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THE SAFETY BELT DEFENSE AT TRIAL AND IN OUT-OF-COURT SETTLEMENT*

DAVID A. WESTENBERG**

I. INTRODUCTION

Previous inquiries into the safety belt defense have focused on it solely as an academic issue, ignoring its practical applications. Through analyses of both practice and precedent, this article provides insight into the current and potential role of the safety belt defense in civil litigation.

The article begins with an overview of the safety belt defense, including an evaluation of current appellate and statutory precedent. Based on interviews with leading attorneys involved in motor vehicle litigation, the article describes how the safety belt defense is used in practice. Trial strategies of both plaintiffs' and defense attorneys, selected from a cross-section of states, are explored and contrasted. The use and impact of the safety belt defense in out-of-court settlement negotiations, where most tort litigation is resolved, is addressed, as well as its link to appellate precedent. The article concludes with observations regarding the potential impact of statutes requiring safety belt use and possible areas of expansion for application of the safety belt defense. Finally, the article

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suggests strategies for promoting increased judicial and practical recognition of the safety belt defense.

II. The Safety Belt Defense: An Overview

A. *Contours of the Safety Belt Defense*

Successful use of the safety belt defense is fraught with difficulties. The case law is replete with examples of trial attorneys stymied at each step of the process.[1] Nonetheless, the safety belt defense has been successfully employed in many cases to reduce the plaintiff's recoverable damages for safety belt non-use.[2]

A defendant who invokes the safety belt defense in a personal injury lawsuit[3] attempts to prove that the plaintiff's failure to use an available safety belt caused or enhanced the plaintiff's injuries, thus reducing or barring the plaintiff's recoverable damages. First, the defendant must file a proper pleading in response to the plaintiff's suit. The defendant must next prove the plaintiff failed to engage an available safety belt. Third, the defendant must show a causal relationship between the failure to use a safety belt and the enhanced injuries. This ordinarily requires the testimony of an expert witness trained in accident reconstruction, biomechanics, engineering and/or medicine. Finally, the defendant requests the judge to charge the jury as to the legal consequences of any facts the jurors adduce from this expert testimony. Special interrogatories are frequently used to facilitate the jury's determination of the plaintiff's damages, reduced for any damages attributable to safety belt non-use. Jurors weigh safety

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

2. For documented examples of trial use of the safety belt defense, see *infra* App. A.

3. As used throughout this article, the phrase "personal injury" lawsuit refers to a tort action where the plaintiff alleges that the defendant's negligence has caused some harm to the plaintiff. The phrase "personal injury" lawsuit includes a product liability lawsuit brought against the vehicle manufacturer alleging that the manufacturer's negligence has caused an injury. Personal injury lawsuits are to be distinguished from suits, herein called "crashworthiness" claims, where the plaintiff sues the vehicle manufacturer for injuries that were enhanced after the initial collision because of a defect in the vehicle design or assembly. *See infra* notes 74-89 and accompanying text. The phrase "civil litigation" or "civil lawsuit" refers to both "personal injury" and "crashworthiness" claims.

belt evidence along with other evidence, and the introduction of the safety belt defense does not ensure a reduction in damages.[4]

B. *Current Status of the Safety Belt Defense*

The role of the safety belt defense in out-of-court settlements derives from its ultimate availability at trial, which, in turn, is predicated on the particular state's appellate and statutory treatment of the defense.

Appendix B summarizes the current status of the safety belt defense in personal injury litigation. Though defense attorneys have been raising the safety belt defense for more than twenty years,[5] the law remains unsettled in many states. Because states with no published opinions on point are the least populated, and some "no-fault" vehicle insurance schemes forbid lawsuits unless the victim's personal injuries exceed a specified threshold, many jurisdictions have not squarely addressed the issue. A number of courts, having faced the safety belt defense, have dealt with it only tangentially or have reached contradictory or uncertain results. The status of the safety belt defense remains unsettled in fourteen states.[6]

Fifteen state supreme courts[7] and nine state legislatures[8] have refused to allow the safety belt defense. Another three jurisdictions have rejected the defense through an intermediate appellate court[9] while the highest state court has remained uncommitted. However, few of these jurisdictions have rejected every possible variation of the defense.[10] The able defense attorney can still influence the development of the defense in these states.

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4. *See infra* App. A, ex. 3.

5. The first known use of the safety belt defense was in Stockinger v. Dunisch, No. 981 (Wis. Cir. Ct. Oct. 9, 1964), as discussed in 5 FOR THE DEF. 79 (1964) and 7 FOR THE DEF. 45-46 (1966), where the jury reduced the plaintiff's damages by 10% for her failure to use the available safety belt. 5 FOR THE DEF. 79 (1964).

6. In Alaska, Arkansas, Georgia, Hawaii, Iowa, Kentucky, Mississippi, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota, Vermont, West Virginia and Wyoming, the status of the safety belt defense is unsettled. *See infra* App. B. and App. C.

7. The highest appellate court has rejected the safety belt defense in Alabama, Colorado, the District of Columbia, Idaho, Illinois, Indiana, Kansas, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Texas and Washington. *See infra* App. B. New Mexico subsequently enacted the safety belt defense as part of its mandatory use statute. *See infra* App. B, note 25.

8. The state legislature initially rejected the safety belt defense in Maine, Minnesota, Tennessee and Virginia. In addition, sixteen of the recent mandatory safety belt use statutes restrict the introduction of evidence of non-use (eleven of these jurisdictions previously had rejected the safety belt defense). *See infra* note 70 and accompanying text; *see also infra* App. B and App. C. At least one court has questioned the constitutionality of a statutory bar to the safety belt defense enacted concurrently with a mandatory use statute. *See* Clarkson v. Wright, 108 Ill. 2d 129, 483 N.E.2d 268 (1985) (Ryan J., dissenting).

9. In Arizona, Delaware and Ohio, an intermediate appellate court has rejected the safety belt defense. *See infra* App. B.

10. *See infra* App. B. A number of courts have rejected one or more, but not all, of the following approaches to the safety belt defense: safety belt non-use as contributory negligence barring recovery; mitigation of the plaintiff's damages because of safety belt non-use; safety belt non-use as evidence of comparative negligence; and avoidable consequences. *See infra* notes 12-13, 93 and 100 and accompanying text. In addition, every appellate court has rejected the argument that safety

Appellate courts have articulated a variety of arguments in rejecting the safety belt defense. In order of frequency these arguments include:[11]

1. *Doctrine.* The safety belt defense does not conform readily with the traditional tort doctrines of contributory negligence,[12] avoidable consequences[13] or assumption of risk,[14] and it violates the maxim that the defendant "takes the plaintiff as he finds him."[15]

2. *Duty.* Closely related to doctrinal objections is the argument that a plaintiff cannot be negligent unless he has violated a statutory or common law duty. Most courts have refused to find a common law duty to use an available safety belt, or a statutory duty inferred from the existence of statutes requiring the installation, but not use, of safety belts. The recent enactment by twenty-seven jurisdictions of statutes requiring use of safety belts by vehicle occupants diminishes the impact of this argument, and may provide a doctrinal basis for use of the safety belt defense.[16]

3. *Separation of Powers.* To penalize the plaintiff for not buckling up, some courts have said, is a matter of public policy reserved for legislative bodies. The recent enactment of six statutes permitting the use of the safety belt defense reduces the viability of this argument.[17]

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belt non-use, in light of statutes mandating safety belt installation but not use, is negligence *per se*. *See infra* notes 53-55 and accompanying text.

11. *See infra* App. B for a breakdown of each court's reasons for rejecting the safety belt defense.

12. Contributory negligence is negligent conduct by the plaintiff concurring with the defendant's negligence to cause the plaintiff's injuries. Under the common law, contributory negligence is a total bar to recovery. Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809). Most courts have maintained that this harsh result cannot flow from the plaintiff's failure to use an available safety belt because such failure was not a concurring cause of the accident, but that it merely enhanced the resultant injuries. Comparative negligence has replaced contributory negligence in most states. *See infra* note 93 and App. D.

13. The doctrine of avoidable consequences (also called mitigation of damages) imposes a duty on the injured plaintiff to exercise reasonable diligence and ordinary care to minimize his damages after the defendant has injured him. *See* City of Duncan v. Nicholson, 118 Okla. 275, 247 P. 979 (1926) (plaintiff barred from recovering for those injuries that he could have prevented by seeking medical aid shortly after the accident). Most jurisdictions have held that this doctrine applies only to post-accident conduct, whereas the failure to buckle up occurs before the accident. The sole exception is New York, where the safety belt defense initially was permitted under the rubric of avoidable consequences. *See infra* App. B, note 26; *see also* 3 HOFSTRA L. REV. 883 (1975).

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

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

16. *See infra* notes 53-55 and accompanying text.

17. The Louisiana, Michigan, Missouri, Nebraska, New Mexico, and New York

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

5. *Common Practice.* Courts have noted that the vast majority of vehicle occupants do not use available safety belts. Therefore, courts have hesitated to infer that non-use violates the duty of care of the "reasonable man."

6. *Majority Rule.* Following several early appellate decisions, some courts simply chose to align themselves with what was perceived to be the majority rule of rejecting the safety belt defense.

7. *Practicality and Trial Administration.* The practical implications of allowing the safety belt defense have given courts pause. These courts have argued that the safety belt defense would unduly increase the length and expense of trials by causing a battle of experts. In addition, submitting the safety belt defense to the jury might encourage excessive speculation as to what might have happened. Finally, admission of safety belt evidence might imply that every conceivable safety device, such as headrests or helmets, must be used.

8. *Fairness.* Courts have argued that reducing the plaintiff's recovery because of failure to use an available safety belt is unfair. The negligent defendant would receive a windfall because he fortuitously injured an unbuckled plaintiff.

9. *Invidious Distinction.* Some courts have expressed concern that the safety belt defense creates an invidious distinction between vehicle occupants because not all vehicles are required to have safety belts. The possibility of a reduction in damages exists only when the vehicle is equipped with safety belts.

Only five states have appellate court precedent for the use of the safety belt defense in a motor vehicle personal injury lawsuit: California, Florida, New York, South Carolina and Wisconsin. In addition to these five states which have adopted the safety belt defense by appellate court action, five states, Louisiana, Michigan, Missouri, Nebraska and New Mexico, have inserted provisions in their mandatory safety belt use statutes explicitly permitting the introduction of the safety belt defense.[18] In each of these states the safety belt defense is limited to the issue of damages,[19] and is not relevant until the plaintiff has established the defendant's liability.[20]

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mandatory safety belt use statutes explicitly permit the defendant to raise the safety belt defense. *See infra* note 18 and accompanying text; *see also infra* App. C, notes 9, 11, 14-15, 17-18 and 23.

18. New York has a similar provision in its mandatory use statutes, but appellate law in this state has already permitted the safety belt defense. *See infra* notes 60-63 and accompanying text; *see also infra* App. B, notes 14, 18, 21-22 and 25-26 and App. C, notes 9, 11, 14-15 and 17-18.

19. *But see* Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (N.Y. App. Div. 1982); *infra* note 51 and App. B, note 26.

20. *See, e.g.*, Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974):

> We today hold that non-use of an available seat belt, and expert testimony in regard thereto, is a factor which the jury may consider, in light of all the other facts received in evidence, in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain. . . . However, as the trial court observed in its charge, the plaintiff's non-use of

One difficulty with restricting the safety belt defense to the jury's consideration of damages is that the issues of damages and liability may merge. The safety belt defense affects the liability issue when a jury concludes that failure to use a safety belt caused all of the plaintiff's injuries.[21] In a state such as South Carolina, which allows the safety belt defense under a "49-51" or "50-50" comparative negligence regime,[22] a finding that non-use of a safety belt caused more than one-half of the plaintiff's injuries will bar recovery completely.[23]

A large number of jurisdictions have not expressly accepted or rejected the safety belt defense. In these states, when the defendant raises the issue, the plaintiff will usually contest the admissibility of the evidence offered. The trial court can strike the issue from the defense pleading or refuse to permit the introduction of safety belt evidence.

Alternatively, the trial court may permit the defendant to present evidence supporting the safety belt defense. If the trial court's decision is not appealed, no published precedent will exist. Therefore, although a given state has no published appellate decisions addressing the propriety of the safety belt defense, defense attorneys may have attempted to use it at many trials, perhaps successfully. Published appellate opinions thus do not necessarily reflect fully the status of trial law, and the safety belt defense may have significance at trial and in settlement negotiations in states that have not addressed the issue in appellate opinions.

III. The Safety Belt Defense in Practice

A. *Methodology*

The first step in analyzing the safety belt defense in practice was to identify leading practitioners who specialize in motor vehicle civil litigation.[24] Attorneys

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an available seat belt should be strictly limited to the jury's determination of the plaintiff's damages and should not be considered by the triers of fact in resolving the issue of liability. Moreover, the burden of pleading and proving that non-use thereof by the plaintiff resulted in increasing the extent of his injuries and damages, rests upon the defendant. That is to say, the issue should not be submitted to the jury unless the defendant can demonstrate, by competent evidence, a causal relationship between the plaintiff's non-use of an available seat belt and the injuries and damages sustained. *Id.* at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920.

21. These cases are difficult to uncover because state trial court decisions ordinarily are not published, but they do exist. *See* Tome v. Buitrago, 75 A.D.2d 521, 426 N.Y.S.2d 1008 (N.Y. App. Div. 1980) (upholding jury's 100% reduction in plaintiff's damages because of safety belt non-use); *see also* Uribe v. Armstrong Rubber & Tire Co., 55 A.D.2d 869, 390 N.Y.S.2d 419 (N.Y. App. Div. 1977) (affirming 85% reduction in plaintiff's damages, from $150,000 to $22,500, because of safety belt non-use).

22. *See infra* App. D, note 1.

23. Wisconsin, distinguishing negligence causing the accident from negligence causing the injuries, has held that safety belt non-use not causing the accident cannot bar recovery, even if non-use causes more than 50% of the resultant injuries. *See infra* App. A, ex. 4.

24. Defense attorneys were identified with the aid of the Defense Research Institute (DRI) of Milwaukee, Wisconsin. Founded in 1960, DRI is closely aligned with the International Association

were chosen from states representing various positions on the safety belt defense. Attorneys were selected from one state which has statutorily barred the defense.[25] Next, attorneys were selected from five states that have rejected the safety belt defense in appellate decisions.[26] Attorneys were identified in four of the five states which have judicially endorsed the use of the safety belt defense.[27] Finally, attorneys were chosen from five states where the appellate status of the defense is unsettled.[28] A total of sixty-four attorneys (three of whom are trial judges) from sixteen states were selected.[29]

Each attorney was interviewed by telephone in conversations ranging in length from ten minutes to more than an hour. Some attorneys were contacted several times. Most defense attorneys were partners in leading defense firms with a substantial insurance company and motor vehicle manufacturer client pool. Plaintiffs' attorneys were about equally divided between solo and firm practices. Each attorney selected devotes a substantial portion of his practice to motor vehicle civil litigation. The attorneys interviewed averaged twenty-four years of experience, with a range of four to fifty-four years.[30]

B. *General Observations*

The role of the safety belt defense in out-of-court settlements derives from its ultimate availability at trial. In negotiations, a defense attorney can use the

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

Plaintiffs' attorneys were identified with the help of the Association of Trial Lawyers of America (ATLA) of Washington, D.C. ATLA's 50,000 members make it the largest organization of plaintiffs' counsel in the United States. ATLA's professional predilection is spelled out in its credo, which provides in part: "[E]specially to advance the cause of those who are damaged in person or property and who must seek redress therefor."

