automobile collision, his contributorily negligent driving before the collision will prevent any recovery at all, but his failure to obtain proper medical care for his broken leg will bar only his damages for the subsequent aggravated condition of the leg.[106]

Both the contributory negligence rule and the avoidable consequences rule "rest upon the same fundamental policy of making recovery depend upon the plaintiff's proper care for the protection of his own interests . . . ."[107]

The seat belt defense is similar to the avoidable consequences rule because it results in plaintiffs receiving only a partial recovery because of their negligence. Courts reduce plaintiffs' damages to the extent that their negligence caused their injuries. The seat belt defense is not identical to either the contributory negligence or the avoidable consequences rule, but all three defenses are based on the premise that people should not recover for injuries that their own negligence caused. The contributory negligence rule recognizes that this principle applies to negligence occurring before the injury. The avoidable consequences rule recognizes that this principle applies when the plaintiff's negligence causes only a part of the injury suffered.

3. The Crashworthiness Rule

A recently developed doctrine that is comparable to the seat belt defense is the "crashworthiness" or "second accident" rule of products liability.[108] A crashworthiness claim against a vehicle manufacturer arises when the vehicle is involved in a collision and the plaintiffs allege that the manufacturer should

106. PROSSER & KEETON, *supra* note 48, at 458 (footnotes omitted).

107. *Id.*

108. In a recent seat belt defense case in which the plaintiff's claim was based on a crashworthiness theory, the Michigan Supreme Court pointed out the similarities in the two doctrines, noting the irony that "one of plaintiff's theories of liability is indeed premised upon the foreseeability of automobile accidents." Lowe v. Estate Motors Ltd., 428 Mich. 439, 460, 410 N.W.2d 706, 715 (1987). Other courts also have noted the similarities between the crashworthiness doctrine and the seat belt defense. *See* Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 452 (Fla. 1984); Dahl v. BMW, 304 Or. 558, 568, 748 P.2d 77, 83 (1987) (en banc).

have designed the vehicle so the injuries suffered by the occupants would not have been as great.[109] The plaintiffs allege that they would have suffered less injury if the dashboard had been padded, if the door had not opened on impact, and so forth. In these cases, as in seat belt defense cases, the plaintiffs have suffered exacerbation damages. In the seat belt cases, exacerbation damages are damages the plaintiffs would not have suffered had they worn seat belts. In the crashworthiness cases, the exacerbation damages are those damages that the plaintiffs would not have suffered had the manufacturer built the vehicle in a crashworthy manner.

Initially, some courts denied plaintiffs recovery in crashworthiness cases on the basis that a collision was not the purpose of the vehicle.[110] Nevertheless, courts generally have held that manufacturers are liable for exacerbation damages in crashworthiness cases based on the fact that a collision is foreseeable.[111]

The seat belt defense is to plaintiffs what the crashworthiness rule is to defendants. Under each, the parties are held responsible if their negligence causes exacerbation of damages. Plaintiffs' and defendants' responsibility to act so as not to cause unreasonable risk finds expression in the defendants' liability for negligence and in the plaintiffs' reduction of recovery in contributory and comparative negligence cases. Plaintiffs' and defendants' responsibility to exercise reasonable care to minimize the extent of injury finds expression in the defendants' liability in crashworthiness cases and the plaintiffs' limitation of recovery in seat belt defense cases.

Arguably, the crashworthiness/seat belt defense analogy breaks down because courts should require a greater amount of care of vehicle manufacturers than they require of vehicle occupants. Manufacturers are in the business of manufacturing vehicles and have a greater responsibility to be aware of the risks of collisions and the types of injuries that can occur and to take steps to avoid such risks. Admittedly, it is proper to require greater knowledge of risk and to impose a greater burden

109. *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495, 501-02 (8th Cir. 1968); Lowe v. Estate Motors Ltd., 428 Mich. 439, 470, 410 N.W.2d 706, 719 (1987).

110. *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822, 825 (7th Cir. 1966), *overruled by* Nuff v. White Motor Corp., 565 F.2d 104, 109 (7th Cir. 1977).

111. *See, e.g.*, *Larsen*, 391 F.2d at 503; *Lowe*, 428 Mich. at 474, 410 N.W.2d at 702.

of safety on the manufacturer than on the vehicle occupant. Courts should hold manufacturers to the standard of a reasonable manufacturer in negligence actions, but they should hold vehicle occupants to the standard of a reasonable person.[112] That standard requires vehicle occupants to foresee the likelihood of an automobile collision, to know the value of seat belt use, and to take the minimal step of using a seat belt. A vehicle occupant's failure to take reasonable precautions to minimize the extent of injuries should reduce that occupant's recovery of exacerbation damages, just as the failure of a manufacturer to take reasonable precautions to minimize the extent of injury should subject the manufacturer to liability in the crashworthiness cases.

4. Inconsistency and the Rejection of the Seat Belt Defense

Not only does the seat belt defense share the underlying principles of contributory negligence, comparative negligence, the avoidable consequences rule, and the crashworthiness rule,[113] but the rejection of the seat belt defense would be highly inconsistent with these defenses. If a jurisdiction rejects the seat belt defense, a plaintiff can recover damages in full from a defendant for injuries that were caused in part by the negligence of the plaintiff. A few rules of law have permitted a full recovery by a plaintiff who was at fault, but courts have rejected most such rules. *Butterfield v. Forrester*[114] recognized the contributory negligence defense in England in 1809, and the court's opinion suggests that even at that time, the contributory negligence defense was widely accepted.[115] The last clear chance rule allowed negligent plaintiffs a full recovery if the defendant had the last clear chance to avoid the injury,[116] but most commentators view the last clear chance doctrine as an

112. *See supra* text accompanying notes 50-55.

113. *See supra* text accompanying notes 99-112.

114. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809) (per curiam).

115. *Id.* In his opinion, Lord Ellenborough presents the rule as if it already were widely accepted. There is no discussion of the policy for the rule. He merely states:

> One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Id. at 927.

The fact that the contributory negligence defense was accepted so quickly, with so little indication that it ran counter to a prior rule, indicates that it may have been a well established rule. *See* Prosser, *supra* note 17, at 467-69.

116. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 462-63.

aberration in the law whose only purpose was to avoid the harsh, no-recovery character of contributory negligence.[117] Most of the jurisdictions that have examined the last clear chance doctrine under comparative fault principles have rejected it, and have allowed the jury to reduce the recovery of negligent plaintiffs in such cases.[118] Many of the early strict products liability cases allowed plaintiffs a full recovery of damages caused both by the defectiveness of the product and a plaintiff's own negligence.[119] Now, however, in strict products liability cases, most courts apply comparative fault.[120]

Consequently, not only is adoption of the seat belt defense consistent with the underlying principles of tort law, but rejection of the seat belt defense is highly *inconsistent* with existing rules of tort law.

D. MANDATORY SEAT BELT USE STATUTES AND THE SEAT BELT DEFENSE

Many countries other than the United States have had statutes requiring seat belt use for several years.[121] These statutes have proven to be quite effective at encouraging seat belt use and saving lives.[122] In 1984, the U.S. Department of Transportation's National Highway Traffic and Safety Administration adopted a standard that requires the installation of either air bags or automatic seat belts in all new cars beginning with the 1990 models, unless states enact mandatory front-seat seat belt use statutes that cover two-thirds of the United States population.[123]

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117. *See, e.g., id.* at 464 & n.11.

118. *See, e.g., id.* at 477 & n.82 and cases cited therein.

119. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 712 & n.7.

120. *See id.* at 478 & n.94.

121. The NHTSA reports that the following countries enacted statutes mandating seat belt use effective on the indicated dates: Australia (1-72), New Zealand (6-72), France (7-73), Puerto Rico (1-74), Sweden (1-75), Norway (19-75), Denmark (1-76), Austria (7-76), South Africa (12-77), Ireland (2-79), Great Britain (1-83). *See* NHTSA STANDARD, *supra* note 38, at 57.

122. *See id.* at 56-57.

123. 49 C.F.R. § 571.208, § s4.1.5 (1987). The state mandatory use statute must contain:

> A provision specifying that the *violation of the belt usage requirement may be used to mitigate damages* with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident.

Id. § 571.208, § s4.1.5.2(c)(2) (emphasis added). Very few of the state statutes contain such a provision. *See supra* notes 32-34.

Since the passage of that standard, twenty-nine states have enacted statutes that require front-seat occupants to wear seat belts.[124] Some of the statutes do not mention the seat belt defense,[125] others prohibit the seat belt defense,[126] and some prohibit the use of the statute to establish that the plaintiff was negligent in failing to use a seat belt.[127]

This section will discuss the effect of each of these types of statutes on the seat belt defense, and whether a court should leave the question of the seat belt defense to the legislature when the legislature has not passed legislation concerning either the seat belt defense or seat belt use.

1. Mandatory Use Statutes That Do Not Mention the Seat Belt Defense

Two states have enacted mandatory use statutes that do not mention the seat belt defense.[128] Such statutes may directly affect the seat belt defense in two ways.

First, states that have rejected the seat belt defense because there is no duty to wear a seat belt[129] may find such a duty in the mandatory use statute. Some of the states that rejected the seat belt defense on the no duty basis prior to the passage of the mandatory use statutes specifically noted that the legislature had not created such a duty.[130]

A second effect that such mandatory use statutes may have on the seat belt defense is that courts may find that such statutes establish a negligence standard. Courts use a statute to establish the standard of conduct in negligence actions if the legislature designed the statute to protect the injured person from the type of injury suffered.[131] The apparent purpose of the mandatory use statutes is to prevent occupants of vehicles from suffering exacerbation of injuries due to vehicle collisions. This is precisely the type of injury at issue in seat belt defense cases. Consequently, courts that recognize the seat belt defense probably will find that plaintiffs may use such statutes to establish a negligence standard of conduct.

In most states, a violation of a statute used to establish the

124. *See supra* note 31.
125. *See supra* note 35.
126. *See supra* note 33.
127. *See supra* note 32.
128. *See supra* note 35.
129. *See supra* note 42.
130. *See supra* note 49.
131. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 222-27.

standard of conduct constitutes negligence *per se*. If people violate a statute, their negligence is established unless they can show an excuse.[132] Violation of a statute can establish the plaintiff's contributory or comparative negligence,[133] as well as the defendant's negligence. If statutes mandating seat belt use establish the negligence standard for seat belt defense purposes, it will be much easier for defendants to establish that plaintiff's failure to wear a seat belt was negligent.

2. No Right to Act Like a Fool, but the Right to Full Recovery if You Do: Mandatory Use Statutes That Prohibit the Seat Belt Defense and Statutes That Prohibit the Use of the Statute to Establish the Seat Belt Defense

Several states that have enacted mandatory use statutes either prohibit the seat belt defense[134] or prohibit the use of the statute to establish the seat belt defense.[135] In other jurisdictions, it is not clear whether the statute prohibits the seat belt defense in cases in which the plaintiff's failure to wear a seat belt is a violation of the statute, or merely prevents the use of the statute to establish the seat belt defense.[136]

a. *Mandatory Use Statutes That Prohibit the Seat Belt Defense*

There is a basic inconsistency in statutes that require seat belt use and prohibit the seat belt defense.[137] When the legislature prohibits citizens from traveling in a vehicle without using seat belts, it is denying them the right to engage in activity that exposes only themselves to a risk. Mandatory use statutes run counter to a strong tradition against protecting citizens from themselves. Such statutes may be justified because they impose a minimal burden on citizens and can lead to a substantial saving of life.[138] Nevertheless, these factors, the minimal burden of buckling up and the great risk of not buckling up, are the very factors that make the plaintiff's failure to use a seat belt

132. *See, e.g., id.* at 227-29 and cases cited therein. Some courts have held that violation of a statute is only evidence of negligence. *See id.* at 230-31.

133. *See, e.g, id.* at 231-33 and cases cited therein.

134. *See supra* note 33.

135. *See supra* note 32.

136. *See supra* note 33.

137. Statutes that require seat belt use and prohibit the seat belt defense are cited at *supra* note 32.

138. *Cf. supra* text accompanying notes 50-55.

negligent. It does not seem fair to deny a defendant the right to show the factors the statute assumes. Moreover, if the plaintiff is negligent, it does not seem fair to impose on the defendant the full loss suffered because of the plaintiff's negligence. It may be proper for the legislature to tell citizens that they cannot act like fools, but when citizens do act like fools, the legislature should not require defendants to pay the full measure of the loss.[139]

b. *Mandatory Use Statutes That May Not be Used to Establish the Seat Belt Defense*

Statutes that require seat belt use but deny the defendant the right to use the statute to establish the seat belt defense[140] are less inconsistent than those that prohibit the seat belt defense. Legislatures that have passed such statutes recognize the importance of seat belt use, yet are unwilling to allow their judgment to affect civil suits. Those legislatures leave development of the seat belt defense to the judiciary.

Although defendants may not use such statutes directly to establish the seat belt defense, it may be that in some jurisdictions the statutes will encourage the development of the seat belt defense. Those courts that reject the seat belt defense because the majority of citizens do not use seat belts[141] may adopt the seat belt defense if, in response to the statute, the majority of citizens begin to use seat belts. If the majority of citizens begin to use seat belts, courts may allow that use as evidence that failure to wear a seat belt is negligent.[142] In addition, if the mandatory use statutes cause the public to consider failure to use a seat belt unreasonable, jury determinations of whether failure to wear a seat belt is negligent are likely to reflect that consensus.

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139. The inconsistency between requiring use of seat belts and prohibiting the use of the seat belt defense, of course, is not the only inconsistency in the law. The inconsistency in these seat belt statutes may be a function of legislative compromise. It may be a function of an indulgent, paternalistic government. The legislature tells citizens what to do for their own safety, and when they are injured because they do not comply, the legislature makes someone else bear the full cost.

140. *See supra* note 32.

141. *See supra* note 62 and accompanying text.

142. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 193-96 (discussing custom as establishing standard of reasonable conduct).

c. *Statute Ambiguity: Prohibition of the Seat Belt Defense or Prohibition of the Use of the Statute to Establish the Seat Belt Defense*

Several mandatory use statutes[143] contain ambiguous language similar to that in the following Illinois statute:

> Failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle.[144]

Is it the plaintiff's failure to wear a seat belt or the fact that the failure to wear a seat belt was a violation of the statute that may not be considered evidence of negligence? The answer is unclear from the language of such statutes.

To avoid unreasonable results, courts should interpret the statutes only to prohibit use of the statute to diminish recovery. Courts should allow the seat belt defense if defendants can establish the defense without using the statute. The statutes do not require seat belt use of back seat occupants and several other categories of occupants.[145] Interpretation of the statutes to prohibit the seat belt defense whenever the failure to wear a seat belt is a violation of the statute, would create the anomalous result that front seat plaintiffs who violated the statute would not have their recovery reduced and back seat plaintiffs, or other plaintiffs not required to use a seat belt, could have their recovery reduced.[146] According to a well-recognized ca-

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143. *See supra* note 33.

144. ILL. ANN. STAT. ch. 95 1/2, para. 12-603.1(c) (Smith-Hurd Supp. 1988).

145. The Illinois statute is typical. The following also are not required to use seat belts:

> 1. A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle, if the speed of the vehicle between stops does not exceed 15 miles per hour.
>
> 2. A driver or passenger possessing a written statement from a physician that such person is unable, for medical or physical reasons, to wear a safety belt.
>
> . . .
>
> 4. A driver operating a motor vehicle in reverse.
>
> 5. A motor vehicle with a model year prior to 1965.
>
> . . .
>
> 9. A motor vehicle operated by a rural letter carrier of the United States postal service while performing duties as a rural letter carrier.

Id. ch. 95 1/2, para. 12-603.1(b).

146. The Michigan Supreme Court acknowledged the possibility of a similar anomaly under its mitigation cap statute, which applies only to front seat occupants. Lowe v. Estate Motors Ltd., 428 Mich. 439, 469, 410 N.W.2d 706, 718-19 (1987). *See infra* text accompanying notes 228-36 (discussing inconsistent treatment of front and back seat occupants).

non of statutory interpretation, in interpreting ambiguous statutes courts should favor interpretations that create reasonable results over those that create unreasonable results.[147] Thus, to avoid an unreasonable distinction between front and back seat occupants, courts should interpret statutes such as the Illinois statute to prohibit only the use of the statute to establish the seat belt defense.

