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NOTES

SEAT BELT LEGISLATION AND JUDICIAL REACTION

In 1798, Thomas R. Malthus, a young British minister, developed the now-famous theory which gloomily predicted that population, unless checked by normal self-restraint, was likely to rise faster than the productive power associated with it and, as the population exceeded the means of subsistence, recurrent famine would result. As some of the dubious factors which might prevent this plight, Malthus suggested war, disease and vice. The Industrial Revolution has supplied many more, one of which has been the automobile, with its less than desirable companion, the traffic accident.[1]

Committed to the idea that the traffic accident is one method of checking the growth of population which society cannot accept, the states have embarked upon a noble but difficult campaign to substantially lessen the frequency and severity of traffic accidents. The present decade, particularly, has witnessed extensive legislative activity attempting to encourage widespread use of safety seat belts as a partial remedy for this very serious problem. This note will examine the various legislative approaches of promoting seat belt use and the legal problems which such legislation creates while emphasizing the issue of whether an automobile driver or occupant's failure to use an available safety seat belt constitutes contributory negligence.

Seat Belt Legislation

The idea of having seat belts as standard equipment in automobiles is not a new one. As early as 1949, Nash Motors unsuccessfully offered the belt as standard equipment to a very unresponsive public.[2] However, with a new public consciousness over auto safety, the 1950's and 1960's have presented compelling evidence of seat belt effectiveness unavailable to the auto buyer of 1949. For example, the common misconception that it was preferrable to be thrown from the vehicle after an accidental impact was statistically disproved by a study showing the risk of fatality among the ejected

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[1] For a discussion of Malthus and his theory, see J. BELL, A HISTORY OF ECONOMIC THOUGHT 192-214 (1953); W. PETERSEN, POPULATION 507-34 (1961).

[2] *The Belts Have Fastened*, TIME, March 8, 1963, at 85.

to be nearly five times greater than among those not ejected,[3] and one of the primary functions of seat belts is to prevent such ejection.

Automotive Crash Injury Research of Cornell University conducted a joint study with the California Highway Patrol which determined that seat belt users "sustained approximately 35 percent less 'major-fatal' grade injuries than did non-users."[4] However, the belt users sustained more "low" grade injuries, thus indicating that the belt is not a panacea but only a method of alleviating the severity of major injury.[5]

While the significant safety value of the belt was amply presented to the public through popular periodicals, acceptance up to the early 1960's continued to be disappointing.[6] Extensive promotion by the American Medical Association, the United States Public Health Service, and the National Safety Council also failed to encourage the use of this protective device.[7] The automotive

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[3] Tourin, *Ejection and Automobile Fatalities*, 73 PUBLIC HEALTH REPORTS 381, 383 (1958). The study further concluded that, of over five thousand automobile deaths each year, twenty-five percent of all fatalities incurred by occupants of passenger cars could be eliminated if ejection were completely prevented. Seat belts were offered as a method to preclude ejection. *Id.* at 390.

> The use of properly designed and installed seat belts, for example, not only protects the wearer from risks associated with ejection but also reduces the force with which he is likely to strike objects within the passenger compartment. It has been observed under controlled laboratory conditions that the restraining action of a lap-type seat belt reduces the force of head blows by as much as one-third. *Id.* at 389.

[4] B. Tourin & J. Garrett, Safety Belt Effectiveness in Rural California Automobile Accidents, 14, Feb. 1960. Four injury classifications were used: "fatal," including those which caused death within thirty days after the accident; "major," consisting of severe wounds, distorted members, and all other injuries requiring the victim to be carried away; "minor," composed of visible injuries such as bruises; and "pain," consisting of pain and momentary unconsciousness. *Id.* at 4. One admitted limitation of the study was that it was confined to California rural accidents and therefore not indicative of seat belt effectiveness in other driving situations. *Id.* at 13.

[5] *Id.* at 10. Some explanations for the fact that users were hurt as often as non-users, only less severely, were (1) most occupants were within striking distance of interior components even with the belt in use and (2) the study was limited to drivers and front seat occupants, precluding the possibility that belted rear seat occupants might not come in contact with the front seat. Apparently, the lessened severity was due to (1) the limitation of the strike zone by users and (2) the value of the seat belt in preventing ejection.

[6] *See, e.g.*, Fales, Jr., *Seat Belts: Safe or Hazardous?*, TODAY'S HEALTH, Oct., 1958, at 28; Gagen, *Seat Belts: No Longer Why, But Why Not*, TODAY'S HEALTH, July, 1960, at 26; Kearney, *So You Don't Use Seat Belts?*, READER'S DIGEST, July, 1963, at 121; *Mahoney, A Seat Belt Could Save Your Life*, READER'S DIGEST, March, 1961, at 78; *Fasten Your Seat Belt*, TIME, July 22, 1966, at 46; *Should Safety Belts be Required by Law?*, SENIOR SCHOLASTIC, March 22, 1961, at 13.