25. The Minnesota legislature has barred the use of the safety belt defense. *See infra* App. B, note 19.

26. The five states rejecting the safety belt defense by appellate decision are Arizona, Indiana, Michigan, Texas and Washington. *See infra* App. B. Michigan has since enacted legislation permitting the safety belt defense. *See infra* App. B, note 18; *see also* App. C, note 11.

27. California, New York, South Carolina and Wisconsin have judicially endorsed use of the safety belt defense. No attorneys were contacted in Florida because judicial recognition of the safety belt defense occurred too recently to assess its impact in this state. *See infra* App. B.

28. The appellate status of the defense is unsettled in Connecticut, Georgia, Massachusetts, New Hampshire and New Jersey. *See infra* App. B. Connecticut, Massachusetts and New Jersey subsequently barred the safety belt defense in conjunction with their mandatory use statutes. *See infra* App. C.

29. Because a number of attorneys requested anonymity, and to prevent the potentially embarrassing attribution of quotations to particular persons, attorneys are not identified by name in this article.

30. This sample does not comprise a scientifically-chosen random sample. The approach was more in the nature of a focus group interview, albeit individually conducted. The results reported in this article represent the consensus impressions which emerged after dozens of interviews during 1983 through 1985. When inconsistencies or contradictions appeared, attorneys were contacted again and the issue was pursued until the vagaries were resolved. Of course, this was not always possible

safety belt defense to reduce the plaintiff's demands only if there is a credible threat of its use at trial. In Minnesota and other states which have statutorily barred the safety belt defense, it is irrelevant to settlement talks.[31] Similarly, where the plaintiff's non-use clearly did not contribute to his injuries, the defense attorney will gain nothing by raising the defense during negotiations.[32] Where both parties realize that attempting to establish the safety belt defense at trial would not be cost-effective, the safety belt defense is not likely to be a factor in settlement. For example, where the plaintiff is seeking relatively small damages, or where the increase in injury severity from safety belt non-use appears small, defense counsel may find the cost of proving the safety belt defense to exceed the expected reduction in damages.[33]

In jurisdictions with appellate precedent hostile to the safety belt defense, the issue is usually of limited importance to settlements. Defense attorneys in these states noted two exceptions. First, if the particular factual pattern of the case and expected trial use of the safety belt defense can be distinguished from existing state precedent, safety belt non-use can be a factor in reducing the amount of case disposition.[34] Second, even in these states, defense counsel believe that the plaintiff's safety belt non-use is an intangible psychological factor which concerns plaintiffs' attorneys and tends to reduce demands.

The safety belt defense has the greatest potential as a negotiating tool in states which have judicially or statutorily endorsed its use at trial. Regardless of a state's position on the safety belt defense in personal injury lawsuits, however, the defense is likely to be more useful in reducing settlement amounts in crashworthiness cases. Because the damages sought in these cases are usually much higher, there exists more latitude for negotiation and a greater likelihood that it will be cost-effective to prove the safety belt defense at trial. This consideration holds true even in states where no judicial precedent exists for the safety belt defense in a crashworthiness case and it has been explicitly rejected in personal injury cases.[35]

A lack of bargaining power, due to attorney inexperience or incompetence, can undermine the force of the safety belt argument. In a state with limited or negative precedent respecting the safety belt defense, experienced counsel

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given the geographical and professional breadth of the sample. Nonetheless, care was taken to avoid reporting personal biases and misbeliefs which lack a reasonable basis in broader experience.

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

32. An example is a case where the plaintiff was severely burned in the fire that ensued after her stopped car was rear-ended by the defendant's car.

33. *See infra* note 51.

34. An example is the defense attorney in Indiana who successfully invoked the safety belt defense in settling a case which appeared likely to fit within the favorable dictum of Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966). *See infra* App. B, note 11.

35. Two examples of such states are Michigan and Washington. *See infra* notes 74-89 and accompanying text; *see also* App B, notes 18 and 37. The Michigan legislature subsequently adopted the safety belt defense. *See infra* App. B, note 18 and App. C, note 11.

may extract a concession from a plaintiff's attorney who is unable to evaluate the practical implications of the defense. One defense attorney reported cutting a plaintiff's demands in half by threatening to use the safety belt defense at trial, though the state's highest appellate court recently had precluded such a possibility. In another settlement negotiation, an inexperienced attorney recognized the potential of the safety belt defense, but refused to acknowledge that it could cost his client anything. The attorney forced the case to trial and received less after the forty percent reduction for safety belt non-use than he could have received in a settlement.

Not surprisingly, the role of the safety belt defense in out-of-court settlements was most pronounced in those four jurisdictions — California, New York, South Carolina and Wisconsin — with longstanding appellate precedent for its use at trial. An examination of the defense's role in out-of-court settlements begins with an appreciation of its use at trial in these states. Published decisions appear to put the safety belt defense on relatively equal footing in each of these states. Differences in its use at trial, however, became apparent during attorney interviews.

C. *Defense Strategies*

The safety belt defense is widely used in New York, Wisconsin and California, but less so in South Carolina. Defense attorneys in the former three states have developed a sophisticated procedure for raising and profiting from the safety belt defense.[36] The process begins with the defense pleading. New York attorneys reported that the defense is pleaded as an affirmative defense in every motor vehicle civil lawsuit, regardless of whether the plaintiff was using an available safety belt or whether non-use contributed to the injuries.[37] Florida also requires the safety belt defense to be pleaded as an affirmative defense. In California and Wisconsin the safety belt defense need not be pleaded affirmatively, and defense attorneys tend not to raise it until and unless they determine its applicability to the facts of the particular case.

The next step, during pre-trial discovery, is to determine whether a safety belt was available and, if so, whether it was used at the time of the accident. Although the plaintiff's favorable admission to these inquiries is desirable, it is not critical. The science of accident reconstruction is sufficiently advanced to overcome a plaintiff's false account of the circumstances. This determination is made simpler in Wisconsin because police reports usually indicate whether safety belts were available and used.

The importance of the safety belt issue during the pre-trial phase depends on the type of accident and the injuries sustained. Safety belt non-use may

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36. Judicial recognition of the safety belt defense in Florida, and the statutory acceptances in Louisiana, Michigan, Missouri, Nebraska and New Mexico, have occurred too recently for there to be widespread experience with it in these states.

37. New York's recent mandatory safety belt use statute provides that the safety belt defense must be pleaded as an affirmative defense. *See infra* App. C, note 18; *see also infra* App. B, note 26.

usually be inferred where the plaintiff is thrown through the windshield or ejected from the vehicle. The defense attorney will confirm this fact and preserve the evidence. In contrast, if the plaintiff is injured in a right angle accident, where the front of the defendant's vehicle strikes the side of the plaintiff's car, non-use of the safety belt may be irrelevant.

If the safety belt defense presents a viable issue for trial, the defense attorney will attempt to select jurors who are likely to believe the safety belt testimony and support a reduction in damages. One approach is to select jurors who usually use their safety belts, but this goal is ordinarily unattainable because the plaintiff's attorney is seeking the opposite result. If each juror has, or says he will have, an open mind on the issue, the defense attorney should be satisfied.

The next step is to present evidence at trial. New York requires the expert testimony of both an engineer, or accident reconstructionist, and a physician, or a person trained in both fields. The engineer describes the plaintiff's movements during the accident and the effect a safety belt would have had on those movements. The physician then testifies to the medical consequences of the difference in movements. In California, the testimony of an engineer is unnecessary if the plaintiff was ejected; medical testimony as to the consequences of the ejection will suffice. In Wisconsin, medical testimony is not required if engineering testimony establishes that a particular movement, such as contact with the dashboard or ejection from the vehicle, would have been prevented by the safety belt. In such a case, all of the plaintiff's injuries are presumed to have been caused by non-use, shifting to the plaintiff the burden of demonstrating otherwise.

Expert testimony is the key link in proving the safety belt defense, and its cost and availability will usually determine whether the defense counsel attempts to perfect the defense in a particular case. Most defense attorneys agreed that the cost of these experts is commensurate with the cost of experts generally. A typical fee is sixty-five to eighty-five dollars an hour, plus expenses. Thus, in a case requiring twenty hours of preparation and two days of trial attendance and testimony by each of two experts, the cost would be approximately $5,400 plus expenses.[38]

The defense attorney will abandon the safety belt defense if he does not expect to save at least this much. Despite the recent statutory adoption of the safety belt defense in Louisiana, Michigan, Missouri and Nebraska, attorneys in these states may be unlikely to pursue the safety belt defense unless the amount sought is very large. These statutes limit damages reductions to two percent, five percent, one percent and five percent, respectively.[39]

In some respects, the availability of expert witnesses is a more serious problem. Safety belt expert witnesses present the same problems as all professional expert witnesses. New York defense attorneys believe that only a few credible

38. This assumes an average fee of $75 an hour and eight hours per day of trial attendance and testimony, and does not include the cost of any increase in attorney time. Expenses, including transportation, housing and meals, can be substantial if an expert is retained from another part of the country.

39. *See infra* App. C, notes 9, 11 and 14-15.

experts with outstanding "national" reputations exist. These attorneys were dissatisfied with local college professors because they are inexperienced and do not project well to a jury. On the other hand, California defense attorneys reported success in using engineering and biomechanics professors from nearby universities. Vehicle manufacturers frequently retain "captive" experts who testify in defense of many of the manufacturer's product liability and crashworthiness suits. With regard to medical testimony, the sympathies of the best available expert — the physician who treated the plaintiff — tend to be adverse to the defendant's cause. If the plaintiff's doctor testifies, he may argue that the safety belt effects a "trading" of injuries, i.e., that it prevents some injuries but inflicts others.

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

During closing arguments, defense counsel typically emphasize that safety belts are provided for the safety of vehicle occupants; that they do no good unless used; and that the plaintiff's injuries could have been reduced or avoided if he had engaged the safety belt. Jury instructions should describe the legal consequences of the safety belt evidence.[40] The judge usually permits the defense attorney to suggest instructions and the latter seeks a favorable jury charge.[41]

Special interrogatories can be useful in focusing the jury's attention on safety belt non-use.[42] This approach requires the jury expressly to reduce the plaintiff's damages for non-use. After considering the equities of a particular case, the defense attorney may conclude this approach is undesirable.

Notwithstanding the admissibility of the safety belt defense, cases may arise where the equities are so strongly against the defendant that a jury is unlikely to reduce the plaintiff's damages. An example is a New York case where the plaintiff was orphaned when the drunken defendant's vehicle killed the plaintiff's parents. The death of the plaintiff's parents probably could have been prevented by safety belt use, but the defense attorney concluded that to raise the issue at trial would be futile and possibly counterproductive.

In contrast to its widespread use in California, New York and Wisconsin, the safety belt defense is infrequently utilized in South Carolina. South Carolina defense attorneys reported little use of the safety belt defense because they believe that juries simply ignore the evidence. In addition, South Carolina appellate precedent for the defense is the weakest of the five states.

D. *The Plaintiff's Response*

Plaintiffs' attorneys employ a number of strategies to overcome or diminish the impact of the safety belt defense. Once the defendant pleads the safety belt

40. Florida, New York and Wisconsin have adopted standard safety belt jury instructions. *See* FLA. STANDARD JURY INSTRUCT. (CIV.) No. 6.14; N.Y. PRAC. JURY INSTRUCT. 2:87.1; WIS. JURY INSTRUCT.-CIV. No. 1277; *see also* App. A, ex. 4.

41. *See infra* App. A, exs. 3 and 4.

42. *See infra* App. A, exs. 1, 2 and 4.

defense, the plaintiff's attorney will move to strike it from the pleadings. Alternatively, he will make a motion seeking to prevent reference at trial to the availability or use of safety belts. In states permitting the safety belt defense, these motions will fail. In uncommitted jurisdictions, the trial judge has discretion to allow the defense attorney to proceed with the safety belt defense.

During pre-trial discovery and at trial, the plaintiff's attorney will try to avoid harmful admissions by his client. The attorney's hope is that the plaintiff either was using his safety belt at the time of the accident, or that he will claim he was. One New York plaintiffs' attorney claimed that ninety percent of his clients use their safety belts. When questioned further, in light of national safety belt use statistics, he hedged: "Ninety percent of my clients say they used the seat belt. . . . They know the law; there's been a lot of publicity around here about reduced recoveries. . . . They know what to say. We don't encourage them to lie, but we point out implications."

If the plaintiff admits not using a safety belt, or the defense can otherwise establish non-use, the plaintiff's attorney will attempt to excuse the non-use. Common arguments are: the safety belt was not operational; the safety belt failed during the accident; the plaintiff did not see the belt; or the safety belt slipped behind the seat. A related tactic is to argue that although a working safety belt was available, in this particular instance the plaintiff could not have been expected to use it. This strategem has succeeded in some cases: persons who were too obese to wear the safety belt; persons who could not buckle up because of a phobia against being constrained (using psychiatric testimony); and pregnant women. These arguments, however, are only applicable under unusual circumstances.

Plaintiffs' attorneys reported that two particular strategies are the most effective. First is the "counter-expert," perhaps the plaintiff's physician, who testifies that had the plaintiff been using the safety belt, he would have sustained different injuries. As medical and scientific evidence of the efficacy of safety belts continues to increase, and with the advent of the lap/shoulder combination safety belt, the impact of this technique has faded. Plaintiffs' attorneys emphasized, however, that use of counter-experts is frequently worth a try, especially if some jurors harbor fears of being trapped in a burning or submerged vehicle. In an appropriate case, such as a right angle accident or other mishap where use of a safety belt may not have reduced the plaintiff's injuries, the plaintiff's counsel may successfully retain an expert witness to demonstrate that safety belt non-use was irrelevant to the plaintiff's injuries.

The most effective rebuttal to the safety belt defense, according to plaintiffs' attorneys, is the fact that the vast majority of Americans do not use their safety belts. Even though common practice does not conclusively define reasonable behavior, this argument apparently sways many jurors. Plaintiffs' attorneys frequently use statistics which indicate an overall safety belt use rate of only ten to fifteen percent. One plaintiffs' attorney said he does not spend money on safety belt experts, he simply tells the jury: "Government statistics show that only about 12% of the American public wear their safety belts. My client merely failed to do what most everyone fails to do. How can you say this is 'unrea-

sonable'?" Due to the likelihood that a majority of the jurors fail to buckle up, this technique is frequently successful.

E. *The Settlement Process*

The vast majority of all motor vehicle civil lawsuits are settled before final judgment. Thus, a particular legal rule, such as the safety belt defense, can be of far broader significance than a survey of appellate and trial decisions would indicate. This section analyzes the role of the safety belt defense in out-of-court settlements. As the safety belt defense plays no part in settling a lawsuit unless there is a realistic threat of its use at trial, this section will concentrate on those states and situations where this threat exists.

