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Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt, The

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THE SEAT BELT DEFENSE: MUST THE REASONABLE MAN WEAR A SEAT BELT?

Insurance Co. of America v. Pasakarnis

The "seat belt defense" has been the subject of extensive litigation in the past two decades. This defense raises the issue of whether the plaintiff may recover for the full extent of his personal injuries resulting from an automobile accident where it can be shown by competent evidence that some of his injuries could have been eliminated or minimized had an available seat belt been worn. The law in this area remains unsettled despite the courts' increasing familiarity with the issue. A majority of the courts considering the defense have rejected it. Many of those decisions were based at least in part on tort theories which have been abandoned and factual assumptions which have

1. 451 So. 2d 447 (Fla. 1984).
5. See, e.g., Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 167, 492 P.2d 1030, 1034 (1972) ("courts have been inconsistent in their handling of the defense"); Comment, supra note 3, at 829 ("confusion and inconsistent rulings . . . and a basic uncertainty as to the status of the seat belt defense"); Note, supra note 3, at 272 ("unsettled issue in automobile litigation").
7. Comment, supra note 3, at 842 ("contributory negligence jurisdictions raise the issue of unfairness in denying recovery when the plaintiff did not cause the accident. Comparative negligence jurisdictions are not susceptible to this concern because
been proven erroneous.8 The viability of the seatbelt defense must be reexamined in light of changes in law, science, and technology. This casenote will examine the recent decision of the Florida Supreme Court in Insurance Co. of North America v. Pasakarnis,8 and the reasons prompting the court’s decision to allow the seat belt defense.

While driving his jeep, Pasakarnis was involved in an automobile accident with Defendant/Petitioner Menninger.10 Menninger’s car ran a stop sign and struck Pasakarnis’ jeep broadside. The accident was caused entirely by Menninger’s negligence.11 Pasakarnis was not wearing his seat belt.12 He was thrown from his jeep and sustained a compression fracture in his lower back.13 Pasakarnis’ physician testified that his injury was caused from impacting on the pavement.14

Menninger alleged as an affirmative defense that Pasakarnis was negligent in not wearing his seat belt in that had he been wearing his seat belt, his injuries would have been reduced or prevented.15 Menninger further alleged that Pasakarnis’ damages should be reduced in proportion to his negligence.16 The trial court granted a motion to strike the defense.17 The District Court of Appeal, Fourth District, affirmed. It held the seat belt evidence inadmissible18 on the authority of Lafferty v. Allstate Insurance Co.19

the plaintiff’s recovery is not barred by his contributory negligence . . . ”). This would also hold true in jurisdictions that have changed from contributory negligence to comparative fault.

8. Several courts holding seat belt evidence inadmissible commented on the uncertainty concerning the effectiveness of seat belts. See, e.g., Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970); D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11, 12 (Miss. 1971); Miller v. Miller, 273 N.C. 228, 233, 160 S.E.2d 65, 69 (1968). But see DOT, Effectiveness and Efficiency of Safety Belt ix (1982) (“there is unequivocal evidence that safety belts . . . could prevent about half of all such deaths [from second collision with interior of car]”); U.S. Dept’ of Transp., Nat’l Highway Traffic Safety Admin., Safety Belt Usage Attitude Study [hereinafter cited as DOT, Safety Belt Usage Attitude Study], § 1.2 (1979) (“occupants not using seat belts were 3 ½ times more likely to be killed, 3 times as likely to be seriously injured . . . as those who were wearing safety belts”). Courts are also beginning to comment on the effectiveness of seat belts. See Spier v. Barker, 35 N.Y.2d 444, 452, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 922 (1974) (“there can be no doubt whatsoever as to the efficiency of the automobile seat belt in preventing injuries”).

9. 451 So. 2d 447.

10. Id. 451 So. 2d at 449. It is impossible to tell from the facts given if the top on the jeep was up or down.

11. Id.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id.

17. Id.

18. Id. at 450.

19. 425 So. 2d 1147 (Fla. Dist. Ct. App. 1982) (rejecting the seat belt defense because, inter alia, it was improper for the judiciary to legislate, there is no duty to
The Supreme Court of Florida addressed the viability of the seat belt defense for the first time in *Pasakarnis*. The court noted that a number of cases involving the seat belt defense never reached the merits of that defense because of problems in pleading and/or producing evidence.

The court first addressed whether allowing the seat belt defense is appropriate for judicial decision. Noting that tort law is peculiarly nonstatutory, the court stated it had not hesitated in the past in overturning unsound precedent in the area of tort law. It is the duty of the court to ensure that “the law remains both fair and realistic as society and technology change.” The issue is thus appropriate for judicial decision, since “[t]o abstain from acting responsibly in the present case on the basis of legislative deference would be to consciously ignore a limited area where decisions by lower courts have created an illogical exception to the doctrine of comparative negligence.

The court next discussed the purposes and applicability of comparative negligence. In *Hoffman v. Jones*, the Florida Supreme Court adopted pure comparative fault stating that it provided a more equitable system of determining liability than contributory negligence. Under a system of pure comparative fault, the plaintiff is barred from recovering only that portion of his damages for which he is responsible. The court stated that a logical and consistent application of comparative fault required the application of the seat belt defense.

The court continued by stating the failure to wear an available seat belt is a pertinent factor to consider when deciding if the plaintiff exercised due care to anticipate the negligence of another, and the duty to mitigate damages arises only after the plaintiff is injured, not before). *rev'd*, 451 So. 2d 447 (Fla. 1984).

21. The court was referring to cases decided by the district courts of appeal. See infra notes 23, 24.
22. *Pasakarnis*, 451 So. 2d at 450.
23. *Id.* (citing Chandler Leasing Corp. v. Gibson, 227 So. 2d 889 (Fla. Dist. Ct. App. 1969) (defendant failed to plead contributory negligence and did not seek instructions on the issue)).
24. *Id.* at 451 (citing Quinn v. Millard, 358 So. 2d 1378 (Fla. Dist. Ct. App. 1978) (record did not contain sufficient evidence to show that the plaintiff would have been less seriously injured had he been wearing an available seat belt at the time of the accident)); see also *Brown v. Kendrick*, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966).
26. *Id.* at 451. The Florida Supreme Court adopted comparative fault absent a legislative mandate in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). The court has modified common law in the past as the occasion required. Jurisdiction which have allowed the seat belt defense have done so without a legislative mandate. See also Note, supra note 5, at 170.
28. *Id.*
29. 280 So. 2d 431 (Fla. 1973).
30. *Id.* at 438.
31. *Id.*
32. *Pasakarnis*, 451 So. 2d at 453.
for his own safety. Several factors were listed in support of this decision. The court stated the effectiveness of seat belts in reducing deaths and decreasing the severity of injuries suffered in automobile accidents was unequivocal. Furthermore, automobile accidents and "second collisions" with the interior of the automobile are foreseeable. The seat belt affords the automobile occupant an opportunity to minimize personal injury before an accident occurs. Given these factors, and in light of the minimal effort required to fasten a seat belt, the failure to wear a seat belt is "obviously pertinent and thus should be deemed admissible in an action for damages, part of which would not have been sustained if the seat belt had been used." The court discussed three theories under which seat belt evidence may be admissible. The first of these theories states nonuse of an available seat belt is negligence per se. This approach was rejected because Florida does not statutorily require the use of a seat belt. The second theory, that one not utilizing an available seat belt may be found contributorily negligent, was also

35. Pasakarnis, 451 So. 2d at 453 (citing Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976)). Pasakarnis and Evancho adopted the language of Larsen v. General Motors Corp., 391 F.2d 495, 501-02 (8th Cir. 1968):
Automobiles are made for use on the roads and highways in transporting persons and cargo to and from various points. This intended use cannot be carried out without encountering in varying degrees the statistically proved hazard of injury-producing impacts of various types. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury producing impacts.
38. Id. These three theories are (1) plaintiff's nonuse as negligence per se, (2) plaintiff is contributorily negligent for failing to comply with the standard of conduct which a reasonable prudent man would have pursued under similar circumstances, and (3) apportionment of damages theory which states that in not using a seat belt, the plaintiff may have acted unreasonably and in disregard of his own best interest and therefore should not be able to recover for those injuries which would not have occurred had his seat belt been fastened.
39. Pasakarnis, 451 So. 2d at 453. 40. Id.
rejected.\textsuperscript{41} The court stated contributory negligence is applicable only if the failure to use reasonable care is a cause of the accident and not just a factor increasing the severity of the injuries.\textsuperscript{42} The third theory states that nonuse of an available seat belt may or may not, according to the circumstances, amount to a failure to use reasonable care.\textsuperscript{43} In adopting this theory, the court stated that the defendant had the burden of pleading and proving the plaintiff did not use an available and operational seat belt, that such nonuse was unreasonable under the circumstances, and that there was a causal connection between the nonuse and the injuries sustained.\textsuperscript{44} If there is competent evidence\textsuperscript{45} to meet this burden of proof, the jury should be allowed to consider it in deciding whether the plaintiff's damage award should be reduced.\textsuperscript{46}