[7] N.Y. JOINT LEGISLATIVE COMM. ON MOTOR VEHICLES & TRAFFIC SAFETY REPORT, LEG. DOC. No. 76, at 15-16 (1963).

industry was well aware of the value of seat belts from tests it had conducted,[8] but did not install them because of the public's failure to use them even when installed and the additional cost.[9]

Confronted with public and industrial apathy, the New York State Joint Legislative Committee on Motor Vehicles and Traffic Safety maintained that, if seat belt installation were required by law, the public would accept it as another of the many pieces of mandatory safety equipment.[10] In 1961, the automobile industry yielded to the pressure of the Committee and announced it would install anchorage units in all 1962 models enabling inexpensive eventual installation of belts.[11] However, unwilling to leave this important item of equipment to the discretion of the individual manufacturer, the New York State Legislature enacted a bill requiring such anchorage units in all New York registered cars manufactured after June 13, 1962, and prohibited the sale of automobile seat belts for New York highway use not conforming to specified minimal standards.[12] In the same year, Wisconsin became the first state to require the actual installation of seat belts for the front seat anchorage units which the industry was to include in all 1962 models.[13] New York followed by amending its statute in 1962 to require installation of at least two sets of safety belts for the front seat of any New York registered motor vehicle manufactured or assembled after June 30, 1964, and designated a 1965 model.[14]

With the guideline established by Wisconsin and New York, other states have experimented with such legislation. Some statutes leave the initial decision to install a belt to the individual automobile owner. If he decides to purchase belts, the dealer is required

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[8] *See id.* at 16.

[9] N.Y. JOINT LEGISLATIVE COMM. ON MOTOR VEHICLES & TRAFFIC SAFETY REPORT, LEG. DOC. No. 77, at 41 (1960).

[10] *Id.* at 40. The Committee also believed that automobile manufacturers would not install belts as standard equipment unless compelled to do so. The industry was opposed to any bill requiring installation, supporting in its stead legislation establishing minimum specifications for the sale of belts within the state, thereby leaving the initial decision to install belts with the individual automobile owner.

[11] N.Y. JOINT LEGISLATIVE COMM. ON MOTOR VEHICLES & TRAFFIC SAFETY REPORT, LEG. DOC. No. 76, at 20-21 (1963).

[12] N.Y. Sess. Laws 1961, ch. 579. The statute was amended in 1962 so as to apply to automobiles manufactured or assembled after June 30, 1962, rather than June 13, 1962. N.Y. Sess. Laws 1962, ch. 759. The year 1962 also witnessed the modification of the 1961 minimal standards for automobile safety seat belts sold in the state for highway use. N.Y. Sess. Laws 1962, ch. 758.

[13] N.Y. JOINT LEGISLATIVE COMM. ON MOTOR VEHICLES & TRAFFIC SAFETY REPORT, LEG. DOC. No. 76, at 22 (1963); WIS. STAT. ANN. § 347.48 (Supp. 1967).

[14] N.Y. Sess. Laws 1962, ch. 759. The entire seat belt law is codified as N.Y. VEHICLE & TRAFFIC LAW § 383.

to sell only equipment of a specified minimal quality,[15] or which has been submitted to, and approved by, a public official or administrative department.[16] Other states also prohibit the sale of substandard safety belts in one of these two ways[17] but make mandatory the installation of safety seat belts on all new cars as of a prescribed date.[18] As a result, those who purchase new cars after the specified date are compelled to have seat belts installed, whereas those with old cars may still exercise their discretion. Yet, if a car owner in the latter group decides to purchase belts for his old car, he is as amply protected as the new car purchaser from receiving inferior equipment.[19] Some statutes unfortunately leave unprotected the old car owner who purchases belts by applying the mandatory standard for belts to apparatus installed on new automobiles only.[20] A purchaser may unknowingly purchase an inferior product which will snap in an automobile accident affording him no protection whatsoever. Even more objectionable, however, are those statutes which do not even specify minimum standards for belts installed in new cars.[21]

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[15] ARK. STAT. ANN. § 75-733 (Supp. 1965).

[16] FLA. STAT. ANN. § 317.951(1) (Supp. 1966); PA. STAT. ANN. tit. 75, § 843 (1960); UTAH CODE ANN. § 41-6-148.10(c) (Supp. 1967).

[17] CAL. VEHICLE CODE § 27302 (1960); CONN. GEN. STAT. ANN. § 14-100a(b) (Supp. 1966); ILL. REV. STAT. ch. 95½, § 217.1(e) (Supp. 1966); MD. ANN. CODE art. 66½, § 296A(c) (1967); MASS. ANN. LAWS ch. 94, § 295Y (1967); MICH. STAT. ANN. § 9.2410(1) (1960); N.C. GEN. STAT. § 20-135.1(b) (1965); OHIO REV. CODE ANN. § 4513.262(C) (Baldwin Supp. 1966); ORE. REV. STAT. § 483.482(2)(a) (1965); VA. CODE ANN. § 46.1-310(c) (1967).