Negotiating an out-of-court settlement is a complicated, dynamic process. A multitude of factors interact to determine the final disposition of a case. Ordinarily no single factor is conclusive, and even in retrospect isolating the impact of a single variable is difficult. In states permitting the safety belt defense, its admissibility is not always determinative when negotiating. Other factors influencing out-of-court settlements include: the egregiousness of the defendant's behavior (was he drunk?); the damages sought; the amount of the defendant's insurance coverage; applicable rules of civil procedure; the relative bargaining skills and experience of the attorneys; the presence or absence of a judge during negotiations; the personalities of the parties; and, most importantly, the type and strength of the plaintiff's case. Attorneys from the three states where the safety belt defense is widely used at trial agreed that the plaintiff's non-use of an available safety belt can be a significant factor in reducing the settlement amount, especially when this non-use contributed to his injuries.[43]

Procedural differences may also affect the utility of the safety belt defense in settlement negotiations. Wisconsin procedural rules emulate the full disclosure spirit of the Federal Rules of Civil Procedure, encouraging pre-trial settlement because both sides know what to expect at trial. In contrast, New York procedural rules do not allow the pre-trial discovery of expert testimony unless the expert possesses information not ascertainable by others.[44] Therefore, in New

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

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

At their first settlement conference, the defense attorney emphasized the safety belt aspects of the case. The plaintiff's attorney did not dispute the point, and the parties subsequently settled for $70,000 immediately before trial. The defense attorney attributed the $30,000 reduction in damages to the safety belt defense and the expert's opinion.

44. An example of such information would be a civil engineer's measurements of the dimensions of a building that subsequently burned down.

York, the defense attorney's pre-trial threat to use the safety belt defense at trial will have less impact on negotiations because of the uncertainty involved.[45]

Negotiation techniques can bolster the impact of the safety belt defense on out-of-court settlements. Several defense attorneys stated that they concentrate on reaching agreement on a dollar figure, and then demand a percentage reduction for the plaintiff's failure to use a safety belt. This effectively results in double discounting because non-use tends subconsciously to reduce the plaintiff's demands. Experienced plaintiffs' counsel will admit that failure to use safety belts will cost their clients something. However, if there is uncertainty as to whether the plaintiff was buckled up, or whether non-use enhanced his injuries, the plaintiff's attorney is unlikely to settle until more facts are established. In New York, this can occur during the trial.[46]

The strongest factual patterns for proof of the safety belt defense, and thus the most conducive to settlement reductions, are the classic head injury/windshield and ejection cases. When bringing claims arising from these types of accidents, plaintiffs' attorneys feel vulnerable. Unless the equities otherwise favor the plaintiff, one plaintiffs' attorney said that he "almost ha[s] to give up on the facts because you can't negotiate from a losing position." In general, the less a case resembles the head injury/windshield and ejection prototypes, the stronger the plaintiff's negotiating position. With the polar case of a right angle accident where the front of the defendant's car collides with the side of the plaintiff's vehicle, the plaintiff's attorney generally need not concede a lower settlement figure.

Even in the worst case scenario, the role of the safety belt defense in settling should be put in perspective. Settlement reductions rarely reach fifty percent, and the truly large reductions ordinarily can be extracted only at trial.[47] Even in the most clear-cut case the potential success of the safety belt defense at trial is tempered by the jury's discretion.[48] Rather than give up one-half or two-thirds of his claim at the outset, the plaintiff usually prefers to rely on his attorney's wiles in arguing the case to the jury.

In effect, the safety belt defense tends to reduce damages settlements from ten to thirty percent. Within this range the defense becomes a form of insurance.

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

At the first negotiation session, the defense attorney stated that he planned to use the safety belt defense at trial. The plaintiff's attorney downplayed its significance and held firm on his demands. The parties met unsuccessfully several more times, and the case went to trial. After the plaintiff established the defendant's liability, the defense attorney introduced expert testimony showing that the plaintiff's non-use of the safety belt caused her ejection and thus a substantial portion of her injuries. The plaintiff's attorney did not challenge this testimony. Before the damages issue went to the jury, the parties settled for $190,000.

46. *See supra* note 45.

47. *See supra* note 21.

48. *See infra* App. A, ex. 3.

The plaintiff's attorney feels "vulnerable" and is "psychologically" influenced by his client's non-use, so he is willing to exchange the certainty of a reduction during settlement to avoid the possibility of no recovery at trial. Likewise, the defense attorney prefers the certainty of a significant gain for his client to the uncertainty and expense of a trial. This process disintegrates when either party makes unrealistic demands, underscoring why experienced attorneys who sense what a case is worth tend to settle when inexperienced counsel in the same case would go to trial.

As a general rule settlement reductions rarely are as dramatic as those found at trial. However, some examples of drastic settlement reductions exist. The nearly ninety percent settlement reduction in *Sams v. Sams*[49] may be best explained by the fact that neither attorney knew what to expect at trial. In this nascent stage, the safety belt defense was regarded as a variant of contributory negligence. It was thought to affect the issue of liability, and was not viewed as a basis for mitigation of damages.[50] Fearing no recovery at trial, the plaintiff in *Sams v. Sams* settled for a small portion of her original claim. In an unusual case where safety belt non-use caused the accident or all or most of the plaintiff's injuries, near-total settlement reductions can occur even today.[51]

One final observation involves the impact of a judge's participation in the settlement process. States vary in the degree to which a judge is permitted or required to take an active role in settlement. In California, mandatory court supervised settlement conferences are held. Attorneys and judges who have participated in these settlements report that the safety belt defense can be a greater force when it is institutionalized in the settlement process. One judge reported that he meets separately with each attorney and his client. He discusses the case frankly, pointing out its merits and weaknesses, and gives an objective

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49. 247 S.C. 467, 148 S.E.2d 154 (1966). The plaintiff in *Sams* was a passenger in a car driven by her defendant-husband. Only two weeks previously the husband had had safety belts installed in their car. The plaintiff alleged that her husband negligently drove the car off the road, causing her to strike the windshield and suffer grievous facial injuries. The evidence suggested that both parties had been drinking. The plaintiff sued her husband for $20,000 in damages (the extent of his insurance coverage), although her medical expenses alone exceeded this figure. In his response, the defendant attempted to plead the safety belt defense, but the trial court struck it from his pleading. The plaintiff rejected a settlement offer of $10,000. The defendant appealed the striking of the safety belt defense from his pleading, and the Supreme Court of South Carolina reversed and remanded the case, holding that the merits of the safety belt defense should be decided at trial in light of all the facts and circumstances. Before trial, the parties settled for $2,500.

50. *See, e.g.*, Kleist, *The Seat Belt Defense — An Exercise in Sophistry*, 18 HASTINGS L.J. 613 (1967).

51. *See* Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (N. Y. App. Div. 1982). In *Curry*, the plaintiff Curry and the defendants Moser and Cleary were traveling to work. Curry was riding in the front passenger seat of Moser's car, with Cleary following in her own car. Curry was sitting sideways in her seat, resting her left arm on the back of the seat while she talked with another passenger who was in the rear seat. She was not using the available safety belt. As the Moser vehicle turned narrowly into a left northbound lane, the Cleary vehicle made a wider turn into the adjacent right northbound lane. During the turn, the front passenger door of Moser's car opened and Curry fell out onto the roadway. She landed directly in the path of Cleary's car, which then struck her. Curry testified that she did not lean on the door and that she touched neither the door nor any other part of the car's interior as she fell out.

estimate of the recovery to be expected. When appropriate, he raises the safety belt issue and suggests that an adjustment be made. In this judge's experience, safety belt settlement reductions typically run from fifteen to twenty-five percent.

The impact of the safety belt defense on judicially supervised settlements is limited by the same factors influencing settlements in general. The truly large damages reductions are not reached by settlement, but are granted at trial. If one party is unrealistically obstinate, no settlement will occur.[52] Although the California system does not eliminate these limitations, it does remove the imperfect information barrier to realistic and equitable settlements.

IV. The Safety Belt Defense: Potential

A. *The Impact of Safety Belt Use Statutes*

In contrast to existing safety belt installation statutes,[53] recent statutes requiring the use of safety belts are of potentially pervasive importance to the safety belt defense. A safety oriented statute represents a legislative decision on a standard of conduct to which all persons must conform their behavior. It establishes a duty to behave in a specified manner. Violation of such a statute is negligence.[54] In such a case, the plaintiff need only show the existence of a valid statute, that the defendant violated it and that such violation caused the harm at issue. The question of negligence is not an issue for the jury. Safety belt use statutes eliminate the three strongest arguments against the safety belt

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At trial, the judge refused to admit safety belt evidence on the issue of liability. During the bifurcated damages phase of the trial, the safety belt defense was raised. The jury determined that plaintiff Curry's damages were $50,000. In response to an interrogatory, the jury found that all of the plaintiff's damages were sustained as a result of her failure to use the safety belt. Nonetheless, the jury reduced Curry's damages only to $26,250.

The supreme court, appellate division reversed because of this inconsistent verdict and remanded the case for retrial. The court also required that a joint trial be held on the combined issues of liability and damages. Thus, notwithstanding the customary New York rule requiring bifurcated trials, the court held that in the new trial the safety belt defense could go to the issue of liability. Alternatively, the jury in the new trial could find the co-defendants liable but agree with the first jury that safety belt use would have prevented 100% of Curry's damages. In either event, the plaintiff would receive much less than her $50,000 in damages.

Before the new trial, plaintiff Curry settled with defendant Moser for $2,000 and defendant Cleary for $4,000. This amounted to 88% less than the amount awarded by the first jury. Defense counsel believe that had the case gone to retrial the plaintiff would not have been awarded any damages, but it was cheaper to pay $6,000 than to go to trial and present a full safety belt defense.

52. Both qualifications are illustrated in an unsuccessful settlement conference in which this judge participated. The case involved a plaintiff who sought $100,000 in damages for injuries he suffered as a result of the defendant's negligent driving. In the mandatory settlement conference, the judge advised the plaintiff and his attorney that based on his experience the case was worth $75,000 to $85,000. The plaintiff agreed to accept a settlement as low as $75,000. The judge repeated his best guess of the case's value to the defendant and her attorney. The defense disagreed, believing the safety belt defense could reduce the amount at least 50%. Consequently, the defendant refused to settle for more than $50,000. The case went to trial. The jury verdict was $85,000.

53. *See supra* note 10.

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

defense: "doctrine," because the doctrine of negligence per se applies; "duty," because a statutory duty to buckle up exists; and "separation of powers," because the legislature approved by inference the safety belt defense.[55]

Until recently, no mandatory safety belt use statutes existed in the United States,[56] although at least twenty-nine foreign nations had such laws.[57] In 1984, the Department of Transportation issued a rule requiring motor vehicle manufacturers to equip all new passenger cars with automatic occupant restraints, either air bags or automatic safety belts, beginning with a three-year phase-in period covering the 1987 through 1989 model years.[58] However, the rule will be automatically rescinded if states comprising at least two-thirds of the United States population enact mandatory safety belt use statutes meeting specified standards by April 1, 1989.[59]

Spurred by motor vehicle manufacturer lobbying,[60] twenty-seven jurisdictions[61] have enacted legislation requiring the use of available safety belts by all front seat occupants. Six of these statutes contain provisions explicitly permitting introduction of the safety belt defense.[62] The existence of the passive restraint

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55. *See supra* notes 12-17 and accompanying text.

56. Brooklyn, Ohio enacted a mandatory safety belt use ordinance in 1966 which is still in effect. Werber, *A Multi-Disciplinary Approach to Seat Belt Issues,* 29 CLEV. ST. L. REV. 217, 239 n.103 (1980). However, even if an appropriate case were to arise in this city, the safety belt defense would be confronted with unfavorable Ohio precedent. *See infra* App. B, note 29. Puerto Rico since 1974 has had a mandatory safety belt use law encompassing all vehicle occupants. P.R. LAWS ANN. tit. 9, § 1212 (1976); *see also* Canales Velazquez v. Rosario Quiles, 107 P.R. Dec. 757 (1978).

57. Australia, Austria, Belgium, Bulgaria, the Canadian provinces of British Columbia, Ontario, Quebec and Saskatchewan, Czechoslovakia, Denmark, England, Finland, France, Greece, Hungary, Iceland, Israel, Japan, Luxembourg, Malawi, Malaysia, Netherlands, New Zealand, Norway, Portugal, South Africa, Soviet Union, Spain, Sweden, Switzerland, West Germany and Yugoslavia have enacted general mandatory safety belt use statutes. AMERICAN SEAT BELT COUNCIL (ASBC), INTERNATIONAL SEAT BELT AND CHILD RESTRAINT USE LAWS (1981); telephone interview with Michael R. Cloney, ASBC Secretary (Mar. 18, 1986); *see also* Legislative Note, *Seat Belt Legislation: An End to Cruel and Unusual Punishment,* 42 SASK. L. REV. 105, 105 (1977).

58. 49 C.F.R. § 571.208 (1985). This rule succeeds a 1977 rule, 42 Fed. Reg. 34,289 (1977), *rescinded in* 1981, 46 Fed. Reg. 53,419 (1981), that would have phased-in installation of passive restraints beginning with the 1982 model year. The 1981 rescission was held arbitrary and capricious by the Supreme Court in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

59. The minimum criteria for safety belt use statutes for this purpose are: each front seat occupant must be required to use a safety belt meeting federal standards; only medical waivers are permitted; minimum fine for violations of $25; statutory endorsement or prior appellate acceptance of the safety belt defense; compliance education program; and effective prior to or on September 1, 1989. 49 C.F.R. § 571.208 (1985). This new rule is also being challenged as arbitrary and capricious in a lawsuit, State Farm Mut. Auto. Ins. Co. v. Dole, Docket No. 84-1301, pending in the United States Court of Appeals for the District of Columbia.

60. *See, e.g.,* The Wall Street Journal, Jan. 3, 1985, at 13, col. 4.

61. Front seat occupants are required by law to use an available safety belt in Connecticut, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Texas, Utah and Washington. California, Massachusetts, Tennessee and Washington laws require both front and rear seat occupants to use available safety belts. *See infra* App. C.

62. The Louisiana, Michigan, Missouri and Nebraska statutes allow maximum reductions in plaintiff's damages of 2%, 5%, 1% and 5%, respectively. *See infra* App. B, notes 14, 18 and 21-

rule, and the momentum and publicity generated by these twenty-seven statutes, are likely to result in the enactment of additional mandatory safety belt use statutes.[63]

In addition to these statutes of general applicability, other state laws require particular classes of drivers or occupants to use a safety belt or similar restraint system. All fifty states and the District of Columbia have enacted child passenger restraint use statutes. Nine states require school bus drivers[64] and in one instance, school bus passengers,[65] to use safety belts. Use of safety belts is mandated for the drivers or passengers of driver training vehicles in three states.[66] In addition, occupants of firefighting vehicles in one state,[67] and drivers of public service vehicles in another state,[68] must wear safety belts. At the federal level, Bureau of Motor Carrier Safety (BMCS) regulations require drivers of vehicles used in interstate commerce to use available safety belts.[69]

For a variety of reasons, these statutes have not yet bolstered judicial acceptance or attorney use of the safety belt defense. Sixteen of the mandatory use statutes explicitly disallow the safety belt defense,[70] and the others are too new to have had a noticeable influence on safety belt defense litigation. Forty-four of the fifty-one statutes requiring the use of child passenger restraints preclude consideration of violations as evidence of negligence, or make the fact of non-use inadmissible in all civil actions, or both.[71] Most of the child passenger

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22 and App. C, notes 9, 11 and 14-15. The New Mexico statute permits introduction of the safety belt defense, and does not limit the amount of reduction for non-use. The New York statute also endorses the safety belt defense, but appellate courts in this state have already permitted its use. *See infra* App. B and App. C.