3. Mandatory Use Statutes that Establish a Seat Belt Defense Mitigation Cap

Three mandatory use statutes establish the seat belt defense but limit reduction of the plaintiff's recovery to one to five percent of the plaintiff's total damages.[148] Because these statutes recognize the seat belt defense and raise issues concerning the proper reduction of damages when one fails to wear a seat belt, discussion of the statutes appears in Part III of this Article.[149]

4. The Seat Belt Defense Where the Legislature Has Not Spoken Concerning Seat Belt Use or The Seat Belt Defense

Half of the states do not have statutes concerning the seat belt defense or mandatory seat belt use. The lack of legislative pronouncement raises the issue of whether courts in such states should adopt the seat belt defense or leave the question to the legislature. Several courts have held that recognition of the seat belt defense would be such a substantial change in the common law that it should be left to the legislature.[150] There is good reason for courts to move slowly in the development of the common law. People rely on precedent. Society bases part of the respect it gives to courts on the belief that courts discover established principles of law, and making dramatic changes undercuts the foundation for this belief. As shown in

147. As one court noted: "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." United States v. Bayko, 774 F.2d 516, 522 (1st Cir. 1985) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION 45.12 (Sands 4th ed. 1984)).

148. *See supra* note 34.

149. *See infra* text accompanying notes 221-45 (discussing mitigation cap statutes).

150. *E.g.*, Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970); Lipscomb v. Diamiani, 226 A.2d 914, 916 (Del. Super. Ct. 1967); Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 62 (Okla. 1976).

an earlier section,[151] however, although courts did not specifically recognize the seat belt defense at common law, it is based on well-established principles of the common law, and failure to adopt the defense would be contrary to those principles.

Some states have decided specifically not to require vehicle occupants to wear a seat belt.[152] In such states, opponents of the seat belt defense may argue that courts should reject the seat belt defense because the legislature has rejected a statute requiring seat belt use. Courts should distinguish, however, between the rejection of a statute mandating seat belt use and the rejection of the seat belt defense. It is possible to argue that the state has no business requiring people to take steps for their own safety—the legislature should not be paternalistic. The argument does not, however, carry weight in the context of the seat belt defense. It is one thing to argue that the state should not require citizens to take reasonable steps to protect themselves from injury. It is quite another to argue that if citizens fail to take reasonable steps to protect themselves, they should receive a full recovery from another for injuries received as a result of such failure. In fact, the individualism at the basis of the argument that the state should not interfere with choices about personal safety also supports the position that people should bear the consequences of their choices. Allowing people to behave like fools if they choose to do so is consistent with making them responsible for injuries caused by their foolish behavior.

Consequently, a court should not reject the seat belt defense on the assumption that the state's decision not to require seat belt use is based on the belief that it is reasonable to fail to wear a seat belt. The state may have decided not to require seat belt use for quite different reasons.

E. ADMINISTRATIVE HEADACHES, TOUGH JURY ISSUES, AND EXPERT BATTLES

It is possible to argue that jurisdictions should reject the

151. *See supra* text accompanying notes 103-07 (arguing seat belt defense is consistent with common-law principles).

152. In Massachusetts and Nebraska, the legislatures mandated seat belt use and the citizens overturned the legislation by referendum. *See* MASS. ANN. LAWS ch. 90, § 7BB (Law. Co-op. Supp. 1989) (providing subsequent history of statute); NEB. REV. STAT. §§ 39-6,103.04 to 39-6,103.08 (1988) (providing statute and subsequent history). Tennessee also has repealed its mandatory seat belt usage statute, effective 1990. *See* TENN. CODE ANN. §§ 55-9-603 to 610 (1988).

seat belt defense because of its administrative headaches.[153] As this Article will demonstrate in Part III, the operation of the seat belt defense varies from jurisdiction to jurisdiction. The degree of administrative difficulty created will depend on the version of the seat belt defense that a jurisdiction adopts.

In some jurisdictions, under the seat belt defense, the judge merely tells the jury that it may consider the failure of the plaintiff to wear a seat belt when determining damages.[154] Such a seat belt defense does not create substantial administrative problems, although it creates other problems that this Article discusses in a later section.[155]

In other jurisdictions that apply the seat belt defense, the defendant must show what portion of the plaintiff's damages would not have occurred had the plaintiff worn a seat belt. This Article refers to these damages as exacerbation damages. Under the no-exacerbation-damage-recovery seat belt defense, the defendant is not responsible for the damages that would not have occurred if the plaintiff had worn a seat belt.[156] To determine what damages would not have occurred had the plaintiff worn a seat belt, the finder of fact must consider six factors:

> (1) the particular crash behavior of the subject vehicle; (2) the trajectory of the claimant's body in the accident; (3) the relationship of the vehicle crash events to occupant kinematics; (4) the particular injuries suffered; (5) the trajectory which a restrained occupant would have taken; (6) the extent of lesser injuries which the restrained occupant would have sustained as a result of the impacts he would have made with the vehicle.[157]

Obviously, evaluation of these factors in many cases will be a difficult responsibility for a jury. The parties may use experts to aid a jury in understanding a factual issue when the expert has knowledge beyond that of the jury that will help the jury

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153. One case rejected the seat belt defense solely on this ground. Jeep Corp. v. Murray, 101 Nev. 640, 645-46, 708 P.2d 297, 301 (1985). Other cases have included administrative difficulties as one of several reasons for rejecting the defense. Britton v. Doehring, 286 Ala. 498, 506, 242 So. 2d 666, 673 (1970); Kopischke v. First Continental Corp., 187 Mont. 471, 495, 610 P.2d 668, 681 (1980); Amend v. Bell, 89 Wash. 2d 124, 133, 570 P.2d 138, 143 (1977).

154. *See infra* note 164 (citing cases leaving seat belt issue to jury).

155. *See infra* text accompanying notes 210-20 (discussing dangers of allowing jury discretion as to method of damage reduction under seat belt defense).

156. *See supra* note 16 (citing cases adhering to no exacerbation-damge-recovery theory).

157. Bowman, *Practical Defense Problems—The Trial Lawyer's View*, 53 MARQ. L. REV. 191, 198 (1970). In some cases, the trier-of-fact may not be able to determine which damages the plaintiff could have avoided by wearing a seat belt. *See infra* text accompanying notes 158-59.

to understand a matter at issue.[158] A jury is likely to need expert testimony by a witness trained in accident reconstruction before it can determine which damages the plaintiff could have avoided by wearing a seat belt.[159] A battle of experts is thus highly likely. Defendants are likely to use experts who tend to find that exacerbation damages are high. Plaintiffs are likely to use experts who tend to find that exacerbation damages are low.

Under the seat belt defense that this Article proposes, in addition to determining what damages would not have occurred had the plaintiff worn a seat belt, the trier-of-fact divides responsibility for those damages based on the relative fault of the parties.[160] The trier-of-fact must compare the fault of the parties and assign a percentage of fault to each. The court then reduces the plaintiff's recovery of exacerbation damages by the percentage of fault assigned to the plaintiff.

Nevertheless, the question of which injuries the plaintiff's failure to wear a seat belt caused and what percentage of fault should be assigned to each party are like other problems with which juries are confronted. In any case in which a plaintiff alleges that the defendant caused some damages and not others, the jury must determine which of the plaintiff's damages the defendant's negligence caused. Also, juries often confront battles of experts. The test for determining whether the jury should be exposed to such a battle of experts should be, as in other areas of the law, whether the expert has knowledge that will help the trier-of-fact to determine a fact at issue.[161] If so, the trier-of-fact can consider the expert testimony. The responsibility of the trier-of-fact to assign a percentage of fault to a plaintiff's failure to wear a seat belt, as proposed in this Arti-

158. *See* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1565 (D. Vt. 1985) (discussing need for expert testimony to establish seat belt defense); Law v. Superior Court, 157 Ariz. 147, 156, 755 P.2d 1135, 1144 (1988) (same); Franklin v. Gibson, 138 Cal. App. 3d 340, 343, 188 Cal. Rptr. 23, 25 (1982) (same); Spier v. Barker, 35 N.Y.2d 444, 449-50, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974) (same).

159. FED. R. EVID. 702 states:

> Rule 702. Testimony by Experts
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

160. *See infra* text accompanying notes 267-75.

161. *See, e.g.*, FED. R. EVID. 702, *supra* note 159.

cle, is similar to the responsibility of the trier-of-fact to compare the fault of the parties in all comparative fault cases.

The question whether the administrative complications of the seat belt defense outweigh its fairness is similar to the issue that many jurisdictions faced when they moved from contributory negligence to comparative negligence. Under the contributory negligence system, the trier-of-fact determined whether the plaintiff was contributorily negligent. No division of damages was required in the typical case. Obviously, an all-or-nothing verdict under contributory negligence was easier to administer than a verdict under comparative fault that requires division of damages. Nevertheless, the vast majority of jurisdictions rejected contributory negligence and adopted comparative fault because of the greater fairness of comparative fault—it divides responsibility for damage caused by the fault of both parties based on their relative fault. The adoption of comparative fault in the vast majority of jurisdictions illustrates the compelling nature of its fairness.[162]

Widespread practice with comparative negligence over several years has demonstrated that a jury can handle the additional step of allocating fault to the parties. The additional administrative burden of adopting the seat belt defense is not substantially greater than that of going from a contributory negligence rule to a comparative fault rule. It accomplishes the same result—an allocation of responsibility for damages caused by the negligence of the parties based on their relative fault. Thus, administrative burdens should not prevent adoption of the seat belt defense.

III. THE BASIS OF DAMAGE REDUCTION UNDER THE SEAT BELT DEFENSE

Under the seat belt defense, there are four basic methods of damage mitigation. Some courts adopt a no-exacerbation-damage-recovery rule, under which the plaintiff is not allowed to recover those damages that the plaintiff's failure to wear a seat belt caused.[163] A second group of courts allows the jury to determine the weight to give to the plaintiff's failure to wear a

162. *See supra* note 19 and accompanying text.

163. Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984); Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920-21 (1974). For a discussion of the no-exacerbation-damage-recovery seat belt defense, see *infra* text accompanying notes 167-88.

seat belt.[164] Statutes enacted in three states establish a third method of dividing responsibility for damages under the seat belt defense. Those statutes require front-seat occupants to wear seat belts, allow admission of the plaintiff's failure to wear a seat belt in violation of the statute to mitigate damages, but limit the mitigation of damages to from one to five percent of the plaintiff's damages.[165]

This Article advocates a fourth method of apportioning damages that takes into consideration both the extent to which the plaintiff's injury was caused by failure to wear a seat belt and the relative fault of the parties. Under this method, the defendant is responsible for all damages the plaintiff would have suffered had the plaintiff worn a seat belt. Responsibility for those damages the plaintiff could have avoided by wearing a seat belt is divided based on the relative fault of the parties.[166]

A. THE NO-EXACERBATION-DAMAGE-RECOVERY SEAT BELT DEFENSE

New York[167]—the first state explicitly to adopt the seat belt defense—and Florida[168]—one of the most recent states to adopt the seat belt defense—have adopted the no-exacerbation-damage-recovery version of the seat belt defense, under which

164. Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1564 (D. Vt. 1985); Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986); Law v. Superior Court, 157 Ariz. 147, 157, 755 P.2d 1135, 1145 (1988); Harlan v. Curbo, 250 Ark. 610, 612, 466 S.W.2d 459, 461 (1971) (by implication); Franklin v. Gibson, 138 Cal. App. 3d 340, 344, 188 Cal. Rptr. 23, 25 (1982); Cannon v. Lardner, 185 Ga. App. 194, 197, 363 S.E.2d 574, 577 (1987); Wemyss v. Coleman, 729 S.W.2d 174, 179 (Ky. 1987); Lowe v. Estate Motors Ltd., 428 Mich. 439, 462, 410 N.W.2d 706, 716 (1987); Dahl v. BMW, 304 Or. 558, 570, 748 P.2d 77, 84 (1987) (en banc). Wisconsin phrases its method of dividing damages in such an ambiguous manner that the trier-of-fact can apply any method of damage apportionment. Foley v. City of West Allis, 113 Wis. 2d 475, 481-82, 335 N.W.2d 824, 827 (1983). For a discussion of the jury discretion seat belt defenses, see *infra* text accompanying notes 189-220.

165. Iowa, IOWA CODE ANN. § 321.445(2) (West Supp. 1988); Michigan, MICH. COMP. LAWS ANN. § 257.710e(3) (West Supp. 1988); Missouri, MO. ANN. STAT. § 307.178(2) (Vernon Supp. 1988); *cf.* WIS. STAT. ANN. § 347.48(g) (West Supp. 1988) (discussed *infra* at note 250). For a discussion of the mitigation cap seat belt defense statutes, see *infra* text accompanying notes 221-45.

166. For a discussion of this seat belt defense, see *infra* text accompanying notes 246-99. The New Jersey Supreme Court, in *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988), adopted a seat belt defense that is similar to the method advocated herein. *See infra* notes 276, 278 and accompanying text.

167. Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 921-23 (1974).

168. Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984).

plaintiffs may not recover any of the damages caused by their negligent failure to wear a seat belt.[169] The defendant must show which portion of the damages the plaintiff would have avoided by wearing a seat belt, referred to in this Article as exacerbation damages.[170] Plaintiffs are allowed to recover only damages they would have suffered had they worn seat belts.[171]

1. Comparison with Contributory Negligence

Courts that adopt the no-exacerbation-damage-recovery seat belt defense place responsibility for the exacerbation damages on the plaintiff on the theory that the defendant should not be responsible for injuries caused by the plaintiff's negligence.[172] That argument is, of course, the foundation of the contributory negligence defense that precludes the plaintiff from any recovery in accidents caused by the plaintiff's negligence.[173] Like the contributory negligence defense, the no-exacerbation-damage-recovery seat belt defense places an unfair responsibility on the plaintiff for all of the exacerbation damages. The no-exacerbation-damage-recovery rule is thus subject to the same objection that commentators raise to the contributory negligence rule—that the rule unjustly places the loss caused by both parties entirely on the injured plaintiff, who is the least able to bear it.[174]

In addition, commentators criticize contributory negligence because the slightest degree of culpability completely bars the plaintiff's recovery.[175] The no-exacerbation-damage-recovery

169. *Id.*; Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920-21 (1974).

170. Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920-21 (1974).

171. Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984); Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920-21 (1974).

172. *See* Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 453-54 (Fla. 1984); Spier v. Barker, 35 N.Y.2d 444, 451, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 921 (1974).

173. *See supra* text accompanying note 107.

174. As Prosser said concerning the contributory negligence rule:

> The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will.

Prosser, *supra* note 17, at 469.

175. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 468-69.

seat belt defense is subject to the same criticism.[176] The plaintiff is probably negligent for failing to wear a seat belt, but the degree of culpability for failure to wear a seat belt is fairly slight. Moreover, the plaintiff's negligence in failing to wear a seat belt, unlike the plaintiff's negligence in many contributory negligence cases, does not expose others to danger. Nevertheless, under the no-exacerbation-damage-recovery rule, even though the plaintiff's negligence in failing to wear a seat belt is slight, courts deny the plaintiff any recovery of the plaintiff's exacerbation loss.

2. Jury Rejection

One reason that the vast majority of jurisdictions rejected contributory negligence is the widely acknowledged fact that in contributory negligence cases, juries often ignored the contributory negligence defense instructions. Rather than deny plaintiffs a recovery because of their negligence, juries allowed recovery and diminished the plaintiffs' damages because of their contributory negligence.[177] A similar phenomenon may be occurring in some no-exacerbation-damage-recovery seat belt defense cases. It appears that some juries consider it unfair to disallow recovery of any exacerbation damages, and attempt to allow plaintiffs a recovery of a portion of those damages despite the judge's instructions to the contrary.[178]

176. Under the no-exacerbation-damage-recovery rule, plaintiffs are entitled to recover primary damages, which are damages they would have suffered even if they had worn seat belts. In many cases, plaintiffs will have no recovery because they would not have suffered any injury if they had worn seat belts. *See, e.g.*, cases cited *supra* note 172. Even when plaintiffs recover primary damages, it is unfair to refuse to allow any exacerbation damage recovery. The plaintiff's failure to wear a seat belt had nothing to do with the primary damages. Allowing plaintiffs to recover primary damages does not justify denying exacerbation damage recovery.