[18] CAL. VEHICLE CODE § 27309 (Supp. 1966); CONN. GEN. STAT. ANN. § 14-100a(a) (Supp. 1966); ILL. REV. STAT. ch. 95½, § 217.1(a)(b) (Supp. 1966); MD. ANN. CODE art. 66½, § 296A(a) (1967); MASS. ANN. LAWS ch. 90, § 7 (1967); MICH. STAT. ANN. § 9.2410(2) (Supp. 1965); N.C. GEN. STAT. § 20-135.2(a) (1965); OHIO REV. CODE ANN. § 4513.262(A) (Baldwin Supp. 1966); ORE. REV. STAT. § 483.482(1) (1965); VA. CODE ANN. § 46.1-309.1(a) (1967).

[19] *See* Letter from Lawrence Jones to Warren G. Magnuson, Aug. 2, 1963, in U.S. CODE CONG. & AD. NEWS 1140 (1963), wherein the importance of this type of legislation is emphasized. The efforts of the states to encourage widespread use of seat belts via statutory compulsory installation will be undermined if inferior and unreliable seat belts flood the market and impair the public confidence in seat belt effectiveness.

[20] *See* IND. ANN. STAT. § 47-2242 (1966); IOWA CODE ANN. § 321.445 (1966); KAN. GEN. STAT. ANN. § 8-5, 135 (Supp. 1965); MINN. STAT. ANN. § 169.685 (Supp. 1966); MISS. CODE ANN. § 8254.5 (Supp. 1966); MO. ANN. STAT. § 304.555 (1963); MONT. REV. CODES ANN. § 32-21-150.2 (Supp. 1967); N.J. REV. STAT. § 39:3-76.2 (Supp. 1966); N.M. STAT. ANN. § 64-20-76 (Supp. 1967); N.D. CENT. CODE § 39-21-41.1 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 12-414 (Supp. 1966); R.I. GEN. LAWS ANN. § 31-23-40 (Supp. 1966); TENN. CODE ANN. § 59-930 (Supp. 1966); VT. STAT. ANN. tit. 23, § 4(29) (1967); WASH. REV. CODE § 46.37.510 (Supp. 1965); W. VA. CODE ANN. § 17C-15-43 (1966); WIS. STAT. ANN. § 347.48 (Supp. 1967).

[21] GA. CODE ANN. § 68-1801 (Supp. 1966); ME. REV. STAT. ANN. tit. 29, § 1368-A (Supp. 1966); NEB. REV. STAT. § 39-7,123.05 (Supp. 1965).

The minimal standards for seat belts, whether applied to the sale of belts in general, or to belts installed in new automobiles, or both, range from simply prohibiting the sale of belts which fail to conform to the minimum standards of the Society of Automotive Engineers[22] to detailed requirements of loop strength, webbing width, etc.[23] The great majority of statutes leave the standard to be determined by a public official or department, either (1) left entirely unguided,[24] (2) compelled to accept, as approved, belts conforming to standards of the Society of Automotive Engineers,[25] (3) authorized or compelled to establish the Society of Automotive Engineers' specifications,[26] or be guided by them,[27] or, (4) prohibited from promulgating standards below those established by the Society of Automotive Engineers[28] or some other organization.[29]

In those states which require installation of belts, the burden of installing the safety feature on new cars may fall on the manufacturer, dealer, or buyer of the vehicle. The shifting of the incidence of the regulation is accomplished either by prohibiting automobiles without the prescribed belts from being sold or offered for sale or trade,[30] thereby placing the burden upon the manufacturer

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[22] ARK. STAT. ANN. § 75-733 (Supp. 1965); MD. ANN. CODE art. 66½, § 296A(c) (1967); MICH. STAT. ANN. § 9.2410(2) (Supp. 1965); MINN. STAT. ANN. § 169.685(3) (Supp. 1966); OHIO REV. CODE ANN. § 4513.262(c) (Baldwin Supp. 1966); W. VA. CODE ANN. § 17C-15-43 (1966).

[23] CONN. GEN. STAT. ANN. § 14-100a(b) (Supp. 1966); N.Y. VEHICLE & TRAFFIC LAW § 383(b); N.C. GEN. STAT. § 20-135.2(b) (1965); R.I. GEN. LAWS ANN. § 31-23-41 (Supp. 1966) (the specifications contained therein apply only to public service vehicles).

[24] FLA. STAT. ANN. § 317.951(1) (Supp. 1966); MASS. ANN. LAWS ch. 94, § 295Y (1967); MICH. STAT. ANN. § 9.2410(1) (1960); NEB. REV. STAT. § 39-7,123.05 (Supp. 1965); N.C. GEN. STAT. § 20-135.1 (1965); PA. STAT. ANN. tit. 75, § 843 (1960).