63. Mandatory safety belt use legislation is pending in Pennsylvania. TRAFFIC SAFETY PROGRAMS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., 1986 STATE MANDATORY SAFETY BELT LEGISLATION (July 3, 1986).

Congress in 1981 removed one financial incentive for state level mandatory safety belt use legislation by amending 23 U.S.C. § 402(j) to eliminate the Secretary of Transportation's authority to increase a state's highway safety funds by 25% of its highway-aid apportionment if the state has enacted a mandatory safety belt use statute. Pub. L. No. 97-35, § 1107(d), 95 Stat. 626 (1981). Puerto Rico had been the only recipient of such an incentive grant.

64. Alabama, Illinois, Maine, Massachusetts, Minnesota, New York, Ohio, Oklahoma and Virginia have enacted safety belt use statutes directed specifically at school bus drivers. *See infra* App. C.

65. Maine is the only state to enact a safety belt use statute for school bus passengers. However, there is no statutory requirement that passenger safety belts be installed in Maine school buses. *See infra* App. C.

66. California, New Jersey and Rhode Island have enacted safety belt use statutes for drivers or passengers of driver training vehicles. *See infra* App. C.

67. California's statutory scheme includes mandatory safety belt use for firefighting vehicle occupants. *See infra* App. C.

68. Rhode Island's statute includes a mandatory safety belt use requirement for public service vehicle drivers. *See infra* App. C.

69. 49 C.F.R. § 392.16 (1985). BMCS is an agency of the Federal Highway Administration, which in turn is part of the Department of Transportation. 49 C.F.R. § 301.60 (1985).

70. *See infra* App. C.

71. *See infra* App. C. Another state refuses to recognize a child's tort action against his parents for negligent supervision. Latta v. Siefke, 60 A.D.2d 991, 401 N.Y.S.2d 957 (N.Y. App. Div. 1978). The effect of this holding is that an injured child, whose parents are suing on his behalf,

restraint statutes and safety belt use laws are inapplicable in some contexts.[72] The statutes covering school bus drivers, driver training and firefighting vehicle occupants and public service vehicle drivers have not been so limited, but they apply to an extremely small fraction of the nation's motor vehicles. The BMCS regulation of potentially broad application has never been officially enforced.[73]

B. *The Safety Belt Defense in Product Liability and Crashworthiness Litigation*

Motor vehicle manufacturers long have incurred liability for injuries resulting from negligence in the design or assembly of their vehicles.[74] The safety belt defense may be used in these product liability cases just as it is in other civil litigation. More recently, courts have imposed liability on vehicle manufacturers on a "crashworthiness" or "second collision" theory.[75] The crashworthiness doctrine permits recovery for injuries attributable to a defect in the vehicle design or fabrication that aggravates the degree or amount of injuries sustained in an accident.

Underlying the crashworthiness doctrine is the manufacturer's duty to design and build a vehicle that is reasonably safe when used as expected. The possibility of being involved in an accident is a foreseeable "use" for which the vehicle must be reasonably safe. The claimant in this type of case does not allege that the defect caused the accident, only that it enhanced the resultant injuries. For example, if the plaintiff was thrown from the vehicle because of a defective door lock, he could recover from the vehicle's manufacturer for injuries he suffered as a result of the defective lock. He could not recover from the manufacturer for injuries sustained in the initial collision, although he perhaps could sue the driver of the vehicle with which he collided.

The crashworthiness doctrine can be traced to the seminal decision in *Larsen*

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cannot be penalized with a reduction in damages because of his parents' non-compliance with New York's child passenger restraint use statute. *See infra* App. C.

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

72. Child passenger restraint laws, for example, might not cover nonresidents, vehicles operated for hire, and situations in which the child's parent or guardian is "providing for the personal needs of the child." Examples among mandatory safety belt use statutes include vehicles that are too old or otherwise not required to be equipped with safety belts, frequently-stopping or slow-moving vehicles, persons with written medical or physical exemptions, buses and motorcycles.

73. Telephone conversation with Neill L. Thomas, Chief, Development Branch, BMCS (Feb. 3, 1983). According to Mr. Thomas, the practical constraint on enforcement of the BMCS safety belt regulation is that it is enforceable only by a criminal action brought by the Department of Justice against the motor carrier (the non-user's employer). *Id.*

74. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). *MacPherson* is "one of the few landmark cases in the history of our law," and has been accepted by every jurisdiction in the United States. C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 370 (3d ed. 1977).

75. *See generally* Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 ST. JOHN'S L. REV. 633 (1981); *see also* Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 WASHBURN L.J. 600 (1977).

v. General Motors Corp.,[76] and has been recognized in at least thirty-eight states.[77] The minority rule, stated in *Evans v. General Motors Corp.*,[78] holds that a manufacturer has no duty to build an accident-proof vehicle, because a collision is not a foreseeable use of the vehicle. Only two states adhere to the *Evans* viewpoint,[79] and *Evans* itself has been overruled.[80] The majority rule recognizing the crashworthiness doctrine constitutes a large potential area for expanded acceptance of the safety belt defense.

Although only five states have appellate precedent for the introduction of the safety belt defense in personal injury litigation, a growing number permit its use in crashworthiness cases. Safety belt evidence may be relevant to crashworthiness litigation for a number of purposes. The manufacturer may assert the safety belt defense to reduce the amount of the plaintiff's damages attributable to injuries enhanced by the vehicle defect.[81]

Evidence of safety belt availability and non-use has been admitted to show the presence of a compensating safety device and therefore that the vehicle as a unified whole was not defective.[82] This is a particularly appropriate use of

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76. 391 F.2d 495 (8th Cir. 1968) (applying Michigan law).

77. *See* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (applying Indiana law) (listing California, the District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin as the jurisdictions following *Larsen*); *see also* General Motors Corp. v. Edwards, slip op. (Ala. Nov. 15, 1985) (available on LEXIS, Alabama file); Cota v. Harley Davidson, 141 Ariz. 7, 684 P.2d 888 (Ct. App. 1985); Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978); Smith v. Ariens Co., 375 Mass. 620, 377 N.E.2d 954 (1978); Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985), *overruling* Walton v. Chrysler Motors Corp., 229 So. 2d 568 (Miss. 1969); Duran v. General Motors Corp., 101 N.M. 742, 688 P.2d 779 (1983); Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978).

78. 359 F.2d 822 (7th Cir.) (applying Indiana law), *cert. denied*, 385 U.S. 836 (1966).

79. *See* Wilson v. Ford Motor Co., 656 F.2d 960 (4th Cir. 1981) (applying North Carolina law); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D.W. Va. 1971) (applying West Virginia law), *aff'd*, 472 F.2d 240 (4th Cir.), *cert. denied*, 412 U.S. 940 (1973).

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

81. *See infra* App. A, ex. 5; *see also* Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985) (safety belt defense permitted to reduce plaintiff's damages in crashworthiness case); Wilson v. Volkswagen of Am., Inc., 445 F. Supp. 1368, 1373 (E.D. Va. 1978) (applying Virginia law) (evidence of safety belt non-use admissible for purpose of mitigation of damages in crashworthiness case); Jordan v. General Motors Corp., slip op. (E.D. La. July 18, 1985) (available on LEXIS, Genfed library) (applying Louisiana law) (evidence of safety belt non-use admissible as it relates to plaintiff's duty to mitigate damages); Breault v. Ford Motor Co., 364 Mass. 352, 305 N.E.2d 824 (1973) (leaning toward admissibility if causal connection established). *But see* DeGraaf v. General Motors Corp., 135 Mich App. 141, 352 N.W.2d 719 (1984) (reversing a trial court for permitting the introduction of safety belt evidence); Seese v. Volkswagenwerk, A.G., 648 F.2d 833 (3d Cir. 1981) (applying North Carolina law) (evidence inadmissible); Vizzini v. Ford Motor Co., 72 F.R.D. 132 (E.D. Pa. 1976) (applying Pennsylvania law) (evidence inadmissible); Daly v. General Motors Corp., 20 Cal. 3d 725, 745, 575 P.2d 1162, 1174, 144 Cal. Rptr. 380, 392 (1978) (evidence inadmissible).

82. *See* Hermann v. General Motors Corp., 720 F.2d 414 (5th Cir. 1983) (applying Louisiana law); Binion v. General Motors, Inc., No. 80-1998, slip op. (5th Cir. Apr. 8, 1981) (per curiam) (applying Texas law); Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980) (applying New Jersey law), *cert. denied*, 450 U.S. 959 (1981); Wilson v. Volkswagen of Am., Inc., 445 F. Supp.

safety belt evidence because the plaintiff is challenging the overall safety of the vehicle, and safety belts are an essential part of the total safety package provided by the manufacturer. The manufacturer may be held liable for providing a defective safety belt, as in the case of a plaintiff who was injured when her safety belt broke during a ninety mile-per-hour collision.[83] Consequently, the manufacturer should be permitted to show that non-use of an available safety belt, and not a defect in the vehicle, caused the injuries. Evidence of safety belt non-use has also been admitted to show that the plaintiff misused the vehicle by not wearing an available safety belt and therefore assumed the risk of injury created by non-use.[84]

Courts have held the law of at least ten states to be consistent with the safety belt defense in crashworthiness cases.[85] However, courts in four of these ten states have rejected the safety belt defense in personal injury litigation.[86] Of the five states with appellate precedent for the safety belt defense in personal injury litigation, only one has rejected the defense in crashworthiness cases, and this rejection is not total.[87] Crashworthiness litigation presents the single most compelling area for recognition of the safety belt defense.[88]

The potential impact of the safety belt defense in products liability and crashworthiness litigation is enormous. Multi-million dollar judgments abound in these cases, and a mere ten or twenty percent reduction in damages can be worth hundreds of thousands of dollars.[89] Appropriate use of the safety belt defense could reduce significantly a motor vehicle manufacturer's exposure to tort judgments and settlements.

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at 1371 (applying Virginia law); Daly v. General Motors Corp., 20 Cal. 3d 725, 746, 575 P.2d 1162, 1174-75, 144 Cal. Rptr. 380, 392-93 (1978); McElroy v. Allstate Ins. Co., 420 So. 2d 214 (La. Ct. App. 1982).

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

84. *See* Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (applying Nebraska law); General Motors Corp. v. Walden, 406 F.2d 606 (10th Cir. 1969) (applying Arizona law); Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978). *But see* MacCuish v. Volkswagenwerk A.G., Slip Op. (Mass. Ct. App. June 20, 1986) (available on LEXIS Massachusetts file) (holding safety belt non-use not to be product misuse); Daly v. General Motors Corp., 20 Cal. 3d 725, 745, 575 P.2d 1162, 1174, 144 Cal. Rptr. 380, 392 (1978).

85. Arizona, California, Colorado, Louisiana, Nebraska, New Jersey, New York, Texas, Virginia and Wisconsin law has been held to permit the use of the safety belt defense in crashworthiness suits. *See supra* notes 81, 82 and 84. *But see infra* App. B.

86. Arizona, Colorado, New Jersey and Texas courts have rejected the safety belt defense in personal injury litigation. In addition, the mandatory use statutes in New Jersey and Texas prohibit the safety belt defense. *See infra* App. B and App. C.

87. Although California has accepted the safety belt defense in personal injury litigation, it has partially rejected the same defense in crashworthiness claims. *See supra* notes 81, 82 and 84.

88. Werber, *supra* note 56, at 250.

89. For example, in the case of Hall v. General Motors Corp., 647 F.2d 175 (D.C. Cir. 1980), the plaintiff recovered $4,750,000 in damages for quadriplegia suffered when his five-month-old car veered unexpectedly across the road and struck a tree. In Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), the driver and his wife recovered a $5,825,000 judgment from their imported subcompact car's manufacturer for brain damage sustained in a head-on collision with a standard-sized car.

C. *Promoting the Safety Belt Defense*

The safety belt defense has not received widespread judicial acceptance. Only five states have appellate precedent for the safety belt defense and only five additional states have statutorily endorsed its admissibility in personal injury litigation. Although more states permit the safety belt defense in crashworthiness cases, they do not comprise a majority. However, the law is unsettled as to personal injury lawsuits in fifteen states, and nearly forty states have yet to consider its admissibility in crashworthiness litigation.[90] This void represents an opportunity for attorneys, government agencies and all parties interested in public safety[91] to promote further judicial recognition of the safety belt defense. Each of the arguments[92] made by courts rejecting the safety belt defense can and should be rebutted.

In the early 1970's, the search for a doctrinal justification for the safety belt defense quickly focused on comparative negligence.[93] Commentators suggested that the safety belt defense would find acceptance as states shifted from contributory to comparative negligence.[94] This assertion has proved only partially correct. Forty-four states have embraced some form of comparative negligence,[95]

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90. *See supra* notes 74-89 and accompanying text; *see also infra* App. B.

91. This statement assumes that a given tort rule, such as the safety belt defense, affects behavior. Whether people comport their conduct with regard to tort liability rules is an empirical question, but some theoretical considerations can be articulated. First, there cannot be any deterrent effect unless there is a link between the person who causes the accident and the person (or entity) that actually pays the tort judgment. The evidence suggests that the tortfeasor rarely pays. Either his insurance company pays, and the only cost felt by the insured defendant is an increase in future premiums, or the public at large pays as consumers and investors. This link could be strengthened if liability insurance companies routinely sought subrogation from their insureds.

Even if the defendant bears the monetary consequences of his negligence, no deterrence exists unless the defendant could have avoided the accident. A high percentage of accidents are unintentional, and the defendant could not have foreseen or prevented its happening. This seems true with the majority of automobile accidents, which comprise most accident litigation. It might be less true of manufacturers, who are uniquely aware of statistical probabilities of injuries from their products, and perhaps here there could be a meaningful deterrent for injury-causing actions.

See generally P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 556-68 (3d ed. 1980); G. CALABRESI, THE COSTS OF ACCIDENTS 244-73 (1970); Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence,* 67 MICH. L. REV. 421 (1969). *Compare* O'Connell, *Taming the Automobile,* 58 NW. U.L. REV. 299, 311-12 (1963) (arguing that tort law deters very little accident-causing or injury-enhancing behavior) *with* Lawton, *Psychological Aspects of the Fault System as Compared With the No-Fault System of Automobile Insurance,* 20 U. KAN. L. REV. 57, 58-64 (1971) (arguing that a fault-based and personal liability-based system maximizes deterrence).

92. See *supra* notes 12-17 and accompanying text.

93. In contrast to contributory negligence, comparative negligence generally calls for a reduction in the plaintiff's damages in proportion to his fault, relative to that of the defendant, in bringing about the harm.

94. "[T]he advent of the comparative negligence standard . . . will ineluctably lead to the adoption of the seat belt rule as a significant element of the damage apportionment equation." Hoglund & Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law,* 50 WASH. L. REV. 1, 14-15 (1974); *see also* Miller, *The Seat Belt Defense Under Comparative Negligence,* 12 IDAHO L. REV. 59 (1975).

