REDUCING THE RECOVERY OF AVOIDABLE "SEAT-BELT DAMAGES": A CURE FOR THE DEFECTS OF *WATERSON V. GENERAL MOTORS CORPORATION*

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I. INTRODUCTION

The legal consequences of a traffic accident victim's failure to wear a seat belt are among the most complicated of the issues frequently faced in routine accident litigation.[1] Federal legislation now conditions the allocation of some highway funds on the state having an approved highway safety program to reduce the number and severity of traffic accidents.[2] Among the features that a state must include within an acceptable safety program is a provision to encourage drivers and passengers to use seat belts.[3] Either in response to this legislation or independently, most states have adopted legislation that requires drivers and front seat passengers to wear seat belts.[4]

States differ markedly, however, in the consequences they at-

[1] Among recent articles on the topic are Ackerman, *The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M.L. REV. 221 (1986); Cochran, *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, and the Basis of Damage Reduction under the Seat Belt Defense*, 73 MINN. L. REV. 1369 (1989); Schwartz, *The Seat Belt Defense and Mandatory Usage: Law, Ethics, and Economics*, 24 IDAHO L. REV. 275 (1988); Note, *A Compromise Between Mitigation and Comparative Fault? A Critical Assessment of the Seat Belt Controversy and A Proposal for Reform*, 14 HOFSTRA L. REV. 319 (1986); Note, *Buckling Up: How the Mandatory Seatbelt Law Affects the Seatbelt Defense*, 17 Sw. U.L. REV. 597 (1988); Note, *Tort Law and The Safety Belt Defense: Analysis and Recent Oregon Developments*, 26 WILLAMETTE L. REV. 517 (1990); Comment, *Plaintiff's Failure to Wear a Seat Belt Does Not Constitute Contributory Negligence*, 40 S.C.L. REV. 237 (1988).

[2] 23 U.S.C.A. § 402(a) (West 1990).

[3] *Id.* at § 402(b)(1)(E).

[4] *See, e.g.,* ARIZ. REV. STAT. ANN. § 28-909 (Supp. 1990); FLA. STAT. ANN. § 316.614 (West 1990 & Supp. 1991); 75 PA. CONS. STAT. ANN. § 4581 (Purdon Supp. 1991). Only nine states currently do not have a mandatory seat belt law. WASH. POST, Sept. 20, 1991, at A25.

4

tach to a personal injury plaintiff's failure to wear a seat belt. A number of states, as a matter of legislation or common law rule, refuse to give any effect to the nonuse of a seat belt.[5] Other states consider nonuse of a seat belt to be relevant to the accident victim's potential recovery. Courts in these states often determine the effect of seat belt nonuse on the basis of two conceptual paradigms: the causation paradigm or the plaintiff misconduct paradigm.

Under the *causation paradigm*, a plaintiff may not recover damages for the harm caused by the failure to wear a seat belt.[6] Among the states using the causation paradigm, some states require the plaintiff to prove that the accident injuries would have been suffered even if the plaintiff had worn a seat belt, while others require the defendant to prove that the plaintiff's injuries would not have occurred if the plaintiff had been wearing a seat belt. In either situation, the causation paradigm calls for a seemingly heroic and precise fact-finding effort in identifying and apportioning the various contributing factors to the harm suffered in traffic accidents.

The *plaintiff misconduct paradigm*, on the other hand, focusses more directly on the plaintiff's fault in failing to wear a seat belt. That fault becomes the basis for calculating a comparative fault reduction in the damages a plaintiff can recover, or for raising a contributory negligence complete bar to a plaintiff's recovery, depending on the jurisdiction's approach to the contributory and comparative negligence defenses.[7] The plaintiff misconduct paradigm requires potentially complicated fact finding for determining the existence and the magnitude of the plaintiff's fault in failing to wear a seat belt.

The most interesting of the recent judicial efforts to resolve the question how to treat an accident victim's failure to wear a seat belt was the decision of the Supreme Court of New Jersey in *Waterson v. General Motors Corporation*.[8] Adopting neither the causation paradigm nor the plaintiff misconduct paradigm in its en-

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[5] *See, e.g.*, VA. CODE ANN. § 46.2-1092 (1989).

[6] *See, e.g.*, LaHue v. General Motors Corp., 716 F. Supp. 407, 416-17 (W.D. Mo. 1989) (under Missouri law, evidence on the causal effect of failure to wear seat belt is admissible; contributory negligence and mitigation of damages not available as a defense).

[7] *See, e.g.*, Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986) (comparative negligence defense contemplates inclusion of nonuse of seat belt as a relevant factor).

[8] 111 N.J. 238, 544 A.2d 357 (1988). The case is discussed in Note, *Negligence — Seat Belt Defense — Failure to Use a Seat Belt Constitutes Evidence of Comparative Negli-*

tirety, the court articulated a hybrid approach that warrants careful attention. Courts in other jurisdictions could easily find the policy considerations that underlie the *Waterson* decision compelling. Upon reflection, however, it is reasonable to come away from the *Waterson* decision with misgivings about the manner in which the New Jersey court implemented those considerations. Specifically, the formula the court adopted for calculating the extent to which a plaintiff's failure to wear a seat belt would reduce the plaintiff's recovery is so cumbersome that other courts may understandably be reluctant to adopt it.[9] In addition, significant parts of the methodology that the court employed are conceptually muddled and perhaps logically flawed.

The New Jersey Supreme Court began its *Waterson* opinion with a deceptively simple announcement of the general principle that would govern the seat belt defense issue: "if a jury finds that a plaintiff's failure to wear a seat belt constitutes negligence that contributed to plaintiff's injuries and damages, that negligence shall be considered in determining plaintiff's award."[10] In an overly-optimistic assessment of the effect that this principle could have on accident litigation about accidents in which plaintiffs failed to wear seat belts, the court commented that "[t]his principle will require only a limited expansion of the jury's responsibilities in automobile accident cases."[11]

A preliminary sense of the complexity involved in the *Waterson* approach to the nonuse of a seat belt can be gained from a consideration of the court's initial explanation of the jury's role in this "limited expansion" of its responsibilities:

> If a jury finds plaintiff negligent for failure to wear a seat belt, plaintiff's recovery for injuries that could have been avoided by seat belt use may be reduced by an amount reflecting plaintiff's comparative fault in not wearing a seat belt. We refer to the damages that arise from these avoidable injuries as "seat belt damages." The jury may take into account plaintiff's negligent failure to use a seat belt only to reduce plaintiff's recovery for these seat belt damages. Plaintiff's failure to wear a seat belt will not affect recovery for injury and damages

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gence, Which May Decrease Recovery for Avoidable Damages, 102 HARV. L. REV. 925 (1989).

[9] The complexity of the decision is noted in Bird, *Decision on Seat Belt Use Is Criticized: Damages Formula Too Complicated?*, 122 N.J.L.J. 297, col. 4 (1988). *See also So Complicated*, 126 N.J.L.J. 1540 (1990) ("*Waterson* set the record for steps, either six or eight depending on how finely you parse it, for damage verdict calculation").

[10] *Waterson*, 111 N.J. at 241, 544 A.2d at 358.

