Tulsa Law Review

Volume 38
Issue 2 *2001-2002 Supreme Court Review*

Winter 2002

The Seatbelt Defense: A Doctrine Based in Common Sense

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COMMENT

THE SEATBELT DEFENSE: A DOCTRINE BASED IN COMMON SENSE

I. INTRODUCTION

Americans drive well over 2,000,000,000,000 miles each year.[1] Whether it is commuting to and from work, going on a family vacation, transporting goods, or simply taking a leisurely drive, there can be no doubt that nearly every American is married to the motor vehicle in one way or another. The relationship, however, is not entirely positive. All these miles traveled result in a staggering number of traffic-related accidents.[2] An automobile-related fatality occurs every thirteen minutes in the United States,[3] and over six people are injured in vehicular accidents each minute.[4] Sadly, many of these deaths and injuries could have been avoided if more people would simply wear a seatbelt.

According to the National Highway Traffic Safety Administration ("NHTSA"),[5] there is no doubt that seatbelts can save lives. All in all, the

1. In 1999, the most recent year for which complete data is available, Americans drove in excess of 2,600,000,000,000 miles. National Highway Traffic Safety Administration, *Traffic Safety Facts 1999* <http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/AvailInf.html#Anchor-Dat-31510> (accessed Sept. 2, 2002).

2. In 1999, there were approximately 6,279,000 automobile accidents in the United States. These accidents resulted in approximately 3,236,000 injuries, and 41,611 deaths. National Highway Traffic Safety Administration, *Traffic Safety Facts 1999—Overview* <http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/AvailInf.html#Anchor-Dat-31510> (accessed Sept. 2, 2002). Consider the following excerpt from the report's introduction for some idea of the magnitude of the cost of automobile travel:

> Motor vehicle travel is the primary means of transportation in the United States, providing an unprecedented degree of mobility. Yet for all its advantages, deaths and injuries resulting from motor vehicle crashes are the leading cause of death for persons of every age from 6 to 33 years old (based on 1997 data). Traffic fatalities account for more than 90 percent of transportation-related fatalities.

Id.

3. *Id.*

4. *Id.*

5. The United States government has long recognized the dangers of traveling via automobile, even establishing the NHTSA for the sole purpose of ensuring the safety of automobile drivers and passengers. The NHTSA is a division of the Department of Transportation. The NHTSA website can be accessed via the Internet at the following address: <http://www.nhtsa.dot.gov>.

NHTSA estimates that seatbelts saved more than 120,000 lives from 1975 to 1999.[6] In 1999 alone, if all vehicle occupants over the age of four had worn seatbelts, an additional 9,553 lives would likely have been saved.[7] Despite all the evidence supporting the effectiveness of seatbelts, about one third of Americans simply fail to accept the rudimentary concept that wearing a seatbelt makes good sense.[8]

Clearly, the most troubling aspect of this reality is that "nonusers" are putting themselves at a much greater risk of sustaining serious injuries or even death. As the law currently stands in the majority of American jurisdictions, however, those who fail to use seatbelts also put the innocent public at risk of paying for their omission. Most states refuse to let a defendant present evidence of seatbelt nonuse in order to reduce a plaintiff's recovery—often referred to as the "seatbelt defense."[9] Even those states that do allow the seatbelt defense[10] typically only allow it in certain situations,[11] and often limit the reduction to an arbitrary percentage amount.[12] The courts' reluctance to allow the defense was understandable decades ago, when the virtues of seatbelts were not fully understood.[13] Today, on the other hand, such reluctance is foolish, stubborn, and contrary to common sense.[14] In light of public policy favoring the use of seatbelts, the seatbelt defense should be allowed to reduce a plaintiff's recovery when the defendant proves that the plaintiff was not using a seatbelt, and that the nonuse caused or increased the plaintiff's injuries.

This comment will analyze the seatbelt defense as it now stands across America's jurisdictions. Section II begins with a brief look at the judicial decisions first giving rise to the defense. The section continues with a description of the impact state legislatures have had vis-à-vis the seatbelt defense and culminates with a summary of the present state of the law. Section III is a separate discussion of the seatbelt defense under Oklahoma law. Section IV argues in favor of the defense and calls for its statutory adoption by each of the states' legislatures. Section V concludes the analysis.

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6. National Highway Traffic Safety Administration, *supra* n. 2.
7. National Highway Traffic Safety Administration, *supra* n. 2.
8. The nationwide seatbelt use rate for 1999 was sixty-seven percent. *Id.*
9. *See infra* n. 121.
10. *See infra* n. 156.
11. *See infra* Sec. II.C.2.
12. *See infra* Sec. II.B.
13. *E.g. Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48, 62 (Okla. 1976) (expressing reluctance to embrace the validity of the "seatbelt phenomenon").
14. *See* Dan B. Dobbs, *The Law of Torts* § 205, 516-17 (West 2000).

II. HISTORY OF THE SEATBELT DEFENSE[15]

A. *Origins*

In the grand scheme of things, the seatbelt defense is in its infancy. Compared to other Anglo-American legal doctrines, many of which trace back for centuries, the seatbelt defense has only been around for the last three and a half decades.[16] When looked at from this perspective, it is unsurprising that the defense has failed to gain full acceptance throughout the many American jurisdictions. Our legal system, while certainly dynamic, is not susceptible to rapid, across-the-board change. But change does occur. The remainder of this section will trace the seatbelt defense from its birth, to its present state of adolescence. This course will illustrate the considerable alterations that have already occurred in the law of the seatbelt defense, all the while hinting at the many desirable changes that remain unaccomplished.

1. *Sams*

The Supreme Court of South Carolina paved the way for the seatbelt defense by becoming the first appellate court[17] to acknowledge its validity.[18] In *Sams v. Sams*, the plaintiff sought recovery for personal injuries arising out of an automobile accident.[19] The plaintiff was a passenger in a car driven by the defendant, which she alleged drove off the road due to the defendant's negligence.[20] The defendant, in his answer, attempted to raise a defense of contributory negligence based on the plaintiff's failure to use an available seatbelt.[21] Upon the plaintiff's motion, the trial court struck that portion of defendant's answer that addressed seatbelt nonuse because it did not believe that such facts, even if taken as true, constituted a valid defense.[22]

In reviewing the trial court's decision, the Supreme Court of South Carolina reversed and held that "the ultimate questions raised by the alleged defense

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15. The importance of understanding the history giving rise to our present-day legal doctrines cannot be overstated. In the words of Oliver Wendell Holmes, Jr.:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

16. *See infra* Sec. II.B.1.

17. *See* David A. Westenberg, *Buckle up or Pay: The Emerging Safety Belt Defense*, 20 Suffolk U. L. Rev. 867, 874 (1986).

18. *Sams v. Sams*, 148 S.E.2d 154 (S.C. 1966).

19. *Id.* at 154.

20. The plaintiff's complaint alleged that: "[S]he was traveling in her automobile, driven by defendant, who drove the same off the road, and that her injuries were proximately caused by the gross negligence, heedlessness, and reckless disregard of the defendant in failing to keep a proper lookout, driving at an excessive rate of speed, and failing to keep the automobile under control." *Id.*

21. *Id.* at 155.

22. *Id.*

should [have been] decided in the light of all the facts and circumstances adduced upon the trial . . . ."[23] Although clearly not a blanket adoption, the *Sams* opinion at least recognized the defense's potential validity.[24]

2. *Bentzler*

Just a year later, the Wisconsin Supreme Court also recognized the potential propriety of the seatbelt defense in *Bentzler v. Braun*.[25] Bentzler was asleep at the time of the collision and was not wearing her seatbelt.[26] As a result of the impact, she was thrown about the interior of the car, sustaining severe maxillofacial injuries and multiple fractures to both legs.[27] At the trial level, Braun requested (in pertinent part) the following jury instruction:

> If you find that the seatbelt was in working order and that Janet Bentzler was not wearing the seatbelt at the time of the accident, then you must find her negligent.
>
> If you find the plaintiff, Janet Bentzler, negligent with regard to use of a safety belt you are then to determine if use of a safety belt would have eliminated or reduced the injuries sustained. If you find that the injuries sustained would have been eliminated or reduced by use of a safety belt, then a failure to use a safety belt is a cause of the injuries and damages sustained.[28]

The trial judge refused to give the requested instruction, and Braun argued on appeal that such a refusal amounted to reversible error.[29] The Wisconsin Supreme Court found Braun's argument persuasive in theory, but ultimately untenable because there was no evidence tending to prove Bentzler's injuries were caused or increased by her failure to wear a seatbelt.[30]

Although affirming the trial court's decision, the court, through dicta, went on to find the existence of a common law duty to wear an available seatbelt.[31] In the view of the court, where a defendant could prove the plaintiff's failure to use a seatbelt, and such proof was accompanied by evidence of a causal link to the injuries suffered, it was entirely appropriate for a jury to find the plaintiff negligent and reduce the recovery accordingly.[32] The court supported its finding by stating:

> [I]t is obvious that, on average, persons using seatbelts are less likely to sustain injury and, if injured, the injuries are likely to be less serious. On the basis of this

23. *Id.*
24. The court limited its holding with the following language: "We intimate no opinion as to the answers to the ultimate questions raised by the stricken defense. We hold simply and only that such questions should be decided, and can be decided much more soundly, in the light of all the facts and circumstances adduced upon the trial." *Id.* at 156.
25. 149 N.W.2d 626 (Wis. 1967).
26. *Id.* at 630.
27. *Id.* at 638.
28. *Id.*
29. *Id.*
30. *Bentzler*, 149 N.W.2d at 640.
31. *Id.* at 639.
32. *Id.* at 640.