95. *See infra* App. D.

and federal law applies it in several areas.[96] Comparative negligence, however, has had little impact on the safety belt defense. Of the ten states considering the propriety of the safety belt defense under comparative negligence principles, eight have rejected it.[97] These courts have reasoned that whether it is called contributory or comparative, there can be no negligence absent some duty to buckle up. The enactment of safety belt use statutes in twenty-seven jurisdictions allows defendants to argue that injured plaintiffs had a statutory duty to use available safety belts.[98]

States without mandatory use laws are not devoid of doctrinal support for the safety belt defense. Dean Prosser recognized that the safety belt situation does not fit conveniently within traditional tort doctrines when he wrote:

> A more difficult problem is presented when the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages. In such a case, [some courts] have apportioned the damages, holding that the plaintiff's recovery will be reduced to the extent that they have been aggravated by his own antecedent negligence. This would seem to be the better view, unless we are to place an entirely artificial emphasis upon the moment of impact, and the pure mechanics of causation. Cases will be infrequent, however, in which the extent of aggravation can be determined with any reasonable degree of certainty, and the court may properly refuse to divide the damages upon the basis of mere speculation.[99]

The Restatement of Torts adopts a similar view.[100] This apportionment rule is consistent with the safety belt defense. Failure to use an available safety belt

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

97. Churning v. Staples, 628 P.2d 180 (Colo. Ct. App. 1981); Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (1975); Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985); Schmitzer v. Misener-Bennett Ford, Inc., 135 Mich. App. 350, 354 N.W.2d 336 (1984); Kopischke v. First Continental Corp., 187 Mont. 471, 610 P.2d 668 (1980); Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985); Mackey v. Buchanan, No. E-85-20, slip op. (Ohio Ct. App. Feb. 21, 1986) (available on LEXIS, Ohio file); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977). The following courts have adopted the safety belt defense under comparative negligence principles: Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). *See infra* App. B.

98. This claim is not available in those states banning the safety belt defense in their mandatory use statutes. *See supra* notes 53-55 and accompanying text; *see also infra* App. C.

99. W. PROSSER, *supra* note 54, at § 65.

100. The Restatement provides, in part:

§ 433A. Apportionment of Harm to Causes

(1) Damages for harm are to be apportioned among two or more causes where
   (a) there are distinct harms, or
   (b) *there is a reasonable basis for determining the contribution of each cause to a single harm.*
(2) Damages for any other harm cannot be apportioned among two or more causes.

does not automatically reduce the damages available to the plaintiff, but the defendant has the opportunity to demonstrate to the trier's satisfaction that the plaintiff's conduct contributed to his harm.

Judicial concerns about duty and common practice are unwarranted. Absent a mandatory safety belt use law, non-use does not breach a statutory duty and hence negligence per se does not apply. The reasonable man standard, however, seems to have been forgotten. When a young child darts in front of a speeding car, he is not acting reasonably simply because no statute forbids the act or because children often run carelessly into streets. The vast majority of motor vehicle occupants recognize the incontrovertible safety value of motor vehicle safety belts. Persons who fail to expend the minimal effort required to engage the safety belt are unreasonably exposing themselves to an unneccesary risk. Nineteen years ago, after a review of less conclusive literature on the safety value of these restraints, the Supreme Court of Wisconsin imposed on vehicle occupants a common law duty to use an available safety belt.[101]

Furthermore, common practice is not dispositive of what constitutes reasonable behavior. The fact that a majority of people act in a certain way does not make that action reasonable. This is especially true when the majority's behavior involves unnecessary risks;[102] Prosser termed such behavior "customary negligence."[103] The common law standard of reasonableness is an aspirational standard — how people ought to act.[104]

Other arguments for rejection of the safety belt defense are readily discredited. Apportioning damages in safety belt cases is at least as practicable as

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RESTATEMENT (SECOND) OF TORTS § 433A (1965) (emphasis supplied).

Explanatory comment c to § 433A provides in part:

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

Id. The New Mexico Court of Appeals quoted these provisions and explicitly adopted this approach when it endorsed the safety belt defense. *See infra* App. B, note 25.

101. While we agree with those courts that have concluded that it is not negligence *per se* to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belts in the vehicle, we nevertheless conclude that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.

. . . On the basis of [accident statistics], and as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts.

Bentzler v. Braun, 34 Wis. 2d at 385, 386-87, 149 N.W.2d at 639, 640.

102. 65 C.J.S. *Negligence* § 16 (1966); 57 AM. JUR. 2d *Negligence* § 78 (1971).

103. W. PROSSER, *supra* note 54, at § 33.

104. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (finding the entire barge industry negligent for not providing radios on board ship).

the apportionment required for comparative negligence and contribution among joint tortfeasors.[105] The defendant who raises the safety belt defense has the burden of proving which injuries are attributable to non-use. If the defendant does not carry this burden, the issue will not be submitted to the jury.[106]

Courts have expressed fears that the safety belt defense will require costly and lengthy expert testimony. However, many trials already involve one or more experts, and introduction of an additional expert on the safety belt issue need not necessarily increase trial cost or length. Local college or university professors can conduct relatively simple studies and reach persuasive conclusions in many instances if furnished with sufficient information. This information should include the dimensions and interior configuration of the vehicle, the size and weight of the injured person, the safety belt design, and the vehicle's speed and direction at the time of the accident.

Charges that the safety belt defense creates an invidious distinction are no longer valid. Safety belts are now available to virtually all vehicle occupants.[107] Each party to an accident should therefore be required to bear the consequences of his own fault.

Efforts toward increased acceptance and use of the safety belt defense should be concentrated in states where the issue is unresolved. Legislatures should be encouraged to enact mandatory safety belt use laws covering, if not the general population, at least those classes of persons who are most vulnerable in accidents or who bear responsibility for the safety of others. All states have passed child passenger restraint use statutes. Similarly, state legislatures should require safety belt use by occupants of school buses, driver training vehicles, emergency vehicles and public service vehicles,[108] as well as by drivers of vehicles for hire. Young or inexperienced drivers, who are involved in a disproportionate number

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

106. Prosser argued that an accident resulting in death can never be separated into constituent causes because "death cannot be divided or apportioned except by an arbitrary rule devised for that purpose." W. PROSSER, *supra* note 54, at § 52. According to the attorneys interviewed and the published appellate cases, there appears never to have been a successful use of the safety belt defense in a wrongful death lawsuit. The court in England v. United States, slip. op. (M.D. Fla. Apr. 14, 1986) (available on LEXIS, Genfed library) rejected the application of Florida's safety belt defense in a wrongful death case.

107. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1985). In addition, there is authority for the proposition that a motor vehicle owner has a duty to equip his vehicle with safety belts if they have not been provided by the manufacturer. Twohig v. Briner, 168 Cal. App. 3d 1102, 214 Cal. Rptr. 729 (1985) (triable issue of fact exists regarding duty of vehicle owner to provide safety belts for use by passengers); McMahon v. Butler, 73 A.D.2d 197, 426 N.Y.S.2d 326 (1980) (holding motorist negligent, as a matter of law, for failing to have safety belts installed in his car). *But see* Brightly v. Lydon, 117 Misc. 2d 854, 459 N.Y.S. 2d 398 (N.Y Sup. Ct. 1983) (distinguishing *McMahon* because the defendant's 1961 vehicle predated New York's safety belt installation statute). In addition, at least one court has held that in the absence of an applicable statute, parents do not have a duty to purchase and install a child passenger restraint device. Selfe v. Smith, 397 So. 2d 348 (Fla. 1st D.C.A. 1981).

108. California, Colorado, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, New Mexico, Ohio, Oregon, South Carolina, South Dakota,

of accidents, might also be required to use safety belts.[109] At a minimum, states should repeal existing statutory barriers to the use of the safety belt defense.[110]

At the federal level, safety belt use should be required and enforced in all government vehicles and in vehicles used in interstate commerce. Provisions could be inserted in government contracts to require safety belt use in all vehicles used in connection with contract performance. These statutes and regulations would directly encourage safety belt use, as well as adding an indirect incentive by facilitating use of the safety belt defense.

Efforts should be made to eliminate doubts about the efficacy of safety belts. Public education programs emphasizing safety belt effectiveness should be expanded; films of simulated crashes can be a powerful reminder of the consequences of non-use. Institutional channels, such as insurance companies, schools (especially driver training courses), law enforcement agencies and governmental units, should encourage use of safety belts. Medical and scientific research reaffirming the utility of safety belts should be financed, publicized and made available to attorneys and legal associations. Defense attorneys might be aided by a geographical listing of available experts. To reduce the need for extensive expert testimony, trial judges should be urged to take judicial notice when appropriate.

Tennessee, Utah, Vermont, Washington and Wisconsin have policies requiring state employees to use safety belts while driving state vehicles. TRAFFIC SAFETY PROGRAMS NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN. STATE EMPLOYEE SAFETY BELT USE POLICIES (Apr. 5, 1985).

109. Prior to passing its mandatory use statute, New York enacted a statute requiring drivers aged 16 and 17 years (and certain other classes of inexperienced drivers) to use a safety belt.

110. Iowa recently repealed its long standing statutory ban to the safety belt defense

APPENDIX A
EXAMPLES OF TRIAL USE OF THE SAFETY BELT DEFENSE

Example 1: Vernon v. Droeste

Facts: The facts in the early case of *Vernon v. Droeste*[1] present a classic safety belt defense situation. The plaintiff's car collided nearly head-on with the defendant's car which was attempting a left turn. The defendant, who was using his safety belt, was slightly dazed but uninjured. The plaintiff, who was not wearing an available safety belt, was propelled forward through the windshield. He suffered facial lacerations, a cut knee and a bruised elbow.

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

Jury Charge and Verdict: The jury's findings with respect to the safety belt defense were expressed through the following special interrogatories and answers:

SPECIAL ISSUE NO. 12

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

Answer We do or We do not.

Answer: We do.

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

SPECIAL ISSUE NO. 13

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

Answer We do or We do not.

Answer: We do.

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

SPECIAL ISSUE NO. 14

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

Answer in percentages, if any, or none.

Answer: 95%.

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1. No. 17, 1705 (Tex D. Ct. June 9, 1966); *see* Comment, *Seat Belts and Contributory Negligence*, 12 S.D.L. REV. 130 (1967) (discussion of *Vernon*). Later Texas appellate decisions have repudiated the safety belt defense. *See infra* App. B.

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Judgment: Under Texas law of contributory negligence,[2] the plaintiff was completely barred from recovering any damages. The case was not appealed.

Example 2: Constantino v. Town of Babylon

Facts: In the case of *Constantino v. Town of Babylon,*[3] the plaintiff was a passenger in a car which left the road and struck a tree at high speed. The plaintiff suffered a compound skull fracture with depressed brain injuries and various head and face lacerations when he was flung into the car's windshield. Two ounces of his brain tissue were destroyed during surgical removal of glass fragments. The plaintiff sued the driver of the vehicle in which he was riding, alleging that excessive speed and a defective headlight caused the accident. The plaintiff also sued the town in which they were driving, on the theory that "titanic" potholes in the roadway contributed to the driver losing control of the car.

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

Jury Charge and Verdict: The judge advised the jurors that they were to debate the question of the safety belt defense only after they had resolved the questions of liability and the amount of damages sustained by the plaintiff. The jury's findings and verdict were expressed through the following special verdicts and answers:

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

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

Examle 3: Coryell v. Conn

Facts: In *Coryell v. Conn,*[4] the plaintiff was a passenger in a car driven by

2. Texas has since adopted comparative negligence. *See infra* App. D.

3. (N.Y. Sup. Ct. Oct. 1980); *see also* Brief of Defendant-Appellant, Constantino v. Town of Babylon (N.Y. App. Div. Sept. 28, 1981).

4. 88 Wis. 2d 310, 276 N.W.2d 723 (1979).

her husband. The defendant's vehicle crossed over the highway dividing line and struck the plaintiff's car head-on. Both drivers were using safety belts and sustained only minor injuries. The plaintiff, who was not using her safety belt, was thrown forward into the dashboard. She suffered a fractured sternum and a soft-tissue injury to her right knee.

Trial: The plaintiff admitted not wearing the available safety belt. The plaintiff, who was five feet four inches tall and weighed 175 pounds at the time of the accident, said she did not use the safety belt because it was tight and uncomfortable. After examining the plaintiff's car and its safety belts, an accident reconstruction engineer testified for the defense that if the plaintiff had been using her safety belt, her chest and knee would not have struck the dashboard. The defense also introduced a photograph of the plaintiff's car's dashboard with a sticker attached to it which said "Safety belt use required in this vehicle." The plaintiff denied the sticker was in the car while she and her husband owned it.

Jury Charge: The following jury instruction was given:

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

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

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

Example 4: Foley v. City of West Allis

Facts: In *Foley v. City of West Allis*,[5] the plaintiff was riding in the right front seat of a vehicle driven by her husband (a co-plaintiff). She was not wearing her safety belt. Unable to see the plaintiff's car because snow was piled six to eight feet high on the traffic median, the oncoming defendant turned left in front of the plaintiff and the two vehicles collided head-on. The plaintiff was thrown into the dashboard and suffered injuries to her forehead, knees and right hand and arm.

Trial: The defendant introduced the testimony of a local engineer who had conducted safety belt research and had worked for the National Safety Council. After examining the vehicle in which the plaintiff was riding and reconstructing

5. No. 81-1747 (Wis. Cir. Ct. Mar. 1981), *aff'd*, 109 Wis. 2d 685, 325 N.W.2d 737 (Wis. Ct. App. 1982), *rev'd*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

the accident, the engineer testified that had the plaintiff worn her safety belt, she would not have struck the dashboard.

Jury Charge: The jury received Wisconsin's standard safety belt instruction (Wis. Jury Instruct.—Civil No. 1277):

> The automobile in which the plaintiff was a passenger was equipped with safety belts. If you are satisfied that a belt was available to the plaintiff for her use and that she failed to use it, you must determine from the evidence in this case and the reasonable inferences therefrom whether or not the omission to use the safety belt was a failure on the part of the plaintiff to exercise ordinary care for her own safety.

Jury Verdict: The jury's verdict was expressed through answers to the following special verdict questions:

11. Was the Plaintiff, Zita Foley, negligent with respect to her own safety?

ANSWER: Yes
(Yes or No)

12. If you answered Question Eleven "yes," then answer this question; otherwise do not answer it.

Was the negligence of Zita Foley a cause of her injuries?

ANSWER: Yes
(Yes or No)

13. . . . .

What percentage of all the causal negligence involved in the accident of January 10, 1978, which produced the injuries to Zita Foley do you attribute to:

A. The combined causal negligence in causing the collision of Thomas Kowalski, the City of West Allis and Daniel Foley	30%
B. The causal negligence of Zita Foley	70%
TOTAL	100%

. . . .

15. You must answer this question:

What sum of money will fairly and reasonably compensate the Plaintiff, Zita Foley, for her damages in the following respects:

A. Past pain, suffering and disability	$ 3,500.00
B. Future pain, suffering and disability	$ 5,000.00
C. Medical expenses	TO BE ANSWERED BY THE COURT
D. Past wage loss	$ 1,500.00
E. Loss of future earning capacity	$ 0

Judgment: Under Wisconsin's "50-50" comparative negligence system,[6] the

6. Under a "50-50" comparative negligence system, the plaintiff cannot recover if his negligence exceeds that of the defendant. *See infra* App. D.

plaintiff was barred from recovering any of her $10,000 of damages because of the jury finding placing her 70% at fault for failing to wear her safety belt.[7]

Example 5: Caiazzo v. Volkswagenwerk, A.G.