To aid the jury in apportioning plaintiff's damages, the court gave the jury special interrogatories.\textsuperscript{47} The jury was to decide the total amount of damages incurred and the percentage of fault attributable to the plaintiff's failure to wear a seat belt.\textsuperscript{48} The court would then reduce the total damages by the plaintiff's percentage of fault.\textsuperscript{49}

The court found that the trial court erred in not allowing the proffered

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\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 454.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} The court did not define competent, but in \textit{Pasakarnis} the evidence that the plaintiff would have been less seriously injured had he worn his seat belt was presented by an expert witness. The defendant's engineer-accident analyst stated had the plaintiff worn his seat belt, there was a high probability that he would not have been injured at all.
\item \textsuperscript{46} \textit{Pasakarnis}, 451 So. 2d at 454.
\item \textsuperscript{47} The jury must first determine the total amount of the plaintiff's damages using the interrogatory in the verdict. \textit{Id.} The special interrogatory suggested reads as follows:
\begin{itemize}
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\item (a) Did defendant prove that the plaintiff failed to use reasonable care under the circumstances by failing to use an available and fully operational seat belt?
\begin{itemize}
\setlength\itemsep{0em}
\item Yes \hspace{1cm} No
\end{itemize}
If your answer to question (a) is No, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (a) is Yes, please answer question (b).
\item (b) Did defendant prove that plaintiff's failure to use an available and fully operational seat belt produced or contributed substantially to producing at least a portion of the plaintiff's damages?
\begin{itemize}
\setlength\itemsep{0em}
\item Yes \hspace{1cm} No
\end{itemize}
If your answer to question (b) is No, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (b) is Yes, please answer question (c).
\item (c) What percentage of plaintiff's total damages were caused by his (or her) failure to use an available and fully operational seat belt? ____% \textsuperscript{48} \textit{Pasakarnis}, 451 So. 2d at 454.
\item \textsuperscript{49} Id.
\end{itemize}
\end{itemize}
seal belt evidence to be submitted to the jury. The case was remanded to the trial court to determine to what extent, if any, the plaintiff's $100,000 damage award should be reduced as a result of his failure to wear a seat belt.

Justice Shaw in his dissent opposed the seat belt defense on several grounds. First, he noted that there is a statutory bar against evidence of nonusage of statutorily mandated child restraint devices in civil cases. If violation of that duty cannot be used to reduce damages, evidence of seat belt nonuse should also be inadmissible to reduce damages.

Justice Shaw believed the majority's decision to allow the seat belt defense was "at the very least based upon a debatable public policy determination." He noted there is no common law or statutory duty to wear a seat belt nor do most people wear seat belts. Furthermore, the doctrine of avoidable consequences, applied by the Pasakarnis majority as a pre-injury duty, traditionally does not arise until the plaintiff has been injured. According to Justice Shaw, the majority decision not only "offends traditional notions of tort law," but also "smacks of judicial policy making." Public policy determinations such as these should be left up to the legislature.

Justice Shaw also identified technical problems with the seat belt defense. Such problems include deciding when the duty to wear a seat belt arises, deciding when the defense is available, and determining the necessary increase in cost, length, and complexity of trial. Justice Shaw believed the seat belt defense would lead to a battle of the experts.

Problems in pleading and producing evidence have prompted many courts to refuse to allow the seat belt defense. According to one author, in 33 out of

50. Id. at 455.
51. Id.
53. Pasakarnis, 451 So. 2d at 455 (Shaw, J., dissenting).
54. Id.
55. Id. at 456.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id. Justice Shaw stated that the causal connection between seat belt nonuse and the plaintiff's injuries must be established by expert testimony. This, he felt, would in turn require the plaintiff to produce expert testimony to counter the defendant's evidence.

49 cases considering the seat belt defense the plaintiff’s damage award was not reduced because of insufficient evidence or a ground tangential to the seat belt issue. Some courts indicated a willingness to allow the seat belt defense but refused to do so because of insufficient evidence to prove that seat belt nonuse caused or increased the plaintiff’s injuries. The cases indicate that the proponents of the seat belt defense often fail to introduce the evidence needed to establish all of its elements. Four prevalent errors allow the courts to decide a case involving the seat belt defense without considering the merits of the defense.

Many courts that have rejected the seat belt defense list among the reasons for so doing a belief that the legislature is the proper forum for resolution of this issue. Some courts have cited examples of legislative intent purportedly indicative of the legislature’s intent that seat belt usage not be mandatory. These courts have mistakenly confused the seat belt defense with mandatory seat belt usage laws.

67. Kircher, supra note 1, at 173. These are “the pleadings did not raise the defense; the fact that the plaintiff was not using belts was not established; the evidence did not establish that the injuries would have been prevented or made less severe by belt use; or the court was not asked to instruct the jury on the seat belt issue.” Id.
For further discussion on this point see Hoglund & Parsons, Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law, 50 WASH. L. REV. 1, 7, 11 (1974); Note, supra note 3, at 286-87; Note, supra note 5, at 170; Comment, The Seat Belt Defense: Should Coloradoans Buckle Up for Safety?, 50 U. COLO. L. REV. 375, 384 (1979); Comment, supra note 64, at 434-35.
70. See supra note 31; Selgado v. Commercial Warehouse Co., 88 N.M. 579, 582, 544 P.2d 719, 722 (1975) (“[t]he public policy of a state fixing a statutory duty to fasten a seat belt rests with the legislature”); Miller v. Miller, 273 N.C. 228, 231-32, 160 S.E.2d 65, 71 (1968); Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 171, 492 P.2d...
Proponents of the seat belt defense are quick to note that lack of legislation on the issue is not conclusive of legislative intent.\textsuperscript{71} Indicia of legislative intent that seat belts be worn are often cited in support of judicial action on the issue of the seat belt defense.\textsuperscript{72} Proponents of the seat belt defense are not asking courts to create an absolute duty to wear a seat belt.\textsuperscript{73} Rather, they claim "that a reasonable man of ordinary prudence would make use of belts in most instances, but that the matter should be left to the trier of facts to decide because of the many circumstances involved in highway travel which make a hard and fast rule unworkable."\textsuperscript{74} The defense does not make seat belt usage mandatory in a statutory sense. Absent a statute there is no criminal liability for seat belt nonuse. The seat belt defense only demands seat belt usage if the plaintiff attempts to recover for all of his injuries.

With the coming of age of comparative fault, several jurisdictions have reexamined the seat belt defense.\textsuperscript{76} In comparative fault jurisdictions, each party is responsible for that portion of the damages or injuries according to his fault.\textsuperscript{76} Thus a plaintiff is prevented from recovering for its own injuries to the extent that he caused them.\textsuperscript{77}

While it has been suggested that comparative fault jurisdictions may react more favorably to the seat belt defense,\textsuperscript{78} the trend in that direction, if there is one, is slow in developing. Several courts in contributory negligence

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1030, 1037 (1972).
\textsuperscript{71} Note, supra note 5, at 169.
\textsuperscript{72} E.g., Hoglund & Parsons, supra note 68, at 7; Note, supra note 3, at 283; Comment, supra note 3, at 846; Comment, supra note 64, at 434. Such indicia of legislative intent include federal highway safety programs, see, e.g., Hoglund & Parsons, supra note 68, at 7 (citing Highway Safety Act of 1973, 23 U.S.C. § 402(j) (Supp. 1974)); Comment, supra note 64, at 434 (citing Highway Safety Act of 1966, 23 U.S.C. § 402 (Supp. 1970)); and state and federal seat belt installation statutes. See, e.g., Note, supra note 3, at 283; Comment, supra note 3, at 846.
\textsuperscript{73} Kircher, supra note 1, at 180.
\textsuperscript{74} Id. at 181.
\textsuperscript{76} C.R. HEF\textsuperscript{7}T & C.J. HEF\textsuperscript{7}T, COMPARATIVE NEGLIGENCE MANUAL § 1.10 (1978); see also Comment, supra note 68, at 376. This differs from contributory negligence in that contributory negligence often requires contribution to the accident not merely the injuries stemming from the accident. See infra notes 133-38 and accompanying text.
\textsuperscript{77} This statement is totally accurate only under a system of pure comparative fault. Under a system of modified comparative fault, if the jury found that the unreasonable nonuse of a seat belt caused more than 50% or 51% of his damages, the plaintiff would be totally barred from recovery. Currently thirteen states have a pure comparative fault system: Alaska, California, Florida, Illinois, Iowa, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington.
\textsuperscript{78} Kircher, supra note 1, at 188; C.R. HEF\textsuperscript{7}T & C.J. HEF\textsuperscript{7}T, COMPARATIVE NEGLIGENCE MANUAL § 1.240 (1978) [hereinafter cited as HEF\textsuperscript{7}T, COMPARATIVE NEGLIGENCE MANUAL]; Annot., 80 A.L.R.3d 1033, 1040 (1977).
jurisdictions have refused to allow the seat belt defense and decrease the plaintiff's damage award by the amount of his contribution to those damages because to do so would be an implicit adoption of comparative fault, a step they were unwilling to take.\textsuperscript{79} There are also marked distinctions between pure and modified comparative fault.\textsuperscript{80} Thus, it is important to know what kind of tort fault system a jurisdiction follows.\textsuperscript{81} The most persuasive arguments in favor of the seat belt defense\textsuperscript{82} can be made in pure comparative fault jurisdictions. In pure comparative fault jurisdictions, the defense is allowed by a slim majority of those courts which have addressed the issue.\textsuperscript{83} Much of the controversy


\textsuperscript{80} See supra note 77.