> experience, and as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seatbelts.[33]

The solid rationale of the *Bentzler* decision has resulted in Wisconsin consistently recognizing and applying the seatbelt defense ever since.[34]

3. *Mount*

The Wisconsin Supreme Court's adoption of the seatbelt defense quickly gained approval from the Appellate Court of Illinois in its decision of *Mount v. McClellan*.[35] Mount and McClellan were involved in a two-vehicle accident, and Mount sued McClellan for damages arising therefrom.[36] At trial, the defense asked Mount, over his counsel's objection, whether his vehicle had been equipped with seatbelts.[37] The trial court overruled the objection, and Mount answered the question in the negative.[38] After the jury's return of what in his view amounted to an inadequate award, Mount sought a new trial on the ground that the court erred in allowing the questions related to the seatbelts.[39]

Upon the trial court's granting of a new trial, McClellan petitioned to the Appellate Court of Illinois.[40] In reviewing the lower proceedings, the court first noted that there had not been a statute requiring automobiles to be equipped with seatbelts at the time of the accident.[41] Despite this apparent weakness in the defense's argument for admissibility, the court went on to note that other jurisdictions had previously allowed such evidence "as a factor in determining the common-law duty of care."[42] In fairness, the court also acknowledged that some jurisdictions had refused to allow such evidence.[43] Ultimately, after relying heavily on *Bentzler*, the *Mount* court decided that seatbelt evidence should be allowed for the jury's consideration.[44] In an effort to refine the rule already propounded in *Bentzler*, the court held that such evidence could not be used for determining liability, but that it could only extend to the analysis of damages.[45]

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33. *Id.* (citations omitted).

34. *See e.g. Foley v. City of W. Allis*, 335 N.W.2d 824 (Wis. 1983); *Vonch v. Am. Stand. Ins. Co.*, 442 N.W.2d 598 (Wis. App. 1989).

35. 234 N.E.2d 329 (Ill. App. 1968).

36. *Id.* at 330.

37. *Id.*

38. *Id.*

39. *Id.* at 330-31. The jury awarded Mount $1,000.00, but he believed he was entitled to $2.440.65. Mount also sought a new trial on the ground that the jury's damage award was insufficient. *Id.*

40. *Mount*, 234 N.E.2d at 330.

41. *Id.*

42. *Id.* (citing *Bentzler*, 149 N.W.2d 626; *Sams*, 148 S.E.2d 154; *Kavanagh v. Butorac*, 221 N.E.2d 824 (Ind. App. 1966)).

43. *Id.* (citing *Lipscomb v. Diamani*, 226 A.2d 914, 918 (Del. 1967); *Brown v. Kendrick*, 192 S.2d 49, 51 (Fla. 1966)).

44. *Id.* at 330-31.

45. In announcing its decision, the court held:

> The use, or nonuse of seat belts, and expert testimony, if any, in relation thereto, is a circumstance which the trier of facts may consider, together with all other facts in evidence,

The court refused to comment as to the weight a jury should give such evidence, but firmly held that such evidence should be allowed.[46] Accordingly, the appellate court reversed and remanded the case to the trial court, with instructions to deny the motion for a new trial, and to reinstate the original ruling.[47] *Mount* set the path for many later Illinois appellate decisions allowing the seatbelt defense,[48] but was ultimately overruled by the Illinois Supreme Court in the 1985 case of *Clarkson v. Wright*.[49]

4. *Truman*

The California Court of Appeals also had an early opportunity to analyze the seatbelt defense, and in *Truman v. Vargas*,[50] the court recognized the defense's validity when coupled with a sufficient evidentiary foundation.[51] *Truman* arose out of an accident whereby Vargas allegedly pulled out in front of the car in which Truman was a passenger.[52] Truman sued Vargas, and the jury found in favor of the defense.[53] Truman sought, and the court granted, a new trial, but only as to damages.[54]

Vargas appealed, arguing among other grounds[55] that the jury should have been able to consider Truman's admission under oath that he was not wearing a seatbelt at the time of the accident.[56] The court agreed with Vargas' argument in theory, but noted that the seatbelt defense will often require, depending on the circumstances, the support of expert testimony.[57] In the court's opinion, this was

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> in arriving at its conclusion as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain. *However, this element should be limited to the damage issue of the case and should not be considered by the trier of facts in determining the liability issue.* Whether a person has or has not availed himself of the use of seat belts would have no relevancy in determining the cause of the accident.

Mount, 234 N.E.2d at 331 (emphasis added).

46. *Id.*
47. *Id.*
48. *See e.g. Eichorn v. Olson*, 335 N.E.2d 774, 778 (Ill. App. 1975).
49. 483 N.E.2d 268, 269 (Ill. 1985).
50. 80 Cal. Rptr. 373 (Cal. App. 1969).
51. *Id.* at 377.
52. *Id.* at 374.
53. *Id.*
54. *Id.*
55. Vargas' stated grounds of appeal were the following:

> 1. It was error to grant the motion of Truman for judgment notwithstanding the verdict.
>
> 2. The jury could have found Truman guilty of contributory negligence in distracting the attention of Valencia from his driving.
>
> 3. Truman was guilty of contributory negligence as a matter of fact in failing to use his seat belt.
>
> 4. It was error to preclude counsel for Mrs. Vargas from arguing that the failure of Truman to use the seat belt was a proximate cause of his injuries and in instructing the jury that evidence of that fact was not to be considered.

Truman, 80 Cal. Rptr. at 375.

56. *Id.*
57. *Id.* at 376-77.

one of those circumstances;[58] if Vargas wished to go forward with the seatbelt defense on retrial, then she would have to present expert testimony proving to what extent Truman's failure to use a seatbelt caused his injuries.[59] This early adoption of the seatbelt defense by California's appellate court remains good law today,[60] and has even been supported by statute.[61]

5. *Spier*

New York, like California, recognized the seatbelt defense at a relatively early date. The New York Court of Appeals (the state's highest court) adopted the defense in *Spier v. Barker*,[62] and it has remained intact ever since. Spier and Barker were involved in an automobile accident that resulted in Spier being ejected from, and subsequently run over by, her car.[63] At trial, Barker presented an expert witness who testified that had Spier been wearing her seatbelt, she would not have been ejected from her car, and would have been spared from many of her injuries.[64] The trial court instructed the jury as to how it was to use the evidence of Spier's failure to use her seatbelt,[65] and the jury then determined that neither party had a cause of action against the other.[66]

Spier appealed, only to have the trial judgment unanimously affirmed by the Appellate Division.[67] In affirming, however, the Appellate Division went on to say that if Barker had been found liable, then it would have been error to allow the jury to apportion damages based on Spier's failure to wear a seatbelt.[68] Such an approach, the Appellate Division argued, "would permit the jury to engage in sheer speculation . . . ."[69]

Although the Appellate Division's comments amounted to nothing more than dicta, as Barker had *not* been found liable, the Court of Appeals nonetheless

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58. *Id.* at 377.

59. The appellate court held:

> Upon a retrial the court or jury will determine whether in the exercise of ordinary care Truman should have used the seat belt; expert testimony will be required to prove whether Truman would have been injured, and, if so, the extent of the injuries he would have sustained if he had been using the seat belt; the burden of going forward upon this issue will be upon Mrs. Vargas.

Id. at 377-78.

60. *See e.g. Housley v. Godinez*, 6 Cal. Rptr. 2d 111 (Cal. App. 1992).

61. Cal. Vehicle Code Ann. § 27315(j) (2001). The statute reads: "In any civil action, a violation of subdivision (d), (e), or (f) or information of a violation of subdivision (h) shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, *but negligence may be proven as a fact without regard to the violation.*" *Id.* (emphasis added).

62. 323 N.E.2d 164 (N.Y. 1974).

63. *Id.* at 165.

64. *Id.* at 166.

65. The trial court gave the jury the following charge: "If you find that a reasonably prudent driver would have used a seat belt, and that she [Spier] would not have received some or all of her injuries had she used the seat belt, then you may not award any damages for those injuries you find she would not have received had she used the seat belt." *Id.*

66. *Id.*

67. *Spier*, 323 N.E.2d at 166.

68. *Id.*

69. *Id.* at 166.

took the opportunity to express a contrary view, and in so doing, added the seatbelt defense to New York law.[70] The court held that:

> [N]onuse of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider, in light of all the other facts received in evidence, in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain.[71]

The court also noted that such evidence should only be used in determining damages and should not be considered in answering the question of liability.[72] The court went on to acknowledge that under ordinary circumstances the opportunity to mitigate damages does not occur until after the occurrence of an accident.[73] So unique, argued the court, is the ability to fasten a seatbelt and thereby immediately reduce the chance of injury, that the doctrine of mitigation still applies.[74] And with that, the New York Court of Appeals adopted its own version of the seatbelt defense—a version that would later be codified by the state legislature.[75]

B. Statutory Evolution

New York's legislature was not alone in its decision to codify the seatbelt defense. In fact, a considerable number of states have promulgated laws addressing the seatbelt defense.[76] Some of these statutes follow suit with New York and effectively codify earlier case law often times with few changes.[77] Still others, in what could be perceived as a relatively modern trend, have drafted statutes allowing the defense to reduce a plaintiff's recovery but only up to a set percentage amount.[78]

1. Michigan

The Michigan Court of Appeals faced its state's "percentage-cap" statute[79] in *Thompson v. Fitzpatrick*,[80] and upheld its validity.[81] Thompson was not wearing a

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70. *Id.* at 167.

71. *Id.*

72. *Spier*, 323 N.E.2d at 167.

73. *Id.* at 168.

74. *Id.*

75. N.Y. Vehicle & Traffic Laws § 1229-c(8) (Consol. 2001). The statute provides: "Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense." *Id.*

76. *See infra* n. 156.

77. *See* Ark. Code Ann. § 27-37-703(a) (LEXIS L. Publg. 2001); Cal. Vehicle Code (Ann.) § 27315(j); Colo. Rev. Stat. § 42-4-237(7) (2000); Fla. Stat. § 316.614(9) (2000); Ohio Rev. Code Ann. § 4513.263(F) (Anderson 2001); Tenn. Code Ann. § 55-9-604 (2001).

78. *See* Iowa Code § 321.445(4)(b) (2001); Mich. Comp. Laws § 257.710e(6) (2001); Mo. Rev. Stat. § 307.178(4) (2000); Neb. Rev. Stat. § 60-6,273 (2001); Or. Rev. Stat. Ann. § 18.590 (1999); W. Va. Code § 17C-15-49(d) (2001); Wis. Stat. § 347.48(g) (2000).