In *Caiazzo v. Volkswagenwerk, A.G.*,[8] the plaintiffs were the driver and passenger of a van struck in the rear by another vehicle traveling at high speed. The collision caused the van to turn over and eject the plaintiffs. The plaintiffs sued the van's manufacturer, alleging that a defective door latch assembly enhanced their injuries. The plaintiff's expert testified that they would not have been ejected but for the defective door latch. The defendant's expert testified, and the plaintiff's expert conceded, that the plaintiffs would not have been ejected had they been using their available safety belts. The jury found the plaintiffs were entitled to a total of $950,000 in damages, of which $650,000 was due to the negligence of the driver (a co-defendant) of the vehicle which rear-ended the plaintiffs' van. The jury reduced the plaintiffs' damages by 25%, to $712,500, because of their failure to use their safety belts.

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7. The trial court decision was affirmed by the Wisconsin Court of Appeals. *Foley*, 109 Wis. 2d 685, 325 N.W.2d 737 (Wis. Ct. App. 1982). The Supreme Court of Wisconsin reversed and held that negligence consisting of failure to use an available safety belt, which enhances injuries but does not cause the accident, can only reduce recoverable damages but cannot bar recovery. *Foley*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983).

8. 468 F. Supp. 593 (E.D.N.Y. 1979) (applying New York law), *aff'd with respect to the safety belt issue and rev'd in part*, 647 F.2d 241 (2d Cir. 1981).

APPENDIX B
CURRENT STATUS OF THE SAFETY BELT DEFENSE

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

1. Appellate court reasons for rejecting the safety belt defense are as follows: 1. Doctrine; 2. Duty; 3. Separation of Powers; 4. Efficacy of Safety Belts; 5. Common Practice; 6. Majority Rule; 7. Practicality and Trial Administration; 8. Fairness; 9. Invidious Distinction. *See supra* notes 12-17 and accompanying text.

2. The Alabama Supreme Court in *Britton* refused to permit introduction of evidence of safety belt non-use for the purpose of mitigating damages. The court did not face and expressly reserved the question of admissibility in wrongful death cases (as distinguished from suits for non-fatal injuries) and whether safety belt non-use may constitute contributory negligence completely barring recovery. *Britton*, 286 Ala. at 505, 242 So.2d at 674.

3. In Spruce Equip. Co. v. Maloney, 527 P.2d 1295 (Alaska 1974), a case not involving a two-vehicle accident, the Supreme Court of Alaska generally favored the admission of evidence to apportion damages, assuming there was an adequate evidentiary foundation. *Id.* at 1298.

4. In *Harlan,* the Supreme Court of Arkansas held a trial court in error for instructing the jury that in considering the plaintiff's negligence the jurors might take into account the plaintiff's non-use of the available safety belt, when the only safety belt evidence introduced at trial was a statement that such belts were available and unfastened. *Harlan*, 250 Ark. at 612, 466 S.W.2d at 460.

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Colorado	Inadmissible	*Fischer v. Moore,* 183 Colo. 392, 517 P.2d 458 (1973); *Churning v. Staples,* 628 P.2d 180 (Colo. Ct. App. 1981)[5]	1,5,8
Connecticut	Inadmissible	Conn. H. 5338[6]	—
Delaware	Inadmissible	*Lipscomb v. Diamiani,* 226 A.2d 914 (Del. Super. Ct. 1967)	1,3,4,6,8
District of Columbia	Inadmissible	*McCord v. Green,* 362 A.2d 720 (D.C. 1976)	1,2,4,9

5. In *Fischer,* the Colorado Supreme Court rejected the safety belt defense for the purpose of mitigating damages or barring recovery under contributory negligence, but did not opine as to its use under comparative negligence. *Fischer,* 183 Colo. at 394-95, 517 P.2d at 459. Subsequent to legislative adoption of comparative negligence in Colorado, the Colorado Court of Appeals in *Churning* reaffirmed *Fischer*'s continuing vitality under comparative negligence principles. *Churning,* 628 P.2d at 181. In Dare v. Sobule, 674 P.2d 960 (Colo. 1984), the Supreme Court of Colorado rejected use of the analogous motorcycle "helmet defense" for mitigation of damages or contributory negligence because, in part, the Colorado legislature had repealed a statute requiring that helmets be worn. *Dare,* 674 P.2d at 962-63.

6. Connecticut's recent mandatory safety belt use statute prohibits introduction of the safety belt defense. *See infra* App. C. A discussion of Connecticut appellate and trial law on the issue follows. Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (Conn. Super. Ct. 1969), suggested that evidence of safety belt non-use may be introduced only when special circumstances exist that require the vehicle occupant to anticipate a collision or other mishap. *Remington,* 28 Conn. Supp. at 292, 259 A.2d at 146. This logic was followed in Tempe v. Giacco, 37 Conn. Supp. 120, 442 A.2d 947 (Conn. Super. Ct. 1981), in which the court allowed the introduction of the safety belt defense where the defendant alleged that the plaintiff failed to wear the available safety belt after being warned not to lean against the right door, which apparently had a defective lock, and the plaintiff subsequently fell through the door as the car made a left turn. *Tempe,* 37 Conn. Supp. at 120-23, 442 A.2d at 948-49. *Cf.* Uresky v. Fedora, 27 Conn. Supp. 498, 245 A.2d 393 (Conn. Super. Ct. 1968); Husted v. Refuse Removal Serv., 26 Conn. Supp. 494, 227 A.2d 433 (Conn. Super. Ct. 1967) (the merits of the safety belt defense can be properly considered only by the introduction of evidence and the evaluation of that evidence at trial). On the other hand, the courts in Brown v. Case, 31 Conn. Supp. 207, 327 A.2d 267 (Conn. Super. Ct. 1974), and Clark v. State, 28 Conn. Supp. 398, 264 A.2d 366 (Conn. Super. Ct. 1970), refused the introduction of safety belt evidence. After Connecticut adopted comparative negligence another Connecticut superior court struck, on the plaintiff's motion, the safety belt defense from the defendant's pleading. Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (Conn. Super. Ct. 1975). Connecticut's high court has expressly not reached the merits of the safety belt defense, although appearing receptive, because the defendant failed to introduce evidence at trial linking the plaintiff's non-use to enhanced injuries. Wassell v. Hamblin, 196 Conn. 463, 467-69, 493 A.2d 870, 872-73 (1985).

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Florida	Admissible	*Insurance Co. of North America v. Pasakarnis,* 451 So.2d 447 (Fla. 1984)[7]	—
Georgia	Unsettled	[8]	—
Hawaii	Unsettled	No cases or statutes on point[9]	—
Idaho	Inadmissible	*Hansen v. Howard O. Miller, Inc.,* 93 Idaho 314, 460 P.2d 739 (1969)	1,7
Illinois	Inadmissible	*Clarkson v. Wright,* 108 Ill.2d 129, 483 N.E.2d 268 (1985)[10]	1,2,3
Indiana	Inadmissible	*State v. Ingram,* 427 N.E.2d 444 (Ind. 1981)[11]	1,8

7. In the *Pasakarnis* decision, the Florida Supreme Court upset the longstanding precedent of Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st D.C.A. 1966), and adopted the safety belt defense. *Pasakarnis*, 451 So.2d at 455. *See also supra* note 106.

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

9. Hawaii House Bill 89 provides, in part, that the mandatory safety belt use statute "shall not be deemed to change existing laws, rules or procedures pertaining to a trial of a civil action for damages for personal injuries or death sustained in a motor vehicle accident." Hawaii has no reported case law on the safety belt defense.

10. In *Clarkson*, the Supreme Court of Illinois reversed a long line of lower appellate court decisions, and rejected the safety belt defense. For prior Illinois law, see, e.g., Eichorn v. Olson, 32 Ill. App. 3d 587, 335 N.E.2d 774 (1975); Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968). Shortly after *Clarkson*, the Illinois Court of Appeals rejected the motorcycle helmet defense. Hukill v. DiGregorio, 136 Ill. App. 3d 1066, 484 N.E.2d 795 (1985).

11. In Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966), the Indiana Court of Appeals refused to recognize the safety belt defense because of the lack of expert testimony at trial linking non-use to specifically enhanced injuries, but recognized the possibility of allowing the defense at some future date where the appropriate proof has been offered. This dictum was seized upon by many legal writers who assumed that, with competent expert testimony, the safety belt defense was available in Indiana. However, attorneys in Indiana have indicated that despite *Kavanagh* the prevailing view in the Indiana bar and judiciary was that the defense was not admissible, and that it was not known to have been introduced in any trials. Thus, it was no surprise when the Supreme Court of Indiana disposed of the *Kavanagh* dictum and held in *Ingram* that the safety belt defense may not be used to limit the plaintiff's recovery. *Ingram*, 427 N.E.2d at 448. A proposed bill that would have reversed *Ingram* failed in 1984. *See* Ind. S. 37.

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Iowa	Settled	[12]	—
Kansas	Inadmissible	*Hampton v. State Highway Comm'n.*, 209 Kan. 565, 498 P.2d 236 (1972); *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985)[13]	1,2,4,8,9
Kentucky	Unsettled	No cases or statutes on point	—
Louisiana	Admissible	La. H. 697[14]	—
Maine	Inadmissible	Me. Rev. Stat. Ann. tit. 29, § 1368-A (1978)[15]	—
Maryland	Inadmissible	Md. S. 15[16]	—

12. Iowa recently repealed a statute, IOWA CODE ANN. § 321.445 (West Supp. 1982), barring the safety belt ISSU code, Iowa appeal courts has yet to face the issue.

13. In *Hampton*, the Kansas Supreme Court disallowed the use of the safety belt defense under a contributory negligence regime. *Hampton*, 209 Kan. at 579-81, 498 P.2d at 248-49. Kansas has since adopted comparative negligence, but the Kansas Supreme Court nonetheless has reaffirmed in *Ratterree* the holding of *Hampton*. *Ratterree*, 707 P.2d at 1069.

14. Louisiana House Bill 697 permits the introduction of the safety belt defense to mitigate the plaintiff's damages by a maximum of 2%, provided that the defendant proves (i) the availability of a functioning safety belt, (ii) that the injured person failed to use the safety belt, (iii) that such non-use contributed to the plaintiff's injuries, and that (iv) use of the safety belt would have reduced the plaintiff's damages by an amount at least equal to the mitigation sought. *See infra* App. C. For Louisiana law prior to this statute, see Benson v. Seagraves, 445 So. 2d 187 (La. Ct. App. 1984) (holding that safety belt non-use does not constitute contributory negligence, but not facing the mitigation of damages approach to the safety belt defense); Fontenot v. Fidelity & Cas. Co., 217 So. 2d 702 (La. Ct. App. 1969); Lawrence v. Westchester Fire Ins. Co., 213 So. 2d 784 (La. Ct. App. 1968) (holding that safety belt non-use cannot be deemed to be such contributory negligence as will bar recovery, but appearing to favor admission of the safety belt defense on the question of damages, assuming proper proof at trial).

15. The statute provides in part: "In any accident involving an automobile, the non-use of seat belts by the driver of or passengers in the automobile shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident." ME. REV. STAT. ANN. tit. 29, § 1368-A (West 1978).

16. Maryland's mandatory use statute bars the safety belt defense. *See infra* App. C. Prior to the enactment of this statute, Maryland's highest court held in Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967) that safety belt non-use is not contributory negligence. *Cierpisz*, 247 Md. at 227, 230 A.2d at 635. Maryland has also rejected the motorcycle helmet defense. Rogers v. Frush, 257 Md. 233, 262 A.2d 549 (1970).

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Massachusetts	Inadmissible	Mass. H. 6491[17]	—
Michigan	Admissible	Mich. S. 6[18]	—
Minnesota	Inadmissible	Minn. Stat. Ann. § 169.685, subdiv. 4 (West Supp. 1984)[19]	—

17. The Massachusetts mandatory use statute provides that evidence of non-use is not admissible in civil litigation. *See infra* App. C. In a crashworthiness case, the Supreme Judicial Court of Massachusetts faced but did not reach, because of an absence of proof at trial, the merits of the safety belt defense. Breault v. Ford Motor Co., 364 Mass. 352, 305 N.E.2d 824 (1973). *See also* MacCuish v. Volkswagenwerk, A.G., slip op. (Mass. Ct. App. June 20, 1986) (available on LEXIS, Massachusetts file) (holding safety belt non-use not to be product misuse, and therefore inadmissible in crashworthiness lawsuit).

18. Michigan Senate Bill 6 includes the following provision:

> 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%.

See infra App. C.

For Michigan law prior to this statute, see Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969) (rejecting the safety belt defense); Seifert v. Anderson, No. 80-209579-NI (Mich. Cir. Ct. Nov. 23, 1982) (denying the plaintiffs' motion to strike the safety belt defense from the defendant's pleading and the plaintiffs' motion *in limine*); Hurd v. Finney, No. 80-012-765-NI (Mich. Cir. Ct. Apr. 19, 1983) (allowing the defendant's motion to permit testimony as to the availability of safety belts, the use or non-use of such safety belts and the consequences thereof); DeGraaf v. General Motors Corp., 135 Mich. App. 141, 352 N.W.2d 719 (1984) (reversing a trial court for permitting the introduction of safety belt evidence in a crashworthiness case); Schmitzer v. Misener-Bennett Ford, Inc., 135 Mich. App. 350, 354 N.W.2d 336 (1984) (rejecting the safety belt defense under comparative negligence principles). *See also* Sullivan, *The Seat Belt Defense Should be Resurrected Under Pure Comparative Negligence,* 61 MICH. B.J. 560 (1982).

19. MINN. STAT. ANN. § 169.685, subdiv. 4 (West Supp. 1984), provides:

> Proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.

Despite some agitation for repeal of this statute from the defense bar, this statute precludes consideration in Minnesota of the safety belt defense. *See* Bowman, *Minnesota's Seat Belt Gag Should Be Abrogated,* 38 HENNEPIN LAW. 4 (May 1970). A proposed bill that would have rescinded this statute and permitted the introduction of safety belt evidence in civil cases failed in 1984. *See* Minn. S. 1497.

Paradoxically, Minnesota has statutorily mandated the motorcycle helmet defense. MINN. STAT. ANN. § 169.974, subdiv. 6 (West Supp. 1984) provides:

> In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear of a type approved by the commissioner of public safety shall be admissible only with respect to the question of damages for head injuries. Damages for head injuries of any person who was not wearing protective headgear shall be reduced to the extent that those injuries could have been avoided by wearing protective headgear of a type approved by the commissioner of public safety. For the purposes of this subdivision "operator or passenger" means any operator or passenger regardless of whether that op-

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Mississippi	Unsettled	[20]	—
Missouri	Admissible	Mo. S. 43[21]	—
Montana	Inadmissible	*Kopischke v. First Continental Corp.*, 471 Mont. 187, 610 P.2d 668 (1980)	1,2,3,5,6,7,8,9
Nebraska	Admissible	Neb. L. 496[22]	—
Nevada	Inadmissible	*Jeep Corp. v. Murray*, 708 P.2d 297 (Nev. 1985)[23]	7
New Hampshire	Unsettled	No cases or statutes on point	—

erator or passenger was required by law to wear protective headgear approved by the commissioner of public safety.

Id.

Prior to enactment of this statute, the Minnseota Supreme Court rejected the motorcycle helmet defense. Burgstahler v. Fox, 290 Minn. 495, 186 N.W.2d 182 (1971).