\textsuperscript{82} See infra notes 148-206 and accompanying text.

\textsuperscript{83} Alaska (no opinion): California (admissible), Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969), and Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982); Florida, (admissible) Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); Illinois (inadmissible), Clarkson v. Wright, 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E.2d 268 (1985); Iowa (inadmissible), Iowa Code Ann. § 321.445 (West 1966) (this statute was adopted before comparative fault was adopted in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982)); Louisiana (appears to favor admission), 56 Notre Dame Law. 272, 274 n.10c (1980); Michigan (inadmissible), Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969) (this case was decided before Michigan adopted comparative fault in Placek v. Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979), and the seat belt defense has not been addressed by the appellate or supreme court since that time); Mississippi (inconsistent rulings), compare Glover v. Daniels, 310 F. Supp. 750 (N.D. Miss. 1970) with D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971); Missouri (inadmissible) Miller v. Haynes, 454 S.W.2d 293 (Mo. App., E.D. 1970) (Miller v. Haynes was decided before comparative fault was decided in Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (en banc), and the issue has not been raised since); New Mexico (inadmissible), Selgado v. Commercial Warehouse Co., 88 N.M. 359, 544 P.2d 716 (1975) (Selgado was decided before the adoption of comparative fault in New Mexico, Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981)); New York (admissible), Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974); Rhode Island (no opinion); Washington (inadmissible), Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977) (en banc) (this case was decided before Washington's 1981 amendment to their comparative fault statute which now includes the U.C.F.A. definition of fault which includes unreasonable failure to avoid an injury Wash. Rev. Code Ann. § 4.22.005 (Supp. 1985)).
under comparative fault will concern what actions or inactions constitute fault. This concern should be lessened in jurisdictions that have adopted the Uniform Comparative Fault Act as it provides a definition of fault.⁵⁴ “There will also be disagreement as to the inclusion of unreasonable failure⁶⁸ to avoid an injury or to mitigate damages in the definition of fault. This will probably include the seat belt cases . . .”⁶⁶

Some modified comparative fault jurisdictions have also allowed the seat belt defense,⁶⁷ while several other comparative negligence jurisdictions have refused to allow the seat belt defense for various reasons.⁶⁸

The most common reason given by courts for not allowing the defense is


Section 1. [Effect of Contributory Fault]
(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant’s contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.
(b) “Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

See also comment to subsection (b): at 41

“Injury attributable to the claimant’s contributory fault” refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant’s fault.

85. Whether the failure to wear a seat belt constitutes unreasonable failure to avoid an injury will be discussed in detail later. See infra notes 190-206 and accompanying text.


88. Comment, supra note 68, at 380. As noted in this comment at 378, the Colorado Supreme Court, while rejecting the seat belt defense under contributory negligence in Fischer v. Moore, 183 Colo. 382, 517 P.2d 458 (1973), left open the possibility of allowing the seat belt defense under comparative negligence. Fischer, 183 Colo. at 394, 517 P.2d at 459. In Churning v. Staples, 628 P.2d 180, 181 (Colo. Ct. App. 1981), however, the Colorado Court of Appeals stated “we find the logic in Fischer still compelling and hold that the seat belt defense is not available for purposes of determining the degree of the plaintiffs negligence under the comparative negligence statute.” Colorado is a modified comparative negligence jurisdiction.
the absence of a duty to wear a seat belt.\textsuperscript{89} The courts reason where there is no duty there can be no negligence.\textsuperscript{90} Other reasons given for not allowing the defense are lack of causation,\textsuperscript{91} fear of speculation as to what portion of the injuries would have been prevented had a seat belt been worn,\textsuperscript{92} that such a change in the law is properly left to the legislature,\textsuperscript{93} that the effectiveness of seat belts is uncertain,\textsuperscript{94} and that allowing the seat belt defense would lead to a battle of the experts.\textsuperscript{95} One final concern enunciated by the comparative fault jurisdictions is the potential inequity in comparing the defendant's fault which causes the accident with the plaintiff's fault in failing to fasten a seat belt.\textsuperscript{96} This concern should be alleviated in jurisdictions which follow the Uniform Comparative Fault Act because under that act, "the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damage claimed."\textsuperscript{97}

Several courts rejecting the seat belt defense have listed among their reasons for so doing the uncertainty concerning the effectiveness of the seat belt as a safety precaution.\textsuperscript{98} While at one time it was not incorrect to deem seat belt effectiveness "at best speculative,"\textsuperscript{99} such a characterization is no longer supportable.\textsuperscript{100}

\begin{itemize}
    \item \textsuperscript{89} See, e.g., Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970), amended on other grounds, 433 F.2d 911 (5th Cir. 1970) (also note, no evidence to support a causal connection between the plaintiff's alleged negligent nonuse of an available seat belt and the decedent's injuries); Taplin v. Clark, 6 Kan. App. 2d 66, ----, 626 P.2d 1198, 1201 (1981) (Kansas is a modified comparative fault state); D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971) (also note that in this case there was insufficient evidence that the plaintiff's injuries would not have occurred, or that they would have been less serious had the plaintiff worn a seat belt); Amend v. Bell, 89 Wash. 2d 124, 132-33, 570 P.2d 138, 143 (1977) (en banc).
    \item \textsuperscript{90} See, e.g., Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977) (en banc).
    \item \textsuperscript{91} Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (1975) (comparative negligence did not change the principles of causation; the court held that to be negligent or at fault one must contribute to the accident, not merely increase the extent of his injuries; Connecticut is a modified comparative fault state).
    \item \textsuperscript{92} Amend, 89 Wash. 2d at 133, 570 P.2d at 143.
    \item \textsuperscript{93} See supra note 68, and accompanying text.
    \item \textsuperscript{94} Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970), amended on other grounds, 433 F.2d 911 (5th Cir. 1970); D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971).
    \item \textsuperscript{95} Amend, 89 Wash. 2d at 133, 570 P.2d at 143.
    \item \textsuperscript{96} Note, supra note 5, at 168; Smith, The Failure to Buckle Up: Limiting Damages by Proof of a Plaintiff's Nonuse of an Available Seat Belt, 53 N.Y. St. B.J. 418, 421 (Oct. 1981).
    \item \textsuperscript{97} UNIF. COMPARATIVE FAULT ACT § 2(b), 12 U.L.A. at 43 (Supp. 1985). Also, as a practical matter, juries no doubt realize the differences in the nature and amount of fault and award damages accordingly. But see, Smith, supra note 96, at 421 (examples of jury substantially reducing injured plaintiff's damage award).
    \item \textsuperscript{98} See authorities cited supra note 7.
    \item \textsuperscript{99} Kleist, The Seat Belt Defense—An Exercise in Sophistry, 18 HASTINGS L.J. 613, 615 (1967).
    \item \textsuperscript{100} Bowman, supra note 66, at 191-92; Hoglund & Parsons, supra note 68, at
\end{itemize}
Properly worn seat belts may be the most significant source of automobile crash protection for automobile occupants.\(^{101}\) Seat belts prevent ejection\(^{102}\) from automobiles\(^{103}\) as well as prevent "second collisions" of the automobile occupant with the interior of the automobile or with other occupants.\(^{104}\) The use of seat belts by all automobile occupants could save an estimated 15,000 to 18,000 lives per year and prevent more than 200,000 moderate to severe injuries.\(^{105}\) Seat belts are less effective in preventing injury when there is a crushing or collapse of the occupant compartment.\(^{106}\) Seat belts have also been credited with preventing accidents altogether.\(^{107}\) Seat belt usage remains low

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102. Ejection from a vehicle increases the chance of fatality almost 500%. See Bowman, supra note 66, at 196.