177. Prosser, *supra* note 17, at 469; *see* Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 263 (1938) (stating: "We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply [apportionment] in spite of us.").

178. *See, e.g.*, Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981); Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982). In *Caiazzo*, all of the plaintiffs' injuries were caused by their failure to wear seat belts. In spite of the judge's instruction that the plaintiffs should receive no recovery for damages that they could have avoided by wearing seat belts, the jury reduced the plaintiffs' damages by only 25%. 647 F.2d at 249. The appellate court reversed the verdict because the jury failed to follow the judge's instructions. *Id.* at 252.

Curry is another no-exacerbation-damage-recovery case in which the jury appears to have ignored the judge's instructions in order to divide responsibil-

When juries believe a rule is unfair and ignore the instructions of judges, courts should re-evaluate that rule.

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ity for exacerbation damages. The Appellate Division of the Supreme Court of New York described the case as follows:

> The jury determined that plaintiff had been damaged in the amount of $50,000. The jury also found, in response to an interrogatory, that 100% of plaintiff's injuries were sustained as a result of her failure to wear a seat belt. However, in mitigating the damage award for plaintiff's failure to wear a seat belt the jury reduced the $50,000 award by only $15,000. . . .
>
> The jury's resolution of the damage issue is obviously inconsistent and reflects an apparent misunderstanding of the trial court's instructions.

89 A.D.2d at 4, 454 N.Y.S.2d, at 313.

A more likely explanation of the jury's action in *Curry* is given by Judge Gibbons of the Appellate Division in another case. *See* DiMauro v. Metropolitan Suburban Bus Auth., 105 A.D.2d 236, 483 N.Y.S.2d 383 (1984). Judge Gibbons states:

> Juries, of course, have shown a certain disinclination to strictly apply the *Spier* [no-exacerbation-damage-recovery] rule (See, e.g., *Curry v. Moser* . . .), apparently sensing the injustice which can result from the failure to apportion liability for the injuries caused by the so-called "second collision" amongst its contributors, e.g., the unbelted passenger and the various operators of the vehicles involved.

105 A.D.2d at 247, 483 N.Y.S.2d at 393, n.4.

Curry illustrates the inconsistency and unfairness of a state that applies comparative negligence when the plaintiff's negligence is a cause of an accident, and applies the no-exacerbation-damage-recovery seat belt defense when the plaintiff's negligence causes exacerbation of the plaintiff's injuries. In *Curry*, the plaintiff fell out of the vehicle in which she was traveling when the door next to her unexpectedly opened. 89 A.D.2d at 3, 454 N.Y.S.2d at 313. The vehicle following the plaintiff struck her. *Id.* The plaintiff brought suit against the driver of the vehicle she occupied and the driver of the vehicle that followed. *Id.* The defendants alleged that had the plaintiff worn a seat belt, she would not have suffered any injury. *Id.* at 4, 454 N.Y.S.2d at 313.

Curry therefore is an unusual case because the failure to wear a seat belt may have been a cause of the accident itself, rather than merely a cause of the exacerbation of injuries. The Appellate Division reached the rather anomalous conclusion that is required in a jurisdiction that recognizes both comparative negligence and the no-exacerbation-damage-recovery rule. The court held that, on remand, if the jury found that the plaintiff's failure to wear a seat belt negligently caused her accident, the jury was to apportion the damages based on comparative negligence. *Id.* at 8, 454 N.Y.S.2d at 316. If the jury found that the failure to wear a seat belt was not a cause of the accident (presumably because the jury might conclude that the plaintiff would have suffered some injuries even if she had worn a seat belt), and it found the failure to wear a seat belt to be negligent, it was not to allow any recovery for those damages that the plaintiff would have avoided by wearing a seat belt. *Id.* at 8-9, 454 N.Y.S.2d at 316. The result is that the plaintiff is allowed a recovery for what is likely to be a substantial portion of her damages if her failure to wear a seat belt caused the entire accident. She is allowed only a minor recovery if the jury determines that she suffered damages in addition to those suffered due to her failure to wear a seat belt. Such a result is not only unfair and unreasonable, but it unjustifiably rewards clever pleading. If the defendant in

3. Comparison with Comparative Fault

The no-exacerbation-damage-recovery seat belt defense resembles comparative fault in that under both defenses, plaintiffs are compensated for only a portion of their injury, but it differs from comparative fault in one significant factor: the basis for reduction of the plaintiff's damages. The basis for reduction of damages under the no-exacerbation-damage-recovery seat belt defense is solely causation—plaintiffs cannot recover for those damages caused by their failure to wear a seat belt. The basis for reduction of damages under comparative fault cases is relative fault—the trier-of-fact compares the fault of the plaintiff and defendant, assigns a percentage of fault to each, and reduces the plaintiff's damages by the percentage of fault allotted to the plaintiff.[179]

The inconsistency between comparative fault and the no-exacerbation-damage-recovery defense becomes clear by comparing two cases. In one, a comparative fault case, the plaintiff and the defendant each negligently cause a collision in which the plaintiff is injured. The plaintiff is wearing a seat belt. In the second case, a seat belt defense case, the defendant negligently causes the collision and the plaintiff drives properly. The plaintiff fails to wear a seat belt and, if the plaintiff had worn a seat belt, the plaintiff would not have suffered any injury. In a jurisdiction such as New York[180] or Florida,[181] which accepts the comparative fault defense and the no-exacerbation-damage-recovery seat belt defense, a court would allow the plaintiff to recover in the first case, although the percent of fault attributed to the plaintiff's negligence would reduce that recovery. In the second case, a court would not allow the plaintiff any recovery.

Curry drops his claim of comparative negligence based on the failure to wear a seat belt, the no-exacerbation-damage-recovery rule goes into effect, and the defendant may be able to prevent the plaintiff from receiving any recovery for the injuries suffered as a result of the failure to wear a seat belt.

179. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 471-72. Some jurisdictions apply a modified comparative fault rule, discussed *infra* note 267. Some cases suggest that both fault and causation should be considered in assigning responsibility for the loss. *See* cases cited *infra* note 191. This suggestion is discussed at text *infra* accompanying notes 201-09.

180. N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976 & Supp. 1989) (adopting pure comparative negligence); Spier v. Barker, 35 N.Y.2d 444, 449-50, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974) (adopting seat belt defense).

181. Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973) (adopting pure comparative negligence); Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984) (adopting seat belt defense).

Culpability does not justify the difference in treatment of the two plaintiffs. If anything, the plaintiff who fails to wear a seat belt is likely to be less culpable than the plaintiff whose negligence gives rise to the accident. The plaintiff in the seat belt defense case exposed himself to a risk by failing to wear a seat belt. The plaintiff in the comparative fault case exposed others as well as himself to risk. The anomalous result is that the relatively minor negligence of the plaintiff who failed to wear a seat belt precludes any recovery, while what may be the substantially more culpable conduct of the plaintiff who caused the collision results in only a reduction of damages.

Causation does not justify the difference in treatment of the plaintiff who negligently caused the collision and the plaintiff who negligently failed to wear a seat belt. In the comparative fault case, the defendant's negligent driving and the plaintiff's negligent driving caused the collision. In the seat belt defense case, the defendant's negligent driving and the plaintiff's negligent failure to wear a seat belt caused the plaintiff's injuries. In both cases, the negligence of the plaintiff, as well as the negligence of the defendant, was a cause of the plaintiff's injuries.

The foreseeability of the injury, from the perspective of either plaintiff or of either defendant, does not justify the difference in treatment of the plaintiffs. The comparative fault plaintiff should have foreseen that negligent driving might cause injury.[182] The plaintiff who failed to wear a seat belt should have foreseen that failure to wear a seat belt might cause injury. Each of the defendants should have foreseen that negligent driving might cause a collision. The defendant in the seat belt defense case might argue that courts should not require defendants to foresee plaintiffs' failure to wear seat belts, but it is common knowledge that many people do not wear seat belts.

The Appellate Division of the New York Supreme Court noted the unfairness of requiring the plaintiff to bear the full responsibility for exacerbation damages under the seat belt defense. In *DiMauro v. Metropolitan Suburban Bus Authority*,[183] the plaintiff chose to sit in a front passenger's seat that did not have a properly functioning seat belt, rather than sit in a va-

182. *See, e.g.*, Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984); Hutchins v. Schwartz, 724 P.2d 1194, 1198 (Alaska 1986); Lowe v. Estate Motors Ltd., 428 Mich. 439, 460, 410 N.W.2d 706, 715 (1987).

183. 105 A.D.2d 236, 483 N.Y.S.2d 383 (1984).

cant back seat where there was a properly functioning seat belt.[184] The court held that a jury could find the plaintiff's choice to sit in the front passenger's seat to be negligent, just as a jury can find the failure to use a seat belt to be negligent.[185] The court further held that if, on remand, the jury determined that the failure of the plaintiff to sit in the seat with a properly functioning seat belt was negligent, the plaintiff would not be able to recover for those injuries the plaintiff could have avoided by taking proper precautions.[186] The court went on to express reluctance to follow a rule that required imposing the total loss for exacerbation damages on the unbelted plaintiff and that might result in the plaintiff recovering nothing for injuries even though the defendant's negligence caused the accident. The court stated, however, that it was bound by precedent to do so.[187]

At the time that New York adopted the no-exacerbation-damage-recovery seat belt defense, it was operating under a system of contributory negligence. When the New York courts examine the seat belt defense under comparative fault principles, they may adopt a new seat belt defense. If the courts do apply comparative fault principles to the seat belt defense, they should require the jury to determine, as it does under the no-exacerbation-damage-recovery rule, which damages would not have occurred had the plaintiff worn a seat belt, and then to allocate responsibility for those damages on comparative fault principles, as this Article advocates in Part IV(D).[188]

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184. *Id.* at 238, 483 N.Y.S.2d at 386-87.

185. *Id.* at 244, 483 N.Y.S.2d at 391.

186. *Id.* at 246-47, 483 N.Y.S.2d at 392-99.

187. The court stated:

> In ruling as we do, we express some reluctance in following the mechanical rule set forth in *Spier v. Barker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164, which effectively imposes 100% liability upon an unbelted plaintiff for injuries sustained as a result of his or her failure to wear a seat belt, notwithstanding the fact that he or she may have been blameless in causing the accident in the first instance. Thus, in the case, of an unbelted passenger who is sitting in a vehicle which is lawfully stopped at a traffic signal, it is theoretically possible to recover nothing even though the vehicle was struck in the rear by a speeding, intoxicated driver. . . . However, the presence of *Spier* as a controlling precedent precludes us from adopting [a rule that would apportion liability for the injuries caused by the so-called "second collision"] in this case.

Id. at 247, 483 N.Y.S.2d at 393 n.4.

188. *See infra* text accompanying notes 246-99.

B. THE JURY DISCRETION SEAT BELT DEFENSES

Some courts appear to give juries great discretion in determining what effect the plaintiff's failure to wear a seat belt is to have. In some of these jurisdictions, the courts simply do not specify the basis for damage reduction.[189] Other jurisdictions phrase the damage reduction method in such an ambiguous manner that juries can apply almost any method of damage apportionment.[190]

Such jurisdictions may give the jury discretion to determine the method of damage apportionment because the language of their comparative fault cases indicates that the jury is to compare causation as well as fault when determining the percentages of fault of the parties.[191] In seat belt defense cases, courts may interpret such language to mean that in apportioning responsibility for damages, the jury determines what weight to give to the fact that plaintiff's failure to wear a seat belt caused a portion of the plaintiff's loss and what weight to give to the plaintiff's relative fault. A careful examination of these comparative fault cases, however, indicates that cause-in-fact questions, such as which damages the plaintiff's failure to wear a seat belt caused, should not affect the responsibility assigned to each of the parties under comparative fault.[192] The trier-of-fact should first resolve the cause-in-fact question and then, concerning damages caused by the negligence of both of the parties, should compare fault.

If a jury has discretion about how the plaintiff's failure to wear a seat belt is to affect recovery, the jury may deny the plaintiff any recovery of exacerbation damages, it may reduce all of the plaintiff's damages based on relative fault, it may reduce the plaintiff's exacerbation damage recovery based on relative fault, or it may divide the damages on some other basis. Verdicts will be inconsistent, and in some cases juries will not

189. *See supra* note 164. The failure of such cases to state explicitly how responsibility for damages is to be allocated may indicate an uneasiness with the no-exacerbation-damage-recovery seat belt defense. The problems with the no-exacerbation-damage-recovery rule are discussed *supra* at text accompanying notes 167-88.

190. See *supra* note 164.

191. *See, e.g.*, Cannon v. Lardner, 185 Ga. App. 194, —, 363 S.E.2d 574, 576-77 (1987), *vacated in part, aff'd in part*, 258 Ga. 332, —, 368 S.E.2d 730, 732 (1988); Wemyss v. Coleman, 729 S.W.2d 174, 179 (Ky. 1987); Lowe v. Estate Motors Ltd., 428 Mich. 439, 462, 410 N.W.2d 706, 716 (1987); Dahl v. BMW, 304 Or. 558, 568-69, 748 P.2d 77, 83 (1987) (en banc); *see also* Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1564 (D. Vt. 1985).

192. *See infra* text accompanying notes 201-09.

divide responsibility for damages caused by both of the parties based on the parties' relative fault.[193]

This section will discuss those jurisdictions that appear to give the jury discretion as to the effect the plaintiff's failure to wear a seat belt is to have. The section analyzes the comparative fault language that might arguably permit the jury to weigh cause-in-fact, as well as fault, in assigning percentages of fault, and the problems that arise if courts give juries such discretion.

1. The Failure to Wear a Seat Belt as a Relevant Factor for Jury Consideration under Comparative Fault

Some courts have held that the jury may consider the plaintiff's failure to wear a seat belt in assessing damage under comparative fault, but have not stated how the jury is to calculate damage reduction.[194] The Alaska Supreme Court, for example, has said: "the concept of comparative negligence contemplates the inclusion of all relevant factors in arriving at the appropriate damage award and non-use of a seat belt is a relevant factor for apportioning damages."[195] If a court merely instructs a jury that the failure of the plaintiff to wear a seat belt is a relevant factor for apportioning damages under comparative negligence, the jury must determine on what basis to reduce plaintiff's recovery. The jury must determine what weight, if any, to give to the fact that the plaintiff's failure to wear a seat belt caused only a portion of the damages and what weight to give to the fact that the plaintiff and the defendant may have differing levels of culpability.

Courts that do not specify how the plaintiff's failure to wear a seat belt is to affect his recovery may not intend that the jury be given such discretion. Rather, they may not yet have faced the issue of how to divide responsibility.

2. Jury Discretion Through Instruction Ambiguity

A 1983 Wisconsin case adopted such an incomprehensible statement explaining reduction of a plaintiff's damages that ju-

193. *See infra* text accompanying notes 210-20.

194. *See supra* note 164.

195. Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986); *see also* Cannon v. Lardner, 185 Ga. App. 194, —, 363 S.E.2d 574, 577 (1987) (citing appellant's failure to use seat belt as likely to have contributed to severity of injuries, so court correctly allowed jury to consider that failure in determining damage award under theory of comparative negligence).

ries appeared to have great discretion as to the basis to use in reducing a plaintiff's recovery.[196] The Wisconsin court said:

> [A] fair and administrable procedure, taking into account the public policy underlying the seat-belt defense and the principles of comparative negligence . . . is to calculate a plaintiff's provable damages by the usual rules of negligence without regard to the seat-belt defense and then take into account the seat-belt defense by *decreasing the recoverable damages by the percentage of the plaintiff's causal seat-belt negligence.*[197]

This statement raises the question of how a jury is to determine "the percentage of the plaintiff's causal seat-belt negligence." The percentage assigned to the plaintiff could be based on the amount of damages caused by failure to wear a seat belt, on the relative culpability of the plaintiff compared with the defendant, or on some combination of the two. A reading of the full Wisconsin opinion does not answer the question. Some portions of the opinion suggest that plaintiffs receive no recovery for those damages they could have avoided by wearing seat belts.[198] Other portions of the opinion, however, suggest that the reduction of recovery is based on a comparison of fault.[199]

In holding that the jury is to determine the percentage that plaintiff's damages are to be reduced based on "plaintiff's causal seat-belt negligence," the court, in effect, left it to the jury to determine the weight to give to the fact that the plaintiff's failure to wear a seat belt caused a portion of the plain-

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196. Foley v. City of West Allis, 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

197. *Id.* at 486-87, 335 N.W.2d at 829 (emphasis added).

198. We should seek to treat the plaintiff and defendant in such a way that the plaintiff recovers damages from the defendant for the injuries that the defendant caused, but that the defendant is not held liable for incremental injuries the plaintiff could and should have prevented by wearing an available seat belt.

Id. at 489, 335 N.W.2d at 830-31.

The Wisconsin court also suggested that its seat belt rule "borrows from the apportionment technique used in two traditional tort doctrines: avoidable consequences and mitigation of damages." *Id.* at 487, 335 N.W.2d at 830. Under those doctrines, plaintiffs are allowed no recovery for damages that they could have avoided by exercising reasonable care after the initial injury. That principle appears to suggest the no-exacerbation-damage-recovery rule.

199. The Wisconsin court suggested that its seat belt defense was based on comparative negligence principles. *Id.* at 485-88, 335 N.W.2d at 829, 830. The court said: "The comparative negligence rule is designed to reduce a plaintiff's damage in proportion to plaintiff's fault." *Id.* at 487-88, 335 N.W.2d at 830.

The New Jersey Superior Court adopted the Wisconsin method of damage apportionment in *Dunn v. Durso*, 219 N.J. Super. 383, 401, 530 A.2d 387, 397 (1986). The New Jersey Supreme Court rejected this method, however, in *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988). *See infra* notes 276, 278.

tiff's injuries. The Wisconsin Legislature recently adopted a new seat belt defense that is similar to the seat belt defense advocated in this Article.[200]

3. Comparison of Causation and Fault

The language in some comparative fault cases and statutes appears to justify a jury's comparison of both fault and causation. Some use the term *comparative causation* rather than *comparative fault*.[201] Others suggest that when the jury compares the fault of the plaintiff with the fault of the defendant, it is to compare both fault and causation.[202] For example, section 2(b) of the Uniform Comparative Fault Act ("UCFA") states: "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."[203]

An examination of the cases that use the term *comparative causation* and the cases and statutes that suggest the jury is to consider fault and causation in assigning percentages of fault, however, reveals that they do not intend to allow the jury to determine what role cause-in-fact is to play. The jury must determine that the plaintiff's negligence was a cause-in-fact of the injury before the jury can compare the fault of the parties.

Those jurisdictions that use the term *comparative causation* do so to emphasize that the fault the jury is to compare is the fault which caused the injury. The United States Court of Appeals for the Ninth Circuit, for example, has said: "perhaps the term 'comparative causation' is a conceptually more precise term than 'comparative fault' since fault alone without causation does not subject one to liability."[204]

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200. 200 WIS. STAT. ANN. § 347.48(g) (West Supp. 1988). The new Wisconsin seat belt statute, like the proposal advocated in this Article, reduces only that portion of the plaintiff's damages that the plaintiff's failure to wear a seat belt caused. *Id.* The Wisconsin statute, however, limits the reduction to 15% of the plaintiff's exacerbation damages. *Id.* For a discussion of the statute, see *infra* note 250.

201. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602 (D. Idaho 1976); *cf.* Pan-Alaska Fisheries, Inc., v. Marine Constr. & Design Co., 565 F.2d 1129, 1137 (9th Cir. 1977) (first examining contributory negligence in causation, then comparing fault).

202. *See, e.g.*, UNIF. COMPARATIVE FAULT ACT § 2(B), 12 U.L.A. 45 (Supp. 1989) [hereinafter U.C.F.A.].

203. *Id.*

204. *Pan-Alaska Fisheries*, 565 F.2d at 1139 (citation omitted). The term *comparative causation* is confusing and is not conceptually more precise than

Under the UCFA, courts may reduce the plaintiff's recovery only for "an injury attributable to the claimant's contributory fault."[205] According to the UCFA comments, the claimant's fault must have caused the claimant's damage under the rules of both cause-in-fact and proximate cause in order for it to reduce the claimant's recovery.[206] What then is the meaning of the statement in section 2 of the UCFA that "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed"?[207] The comment to Section 2 suggests that the aspect of causal relation the jury is to consider in determining percentage of fault is the "relative closeness" of the parties' negligence and the injury.[208]

Thus, by saying that the finder-of-fact may consider fault and causation, neither the courts nor the UCFA are suggesting that the jury can determine the role which cause-in-fact is to play in reduction of damages. Rather, the finder-of-fact may consider causation in the sense of proximate cause, the foreseeability of the harm in assessing culpability. The finder-of-fact should determine what harm both the negligence of the plaintiff and the negligence of the defendant caused and should divide responsibility for the harm caused by both of them based on a comparison of fault.[209]

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the term *comparative fault.* There is no reason for the label given to the defense to convey the concept that the trier-of-fact is to compare only the negligence causing the harm. It is well-established that the the defendant must show that the plaintiff's negligence caused the harm before courts will apply either contributory negligence or comparative negligence.

205. U.C.F.A. § 1(a), *supra* note 202, at 41.

206. The comment states:

> *Causation.* For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.
>
> "Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage.

Id. comment to § 1, at 42.

207. *Id.* § 2(b), at 45.

208. The comment to section 2 states:

> In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed . . . .

Id. comment to § 2, at 46.

209. *See infra* text accompanying notes 246-99.

4. Dangers of the Jury Discretion Seat Belt Defenses

This Article has discussed some cases that appear to give juries discretion to determine the roles that cause-in-fact and relative fault are to play in the seat belt defense. At least one commentator has looked favorably on this approach.[210]

If courts allow juries to consider the plaintiff's failure to wear a seat belt, without instructions as to the role that causation and comparative fault are to play, however, two dangers emerge. Lack of judicial guidance could produce inconsistent results and some juries will give inappropriate consideration to the roles of cause-in-fact and comparative fault. If courts do not instruct juries as to the role that causation and comparative fault are to play in the seat belt defense, juries may apply any one of several methods of damage reduction. Juries might:

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210. Twerski has commented favorably on the idea of leaving to the jury the determination of what effect the plaintiff's failure to wear a seat belt should have on damages. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 326 (1977). He says in discussing a case that adopted the seat belt defense but failed to specify the basis on which the plaintiff's damages were to be reduced:

> [T]he Wisconsin court did not see fit to bifurcate the first collision damages and the second collision damages which resulted from the failure to wear the seat belt and opted instead for a general homespun evaluation of fault for the entire injury. . . . [I]n a common sense way the court dealt intelligently with what is a most complex problem. The court took the position that plaintiffs should bear responsibility for some safety and that it would leave to the good sense of the jury just how to evaluate plaintiff's share in the overall injury setting. . . . [T]he court opted not for a *comparison* of the negligence but rather for a reduction of plaintiff's verdict based on a visceral assessment of the role that plaintiff played in the injury.

Id. at 328-29 (footnote omitted) (discussing Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967), one of the early cases to recognize the seat belt defense).

The *Bentzler* court held that application of the seat belt defense under the evidence presented at trial would have been improper because the defendant failed to introduce sufficient evidence for the jury to determine whether the failure to wear a seat belt contributed to the injuries. *Bentzler*, 34 Wis. 2d at 387, 149 N.W.2d at 640. In *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983), the Wisconsin Supreme Court held that under the seat belt defense, the jury is to reduce the plaintiff's damages by "the percentage of the plaintiff's causal seatbelt negligence." 113 Wis. 2d at 486-87, 335 N.W.2d at 829 (footnote omitted). *See supra* text accompanying note 197.

Twerski acknowledges that "[i]f we are to seek analytical purity," we will adopt either the no-exacerbation-damage-recovery rule or reduce the plaintiff's recovery of exacerbation damages based on relative fault, as this Article advocates. Twerski, *supra*, at 327-28. He argues, however, that it would be impossible to compare the negligence of the plaintiff in failing to wear a seat belt with the negligence of the defendant which caused the collision. That argument is discussed *infra* at text accompanying notes 268-75.

(1) Deny plaintiffs any recovery for damages that they could have avoided by wearing a seat belt;[211]

(2) Reduce the total damages of plaintiffs based on their relative fault;[212] or

(3) Reduce the recovery of damages that plaintiffs could have avoided by wearing a seat belt based on their relative fault.[213]

A hypothetical illustrates the variety of verdicts that different juries might render, based on the same factual conclusions under a jury discretion seat belt defense. Assume a case in which a defendant, negligently driving five miles per hour over the speed limit, causes a collision with a plaintiff who is not wearing a seat belt. The plaintiff's total damages are $100,000. The defendant presents credible evidence that if the plaintiff had worn a seat belt, the plaintiff's damages would have been $30,000. The court either instructs the jury that it is merely to reduce the plaintiff's damages based on failure to wear a seat belt[214] or that it is to reduce the plaintiff's damages based on "causal seat belt negligence."[215] The three approaches listed above produce different results:

(1) The jury might conclude that the plaintiff should receive no recovery for damages that the plaintiff could have avoided by wearing a seat belt, and award the plaintiff $30,000 [$100,000 - $70,000].

(2) The jury might compare the negligence of the plaintiff in failing to wear a seat belt with the negligence of the defendant in driving five miles an hour over a safe speed, conclude that the degree of fault is approximately equal, and award the plaintiff $50,000 [$100,000 - $50,000].

(3) The jury might reduce those damages caused by the plaintiff's failure to wear a seat belt [$70,000] by the relative culpability of the plaintiff [50%] and award the plaintiff damages of $65,000 [$100,000-$35,000].

In all three cases, the jury reached the same factual conclu-

211. This Article refers to this method of damage reduction as the no-exacerbation-damage-recovery seat belt defense. *See supra* text accompanying notes 167-88.

212. This method of damage reduction is discussed *infra* text accompanying notes 256-62.

213. This method of damage reduction is advocated by this Article. It is discussed *infra* text accompanying notes 244-99.

214. *See, e.g., supra* note 164.

215. *See, e.g., supra* note 165.

sions: total damages are $100,000; exacerbation damages are $70,000; and relative fault is fifty percent each. The damage award in each case, however, was substantially different.[216] Parties should not be subject to such widely divergent verdicts based on the same factual determinations.

The hypothetical illustrates two different risks. A jury discretion rule is likely to produce inconsistent results. Further, some juries will not give appropriate weight to causation and comparative fault. The first jury above applied a no-exacerbation-damage-recovery rule, which fails to consider the relative fault of the parties.[217] The jury in the second example failed to give appropriate weight to the role of causation, by reducing all of the plaintiff's damages based on the plaintiff's fault in failing to wear a seat belt.[218] As this Article will demonstrate,[219] the seat belt defense should not reduce the plaintiff's recovery of damages that failure to wear a seat belt did not cause. The third jury applied the proper rule. It determined which damages the plaintiff's failure to wear a seat belt caused, and reduced those damages based on the plaintiff's relative fault.[220]

C. THE STATUTORY MITIGATION CAP SEAT BELT DEFENSES

In the last few years, the legislatures in twenty-nine states have passed statutes requiring seat belt use.[221] Three of those states allow the seat belt defense when the plaintiff violates the statute, but limit the reduction of damages to a small percent of the plaintiff's total damages—one percent in Missouri and five percent in Iowa and Michigan.[222] These statutes may lead to inconsistent treatment of front and back seat occupants. The statutes require only front seat occupants to wear seat belts,

216. In the language of the Wisconsin rule, the jury determined the plaintiff's "causal seatbelt negligence" in each case to be substantially different (30%, 50%, 65%). *See supra* note 197.

217. *See supra* text accompanying notes 167-88.

218. Such a seat belt defense is discussed *infra* text accompanying notes 256-62.

219. *See infra* text accompanying notes 256-62.

220. *See infra* text accompanying notes 246-99.

221. *See supra* note 31.

222. IOWA CODE ANN. § 321.445 4(b)(2) (West Supp. 1988); MICH. COMP. LAWS ANN. § 257.710e(5) (West Supp. 1988); MO. ANN. STAT. § 307.178(3) sec. (2) (Vernon Supp. 1989); *cf.* WIS. STAT. ANN. § 347.48(g) (West Supp. 1988) (placing a 15% cap on reduction of plaintiff's recovery of exacerbation damages). The Wisconsin statute is similar to the proposal in this Article in that, unlike other mitigation cap statutes, it permits reduction of only the exacerbation damages recovery. *Id. See also infra* note 250 (discussing Wisconsin statute).

and the mitigation cap applies only to violations of the statute.[223] If the courts of these states adopt the seat belt defense, the states may have the anomalous result of limiting the reduction of a front seat occupant's damages for failure to wear a seat belt to one to five percent of his damages, while placing no limit on the reduction of the back seat occupant's damages. The Michigan Supreme Court has indicated that this result is possible.[224] An additional question is whether the limitation on reduction of damages applies whenever the plaintiff's failure to use a seat belt is a violation of the statute, or applies only when the defendant attempts to use the statute to establish the plaintiff's negligent failure to use a seat belt.[225]

This section will analyze three issues. The first subsection examines the mitigation cap statutes under the principles of comparative fault. The second subsection explores the possibility that front and back seat occupants will be treated differently under the mitigation cap statutes. The final subsection evaluates whether the mitigation cap should apply if the defendant does not use the statute to establish that the plaintiff's failure to wear a seat belt constitutes negligence.

1. Consistency with Comparative Fault

A provision limiting the reduction of damages under the seat belt defense undercuts the principle of comparative fault that responsibility for damages caused by the negligence of both parties should reflect the relative culpability of the parties. A low mitigation cap ignores the role that both causation and culpability should play in damage assessment.

The proportion of the damages caused by the plaintiff's failure to wear a seat belt will vary substantially from case to case. In some cases, the failure to wear a seat belt will cause very little damage. In others, the failure to wear a seat belt will cause all of the plaintiff's damages.

The plaintiff's relative culpability for failure to wear a seat belt will also vary substantially depending on the relative extent of the defendant's and the plaintiff's culpability. The relative culpability of a plaintiff who fails to wear a seat belt is

223. *See infra* note 228.

224. The Michigan court has suggested that such an anomaly is a possibility but that it is "a legislative concern." Lowe v. Estate Motors Ltd., 428 Mich. 439, 469, 410 N.W.2d 706, 718-19 (1987). For a discussion of this problem, see *infra* text accompanying notes 228-45.

225. *See infra* text accompanying notes 237-45.

much greater when compared with a defendant who drives five miles-per-hour over the limit than when compared with a defendant who exceeds the limit by thirty-five miles-per-hour. A plaintiff who fails to buckle a seat belt in the front seat before traveling on an icy, crowded highway is probably more culpable than one who fails to buckle up in the back seat prior to a short drive in a suburban neighborhood under good driving conditions. The amount of damage reduction should vary if the plaintiff's recovery is to reflect the relative fault of the parties in causing the damages suffered due to the failure to wear a seat belt.

The rule that courts formerly applied in admiralty was similar in some respects to a seat belt defense mitigation cap. Under the old admiralty comparative negligence rule, when both the plaintiff and the defendant negligently caused the plaintiff's damages, the courts reduced the plaintiff's recovery by half.[226] The finder of fact was not required to weigh relative culpability. Courts rejected this rule because the relative culpability of the parties varies substantially from case to case.[227] Courts now reduce the recovery of admirality plaintiffs by the percentage of fault attributed to them. Seat belt statutes that place a cap on damage reduction raise this same issue, because the damage award may not reflect the relative culpability of the parties.