[11] *Id.*

that would have occurred regardless of whether plaintiff had worn a seat belt. The amount of the reduction of seat belt damages must fairly reflect all of the parties' contributions to the seat belt damages: defendant's contribution in causing the accident in the first place, plaintiff's contribution in causing the accident in the first place, and plaintiff's contribution to the extent of his or her injuries in not wearing a seat belt. The court will mold these jury findings, expressed as percentages of comparative fault, into the final verdict.[12]

The *Waterson* approach thus requires an initial determination whether the plaintiff was at fault in not wearing a seat belt. If so, it is necessary to determine the amount of what the court refers to as "seat belt damages," that is, the damages that would have been avoided had the plaintiff not been at fault in failing to wear a seat belt. The significance of identifying seat belt damages lies primarily in the fact that the court's approach allows for the plaintiff's fault in not wearing a seat belt to be taken into account only in making a reduction in the recovery of *those* damages.

The reduction in the amount of damages that a plaintiff may recover is supposed to take place according to a methodology that seems to be fundamentally flawed as a matter of logic but that is substantially more defensible as a matter of policy. The methodology requires the judge and the jury to complete a six-stage process which Part I of this article explains. The *Waterson* approach will first be described in the court's language, and then displayed in a chart (Table 1) that shows the steps in the complex analytical process that a judge and jury are required to follow. The chart presented in Table 1 will then be used to follow the court's illustration of how its formula should operate, as well as to consider some additional hypotheticals that raise further complications in the use of this methodology. Once the court's own approach has been presented, a critical analysis of that approach will be conducted in Part II, followed in Part III by a revision of the *Waterson* methodology, which retains *Waterson*'s policy choices but avoids the unnecessary and daunting complexity of the original decision. This article attempts to rescue *Waterson*'s admirable policy conclusions from its inadequate methodology. In effect, then, as the subtitle indicates, this article offers a cure for the defects in the *Waterson* approach.

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[12] *Id.* at 241-42, 544 A.2d at 358.

TABLE 1

THE *WATERSON* FORMULA FOR REDUCING DAMAGE
AWARDS

Stage 1:

Determine plaintiff's total damages   (1) $_____

Stage 2:

Compare parties' fault in the collision
     a) plaintiff's fault   (2a) _____%
     b) defendant's fault   (2b) _____%

[Note: a + b = 100]

Stage 3:

Calculate "seat-belt damages"
     a) damages if seat belt worn $_____
     b) subtract 3(a) from 1   (3) $_____

Stage 4:

Determine reduction percentage
     a) plaintiff's negligence *re* belt _____%
     b) add 4(a) and 2(a)   _____%
     c) add 4(a) and 2(a) and 2(b) _____%
     d) divide 4(b) by 4(c)   (4) _____%

Stage 5:

Reduce recovery of "seat-belt damages"
     multiply 3(b) by 4   (5) $_____

Stage 6:

Award plaintiff damages   (6) $_____

II. THE *WATERSON* APPROACH TO REDUCING RECOVERY OF SEAT-BELT DAMAGES

A. *The Waterson Formula*

The *Waterson* decision requires a reduction of an accident victim's recovery by the harm that would have been avoided had the victim not been negligent in failing to wear a seat belt. The court promulgated a multi-part formula to calculate the appropriate reduction, if any:

     (1) The jury determines total damages as if there were no seat belt issue at all.

     (2) The jury determines the comparative fault of each

party in causing the accident and expresses those determinations in terms of a percentage . . .

(3) The jury determines whether plaintiff's nonuse of a seat belt increased the extent or severity of plaintiff's injuries and whether plaintiff's nonuse of a seat belt constituted negligence.

(4) The jury determines plaintiff's second-collision injuries, or seat belt damages.

(5) The jury determines the percentage of plaintiff's comparative fault for the second-collision injuries or seat belt damages. The court should inform the jury that plaintiff's fault for failure to wear a seat belt will be added to plaintiff's fault, if any, in causing the accident to reduce further plaintiff's award in an amount proportionate also to defendant's relative fault in causing the accident.

(6) The court determines plaintiff's recovery by molding the jury's damages and negligence findings.[13]

The best way to explain this formula is to examine the *Waterson* court's hypothetical illustration. To elucidate this explanation, it is helpful to introduce a step-by-step guide to the *Waterson* formula for calculating the plaintiff's recovery as illustrated in Table 1.

While some of the stages presented in this formula are relatively easy to understand, others are more complicated. In this initial examination of the *Waterson* formula, the court's decision will be accepted on its own terms, with a more critical analysis of some of the steps reserved for subsequent discussion.

The first stage of the court's approach requires the fact finder to calculate the monetary value of the plaintiff's harm. This stage ignores the plaintiff's nonuse of a seat belt. Here, the jury simply determines the amount of damages for the plaintiff's legally compensable injuries attributable to the accident.

In stage two, the jury must perform a standard comparative negligence analysis of the accident, determining the plaintiff's and defendant's relative percentages of fault. The significant aspect of this initial comparative fault analysis, however, is that it should be limited to the parties' negligence with regard only to the accident itself, ignoring the seat belt issues. In other words, the second stage's comparative fault calculation looks only at what can be referred to as the "first-collision" element of the accident in which the plaintiff was injured.

In addition, under New Jersey law, the second stage compara-

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[13] *Id.* at 274, 544 A.2d at 375-76.

tive negligence calculation is subject to the "modified" comparative negligence scheme previously adopted by the New Jersey legislature.[14] Under the New Jersey Comparative Negligence Act, a plaintiff's contributory negligence will operate to reduce, rather than to bar, the plaintiff's recovery only when the plaintiff's negligence is not greater than the negligence of the defendant.[15] Therefore, unless the plaintiff's negligence in causing the accident was equal to or less than the defendant's negligence, the New Jesey Comparative Negligence Act will bar the plaintiff from any recovery. In such a case, there is no need to continue the *Waterson* formula. The terms of the comparative negligence statute would prevent the plaintiff from recovering any damages for the harm suffered in the accident.

If the plaintiff's claim for damages is not precluded by the state's comparative negligence statute, then the plaintiff's failure to wear a seat belt enters the analysis in the *Waterson* formula's third stage. Although Stage 3 of Table 1 describes this as a calculation of what the court labelled the plaintiff's seat belt damages, this stage actually contains a number of related causation and fault issues that could be difficult to resolve in practice.

The first question to be asked in the third stage of the *Waterson* calculation is whether the failure to wear a seat belt constituted negligence by the plaintiff. It is, the court makes clear, only a *negligent* failure to wear a seat belt that reduces the amount of the avoidable damages that a plaintiff is entitled to recover. Thus, if a jury concludes that a plaintiff was not negligent in failing to wear a seat belt, then the plaintiff's failure to wear a seat belt would be irrelevant in determining the recovery.

As a result of this fault-based limitation on the defensive use of a failure to wear a seat belt, litigation that employs the *Waterson* formula can present all of the complexity associated with having to arrive at a fault characterization of the plaintiff's conduct in not using the seat belt. The ultimate question in making that characterization is the reasonableness of the plaintiff's failure to wear a seat

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[14] Comparative negligence schemes can be constructed along two different lines. A "pure" system completely replaces the contributory negligence rule with a comparative fault rule. In a pure system, a plaintiff whose negligence is less than one hundred percent responsible for the plaintiff's injuries would never be totally barred from recovery because of that negligence. In a "modified" system, the replacement of the contributory negligence rule is partial rather than total. At some percentage of plaintiff's negligence in a modified comparative negligence scheme, the plaintiff's fault will act as a total bar to recovery. A comprehensive treatment of this defense can be found in V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986).