103. DOT, Effectiveness and Efficiency of Safety Belt Usage, at 6; Bowman, supra note 66, at 196; Snyder, supra note 100, at 222; Note, supra note 5, at 170; Huelke, supra note 100, at 205; Note, supra note 5, at 170.

104. See authorities cited supra, note 103. For an illustrated description of what occurs during the first and second collisions see DOT, Effectiveness and Efficiency of Seat Belt Usage at 4.


Accidents of all types are the third leading cause of death. When losses are measured in terms of numbers of working years cost, accidents rank first with an average cost of more than 20 years. Automobile accidents account for 50% of all accidental deaths. Transportation Research Board Nat’l Academy of Sciences, Study of Methods for Increasing Safety Belt Use 2 (1981). Economic loss to society from motor vehicle crashes is estimated at $57 billion every year. DOT, Progress and Assessment Report at ii.

In 1971 it was estimated that indirect losses such as medical expenses and lost wages due to nonuse of seat belts was approximately $1 billion per year. Comment, supra note 64, at 427.

The figure of $1 billion per year has no doubt increased significantly in the past 14 years. Losses from seat belt nonuse also include pain and suffering to the victim, indirect losses to employers, consumers and investors, and a potential drain on societal resources. Comment, supra note 64, at 428. The public in general may also suffer as a result of seat belt nonuse, bearing higher health care and insurance costs and higher tax costs because of the additional burdens on the social welfare system. Transportation Research Board Nat’l Academy of Sciences, Study of Methods for Increasing Safety Belt Use 6 (1981).

106. Huelke, supra note 100, at 209.

107. *E.g.*, DOT, Effectiveness and Efficiency of Safety Belt Usage at 6; 50 Wash. L. Rev. 1, 4 n.11 (1974); Bowman, supra note 66, at 196.
Most courts have not been willing to take judicial notice of the efficacy of seat belts. Some courts have interpreted the low seat belt usage rate as an indication of the public's ignorance as to the effectiveness of seat belts. Unwilling to charge the public with such knowledge, the courts decline to find negligence on the part of the nonuser. The view that the public is unaware of the effectiveness of seat belts in preventing fatal and serious injuries can no longer be supported. The fact that usage rate fluctuates and increases in situations perceived as hazardous is evidence of the public's knowledge of seat belt effectiveness.

Several arguments are often voiced in opposition to seat belt usage. These include the belief that the seat belt can cause injuries and the fears of entrapment, burning, and submersion. While there are some injuries attributable to the belt itself, "it is almost invariably of a lesser degree than had the occupant not worn a seat belt. The significance of a comparatively minor belt

108. Dep't of Transporation estimates seat belt usage at 14% for the first half of 1983 up from 11% in 1981. DOT, Progress and Assessment Report at ii.


110. E.g., Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970), amended on other grounds, 433 F.2d 911 (5th Cir. 1970); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968). See generally, Note, supra note 3, at 286; Comment, supra note 3.

111. Miller v. Miller, 273 N.C. 228, 232, 160 S.E.2d 65, 69 (1968) ("The social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence.").

112. In June, 1983 the average percentage of people who had seen or heard an advertisement concerning safety belts was 69.6%. DOT Progress and Assessment Report at ii. In another survey, only 10.3% of persons questioned said that they never used seat belts. Kircher, supra note 1, at 181. See also Comment, supra note 3, at 843.


116. See generally Snyder, supra note 100, at 224; Seat Belts—Pros and Cons, 29 CURRENT MED. FOR ATTY'S 31 (Nov. 1982).
injury must be viewed in proper perspective to the more serious or fatal injuries shown to occur to unrestrained occupants."\[^{117}\] The fears of entrapment, submersion, and burning are unfounded.\[^{118}\] It has also been noted that even if fire or submersion do occur, the seat belt wearer will be better able to cope with the situation because he is less likely to lose consciousness.\[^{119}\] While individuals cite discomfort, sporadic driving, and forgetfulness as the main reasons for not wearing seat belts,\[^{120}\] most people have never made a conscious decision not to wear seat belts.\[^{121}\] The fact remains, however, as stated by the Wisconsin Supreme Court, "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."\[^{122}\]

There are three available theories under which the seat belt evidence may be admissible.\[^{123}\] Every court which has addressed the issue has rejected the negligence per se theory.\[^{124}\] The most common reason for rejecting this theory is that seat belt usage is not statutorily required.\[^{125}\] Courts have been unwilling

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117. Snyder, supra note 100, at 224.  
118. Kircher, supra note 1, at 183; see also 50 WASH. L. REV. 1, 6-7 n.16 (1974) (fire occurs in only 0.2% of all injury producing accidents and submersion occurs in only 0.3%).  
119. 50 WASH. L. REV. 1, 6-7 n.16 (1974).  
121. DOT Progress and Assessment Report at 4.  
122. Bentzler v. Braun, 34 Wis. 2d 362, 387, 149 N.W.2d 626, 640 (1967); see also Pasakarnis, 451 So. 2d at 453 ("In view of the importance of the seat belt as a safety precaution available for the plaintiff's protection, failure to wear it under certain circumstances may be a pertinent factor for the jury to consider in deciding whether the plaintiff exercised due care for his or her own safety.").  
123. See supra note 38.  
to view seat belt installation statutes as imposing a duty to wear seat belts,\textsuperscript{126} even when the statutes contained "installed for use" language.\textsuperscript{127} In the presence of a statutory requirement that seat belts be worn,\textsuperscript{128} the negligence per

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126. Petersen, 426 F.2d at 204, \textit{amended on other grounds}, 433 F.2d 911 (1970); Romankewiz, 16 Mich. App. at 124, 167 N.W.2d at 607; Selgado, 88 N.M. at 582, 544 P.2d at 722; Miller, 273 N.C. at 231, 160 S.E.2d at 68; \textit{Amend}, 89 Wash. 2d at 132, 570 P.2d at 143. \textit{See generally}, Note, \textit{supra} note 3, at 278; Comment, \textit{supra} note 3, at 830-31; Kircher, \textit{supra} note 1, at 180.

127. Proponents of the seat belt defense, when alleging nonuse of an available seat belt is negligence per se, typically argue that in requiring "installation for use," the legislature intended to impose a duty to wear the seat belts on automobile occupants. 56 \textit{Notre Dame Law}. 272, 278 n.25 (lists of state seat belt installation statutes, specifying which of these statutes contain "for use" language). \textit{See also}, Miller, 273 N.C. at 233-34, 160 S.E.2d at 68; Bentzler, 34 Wis. 2d at 385, 142 N.W.2d at 639 ("It seems apparent that the Wisconsin legislation, which does not require by its terms the use of seat belts, cannot be considered a safety statute in a sense that it is negligence per se for an occupant of an automobile to fail to use available seat belts."). Kircher, \textit{supra} note 1, at 175 (without a showing of greater legislative intent on the issue, it would appear that there is no legislative standard of conduct as to seat belt usage); 1983 \textit{Det. C.L. Rev.} 827, 831 n.18 (1983).

128. For a listing of statutes requiring seat belt usage see 56 \textit{Notre Dame Law}. 272, 278 n.24 (1980). New York (1984 \textit{N.Y. Laws} ch. 365 §§ 1-5, effective date Jan. 1, 1985) and Illinois (ILL. ANN. STAT. ch. 95 § 12-603.1 (Smith-Hurd 1985)) have mandatory seat belt usage laws. \textit{Compare} 1984 \textit{N.Y. Laws} ch. 365 § 1(8) ("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.") with ILL. ANN. STAT. ch. 95 § 12-603.1(c) ("failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle"). \textit{But see} Mo. S.B. 43, 83d Gen. Assembly, 1st Sess. (1985):

3. In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section may be admitted to mitigate damages, but only under the following circumstances:

(1) Parties seeking to introduce evidence of the failure to wear a safety belt in violation of this section must first introduce expert evidence proving that a failure to wear a safety belt contributed to the injuries claimed by plaintiff;

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

Missouri, while statutorily permitting the seat belt defense, in effect disallows it. The 1% limitation on plaintiffs damage reduction makes the cost of the seat belt defense prohibitive. If the plaintiff can plead and prove $100,000 in damages, the defendant
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se approach would have merit\textsuperscript{129} absent statutory preclusion of that approach.\textsuperscript{130}

The theory that nonuse of an available seat belt is contributory negligence was also rejected by the \textit{Pasakarnis} court.\textsuperscript{131} The court followed the majority view\textsuperscript{132} on this theory stating that to constitute contributory negligence, the plaintiff must contribute to the cause of the accident, not merely cause or increase the injuries.\textsuperscript{133} The failure to wear a seat belt does not cause the accident.\textsuperscript{134}

A few courts have addressed the contributory negligence theory in terms of injury or harm causation.\textsuperscript{135} Under this approach consideration of seat belt nonuse is limited to the issue of damages as opposed to the issue of liability.\textsuperscript{136}

could use the seat belt defense to reduce the damages by a maximum of $1,000. In most cases the cost of expert testimony required to present this defense far exceed the damage reduction allowed.