2. Inconsistent Treatment of Front and Back Seat Occupants

The mandatory use statutes that include a mitigation cap require only the front seat occupants to use seat belts,[228] and the mitigation cap applies only to plaintiffs who are in violation of the statute.[229] Unless the courts of these jurisdictions adopt the same mitigation cap for seat belt defense cases involving

226. T. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 13-3, at 456, 456n.1 (1987) (noting that this rule was established in *The Schooner Catherine v. Dickinson*, 58 U.S. (17 How.) 170, 177-78 (1855), and survived until 1975).

227. *Id.* § 13-3, at 456. *See also* United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975) (overruling *The Schooner Catherine* and establishing a new rule which allocates liability for damages based on comparative degree of fault).

228. IOWA CODE ANN. § 321.445(2). (West Supp. 1988); MICH. COMP. LAWS ANN. § 257.710(e)(3) (West Supp. 1988); MO. ANN. STAT. § 307.178(2) (Vernon Supp. 1989).

229. IOWA CODE ANN. § 321.445(4)(b) (West Supp. 1988); MICH. COMP. LAWS ANN. § 257.710(e)(5) (West Supp. 1988); MO. ANN. STAT. § 307.178(3) (Vernon Supp. 1989)

back seat occupants, those state courts will apply inconsistent seat belt defenses to front and back seat occupants.

If the courts of a state with a mitigation cap reject the seat belt defense for back seat occupants, the difference in treatment will be consistent with the underlying theory of the legislation. The danger of injury in a collision for one not wearing a seat belt is much greater for front seat occupants than for back seat occupants.[230] The failure of the front seat occupant to use a seat belt therefore shows greater culpability. Consequently, it is possible to justify a reduction of the front seat occupant's recovery, but not the back seat occupant's recovery, based on relative carelessness.

The courts of those states with a mitigation cap will create a great, unjustified inconsistency, however, if they apply the seat belt defense in cases involving back seat occupants. The finder-of-fact could reduce the recoveries of front seat occupants by only a small amount under the statute, but could reduce the recoveries of back seat occupants substantially. Not only would such an approach treat the front and back seat occupants differently, but it would allow the more negligent of the two, the front seat occupant, the greater recovery.

The Michigan Supreme Court discussed this issue recently in *Lowe v. Estate Motor Ltd.*[231] *Lowe* involved a collision that occurred prior to the adoption of Michigan's five percent mitigation cap statute, but the court reached its decision after the enactment of the statute.[232] The plaintiff was a back seat passenger who failed to wear a seat belt.[233] The court adopted the seat belt defense, holding that the plaintiff's failure to wear a seat belt should be treated similarly to other forms of comparative negligence.[234] The court recognized that its decision could result in the anomalous result of protecting the recoveries of front seat occupants under the statute while not protecting the recoveries of the arguably less culpable back seat occupants, but the court stated that the problem was an issue for the legislature.[235]

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230. *See, e.g., supra* note 55 and studies cited therein.
231. 428 Mich. 439, 410 N.W.2d 706 (1987).
232. *Id.* at 463, 410 N.W.2d at 716.
233. *Id.* at 446, 410 N.W.2d at 708.
234. *Id.* at 462, 410 N.W.2d at 715-16.
235. The court stated:

> While we are cognizant of the potential argument that the effect of the five-percent limitation could lead, potentially and perhaps anomalously, to the irrational result of protecting the recoveries of individu-

Some courts may decide, in the name of consistency and out of deference to the legislatures, to apply the same statutory cap to back seat occupants that the statutes require for front seat occupants. The Michigan Supreme Court, however, indicated that it would not be inclined to apply the mitigation cap to back seat passengers because "the judiciary has traditionally not involved itself in the setting of arbitrary figures or percentages."[236]

3. Applicability of the Mitigation Cap if Statute Not Used to Establish Negligence

It is unclear under the statutes that place a cap on damage reduction whether or not the cap applies if the defendant does not use the statute to establish the plaintiff's negligence. The Michigan statute, for example, states:

> Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, *such negligence* shall not reduce the recovery for damages by more than 5%.[237]

Does "such negligence" refer to the negligence defendants establish using the statute, or to all negligence that is a violation of the statute? The Iowa and Missouri statutes create a similar ambiguity.[238]

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als whose failure to use seat belts was in violation of the statute, while not protecting the recoveries of those whose failure to use seat belts was not in violation of it, we are compelled to conclude that that effect is essentially a legislative concern.

428 Mich. at 469, 410 N.W.2d, at 718-19.

236. *Id.* at 468, 410 N.W.2d at 718. The court said:

> The question of specific percentage limitations is not now before the Court. Furthermore, unlike the Legislature, *the judiciary has traditionally not involved itself in the setting of arbitrary figures or percentages.* Thus, when faced with the question whether, because of the five-percent limitation, we should affirm, as a matter of common law, an erroneous and unsupportable exception to the doctrine of comparative negligence, we are compelled to answer in the negative.

428 Mich. at 468-69, 410 N.W.2d at 817 (emphasis added).

237. MICH COMP. LAWS ANN. § 257.710e(h)(5) (West Supp. 1988) (emphasis added).

238. IOWA CODE ANN. § 321.445(4)(b) (West Supp. 1988); MO. ANN. STAT. § 307.178(3) (Vernon Supp. 1989). The Iowa statute states:

> [T]he *failure to wear a safety belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances*: (1) Parties seeking to introduce evidence of the failure to wear a safety belt or safety harness in violation of this section must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.

Under each of the statutes, the mitigation cap clearly applies when the defendant uses the violation of the statute to mitigate damages. The difficult issue is whether the cap applies if the defendant argues only that the plaintiff's failure to wear a seat belt is a violation of the common-law requirement that people exercise reasonable care for their own safety.[239]

In the absence of legislative intent to the contrary, it is reasonable to read these statutes as placing a cap on the mitigation of the plaintiff's recovery only in those cases in which the defendant uses the statute to establish that the plaintiff's failure to use a seat belt is a failure to exercise reasonable care. If courts interpret the mitigation cap to apply only when the statute is used to establish that the plaintiff's failure to wear a seat belt is negligent, defendants have the option of using the statute and accepting the limit on damage mitigation. Defendants can avoid the mitigation cap, but they must persuade the court to adopt the seat belt defense without the aid of the statute and must convince the trier-of-fact that the failure to wear a seat belt is negligent.[240]

Under such an interpretation of the mitigation cap statutes, there is no great inconsistency with comparative fault[241] because defendants have the option of subjecting themselves to the limit of the mitigation cap. This interpretation also minimizes the discrepancy between treatment of front and back seat plaintiffs.[242] Front seat plaintiffs will benefit from the limita-

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(2) If the evidence supports such a finding, *the trier of fact . . . may reduce the amount of plaintiff's recovery by an amount not to exceed five percent* of the damages awarded after any reductions for comparative fault.

IOWA CODE ANN. § 321.445(4)(b) (West Supp. 1988) (emphasis added); *see also* MO. ANN. STAT. § 307.178(3) (Vernon Supp. 1989) (allowing reduction by amount not to exceed one percent of the damages awarded after any comparative negligence reductions). Is the limitation on the mitigation of damages merely one of the "circumstances" under which the violation of the statute can be admitted to mitigate damages, or is a limitation to be applied whenever the plaintiff's failure to wear a seat belt is a violation of the statute?

239. *See generally* PROSSER & KEETON, *supra* note 48, at 193-208 (discussing application of reasonable conduct standard).

240. Under the Iowa and Missouri statutes, evidence of the plaintiff's failure to wear a seat belt in violation of the statute may not be used as evidence of comparative negligence. IOWA CODE ANN. § 321.445(4)(b) (West Supp. 1988); MO. ANN. STAT. § 307.178(3) (Vernon Supp. 1989). The statutes, however, do not state whether courts may admit the failure to wear a seat belt, without a showing that it is in violation of the statute, as evidence of comparative negligence.

241. *See supra* text accompanying notes 221-27.

242. *See supra* text accompanying notes 228-36.

tion of the mitigation cap only if defendants attempt to use the statute to establish negligence. If defendants do not use the statute, front and back seat plaintiffs will be on equal footing when defendants attempt to persuade a court to adopt the seat belt defense or attempt to convince a judge or jury that failure to wear a seat belt is negligent. If courts interpret the mitigation cap as applying to all violations of the statute, however, then a state may be left with what the Michigan Supreme Court has called the "irrational result of protecting the recoveries of individuals whose failure to use seat belts was in violation of the statute, while not protecting the recoveries of those whose failure to use seat belts was not in violation of it . . ."[243]

When a statute is susceptible of two meanings, one of which would lead to inconsistent results, courts should adopt the more reasonable meaning.[244] The potential inconsistency in treatment of front and back seat occupants is obvious. It is reasonable to conclude that the legislatures intended to give the defendant the right to use the statute to establish that the plaintiff is negligent, but that if the defendant does so, the court will reduce the plaintiff's damages by only a small amount.[245]

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243. *Lowe*, 428 Mich. at 469, 410 N.W.2d at 718-19.

244. *See supra* text accompanying note 147.

245. Justice Levin of the Michigan Supreme Court, dissenting in *Lowe*, suggested another interpretation of the mitigation cap statutes. In his opinion, the Michigan statute, which appears *supra* in text accompanying note 237:

> codified the common-law rule, established by the Court of Appeals, that damages may not be reduced for failure to wear a seat belt with a "narrow exception" permitting reduction of a damage award by not more than five percent for failure of a front-seat occupant to wear a seat belt.

428 Mich. at 492, 410 N.W.2d at 729 (Levin, J., dissenting) (footnotes omitted).

Justice Levin's statement that the common law rejects the seat belt defense is based on two Michigan Court of Appeals decisions, *Schmitzer v. Misener-Bennett*, 135 Mich. App. 350, 359-60, 354 N.W.2d 336, 340 (1984) (holding evidence demonstrating plaintiff's failure to wear seat belt inadmissible under Michigan's system of comparative negligence), and *Romankewiz v. Black*, 16 Mich. App. 119, 127, 167 N.W.2d 606, 610-11 (1969) (finding failure to use seat belt not appropriate under doctrine of avoidable consequences). *Lowe*, 428 Mich. at 490-91, 410 N.W.2d at 728 (Levin, J., dissenting). If the legislature codified the rejection of the seat belt defense, except for the front seat passenger mitigation cap seat belt defense, as Justice Levin suggests, the mitigation cap statute would not create the danger of unjustified inconsistent treatment of front and back seat occupants suggested above. Courts could mitigate the recoveries of front seat occupants by up to five percent, but could not mitigate the recoveries of the less culpable rear seat occupants at all.

Justice Levin's argument that the legislature "codified the common-law rule," 428 Mich. at 492, 410 N.W.2d at 729, however, is questionable. The stat-

D. A PROPOSAL: THE COMPARATIVE FAULT REDUCTION OF EXACERBATION DAMAGES

Rejection of the seat belt defense is unfair because it imposes on the defendant full responsibility for injuries caused by the plaintiff's negligent failure to wear a seat belt.[246] The no-exacerbation-damage-recovery seat belt defense is also unfair, because it denies the plaintiff any recovery for exacerbation damages, which were caused by the defendant's negligence as well as by the plaintiff's failure to wear a seat belt.[247] Jurisdictions that leave to jury discretion the effect that the plaintiff's failure to wear a seat belt defense is to have on recovery will have inconsistent results, some of which will give inappropriate consideration to the question of what portion of the damages the plaintiff's failure to wear a seat belt caused and to the question of the relative fault of the parties.[248] Seat belt defense mitigation cap statutes do not allow juries to divide responsibility for damages caused by both of the parties based on their relative culpability, and may treat front and back seat plaintiffs inconsistently.[249]

The defendant should be responsible for the plaintiff's primary damages—those damages the plaintiff would have suffered had the plaintiff worn a seat belt. The plaintiff and the defendant should share responsibility for the exacerbation damages, because both the plaintiff's failure to buckle a seat belt and the defendant's negligence caused the exacerbation damages. To achieve that result, this Article proposes a two-step analysis after the trier-of-fact determines the total damages of the plaintiff. The trier-of-fact first should determine the plaintiff's exacerbation damages, that is, those damages that the plaintiff could have avoided by wearing a seat belt, and then should divide responsibility for the exacerbation damages based on a comparison of the fault of the plaintiff in failing to use a seat belt and the fault of the defendant in causing the collision.[250]

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ute gives no indication of what rule is to apply to seat belt defense cases that do not fall under the statute. If the legislature had wanted to preclude the adoption of the seat belt defense in cases the statute does not cover, it could have done so explicitly with ease.

246. *See supra* text accompanying notes 14-19.

247. *See supra* text accompanying notes 14-19, 167-88.

248. *See supra* text accompanying notes 189-220.

249. *See supra* text accompanying notes 221-45.

250. The possibility of this method of handling the seat belt defense is suggested in Slatter, *Seat Belts and Contributory Negligence*, 4 DALHOUSIE L.J. 96,

1. Step One: Cause-in-Fact, What Damages Could the Plaintiff Have Avoided by Wearing a Seat Belt?

Once it has been established that the defendant's negligence proximately caused the plaintiff's injuries and that the plaintiff negligently failed to wear a seat belt, the trier-of-fact should determine what damages the plaintiff's failure to wear a seat belt caused.[251] That determination is, of course, the only damage allocation step taken by those states that apply the no-

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109-10 (1977); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 327-39 (1977); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERC. L. REV. 373, 385-86 (1978); Comment, *Torts—Seat Belts and Contributory Negligence*, 49 CANADIAN B. REV. 475, 480-81 (1971); and *A Compromise*, *supra* note 1, at 345-46.

The New Jersey Supreme Court, in *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988), adopted a seat belt defense damage apportionment method very similar to the one advocated in this Article. For a discussion of the *Waterson* damage apportionment method, see *infra* notes 276 and 278.

A seat belt defense statute recently enacted by the Wisconsin legislature contains a damage apportionment method that is similar in some respects to the one advocated in this Article. *See* WIS. STAT. ANN. § 347.48(g) (West Supp. 1988). The statute states:

> Evidence of . . . failure to comply with [the mandatory seat belt use provision of this statute] is admissible in any civil action for personal injuries or property damage resulting from the use or operation of a motor vehicle. . . *[W]ith respect to injuries or damages determined to have been caused by* a failure to comply with [the mandatory use provision], such a failure shall not reduce the recovery for those injuries or damages by more than 15%.

Id. (emphasis added).

The statute requires the first step, the causation step, of the proposal advocated in this Article. The mitigation cap applies only to those damages that plaintiff's failure to wear a seatbelt caused—those damages referred to in this Article as exacerbation damages. *Id.* Presumably, those are the only damages that can be reduced based on plaintiff's failure to wear a seat belt. The statute does not identify the basis on which the court is to reduce the damages, but the relative fault of the parties appears to be the appropriate basis.

The Wisconsin statute is different from the proposal advocated in this Article in that it places a 15% cap on the reduction of exacerbation damages. *Id.* In this respect, the Wisconsin statute is somewhat like the mitigation cap statutes discussed *supra* at text accompanying notes 221-45. Like these mitigation statutes, the Wisconsin statute limits the reduction of plaintiff's damages, and therefore may yield results that are inconsistent with comparative fault. Because the Wisconsin statute mitigation cap applies only to exacerbation damages and is 15 percent, rather than one or five percent, however, the results under the Wisconsin statute are likely not to be as inconsistent with comparative fault as the results under the other mitigation cap statutes. The other mitigation statutes are cited *supra* at note 222.

251. The defendant's negligence will not result in liability unless it caused the plaintiff's injury. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 263. The plaintiff's negligence will not result in either preclusion of recovery under

exacerbation-damage-recovery seat belt defense.[252]

Courts have applied one of two tests to determine whether an actor's negligent behavior caused damages. Under the traditional "but-for" test, the plaintiff's failure to wear a seat belt is

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contributory negligence, *see id.* at 456, or reduction of recovery under comparative negligence unless that negligence was a cause of the injury.