[15] N.J. STAT. ANN. § 2A:15-5.1 (West 1987).

belt. Resolution of that issue can turn on such matters as statutory requirements for its use,[16] the prevalence of use or nonuse in the community, the effectiveness of seat belts in preventing injuries, the nature and magnitude of the risk that seat belt use might enhance injuries, and any peculiar circumstances that might explain why a seat belt was not worn on the specific occasion of the accident in which the plaintiff was injured.

If the plaintiff's failure to wear a seat belt is deemed negligent, then the next question in the third stage is whether that negligent conduct increased the plaintiff's injuries. The underlying rationale for this inquiry is the common-sense notion that the plaintiff's negligent failure to wear a seat belt becomes relevant only if the failure to wear a seat belt had some causal significance in the harm the plaintiff suffered. The question to ask, then, is whether the failure to wear a seat belt enhanced the plaintiff's injuries.

Although this appears to be simply a causal inquiry, it might actually be more complex, for the preliminary decision to restrict the effect of the plaintiff's nonuse of a seat belt to a negligent nonuse could come into play in answering this question. The relevant increase in the extent of injury is the harm that is attributable to a negligent failure to wear a seat belt. Theoretically, at least, one can imagine the additional complexity that would be associated with an attempt to distinguish harm attributable to a negligent failure to wear a seat belt from harm attributable to a non-negligent failure to wear a seat belt. *Waterson*'s fault-based approach to the consequences of the plaintiff's failure to wear a seat belt would require the latter to be subtracted from the former before any reduction in the amount of recovery was to be performed.

Nevertheless, the heart of this question in *Waterson*'s third stage is a causal inquiry about the extent of the harm produced by the plaintiff's failure to wear a seat belt, when that failure has previously been characterized as negligent. As with other counter-factual causation inquiries, this analysis requires a comparison of the actual plaintiff's injuries with the injuries of a hypothetical plaintiff in the same position as the actual plaintiff, but who was wearing a seat belt during the accident.

If the plaintiff's injuries are determined to have been greater because of the negligent nonuse of a seat belt, the fact-finder com-

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16 The New Jersey court noted that, at the time of the accident from which the *Waterson* case arose, there was no legislation that required seat belts to be worn, and that there was therefore no negligence per se aspect to this contributory negligence issue. *Waterson*, 111 N.J. at 262, 544 A.2d at 369.

pleting Stage 3 must consider a third question that examines the difference between the harm that the plaintiff actually suffered and the harm that the plaintiff would have suffered if the plaintiff had worn a seat belt. The preceding inquiry in Stage 3 asked *whether* the negligent plaintiff's injuries were greater than they would have been had the plaintiff worn a seat belt. If they were, then the fact finder must now decide *how much* of a difference exists between the injuries of a hypothetical plaintiff who wore a seat belt and those of the actual plaintiff who negligently failed to wear one. The figure arrived at in answering this question constitutes the amount of the plaintiff's seat belt damages. These are the damages that would have been avoided if the plaintiff had exercised reasonable care by wearing a seat belt, and these are the damages that will be subjected to the reduction in the amount of the plaintiff's recovery to be calculated according to the remaining steps of the analysis.

The fourth stage of the *Waterson* formula is designed to calculate the extent of the reduction that will be made in the recovery of the amount of seat belt damages calculated in the preceding stage. It is at this stage that the court appears to introduce a fundamental error into its methodology, but before going into that flaw in detail in Part II of the article, the discussion here will continue to accept the court's approach at face value and proceed with the analysis.

The reduction percentage in Stage 4 is determined by constructing a fraction comprising different combinations of the comparative fault percentages that were obtained in previous stages of the analysis. The numerator, according to the court, consisted of the two distinct contributory negligence components of the plaintiff's behavior. As described above, those are the plaintiff's negligence in causing the accident (which must be 50% or less to avoid the bar of the state's modified comparative negligence statute) and the plaintiff's negligence in not wearing a seat belt. The denominator of the fraction incorporated those two percentages plus a third percentage that consists of the defendant's negligence in causing the accident. The *Waterson* fraction of Stage 4 therefore consisted of the following elements:

FIGURE 1

THE *WATERSON* OPINION'S REDUCTION FRACTION

$$\frac{\text{Plaintiff's Negligence in Causing the Accident} + \text{Plaintiff's Negligence in Nonuse of Seat Belt}}{\text{Plaintiff's Negligence in Causing the Accident} + \text{Plaintiff's Negligence in Nonuse of Seat Belt} + \text{Defendant's Negligence in Causing the Accident}}$$

After the reduction percentage fraction is calculated in Stage 4, that fraction is then, in Stage 5, simply multiplied by the seat belt damages that were calculated in Stage 3. The product obtained in Stage 5 therefore consists of the amount of the seat belt damages that the plaintiff will not be allowed to recover. The court's attempt to separate the effects of the different ways in which a plaintiff's negligence will affect recovery will thus be implemented at this stage. The portion of the plaintiff's injuries that are unrelated to the plaintiff's failure to wear a seat belt will be unaffected by the fault in not wearing the seat belt, and the damages that were avoidable by reasonable care in wearing a seat belt will be reduced to reflect that aspect of the plaintiff's negligence.

The final stage of the process, Stage 6, calls for the court to use the results of this decision to arrive at a judgment that reflects this partial disallowance of the portion of the damages that could have been avoided had the plaintiff exercised reasonable care by wearing a seat belt. At the very least, the framing of that judgment would involve a subtraction of the figure produced in Stage 5 from the total damages that were determined in Stage 1. As will be demonstrated below, however, there is another important part of the calculation of the damage award that must be performed at this last stage of the *Waterson* approach.

B.   *Waterson's Hypothetical Illustration*

At this point in analyzing the *Waterson* seat belt defense methodology, it is probably wise to consider the simple hypothetical the court used to illustrate its methodology. After the hypothetical has been presented, some further refinements of the approach can be made and the critical analysis of this methodol-

ogy can proceed. The facts from the court's hypothetical can easily be plugged into the step-by-step guide introduced in Table 1.

The court's hypothetical began with the Stage 2 comparative negligence determination and assumed that the plaintiff was 20% negligent and the defendant was 80% negligent in causing the accident. Because the percentage of negligence was less than the "51% bar" of the state's comparative negligence rule, the plaintiff's contributory negligence did not completely bar recovery, and the analysis proceeded to Stage 3.

The court next assumed that the Stage 3 calculation of the plaintiff's seat belt damages equalled $300,000. To determine how much of those damages the plaintiff may not recover, the court computed the reduction percentage of Stage 4, adding the only remaining assumption needed to complete the computation: the percentage of the plaintiff's negligence in failing to wear a seat belt. That figure, the court hypothesized, was 20%. Although the court failed to explain how it chose 20%, it is sufficient to know the number to be plugged into the reduction fraction formula. Table 2 illustrates the facts from the court's hypothetical showing that the plaintiff's judgment would be reduced by $100,000.

Additionally, although the court does not need to spell this out in the *Waterson* opinion, the plaintiff's recovery must also be reduced by the plaintiff's fault in causing the accident. All that the *Waterson* methodology produces is the amount of the seat belt damages that are unrecoverable because of the plaintiff's negligence in failing to wear a seat belt. Stage 2 of the analysis identified another instance of the plaintiff's negligent behavior — negligence in causing the accident — that also must be considered. To give full effect to the comparative negligence doctrine, the final calculation of the plaintiff's award must include a reduction of the damages that were unrelated to the plaintiff's failure to wear a seat belt. This reduction can be made simply by determining the first-collision damages and then reducing the plaintiff's recovery of those damages by the percentage of the plaintiff's negligence in causing the accident.