129. Note, \textit{supra} note 3, at 277-78; Kircher, \textit{supra} note 1, at 175, 180.
130. \textit{See supra} note 128.
136. \textit{E.g.}, Truman \textit{v.} Vargas, 275 Cal. App. 2d 976, 983-84, 80 Cal. Rptr. 373,
Even though the Restatement (Second) of Torts\textsuperscript{137} and Dean Prosser\textsuperscript{138} refer to the causation issue in contributory negligence as causation of injury or harm, the position taken by the Pasakarnis court is the most common one.

Another frequently mentioned reason for rejecting the seat belt defense under the contributory negligence theory is the absence of a duty to wear a seat belt.\textsuperscript{139} While the Wisconsin Supreme Court in Bentzler v. Brown\textsuperscript{140} held that there was a duty to wear available seat belts based on the common law standard of ordinary care,\textsuperscript{141} a common law duty to wear seat belts has not been favored.\textsuperscript{142} In view of the variety of circumstances which arise in automobile travel, the rejection of this argument seems reasonable.\textsuperscript{143} Other reasons given for rejecting the contributory negligence theory include the harshness of the result,\textsuperscript{144} that the legislature is the proper forum for such a decision,\textsuperscript{145} and

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375 (1969); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).
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\textsuperscript{137} Restatement (Second) of Torts § 465 (1965) provides:

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  \item[(1)] The plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it.
  \item[(2)] The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others.
\end{itemize}

Comment C

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.

\textsuperscript{138} W. Prosser & W. Keeton, The Law of Torts § 65 at 451 (5th ed. 1984) ("Contributory Negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is to conform for his own protection.").

\textsuperscript{139} See, e.g., Romankewiz, 16 Mich. App. at 121, 167 N.W.2d at 607 ("common-law duty to use ordinary care for his own safety does not include a duty to wear seat belts"); Fields v. Volkswagen of America, 555 P.2d 48, 62 (Okla. 1976) ("in the absence of any common law or statutory duty, we find that evidence of the failure to use seat belts is not admissible to establish a defense of contributory negligence"); Amend, 89 Wash. 2d at 132, 570 P.2d at 143 ("The question then is whether the court should impose a standard of conduct upon all persons riding in vehicles equipped with seat belts. We think we should not.").

\textsuperscript{140} Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

\textsuperscript{141} Id. at 639 (also note: Wisconsin is a comparative fault state and a breach of this common law duty would not bar the plaintiff's recovery).

\textsuperscript{142} Note, supra note 3, at 281.

\textsuperscript{143} Kircher, supra note 1, at 175 (quoting W. Prosser, Torts § 37 at 212 (3rd ed. 1964) ("A standard which requires only conduct proportionate to the circumstances and the risk seldom, if ever, can be made a matter of absolute rule.").

\textsuperscript{144} See, e.g., Fischer v. Moore, 182 Colo. 392, 517 P.2d 458 (1973) (en banc); Miller, 273 N.C. at 237, 160 S.E.2d at 73; Derheim, 80 Wash. 2d at 168, 492 P.2d at

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fear of a fortuitous windfall to the tortfeasor.\(^{146}\) While courts have been reluctant to allow seat belt evidence under a contributory negligence theory, the option of pleading contributory negligence for the purpose of reducing damages may still be available.\(^{147}\)

The third main theory\(^{146}\) is apportionment or mitigation of damages.\(^{149}\) Under this theory, evidence of the plaintiff's failure to wear an available seat belt is directed toward the issue of damages rather than liability.\(^{160}\) Proponents of this theory argue that since the defendant is only responsible for those damages which he proximately caused, he should not be held responsible for those injuries that would not have occurred but for the plaintiff's nonuse of a seat belt.\(^{181}\) The mitigation theory\(^{102}\) is a balance between the harshness of totally barring recovery and, conversely, allowing the occupant of an automobile to disregard a proven safety device which may significantly reduce his chances of serious injury or death.\(^{183}\)

"An obvious prerequisite to the reduction of damages due to nonuse of seat belts is the imposition of a duty to wear such equipment."\(^{104}\) While the imposition of an absolute duty to wear seat belts has not been favored,\(^{185}\) there are two duty analyses under which seat belt evidence has been admitted to assist the jury in determining whether the plaintiff acted reasonably under the circumstances. The first of these is the rule of avoidable consequences. Under

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145. See supra note 68, and accompanying text.
146. See, e.g., Fischer, 183 Colo. at 395-96, 517 P.2d at 460.
147. Note, supra note 3, at 275; Comment, supra note 64 at 439 ("since failure to use a seat belt may increase damages, but cannot cause accidents, a rule apportioning losses would not be inconsistent with the traditional doctrine of contributory negligence").
148. Other theories have also been advanced by the proponents of the seat belt defense. These include (1) assumption of the risk, Kleist, supra note 99, at 620; 3 Hofstra L. Rev. 883, 886 n.15 (1975); 1983 DET. C.L. Rev. 827, 845 n.106 (1983); Comment, supra note 68, at 378; (2) contribution among joint tortfeasors, see Comment, supra note 68, at 378-79; and (3) superseding v. intervening causes, Note, supra note 3, at 289.
149. Pasakarnis, 451 So. 2d at 454.
151. E.g., Comment, supra note 64, at 434; Note, supra note 3, at 275.
152. For cases allowing and rejecting the seat belt defense under the mitigation of damages theory see Note, supra note 3 at 272 nn.4-5 (1980).
153. E.g., Annot., 80 A.L.R.3d 1033, 1037-38 (1977); see also Hoglund & Parsons, supra note 68, at 9-10.
154. Hoglund & Parsons, supra note 68, at 11; see also, Kircher, supra note 1, at 180; Comment, supra note 68, at 384.
155. See supra note 73, and accompanying text.

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this doctrine, recovery is denied for any damages which could have been avoided by reasonable conduct on the part of the plaintiff.\textsuperscript{156} As a general rule, the doctrine of avoidable consequences arises only after the plaintiff has been injured, but while some damages may still be averted.\textsuperscript{157}

Several courts have rejected the seat belt defense under the doctrine of avoidable consequences, stating "the seat belt situation does not fit the doctrine of avoidable consequences because the failure to fasten the seat belt occurred before the defendant's negligent act and before the plaintiff's injury."\textsuperscript{158} When the doctrine of avoidable consequences was developed, opportunities to mitigate damages before injuries occurred were scarce.\textsuperscript{159} However, the purely chronological distinction upon which this doctrine relies is no longer justifiable and several courts have chosen to ignore it.\textsuperscript{160} This is the approach taken by the Pasakarnis court.\textsuperscript{161} Citing Spier v. Barker,\textsuperscript{162} the court stated that seat belts afford an individual the unique opportunity to mitigate his damages prior to the occurrence of the accident.\textsuperscript{163}

When the post-injury doctrine of avoidable consequences is extended to the pre-injury nonuse of seat belts, it becomes nearly analogous to the duty of self-protection.\textsuperscript{164} This is the second duty analysis which may include the duty to wear an available seat belt.\textsuperscript{165} The duty to protect oneself from harm requires, at the very least, that one not expose oneself to a known risk.\textsuperscript{166}

One must exercise the standard of care of the reasonable prudent person under similar circumstances in fulfilling his duty to mitigate damages or to protect himself from harm.\textsuperscript{167} If he acts unreasonably and such action causes