79. Mich. Comp. Laws § 257.710e(6). This section provides: "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*

seatbelt at the time of an accident between himself and Fitzpatrick.[82] The force of the two automobiles colliding together propelled him from his vehicle, causing serious injury.[83] Thompson initiated a personal injury action, and the parties stipulated to a partial consent judgment, whereby "the parties agreed [Thompson] sustained $250,000 in damages, $125,000 of which would have been prevented had [Thompson] been wearing his seat belt . . . ."[84] At this point, Thompson promptly moved for summary judgment, which the trial court granted.[85] The trial court applied the Michigan statute[86] and reduced the damages award by five percent (as opposed to the fifty percent reduction to which the parties had stipulated).[87] The Court of Appeals, relying on an earlier decision,[88] upheld the trial court's ruling and concluded that the statute was clear and unambiguous in its five percent reduction cap.[89]

2. Colorado

In yet another mutation of the seatbelt defense, Colorado has enacted legislation allowing the defense to reduce a plaintiff's recovery but only with respect to awards for pain and suffering.[90] The Supreme Court of Colorado first had occasion to construe this statute in *Anderson v. Watson*.[91] The accident giving rise to the litigation involved cars driven by both Anderson and Watson.[92] Watson admitted she was negligent in running a red light, and that her negligence caused the accident.[93] Although she admitted fault, Watson raised an affirmative defense that Anderson had failed to mitigate pain and suffering damages by failing to use her seatbelt at the time of the accident.[94] There was very little evidence presented

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negligence shall not reduce the recovery for damages by more than 5%." *Id.* (emphasis added).

80. 501 N.W.2d 172 (Mich. App. 1992).

81. *Id.* at 173.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Thompson,* 501 N.W.2d at 173.

86. Mich. Comp. Laws § 257.710e(6).

87. *Thompson*, 501 N.W.2d at 173.

88. *Ullery v. Sobie*, 492 N.W.2d 739 (Mich. App. 1992).

89. The court held: "[t]he use of seat belts is mandated by [§257.710e(6)]. Failure to wear a seat belt in violation of that section may be considered evidence of negligence, but may not reduce a plaintiff's recovery by more than five percent." *Thompson*, 501 N.W.2d at 173.

90. Colo. Rev. Stat. § 42-4-237(7) (2000). The statute provides:

> Evidence of failure to comply with the requirement of subsection (2) of this section [requiring seatbelt use] shall be admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. *Such mitigation shall be limited to awards for pain and suffering and shall not be used for limiting recovery of economic loss and medical payments.*

Id. (emphasis added).

91. 953 P.2d 1284 (Colo. 1998).

92. *Id.* at 1286.

93. *Id.*

94. *Id.* at 1286-87. Watson based her affirmative defense on Colo. Rev. Stat. § 42-4-237(7). *See supra* n. 90.

by either side as to the relationship between Anderson's injuries and her failure to fasten her seatbelt;[95] but the trial court nonetheless allowed the jury to consider the evidence in apportioning damages.[96] After the jury returned a verdict completely void of a pain and suffering award,[97] Anderson appealed and the court of appeals affirmed.[98]

Anderson subsequently petitioned for certiorari to the Colorado Supreme Court,[99] and gave the court its first opportunity to interpret and apply Colorado's seatbelt defense statute. In completing its task, the court felt compelled to conform its decision with the policy behind the statute of encouraging seatbelt use.[100] Along that line, the court opined that the legislature had not intended to place the entire burden of proving the seatbelt defense on the defendant.[101] Instead, the defendant only had to prove a prima facie case of seatbelt nonuse in order for the defense to be presented for the jury's consideration.[102] Anderson's admission that she had not been wearing a seatbelt at the time of the accident easily fulfilled this requirement in the case at bar.[103] Accordingly, the Colorado Supreme Court affirmed the earlier decision.[104] The court had appropriately instructed the jury on the seatbelt defense, resulting in the jury's determination that Anderson's nonuse justified elimination of her pain and suffering damages.[105]

3. Tennessee

Tennessee was once a part of the majority in refusing to allow evidence of seatbelt nonuse for the purpose of reducing recovery.[106] In 1994, however, the

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95. *Anderson*, 953 P.2d at 1287.

96. *Id.* at 1288. The trial court issued the following instruction:

> If you find in favor of the plaintiff, Katrina Lee Anderson, and that she is entitled to actual damages, then you must consider whether the affirmative defense of plaintiff's failure to mitigate or minimize pain and suffering damages has been proved.
>
> One claiming damages for personal injuries has the duty to take such reasonable steps as are reasonable under the circumstances to mitigate or minimize those damages. Any damages resulting from a failure to take such reasonable steps cannot be awarded.

Id.

97. The jury's award to Anderson consisted of $640 in economic damages. *Id.*

98. *See Anderson v. Watson*, 929 P.2d 6 (Colo. App. 1996).

99. *Anderson*, 953 P.2d at 1286.

100. The court stated the following:

> [W]e note that our outcome today comports with the General Assembly's goal in enacting the Mandatory Seat Belt Act, i.e., to promote seat belt use. This aim is amply reflected in the provisions of the Mandatory Seat Belt Act.... By decreasing the amount of pain and suffering damages in proportion to injuries attributable to seat belt non-use, the General Assembly sent a signal to drivers and front-seat passengers to buckle up. It is not unusual for the legislature to circumscribe non-economic damages as a declaration of public policy.

Id. at 1290.

101. *Id.* at 1291.

102. *Id.* at 1292.

103. *Id.* at 1291.

104. *Anderson*, 953 P.2d at 1292.

105. *Id.*

106. *See* Brett R. Carter, Student Author, *The Seatbelt Defense in Tennessee: The Cutting Edge*, 29 U. Mem. L. Rev. 215, 225 (1998). The original Tennessee statute provided that "in no event shall failure

Tennessee legislature, in an act that has been lauded by commentators,[107] amended the state's seatbelt use statute so as to allow reduction under certain circumstances.[108] The statute presently provides:

> (a) The failure to wear a safety belt shall not be admissible into evidence in a civil action; provided, that evidence of a failure to wear a safety belt, as required by this chapter, may be admitted in a civil action as to the causal relationship between non-compliance and the injuries alleged, if the following conditions have been satisfied:
>
> (1) The plaintiff has filed a products liability claim;
>
> (2) The defendant alleging non-compliance with this chapter shall raise this defense in its answer or timely amendment thereto in accordance with the rules of civil procedure; and
>
> (3) Each defendant seeking to offer evidence alleging noncompliance with this chapter has the burden of proving noncompliance with this chapter, that compliance with this chapter would have reduced injuries and the extent of the reduction of such injuries.
>
> (b) Upon request of any party, the trial judge shall hold a hearing out of the presence of the jury as to the admissibility of such evidence in accordance with the provisions of this section and the Tennessee Rules of Evidence.[109]

As evidenced by subsection (1), the Tennessee legislature apparently places a great deal of importance on whether an action arises out of a products liability theory.[110] Accordingly, a seatbelt nonuser in Tennessee is much better off to get in an accident by way of a manufacturing or design defect than by the negligence of another. The reasoning behind this distinction is unclear.[111]

Statutes like those existing in Michigan,[112] Colorado,[113] and Tennessee[114] beg the question of whether such limitations on the seatbelt defense make sense. In *Thompson*,[115] the parties clearly believed Thompson's failure to use his seatbelt amounted to a significant cause of his injuries.[116] Instead, the statute left Thompson with a windfall at Fitzpatrick's expense. Even Wisconsin, the jurisdiction that brought us one of the earliest approvals of the seatbelt defense,[117] has resorted to a similar statutory scheme.[118] Equally illogical is the statute dealt

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to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belts be considered in mitigation of damages on the trial of any civil action." *Id.* (quoting Tenn. Code Ann. § 59-930 (1963)).

107. *Id.* at 242-43.
108. Tenn. Code Ann. § 55-9-604.
109. *Id.*
110. *Id.*; Carter, *supra* n. 106, at 233, 242-43.
111. Carter, *supra* n. 106, at 242-43.
112. Mich. Comp. Laws § 257.710e(6).
113. Colo. Rev. Stat. § 42-4-237(7).
114. Tenn. Code Ann. § 55-9-604.
115. 501 N.W.2d 172.
116. *Id.* at 173.
117. *Bentzler*, 149 N.W.2d 626.
118. The Wisconsin statute allows for no more than a fifteen percent reduction. Wis. Stat. § 347.48(g).

with in *Anderson*.[119] If failure to use a seatbelt is sufficient grounds for reducing pain and suffering damages, then why is it insufficient for reducing other types of damages as well? Colorado's statute, while clearly more liberal than the strict "percentage-cap" models, is essentially a reduction cap nonetheless. Finally, Tennessee's statute places an arbitrary distinction on products liability actions.[120] These arrangements, while clearly better than an outright refusal to accept the defense, still leave much to be desired.

C. *The Present State of the Law*

1. A Still-Solid Majority

A clear majority of the jurisdictions hold onto the belief that seatbelt evidence should generally not be allowed to reduce a plaintiff's recovery.[121] In

119. *See supra* n. 90.

120. Tenn. Code Ann. § 55-9-604.

121. For statutes refusing evidence of seatbelt use/nonuse in order to reduce recovery *see* Ala. Code § 32-5B-7 (2001); Conn. Gen. Stat. § 14-100a(4) (2001); Del. Code Ann. tit. 21 § 4802(i) (2001); D.C. Code Ann. § 50-1807 (2001); Ga. Code Ann. § 40-8-76.1(d) (2000); 625 Ill. Comp. Stat. § 5/12-603.1(c) (2001); Kan. Stat. Ann. § 8-2504(c) (2000); La. Stat. Ann. § 32:295.1(E) (2000); Md. Transp. Code Ann. § 22-412.3(h) (2001); Minn. Stat. § 169.685(4) (2000); Miss. Code Ann. § 63-2-3 (2001); Mont. Code Ann. § 61-13-106 (2000); Nev. Rev. Stat. § 484.641(4) (2001); N.H. Rev. Stat. Ann. § 265:107-a(IV) (2000); N.M. Stat. Ann. § 66-7-373(A) (2001); N.C. Gen. Stat. § 20-135.2A(d) (2000); Okla. Stat. tit. 47, § 12-420 (2000); 75 Pa. Consol. Stat. § 4581(E) (2001); S.D. Codified Laws § 32-38-4 (2001); Tex. Transp. Code Ann. § 545.413(g) (2000); Utah Code Ann. § 41-6-186 (2001); Va. Code Ann. § 46.2-1094(D) (2001); Wash. Rev. Code § 46.61.688(6) (2001); Wyo. Stat. Ann. § 31-5-1402(f) (2001).