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

21. Section 3 of Missouri Senate Bill 43 provides as follows:

> 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:
>
> a. 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 failure to wear a safety belt contributed to the injuries claimed by Plaintiff.
>
> b. If the evidence supports such a finding, the trier of fact may find that the injuries claimed by a Plaintiff [were] contributed to [by] his or her failure to wear a safety belt in violation of this section, and may reduce the amount of Plaintiff's recovery by an amount not to exceed one percent of the damages awarded after any reductions for comparative negligence.

See infra App. C.

For Missouri law prior to this statute, see Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970) (rejecting the safety belt defense).

22. The Nebraska mandatory safety belt use statute sanctions use of the safety belt defense to mitigate the plaintiff's damages by a maximum of 5%. *See infra* App. C.

23. In *Murray*, the Nevada Supreme Court upheld the trial court's refusal to permit the safety belt defense in a product liability case.

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
New Jersey	Inadmissible	N.J. A. 2304[24]	—
New Mexico	Admissible	N.M. S. 111[25]	—
New York	Admissible	*Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974)[26]	—

24. The New Jersey mandatory use statute precludes the safety belt defense. *See infra* App. C. For prior New Jersey law, see Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967) (holding that safety belt non-use cannot bar recovery under contributory negligence, but generally favoring the admission of safety belt evidence on the issue of damages).

25. Section 4.B. of the recently enacted New Mexico Senate Bill 111 provides in part as follows:

> Evidence of a violation of [this statute] shall be admissible concerning mitigation of damages, apportionment of damages or comparative fault, with respect to any person who is involved in an accident while violating [this statute] and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident.

See infra App. C. For prior New Mexico law, see Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985) and Selgado v. Commercial Warehouse Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975) (rejecting the safety belt defense).

26. The New York Court of Appeals held in *Spier* that the safety belt defense was admissible for the purpose of mitigating damages, but that such evidence must be strictly limited to the jury's determination of the plaintiff's damages and should not be considered in resolving the issue of liability. *Spier*, 35 N.Y.2d at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920. The court noted, however, that this limitation did not necessarily embrace the case in which safety belt non-use is alleged to have caused the accident. *Spier*, 35 N.Y.2d at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3; *see supra* note 20 and accompanying text.

Prior to the enactment of New York's mandatory safety belt use statute, the supreme court, appellate division focused on this footnote 3 and held that, contrary to the general rule of *Spier*, defendants may sometimes raise the safety belt defense with respect to the issue of liability. In Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (N.Y. App. Div. 1982), the court held that the plaintiff-passenger's failure to engage the available safety belt prior to the time that the front passenger door of the vehicle opened and the plaintiff fell onto the roadway where she was struck by a following vehicle could be considered by the jury in determining liability. Thus, notwithstanding the customary New York rule requiring bifurcated trials on liability and damages, the court ordered that on remand there be a joint trial on the combined issues of liability and damages. The case subsequently was settled before retrial. *See supra* note 51.

Although *Curry*'s holding seemed to be a cue to a future role for the safety belt defense in the determination of liability, this possibility has been statutorily removed. The New York legislature has reaffirmed *Spier* by inserting the following provision in its new mandatory safety belt use statute:

> 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.

N.Y. VEH. & TRAF. LAW § 1229-c.8 (McKinney Supp. 1984). *See infra* App. C.

New York also permits use of the motorcycle helmet defense. Dean v. Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859 (N.Y. Sup. Ct. 1973).

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
North Carolina	Inadmissible	*Miller v. Miller,* 273 N.C. 228, 160 S.E.2d 65 (1968)[27]	1,2,3,4,5,8,9
North Dakota	Unsettled	[28]	—
Ohio	Inadmissible	*Roberts v. Bohn,* 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971), *rev'd on other grounds,* 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972)[29]	1,2,4,7,8,9
Oklahoma	Inadmissible	*Fields v. Volkswagen of Am., Inc.,* 555 P.2d 48 (Okla. 1976)[30]	1,2,4,7,8,9

27. North Carolina Senate Bill 39 provides that a violation of the mandatory safety belt use statute shall not constitute negligence, and that this statute shall not "change any existing law, rule or procedure" pertaining to civil litigation, presumably including North Carolina's rejection of the safety belt defense. *See infra* App. C.

28. In Kunze v. Stang, 191 N.W.2d 526 (N.D. 1971), the Supreme Court of North Dakota held that non-use of an available safety belt cannot constitute contributory negligence as a matter of law. *Kunze,* 191 N.W.2d at 534. The *Kunze* court did not consider the issue of the use of the safety belt defense in mitigation of damages, but a more recent decision indicates that, when properly presented, such use probably will be endorsed. In Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983) the North Dakota Supreme Court adopted the *Spier* (*supra* note 26) view in the context of the motorcycle helmet defense, and held that "evidence of a person's failure to wear a protective helmet while traveling on a motorcycle is admissible to reduce the plaintiff's damages so long as there is competent testimony by a qualified expert that the use of a helmet would have lessened the injuries the plaintiff sustained." *Halvorson,* 336 N.W.2d at 120.

29. In Woods v. City of Columbus, No. 85AP-122, slip op. (Ohio Ct. App. Aug. 27, 1985) (available on LEXIS, Ohio file), the Ohio Court of Appeals appeared receptive to the safety belt defense, but did not reach the merits of the defense because no evidence was introduced at trial. In a subsequent case where appropriate evidence had been introduced at trial, the Ohio Court of Appeals stoutly rejected the safety belt defense, and reaffirmed the holding in *Roberts* despite the 1980 legislative adoption of comparative negligence in Ohio. Mackey v. Buchanan, No. E-85-20, slip op. (Ohio Ct. App. Feb. 21, 1986) (available on LEXIS, Ohio file).

30. In *Fields,* the Oklahoma Supreme Court held safety belt evidence inadmissible in the product liability context. *Fields,* 555 P.2d at 62. Although no cases have so held, it seems unlikely that an Oklahoma appellate court would endorse the safety belt defense in a personal injury suit. Two federal courts construing Oklahoma law have reached this conclusion. Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969) and Henderson v. United States, 429 F.2d 588 (10th Cir. 1970) refused to admit safety belt evidence on the issue of contributory negligence.

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Oregon	Inadmissible	*Robinson v. Lewis,* 254 Or. 52, 457 P.2d 483 (1969)[31]	2,4,8,9
Pennsylvania	Unsettled	[32]	—
Rhode Island	Unsettled	No cases or statutes on point	—
South Carolina	Admissible	*Sams v. Sams,* 247 S.C. 467, 148 S.E.2d 154 (1966); *Jones v. Dague,* 252 S.C. 261, 166 S.E.2d 99 (1969)	—
South Dakota	Unsettled	No cases or statutes on point	—
Tennessee	Inadmissible	Tenn. Code Ann. § 55-9-214(a) (Supp. 1982)[33]	—

31. The Oregon Supreme Court held in *Robinson* that safety belt non-use cannot be considered to constitute contributory negligence. *Robinson*, 254 Or. at 57-58, 457 P.2d at 485-86. After Oregon adopted a comparative negligence scheme, the Supreme Court of Oregon strongly suggested that safety belt non-use was not admissible on the issue of damages. Smith v. Oregon Agricultural Trucking Assoc., 272 Or. 156, 535 P.2d 1371 (1975).

32. Two federal courts construing Pennsylvania law have admitted evidence of safety belt non-use on the question of damages if competent testimony establishes a causal connection between the non-use and injury enhancement. 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). The only Pennsylvania state appellate court that has faced the issue expressly refused to commit itself on the merits of the safety belt defense until presented with a suitable case. Parise v. Fehnel, 267 Pa. Super. 83, 406 A.2d 345 (1979). At least one Pennsylvania trial court has permitted the safety belt defense. Campbell v. Peck, No. 82-11258 (Pa. Cty. Ct. Dec. 18, 1984) (plaintiff's damages reduced by 40%, to $72,000).

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

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Texas	Inadmissible	*Carnation Co. v. Wong,* 516 S.W.2d 116 (Tex. 1974)	1,6
Utah	Inadmissible	Utah H. 16[34]	—
Vermont	Unsettled	[35]	—
Virginia	Inadmissible	Va. Code § 46.1-309.1(b) (1980)[36]	—
Washington	Inadmissible	*Derheim v. North Fiorito Co.,* 80 Wash. 2d 161, 492 P.2d 1030 (1972); *Amend v. Bell,* 89 Wash. 2d 124, 570 P.2d 138 (1977)[37]	1,2,3,4,5,6,7,8,9
West Virginia	Unsettled	No cases or statutes on point	—
Wisconsin	Admissible	*Bentzler v. Braun,* 34 Wis. 2d 362, 149 N.W.2d 626 (1967)	—

34. The Utah mandatory use statute prohibits the safety belt defense. *See infra* App. C.

35. The United States District Court for the District of Vermont, construing Vermont substantive law, has permitted introduction of the non-use of an available safety belt on at least four occasions. Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561 (D. Vt. 1985); O'Day v. Bissonette, No. 82-45 (D. Vt. Apr. 5, 1985); Beaudoin v. Hurilla, No. 81-199 (D. Vt. July 30, 1982); Cameron v. Spencer, No. 73-79 (D. Vt. Dec. 17, 1973).

36. Prior to 1978, VA. CODE § 46.1-309.1(b) (1980) read: "Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence." Contrasting this statute with the Minnesota and Tennessee statutes (*supra* notes 19 and 33), a federal court interpreted the Virginia statute to permit the introduction of safety belt evidence for the purpose of mitigation of damages. Wilson v. Volkswagen of Am., Inc., 445 F. Supp. 1368 (E.D. Va. 1978); *see* Robinson & Cullen, *Federal Court Rules Virginia Law Allows Evidence of Non-Use of Seat Belt,* 13 U. RICH. L. REV. 123 (1978). In 1980 the Virginia statute was amended to add the clause "nor shall evidence of such non-use of such devices be considered in mitigation of damages of whatever nature" at the end of subsection (b). VA. CODE § 46.1-309.1(b) (1980).

37. In *Derheim,* the Washington Supreme Court rejected the admissibility of the safety belt defense for a number of reasons. *Derheim,* 80 Wash. 2d at 172, 492 P.2d at 1037. Five years later, after the state legislature adopted the doctrine of comparative negligence, the Washington Supreme Court in *Amend* again rejected the safety belt defense for any purpose, including reduction of damages. *Amend,* 89 Wash. 2d at 133-34, 570 P.2d at 143-44.

Jurisdiction	*Status*	*Leading Authority*	*Reasons*[1]
Wyoming	Unsettled	[38]	—

38. In Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978), the Supreme Court of Wyoming did not reach the merits of the safety belt defense in a crashworthiness case because the issue was not preserved for appeal (there was no offer of proof at trial). *Todorovich*, 580 P.2d at 1135.

APPENDIX C
STATUTES REQUIRING THE USE OF SAFETY BELTS OR CHILD PASSENGER RESTRAINT SYSTEMS

Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
Alabama	Child passengers	Ala. Code § 32-5-222 (1983)	1982	1
	School bus drivers	Ala. Code § 16-27-6 (1977)	1969	None
Alaska	Child passengers	Alaska S. 163	1984	None
Arizona	Child passengers	Ariz. Rev. Stat. Ann. § 28-907 (Supp. 1983)	1983	2
Arkansas	Child passengers	Ark. Stat. Ann. § 75-2601 to § 75-2607 (Supp. 1983)	1983	1,2
California	Child passengers	Cal. Veh. Code § 27360 (West Supp. 1983)	1982	None
	Driver training vehicle occupants	Cal. Veh. Code § 27304 (West 1971 and Supp. 1983)	1961	None
	Firefighting vehicle occupants	Cal. Veh. Code § 27305 (West 1971 and Supp. 1983)	1963	None
	All occupants	Cal. A. 27	1985	None[3]
Colorado	Child passengers	Colo. Rev. Stat. § 42-4-235 (Supp. 1983)	1983	1

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
Connecticut	Child passengers	Conn. Gen. Stat. Ann. § 14-100a (West Supp. 1983)	1982	1,2
	Front seat occupants	Conn. H. 5338	1985	1,2
Delaware	Child passengers	Del. Code Ann. tit. 21, § 4199C (Supp. 1982)	1982	1,2
District of Columbia	Child passengers	D.C. Code Ann. § 40-1201 to § 40-1208 (Supp. 1983)	1983	1
	Front seat occupants	D.C. Code Ann. § 40-1601 to § 40-1607 (Supp. 1986)	1985	1
Florida	Child passengers	Fla. Stat. Ann. § 316.613 (West Supp. 1983)	1982	1,2
	Front seat occupants	Fla. H. 40	1986	None
Georgia	Child passengers	Ga. Code Ann. § 40-8-76 (Supp. 1983)	1983	1
Hawaii	Child passengers[4]	Hawaii H. 890	1983	1
	Front seat occupants	Hawaii H. 89	1985	None[5]
Idaho	Child passengers	Idaho H. 471	1984	1,2
	Front seat occupants[6]	Idaho H. 414	1986	None
Illinois	Child passengers	Ill. H. 608	1983	1,2
	Front seat occupants	Ill. H. 2800	1985	1

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
	School bus drivers	Ill. Rev. Stat. ch. 95 1/2, § 12-807 (Supp. 1983)	1974	None
Indiana	Child passengers	Ind. Code Ann. § 9-8-13 (West Supp. 1983)	1983	1
	Front seat occupants[7]	Ind. H. 1957	1985	1,2
Iowa	Child passengers	Iowa S. 2089	1984	1,2
	Front seat occupants[6]	Iowa S. 499	1986	None[8]
Kansas	Child passengers	Kan. Stat. Ann. § 8-1343 to § 8-1347 (1982)	1981	1
	Front seat occupants[6]	Kan. H. 3160	1986	2
Kentucky	Child passengers	Ky. Rev. Stat. § 189.125 (Supp. 1982)	1982	1,2
Louisiana	Child passengers	La. H. 425	1984	1,2
	Front seat occupants[6]	La. H. 697	1985	None[9]
Maine	Child passengers	Me. Rev. Stat. Ann. tit. 29, § 1368-B (Supp. 1983)	1983	1,2
	School bus occupants[10]	Me. Rev. Stat. Ann. tit. 29, § 2014 (1978)	1973	None
Maryland	Child passengers	Md. Transp. Code Ann.	1983	1,2

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
		§ 22-412.2 (Supp. 1983)		
	Front seat occupants[6]	Md. S. 15	1986	1,2
Massachusetts	Child passengers	Mass. Gen. Laws Ann. ch. 90, § 7AA (West Supp. 1983)	1981	1
	School bus drivers	Mass. Gen. Laws Ann. ch. 90, § 7B (West Supp. 1983)	1971	None
	All occupants	Mass. H. 6491	1985	2
Michigan	Child passengers	Mich. Comp. Laws Ann. § 257.710d (West Supp. 1983)	1981	None
	Front seat occupants	Mich. S. 6	1985	None[11]
Minnesota	Child passengers	Minn. Stat. Ann. § 169.685, subdiv. 4 and 5 (West Supp. 1983)	1981	2
	School bus drivers	Minn. Stat. Ann. § 169.44, subdiv. 9 (West Supp. 1983)	1969	None
	Front seat occupants[12]	Minn. S. 40	1986	None[13]
Mississippi	Child passengers	Miss. Code Ann. § 63-7-301 to § 63-7-313 (Supp. 1983)	1983	1
Missouri	Child passengers	Mo. Ann. Stat. § 210.104 and § 210.106 (Vernon Supp. 1984)	1983	1,2