This final step completing the *Waterson* methodology is illustrated in Table 3 by making explicit one additional fact that is consistent with the assumptions made in the court's own hypothetical. In this "expanded" version of the court's illustration, it will be assumed that the plaintiff's total damages were $1,000,000. With this addition, we now can infer that the Stage 3

TABLE 2

THE *WATERSON* FORMULA FOR REDUCING DAMAGE
AWARDS: THE COURT'S ILLUSTRATION

Stage 1:

Determine plaintiff's total damages   (1) $_____

Stage 2:

Compare parties' fault in the collision
    a) plaintiff's fault   (2a)   20 %
    b) defendant's fault   (2b)   80 %

Stage 3:

Calculate "seat-belt damages"
    a) damages if seat belt worn $_____
    b) subtract 3(a) from 1   (3) $300,000

Stage 4:

Determine reduction percentage
    a) plaintiff's negligence *re* belt   20   %
    b) add 4(a) and 2(a)   40   %
    c) add 4(a) and 2(a) and 2(b)   120   %
    d) divide 4(b) by 4(c)   (4)   33⅓%

Stage 5:

Reduce recovery of "seat-belt damages"
    multiply 3(b) by 4   (5) $100,000

Stage 6:

Award plaintiff damages   (6) $_____

calculation involved a determination that a plaintiff who had been wearing a seat belt would have suffered $700,000 in damages. This sum, which is entered into the calculation in Stage 3(a), constitutes what will now be referred to as the first-collision damages. The Stage 6 calculation of the plaintiff's award must therefore include the additional steps of multiplying the first-collision damages by the percentage of the plaintiff's negligence in causing those damages, and then subtracting that sum from the plaintiff's total damages.

In this expanded hypothetical, still accepting the court's assumption that the plaintiff was 20% negligent in causing the accident, this last part of the calculation would require the court to multiply the first-collision damages of $700,000 by the plaintiff's negligence of 20%, to arrive at a product of $140,000. That figure, plus the $100,000 reduction of the plaintiff's recovery of

seat belt damages, must then be subtracted from the plaintiff's total damages determined in Stage 1, resulting in a judgment for the plaintiff of $760,000. Table 3 thus presents a complete picture of the *Waterson* approach to the issue of what effect a negligent failure to wear a seat belt will have on a plaintiff's recovery for injuries suffered in a traffic accident.

At the conclusion of its opinion, the court reiterated its confidence "that juries can follow this formula."[17] Whether that confidence is justified will be tested in practice. There is, however, reason to be skeptical.

C.   Problems in Applying the Waterson Methodology

The three questions that must be answered in Stage 3 of the *Waterson* approach involve the jury in all of the complex and controversial fact finding presented by both the causation and the plaintiff misconduct paradigms of nonuse. The plaintiff's behavior must be characterized either as negligent or as reasonably careful; the causal relationship between the plaintiff's negligent failure to wear a seat belt and the plaintiff's injuries must be determined, and the difference between the plaintiff's injuries and those of a hypothetical seat-belted victim must be quantified. It is virtually certain that all of these considerations would play a role in an ideally comprehensive and sophisticated assessment of the legal significance of the nonuse of a seat belt. Nevertheless, it might be at least somewhat disingenuous to label this a modest increase in the complexity of the jury's decision making process.

Further, there may be considerable difficulty regarding the ability of the parties to offer evidence, particularly credible expert testimony, on the questions that are involved in the allocation of the plaintiff's injuries between seat belt damages and first-collision damages. As an appellate court in another state said when looking at the evidence that had been introduced in the original trial of the *Waterson* case:

> In the case of Waterson v. General Motors Corp., . . . the defendant seems to have identified the ideal expert to testify concerning the plaintiff's failure to wear his seat belt. This witness had degrees in physics, mathematics and biomedical engineering and he was a senior engineer of safety research. He testified that the plaintiff would have suffered no injury at all if seat belts had been used. No expert testimony was offered by the plaintiff. The jury found the plaintiff 40% com-

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[17] *Id.* at 275, 544 A.2d at 376.

TABLE 3

THE *WATERSON* APPROACH TO REDUCTION OF DAMAGES: THE COURT'S ILLUSTRATION "EXPANDED"

Stage 1:

Determine plaintiff's total damages   (1) $1,000,000

Stage 2:

Compare parties' fault in the collision
    a) plaintiff's fault   (2a)   20 %
    b) defendant's fault   (2b)   80 %

[Note: a + b = 100]

Stage 3:

Calculate "seat-belt damages"
    a) damages if seat belt worn
       ("first-collision damages") $700,000
    b) subtract 3(a) from 1   (3) $300,000

Stage 4:

Determine reduction percentage
    a) plaintiff's negligence *re* belt   20 %
    b) add 4(a) and 2(a)   40 %
    c) add 4(a) and 2(a) and 2(b)   120 %
    d) divide 4(b) by 4(c)   (4) $33\frac{1}{3}$ %

Stage 5:

Reduce recovery of "seat-belt damages"
    multiply 3(b) by 4   (5) $100,000

Stage 6:

Award plaintiff damages
    a) multiply 3(a) by 2(a) $140,000
    b) add 6(a) and 5 $240,000
    c) subtract 6(b) from 1   (6) $760,000

paratively negligent. In upholding the trial court's refusal to grant a directed verdict for the defendant, the court found that the jury could reject the expert's testimony and reach its own conclusions concerning the effect of the collision on the plaintiff and the effect of her failure to use a seat belt.[18]

In at least some cases, both the plaintiff and the defendant will be expected to introduce expert testimony about how much the plain-

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[18] State Farm Mut. Auto. Ins. Co. v. Smith, 565 So.2d 751, 753 n.3 (Fla. Dist. Ct. App. 1990).

tiff's failure to wear a seat belt increased the plaintiff's injuries. The fact-finder would then be required to accept the conclusion of one of the conflicting experts or to reject the testimony of both and reach its own conclusion. Deriving the numbers to incorporate into the *Waterson* formula thus may be considerably more difficult than the court's presentation of its hypothetical indicates.

III. "FIXING" THE FLAW IN THE *WATERSON* METHODOLOGY

Even if the *Waterson* approach's fact-finding process is supportable by credible expert testimony and the steps in the approach are capable of being performed by the average juror, the *Waterson* methodology still raises significant questions. The major flaw in the New Jersey court's approach occurs in Stage 4 of the analysis as it was set out in Part I of this article. That is where our attention needs now turn.

The purpose of Stage 4 is to determine the reduction percentage that should be made in the plaintiff's recovery of the seat belt damages. To calculate this percentage, the court constructed a fraction that consists of a numerator of the plaintiff's negligence percentage in causing the accident plus the plaintiff's negligence percentage in not wearing a seat belt, and a denominator that includes those two elements plus the defendant's negligence percentage in causing the accident. This approach may seem to be a reasonable way of apportioning the respective fault contributions to the distinct categories of injuries that the plaintiff has suffered. This approach, however, contains significant errors.

Consider first the idea that the three elements used to produce the reduction fraction consist of percentages of fault. Assuming that is true (although as will soon be shown, there is ample reason to question that assumption), then the fraction that the court constructed seems to be missing a necessary element. Because the court included the *plaintiff's* percentage of fault in seat-belt nonuse into the numerator and the denominator of the fraction, then one might argue that it should also have included in the fraction an element that reflects the *defendant's* fault share regarding liability for the seat belt damages.