[25] IND. ANN. STAT. § 47-2242 (1965); KAN. GEN. STAT. ANN. § 8-5, 135 (Supp. 1965); MISS. CODE ANN. § 8254.5 (Supp. 1966); MONT. REV. CODES ANN. § 32-21-150.2 (Supp. 1967); N.M. STAT. ANN. § 64-20-76 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 12-414 (Supp. 1966); R.I. GEN. LAWS ANN. § 31-23-40 (Supp. 1966); TENN. CODE ANN. § 59-930 (Supp. 1960); WIS. STAT. ANN. § 347.48 (Supp. 1967).

[26] N.D. CENT. CODE § 39-21-41.1 (Supp. 1967); ORE. REV. STAT. § 483.484(2) (1965); VA. CODE ANN. § 46.1-310(b) (1967).

[27] N.J. REV. STAT. § 39:3-76.2 (Supp. 1966).

[28] ILL. REV. STAT. ch. 95½, § 217.1(d) (Supp. 1966); UTAH CODE ANN. § 41-6-148.10(b) (Supp. 1967); WASH. REV. CODE § 46.37.510 (Supp. 1965).

[29] CAL. VEHICLE CODE § 27301 (1960) (Civil Aeronautics Administration Technical Standard Orders for Safety Belts and Safety Harnesses).

[30] CAL. VEHICLE CODE § 27309 (Supp. 1966); GA. CODE ANN. § 68-1801 (Supp. 1966); MICH. STAT. ANN. § 9.2410(2) (Supp. 1965); NEB. REV. STAT. § 39-7,123.05 (Supp. 1965); N.J. REV. STAT. § 39:3-76.2 (Supp. 1966); OKLA. STAT. ANN. tit. 47, § 12-413 (Supp. 1966); ORE. REV. STAT. § 483.482 (1965). Some states attempt to cover the entire commercial transaction by prohibiting buying, selling, leasing, trading, or transferring the vehicle without the required belt. *See* IND. ANN. STAT. § 47-2241 (1966); ME. REV. STAT. ANN. tit. 29, § 1368-A (Supp. 1966); MISS. CODE

or dealer, or by requiring the installation of belts in all registered cars manufactured in a certain year or later,[31] thereby placing the onus upon the automobile owner. Some states combine the two approaches by requiring the equipment for both a lawful sale and registration.[32] Others require installation in order for the vehicle to be operated on the state's roads.[33]

More important than upon whom the statute places the burden of costs and installation of safety equipment is the failure of these statutes to make adequate provision for their fullest utilization. All the statutes, except those of Rhode Island and California, fail to require *use* of the seat belt by drivers or occupants, and even the two exceptions restrict their application. The Rhode Island statute requires use only by a driver of certain specified public service vehicles,[34] while California requires the proper utilization of the belts by licensed driving instructors and student drivers when the automobile is being used for instruction purposes.[35] The majority of states also fail to provide complete protection by not requiring belts for the rear seats.[36]

ANN. § 8254.5 (Supp. 1966); MONT. REV. CODES ANN. § 32-21-150.1 (Supp. 1967); N.M. STAT. ANN. § 64-20-75 (Supp. 1967); N.D. CENT. CODE § 39-21-41.1 (Supp. 1967); OHIO REV. CODE ANN. § 4513.262(B) (Baldwin Supp. 1966) (extends only to selling, leasing or renting); R.I. GEN. LAWS ANN. § 31-23-39 (Supp. 1966); TENN. CODE ANN. § 59-930 (Supp. 1966); W. VA. CODE ANN. § 17C-15-43 (1966) (does not include buying); WIS. STAT. ANN. § 347.48 (Supp. 1967).

[31] MASS. ANN. LAWS ch. 90, § 7 (Supp. 1966) (does not limit the provision to automobiles of any specified year or later); N.Y. VEHICLE & TRAFFIC LAW § 383(a); N.C. GEN. STAT. § 20-135.2 (1965); R.I. LAWS ANN. § 31-23-40 (Supp. 1966).

[32] CONN. GEN. STAT. REV. § 14-100a(a) (Supp. 1966); ILL. REV. STAT. ch. 95½, § 217.1(a) (Supp. 1966); IOWA CODE ANN. § 321.445 (1966); KAN. GEN. STAT. ANN. § 8-5, 135 (Supp. 1965); MD. ANN. CODE art. 66½, § 296A(a) (1967); MINN. STAT. ANN. § 169.685(1) (Supp. 1966); MO. ANN. STAT. § 304.555(1) (1963); WASH. REV. CODE § 46.37.510 (Supp. 1965).

[33] ILL. REV. STAT. ch. 95½, § 217.1(b) (Supp. 1966); MONT. REV. CODES ANN. § 32-21-150.1 (Supp. 1967); N.J. REV. STAT. § 39:3-76.2 (Supp. 1966); OHIO REV. CODE ANN. § 4513.262(A) (Baldwin Supp. 1966); VA. CODE ANN. § 46.1-309.1(a) (1967); WIS. STAT. ANN. § 347.48 (Supp. 1967).