For decisions refusing to allow evidence of seatbelt nonuse to reduce a plaintiff's recovery *see Coker v. Ryder Truck Lines*, 249 So.2d 810 (Ala. 1971); *Britton v. Doehring*, 242 So.2d 666 (Ala. 1970); *Bower v. D'Onfro*, 663 A.2d 1061 (Conn. App. 1995); *Partman v. Budget Rent-a-Car of Winchester, Inc.*, 649 A.2d 275 (Conn. Super. 1994); *Futterleib v. Mr. Happy's, Inc.*, 548 A.2d 728 (Conn. App. 1988); *Wassell v. Hamblin*, 493 A. 2d 870 (Conn. 1985); *Melesko v. Riley*, 339 A.2d 479 (Conn. Super. 1979); *Clark v. St.*, 264 A.2d 366 (Conn. Super. 1970); *Remington v. Arndt*, 259 A.2d 145 (Conn. Super. 1969); *Uresky v. Fedora*, 245 A.2d 393 (Conn. Super. 1968); *Ruderman v. St. Farm Fire & Cas. Co.*, 2001 Del. Super. LEXIS 229 (Jan. 8, 2001); *Lipscompb v. Diamiani*, 226 A.2d 914 (Del. Super. 1967); *McCord v. Green*, 362 A.2d 720 (D.C. App. 1976); *C.W. Matthews Contracting Co., Inc. v. Gover*, 428 S.E.2d 796 (Ga. 1993); *Purvis v. Virgil Barber Contractor, Inc.*, 421 S.E.2d 303 (Ga. App. 1992); *Reid v. Odom*, 404 S.E.2d 323 (Ga. App. 1991); *Bales v. Shelton*, 399 S.E.2d 78 (Ga. App. 1990); *Boatwright v. Czerepinski*, 391 S.E.2d 685 (Ga. App. 1990); *Jones v. Scarborough*, 390 S.E.2d 674 (Ga. App. 1990); *Payne v. Joyner*, 399 S.E.2d 83 (Ga. App. 1990); *Katz v. White*, 379 S.E.2d 186 (Ga. App. 1989); *Quick v. Crane*, 727 P.2d 1187 (Idaho 1986); *Hansen v. Howard O. Miller, Inc.*, 460 P.2d 739 (Idaho 1969); *Clarkson v. Wright*, 483 N.E.2d 268 (Ill. 1985); *Hopper v. Carey*, 761 N.E.2d 566 (Ind. App. 1999); *St. v. Ingram*, 427 N.E.2d 444 (Ind. 1981); *Fudge v. City of Kansas City*, 720 P.2d 1093 (Kan. 1986); *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985); *Rollins v. Dept. of Transp.*, 711 P.2d 1330 (Kan. 1985); *Taplin v. Clark*, 626 P.2d 1198 (Kan. App. 1981); *Hampton v. St. Hwy. Commn.*, 498 P.2d 236 (Kan. 1972); *Miller v. Coastal Corp.*, 635 So.2d 607 (La. App. 1994); *Morton v. Brockman*, 184 F.R.D. 211 (D. Me. 1999) (applying Maine law); *Pasternak v. Achorn*, 680 F. Supp. 447 (D. Me. 1988) (applying Maine law); *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522 (D. Md. 1987) (applying Maryland law); *Shahzade v. C.J. Mabardy, Inc.*, 586 N.E.2d 3 (Mass. 1992); *Anker v. Little*, 541 N.W.2d 333 (Minn. App. 1995); *Cressy v. Grassmann*, 536 N.W.2d 39 (Minn. App. 1995); *Lind v. Slowinksi*, 450 N.W.2d 353 (Minn. App. 1990); *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264 (Miss. 1999); *Jones v. Panola County*, 725 So.2d 774 (Miss. 1998); *Roberts v. Grafe Auto Co., Inc.*, 701 So.2d 1093 (Miss. 1997); *D.W. Boutwell Butane Co. v. Smith*, 244 So.2d 11 (Miss. 1971); *Petersen v. Klos*, 426 F.2d 199 (5th Cir. 1970) (applying Mississippi law); *Glover v. Daniels*, 310 F. Supp. 750 (N.D. Miss. 1970) (applying Mississippi law); *Newman v. Ford Motor Co.*, 975 S.W.2d 147 (Mo. 1998); *Miller v. Haynes*, 454 S.W.2d 293 (Mo. App. 1970); *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473 (D. Mont. 1995) (applying Montana law); *Kopischke v. First Continental Corp.*, 610 P.2d 668 (Mont. 1980); *Jeep Corp. v. Murray*, 708 P.2d

these jurisdictions, it makes no difference how compelling the defendant's proof, or how egregious the plaintiff's violation of statute—seatbelt evidence will simply not come in. With that said, there are at least a few areas in which many of these stubborn states have chosen to carve out exceptions.[122] Strangely enough, the first of these exceptions arises when the plaintiff, rather than the defendant, wishes to admit seatbelt evidence.[123] It is important to note, however, that in these situations the court allows evidence of seatbelt use not for the purpose of the seatbelt defense but instead to support the plaintiff's claim of a failure in the vehicle's seatbelt mechanism.[124] The evidence comes in, but the defense remains out. In a second type of exception, some members of the majority have even allowed *defendants* to admit evidence of seatbelt nonuse, but only in actions where the plaintiff attacks the vehicle's safety or restraint system.[125]

Although these two exceptions seem quite similar at first glance, a Tenth Circuit case, *Gardner v. Chrysler Corporation*,[126] illustrates the distinction quite well. Gardner was a passenger in the front seat of her sister's minivan.[127] Gardner's five-year-old niece rode on her lap.[128] Neither of the two were wearing a seatbelt, and their vehicle was rear-ended by a car traveling approximately

297 (Nev. 1985); *Thibeault v. Campbell*, 622 A.2d 212 (N.H. 1993); *Forsberg v. Volkswagen of Am., Inc.*, 769 F. Supp. 33 (D. N.H. 1990); *Mott v. Sun Country Garden Prods., Inc.*, 901 P.2d 192 (N.M. App. 1995); *Thomas v. Henson*, 695 P.2d 476 (N.M. 1985); *Hagwood v. Odom*, 364 S.E.2d 190 (N.C. App. 1988); *Miller v. Miller*, 160 S.E.2d 65 (N.C. 1968); *Craig v. Woodruff*, 748 N.E.2d 592 (Ohio App. 2000) (subsequent statute would likely allow the defense); *Comer v. Preferred Risk Mut. Ins. Co.*, 991 P.2d 1006 (Okla. 1999); *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48 (Okla. 1976); *Nicola v. Nicola*, 673 A.2d 950 (Pa. Super. 1996); *Solonoski v. Yuhas*, 657 A.2d 137 (Pa. Commw. 1995); *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430 (3d Cir. 1992) (applying Pennsylvania law); *Kolbeck v. Gen. Motors Corp.*, 745 F. Supp. 288 (E.D. Pa. 1990); *Grim v. Betz*, 539 A.2d 1365 (Pa. Super. 1988); *Parise v. Fehnel*, 406 A.2d 345 (Pa. Super. 1979); *Vizzini v. Ford Motor Co.*, 569 F.2d 754 (3d Cir. 1977) (applying Pennsylvania law); *Benner v. Interstate Container Corp.*, 73 F.R.D. 502 (E.D. Pa. 1977); *Pritts v. Walter Lowery Trucking Co.*, 400 F. Supp. 867 (W.D. Pa. 1975); *Swajian v. Gen. Motors Corp.*, 559 A.2d 1041 (R.I. 1989); *Keaton v. Pearson*, 358 S.E.2d 141 (S.C. 1987); *Jones v. Dague*, 166 S.E.2d 99 (S.C. 1969); *Davis v. Knippling*, 576 N.W.2d 525 (S.D. 1998); *Milbrand v. Daimler Chrysler Corp.*, 105 F. Supp. 2d 601 (E.D. Tex. 2000) (applying Texas law); *St. Hwy. Dept. v. Hinson*, 517 S.W.2d 308 (Tex. App. 1974); *Mercer v. Band*, 484 S.W.2d 117 (Tex. App. 1972); *United Furniture & Appliance Co. v. Johnson*, 456 S.W.2d 455 (Tex. App. 1970); *Sonnier v. Ramsey*, 424 S.W.2d 684 (Tex. App. 1968); *Tom Brown Drilling Co. v. Nieman*, 418 S.W.2d 337 (Tex. App. 1967); *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423 (Utah 1995); *Whitehead v. Am. Motor Sales Corp.*, 801 P.2d 920 (Utah 1990); *Hillier v. Lamborn*, 740 P.2d 300 (Utah App. 1987); *Clark v. Payne*, 810 P.2d 931 (Wash. App. 1991); *Amend v. Bell*, 570 P.2d 138 (Wash. 1977); *Grobe v. Valley Garbage Serv., Inc.*, 551 P.2d 748 (Wash. 1976); *Derheim v. N. Fiorito Co., Inc.*, 492 P.2d 1030 (Wash. 1972); *Wright v. Hanley*, 387 S.E.2d 801 (W. Va. 1989) (subsequent statute would allow up to a five percent reduction).

122. *See Gen. Motors Corp. v. Wolhar*, 686 A.2d 170 (Del. 1996) (in the crashworthiness context); *Floyd*, 960 P.2d 763 (allowing seatbelt evidence, because offered to disprove the existence of an alleged defective steering column); *Gardner v. Chrysler Corp.*, 89 F.3d 729 (10th Cir. 1996) (applying Kansas law in the crashworthiness context); *Fedele v. Tujuague*, 717 So.2d 244 (4th Cir. 1998) (in the product liability context); *Bishop v. Takata*, 12 P.3d 459 (Okla. 2000) (in the context of a product liability action claiming a defective seatbelt mechanism); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132 (Tex. 1994) (in the crashworthiness context, claiming a defective seatbelt mechanism).

123. *See Bishop*, 12 P.3d 459; *Bridgestone/Firestone*, 878 S.W.2d 132. For discussion of *Bishop*, *see infra* Section III.E.

124. *See Bishop*, 12 P.3d at 461; *Bridgestone/Firestone*, 878 S.W.2d at 133.