The objection to the incompleteness of the court's fraction appears to be technically correct. The New Jersey court described the analytical element that considers the plaintiff's negligence in failing to wear a seat belt as "the percentage of plaintiff's fault for these [i.e., seat belt] damages that are attribu-

table to plaintiff's failure to wear a seat belt."[19] By definition, of course, a "percentage" is a particular share of one hundred. If the plaintiff's negligence in failing to wear a seat belt is, as the court assumes in its hypothetical, twenty percent, then there is another eighty percent of fault that has been ignored.

While it is true that the defendant's negligence in causing the accident plays a role in the reduction of plaintiff's recovery of seat belt damages as the third element of the denominator of the court's fraction, that particular fault percentage should only count as the reciprocal of the plaintiff's fault in causing the accident. That reciprocal relationship accounts for the definitional note in Table 1 that the plaintiff's fault in causing the accident and the defendant's fault in causing the accident must equal one hundred.[20] If the numerator includes two plaintiff negligence elements, one for each of the plaintiff's distinct categories of negligent behavior, then arguably the denominator should also include two elements for the defendant's negligence. Otherwise, plaintiff's negligence would be double-counted as compared to defendant's negligence.

After acknowledging the potential flaw in the court's method of constructing the reduction fraction, there are two ways to proceed. The first possibility would be to "fix" Stage 4 of the *Waterson* analysis in which the flaw appears. Following this course of action, one would say that what the court should do in Stage 4 is to construct the fraction by which plaintiff's recovery of seat belt damages is to be reduced not by using the three elements of the *Waterson* opinion, but rather in a way that consists of the following four elements:

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[19] *Waterson*, 111 N.J. at 273, 544 A.2d at 375.

[20] This assumes, of course, that the accident resulted from the negligence of only the two parties to this simple personal injury claim.

FIGURE 2

A REVISED REDUCTION FRACTION THAT FIXES THE FLAW
BUT UNDERMINES THE POLICY

Plaintiff's Negligence in Causing the Accident	+	Plaintiff's Negligence in Nonuse of Seat Belt				

Plaintiff's Negligence in Causing the Accident	+	Plaintiff's Negligence in Nonuse of Seat Belt	+	Defendant's Negligence in Causing the Accident	+	Defendant's Negligence in Causing Seat-belt Damages

The two instances of plaintiff's fault are now part of a fraction that includes the remainder of the whole of which each plaintiff fault percentage is a part.

Now consider what happens when the factual assumptions of the New Jersey court's own hypothetical are plugged into this revised method of determining the reduction fraction. The numerator remains the same as it was in the illustration set out in Table 2: plaintiff's negligence in causing the accident is 20% and plaintiff's negligence in failing to use a seat belt is also 20%, producing a numerator of 40. Now, however, instead of the denominator of 120 that the court reached in its original approach, the denominator would be 200. That figure is determined by adding the two plaintiff's negligence figures of 20 and 20 to the defendant's negligence in causing the accident (80%) plus the "phantom" 80% that is the reciprocal of the plaintiff's negligence in nonuse of a seat belt. Under this method of calculating the reduction percentage, the plaintiff's seat belt damages would therefore be reduced not by one-third (40 divided by 120) but rather by twenty percent (40 divided by 200).

In looking at the "corrected" method of deriving the fraction used to reduce the plaintiff's recovery of seat belt damages, it should become apparent that the denominator is *always* going to be 200. The "corrected" denominator consists of *all* the fault percentages of *both* parties for the two distinct components of behavior (regarding the first collision damages and the seat belt damages in the second collision between the plaintiff and the interior of the vehicle) that produced harm to the plaintiff, and each of those components consists of one hundred percent. Any doubt that the court believed the seat belt damage component is supposed to equal one hundred

percent should be removed by its own declaration that "[t]he total fault for these seat belt damages, as for all damages, is one-hundred percent."[21]

If the denominator is by definition always 200, then there is a much simpler way to express the effect of the "corrected" way to calculate the reduction fraction. A percentage-based fraction with a denominator of 200 is always going to produce a result that can be expressed as a percentage equal to one-half of the numerator. If this change in Stage 4 of the *Waterson* approach were adopted, then the way to determine the reduction percentage of the plaintiff's recovery of seat belt damages would simply be to add the two plaintiff's negligence components and divide by two.

One possible source of confusion in the court's opinion needs to be recognized and avoided. In the court's hypothetical illustrating the reduction in seat belt damages,[22] the two plaintiff's negligence components were assumed to be equal, each being 20%. Although the court uses some ambiguous language,[23] it is apparent, taking the opinion as a whole, that the equivalence of the two plaintiff's negligence figures is a matter of coincidence rather than definition.[24]

One can imagine why the court was not inclined to "correct" the calculation of the reduction fraction used to reduce the plaintiff's seat belt damages recovery of the plaintiff. Adding in the "missing" remainder of the one hundred percent of the negligence responsible for the seat belt damages would operate simply to cut each of the plaintiff's negligence figures in half. The implicit message of that approach would be that plaintiff's negligence should be taken into account in reducing the plaintiff's recovery,

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[21] *Waterson*, 111 N.J. at 273, 544 A.2d at 375.

[22] *See* Table 2.

[23] The court says that:
> [i]f the jury previously found a percentage division of fault between plaintiff and defendant in causing the accident, the jury must be told that the court, when finally molding the jury findings into the verdict, *will continue that proportion of fault* when adding in the percentage attributable to plaintiff's failure to wear a seat belt.

Waterson, 111 N.J. at 273, 544 A.2d at 375 (emphasis added).

[24] In describing the refusal to apply the state's modified comparative negligence rule to the plaintiff's negligence in failing to wear a seat belt, the court used an example of a plaintiff who was 60% negligent in not wearing a belt. *Id.* at 274-75, 544 A.2d at 376. If the two separate components of the plaintiff's negligence were to be treated as equal by definition, then the plaintiff's negligence in causing the accident would also have been 60%. If that were so, then the plaintiff's claim would have been barred at the completion of the Stage 2 comparison of the parties' fault in producing the collision.

but that such negligence counted only half as much as comparable negligence by the defendant.

Such a message would appear to be inconsistent with *Waterson*'s underlying policy goal to calculate precisely the effect of the plaintiff's separate acts of negligence on the distinct items of loss that the plaintiff suffered. The incomplete-denominator flaw in the court's methodology may thus appear to be necessary if the court is to be successful in apportioning the parties' respective percentages of negligence to the separate fault components that contributed to the plaintiff's injuries. As will be demonstrated in the next Part of this article, however, that appearance is illusory, and the court's goal can be accomplished with a methodology that both displays sound policy and provides an ease of application that is too frequently absent from the *Waterson* approach set out by the Supreme Court of New Jersey.

IV. CONSTRUCTING AN ALTERNATIVE TO THE *WATERSON* METHODOLOGY THAT ADHERES TO THE *WATERSON* PRINCIPLES

"Fixing" the court's method of calculating the reduction fraction was described as the first course of action along which further consideration could proceed. But the preceding section of this article reveals that "correcting" the court's methodology can be seen as an effort that undermines the central rationale for engaging in the enterprise in the first place. The question that arises, then, is whether there is an alternative that retains more of the court's attempt to distinguish between the proportional diminution in liability for the seat belt damages and that for the first-collision damages. The remainder of this article demonstrates an alternative approach to accomplish this goal.