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\textsuperscript{157} Id.
\textsuperscript{158} Romankeziz, 16 Mich. App. at 127, 167 N.W.2d at 610 (quoting Miller, 273 N.C. at 239, 160 S.E.2d at 74); Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. 1967); Miller v. Haynes, 454 S.W.2d 293, 300 (Mo. App., St. L. 1970); see also, Selgado, 88 N.M. at 581, 544 P.2d at 721; Derheim, 80 Wash. 2d at 168, 492 P.2d at 1035; Hoglund & Parsons, supra note 68, at 9-10; Kleist, supra note 99, at 620-21; Note, supra note 3, at 285.
\textsuperscript{159} Comment, supra note 64, at 438; see, e.g., Spier, 35 N.Y.2d at 444, 323 N.E.2d at 168, 363 N.Y.S.2d at 921-22.
\textsuperscript{160} Comment, supra note 64, at 438.
\textsuperscript{161} Pasakarnis, 451 So. 2d 447; see also W. Prosser & W. Keeton, supra note 156, § 65 at 459 ("[T]he plaintiff's recovery should be reduced to the extent that they [damages] have been aggravated by his own antecedent negligence. This may be the better view unless we are to place artificial emphasis upon the moment of impact, and the pure mechanics of causation.").
\textsuperscript{162} Spier, 35 N.Y.2d at 452-53, 323 N.E.2d at 168; 363 N.Y.S.2d at 922.
\textsuperscript{163} Pasakarnis, 451 So. 2d at 453.
\textsuperscript{164} Comment, supra note 3, at 847.
\textsuperscript{165} Note, supra note 3, at 281.
\textsuperscript{166} Comment, supra note 3, at 845.
\textsuperscript{167} W. Prosser, The Law of Torts, § 65 at 419 (4th ed. 1971); Restatement (Second) of Torts § 283 (1965); Note, supra note 3, at 281.
harm, he is responsible for the damage he has caused.\textsuperscript{168} The reasonably prudent man standard is perhaps the best approach to the seat belt defense.\textsuperscript{169} While it has been said that the "common law duty to use ordinary care for [one's] own safety does not include a duty to wear seat belts,"\textsuperscript{170} it must be remembered that that which is required of the ordinary prudent person is not unchanging.\textsuperscript{171} The standard is adaptable and should evolve with the times.\textsuperscript{172} "It is both predictable and desirable that technological changes give rise to new precautionary obligations."\textsuperscript{173} There are two primary arguments against allowing the trier of fact to consider seat belt nonuse in determining whether the plaintiff acted reasonably under the circumstances. The first is that in effect it would require the plaintiff to anticipate the negligence of others.\textsuperscript{174} This offends traditional notions of tort law in that there is a general right to assume due care of others.\textsuperscript{175} Many courts have advanced this argument in support of their refusal to allow the seat belt defense.\textsuperscript{176} The right to assume that others will exercise due care is not unqualified. "[I]t exists only 'in the absence of notice or knowledge to the contrary.'"\textsuperscript{177} There remains some question, however, as to whether the plaintiff must be on notice of a specific act of negligence before this duty arises.\textsuperscript{178} The public is generally aware that automobile accidents happen.\textsuperscript{179} Such general awareness should be enough to put the public on notice.\textsuperscript{180}

\textsuperscript{168} W. PROSSER, supra note 167, § 30 at 143.

\textsuperscript{169} Hoglund & Parsons, supra note 68, at 13.

\textsuperscript{170} Romankewiz, 16 Mich. App. at 121, 167 N.W.2d at 607; see also Derheim, 80 Wash. 2d at 172, 492 P.2d at 1037 (Neill, J., concurring) ("[A] failure by plaintiff to wear a seat belt would not, in the present state of things, amount to a breach of his duty to exercise reasonable care in his own behalf."); Hampton, 209 Kan. at 580, 498 P.2d at 249 (failure to wear a seat belt did not fall below the standard required of the reasonable prudent man).

\textsuperscript{171} Hoglund & Parsons, supra note 68, at 13.

\textsuperscript{172} See generally W. PROSSER & W. KEETON, supra note 156, § 32 at 173-75.

\textsuperscript{173} Comment, supra note 64, at 426.

\textsuperscript{174} Kleist, supra note 99, at 615.

\textsuperscript{175} W. PROSSER & W. KEETON, supra note 156, § 33 at 197-98.

\textsuperscript{176} See, e.g., Britton, 286 Ala. at 506, 242 So. 2d at 673; Nash v. Kamrath, 21 Ariz. App. 530, 532, 521 P.2d 161, 163; Remington, 28 Conn. Supp. at 292, 259 A.2d at 146; Taplin, 6 Kan. App. 2d at ____, 626 P.2d at 1200; Romankewiz, 16 Mich. App. at 125, 167 N.W.2d at 610; Miller v. Haynes, 454 S.W.2d at 300; Miller, 273 N.C. at 234, 160 S.E.2d at 70; Amend, 89 Wash. 2d at 132-33, 570 P.2d at 143.


\textsuperscript{178} Compare Kleist, supra note 99, at 615-16 with Comment, supra note 3, at 844-45.

\textsuperscript{179} Miller, 273 N.C. at 232, 160 S.E.2d at 68-69; Amend, 89 Wash. 2d at 139, 570 P.2d at 146 (Horowitz, J., dissenting); Comment, supra note 64, at 439; Comment, supra note 3, at 844-45.

\textsuperscript{180} Comment, supra note 64, at 439; see also Comment, supra note 68, at 386 (government advertising campaigns encourage defensive driving, in effect telling motorists to anticipate the negligence of others).
The second qualification to the right to assume that others will exercise due care concerns the danger of that assumption. A person is required to realize that negligent acts do occur. Where the risk of harm is relatively slight, it is reasonable to assume that others will act with due care. But, when the risk becomes serious, either because the probability or the gravity of the harm are great, reasonable care may require one to anticipate and protect against the negligence of others.¹⁸¹ In the realm of automobile travel, reasonable care must include anticipation of negligence on the part of others.¹⁸²

The second main argument is that because the average man doesn't wear a seat belt,¹⁸³ seat belt nonuse cannot be deemed unreasonable.¹⁸⁴ While custom is relevant to the issue of reasonableness,¹⁸⁵ "[t]he fact that a majority of people act in a certain manner does not make such action reasonable."¹⁸⁶ While some customs are the result of logic and reasoned decision-making, "others arise from the kind of inadvertence, carelessness, [and] indifference . . . that is normally associated with negligence."¹⁸⁷ For a custom to be reasonable, it must be the product of "'learned reason.'"¹⁸⁸ Customary negligence is certainly possible,¹⁸⁹ and may well be the proper way to describe the nonuse of available seat belts.

The best way to determine whether the plaintiff acted reasonably under the circumstances is to employ the formula first articulated by Judge Learned Hand in *United States v. Carroll Towing Co.*¹⁹⁰ Under this formula, one is found to have acted unreasonably if the probability of harm multiplied by the gravity of that harm is greater than the burden of adequate precautions

¹⁸¹ W. Prosser & W. Keeton, *supra* note 156, § 33 at 198. Prosser further states, "'It is not due care to depend upon the exercise of care by another when such reliance is accompanied by obvious danger.'"

¹⁸² Kircher, *supra* note 1, at 186.

¹⁸³ See, e.g., *Amend*, 89 Wash. 2d at 133, 570 P.2d at 143.


¹⁸⁵ W. Prosser & W. Keeton, *supra* note 156, § 33 at 194-95.


¹⁸⁷ W. Prosser & W. Keeton, *supra* note 156, § 33 at 194.

¹⁸⁸ Id. at 195.

¹⁸⁹ Id. at 194.

¹⁹⁰ United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir.), *reh'g denied*, 160 F.2d 482 (1947).
against that harm or the importance of the interest sought to be advanced. This approach was first employed in the area of the seat belt defense by New York's highest court in Spier v. Barker, and is followed by the Pasakarnis court.

It has already been established that the general public is on notice of the possibility of automobile accidents. While the probability of being involved in an automobile accident on any given trip is low, "[t]here is a high probability that the average motorist will be involved in at least one accident, resulting in death or injury to himself, during his lifetime." The harm associated with automobile accidents is great, so even though the probability of an accident occurring on any given trip is low, the risk one takes by venturing out unprotected is great.

The burden of adequate precautions, on the other hand, is minimal.

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191. W. PROSSER & W. KEETON, supra note 156, § 33 at 199; Note, supra note 124, at 888; Comment, supra note 64, at 423.
192. Kircher, supra note 1, at 184.
193. Spier v. Barker, 35 N.Y.2d 444, 452, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 922 (1974) ("When an automobile occupant may readily protect himself, at least partially, from the consequences of a collision, we think that the burden of buckling an available seat belt may, under the facts of the particular case, be found by the jury to be less than the likelihood of injury when multiplied by its accompanying severity.").
195. See supra notes 179-80 and accompanying text; Pasakarnis, 451 So. 2d at 452 (citing Ford Motor Co. v. Evancho, 327 So. 2d 201, 204 (Fla. 1976)).
196. Note, supra note 3, at 281; Kircher, supra note 1, at 185.
197. Hoglund & Parsons, supra note 68, at 3 state:

Over 1,000 Americans are killed every week in traffic accidents; almost 10,000 are injured each day. The combined figure, computed on an annual basis, approximately equals the number of babies born in the United States yearly. . . .