125. *See e.g. Wolhar*, 686 A.2d 170; *Gardner*, 89 F.3d 729.

126. 89 F.3d 729 (10th Cir. 1996) (applying Kansas law).

127. *Id.* at 732.

128. *Id.*

twenty to twenty-five miles per hour.[129] As a result of the accident, Gardner's seatback collapsed, allowing her to be propelled to the rear of the vehicle.[130] In the course of being thrown about the interior of the minivan, Gardner sustained severe injuries including brain damage.[131] Gardner's theory of the case centered around the collapse of the seatback.[132] At the trial, she alleged that the seat was of a defective design, because it buckled under the force of a moderate rear impact, thereby causing her to be thrown to the rear of the vehicle.[133]

Chrysler disagreed with Gardner's allegations. Instead of focusing on the initial impact of the rear-end collision, Chrysler's defense pointed to secondary impacts that occurred when the minivan lost control and turned over in a ditch.[134] In the opinion of Chrysler's experts, these secondary impacts caused Gardner and her niece to be thrown towards the windshield and then slammed back into the seat.[135] It was this impact, the experts opined, that caused the seatback to fail; and it was this impact that would have never occurred had Gardner and her niece been properly seated with their seatbelts fastened.[136] In concluding its theory, "Chrysler maintained that [its seat design] contemplated utilization of the seat belt which, it asserted, was integral to the seat design."[137]

Gardner argued that Chrysler's defense should fail because of a Kansas statute[138] forbidding the admission of evidence related to seatbelt nonuse.[139] Gardner filed, and the trial court denied, a motion in limine with regard to the seatbelt evidence.[140] After the jury returned a defense verdict, Gardner argued on appeal that such denial was contrary to Kansas' anti-seatbelt defense statute.[141] Since the evidence of seatbelt nonuse was presented to the jury, Gardner argued that Chrysler was essentially permitted to plead the seatbelt defense.[142] Even

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129. *Id.* at 732-33.
130. *Id.* at 732.
131. *Gardner*, 89 F.3d at 732.
132. *Id.* at 732-33.
133. *Id.*
134. *Id.* at 733.
135. *Id.*
136. The court summarized Chrysler's defense as follows:

> Chrysler's theory of defense discounted the first impact when the [other vehicle] collided with the Minivan at a "closing velocity" calculated at about 20-25 mph, which it considered insufficient to overload the seat back. Instead, its experts opined in the second and third impacts, as the Minivan pirouetted, hitting the ditch initially and turning on its side in a clockwise rotation, Ms. Gardner was thrown forward perhaps hitting the windshield or headliner[] before the seat back failed, jettisoning her into the rear seat. In that third impact, Chrysler claimed the 190-pound force of Ms. Gardner's and Kimberly's hitting the seat back without any other counter restraint caused the seat back to yield or fail.

Gardner, 89 F.3d at 733 (footnote omitted).
137. *Id.*
138. Kan. Stat. Ann. § 8-2504(c). The section provides that "[e]vidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages." *Id.*
139. *Gardner*, 89 F.3d at 733.
140. *Id.*
141. *Id.*
142. *Id.* at 734.

though Chrysler was not permitted to argue that Gardner's failure to wear a seatbelt caused or contributed to her injuries,[143] Gardner believed the jury still equated her nonuse with negligence.[144] In reviewing the case, the Tenth Circuit found no violation of the statute.[145] Gardner had alleged a defect in the design of the seat, of which the seatbelt was an integral part.[146] Therefore, Chrysler had the right to introduce evidence of seatbelt nonuse in order to counter Gardner's claim.[147] The court acknowledged the likelihood that the evidence could have a prejudicial effect on the jury, but concluded that the evidence had to come in regardless.[148]

The interesting distinction between the two exceptions observed by many of the majority states stems from who sponsors the evidence. Ironically, in the first exception, the defendant would prefer that the seatbelt evidence stay out.[149] This is because keeping the evidence out works as a defense in itself. If a plaintiff cannot admit *any* evidence related to seatbelts (as most majority statutes provide), then that plaintiff's attack on the seatbelt's design must fail.[150] Nearly every state faced with this question has determined that their legislature could not have intended such a result.[151] In the words of the Oklahoma Supreme Court, such an interpretation "would inexplicably create a new defense to products liability claims that neither the Legislature nor this Court has previously recognized."[152]

In the second area of exception, the roles reverse. Here, the defendant wants the seatbelt evidence in, while the plaintiff wants it out.[153] The defendant does not want the evidence in for the explicit purpose of pleading the seatbelt defense, as any majority statute will disallow such a use.[154] Instead, the defendant wants to use the evidence to counter the plaintiff's argument of a defective safety/restraint system.[155] It clearly makes sense that if a plaintiff wishes to

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143. *Id.* In addition to this limitation, the trial judge gave the jury the following instruction:

> You may consider the fact that the Chrysler minivan was equipped with a seat belt restraint system for the sole purpose of determining whether the overall design of the seat assembly was defective and unreasonably dangerous. However, you may not consider Cindy Gardner's nonuse of seatbelts in determining whether she was negligent or otherwise at fault for her own injuries.

Id.

144. *Gardner,* 89 F.3d at 734.

145. *Id.* at 737. The 10th Circuit held that "the trial court properly admitted evidence of plaintiff's nonuse of the seat belt and appropriately limited its use to disprove a defect." *Id.*

146. *Id.* at 733.

147. *Id.* at 737.

148. *Id.* The court stated that "[a]lthough Ms. Gardner is probably correct in suggesting the average juror may not be able to divest the presence of a seat belt with the moral implication it ought to be worn, we must follow the law and not human nature." *Id.*

149. *See Bishop*, 12 P.3d at 461; *Bridgestone/Firestone*, 878 S.W.2d at 133.

150. *See Bishop*, 12 P.3d at 465-66; *Bridgestone/Firestone*, 878 S.W.2d at 134.

151. *See Bishop*, 12 P.3d 459; *Bridgestone/Firestone*, 878 S.W.2d 132. *But see Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997) (the court interpreted the statute's meaning literally, and refused to allow even the plaintiff to admit seatbelt-related evidence).

152. *Bishop*, 12 P.3d at 465.

153. *See e.g. Gardner*, 89 F.3d at 733-34.

154. *See supra* n. 121.

155. *See Gardner*, 89 F.3d at 734.

challenge the integrity of a vehicle's seatbelt mechanism, then that plaintiff must have in fact been utilizing the system at the time of the alleged failure.

2. A Minority Fraught With Factions

Perhaps one of the biggest barriers to widespread acceptance of the seatbelt defense is the lack of a unified modern trend. A growing number of states allow the defense,[156] but the predicates for the defense vary from jurisdiction to

156. For decisions allowing seatbelt evidence in one form or another *see Garcia v. Gen. Motors Corp.*, 990 P.2d 1069 (Ariz. App. 1st Div. Dept. D 1999); *Law v. Super. Ct. of Ariz.*, 755 P.2d 1135 (Ariz. 1998); *Lovett v. Union P. R.R. Co.*, 201 F.3d 1074 (8th Cir. 2000) (applying Arkansas law); *Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 3d Div. 1993); *Askew v. Gerace*, 851 P.2d 199 (Colo. App. 2d Div. 1992); *Gen. Motors Corp. v. Wolhar*, 686 A.2d 170 (Del. 1996) (allowing the evidence only in the crashworthiness context); *Smith v. Butterick*, 769 So.2d 1056 (Fla. App. 2d Dist. 2000); *Brito v. County of Palm Beach*, 753 So.2d 109 (Fla. App. 4th Dist. 1998); *Zurline v. Levasque*, 642 So.2d 1169 (Fla. App. 4th Dist. 1994) (allowing the evidence, but determining it insufficient to reduce recovery); *Bulldog Leasing Co., Inc. v. Curtis*, 630 So.2d 1060 (Fla. 1994); *McCoy v. Hollywood Quarries, Inc.*, 544 So.2d 274 (Fla. App. 4th Dist. 1989); *Bonds v. Fleming*, 539 So.2d 1145 (Fla. App. 5th Dist. 1989); *Parker v. Montgomery*, 529 So.2d 1145 (Fla. App. 1st Dist. 1988); *England v. U.S.*, 632 F. Supp. 1340 (M.D. Fla. 1986) (applying Florida law); *Burns v. Smith*, 476 So.2d 278 (Fla. App. 2d Dist. 1985); *Allstate Ins. Co. v. Lafferty*, 451 So.2d 446 (Fla. 1984); *Ins. Co. of N. Am. v. Pasakarnis*, 451 So.2d 447 (Fla. 1984); *Floyd v. Gen. Motors Corp.*, 960 P.2d 763 (Kan. App. 1998) (only when offered to disprove the existence of a defect); *Gardner v. Chrysler Corp.*, 89 F.3d 729 (10th Cir. 1996) (applying Kansas law) (allowing the evidence only for the purpose of determining whether seat design was defective); *Brand v. Mazda Motor of Am., Inc.*, 1996 U.S. Dist. LEXIS 18128 (D. Kan. Nov. 18, 1996) (applying Kansas law) (allowing the evidence only for the purpose of proving the lack of a defect in the vehicle's restraint system); *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987) (allowing the evidence depending on the facts of each case); *Fedele v. Tujague*, 717 So.2d 244 (La. App. 1997) (allowing the evidence only in the context of a products liability action); *Klinke v. Mitsubishi Motors Corp.*, 581 N.W.2d 272 (Mich. 1998); *Carissimi v. Jonas*, 557 N.W.2d 148 (Mich. App. 1996); *Thompson v. Fitzpatrick*, 501 N.W.2d 172 (Mich. App. 1992); *Ullery v. Sobie*, 492 N.W.2d 739 (Mich. App. 1992); *Lowe v. Estate Motors Ltd.*, 410 N.W.2d 706 (Mich. 1987); *Hierta v. Gen. Motors Corp.*, 492 N.W.2d 738 (Mich. App. 1985); *LaHue v. Gen. Motors Corp.*, 716 F. Supp. 407 (W.D. Mo. 1989) (applying Missouri law to allow the defense only in the context of a defective design products liability action); *Waterson v. Gen. Motors Corp.*, 544 A.2d 357 (N.J. 1988); *Dunn v. Durso*, 530 A.2d 387 (N.J. Super. L. Div. 1986); *Shpritzman v. Strong*, 670 N.Y.S.2d 50 (App. Div. 2d Dept. 1998) (only as to mitigation); *Bishop v. Takata Corp.*, 12 P.3d 459 (Okla. 2000) (allowing the evidence only in the context of a product liability action claiming a defect in the seatbelt mechanism); *Smith v. Goodyear Tire & Rubber Co.*, 600 F. Supp. 1561 (D. Vt. 1985) (applying Vermont law); *Brown v. Ford Motor Co.*, 2001 U.S. App. LEXIS 4539 (4th Cir. Mar. 23, 2001) (applying Virginia law); *Wilson v. Volkswagen of Am., Inc.*, 445 F. Supp. 1368 (E.D. Va. 1978) (applying Virginia law); *Vonch v. Am. Stand. Ins. Co.*, 442 N.W.2d 598 (Wis. App. 1989); *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992) (subsequent statute, Wyo. Stat. Ann. § 31-5-1402 (2001), precludes such evidence).