Arriving at an affirmative answer to that question requires analyzing some of the court's assumptions in constructing the fraction by which it would reduce the plaintiff's recovery of seat belt damages. Once those assumptions are changed, there are two different ways to proceed. One option at that point is to ignore the primary policy considerations that drive the *Waterson* decision. The other option will permit a court to give effect to those considerations, but do so in a way that avoids the methodological error of the *Waterson* opinion's approach. To appreciate the significance of the proposed alternative to the *Waterson* approach, the operation of each of those options needs to be understood.

The strongest message that emerges from the *Waterson* deci-
sion — indeed the driving principle of the *Waterson* approach —
is that the plaintiff's distinct negligent acts should be equitably
applied to determine the share of the damages that are reason-
ably attributable to those different elements of fault. As a corol-
lary proposition, however, the court decided that the equitable
treatment of a plaintiff's negligence in not wearing a seat belt
would require a proportional reduction in the plaintiff's recovery
of the seat belt damages, rather than a total bar to the recovery of
those damages.[25] The court's ultimate goal in *Waterson* was
"properly [to] isolate the damages *and fault* attributable to a
plaintiff's failure to wear a seat belt."[26] That goal is both lauda-
ble and attainable, but the approach taken by the Supreme Court
of New Jersey in the *Waterson* case needs to be modified if the
court's ideas are to receive the favorable attention that they de-
serve from courts in other jurisdictions.

A. Constructing An Alternative to the Waterson Methodology

An alternative to the *Waterson* approach needs to be built
around a different treatment of the Waterson court's basic dis-
tinction between the fault in causing the accident and the fault in
failing to wear a seat belt. Within this proposed alternative, it is
possible to conceive of an option that rejects the *Waterson* princi-
ples, but it is also possible to construct an option that adheres to
those principles. Each of those options starts with the same ini-
tial steps, which are identical to the first two stages of the *Water-
son* analysis described above and presented in Tables 1 through
3.

The first step in the proposed alternative requires the jury to
determine the total sum of the damages that would compensate
the plaintiff for the injuries suffered in the accident. As in the
Waterson approach itself, no distinction is drawn at this step be-
tween damages that result from negligence in causing the acci-
dent and damages that result from a negligent failure to wear a
seat belt.

The second step of the proposed alternative similarly asks
the jury to apportion the parties' fault in causing the accident. In

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[25] *Id.* at 275, 544 A.2d at 376. The court stated that the reduction percentage
derived from the fifth step of its approach would not bar the plaintiff's recovery
"even if plaintiff was more than fifty percent at fault for causing the second-colli-
sion injuries, after the calculation made in step 5." *Id.* at 274, 544 A.2d at 376.

[26] *Id.* (emphasis in original).

a state with a modified, as opposed to a pure, comparative negligence system, if the jury finds that the plaintiff's fault percentage exceeds the statutory threshold, the plaintiff would recover nothing. As with *Waterson*, therefore, the analysis could in some cases stop at this point with a judgment being entered for the defendant.

In the proposed alternative to *Waterson*, the third step would focus exclusively on an apportionment of the plaintiff's damages to the two types of the plaintiff's negligence. The jury would be asked to divide the total damages announced in Step 1 into the two relevant categories: first-collision damages and seat belt damages. The basic conceptual device for making this apportionment would remain a consideration of what injuries the plaintiff would have suffered had the plaintiff been wearing a seat belt in this accident. The valuation of those injuries is then deemed to be the first-collision damages, with the remainder of the total damages being designated as the seat belt damages.

Notice that at this third step of the proposed alternative, the jury is *not* being asked to characterize the plaintiff's failure to wear a seat belt as negligent. The inquiry at this step of the analysis is more narrowly focused on causal grounds, leaving the issue whether the plaintiff was at fault in failing to wear a seat belt for a later determination. This causal inquiry is still complicated and subject to controversy in particular cases, but there is no way to eliminate those features from a decision making process that attempts to be sensitive to the differences in the ways that parties can be at fault in their behavior. We can, however, strive for conceptual clarity and a greater appreciation of the purpose of the decisions we ask juries to make.

After the division between first-collision damages and seat belt damages has been determined in Step 3, the proposed alternative's next step gives effect to the plaintiff's comparative negligence in causing the collision. Because the jury would have determined the plaintiff's fault percentage in Step 2 and the amount of damages that are classified as first-collision damages in Step 3, the next step would simply be to reduce the plaintiff's recovery of the first-collision damages by the plaintiff's percentage of fault in causing the accident. The figure of reduced first-collision damages recovery derived in Step 4 would then be held for use by the court when it computes the plaintiff's award after the remainder of the analysis has taken place.

The proposed alternative to *Waterson* would then ask in Step

5 the critical fault question about the plaintiff's failure to wear a seat belt. As was true in *Waterson*'s original approach, that question should be initially framed as a "whether-or-not" proposition. In the alternative proposed here, however, that is *all* that should be accomplished at this fifth step of the analysis.

The question that then arises is what to do with the result of the fault characterization of the plaintiff's conduct in not wearing a seat belt. As described earlier, the *Waterson* approach requires the fact-finder to determine the percentage of the plaintiff's fault in failing to wear a seat belt. The alternative to the *Waterson* approach should evaluate the significance of a plaintiff's fault in nonuse of a seat belt in a different way. The effect of the finding of first-collision fault of the plaintiff would still be confined to the reduction in the recovery of first-collision damages. The recovery of seat belt damages, however, requires something other than a comparative negligence evaluation of the consequences of a negligent nonuse of a seat belt. The consequences of that fault come into play in Step 6 of this alternative approach in computing the plaintiff's damages. At this point, however, there are two options in how to attach significance to the plaintiff's nonuse of a seat belt.

B. *Alternative to the Waterson Approach that Rejects the Waterson Principles*

As the first option, a way of calculating the plaintiff's total recovery that deviates from the *Waterson* principle of using a plaintiff's negligence in not wearing a seat belt as a factor that reduces but does not bar the plaintiff's recovery of seat belt damages. This version of an alternative approach to *Waterson* that is inconsistent with the central principles of that case is illustrated in Table 4.

Under this alternative, an affirmative answer to the question whether the plaintiff was negligent in not wearing a seat belt would produce the following line of reasoning. If the plaintiff was negligent in failing to wear a seat belt, then the only damages that the plaintiff would have suffered without that additional negligence would have been the first-collision damages. If all of the seat belt damages were avoidable by the plaintiff's exercise of reasonable care, the plaintiff should recover none of the seat belt damages.[27] Therefore, at this final step of the process, the rea-

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[27] This is the main thrust of the criticism of *Waterson* presented in the student note cited earlier. *See* Note, *supra* note 8 (proposing that the court should treat

TABLE 4

MODEL OF THE ALTERNATIVE TO *WATERSON*
CONSTRUCTED IN A WAY THAT REJECTS THE
WATERSON PRINCIPLES

Step 1:

   Determine plaintiff's total damage   (1) $_____

Step 2:

   Compare fault in causing the accident
      a) plaintiff's negligence   _____%
      b) defendant's negligence   _____%

Step 3:

   Apportion damages to different causes
      a) first-collision damages $_____
      b) seat-belt damages $_____

Step 4:

   Reduce recovery of first-collision damages
      multiply 2(a) by 3(a)   (4) $_____

Step 5:

   Determine whether plaintiff negligent
   in not wearing seat belt

Step 6:

   Award damages to plaintiff
   If 5 is yes:
      subtract 3(b) and 4 from 1   (6) $_____
   If 5 is no: or
      subtract 4 from 1 $_____

soning would demand that the court complete the analysis by using a Step 6 that simply makes the comparative fault reduction of the first-collision damages and eliminates the seat belt damages entirely from the plaintiff's award. This last step would thus be accomplished in Table 4 by subtracting from the total damages of Step 1 the first-collision damages attributable to the plaintiff's fault percentage in causing the accident that were derived from Step 4. None of the avoidable seat belt damages of Step 3(b) would be recoverable by the negligent plaintiff, and those too

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failure to wear a seat belt as negligence per se and deny a plaintiff recovery of any avoidable damages caused by that negligence).

would be subtracted from the total damages as quantified in Step 1.