One's exposure to death by automobile collision is considerably higher than one's exposure to death by involvement in warfare. From 1900 through 1972, motor vehicle deaths totaled more than 1,900,000, whereas U.S. military casualties in principal wars (including battle and other causes of death) from the Revolutionary War (1775) through the Viet Nam War (1972) totaled approximately 1,155,000.

Id. at 3-4 n.8.
198. DOT, Progress and Assessment Report at 1 states:

The fifth leading cause of all deaths is the motor vehicle accident, and the leading cause of death for those between one year and age 44. Approximately 44,000 lives were lost last year in all highway accidents—an average of 121 each day. An estimated 29,400 persons were killed and about 500,000 received moderate to severe injuries as occupants of passenger vehicles, light trucks, and vans. The economic loss to society from motor vehicle crashes is estimated at $57 billion every year.

See also, Kircher, supra note 1, at 185.
199. Kircher, supra note 1, at 185; Note, supra note 3, at 281.
200. Pasakarnis, 451 So. 2d at 453 (quoting Insurance Co. of North America v.
While this burden may include such things as the costs of tactile inconvenience, actual physical effort, and aesthetic loss, it usually cannot be said that these burdens are greater than the risks involved in automobile travel. The public knows or should know of the effectiveness of seat belts in preventing or minimizing the injuries sustained in automobile accidents. Under the foregoing analysis, the plaintiff’s nonuse of an available seat belt may amount to a failure to use reasonable care. There are circumstances, however, under which it would be reasonable to travel in an automobile without wearing a seat belt. It was for these reasons that the Pasakarnis court stated that “[n]onuse of the seat belt may or may not amount to a failure to use reasonable care on the part of the plaintiff.”

If the plaintiff is found to have acted unreasonably in not wearing his seat belt, before his damage award can be decreased it must be shown that but for the seat belt nonuse certain injuries would not have occurred. There must be a causal connection between the nonuse of an available seat belt and the injuries and damages sustained. The defendant has the burden of pleading and proving the availability and nonuse of the seat belt as well as the causal connection between that nonuse and the plaintiff’s injuries. There is no presumption that nonuse of seat belts caused or increased the severity of injuries.


201. Comment, supra note 64, at 429.


203. See supra notes 112-13 and accompanying text.

204. Pasakarnis, 451 So. 2d at 454; Note, supra note 124, at 888; Kircher, supra note 1, at 181; Note, supra note 3, at 281.

205. Kircher, supra note 1, at 181.

206. Pasakarnis, 451 So. 2d at 454; see also Spier, 35 N.Y.2d at 452, 323 N.E.2d at 168, 363 N.Y.S.2d at 922; Kircher, supra note 1, at 181; Note, supra note 124, at 888.

207. For an excellent discussion of the “available” requirement see Clarkson v. Wright, 121 Ill. App. 3d 230, 459 N.E.2d 305 (1984) (evidence of installment is sufficient to establish evidence of availability absent evidence of non-workability; failure of a seat belt to work sometime in the past is not enough to show the seat belt didn’t work on the day of the accident), rev’d, 108 Ill. 2d 129, 90 Ill. Dec. 950, 483 N.E.2d 268 (failure to wear a seat belt should be considered for neither liability nor damages).

208. Pasakarnis, 451 So. 2d at 454 (citing Spier, 35 N.Y.2d at 450, 323 N.E.2d at 167, 363 N.Y.S.2d at 920).


The causal connection between the nonuse of an available seat belt and the plaintiff's injuries must be shown by "competent evidence." 211 Competent evidence has been interpreted by most courts to mean expert testimony. 212 Members of varying professions 213 have qualified as experts competent to testify on the extent to which the plaintiff's injuries would have been avoided or minimized had he worn a seat belt. 214 Use of both biomechanic and medical experts 215 may be the most desirable approach to the causation issue. 216

The need for expert witnesses provides another topic of controversy within the seat belt defense. Opponents of the defense fear a "battle of the experts," 217 as do many of the courts which have rejected the seat belt defense. 218 Requiring expert testimony is not uncommon in our courts and should not stand as the reason for rejecting the seat belt defense. Adequate safeguards are maintained by the trial judge who has the discretion to limit expert testimony.

211. Pasakarnis, 451 So. 2d at 454; Spier, 35 N.Y.2d at 444, 323 N.E.2d at 167, 363 N.Y.S.2d at 916; Kircher, supra note 1, at 187.

212. E.g., Franklin, 138 Cal. App. 3d at 343, 188 Cal. Rptr. at 24; Truman v. Vargas, 275 Cal. App. 2d 976, 982-83, 80 Cal. Rptr. 373, 376-78 (1969); Clarkson, 121 Ill. App. 3d at 233, 459 N.E.2d at 308; Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Bentzler, 34 Wis. 2d at 388, 149 N.W.2d at 641; Hoglund & Parsons, supra note 68, at 21-22; Note, supra note 3, at 282.

213. See Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969) (an expert on the field of automobile accidents); Spier, 35 N.Y.2d at 447, 323 N.E.2d at 166, 363 N.Y.S.2d at 916 (professor of mechanical and aerospace engineering); Hoglund & Parsons, supra note 68, at 21 (medical experts); Bowman, supra note 66, (an expert biomechanic, a trajectory reconstructionist). But see Turner v. Pfluger, 407 F.2d 648 (7th Cir. 1969) (ear, nose, and throat specialist was not qualified to testify whether the use of a seat belt would have decreased the severity of the injuries suffered).


215. A biomechanical expert would testify to the path and speed the plaintiff's body would have taken had he worn a seat belt as well as the objects his body would have contacted. The medical expert could then explain what, if any, injury producing effects this contact would have had on the plaintiff.

216. For a comprehensive approach to details which should be covered by an expert in the seat belt defense, see Bowman, supra note 66, at 191. The best cases for the seat belt defense are those that involve total or partial ejection, violent collision maneuvers, multiple impacts and accidents in which the seat belt would have directed the plaintiff's path for effective utilization of intended energy absorbing portions of the passenger compartment. The seat belt defense is much less likely to be effective when the passenger compartment of the automobile has been severely compromised. Id. at 197. If the difference between the actual injuries and those which would have been sustained had the plaintiff worn a seat belt is slight, the seat belt defense would not be cost effective. Id. at 202.


218. E.g., Selfe v. Smith, 397 So. 2d 348 (Fla. Dist. Ct. App. 1981); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977); Derheim, 80 Wash. 2d 161, 492 P.2d 1030. But see Amend, 89 Wash. 2d at 135, 570 P.2d at 144 (Dolliver, J., concurring in the result) ("The specter raised by the majority is just that: a ghostly apparition with no substance.").
testimony if it is irrelevant or cumulative. Opponents of the seat belt defense further claim that the experts necessarily involved therein will increase the cost and length of litigation.\(^\text{219}\) While this is a possibility, the seat belt defense has also been viewed as the "impetus needed to settle cases of relatively certain liability."\(^\text{220}\)

Under the apportionment or mitigation of damages theory, if the plaintiff's seat belt nonuse is found to be unreasonable under the circumstances, and if that unreasonable act caused a portion of his damages, the plaintiff may not recover for those damages that seat belt usage would have avoided.\(^\text{221}\) Evidence of seat belt nonuse must be strictly limited to the issue of the plaintiff's damages and should not be considered by the jury in their determination of liability.\(^\text{222}\) Fear of speculation by the jury in damage apportioning is an oft-cited reason for rejecting the seat belt defense.\(^\text{223}\) This position fails to consider the fact that damage apportioning is not new to juries.\(^\text{224}\) There are several ways to ensure against jury speculation in apportioning damages. First, requiring expert testimony to establish the causal connection between the non-use of a seat belt and the extent of the plaintiff's injuries will necessarily tell the jury what portion of the damages were caused by the plaintiff's alleged negligence.\(^\text{225}\) Second, jury speculation could be prevented by ordinary procedural safeguards\(^\text{226}\) such as detailed jury instructions and special interrogatories. Finally, if there is insufficient evidence to determine with reasonable cer-

\(^{219}\) Derheim, 80 Wash. 2d at 169, 570 P.2d at 1035.

\(^{220}\) Smith, supra note 96, at 421. Also, an increase in the frequency of settlement would absorb a large number of the increases in trial duration and expert witness fees, 40 U. CHI. L. REV. 421, 430 n.37 (1973).

\(^{221}\) Spier, 35 N.Y.2d at 450, 323 N.E.2d at 167, 363 N.Y.S.2d at 921; Kircher, supra note 1, at 178.