[34] R.I. GEN. LAWS ANN. § 31-23-41 (Supp. 1966). The statute applies to drivers of a jitney, bus, private bus, school bus, trackless trolley coach and authorized emergency vehicles.

[35] CAL. VEHICLE CODE § 27304 (Supp. 1966).

[36] The exceptions include: N.Y. VEHICLE & TRAFFIC LAW § 383(a) (at least one set of rear seat safety belts for each passenger for which the vehicle was designed); N.C. GEN. STAT. § 20-135.3 (1965) (provides for at least two sets of rear seat belts).

The Vehicle Equipment Safety Compact

One can readily appreciate the conflicting demands made upon automobile manufacturers as a result of the independently drafted state legislation. Automobile manufacturers, for purely economic reasons, may have to install a belt of the quality required by the state with the highest standards despite the fact that many cars may be sold in states having less stringent requirements, or, indeed, no requirements at all. Automobile transportation has taken on an interstate character which necessitates a more uniform approach to safety and highway regulation. For these reasons there has been noticeable federal activity in motor vehicle and highway matters, an area traditionally of state concern.[37] This has stimulated state interest in an interstate compact for, among other things, vehicle safety equipment. This action would enable the states to take advantage of the uniformity and efficiency afforded by federal intervention, while maintaining their state sovereignty.[38] To date, forty-four states have adopted the Compact.[39]

A "Vehicle Equipment Safety Commission" is created by the Compact, composed of one commissioner from each party state,[40] each having one vote on the Commission.[41] The effect that this machinery for interstate cooperation will have on seat belt legislation is embodied in Article V of the Compact. It empowers the Commission to issue rules, regulations or codes prescribing performance requirements or restrictions for any item or items of equipment.[42] After a study of the desirability of taking such action is conducted, the results may be published in a report and hearings must be held within sixty days after such publication.[43]

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[37] *See, e.g.*, Highway Safety Act of 1966, 23 U.S.C. §§ 401-04 (Supp. II 1967); National Traffic & Motor Vehicles Safety Act of 1966, 15 U.S.C. §§ 1391-1425 (Supp. II 1967); Department of Transportation Act, 49 U.S.C. §§ 1651-59 (Supp. II 1967).

[38] For an example of the need for uniform standards of safety equipment see COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS FOR TRAFFIC SAFETY 5 (1962).

[39] The six states not party to the Compact are: Alabama, Alaska, Hawaii, Mississippi, South Carolina and West Virginia. All references to the content of the Compact will be made to the text as contained in COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS FOR TRAFFIC SAFETY 35-47 (1962), which is substantially identical to those of all the adopting states, and will be cited: VEHICLE EQUIPMENT SAFETY COMPACT. It should be noted that a state lacks the power to enter into a compact with another state without the consent of Congress. U.S. CONST. art. I, § 10. Such consent was provided by Act of Aug. 20, 1958, Pub. L. No. 85-684, 72 Stat. 635.

[40] VEHICLE EQUIPMENT SAFETY COMPACT art. III(a).

[41] *Id.* at art. III(b).

[42] *Id.* at art. V(b).

[43] *Id.* at art. V(a).

Within six months after the Commission sends notice of its action, the motor vehicle agency of a party state must, after hearings, adopt the rule, regulation or code as part of the law of the jurisdiction,[44] or, as an alternative to this procedure, if the constitution or statutes of a party state so provide, legislative approval may be mandatory as a condition precedent for the taking effect of any Commission rule, regulation or code within the party state.[45]

In the context of seat belt legislation, the hope offered by the Compact is twofold: first, that the participating states which do not have seat belt legislation will, by the workings of the Commission, promulgate seat belt laws in their jurisdictions;[46] second, that the conflicting and variant statutes which already exist will be brought to conform to one another. However, the legislative approval which some states have decided to make mandatory before a Commission rule becomes effective has provided unprogressive legislatures with an opportunity to again reject the idea when brought before them in the form of a proposed Commission rule or regulation. The advantages of uniformity may not be compelling enough for them to pass a bill where they are initially opposed to the concept of compulsory use of safety equipment, or merely against the particular piece of legislation before them.[47]

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[44] *Id.* at art. V(f). The motor vehicle agency of the party state may reject the rule if, after public hearings with due notice, the agency finds it necessary for public safety to deviate from the resolution, and incorporates in its findings the reasons upon which it is based. *Id.* at art. V(g).

[45] The underlying purpose of the plan is to promote uniform equipment standards adopted through efficient machinery. Yet, under this procedure for legislative approval, there is no control by the Commission over the activities of the respective state legislatures in adopting Commission rules. Unnecessary variations from the recommended rule may be made to satisfy private interests which exert pressure on the legislators, or the rule may be shelved or rejected or passage delayed for less than satisfactory reasons.