In tort law, the term *causation* is used in two very different senses. It is used in the purely factual sense of cause-in-fact. In the context of the seat belt defense, the plaintiff's failure to wear a seat belt was a cause-in-fact of those damages that the plaintiff could have avoided by wearing a seat belt. Some commentators argue that determinations of cause-in-fact must involve policy considerations. *See, e.g.*, Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 61, 64 (1956). As Richard Wright argues, however, determining whether something was "*the* cause" or "the responsible cause" involves a tortious-conduct inquiry, a causal inquiry, and a proximate-cause inquiry, and the causal inquiry should be purely a factual question—whether the actor's negligence was a cause-in-fact of that harm. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1742-45 (1985).

The second causation issue, that of proximate cause, is clearly policy-laden. In the context of the seat belt defense, the proximate cause question is whether the connection between the plaintiff's failure to wear a seat belt and the injuries that failure caused is sufficiently close that the plaintiff's failure to wear a seat belt should reduce the plaintiff's damages. If the defendant can show that the plaintiff's failure to wear a seat belt was a cause-in-fact of plaintiff's exacerbation damages, the defendant should have no difficulty showing that the plaintiff's failure to wear a seat belt was a proximate cause of the exacerbation damages under well-established proximate cause rules. At the time of the plaintiff's failure to wear a seat belt, it was foreseeable that the plaintiff might suffer injury in an automobile collision. *See, e.g.*, Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (Wagon Mound No. 1), 1961 A.C. 388, 426 (P.C.) (limiting defendant's responsibility to foreseeable injuries). The injury—increased damage in an automobile collision due to failure to wear a seat belt—is foreseeable even if the manner of the occurrence is not. *See, e.g.*, Bunting v. Hogsett, 139 Pa. 363, 374-75, 21 A.31, 32 (1891), *see also* Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169-70, 414 N.E.2d 666, 670 (1981) (noting plaintiff need not show that precise manner of injury was foreseeable, so long as the injury was foreseeable). In light of all of the publicity given to seat belts in recent years, it clearly is foreseeable that failure to use a seat belt will increase injury.

Calabresi suggests using the proximate cause requirement to limit the responsible cause to the party who is the least cost avoider. Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 82-84 (1975). He explicitly acknowledges that in making such a suggestion, he is attempting to use the flexibility of the proximate cause term to impose liability on the least cost avoider. *See id.* at 82-84. In the seat belt context, Calabresi would ask whether the defendant or the plaintiff who failed to wear a seat belt is generally the least cost avoider. The least cost avoider would be the proximate cause of the harm. The least cost avoider in seat belt defense cases is probably the plaintiff. *See supra* note 29.

252. The no-exacerbation-damage recovery seat belt defense does not allow the plaintiff any recovery for those damages that the plaintiff could have avoided by wearing a seat belt. *See supra* text accompanying notes 167-88.

a cause of those damages that would not have occurred had the plaintiff worn a seat belt.[253] Under the "substantial factor" test, the plaintiff's failure to wear a seat belt is a cause of those damages which the failure to wear a seat belt was a substantial factor in bringing about.[254] Either test yields the same result when applied to a seat belt defense case, because the plaintiff's failure to wear a seat belt is a substantial factor in causing that portion of plaintiff's injuries that plaintiff could have avoided by wearing a seat belt.[255] The plaintiff's failure to wear a seat belt was not a factor in causing those damages that the plaintiff would have suffered even if the plaintiff had worn a seat belt.

This section will discuss two cause-in-fact issues that arise in the context of the seat belt defense. The first issue is why courts should limit the reduction in the plaintiff's damages to those caused by failure to wear a seat belt rather than simply reducing the plaintiff's damages based on comparative fault. The second issue involves the difficulty of proving which damages the plaintiff could have avoided by wearing a seat belt.

a. *Why the Cause-in-fact Limitation?: The Comparative-Fault-Reduction-of-Total-Damages Seat Belt Defense*

The section of this Article on the jury discretion seat belt defenses suggested that one likely result of giving the jury discretion as to the basis for reduction of plaintiff's damages is that the jury will ignore the question of which injuries the plaintiff's failure to wear a seat belt caused, compare the negligence of the plaintiff's failure to wear a seat belt with the negligence of the defendant, and reduce the plaintiff's total damages based on relative culpability.[256] Such use of jury discretion is so likely that some commentators have interpreted

253. *Cf.* PROSSER & KEETON, *supra* note 48, at 265-66 and cases cited therein.

254. *See, e.g., id.* at 267-68 and cases cited therein. The "substantial factor" test has substantial weaknesses, *see, e.g.*, Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1781-84 (1985) ("substantial" introduces policy into what should be a factual inquiry); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 554 (1962) (noting that "substantial" cannot be defined), but is sufficient for determining which injuries the plaintiff's failure to wear a seat belt caused.

255. Another causation test is the "Necessary Element of a Sufficient Set" (NESS) test, first suggested by H. HART & T. HONORE, CAUSATION IN THE LAW, 111-18 (2d ed. 1985), and discussed recently in Wright, *supra* note 254, at 1788-1803. Application of this test to seat belt defense cases will yield the same results as the other two tests.

256. *See supra* text accompanying note 212.

decisions that do not give juries direction on the division of damages as establishing a comparative-fault-reduction-of-total-damages seat belt defense.[257]

A comparative-fault-reduction-of-total-damages rule would be inconsistent with the almost universally recognized tort requirement that negligence cause injury before that negligence leads to consequences. "Proof of negligence in the air, so to speak, will not do."[258]

If courts do not limit reduction of damages to those damages caused by the plaintiff's failure to use a seat belt, the difference in recovery can be substantial. To illustrate, assume that the plaintiff suffers $100,000 in damages, but would have suffered $90,000 in damages had the plaintiff worn a seat belt. A jury compares the plaintiff's fault in failing to wear a seat belt with the defendant's fault and assigns thirty percent of the fault to the plaintiff. The plaintiff's recovery would be $70,000 if the comparative fault reduction applied to all of the plaintiff's damages, $90,000 under a no-exacerbation-damage-recovery rule, and $97,000 under the rule advanced by this Article [$100,000 - ($10,000 x 30%)]. It is unfair to reduce the $90,000 loss that the plaintiff would have suffered even if the plaintiff had worn a seat belt because of failure to wear a seat belt.

Legal commentators have argued that the cause-in-fact requirement of tort liability serves various purposes.[259] Some

257. In *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626, 639-41 (1967), the Wisconsin Supreme Court adopted the seat belt defense. The Court did not state how the seat belt defense was to operate. *Id.* at 362, 149 N.W.2d at 641. Dean Wade suggested that in *Bentzler*: "the Wisconsin court mitigated damages for comparative fault but mitigated for the total damages, not just those caused by the failure to use the seat belt." Wade, *supra* note 250, at 386 n.44. In *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983), Wisconsin held that the jury is to reduce the plaintiff's recovery "by the percentage of the plaintiff's causal seat-belt negligence." 113 Wis. 2d at 486-87, 335 N.W.2d at 829. As argued at text accompanying notes 197-200, *supra*, the phrase *causal seat belt negligence* is so ambiguous that under it the jury could reduce plaintiff's damages based solely on causation, solely on comparison of fault, or on some combination of the two.

258. Martin v. Herzog, 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920) (citing F. POLLOCK, LAW OF TORTS 472 (10th ed. 1916)).

259. Professor Calabresi suggests that the cause-in-fact requirement aids the tort system's goal of economic efficiency, that is, it helps to minimize the sum of injury costs and safety costs. *See* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84-85 (1975). Calabresi believes that courts should place liability on the cheapest cost avoider—that person who has the best knowledge of the risks and the ways to avoid them, and can most cheaply take the safety steps that could avoid the loss. *See id.* at 84. When the cheapest cost avoiders know that they

suggest that it protects the rights of the individual and encourages freedom of action.[260] The negligence system imposes liability on defendants or reduces the recovery of plaintiffs only when their negligence has caused harm. As far as tort liability is concerned, a person is free to act negligently so long as that negligence does no harm. If the legislature believes that a further limitation of freedom is justified, it can limit behavior through legislation, as many legislatures have done with statutes requiring seat belt use.[261] In the context of the seat belt defense, absent a statutory requirement of seat belt use, people should be free either to wear a seat belt or not to wear a seat belt. The failure to wear a seat belt should reduce the plaintiff's damages only if the plaintiff's failure to wear a seat belt caused those damages.

Finally, the cause-in-fact requirement also serves the tort system's goal of corrective justice by requiring a defendant who tortiously causes injury to compensate the victim for losses the defendant's negligence caused and thus correct the imbalance in the distribution of wealth created by the injury.[262] When the plaintiff's negligence also has caused a portion of the plaintiff's

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bear the risk of loss, it will be in their interest to calculate whether the costs of safety are less than the risks of injury, and to make efficient choices. See *id.* Calabresi argues that the cause-in-fact requirement serves the economic efficiency goal because it "is simply a useful way of toting up some of the costs the cheapest cost avoider should face in deciding whether avoidance is worthwhile." *Id.* at 85.

As noted previously in this Article, if a jurisdiction is to follow a cheapest cost avoider/economic efficiency theory on the seat belt defense issues, it will probably adopt a no-exacerbation-damage-recovery seat belt defense. The plaintiff can avoid the exacerbation damages at the cheapest cost by buckling his seat belt. *See supra* note 29 and accompanying text. The seat belt defense advocated herein, however, is based on a corrective justice/comparative fault justification, which does not support imposing the entire cost of the accident on plaintiffs. Therefore, Calabresi's economic justification for the cause-in-fact requirement does not help to justify the cause-in-fact limitation on the seat belt defense advocated in this Article.

260. *See, e.g.*, Weinrib, *Causation and Wrongdoing*, 63 CHI-KENT L. REV. 407, 411 (1987) (citing Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101, 107-12 (1984), *reprinted in* J.J. THOMPSON, RIGHTS, RESTITUTION, AND RISK 199-202 (1989)). Professor Paul Zwier finds the roots of the cause-in-fact requirement in the concern of the Puritans with the rights of the individual to be free from governmental control. Zwier, *"Cause in fact" in Tort Law—A Philosophical and Historical Examination*, 31 DE PAUL L. REV. 769, 784-96 (1982).

261. *See supra* note 31.

262. As one commentator has stated: "[A] person who disrupts [society's conception of the just distribution of wealth] does an injustice that must be corrected . . . by paying compensation. To be specific, a person who causes a tortious accident must compensate the victim in order to restore a just distri-

injury, the plaintiff should help to bear the responsibility for that portion of the loss which the plaintiff's negligence caused.

In seat belt defense cases, courts should limit the damages that are subject to reduction to those damages caused by plaintiff's failure to wear a seat belt. Courts should not reduce the damages that the plaintiff would have suffered even if the plaintiff had worn a seat belt, based on the plaintiff's unrelated negligence.[263] A court might as well reduce the plaintiff's damages because the plaintiff was negligent on the day before the injury or because the plaintiff is a disagreeable person.

b. *Difficult Causation Cases*

In some seat belt defense cases, it will be difficult for the defendant to establish which losses the plaintiff would have avoided by wearing a seat belt. Nevertheless, some courts appear strictly to require the defendant to demonstrate those damages.[264] A similar problem of proof arises in cases in which the negligence of two parties caused different injuries to the plaintiff, and it is difficult for the plaintiff to prove who caused which portion of the harm.[265] Courts often leave division of such damages to the jury's estimate.[266] A similar flexibility is

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bution of wealth." Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 CHI-KENT L. REV. 523, 546 (1987).

263. The New Jersey Supreme Court, in *Waterson v. General Motors Corp.*, 111 N.J. 238, 271, 544 A.2d 357, 374 (1988), said:

> [W]e do not believe that the court should reduce the full amount of damages caused by injury in an automobile accident by an arbitrary percentage determined by the jury to reflect a plaintiff's failure to wear a seat belt. Indisputably, in a case such as this one, plaintiff's failure to wear her seat belt had absolutely nothing to do with the accident.

264. *See, e.g.*, Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986); Franklin v. Gibson, 138 Cal. App. 3d 340, 343, 188 Cal. Rptr. 23, 24-25 (1982).

265. *See, e.g.*, PROSSER & KEETON, *supra* note 48, at 348-52 and cases cited therein.

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> Evidence may be entirely lacking upon which to apportion some elements of the damages, such as medical expenses, or permanent disability, or the plaintiff's pain and suffering. . . .
>
> There have appeared in the decisions a number of similar situations, in some of which the extent of the harm inflicted by the separate torts has been almost incapable of any definite and satisfactory proof, and has been left merely to the jury's estimate.

Franklin, 138 Cal. App. at 348, 188 Cal. Rptr. at 27.

Under comparative fault, courts may tend to send to the jury seat belt defense cases in which proof of the amount of avoidable damages is unclear under what Twerski has called "comparative-cause-in-fact." Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413-14 (1978). Traditionally, of course,

justified in the seat belt defense cases. In a case in which exact proof of damages the plaintiff could have avoided by wearing a seat belt is not available, the injustice of a somewhat incorrect estimate by the jury is less serious than the greater injustice of not allowing the seat belt defense.

2. Step Two: Compare the Plaintiff's Failure to Wear a Seat Belt with the Defendant's Fault

The second step of the seat belt defense proposed by this Article is allocation of responsibility for the exacerbation damages, those damages that the plaintiff could have avoided by wearing a seat belt. The negligence of both of the parties caused the exacerbation damages, and the trier-of-fact should divide responsibility based on comparative fault principles. The trier-of-fact should assign a percentage of responsibility to each of the parties at fault in causing the exacerbation damages. The court should reduce the plaintiff's recovery of exacerbation damages by the percentage of fault assigned to the plaintiff.[267] The goal of the seat belt defense proposed by this

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causation-in-fact is an all-or-nothing proposition. The judge sends an issue of cause-in-fact to the jury if reasonable people could conclude that it is more likely than not that the defendant's negligence caused the plaintiff's damages. If not, the judge directs a verdict for the defendant. If the jury considers that it is more likely than not that the defendant's negligence caused such damages, cause-in-fact is established. If not, the plaintiff is allowed no recovery. Twerski argues that the development of comparative fault may lead courts to be less rigid in requiring evidence of cause-in-fact before sending a case to the jury. In a comparative negligence case in which either the plaintiff's or the defendant's proof of cause-in-fact is questionable, the court might send the matter to a jury, knowing that the jury can compromise the recovery. In seat belt defense cases in which the defendant's proof of which damages the plaintiff could have avoided by wearing a seat belt is questionable, courts may allow the matter to go to the jury rather than reject the defendant's seat belt defense, and the jury might err on the side of low exacerbation damages rather than deny the defendant any diminution of damages.

267. A substantial number of jurisdictions apply "pure" comparative fault. Under pure comparative fault, even if the trier-of-fact attributes a majority of the fault to the plaintiff, the plaintiff still can recover. The trier-of-fact simply reduces the plaintiff's recovery by the percentage of fault attributed to the plaintiff. *See, e.g.*, SCHWARTZ, COMPARATIVE NEGLIGENCE 47-48 (2d ed. 1986).

The majority of jurisdictions have adopted one of the "modified" comparative fault systems. Under one form of modified comparative fault, the plaintiff may not recover unless the plaintiff's negligence is "not as great as" that of the defendant. Under the other form of modified comparative fault, the plaintiff's fault must be "not greater than" that of the defendant. *See, e.g., id.* at 69-72. Numerous arguments have been made against the modified comparative negligence approaches. The problem with modified comparative negligence approaches is that, like contributory negligence, in some cases they impose on one party the entire loss that was caused by the negligence of two parties. *See,*

Article, as of comparative fault generally, is that responsibility

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e.g., *id.* at 363. They do not allow the plaintiff who is credited with 51% of the fault to recover anything from the defendant who is credited with 49% of the fault. For an extensive comparison of modified and pure comparative fault, see *id.* at 360-63.