If the answer to the question whether the plaintiff was negligent in the nonuse of the seat belt had been negative, then none of the plaintiff's seat belt damages would be attributable to that type of plaintiff's fault. In that situation, then, the analysis should be completed simply by reducing the total damages of Step 1 by the comparative fault reduction of the first-collision damages calculated in Step 4.

Table 5 illustrates the use of this first option in the construction of an alternative to *Waterson* in a hypothetical case that resembles the situation used to explain the *Waterson* approach. Assume as before that a plaintiff who has legally compensable injuries that are quantified in Step 1 at total damages of one million dollars was determined in Step 2 to be 20 percent at fault in causing the initial collision. Assume further that a person in the plaintiff's circumstances who was wearing a seat belt would only have suffered injuries that amounted to $700,000. In Step 3, therefore, the apportionment of damages would be $700,000 in first-collision damages and $300,000 in seat belt damages.

The approach that has just been outlined as the first option for an alternative to *Waterson* would reduce the recovery of the $700,000 in first-collision damages by the 20% of the plaintiff's fault in causing the accident, producing a $140,000 reduction of the recoverable damages. If the plaintiff was found in Step 5 to be negligent in not wearing a seat belt, then the computation of the plaintiff's judgment would be completed simply by subtracting that figure from the first-collision damages and awarding the plaintiff the difference of $560,000. If the plaintiff's failure to wear a seat belt was not characterized as negligence, then the judgment would award the plaintiff all of the seat belt damages and the reduced amount of the first-collision damages for a total judgment of $860,000.

C. *Alternative to the Waterson Approach That Is Consistent With The Waterson Principles*

Finally, consider an alternative to the *Waterson* approach that is consistent with the *Waterson* principles. The goal in this proposed alternative is to accomplish the *Waterson*'s stated objective in a way that is conceptually sound and that is also easier to apply than the court's original approach. This alternative proceeds just as Table 4's first option does until the plaintiff's negligence ques-

TABLE 5

ILLUSTRATION OF THE ALTERNATIVE TO *WATERSON*
CONSTRUCTED IN A WAY THAT REJECTS THE
WATERSON PRINCIPLE

Step 1:

Determine plaintiff's total damage   (1) $1,000,000

Step 2:

Compare fault in causing the accident
    a) plaintiff's negligence   20   %
    b) defendant's negligence   80   %

Step 3:

Apportion damages to different causes
    a) first-collision damages $700,000
    b) seat-belt damages $300,000

Step 4:

Reduce recovery of first-collision damages
    multiply 2(a) by 3(a)   (4) $140,000

Step 5:

Determine whether plaintiff is negligent
in not wearing seat belt

Step 6:

Award damages to plaintiff
If 5 is yes:
    subtract 3(b) and 4 from 1   (6) $560,000
If 5 is no: or
    subtract 4 from 1 $860,000

tion of Step 5 is answered. The first option rejected *Waterson's* basic idea at that point by treating all of the seat belt damages attributable to the plaintiff's negligence in failing to wear a seat belt as unrecoverable. The proposed second option instead adheres to the *Waterson* idea that a comparative fault principle should reduce, but not bar, the recovery of seat belt damages by a plaintiff who was negligent in that regard.

    The greatest conceptual flaw in the *Waterson* approach consists of the court's conception of the plaintiff's negligence in nonuse of a seat belt as behavior that fits into a standard comparative negligence framework. As was demonstrated earlier, that conception, at least as it is put into operation in the New Jersey court's methodology, either ignores or distorts the difference be-

tween the percentage of fault assigned to the plaintiff's negligence in not wearing a seat belt and the total percentage for that component of fault. The court's approach in *Waterson* leaves some percentage of the total for that element of fault unaccounted for, or as the "phantom" percentage that does not appear in the calculation of the fraction by which the plaintiff's recovery of seat belt damages is to be reduced.

That glitch in the *Waterson* approach seems fairly easy to cure. The plaintiff's negligence in not wearing a seat belt is an element of fault that is uniquely attributable to the plaintiff. *That negligence is not subject to a comparison with a comparable fault of the defendant.* While it is conceptually meaningful to speak of an apportionment of 20% of first-collision damages to the plaintiff, for example, and 80% to the defendant, that apportionment is conceptually muddled when applied to seat belt damages. Seat-belt damages are attributable on an all-or-nothing basis to the plaintiff's decision not to wear a seat belt. If the belt had been worn, none of those damages would have occurred. Because the belt was not worn, all of those damages were suffered by the plaintiff. Unlike the conduct that gave rise to the accident itself, in which the fault of both parties contributed to the collision, there is no fault on the part of the defendant that specifically corresponds to the fault of the plaintiff in not wearing a seat belt.[28]

The preferable alternative to the *Waterson* approach therefore needs to reflect a re-conceptualization of the significance of asking whether the plaintiff was negligent in failing to wear a seat belt. Once the jury determines that the plaintiff was negligent in failing to wear a seat belt, the court should adopt a method of analysis that proceeds along the track illustrated in Table 6.

As Table 6 shows, the negligence characterization of the plaintiff's failure to wear a seat belt is more complicated than it has been assumed in all of the previous models. The first part of Step 5 repeats the initial question whether the plaintiff's nonuse of a seat belt was negligent. The appropriate question that must then be asked, however, is *how* negligent was the plaintiff in fail-

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[28] Professor Robert Cochran recently made an impressive contribution to the scholarship on the seat belt defense. *See* Cochran, *supra* note 1. A major difference between the proposal offered by Professor Cochran and the one presented in this article lies in this article's rejection of an attempt to express the plaintiff's fault in not wearing a seat belt as a percentage of some composite of plaintiff and defendant fault. Professor Cochran's complicated method of calculating a plaintiff's fault percentage in causing seat-belt damages (or "exacerbation damages", as he refers to them) is set out in Cochran, *supra* note 1, at 1437-46.