[46] The states which have adopted the Compact but have failed to take action on seat belts include: Arizona, Colorado, Delaware, Idaho, Kentucky, Louisiana, Nevada, New Hampshire, South Dakota, Texas and Wyoming.

[47] The threat to the realization of the Compact purpose is a significant one since the great majority of party states have passed legislation requiring legislative approval of Commission rules. *See* ARIZ. REV. STAT. ANN. § 28-1615 (Supp. 1966); ARK. STAT. ANN. § 75-2003 (Supp. 1965); CAL. VEHICLE CODE § 28102 (Supp. 1966); DEL. CODE ANN. tit. 21, § 8012 (Supp. 1966); GA. CODE ANN. § 68-1913 (Supp. 1966); IDAHO CODE ANN. § 49-2003 (Supp. 1965); ILL. REV. STAT. ch. 95½, § 553 (Supp. 1966); IND. ANN. STAT. § 47-3202 (1966); KAN. GEN. STAT. ANN. § 8-1204 (1964); KY. REV. STAT. ANN. § 189.773 (Supp. 1967); LA. REV. STAT. § 32:1403 (Supp. 1964); ME. REV. STAT. ANN. tit. 29, § 1554 (1964); MD. ANN. CODE art. 66½, § 419 (1967); MICH. STAT. ANN. § 4.148(2) (Supp. 1965); MO. ANN. STAT. § 304.620 (Supp. 1966); MONT. REV. CODES ANN. § 32-21-168 (Supp. 1967); NEV. REV. STAT. § 484.483 (1963); N.M. STAT. ANN. § 64-20-80 (Supp. 1967); N.Y. VEHICLE & TRAFFIC LAW § 384(3); N.C. GEN. STAT. § 20-183.15 (1965); N.D. CENT. CODE § 39-23-03 (Supp. 1967); OHIO REV. CODE ANN. § 4513.52 (Baldwin 1964); ORE. REV. STAT. § 483.676 (1965);

The New Federal Law

Motivated by the same concern over the ever-increasing traffic accident rate, and the need for uniform motor vehicle standards, Congress has involved the federal government in safety equipment activity. It was well aware of the weakness of individual state governments and of the cooperative safety compacts.[48] The new legislation reflects an attempt to utilize the federal power to its fullest extent to compensate for the inherent weakness of efforts among the states.

Under the new National Traffic and Motor Vehicle Safety Act, the Secretary of Commerce is empowered to establish federal motor vehicle safety standards [49] which prevail over any standard established by a state. The statute expressly denies any state the power to enact or continue a safety standard which is not identical to that promulgated by the Secretary of Commerce, except that a state may enact a standard applicable to vehicles used by the state government which is more rigorous than that established by the federal government.[50] In prescribing standards, the Secretary is specifically required to consult the Vehicle Equipment Safety Commission.[51] Furthermore, he is required to establish a "National Motor Vehicle Safety Advisory Council," composed of representatives of the general public, state and local governments, motor vehicle manufacturers, and equipment manufacturers and dealers,[52] with which he is to consult.[53]

The Legal Implications

Concluding the survey of the legislation in this area, attention is now centered upon the legal implications created by the statutes. Some of the individual state statutes have expressly provided penalties for violation of the seat belt provisions, some classifying them misdemeanors,[54] while others impose penalties without so designat-

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PA. STAT. ANN. tit. 75, § 2304 (Supp. 1966); R.I. GEN. LAWS ANN. § 31-23.1-4 (Supp. 1966); UTAH CODE ANN. § 41-15-5 (Supp. 1965); VA. CODE ANN. § 46.1-308.3 (1967); WASH. REV. CODE § 46.38.030 (Supp. 1965); WIS. STAT. ANN. § 347.76(2) (Supp. 1967); WYO. STAT. ANN. § 31-348 (Supp. 1965).

[48] *See* Senate Report No. 1301 on the National Traffic & Motor Vehicle Safety Act of 1966 in 2 U.S. CODE CONG. & AD. NEWS 2709, 2712 (1966).

[49] National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(a) (Supp. II 1967).

[50] 15 U.S.C. § 1392(d) (Supp. II 1967).

[51] 15 U.S.C. § 1392(f)(2) (Supp. II 1967).

[52] 15 U.S.C. § 1393(a) (Supp. II 1967).

[53] 15 U.S.C. § 1393(b) (Supp. II 1967).

[54] ARK. STAT. ANN. § 75-734 (Supp. 1965); GA. CODE ANN. § 68-9936 (Supp. 1966); IND. ANN. STAT. § 47-2243 (1966); MISS. CODE ANN. § 8254.5 (Supp. 1966); MO. ANN. STAT. § 304.555 (1963); MONT. REV.

ing the violation.[55] Some statutes explicitly state that failure to comply with the provisions is not to be deemed an offense[56] and evidence of failure to use the seat belt is inadmissible in any criminal proceeding arising out of an automobile accident.[57] Under the Compact, absolutely no mention is made of the methods of enforcement or of penalties for violation of the rules, regulations and codes established by the Commission. Such provisions were left to the individual states to adopt, undermining the very purpose of uniformity which sparked interest in the Compact.