For statutes allowing evidence of seatbelt nonuse to reduce a plaintiff's recovery in at least some circumstances *see* Ariz. Rev. Stat. § 12.2505 (2000) (a comparative negligence statute that has been interpreted to allow the seatbelt defense to reduce recovery); Ark. Code Ann. § 27-37-703(a) (LEXIS L. Publg. 2001) (allowing reduction, but only when particular elements are met); Cal. Vehicle Code Ann. § 27315(j) (Bancroft-Whitney 2001) (allowing the defense, but only when a causal connection is shown); Colo. Rev. Stat. § 42-4-237(7) (2000) (allowing the defense, but only to prove a failure to mitigate pain and suffering damages); Fla. Stat. § 316.614(9) (2000) (allowing the defense as it relates to comparative fault, but not to mitigation); Iowa Code § 321.445(4)(b) (2001) (allowing the defense only to prove a failure to mitigate, and the reduction cannot exceed five percent); Mich. Comp Laws § 257.710e(6) (2001) (five percent limitation on the reduction); Mo. Rev. Stat. § 307.178(4) (2000) (allowing defense to prove failure to mitigate, but cannot reduce recovery by more than one percent); Neb. Rev. Stat. Ann. § 60-6,273 (LEXIS L. Publg. 2001) (allowing defense to prove failure to mitigate, but cannot reduce recovery by more than five percent); N.Y. Vehicle & Traffic Laws § 1229-c(8) (Consol. 2001) (allowing defense, but only to prove a failure to mitigate damages); Ohio Rev. Code Ann. § 4513.263(F) (Anderson 2001) (allowing defense so long as causal connection proved); Or. Rev. Stat. Ann. § 18.590 (1999) (allowing defense for mitigation purposes, but only up to a five percent reduction); Tenn. Code Ann. § 55-9-604 (2001) (allowing reduction, but only when particular elements

jurisdiction. Although capable of different methods of division, the factions can be viewed as falling into seven different categories. The first of the categories is comprised of states that have adopted the defense through judicial decision only.[157] In these states, there are no statutes pertaining to the seatbelt defense, but the courts have adopted the defense in one form or another. In comparison, the states belonging to the second category have statutes allowing for the seatbelt defense, and these statutes do not seem to limit the defense's applicability.[158] Ohio's statute of this type seems to perhaps even allow for a complete bar against recovery:

> The failure of a person to wear all of the available elements of a properly adjusted occupant restraining device . . . shall be considered by the trier of fact in a tort action as *contributory negligence*[159] or other tortious conduct or considered for any other relevant purpose if the failure contributed to the harm alleged in the tort action . . . .[160]

The third category of the minority limits the seatbelt defense's applicability to mitigation of damages.[161] Contrastingly, the fourth category allows evidence of seatbelt nonuse for the purpose of proving comparative negligence, but not for mitigation of damages.[162] Already discussed in Section II.B.2, the fifth category allows the trier of fact to consider nonuse evidence, but only for the purpose of reducing a plaintiff's pain and suffering award.[163]

In what at least one commentator has hailed as the "cutting edge" of seatbelt defense law,[164] the states comprising the sixth minority category only allow the

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are met); W. Va. Code § 17C-15-49(d) (2001) (allowing defense as to mitigation, but only up to a five percent reduction); Wis. Stat. § 347.48(g) (2000) (allowing defense, but reduction is limited to fifteen percent).

157. Alaska, Arizona, Kentucky, and New Jersey belong to the first category. *See Hutchins*, 724 P.2d 1194; *Law*, 755 P.2d 1135; *Wemyss*, 729 S.W.2d 174; *Waterson*, 544 A.2d 357.

158. California and Ohio belong to the second category. *See* Cal. Vehicle Code Ann. § 27315(j); Ohio Rev. Code Ann. § 4513.263(F). California's statute provides: "In any civil action, a violation of [the mandatory seatbelt usage statute] shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation." Cal. Vehicle Code Ann. § 27315(j).

159. Black's defines the doctrine of *contributory negligence* as follows: "The principle that *completely bars* a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault." *Black's Law Dictionary* 330 (Bryan A. Garner ed., 7th ed., West 1999) (emphasis added). As the Ohio statute has yet to be construed by the state's courts, it is unclear whether a complete bar against recovery would be allowed.

160. Ohio Rev. Code Ann. § 4513.263(F) (emphasis added).

161. New York is the only state belonging to the third category. *See* N.Y. Vehicle & Traffic Laws § 1229-c(8). For the full text of the statute, *see supra* note 75.

162. Florida is the only state belonging to the fourth category. *See* Fla. Stat. § 316.614(9). The statute provides: "A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action." *Id.*

163. Colorado is the only state belonging to the fifth category. *See* Colo. Rev. Stat. § 42-4-237(7). For the full text of the statute, *see supra* note 90.

164. Carter, *supra* n. 106, at 242-43.

defense in actions based in products liability.[165] Without a doubt, the states belonging to this category have chosen a more liberal approach to the seatbelt defense than most of their counterparts. To refer to their statutory schemes as being on the "cutting edge," however, seems to amplify reality. Even the commentator who praised Tennessee's statute had to admit his own confusion at the products liability requirement.[166]

The seventh and final category of minority jurisdictions allowing the seatbelt defense is perhaps the most troubling. This category is worrisome for two primary reasons: first, it is the largest of the minority factions; and second, it seems to be the least logical of them all. States belonging to this group acknowledge the validity of the seatbelt defense, but place a percentage cap on the amount of a plaintiff's recovery that may be reduced.[167] Wisconsin limits the reduction to fifteen percent,[168] while several other states limit it to only five percent.[169]

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165. Arkansas and Tennessee belong to the sixth category. *See* Tenn. Code Ann. § 55-9-604; Ark. Code Ann. § 27-37-703. For the full text of the Tennessee statute, *see* Sec. II-B-3. The Arkansas statute is very similar to the Tennessee statute. The Arkansas statute provides:

> (a) (1) The failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action.
>
> (2) Provided, that evidence of such a failure may be admitted in a civil action as to the causal relationship between noncompliance and the injuries alleged, if the following conditions have been satisfied:
>
> (A) The plaintiff has filed a products liability claim other than a claim related to an alleged failure of a seat belt;
>
> (B) The defendant alleging noncompliance with this subchapter shall raise this defense in its answer or timely amendment thereto in accordance with the rules of civil procedure; and
>
> (C) Each defendant seeking to offer evidence alleging noncompliance has the burden of proving:
>
> (i) Noncompliance;
>
> (ii) That compliance would have reduced injuries; and
>
> (iii) The extent of the reduction of such injuries.
>
> (b) (1) Upon request of any party, the trial judge shall hold a hearing out of the presence of the jury as to the admissibility of such evidence in accordance with the provisions of this section and the rules of evidence.
>
> (2) The finding of the trial judge shall not constitute a finding of fact, and the finding shall be limited to the issue of admissibility of such evidence.

Ark. Code Ann. § 27-37-703.

166. Carter, *supra* n. 106, at 242-43. In his analysis of the two states' statutes, Carter notes that under both schemes "the admissibility of such evidence is limited to products liability cases, thereby excluding this evidence in a normal personal injury case, where it would seem that such evidence would be equally probative." *Id.* (footnote omitted).

167. Iowa, Michigan, Missouri, Nebraska, Oregon, West Virginia, and Wisconsin belong to the seventh category. *See* Iowa Code § 321.445(4)(b); Mich. Comp Laws § 257.710e(6); Mo. Rev. Stat. § 307.178(4); Neb. Rev. Stat. Ann. § 60-6,273; Or. Rev. Stat. Ann. § 18.590; W. Va. Code § 17C-15-49(d); Wis. Stat. § 347.48(g).

168. *See* Wis. Stat. § 347.48(g). The Wisconsin statute provides:

> Evidence of compliance or failure to comply with [the mandatory seatbelt usage statute] is admissible in any civil action for personal injuries or property damage resulting from the use or operation of a motor vehicle.... [S]uch a failure shall not reduce the recovery for those injuries or damages by more than 15%. This paragraph does not affect the determination of causal negligence in the action.

Id.

Missouri is the least generous, with a one percent reduction cap.[170] These percentage cap statutes make no sense. In enacting them, the legislatures have in

169. *See* Iowa Code § 321.445(4)(b); Mich. Comp Laws § 257.710e(6); Neb. Rev. Stat. Ann. § 60-6,273; Or. Rev. Stat. Ann. § 18.590; W. Va. Code § 17C-15-49(d). The Iowa statute provides in pertinent part:

> (b) In a cause of action . . . brought to recover damages arising out of the ownership or operation of a motor vehicle, the failure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault . . . . However, . . . the 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.
>
> (2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and 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 § 321.445(4)(b) (emphasis added). For the full text of the Michigan statute, *see supra* note 79. The Nebraska statute provides:

> Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it *shall not reduce recovery by more than five percent.*

Neb. Rev. Stat. § 60-6,273 (emphasis added). The Oregon statute provides:

> (1) In an action brought to recover damages for personal injuries arising out of a motor vehicle accident, evidence of the nonuse of a safety belt of harness may be admitted only to mitigate the injured party's damages. The mitigation *shall not exceed five percent* of the amount to which the injured party would otherwise be entitled.
>
> (2) Subsection (1) of this section shall not apply to:
>
> (a) Actions brought under [Oregon's products liability statute]; or
>
> (b) Actions to recover damages for personal injuries arising out of a motor vehicle accident when nonuse of a safety belt or harness is a substantial contributing cause of the accident itself.