\(^{222}\) Truman, 275 Cal. App. at 983-84, 80 Cal. Rptr. at 375; Pasakarnis, 451 So. 2d at 454; Spier, 35 N.Y.2d at 450, 323 N.E.2d at 167, 363 N.Y.S.2d at 921; Bentzler, 34 Wisc. 2d at 388, 149 N.W.2d at 641. This also applies if the apportionment is done under the doctrine of comparative fault. See Sullivan, supra note 75, at 561; see also Unif. Comp. Fault Act § 1, 12 U.L.A. 35, 38 (Supp. 1984) (" 'Injury attributable to the claimant's contributory fault' refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat belt restraint played a part, and not, for example, to damage to the car.").


\(^{224}\) Spier, 35 N.Y.2d at 452-53, 323 N.E.2d at 169, 363 N.Y.S.2d at 922; Comment, supra note 68, at 388.


\(^{226}\) Comment, supra note 64, at 440.
tainty which injuries would have been avoided had the plaintiff worn a seat belt, the court may properly refuse to permit apportionment.227

Several different methods of apportioning damages exist.228 The following method229 seems the most consistent with apportioning damages in a pure comparative fault jurisdiction. Three figures are initially calculated: the accident causation percentage,230 the reduction percentage,231 and the actual proved damages. The gross recoverable damages are then calculated by multiplying the accident causation percentage by the actual proved damages232 and subtracting the product from the actual proved damages.233 At this point, the trier of fact should decide what portion of those injuries would not have occurred but for plaintiff's seat belt nonuse. The damages that would have occurred regardless of seat belt usage are to be set aside and added back into the net recoverable damages only after the portion of damages attributable to the seat belt nonuse have been reduced.234 The gross recoverable damages which the trier of fact has decided would not have occurred but for the seat belt nonuse235 are then multiplied by the reduction percentage and the product is subtracted from the gross recoverable damages.236 The final result is termed the net recoverable damages and are the amount the plaintiff will recover unless the court, in its discretion, alters the reduction percentage.237 This formula

227. Spier, 35 N.Y.2d at 453, 323 N.E.2d at 169, 363 N.Y.S.2d at 922; W. Prosser & W. Keeton, supra note 156, § 65 at 459; RESTATEMENT (SECOND) OF TORTS § 465, Comment c at 511 (1965); Kircher, supra note 1, at 187; Comment, supra note 64, at 440.

228. See Pasakarnis, 451 So. 2d at 454; Hoglund & Parsons, supra note 68, at 19; Smith, supra note 96, at 420.

229. Hoglund & Parsons, supra note 68, at 19.

230. This is the relative contribution of each party to the cause of the accident.

Hoglund & Parsons, supra note 68, at 19.

231. Reduction percentage is "the degree of personal fault that a party should bear for the extent of, or the exacerbation of, the injuries he or she suffered due to personal negligence." Id.

232. Id.

233. Id. Thus if the actual proved damages were $10,000, and the plaintiff was 20% at fault in causing the accidents, the gross recoverable damages would be $8,000.

234. Using the damage figure from note 233, supra, of $8,000 we will assume $4,000 of those damages would have occurred even if the plaintiff had worn a seat belt. The plaintiff will recover this $4,000. The remaining $4,000 of damages will be further apportioned.

235. This added step was not included in the Pasakarnis special interrogatories. See supra note 47.

236. We have already determined that $4,000 of the $8,000 gross recoverable damages would not have occurred but for seat belt nonuse. The trier of fact then must decide what percentage of fault is assignable to the plaintiff's nonuse of an available seat belt. If the trier of fact decides that those damages are due 25% to the plaintiff's fault and 75% to the defendant's negligence, the plaintiff will recover $3,000 + $4,000 (would have occurred even if seat belt had been worn) for a total of $7,000.

237. The reduction percentage and the net recoverable damages are inversely proportional; a decrease in the reduction percentage will increase the net recoverable damages.
is somewhat dissimilar to the special verdict interrogatories suggested in *Pasakarnis*.\(^{238}\) Mechanics of damage reduction aside, the question remains whether juries (most of whom don’t wear seat belts\(^{239}\)) will actually reduce a plaintiff’s award under the seat belt defense. This will largely turn on the circumstances of each case.\(^{240}\)

Several minor objections to the seat belt defense bear mentioning. The first of these was raised by the dissent in *Pasakarnis*.\(^{241}\) Justice Shaw analogizes the mandatory child restraint law\(^{242}\) to the seat belt defense. He stated that since evidence of nonusage of the child restraint devices is not admissible as evidence of negligence in civil cases, evidence of seat belt nonusage should also be inadmissible to reduce damages.\(^{243}\) These two issues can easily be distinguished on the basis of public policy. The law does not charge a young child with the duty of buckling himself into a restraint device, and will not reduce his damages because of someone else’s negligence.

Another argument against the seat belt defense is that it will not increase seat belt usage.\(^{244}\) While no statistics are currently available on this point, it has been suggested that allowing the seat belt defense might increase seat belt usage.\(^{245}\) The fact that not all cars have seat belts is also listed among the reasons for rejecting the seat belt defense.\(^{246}\) Under the seat belt defense, it is feared that the defendant will be able to “take advantage of the fortuitous circumstance that plaintiff was riding in a car so equipped.”\(^{247}\) Due to seat belt installation requirements,\(^{248}\) this objection will soon be moot. Another regarding of the seat belt defense is the fear of a windfall to the defendant tortfeasor.\(^{249}\) “The seat belt defense would likely result in neither substantial

238. *See supra* note 233. Also note that in *Pasakarnis*, damages were merely apportioned. That is, the plaintiff could not recover for those damages that wouldn’t have occurred but for seat belt nonuse. His fault in not wearing a seat belt was not compared with the defendant’s fault in causing the accident. *See supra* note 47.

239. *See supra* note 136 and accompanying text.

240. Smith, *supra* note 96, at 420 (citing damage reductions from 0-85%).

241. *Pasakarnis*, 451 So. 2d at 455 (Shaw, J., dissenting).


243. *Pasakarnis*, 451 So. 2d at 455 (Shaw, J., dissenting).


245. Transportation Research Board Nat’l Academy of Sciences, Study of Methods for Increasing Safety Belt Use, p. 6 (1981) (“A judicial doctrine permitting mitigation of damages in a civil action if the plaintiff’s safety belt was not in use at the time of a crash might help motivate drivers to use their belts.”); *see also* 50 WASH. L. REV. 1, 15 n.52 (1974).

246. *E.g., Britton*, 286 Ala. at 506, 242 So. 2d at 673; *Amend*, 89 Wash. 2d at 133, 570 P.2d at 143; *Derheim*, 80 Wash. 2d at 171, 492 P.2d at 1037.

247. *Amend*, 89 Wash. 2d at 133, 570 P.2d at 143.


lost damages to the plaintiff nor a windfall to the defendant. . . ."²⁵⁰ The final argument in opposition of the seat belt defense is that the analysis that allows seat belt evidence to be considered by the jury will necessarily allow evidence of any and all safety devices.²⁵¹ Under the Carroll Towing test,²⁵² it is doubtful that a plaintiff automobile occupant will be deemed unreasonable for "failing to wear a crash helmet [or] for failing to drive an armored car."²⁵³

The seat belt has proven to be an efficient self-protective safety device.²⁵⁴ The average motorist is aware that automobile accidents happen²⁵⁵ and that seat belts are effective in preventing or minimizing serious injuries.²⁵⁶ Balancing the probability of harm and the gravity of harm associated with seat beltless automobile travel against the burden of wearing a seat belt, the jury could conclude that one so traveling acted unreasonably under the circumstances.²⁵⁷ The apportionment or mitigation of damages theory of the seat belt defense holds the plaintiff responsible for the damages he could have reasonably avoided, while compensating him for those which he could not have prevented.²⁵⁸ The same result is possible under a system of pure comparative fault, where each party is liable for that portion of the damages his negligent conduct caused.²⁵⁹ It seems infinitely more equitable to both parties to prevent an injury than to merely award money damages to a plaintiff for a potentially permanent, irreplaceable loss.

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²⁵⁰ Note, supra note 3, at 284.
²⁵¹ Derheim, 80 Wash. 2d at 169, 492 P.2d at 1035; Kleist, supra note 99, at 621-22; Comment, supra note 64, at 426; Note, supra, note 5, at 173.
²⁵² See supra notes 190-206, and accompanying text.
²⁵³ Kleist, supra note 99, at 621-22.
²⁵⁴ See supra notes 99-107, and accompanying text.
²⁵⁵ See supra notes 179-80, and accompanying text.
²⁵⁶ See supra notes 108-22, and accompanying text.
²⁵⁷ See supra notes 190-205, and accompanying text.
²⁵⁸ See supra notes 148-53, and accompanying text.
²⁵⁹ See supra notes 76-78, and accompanying text.