The federal statute provides a uniform penalty for violation of its provisions.[58] As in many states, the onus of compliance falls on the manufacturer and distributor of motor vehicles or motor vehicle equipment by prohibiting the manufacture or sale, in interstate commerce, of automobiles or automobile equipment not in conformity with the established standards.[59]

Enforcement of seat belt statutes may also be accomplished indirectly by the judicial application of tort concepts—*i.e.*, the doctrines of contributory negligence, avoidable consequences and assumption of risk. This method of enforcement might be more effective than the existing statutory punishments outlined above and have greater and more significant legal ramifications. If the driver of an automobile knew that the courts might be sympathetic to a negligent defendant's assertion of the doctrine of contributory negligence against an injured plaintiff motorist, predicated solely upon such plaintiff's failure to use an available seat belt, or a seat belt which, by statute, should have been available, such motorist may well be inclined not only to install the belt but to use it as well. The question must then be posed as to whether the doctrine of contributory negligence is an appropriate vehicle for the accomplishment of this purpose, *i.e.*, whether failure to use a seat belt consti-

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CODES ANN. § 32-21-150.3 (Supp. 1967); NEB. REV. STAT. § 39-7,123.05 (Supp. 1965); OKLA. STAT. ANN. tit. 47, § 17-101(a) (Supp. 1966); TENN. CODE ANN. § 59-930 (Supp. 1966).

[55] ILL. REV. STAT. ch. 95½, § 217.1(e) (Supp. 1966); MASS. ANN. LAWS ch. 94, § 295Y (1967); N.Y. VEHICLE & TRAFFIC LAW § 383(i); OHIO REV. CODE ANN. § 4513.99 (Baldwin 1964); PA. STAT. ANN. tit. 75, § 843 (1960).

[56] IOWA CODE ANN. § 321.445 (1966).

[57] ME. REV. STAT. ANN. tit. 29, § 1368-A (Supp. 1966).

[58] National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1398(a) (Supp. II 1967).

[59] 15 U.S.C. § 1397(a)(1) (Supp. II 1967). If the non-compliance is discovered after the sale of the item by a manufacturer or distributor to a distributor or dealer and prior to the subsequent sale of the item, the manufacturer or dealer is required to repurchase the car or automobile equipment at the vendee's cost or furnish the vendee, free of charge, the required conforming parts for installation by the vendee, reimbursing him for the reasonable value of such installation. 15 U.S.C. § 1400(a) (Supp. II 1967).

tutes contributory negligence.[60] If it is established that the doctrine does in fact lend itself to a reasonable application to the seat belt situation, normal human reaction might provide the balance of the stimulus to coerce seat belt use.

Some state legislatures have forestalled this development by expressly providing that evidence of failure to use a seat belt is inadmissible in a civil action brought for damages,[61] in any civil or criminal trial arising out of an automobile accident,[62] or in any action involving personal injuries or property damage resulting from the use or operation of any motor vehicle.[63] The Tennessee statute states that failure to use a seat belt is not to be considered contributory negligence, nor is the failure to wear the belt to be considered in order to mitigate damages.[64] Virginia likewise holds that failure to use the belt is not to be deemed negligent.[65] Most states, however, have not precluded by legislation the possible application of contributory negligence to the seat belt situation.

A widely accepted definition of the doctrine appears in the Restatement of Torts:

> Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.[66]

It is not every negligent act of the plaintiff which immunizes the defendant from liability. The doctrine of contributory negligence usually requires that the plaintiff's conduct contribute to his injury as a proximate cause, as opposed to a remote cause or a mere condition; if proximate causation is found, the plaintiff is completely barred from recovery.[67]

The Judicial Decisions

To date, at least six cases have reached the appellate level which concern the tort ramifications of failure to utilize an avail-

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[60] The discussion of contributory negligence will be predicated on the fact that the driver of the automobile is not negligent as to any other aspect of vehicle operation or maintenance. The sole contention of negligent conduct will be exclusively centered around the failure to use the belt.

[61] IOWA CODE ANN. § 321.445 (1966).

[62] ME. REV. STAT. ANN. tit. 29, § 1368-A (Supp. 1966).

[63] MINN. STAT. ANN. § 169.685(4) (Supp. 1966).

[64] TENN. CODE ANN. § 59-930 (Supp. 1966).

[65] VA. CODE ANN. § 46.1-309.1(b) (1967).

[66] RESTATEMENT (SECOND) OF TORTS § 463 (1965); *see* W. PROSSER, TORTS § 64, at 427 (3d ed. 1964).