In a modified comparative negligence jurisdiction, what should be the effect of the plaintiff's failure to wear a seat belt? Some jurisdictions consider the failure to wear a seat belt as part of the plaintiff's negligence for purposes of determining whether or not the plaintiff's negligence is equal to or less than that of the defendant. *See* Cannon v. Lardner, 185 Ga. App. 194, —, 363 S.E.2d 574, 576 (1987); Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561, 1564 (D. Vt. 1985). Others do not consider the plaintiff's failure to wear a seat belt in determining whether the plaintiff's negligence is equal to or less than that of the defendant. *See* Foley v. City of West Allis, 113 Wis. 2d 475, 489-90, 335 N.W.2d 824, 833 (1983); Waterson v. General Motors Corp., 111 N.J. 238, 241, 544 A.2d 357, 358 (1988).

In *Foley*, under the Wisconsin modified comparative negligence statute, the trial court considered the plaintiffs' failure to wear seat belts in detemining whether the plaintiffs' negligence was greater than defendants' negligence. The negligence of one plaintiff, Daniel Foley, in causing the accident was less than the negligence of any defendant, but his negligence in causing the accident when combined with his negligence in failing to wear a seat belt was greater than the negligence of any defendant. *Foley*, 113 Wis. 2d at 480-81, 335 N.W.2d at 826-27. The negligence of the plaintiff, Zita Foley, in failing to wear her seat belt was greater than the negligence of any defendant. Under the Wisconsin statute, the trial court denied a recovery to either plaintiff. *Id.* at 478-82, 335 N.W.2d at 826-27. On appeal, the Wisconsin Supreme Court distinguished seat belt negligence from the plaintiffs' negligence in causing the accident and noted that the Wisconsin comparative fault statute does not require courts to compare seat belt negligence with the negligence of the defendant in causing the accident. *Id.* at 478-82, 335 N.W.2d at 826, 830. The court stated:

> [I]t is not logical or necessary to view the negligence causing the collision together with plaintiff's seat-belt negligence in a one-dimensional way when there are actually two distinct incidents contributing to the injuries. In addition, the circuit court's interpretation of the statute and the seat-belt defense would cause inequitable results, because the defendant could have a windfall. For example, in this case, Zita and Daniel Foley receive no compensation for damages that the jury determined they could not have totally prevented, and the defendants escape liability for injuries the jury determined their negligence caused. We do not think such a result is reasonable if the goal is a system of tort law that is both fair and administrable. We should seek to treat the plaintiff and defendant in such a way that the plaintiff recovers damages from the defendant for the injuries that the defendant caused, but that the defendant is not held liable for incremental injuries the plaintiff could and should have prevented by wearing an available seat belt.

Id. at 488-89, 335 N.W.2d at 830-31.

The court thus adopted a rule under which the trier-of-fact compares only the plaintiff's negligence in causing the collision with the negligence of the defendant to determine whether the plaintiff may recover under the modified comparative negligence statute. The trier-of-fact reduces the plaintiff's recovery based on failure to wear a seat belt, but the failure to wear a seat belt does not affect the plaintiff's ability to recover. *Id.* at 489, 335 N.W.2d at 831. In

for the damages caused by both of the parties be allocated based on their relative fault.

One commentator, Professor Aaron Twerski, has argued that it would be difficult for juries to compare the fault of the plaintiff in failing to wear a seat belt with the fault of the defendant in causing the collision.[268] In comparative fault cases, however, the trier-of-fact often compares the negligence of one party with a different kind of conduct on the part of the other party. In some jurisdictions, the trier-of-fact compares the negligence of the plaintiff with the recklessness of the defendant,[269] and in some jurisdictions, the trier-of-fact compares the plaintiff's assumption of risk with the defendant's negligence.[270] In addition, in a growing number of states, the trier-of-fact in strict products liability cases compares the plaintiff's negligence with the defendant's production of a defective product.[271] Comparisons of such varying types of fault and nonfault do not appear to have created substantial problems.

Twerski objects to comparing the plaintiff's negligent failure to wear a seat belt with the defendant's negligence on two bases. Twerski's first basis for objection is that the negligence "took place at different times."[272] The fact that the negligence of the plaintiff and the defendant took place at different times should not, however, create substantial problems for a jury in comparing fault. In comparative fault cases, the negligence of the plaintiff and the negligence of the defendant often take place at different times.[273] Moreover, product defect cases, in which Twerski advocates the application of comparative fault

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Foley, Daniel Foley's negligence in causing the collision was less than the negligence of any of the defendants. Zita Foley did not negligently cause the collision, and therefore the court allowed both plaintiffs to recover. *Id.* at 490-91, 335 N.W.2d at 831.

268. *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297, 329 (1977).

269. *See, e.g.*, Sorensen v. Allred, 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441, 445-46 (1980); *see also* Annotation, *Application of Comparative Negligence in Action Based on Gross Negligence, Recklessness, or the Like*, 10 A.L.R.4th 946, 948-52 (1981).

270. *See, e.g.*, Gonzalez v. Garcia, 75 Cal. App. 3d 874, 879, 142 Cal. Rptr. 503, 505 (1977); *see also* Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R.4th 700, 711-15 (1982).

271. *See, e.g.*, Daly v. General Motors Corp. 20 Cal. 3d 725, 734-35, 575 P.2d 1162, 1165-73, 144 Cal. Rptr. 380, 384-93 (1978).

272. Twerski, *supra* note 268, at 329. Twerski, however, supports comparing the negligence of the plaintiffs with the defendant's creation of defective products. *Id.* at 347-48.

273. *See, e.g*, Daly v. General Motors Corp., 20 Cal. 3d 725, 731, 575 P.2d 1162, 1165, 144 Cal. Rptr. 380, 383 (1978); *see also* Annotation, *Applicability of*

principles, typically involve plaintiff negligence that occurs long after the defendant manufactures a defective product.[274]

The second basis on which Twerski objects to the application of comparative fault to the exacerbation damages under the seat belt defense is that the negligence of the plaintiff and the defendant "played different roles."[275] The negligence of the plaintiff and the defendant do play different roles in the seat belt defense cases. The defendant's negligence causes all of the plaintiff's injuries. The plaintiff's negligence causes only the exacerbation damages. As to the exacerbation damages, however, the plaintiff's negligence and the defendant's negligence share the key characteristic. The negligence of both the plaintiff and the defendant caused the plaintiff's exacerbation damages, and courts should divide responsibility for those damages based on relative fault.

3. Plaintiffs Who Negligently Cause Accidents and Fail to Use Seat Belts

The plaintiff may be at fault in causing the accident, as well as being at fault in failing to wear a seat belt. This situation adds a complication to the seat belt defense which courts should handle in the following manner.

Step One, Causation: Under the proposal advanced in this Article, the trier-of-fact first will answer the same causation question suggested previously. The trier-of-fact will determine which damages the plaintiff's failure to wear a seat belt caused.

There will, however, be two comparative fault evaluations. One determines responsibility for the plaintiff's primary damages, those damages that the plaintiff would have suffered even if the plaintiff had worn a seat belt. The second determines responsibility for plaintiff's exacerbation damages, those damages suffered because of the plaintiff's failure to wear a seat belt.

Step Two, Comparative Fault - Primary Damages: Regarding plaintiff's primary damages, the trier-of-fact should allot a percentage of fault to each of the defendants and to the plaintiff, for each person's fault in causing the collision, the total to equal 100%. The court should reduce the plaintiff's recovery of primary damages by the percentage of fault allotted to the plaintiff.

Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort, 9 A.L.R.4th 633 (1981).

274. Twerski, *supra* note 268, at 329.

275. *See supra* text accompanying note 272.

Step Three, Comparative Fault - Exacerbation Damages: The court should reduce the plaintiff's exacerbation damage recovery both for negligence in failing to wear a seat belt and for fault in causing the accident. Both of these negligent acts caused the plaintiff's exacerbation damages. The trier-of-fact should assign a percentage of fault to the plaintiff's failure to wear a seat belt when that failure is compared with the combined negligence of all of the defendants and with the negligence of the plaintiff in causing the collision. The judge will use this percentage of fault for failing to wear a seat belt to reduce exacerbation damage recovery.

The judge first should calculate the percentage of fault for causing the accident to use in reducing the plaintiff's exacerbation damage recovery. To do this, the judge should deduct the percentage of fault assigned to the plaintiff's failure to wear a seat belt from 100%. The judge should divide responsibility for the remaining percentage of fault based on the jury's earlier assignment of responsibility for causing the accident (from step two). The judge should do this by using the following formula:

Percentage of negligence to be assigned to plaintiff's negligence in causing the collision when calculating exacerbation damage recovery	=	100% minus the percentage of fault assigned to plaintiff's failure to wear a seat belt	x	Percentage of negligence assigned to plaintiff's negligence in causing the accident when compared with all negligence causing the accident (from step two)

The judge should reduce the plaintiff's recovery of exacerbation damages by the sum of this percentage and the percentage allocated by the jury to the plaintiff's fault in failing to wear a seat belt. The court will give the plaintiff judgment for the plaintiff's total damages, minus the reduction from primary damages calculated in step two and the reduction from exacerbation damages calculated in step three.[276]

For example, assume that in a seat belt defense case, the

276. The New Jersey Supreme Court adopted a method of damage apportionment that is similar to the one advocated in this Article in *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988). Under *Waterson*, as under this Article's proposal, the jury determines plaintiff's exacerbation damages, called seat-belt damages by the New Jersey court, *id.* at 272, 544 A.2d at 374, and determines the comparative fault of each party for causing the accident. *Id.* at 272-73, 544 A.2d at 375. The New Jersey method of determining the parties' responsibility for exacerbation damages, however, is somewhat different from the method proposed in this Article. Under the New Jersey method,

jury concludes that the plaintiff has suffered $30,000 total

> After the jury has . . . found (1) that the failure to use a seat belt constituted negligence and (2) that plaintiff sustained avoidable, second-collision [exacerbation] injuries, the jury must then determine the percentage of plaintiff's comparative fault for damages arising from those injuries. The *total* negligence for these second-collision or seat-belt damages consists of (a) defendant's negligence in causing the accident (since without that negligence there would have been no accident and no injuries of any kind), (b) plaintiff's comparative negligence, if any, in causing the accident (since, again, without plaintiff's comparative negligence there would have been no accident and no injuries), and (c) plaintiff's negligence in failing to use a seat-belt (since without that negligence there would not have been any second collision injuries). The total fault for these seat belt damages, as for all damages, is one-hundred percent. Thus, the jury must determine the percentage of plaintiff's fault for these damages that are attributable to plaintiff's failure to wear a seat belt. If the jury previously found a percentage division of fault between plaintiff and defendant in causing the accident, the jury must be told that the court, when finally molding the jury findings into the verdict, will continue that proportion of fault when adding in the percentage attributable to plaintiff's failure to wear a seat belt.
>
> For example, if a jury found plaintiff twenty percent liable for an accident and defendant eighty percent liable for the accident, and, further, that plaintiff was twenty percent liable for plaintiff's seat-belt damages due to his failure to use a seat belt, the court would mold these three findings of fault in determining plaintiff's recovery for those damages. The three percentages of fault add up to 120%. The court would add the two findings of plaintiff's negligence (twenty percent for causing the accident, twenty percent for failure to use a seat belt), which total forty percent. The sum of forty percent would become the numerator of a fraction in which the denominator would be 120, or the total of all three findings of negligence (defendant's eighty percent fault for causing the accident, plaintiff's twenty percent fault for causing the accident, and plaintiff's twenty percent fault for not wearing a seat belt). This fraction results in a finding of 33 1/3%, which reflects the amount by which the court would reduce plaintiff's recovery for seat-belt damages due to the negligent failure to use a seat belt.

Id. at 272-74, 544 A.2d at 375.

Under both the New Jersey rule and this Article's proposal, the jury assigns a percentage of fault to the failure of the plaintiff to wear a seat belt when compared with the negligence of the defendant and the plaintiff in causing the collision. The methods differ in that under this Article's method, the jury is instructed that the total is to equal 100%. Under the New Jersey method, the percentage assigned to the failure to wear a seat belt is added to the 100% responsibility for causing the accident. Under both methods, the court then determines the appropriate reduction of damages based on the jury's determination of the defendant's and plaintiff's relative fault in causing the accident and the plaintiff's relative fault in causing the exacerbation damages.

Assuming that a jury, when comparing the plaintiff's failure to wear a seat belt with the plaintiff's and the defendant's negligence in causing the collision will assign proportionately the same percentage of fault to the plaintiff's failure to wear a seat belt, the resulting judgment will be the same under either method. This is illustrated *infra* at note 278 and accompanying text.

damages and that if the plaintiff had worn a seat belt, the plaintiff would have suffered only a $10,000 loss. When comparing the plaintiff's and the defendant's fault in causing the collision, the jury assesses each at fifty percent. When the jury compares the plaintiff's fault in failing to wear a seat belt with the negligence of both the plaintiff and defendant in causing the collision, the jury finds the plaintiff's fault in failing to wear a seat belt is twenty percent.[277] The following table illustrates the method for calculating the plaintiff's recovery.

Step One: Causation	
Plaintiff's total damages (det. by jury)	$30,000
Primary damages (damages if plaintiff had worn seat belt) (det. by jury)	−10,000
Exacerbation Damages	$20,000
Step Two: Comparative Fault, Primary Damages	
Fault of plaintiff for causing accident (det. by jury)	50%
Fault of defendant for causing accident (det. by jury)	50%
Primary damages	$10,000
Plaintiff's fault for causing accident	×50%
Reduction of recovery of primary damages	$5,000
Primary damages	$10,000
Reduction of primary damages for plaintiff's fault	−5,000
Primary damage recovery of plaintiff	$5,000
Step Three: Comparative Fault, Exacerbation Damages	
Fault of plaintiff in failing to wear seat belt, compared with all negligence causing accident (jury det.)	20%
Fault of plaintiff and defendants in causing the collision when compared with plaintiff's failure to wear seat belt (100% − 20%)	80%
Fault of plaintiff in causing accident, when compared with plaintiff's failure to use seat belt and defendant's fault in causing the accident (80% x 50%)	40%
Plaintiff's fault in causing exacerbation damages (20% + 40%)	60%[278]

Note 278 applies the New Jersey method to a set of facts, and the accompanying text applies this Article's method to the same facts.

Although the New Jersey method will yield the same result as the method proposed in this Article, the New Jersey method may be somewhat confusing to a jury because the jury is to determine the total responsibility for the exacerbation damages to be greater than 100%.

277. The facts used in this example are taken from a hypothetical posed in *A Compromise*, *supra* note 1, at 347.

278. Under the New Jersey method of damage reduction, see *supra* note 276, the jury assigns a percentage of fault to the plaintiff's failure to wear a seat belt when compared with the fault of the defendant and the plaintiff in causing the accident. The total is not limited to 100%. *Waterson*, 111 N.J. at

Exacerbation damages (from step one)	$20,000
Plaintiff's fault in causing exacerbation damages	x60%
Reduction of exacerbation damages for plaintiff's fault	$12,000
Exacerbation damages (from step one)	$20,000
Reduction of exacerbation damages for plaintiff's fault	−12,000
Exacerbation damage recovery of plaintiff	$8,000
Total Judgment of Plaintiff	
Primary damage recovery of plaintiff	$5,000
Exacerbation damage recovery of plaintiff	+8,000
Judgment for plaintiff	$13,000[279]

In jurisdictions where the court assigns damage responsibility

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272-74, 544 A.2d at 375. Under this Article's method of damage reduction, the jury assigns a percentage of fault to the plaintiff's failure to wear a seat belt when compared with the negligence of both the plaintiff and the defendant in causing the collision, but the total responsibility for the exacerbation damages is to equal 100%. In the example discussed in the text, under this Article's method, the jury assigns 20 percent of the fault to the plaintiff's failure to wear a seat belt. Under the New Jersey method, if the jury assigns proportionately the same percentage of fault to the plaintiff's failure to wear a seat belt, it will assign 25 percent of the responsibility for exacerbation damages to the failure to wear a seat belt, because 25 percent bears the same relation to 125 percent as 20 percent bears to 100 percent. Each is one-fifth of the total percentage of fault. Under the New Jersey method, "[t]he court would add the two findings of plaintiff's negligence." *Id.* at 273, 544 A.2d at 375. Fifty percent (for causing the accident) plus 25 percent (for failing to wear a seat belt) equals 75 percent. "The sum [75 percent] would become the numerator of a fraction in which the denominator would be . . . the total of all three findings of negligence (defendant's [50 percent] fault for causing the accident, plaintiff's [50 percent] fault for causing the accident, and plaintiff's [25 percent] fault for not wearing a seat belt)." *Id.* Fifty percent plus 50 percent plus 25 percent equals 125 percent.

$$\frac{75\%}{100\%} = 60\%$$

Therefore, plaintiff's responsibility for exacerbation damages would be the same, 60 percent, under either the New Jersey method or this Article's method.