Or. Rev. Stat. Ann. § 18.590 (emphasis added). West Virginia's statute provides in pertinent part:

> (d) A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages: Provided, That the court may, upon motion of the defendant, conduct an in camera hearing to determine whether an injured party's failure to wear a safety belt was a proximate cause of the injuries complained of. Upon such a finding by the court, the court may then, in a jury trial, by special interrogatory to the jury, determine (1) that the injured party failed to wear a safety belt and (2) that the failure to wear the safety belt constituted a failure to mitigate damages. The trier of fact may reduce the injured party's recovery for medical damages *by an amount not to exceed five percent* thereof . . . .

W. Va. Code § 17C-15-49(d) (emphasis added).

170. *See* Mo. Rev. Stat. § 307.178(4). The statute provides:

> In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt 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 in violation of this section must first introduce expert evidence proving that a failure to wear a safety belt contributed to the injuries claimed by plaintiff;

effect handicapped the defense; they recognize its validity, but only to the extent that the percentage limits will allow. A moment's reflection reveals that if the failure to wear a seatbelt could account for five percent of a plaintiff's injuries, then it could also account for ten, twelve, or even twenty percent as well. While clearly better than an outright refusal of the defense, statutory caps are still destined to lead to windfalls for plaintiffs who fail to buckle up.

The preceding summary of current seatbelt defense jurisprudence may well leave many readers confused. If this prediction proves accurate, then at least one portion of this paper will have succeeded in its goal. America's jurisdictions are both literally and figuratively *all over the map* with regard to the seatbelt defense.

III. OKLAHOMA'S TREATMENT OF THE SEATBELT DEFENSE

A. *Woods*

In 1969, the United States District Court for the Northern District of Florida was the first court to analyze the seatbelt defense under Oklahoma law in *Woods v. Smith*.[171] The court conceded the difficulty of its task from the outset, as Oklahoma had yet to address the issue.[172] Faced with the unenviable objective of applying "Oklahoma" law to an issue that Oklahoma courts would not confront for nearly a decade,[173] the court turned to the law of other jurisdictions.[174] Citing decisions from Oregon, North Carolina, and Florida, the court concluded that Oklahoma would likely not allow evidence of seatbelt nonuse to reduce or eliminate a plaintiff's recovery.[175]

> (2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt in violation of this section contributed to the plaintiff's claimed injuries, and may reduce the amount of the plaintiff's recovery *by an amount not to exceed one percent* of the damages awarded after any reductions for comparative negligence.

Mo. Rev. Stat. § 307.178(4) (emphasis added).

171. 296 F. Supp. 1128 (N.D. Fla. 1969). Unfortunately, the opinion contains none of the underlying facts regarding the litigation.

172. *Id.* at 1129. The judge opened his opinion with the following:

> Limned by this controversy is the quandary in which federal judges from time to time find themselves because of diversity jurisdiction. A Florida federal judge, with scant knowledge of Oklahoma law, must endeavor to decide the question presented as the courts of Oklahoma would decide it, without benefit of authoritative precedent from those courts.
>
> The question presented is whether failure of a plaintiff to fasten and use a seat belt in an automobile, to which he had access, may be presented at the trial as contributory negligence barring recovery, or in mitigation of damages.
>
> Exhaustive research by counsel, and independent research and investigation by the Court, has disclosed no Oklahoma decision on the problem. The courts of that state apparently have not yet ruled upon the question.

Id.

173. *See infra* Sec. III.C.

174. *Woods*, 296 F. Supp. at 1129.

175. *Id.* (citing *Robinson v. Bone*, 285 F. Supp. 423 (D. Or. 1968); *Miller v. Miller*, 160 S.E.2d 65 (N.C. 1968); *Brown v. Kendrick*, 192 So.2d 49 (Fla. App. 1st Dist. 1966)).

B. Henderson

Just one year later in *Henderson v. United States*,[176] a federal court revisited the issue of applying the seatbelt defense under Oklahoma law. In *Henderson*, a case arising out of the alleged negligence of a federal employee,[177] the United States argued on appeal "that the court erred in concluding that the nonuse of available seat belts by the appellees was not a defense to the action and could only be considered in mitigation of damages."[178] The Tenth Circuit noted the complete absence of guidance from Oklahoma's courts on the issue, and therefore concluded that under the circumstances the trial court's ruling could not be viewed as clearly erroneous.[179] Although its decision was somewhat at odds with the holding in *Woods*, the court pointed to the unsettled nature of the seatbelt defense and concluded that such a result was a plausible prediction of how an Oklahoma court would treat the defense.[180] The trial court's decisions to allow evidence of nonuse for the purposes of mitigation was thus affirmed.[181]

So in the early 1970's there were but two decisions addressing the seatbelt defense under Oklahoma law.[182] *Woods* refused the defense for any purpose,[183] while *Henderson* allowed it for the sole purpose of mitigation.[184] The conflicting nature of these holdings was further compounded by their unbinding status as mere federal interpretations of Oklahoma law.[185] Essentially, the seatbelt defense remained an unaddressed issue in Oklahoma.

C. Fields

In 1976, the Oklahoma Supreme Court finally tackled the seatbelt defense in *Fields v. Volkswagen of America, Inc.*[186] Fields was involved in an accident

176. 429 F.2d 588 (10th Cir. 1970).

177. *Id.* at 589. The plaintiffs originally brought suit against Roberta Jean Price in Oklahoma state court. The action was subsequently removed to Federal Court because "at the time of the accident Price, the driver of one of the automobiles, was an employee of the United States and acting within the scope of her employment when the collision occurred." *Id.* Price was subsequently dismissed as a defendant, with the United States taking her place. *Id.*

178. *Id.* at 591.

179. *Id.* The court stated: "In such circumstances we have often stated that in the absence of any state court decisions on the question raised, the district court's determination of the state law will not be disturbed on appeal unless clearly erroneous. The district court's determination was not clearly erroneous and is generally supported by the authorities." *Id.* (citations omitted).

180. *Id.* The court attempted to harmonize its decision and the *Woods* decision with the following language: "Although the Florida and Oklahoma district courts resolved the issue differently as to the mitigation of damages question, there was total harmony in that the nonuse of seat belts was not a defense under Oklahoma law, but rather to be viewed, if at all, from the standpoint of proximate cause." *Id.* (citations omitted).

181. *Henderson*, 429 F.2d at 591.

182. *Woods*, 296 F. Supp. 1128; *Henderson*, 429 F.2d 588.

183. *Woods*, 296 F. Supp. at 1129.

184. *Henderson*, 429 F.2d at 591.

185. These two opinions were completely non-binding in Oklahoma courts. The Supreme Court of Oklahoma did not even cite to either of them in its seminal case on the seatbelt defense, *Fields*, 555 P.2d 48. *See infra* Sec. III.C.

186. 555 P.2d 48.

whereby his van left the road and rolled over.[187] He was not wearing a seatbelt[188] and sustained injuries as a result.[189] Fields alleged the accident was caused by a defect in the van's steering mechanism that made it impossible to maintain control of the vehicle.[190] At the trial, Volkswagen unsuccessfully attempted to admit evidence of Fields' failure to use a seatbelt.[191] Volkswagen also failed in an attempt to have the jury instructed "that failure to wear a seatbelt could be considered" a failure to mitigate damages.[192] When faced with the issue of whether the trial court's rulings on these matters were correct, the Supreme Court answered in the affirmative:

> In view of the lack of unanimity on a proper seat belt system, the lack of public acceptance, and in the absence of any common law or statutory duty, we find that evidence of the failure to use seat belts is not admissible to establish a defense of contributory negligence or to be considered in mitigation of damages. For the present time we await the direction of the legislature.[193]

Perhaps the court anticipated a rapid response to their invitation; but if so, they would be disappointed because the Oklahoma legislature would not address the issue for over a decade.[194]

D. Comer

Although the Oklahoma legislature enacted an anti-seatbelt defense statute in 1987,[195] the Oklahoma Supreme Court would not interpret it until 1999. In *Comer v. Preferred Risk Mutual Insurance Co.*, the Comers' daughter died of injuries sustained in a vehicular accident.[196] She was a passenger in a church bus, and her supervisors did not ensure that she fastened her seatbelt, which in fact she did not.[197] The Comers sought recovery from the church, alleging a common law duty to make sure a child passenger is safely secured.[198] The church moved for dismissal for failure to state a claim upon which relief can be granted, arguing that the statute precluded all evidence related to seatbelts.[199] The court agreed and held the language of the statute precluded any and all evidence of the use or nonuse of seatbelts.[200]

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187. *Id.* at 52.
188. *Id.* at 61.
189. *Id.* at 52.
190. *Id.*
191. *Fields*, 555 P.2d at 61.
192. *Id.*
193. *Id.* at 62.
194. Oklahoma's statute regarding seatbelt evidence did not come into effect until 1987. Okla. Stat. tit. 47, § 12-420.
195. The statute reads: "Nothing in this act shall be used in any civil proceeding in this state and the use or nonuse of seat belts shall not be submitted into evidence in any civil suit in Oklahoma." Okla. Stat. tit. 47, § 12-420.
196. 991 P.2d at 1008.
197. *Id.*
198. *Id.* at 1009-10.
199. *Id.* at 1009.
200. *Id.* at 1014.