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
	Front seat occupants	Mo. S. 43	1985	1[14]
Montana	Child passengers	Mont. S. 22	1983	None[3]
Nebraska	Child passengers	Neb. L. 306	1983	1
	Front seat occupants	Neb. L. 496	1985	None[15]
Nevada	Child passengers	Nev. Rev. Stat. § 484.474 (1983)	1983	1
	Front seat occupants[16]	Nev. A. 390	1985	None
New Hampshire	Child passengers	N.H. Rev. Stat. Ann. § 265:107-a (Supp. 1983)	1983	1
New Jersey	Child passengers	N.J. A. 851	1983	1,2
	Driver training vehicle occupants	N.J. A. 861	1984	None
	Front seat occupants	N.J. A. 2304	1984	1,2
New Mexico	Child passengers	N.M. Stat. Ann. § 66-7-368 to § 66-7-369 (Supp. 1983)	1983	1
	Front seat occupants	N.M. S. 111	1985	None[17]
New York	Child passengers	N.Y. Veh. & Traf. Law § 1229-c (McKinney Supp. 1984)	1981	None
	Front seat occupants	N.Y. Veh. & Traf. Law § 1229-c (McKinney Supp. 1984)	1984	None[18]

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
	School bus drivers	N.Y. Veh. & Traf. Law § 383.4-a (McKinney 1970)	1969	None
North Carolina	Child passengers	N.C. Gen. Stat. § 20-137.1 (1983)	1981	1
	Front seat occupants	N.C. S. 39	1985	1[11]
North Dakota	Child passengers	N.D. Cent. Code § 39-21-41.2 (Supp. 1983)	1983	1,2
Ohio	Child passengers	Ohio Rev. Code Ann. § 4511.81 (Page 1982 and Supp. 1983)	1982	1,2
	Front seat occupants	Ohio S. 54	1986	1,2
	School bus drivers	Ohio S. 54	1986	1,2
Oklahoma	Child passengers	Okla. H. 1005	1983	2
	School bus drivers	Okla. Stat. Ann. tit. 70, § 24-121 (West 1972)	1968	None
	Front seat occupants[20]	Okla. H. 1328	1985	2
Oregon	Child passengers[21]	Or. Rev. Stat. § 483.482 to § 483.488 (Supp. 1983)	1983	1,2
Pennsylvania	Child passengers	Pa. Stat. Ann. tit. 75, § 4581 (Purdon Supp. 1984)	1983	1,2

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
Rhode Island	Child passengers	R.I. Gen. Laws § 31-22-22 (1982)	1980	1,2
	Public service vehicle drivers[22]	R.I. Gen. Laws § 31-23-41 (1982)	1962	None
	Student drivers	R.I. H. 5253	1985	None
South Carolina	Child passengers	S.C. Code Ann. § 56-5-6410 to § 56-5-6470 (Law. Co-op. Supp. 1983)	1983	1,2
South Dakota	Child passengers	S.D. H. 1086	1984	1,2
Tennessee	Child passengers	Tenn. Code Ann. § 55-9-214(b) (Supp. 1983)	1977	1,2
	All occupants	Tenn. S. 790	1986	1,2
Texas	Child passengers	Tex. S. 3 (H. 18)	1984	2
	Front seat occupants	Tex. S. 500	1985	2
Utah	Child passengers	Utah S. 10	1984	1,2
	Front seat occupants	Utah H. 16	1986	1,2
Vermont	Child passengers	Vt. Stat. Ann. tit. 23, § 1258 (Supp. 1984)	1984	None
Virginia	Child passengers	Va. Code § 46.1-314.2 to § 46.1-314.7 (Supp. 1983)	1982	1,2

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Jurisdiction	*Requirement*[1]	*Statute*	*Year Enacted*	*Statutory Limitations*[2]
	School bus drivers	Va. Code § 46.1-287.2 (1980)	1973	None
Washington	Child passengers	Wash. S. 3203	1983	1,2
	All occupants	Wash. H. 1182	1986	1,2
West Virginia	Child passengers	W. Va. Code § 17C-15-46 (Supp. 1983)	1981	1
Wisconsin	Child passengers	Wis. Stat. Ann. § 347.48(4) (West Supp. 1982)	1981	None[3]
Wyoming	Child passengers	Wyo. H. 94	1985	1

1. This column indicates the class of vehicle occupants which is covered by each statute All statutes are in effect unless otherwise noted.

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

1 The statute provides that non-use of the safety belt or child passenger restraint system shall not be considered to be negligence. For an example, *see supra* Appendix B, note 36.

2. The statute provides that non-use of the safety belt or child passenger restraint system shall not be admissible in civil trials. For an example, *see supra* Appendix B, note 19.

3. The statute provides that a violation thereof is not negligence *per se*; but that negligence may be proven as a fact without regard to the violation. *See supra* note 54 and accompanying text.

4. Hawaii also provides a state income tax credit for the purchase of a qualifying child passenger restraint system. Hawaii Rev. Stat. § 235-15 (Supp. 1984).

5. Hawaii House Bill 89 provides in part that the mandatory safety belt use statute "shall not be deemed to change existing laws, rules or procedures pertaining to a trial of a civil action for damages for personal injuries or death sustained in a motor vehicle accident." There is no reported Hawaii case law on the safety belt defense. *See supra* Appendix B.

6. Effective July 1, 1986.

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7. Effective July 1, 1987.

8. *See supra* Appendix B, note 12.

9. Louisiana House Bill 697 permits the introduction of the safety belt defense to mitigate the plaintiff's damages by a maximum of 2%, provided that the defendant proves (i) the availability of a functioning safety belt, (ii) that the injured person failed to use the safety belt, (iii) that such non-use contributed to the plaintiff's injuries, and that (iv) use of the safety belt would have reduced the plaintiff's damages by an amount at least equal to the mitigation sought.

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

11. Michigan Senate Bill 6 provides that safety belt non-use in violation of the statute may reduce the plaintiff's recoverable damages by a maximum of 5%. The Michigan statute expires on April 1, 1989 if by that date the federal government requires the installation of passive passenger restraints in new automobiles. *See supra* note 59 and accompanying text.

12. Effective August 1, 1986.

13. *But see supra* Appendix B, note 19.

14. Section 3 of Missouri Senate Bill 43 permits the introduction of evidence showing safety belt non-use in violation of the statute for the purpose of mitigating the plaintiff's damages by a maximum of 1%. The statute requries the defendant to introduce expert testimony proving that the safety belt non-use contributed to the plaintiff's injuries. The Missouri statute expires if the Secretary of Transportation determines prior to April 1, 1989 that states covering at least two-thirds of the United States population have not enacted mandatory safety belt use statutes meeting the specified criteria. *See supra* note 59 and accompanying text.

15. Nebraska Legislative Bill 496 sanctions use of the safety belt defense to mitigate the plaintiff's damages by a maximum of 5%.

16. Nevada Assembly Bill 390 takes effect only if the federal government authorizes Nevada to impose a maximum speed limit of at least 70 miles per hour.

17. Section 4.B. of New Mexico Senate Bill 111 permits the introduction of evidence of non-use of a safety belt in violation of the statute for purposes of "mitigation of damages, apportionment of damages or comparative fault." There is no statutory limit on the amount of the damages reduction.

18. Section 1229-c.8. provides that non-use of a safety belt may be introduced for the purpose of mitigating damages without limitation (but not on the issue of liability) if the safety belt defense is pleaded as an affirmative defense. The constitutionality of the New York statute was upheld in New York v. Weber, slip op. (N.Y. Cty. Ct. Oct. 14, 1985) (available on LEXIS, New York file).

19. North Carolina Senate Bill 39 provides that failure to use a safety belt shall not constitute negligence, and that the mandatory safety belt use statute shall not "change any existing law, rule or procedure" pertaining to civil litigation. North Carolina appellate law currently bars the safety belt defense. *See supra* Appendix B.

20. Effective February 1, 1987.

21. Oregon Senate Bill 342 extended the child passenger statute to all occupants under 16 years of age.

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

23. The statute provides that a violation thereof is admissible in a civil suit but is not negligence per se. *See supra* note 54 and accompanying text.

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APPENDIX D
CURRENT STATUS OF COMPARATIVE NEGLIGENCE

Jurisdiction	*Status*	*Authority*	*Year Adopted*	*Type*[1]
Alabama	Rejected	—	—	—
Alaska	Adopted	*Kaatz v. State,* 540 P.2d 1037 (Alaska 1975)	1975	Pure
Arizona	Adopted	Ariz. Rev. Stat. Ann. § 12-2505 (West Supp. 1985)	1984	Pure
Arkansas	Adopted	Ark. Stat. Ann. § 27-1763 to § 27-1765 (1979)	1955	49-51
California	Adopted	*Li v. Yellow Cab Co.,* 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)	1975	Pure
Colorado	Adopted	Colo. Rev. Stat. § 13-21-111 (1973 and Supp. 1983)	1971	49-51
Connecticut	Adopted	Conn. Gen. Stat. Ann. § 52-572h (West Supp. 1983)	1973	50-50
Delaware	Adopted	Del. Code Ann. Ch. 10, § 8132	1984	50-50
District of Columbia	Rejected	—	—	—
Florida	Adopted	*Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973)	1973	Pure
Georgia	Adopted	Ga. Code Ann. § 51-11-7 (1982)	[2]	49-51

Jurisdiction	*Status*	*Authority*	*Year Adopted*	*Type*[1]
Hawaii	Adopted	Hawaii Rev. Stat. § 663-31 (1976)	1969	50-50
Idaho	Adopted	Idaho Code § 6-801 (1979)	1971	49-51
Illinois	Adopted	*Alvis v. Ribar,* 85 Ill. 2d 1, 421 N.E.2d 886 (1981)	1981	Pure
Indiana	Adopted	Ind. Code Ann. § 34-4-33 (West Supp. 1983)	1983	50-50
Iowa	Adopted	*Goetzman v. Wichern,* 327 N.W.2d 742 (Iowa 1982)	1982	Pure
Kansas	Adopted	Kan. Stat. Ann. § 60-258a (1983)	1974	49-51
Kentucky	Adopted	*Hilen v. Hays,* 673 S.W.2d 713 (Ky. 1984)	1984	Pure
Louisiana	Adopted	La. Civ. Code Ann. art. 2323 (West Supp. 1983)	1979	Pure
Maine	Adopted	Me. Rev. Stat. Ann. tit. 14, § 156 (1980)	1965	49-51
Maryland	Rejected	—	—	—
Massachusetts	Adopted	Mass. Gen. Laws Ann. ch. 231, § 85 (West Supp. 1983)	1971	50-50
Michigan	Adopted	*Placek v. City of Sterling Heights,* 405 Mich. 638, 275 N.W.2d 511 (1979)	1979	Pure

Jurisdiction	*Status*	*Authority*	*Year Adopted*	*Type*[1]
Minnesota	Adopted	Minn. Stat. Ann. § 604.01, subdiv. 1 (West Supp. 1983)	1969	50-50
Mississippi	Adopted	Miss. Code Ann. § 11-7-15 (1972)	1910	Pure
Missouri	Adopted	*Gustafson v. Benda,* 661 S.W.2d 11 (Mo. 1983)	1983	Pure
Montana	Adopted	Mont. Code Ann. § 27-1-702 (1981)	1975	50-50
Nebraska	Adopted	Neb. Rev. Stat. § 25-1151 (1979)	1913	Slight/Gross
Nevada	Adopted	Nev. Rev. Stat. § 41.141 (1979)	1973	50-50
New Hampshire	Adopted	N.H. Rev. Stat. Ann. § 507:7-a (1983)	1969	50-50
New Jersey	Adopted	N.J. Stat. Ann. § 2A:15-5.1 (West Supp. 1983)	1973	50-50
New Mexico	Adopted	*Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234 (1981)	1981	Pure
New York	Adopted	N.Y. Civ. Prac. Law § 1411 (McKinney 1976)	1975	Pure
North Carolina	Rejected	—	—	—
North Dakota	Adopted	N.D. Cent. Code § 9-10-07 (1975)	1973	49-51
Ohio	Adopted	Ohio Rev. Code Ann. § 2315.19 (Page 1981)	1980	50-50

Jurisdiction	*Status*	*Authority*	*Year Adopted*	*Type*[1]
Oklahoma	Adopted	Okla. Stat. Ann. tit. 23, § 13 (West Supp. 1982)	1973	50-50
Oregon	Adopted	Or. Rev. Stat. § 18.470 (1981)	1971	50-50
Pennsylvania	Adopted	Pa. Stat. Ann. tit. 42, § 7102(a) (Purdon 1982)	1976	50-50
Rhode Island	Adopted	R.I. Gen. Laws § 9-20-4 (Supp. 1983)	1971	Pure
South Carolina	Rejected[3]	—	—	—
South Dakota	Adopted	S.D. Codified Laws Ann. § 20-9-2 (1979)	1941	Slight/Gross
Tennessee	Adopted[4]	—	—	—
Texas	Adopted	Tex. Rev. Civ. Stat. Ann. art. 2212a (Vernon Supp. 1982)	1973	50-50
Utah	Adopted	Utah Code Ann. § 78-27-37 (1977)	1973	49-51
Vermont	Adopted	Vt. Stat. Ann. tit. 12, § 1036 (Supp. 1983)	1970	50-50
Virginia	Rejected[5]	—	—	—
Washington	Adopted	Wash. Rev. Code Ann. § 4.22.010 (Supp. 1983)	1973	Pure

Jurisdiction	*Status*	*Authority*	*Year Adopted*	*Type*[1]
West Virginia	Adopted	*Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979)	1979	49-51
Wisconsin	Adopted	Wis. Stat. Ann. § 895.045 (West 1983)	1931	50-50
Wyoming	Adopted	Wyo. Stat. § 1-1-109 (1977)	1973	49-51

Appendix D

1. The types of comparative negligence are:

(i) *Pure* comparative negligence, in which the plaintiff can recover damages in proportion to his degree of fault so long as he is not 100% at fault. In theory, the defendant could be 99% non-negligent and yet have to pay to the plaintiff one percent of the plaintiff's damages.

(ii) *49-51* comparative negligence, in which the plaintiff can recover damages in proportion to his degree of fault so long as his negligence is less than that of the defendant. If the plaintiff is 35% at fault, he collects 65% of his damages. If he is 50% or more at fault, he receives nothing.

(iii) *50-50* comparative negligence, in which the plaintiff can recover damages in proportion to his degree of fault so long as his negligence is less than or equal to that of the defendant. If the plaintiff is 50% at fault, he collects one-half of his damages. If he is 51% or more at fault, he receives nothing.

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

For a detailed analysis of comparative negligence systems, see C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL (1978 & Supp. 1985).

2. Georgia's statute traces to the nineteenth century.

3. In 1962, South Carolina adopted a statute, § 15-1-300 (Law. Co-op. 1977), mandating comparative negligence for litigation involving motor vehicle accidents. This statute subsequently was declared unconstitutional as lacking any rational basis for distinguishing injuries suffered in motor vehicle accidents from injuries due to other types of torts. Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978).

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

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