279. *A Compromise*, *supra* note 1, at 347, suggests determining the plaintiff's damages in a somewhat different manner from that suggested in this Article. In the course of the discussion, the author refers to the plaintiff's failure to wear a seat belt as "passive negligence," and to the negligence of the parties in causing the collision as "active negligence." Those damages the plaintiff would have suffered even if wearing a seat belt—called "primary damages" in this Article—are referred to as "first collision" damages. Those damages the plaintiff suffered as a result of failure to wear a seat belt—"exacerbation damages" in this Article—are called "second collision" damages. The author proposes:

> [T]he jury should first determine the percentage of comparative fault attributable to the active negligence [i.e., fault in causing the collision] of both parties. Once this has been accomplished, the jury should then single out the plaintiff's passive fault in failing to buckle up and

> attribute to it a separate fault percentage. This would allow a court to accomplish the fault comparison on each separate collision.
>
> . . . [T]he court should compare the percentages attributed to the active fault of both parties and distribute those first collision [primary] damages accordingly.
>
> With regard to the second collision, the total percentage of plaintiff's comparative fault should equal the sum of his predetermined active fault percentage and the predetermined percentage of his passive fault that was solely attributable to nonuse of a seat belt. The plaintiff's total percentage of fault should then be compared with the fault of the defendant in distributing the costs of the second collision [exacerbation] injuries. Let us assume, for example, that the defendant has introduced the requisite expert evidence, which apportions the damages into $10,000 for the first collision [primary damages] and $20,000 for the second collision [exacerbation damages]. Let us further assume that the jury has found plaintiff to be fifty percent at fault for his active negligence in causing the accident, and twenty percent at fault for his passive negligence in failing to buckle up. As the court accomplishes a fault comparison on each collision individually, the result would yield fifty percent fault (plaintiff) / fifty percent fault (defendant) for the first collision, and seventy percent fault (plaintiff) / thirty percent fault (defendant) for the second collision. Accordingly, the plaintiff would recover $5,000 of his first collision [primary] injuries and $6,000 of his second collision [exacerbation] injuries, for a total recovery of $11,000.

Id. at 346-47 (footnotes omitted).

The proposal errs in its calculation of responsibility for exacerbation (or second collision) damages. If in determining the plaintiff's responsibility for exacerbation (or second collision) damages, the court merely adds the plaintiff's percentage of responsibility for failure to wear a seat belt to the earlier calculation of responsibility for causing the collision, the plaintiff is given too high a percentage of responsibility for causing the collision. The plaintiff's percentage of responsibility for causing the collision is a relative number, and it will change if the court is calculating responsibility for damages that additional negligent acts caused. When the court is determining responsibility for exacerbation damages, it must consider both fault in failing to wear a seat belt and the fault of the parties in causing the collision. Because the court is considering a cause of the injuries—failure to wear a seat belt—in addition to the causes compared during the earlier calculation, the court should reduce the percentages initially allotted to the causes of the collision proportionately. In the example suggested in *A Compromise*, which is evaluated in the text herein *supra* following note 277, in the calculation of responsibility for exacerbation (second collision) damages, allocation to the plaintiff of 20% of the fault for failure to wear a seat belt (passive negligence) should not reduce the defendant's fault for causing the accident (active negligence) to 30% and leave the plaintiff's fault for causing the accident (active negligence) at 50%. If the plaintiff's and the defendant's fault in causing the accident were equal at the first calculation, they should be equal at the second calculation. The court should reduce the responsibility of each party for causing the accident proportionately, so that each retains the same degree of fault for causing the accident relative to the other. As suggested herein, *see* text *supra* following 277, when calculating responsibility for exacerbation (second collision) damages, the plaintiff's degree of responsibility for causing the collision should be 40% (80% x 50%), rather than 50%. The plaintiff's responsibility for exacerbation dam-

among the defendants for comparative contribution purposes,[280] the court can assign responsibility to the individual defendants by the same method.[281]

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ages should be 60% (40% + 20%), not 70%. The plaintiff's total recovery should be $13,000, not $11,000.

The difference in results between the two proposals will be more substantial in cases in which the trier-of-fact attributes a higher percentage of fault to the plaintiff's failure to wear a seat belt. If under the example used, the jury assessed the plaintiff's fault for failure to wear a seat belt at 50%, rather than 20%, the plaintiff would get no recovery of exacerbation damages under the proposal suggested in *A Compromise* ($20,000 x 0%) and $5,000 under the proposal advanced in this Article ($20,000 x 25%).

280. *See* American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 578-617, 578 P.2d 899, 901-16, 146 Cal. Rptr. 182, 182-208 (1978); *see also* U.C.F.A. § 2(b), *supra* note 202 (noting court should divide responsibility for damages between parties causing harm based on relative fault); Annotation, *Contribution or Indemnity Between Joint Tortfeasors on Basis of Relative Fault*, 53 A.L.R.3d 184, 184-226 (1973) (discussing fault apportionment and doctrine of comparative negligence).

281. The court should assign to the defendants responsibility for the plaintiff's primary damages based on the percentages stated by the jury in its comparative fault calculation of the responsibility of all of the parties in causing the accident. The court should allocate responsibility for exacerbation damages as follows: for each defendant, the court should multiply the sum of exacerbation damage responsibility allotted to the plaintiff and to the defendants for causing the collision (i.e., 100% minus plaintiff's percentage of negligence for failing to wear a seat belt) by the percentage of fault attributed to that defendant for causing the accident. For example, assume in the example given *supra* text following note 277, that there were two negligent defendants. Plaintiff's negligence in causing the accident remains 50%. Defendant 1's share of negligence for causing the accident is 20%, and defendant 2's share is 30%. The court should calculate responsibility of each defendant as follows:

Primary Damage Responsibility

Plaintiff's primary damages	$10,000
Defendant 1's percentage of fault for causing accident	x20%
Defendant 1's responsibility for primary damages	$2,000
Plaintiff's primary damages	$10,000
Defendants 2's percentage of fault for causing accident	x30%
Defendant 2's responsibility for primary damages	$3,000

Exacerbation Damage Responsibility

Percentage of fault for causing exacerbation damages allocated to all negligent causes of accident (i.e., all causes but plaintiff's failure to wear seat belt)	80%
Defendant 1's percentage of fault causing collision, compared with other causes of the collision	x20%
Defendant 1's percentage of fault for causing the exacerbation damages	16%
Total exacerbation damages	x$20,000

4. The Uniform Comparative Fault Act and the Seat Belt Defense

The Uniform Comparative Fault Act ("UCFA") was approved by the National Conference of Commissioners on Uniform State Laws in 1977.[282] Although the UCFA does not explicitly suggest a step-by-step method of seat belt defense damage reduction, it provides further support for the seat belt defense proposed in this Article. Although the legislatures of only two states, Iowa[283] and Washington,[284] have adopted the UCFA, it has had a substantial impact on judicial decisions in other jurisdictions.[285] The UCFA creates a system of comparative fault that resolves many of the complications created by the shift from contributory negligence to comparative fault, and attempts to provide uniformity throughout the country.[286]

Under the UCFA, when assigning responsibility for damages, courts compare the fault of the parties, including "unreasonable failure to avoid an injury or to mitigate damages."[287] The comment to Section 1 of the UCFA uses the plaintiff's failure to wear a seat belt as an example of fault that will reduce recovery.[288]

The first damage reduction step under the UCFA is to determine which damages the plaintiff's fault caused. The plaintiff's fault diminishes recovery proportionately "for an injury

Defendant 1's share of exacerbation damages	$3,200
Percentage of fault for causing exacerbation damages allocated to all negligent causes of the accident (100%−20%)	80%
Defendant 2's percentage of fault causing collision compared with other causes of the collision	x30%
Defendant 2's percentage of fault for causing exacerbation damages	24%
Total exacerbation damages	x$20,000
Defendant 2's share of exacerbation damages	$4,000

Cf. Vermont's contributory fault statute, VT. STAT. ANN. tit. 12 § 1036 (1973 & Supp. 1988) (When recovery is allowed against more than one defendant, each defendant is liable for that portion of total dollar amount awarded as damages in ratio of amount of his or her causal negligence to amount of causal negligence attributed to all defendants against whom recovery is allowed.)

282. U.C.F.A. historical note, *supra* note 202, at 39.

283. IOWA CODE ANN. §§ 668.1 to 668.14 (West 1987 & Supp. 1988).

284. WASH. REV. CODE ANN. §§ 4.22.005 to 4.22.925 (1988 & Supp. 1989).

285. *See, e.g.*, Evangelatos v. Superior Court, 44 Cal. 3d 1188, —, 753 P.2d 585, 602, 246 Cal. Rptr. 629, 646 (1988); Arctic Structures Inc. v. Wedmore, 605 P.2d 426, 432, n.17 (Alaska 1979); Hilen v. Hayes, 673 S.W.2d 713 (Ky. 1984); Wemyss v. Coleman, 729 S.W.2d 174, 177 (Ky. 1987).

286. U.C.F.A. prefatory note, *supra* note 202, at 39.

287. U.C.F.A. § 1(b), *supra* note 202, at 39-40.

288. U.C.F.A. comment to § 1, *supra* note 202, quoted *infra* note 290.

attributable to," that is, an injury caused by, the plaintiff's fault.[289] According to the comments, "negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car."[290]

The second seat belt defense damage reduction step under the UCFA is the same step advocated in this Article. The court reduces the plaintiff's recovery based on the plaintiff's relative fault. The UCFA states that the recovery is diminished "proportionately,"[291] based on the fault of the parties.[292]

This interpretation of the UCFA is consistent with the purpose of comparative fault in that the parties share responsibility for damages caused by their negligence based on their relative fault. John Wade, the chairman of the committee that drafted the UCFA, shares this interpretation.[293]

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289. U.C.F.A. § 1 states: "[A]ny contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for *an injury attributable* to the claimant's contributory fault. . ." *Id.* § 1(a) (emphasis added).

290. U.C.F.A. comment to § 1, *supra* note 202 at 41. The comment to section 1 also states:

> *Causation.* For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.
>
> "Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage.

The comment does not explicitly state that the plaintiff is entitled to a full recovery of those personal injuries that were not caused by failure to wear a seat belt. The comment explicitly answers only the easy question: the plaintiff's failure to wear a seat belt does not diminish recovery for damage to the car. Personal injury damages not caused by plaintiff's failure to wear a seat belt, however, also fit into the category of damages for which the lack of a seat belt does not play a part and should not be subject to mitigation due to plaintiff's failure to wear a seat belt.

291. U.C.F.A. § 1(a).

292. U.C.F.A. § 2(b). *See also supra* text accompanying notes 205-09 (explaining fault apportionment under U.C.F.A.).

293. Dean Wade makes the argument:

> The [U.C.F.A.] provides that "fault" includes "unreasonable failure to avoid injury or to mitigate damages" (§ 1(b)). This should be read together with another sentence providing that plaintiff's contributory fault proportionately diminishes the amount awarded as damages "for an injury attributable to the claimant's contributory fault" (§ 1(a)). The Act therefore covers the concept of avoidable consequences and provides that for a particular injury that could have been avoided by the plaintiff or *for the diminution of damages that he could have effected by the exercise of reasonable care, the amount will be diminished proportionately according to the comparative fault of the parties.* Thus, suppose the plaintiff was driving a new car with due

Although a careful reading of the UCFA discloses that it supports the seat belt defense advocated in this Article, it is unfortunate that the UCFA does not state more clearly how courts are to divide responsibility under the seat belt defense. The danger of this failure is illustrated in a Kentucky case, *Wemyss v. Coleman*,[294] the only case to discuss the application of the UCFA to the seat belt defense. Kentucky applies the UCFA as its form of comparative fault based on judicial decision.[295] The Kentucky court favorably cites the traditional avoidable consequences rule, under which courts do not allow plaintiffs any recovery for damages they could have avoided by exercising reasonable care after the injury, and states that the same rule should apply to the plaintiff's negligent failure to wear a seat belt prior to injury.[296] The court fails to deal with portions of the UCFA which indicate that courts are to divide damage responsibility "proportionately"[297] based on "the nature of the conduct of each party."[298] The court adopts a no-exacerbation-damage-recovery seat belt defense.[299] This defense

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> care, when due to defect the left front wheel locked, causing him to swerve and hit a tree. Plaintiff had not buckled his seat belt and as a result his head hit the windshield and his face was damaged. His leg was broken, but this would have happened even if the seat belt had been buckled. He would not consent to medical treatment of the broken leg and the bone has not knit together. His recovery for both the facial injury and the untreated leg will be diminished, but for separate reasons (avoidable injury, and failure to mitigate damages). The damages to his car will not be mitigated.

Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 385-86 (1978) (emphasis added).

294. 729 S.W.2d 174 (Ky. 1987).

295. Wemyss v. Coleman, 729 S.W.2d 174, 177 (Ky. 1987) (quoting Hilen v. Hayes, 673 S.W.2d 713 (Ky. 1984)).

296. The court stated:

> [T]he doctrine of avoidable consequences . . . 'serves to mitigate the damages . . . to the extent the patient's injury was aggravated or increased by his own negligence.'
>
> The same principle should apply to the antecedent negligence of the plaintiff, if any, to the extent the injury was aggravated or increased by his own negligence."

729 S.W.2d at 178 (citation omitted).

297. U.C.F.A. § 1(a), *supra* note 202, quoted *supra* text accompanying note 291.

298. U.C.F.A. § 2(b), *supra* note 202.

299. At the end of its discussion of the seat belt defense, the Kentucky Supreme Court states:

> [A] proper instruction will not specifically refer to a seat belt defense but will state the general duty to exercise ordinary care for one's own safety, leaving it to the jury to decide from the evidence whether the failure to utilize an available seat belt was a breach of that duty in the circumstances of this case, and, if so, whether such breach was a sub-

violates a basic principle of the UCFA, that responsibility for damages caused by both of the parties should be divided based on their relative fault.

The version of the seat belt defense proposed in this Article is based on the same principle of comparative fault as the UCFA. Jurisdictions that have adopted the UCFA, either by legislative or judicial action, thus should adopt the seat belt defense proposed in this Article.

IV. CONCLUSION

Courts should adopt the seat belt defense. Plaintiffs should bear a portion of the loss caused by their unreasonable failure to wear a seat belt. Courts should apply the seat belt defense in cases in which, at the time of the accident, the plaintiff was protected by an air bag. Seat belts provide substantial added protection, and the finder-of-fact should determine whether a reasonable person in the position of the plaintiff would wear a seat belt. Courts should interpret mandatory seat belt use statutes, where possible, to support the adoption of the seat belt defense. Mandatory use statutes evidence a recognition by the legislature of the unreasonableness of the failure to wear a seat belt.

Under the seat belt defense, plaintiffs should recover all damages that they would have suffered if they had worn seat belts, and courts should divide responsibility for exacerbation damages based on the relative fault of the parties. Such a seat belt defense is consistent with the underlying comparative fault principle of modern tort law that loss should be borne by those who created it, based on their relative fault.

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stantial factor contributing to cause or enhance the claimant's injuries.

729 S.W.2d at 181. Presumably, the court would instruct the jury, based on the portion of the court's opinion discussed at *supra* text accompanying note 296, that it should mitigate the plaintiff's recovery "to the extent the patient's injury was aggravated or increased by his own negligence." 729 S.W.2d at 178. If the jury is not given such an instruction, then it would be free to apply any seat belt defense it desired, as discussed *supra* text accompanying notes 189-269.