E. *Bishop*

Just a year after deciding *Comer*, the Oklahoma Supreme Court ruled on the admissibility of seatbelt evidence in yet another context found in *Bishop v. Takata*.[201] Like the Comers, the Bishops also lost their daughter in an automobile accident. The Bishops claimed their daughter's seatbelt became disengaged, thereby causing the injuries that precipitated her death.[202] Defendant Takata moved for summary judgment, arguing that Oklahoma's anti-seatbelt defense statute precluded the admission of any evidence pertaining to seatbelts.[203] Without such evidence, the Bishop's claim would fail.[204] In answering a certified question from the federal district, the Oklahoma Supreme Court determined that the statute was enacted to ensure against persons being penalized for failing to use a seatbelt.[205] The result sought by Takata would flout the legislature's intent and, in essence, create immunity for manufacturers of seatbelts.[206] The court refused to sanction such a result and held that the statute did not apply to product liability actions where a defective seatbelt mechanism is claimed.[207]

Despite the *Bishop* court's holding, Oklahoma remains part of the majority in refusing to allow defendants to plead the seatbelt defense. Section 12-420 quite clearly bans the use of any evidence related to seatbelt nonuse in a civil trial.[208] After *Bishop*, however, such evidence may be introduced when it is essential to the plaintiff's claim of a defect in the seatbelt mechanism itself,[209] but this is clearly not an adoption of the seatbelt defense. As the law stands in Oklahoma, evidence of seatbelt nonuse cannot be introduced for the purpose of reducing a plaintiff's recovery. With the unambiguous prohibitive language of section 12-420, it seems legislative action is the only way the seatbelt defense could possibly become a part of Oklahoma law.

IV. AN APPEAL TO REASON

> *It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain.*[210]

Although over a century has passed, Holmes' words hold just as true today as when they were first set down on paper. Implicit in our legal system is the notion that doctrines of the past are to be revered, but equally implicit is the idea

201. 12 P.3d 459.
202. *Id.* at 461.
203. *Id.*
204. *Id.* at 462.
205. *Id.* at 466.
206. *See Bishop*, 12 P.3d at 465-66.
207. *Id.* at 466.
208. *See supra* n. 195.
209. *Bishop*, 12 P.3d at 466.
210. Holmes, Jr., *supra* n. 15, at 468.

that we should not follow those doctrines blindly. When the seatbelt defense was first proposed decades ago, the majority of jurisdictions were probably quite right in refusing its application. Data regarding the efficacy of seatbelts was nearly nonexistent; few states had enacted legislation requiring seatbelt use; and the vast majority of vehicle occupants did not wear their seatbelts.[211] To reduce a plaintiff's recovery for failure to use a device, the virtues of which remained widely unknown, would have been a harsh result indeed. The same cannot be said today.

A. The Time Is Ripe

It is certainly time for the majority that still refuses the seatbelt defense[212] to reconsider its position. Likewise, those states that choose only to allow some adulterated form of the defense[213] should consider adopting it in whole. The evidence supporting the proposition that seatbelts save lives is insurmountable.[214] Although some plaintiffs have tried to argue that seatbelts may create more injuries than they prevent,[215] statistics tell us that the rewards of seatbelt use far outweigh the risks.[216] Also in favor of the seatbelt defense is the fact that nearly every state now has legislation requiring seatbelt use.[217] The enactment of such legislation is an overwhelming indication that public policy favors seatbelt use; and the adoption of the seatbelt defense is clearly consistent with such aims.[218]

Although the preceding paragraph suggests that the seatbelt defense is ripe for adoption, such an outcome will not be easy to achieve. Since nearly every jurisdiction has a statute of some kind regarding the admissibility of seatbelt evidence,[219] judges have little latitude when dealing with the seatbelt defense. If it is barred by statute, then the judge may not allow the defense to be contemplated by the trier of fact. The reality of this situation dictates that if any sweeping changes are to occur in seatbelt defense jurisprudence, they will have to occur in the legislative branch. The following analysis will show why each state legislature should move toward a full, uncompromised adoption of the seatbelt defense.

B. Arguments of the Opposition

Although opponents have proffered numerous reasons for the defense's refusal, three main arguments seem to emerge consistently. A brief consideration

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211. *See generally Fields*, 555 P.2d at 62.

212. *See supra* n. 121.

213. *See supra* Sec. II.C.2.

214. *See* Natl. Hwy. Traffic Safety Administration, *supra* n. 6; *Motor Vehicle Mfrs. Assn. of the U.S., Inc., v. St. Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983) ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries.").

215. *E.g. Law*, 755 P.2d at 1137.

216. *See generally* Thomas V. Harris, *Enhanced Injury Theory: An Analytical Framework*, 62 N.C. L. Rev. 643, 682-83 (1984).

217. *See* Dobbs, *supra* n. 14, at 516 n. 14.

218. *See Vizzini v. Ford Motor Co.*, 569 F.2d 754, 771 (3d. Cir. 1977) (Weis, J., dissenting).

219. *See supra* nn. 120, 156.

of these arguments should reveal their misleading and fallacious nature. The seatbelt defense is based on solid reason—even the most elegant sophistry cannot dismantle its foundation.

1. No Need to Anticipate the Negligence of Others

Those who oppose the seatbelt defense often claim that plaintiffs need not anticipate the negligent acts of others.[220] "This is an old saying [in tort law] that simply is not true."[221] The truth of the matter is that automobile accidents are so common that "[o]ver a lifetime, . . . it is almost certain that a motor vehicle accident *will* injure the average motorist."[222] Given this unfortunate reality the Arizona Supreme Court addressed the argument as follows:

> [W]e conclude as a matter of public policy that the law must recognize the responsibility of every person to anticipate and take responsible measures to guard against the danger of motor vehicle accidents that are not only foreseeable but virtually certain to occur sooner or later. Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others. *There is nothing to anticipate; the negligence of motorists is omnipresent.*[223]

Little more need be said with regard to this argument. Every motorist must recognize the likelihood of accidents and prepare accordingly. The first step of this preparation should occur with the latching of a seatbelt.

2. The Defense Would Result in a Windfall for Defendants

Opponents of the seatbelt defense also contend that defendants will receive windfalls if juries are allowed to reduce plaintiffs' recoveries for their failure to buckle up.[224] It should become immediately clear, however, that the exact opposite is true: refusal of the defense will result in windfalls for plaintiffs.[225] When the seatbelt defense is not allowed, plaintiffs recover for damages that would not have occurred but for their failure to buckle up. These results are incongruous with the aims of tort law and should not be allowed to continue. There is no doubt that plaintiffs should recover damages arising out of the negligence of defendants, but they should not be given the equivalent of a reward for failing to perform the prudent act of fastening a seatbelt.

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220. *E.g.* Dobbs, *supra* n. 14, at 516; *Law*, 755 P.2d at 1137.

221. Dobbs, *supra* n. 14, at 516 n. 15.

222. *Law*, 755 P.2d at 1140 (citing Hoglund & Parsons, *Caveat Viator: The Duty to Wear Seat Belts under Comparative Negligence Law*, 50 Wash. L. Rev. 1, 3 (1974)).

223. *Id.* (emphasis added).

224. *E.g.* Dobbs, *supra* n. 14, at 516; *Law*, 755 P.2d at 1137.

225. *See supra* Secs. II.B.1 & II.B.3 (discussion of *Thompson*, 501 N.W.2d 172, where parties stipulated that plaintiff's failure to use a seatbelt accounted for fifty percent of his injuries, but Michigan statute limited the reduction to five percent).

3. Failure to Wear a Seatbelt Does Not Cause Accidents

The final and perhaps most-often cited argument against the adoption of the seatbelt defense goes as follows: the plaintiff's failure to use a seatbelt did not cause the accident so it should not be allowed to reduce recovery.[226] The first part of this contention is entirely true. In only the wildest of fact patterns could one imagine the failure to wear a seatbelt as the actual cause of an accident. Despite its veracity, the argument misses the mark altogether. The seatbelt defense is not about what caused the initial accident; instead it is about what caused the plaintiff's subsequent injuries. As a result the defense applies not to liability, but to damages.

C. *The Distinction Between Liability & Damages*

Although an oft-confused concept,[227] the only time the seatbelt defense should be considered is during the apportionment of damages.[228] It is thus technically improper to examine the defense in the context of comparative negligence.[229]

Comparative negligence appraises the factors that caused the impact, collision or similar event and uses the relative degree of fault to reduce the damages. Mitigation or apportionment of damages and avoidable consequences, on the other hand, are directed toward activity (or nonaction) having a direct bearing on the extent of injury but not on the conduct causing the litigated event.[230]

Because the doctrine of mitigation (sometimes called avoidable consequences) typically applies to post-accident activities, many have argued that it is not appropriate for use in conjunction with the seatbelt defense.[231] The simple fact that the opportunity to mitigate in most other situations does not arise until after an accident has occurred should not preclude the defense's application under a mitigation theory. "The test should be not when the challenged activity or nonactivity took place. Rather, the focus should be whether it played a part in producing the event or was totally unrelated to that event and affected only the injury."[232]

V. CONCLUSION

When applied appropriately at the damages stage of the trial, the seatbelt defense will lead to the most equitable result for both parties. There will of course be questions of proof, which is a topic beyond the scope of this article. The variety

226. *E.g.* Dobbs, *supra* n. 14, at 516.
227. *E.g. Law*, 755 P.2d 1135; *Vizzini*, 569 F.2d 754.
228. *E.g. Law*, 755 P.2d at 1146 (Holohan, J., dissenting); *Vizzini*, 569 F.2d at 769 (Weis, J., dissenting).
229. *Id.*
230. *Vizzini*, 569 F.2d at 769 (Weis, J., dissenting).
231. *See id.* at 770.
232. *Vizzini*, 569 F.2d at 770 (Weis, J., dissenting).

of possible fact scenarios makes a discussion regarding what should constitute sufficient proof difficult, if not impossible. It suffices to say, however, that experts will almost invariably be required to testify as to the injuries the plaintiff incurred, but could have avoided with the use of a seatbelt. Ultimately, the defense relies on the jury taking all the evidence into account and making a final factual determination. There will undoubtedly be cases that present difficult factual determinations, but then again that is where the jury's role comes into play.

It is time for state legislatures to yield to common sense and recognize that the seatbelt defense is the only rational method for apportioning damages when a plaintiff has failed to wear a seatbelt. Because of the widespread confusion surrounding its application, each legislature should enact the correct and most sensible version of the defense. When a defendant proves that a plaintiff was not wearing a seatbelt, and that injuries could have otherwise been avoided, the seatbelt defense should be allowed. There should be no limiting percentage caps, for such schemes have no logical basis. Furthermore, the defense should not apply to determination of liability, but only to apportionment of damages. The seatbelt defense is not a radical doctrine but rather a rational approach to a very real problem. To refuse its application is to fly in the face of fundamental notions of logic, fairness, and public policy.

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