TABLE 6

MODEL OF THE PROPOSED ALTERNATIVE TO THE
WATERSON APPROACH THAT IS CONSISTENT
WITH THE *WATERSON* PRINCIPLES

Step 1:

   Determine plaintiff's total damages   (1) $_____

Step 2:

   Compare fault in causing the accident
      a) plaintiff's negligence   _____%
      b) defendant's negligence   _____%

Step 3:

   Apportion damages to different causes
      a) first-collision damages $_____
      b) seat-belt damages $_____

Step 4:

   Reduce recovery of first-collision damages
      multiply 2(a) by 3(a)   (4) $_____

Step 5:

   Part 1:
   Determine whether plaintiff negligent in not
   wearing seat belt
   Part 2:
   How great was plaintiff's fault in not wearing
   seat belt on a scale of 1 (slight) to 10 (severe)?   _____
   Part 3:
   Compute reduction in recovery of seat-belt damages
      multiply 3(b) by (0.10 times Part 2)   (5) $_____

Step 6:

   Award damages to plaintiff
      subtract 4 and 5 from 1   (6) $_____

ing to wear a seat belt. It is fundamentally misleading to attempt
to express the answer to that question directly as a percentage of
fault, because of the absence of a conceptually sound notion that
there is a corresponding percentage that would represent the de-
fendant's negligence contributing to the harm from the plaintiff's
failure to wear a seat belt. Instead, the jury should be asked in
the second part of Step 5 to express the magnitude of the plain-
tiff's negligence in not wearing a seat belt on some basis other
than a percentage that apportions fault between the plaintiff and

the defendant. The proposal offered here suggests that this magnitude of fault could be stated as a position on a scale of culpability from one to ten, with one being only slightly negligent and ten being severely negligent.

This culpability scale has the advantage of allowing a case-by-case consideration of the plaintiff's degree of fault in failing to wear a seat belt. It also properly (and consistently with the *Waterson* principle) treats that degree of fault as conceptually distinct from the plaintiff's fault in causing the collision, which is handled separately in this proposed alternative to the *Waterson* approach.

After the jury has resolved the issue of the plaintiff's fault for failure to wear a seat belt, the third part of Step 5 then converts that magnitude or degree into a reduction calculation that is to be applied only to the seat belt damages that were calculated in Step 3(b). The conversion is accomplished simply by taking the number that the jury returns in Part 2 of Step 5 and multiplying it by 0.10. For example, if the jury characterized the plaintiff's failure to wear a seat belt as a four on the culpability scale, the reduction factor for the seat belt damages would be 0.40. Part 3 of this fifth step would complete the calculation of the reduction in the recovery of seat belt damages by multiplying the seat belt damages figure derived in Step 3(b) by that figure.

This proposed alternative approach concludes with a determination in Step 6 of the damages component of the plaintiff's award. At this point in the analysis, the only task is for the court to subtract the reduction in first-collision damages of Step 4 and the reduction in seat belt damages of Step 5 from the total damages of Step 1.

Table 7 illustrates the consideration of the avoidable seat belt damages issue by applying the now-familiar assumptions to this proposal for a revised approach that is consistent with the *Waterson* principles. The first four steps of the illustration in Table 7 replicate the corresponding steps of Table 5 with regard to the plaintiff's total damages, the apportionment of fault in causing the accident, the apportionment of first-collision and seat belt damages, and the extent to which the plaintiff's recovery of first-collision damages is to be reduced.

The multi-part analysis in the proposed Step 5 starts with the same question: whether the plaintiff was negligent in not wearing a seat belt. If the answer to that question is yes, then part 2 of this step asks the jury to locate the degree of that fault on a culpability scale from 1 to 10. Assume the jury decides the appropri-

TABLE 7

ILLUSTRATION OF THE PROPOSED ALTERNATIVE TO
WATERSON CONSTRUCTED TO BE CONSISTENT
WITH THE *WATERSON* PRINCIPLE

Step 1:

Determine plaintiff's total damage   (1) $1,000,000

Step 2:

Compare fault in causing the accident
    a) plaintiff's negligence   20   %
    b) defendant's negligence   80   %

Step 3:

Apportion damages to different causes
    a) first-collision damages $700,000
    b) seat-belt damages $300,000

Step 4:

Reduce recovery of first-collision damages
    multiply 2(a) by 3(a)   (4) $140,000

Step 5:

Part 1:
Determine whether plaintiff negligent in not
wearing seat belt
Part 2:
How great was plaintiff's fault in not wearing
seat belt on a scale of 1 (slight) to 10 (severe)?   7
Part 3:
Compute reduction in recovery of seat-belt damages
    multiply 3(b) by (0.10 times Part 2)   (5) $210,000

Step 6:

Award damages to plaintiff
    subtract 4 and 5 from 1   (6) $650,000

ate figure for the plaintiff's fault in not wearing a seat belt is 7. That degree of fault figure is then multiplied by 0.10 to produce a reduction factor of 0.7, which is in turn multiplied by the seat belt damages figure to produce a reduced recovery of seat belt damages of $210,000. The judgment that is entered for the plaintiff who was negligent in causing the accident and in not wearing a seat belt is then calculated by subtracting from the total damages figure the reductions in first-collision and in seat belt damages determined in steps 4 and 5. In this illustration, the

plaintiff's $1,000,000 would thus be reduced to $650,000. This alternative to *Waterson* reflects both of the ways in which the plaintiff was negligent, and does so in a manner that maintains throughout the analysis the distinction in those categories of fault and the harm they caused.

The major conceptual change involved in the proposal offered here is the initial characterization of the plaintiff's negligence in failing to wear a seat belt as a particular value on a scale of culpability rather than as a percentage of fault. Even though the figure used to represent that point on the scale eventually ends up operating in the same manner as a percentage, which is to determine the extent to which the plaintiff's seat belt damages are to be reduced, the case for making that conceptual distinction is both logically compelling and functionally useful. This alternative proposal allows the plaintiff's fault in not wearing a seat belt to be used to reduce the plaintiff's recovery for the harm that is attributable to that fault in a way that avoids the flaws in the *Waterson* methodology and that is relatively easy to apply.

V. CONCLUSION

The Supreme Court of New Jersey has developed a well-deserved reputation as one of the most thoughtful and innovative courts in the country in dealing with issues of tort law and injury compensation. Its decisions of the last decade are among the most sophisticated attempts to encompass the range of policy considerations in the routine and in the more complex tort litigation scenarios.[29] The court's decision in *Waterson v. General Motors Corporation* could add to that reputation, but the complexity of the court's approach may make courts in other jurisdictions reluctant to follow *Waterson*.

This article has criticized some of the *Waterson* decision's details, but that criticism ought not to detract from the substantial approval and admiration the court deserves for the extent to which it has grappled with a quite complicated issue in an impressive manner. The television show "American Bandstand" used to have a regular feature called "Rate-a-Record," in which se-

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[29] *See, e.g.,* Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (state-of-the-art evidence admissible in failure to warn claim involving prescription drugs); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (social host liable to accident victim injured by guest who becomes intoxicated driver); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) (state-of-the-art evidence inadmissible in failure to warn claim involving asbestos).

lected members of the audience were asked to give their opinions on a couple of recently released songs. If I were evaluating the *Waterson* decision in a "Rate-an-Opinion" exercise, I would give it a 78. In an evaluation similar to that of the American Bandstand "record-raters" who were asked to explain their ratings, my reaction to the *Waterson* opinion could easily be expressed in terms that those music critics might appreciate: *Waterson* has very interesting lyrics, but it's hard to dance to.

The purpose of this article has been to revise the *Waterson* choreography so that the significant steps that the Supreme Court of New Jersey has outlined can lead more easily to the goal that the court has identified. The attainment of that goal, which is a rational and equitable assessment of the legal significance of a failure to use an available seat belt, is worthy of careful consideration by courts and policy makers in other jurisdictions who are grappling with the complex policy and technical questions that are raised by a plaintiff's failure to wear a seat belt. The alternative to the *Waterson* approach proposed in this article should encourage courts in other jurisdictions to take *Waterson* seriously.