[67] Doran v. City & County of San Francisco, 44 Cal. 2d 477, 283 P.2d 1 (1955); Petroleum Carrier Corp. v. Robbins, 52 So. 2d 666 (Fla. 1951); Nudd v. Matsonkas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

able seat belt. In one, *Kavanagh v. Butorac*,[68] plaintiff-appellee, a front-seat automobile passenger, incurred injuries necessitating removal of his left eye as a result of a collision with the defendant-appellant. It was highly probable that this injury was due to forcible contact with the rear-view mirror and it was further found that seat belts were available, although not utilized.

One of the theories advanced by the appellant to reverse the plaintiff's $100,000 recovery was that of avoidable consequences. It is incumbent upon the victim of a tort to use reasonable means to avoid or minimize the damages received, and the injured party cannot recover for those damages which could have been avoided.[69] The court noted the difference between the doctrine of avoidable consequences and that of contributory negligence. The latter doctrine applies to the plaintiff's conduct before he suffers from any wrongdoing, barring all recovery if his negligent act or omission proximately causes injury. The former doctrine directs attention to the plaintiff's conduct subsequent to the infliction of the harm, barring recovery of only those damages which could have been reasonably avoided. The court refused to apply the doctrine because of the lack of sufficient authority although it conceived of its utilization in some future case where the causes of the damages were more clearly discernible. Even if the doctrine were applied, commented the court, there was not enough evidence for it to declare, as a matter of law, that the injuries would have been any different had the belt been used. "Common knowledge and the expert testimony inform us that only a few inches separate the head of a seat belt user from the . . . mirror."[70]

The court, also recognizing the possibility that the contributory negligence doctrine might apply to the seat belt situation, refused to declare its applicability to the case before it as a matter of law. It expressly declared, however, that the holding was limited to the facts then before it.

Brown v. Kendrick[71] also involved the attempts of a defendant to invoke the doctrine of contributory negligence against an injured party not using an available seat belt at the time of the accident. The answer containing the allegation was twice stricken by the trial court, such rulings constituting the principal ground for appeal. Acknowledging the legislative activity concerning seat belts and the controversy over their effectiveness, the court nevertheless noted that the Florida legislature did not require use of the belts or attach any tortious significance to the failure to use them. The court refused to invoke the doctrine of contributory negligence, characterizing

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[68] 221 N.E.2d 824 (Ind. App. 1966).
[69] *Id.* at 830; C. MCCORMICK, DAMAGES § 33 (1935).
[70] 221 N.E.2d at 833-34.
[71] 192 So. 2d 49 (Fla. Dist. Ct. App. 1966).

any argument between the plaintiff and defendant on the subject as "conjectural and of doubtful propriety."[72] Therefore, as a matter of judicial discretion, there was no error in the trial court's refusing to allow defendant to introduce evidence of plaintiff's failure to use an available belt.

In *Lipscomb v. Diamiani*,[73] the Delaware court likewise held evidence of a plaintiff's failure to use an available seat belt inadmissible, expressly approving of *Brown* as the best approach.[74] The court stated that the alternative to the *Brown* approach was to make the issue of whether or not the failure to use a seat belt is contributory negligence a question of fact for the jury, for it was deemed inconceivable that, absent a statute, the failure to use a belt would constitute contributory negligence as a matter of law. The court might merely instruct the jury that the plaintiff was to use reasonable care for his own safety under the circumstances. The approach of using a broad jury instruction was criticized because it offered no standard to the jury to aid in their analysis of the variables involved in the failure to utilize an available seat belt.

Even if the evidence were admitted so as to merely invoke the doctrine of avoidable consequences as suggested by *Kavanagh*, the court feared the problem of damage apportionment. Not only is apportionment ordinarily difficult, but under certain circumstances it is impossible. And, the court further noted, the doctrine of avoidable consequences is not squarely appropriate to a seat belt fact pattern since the plaintiff's alleged negligence in not avoiding excessive injury occurs prior to any injury inflicted by the defendant. Another important factor in the court's rationale was the fear that the traditional tort doctrine that one is usually not negligent for failing to anticipate another's negligence might be weakened if evidence of failure to use a seat belt were admitted.

A contrary decision was reached in *Sams v. Sams*,[75] where the trial court struck out the contributory negligence defense as applied to non-use of seat belts. The appellate court held that such evidence of contributory negligence should not have been stricken and that the ultimate questions raised by the defense should have been decided in the light of other facts offered at the trial level and not by the court on the pleadings.

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[72] *Id.* at 51. The court stated, however, that the
> plaintiff's failure to fasten her seat belt was not such negligence as to contribute to the occurrence of the accident, nor to be the proximate contributing cause of the injury in the absence of a showing that the accident could have been avoided in the absence of such a negligent act. *Id.*

[73] 226 A.2d 914 (Del. Super. Ct. 1967).

[74] *Id.* at 916. The court stated that the "life and death area with which we are dealing is peculiarly suited for . . . legislative exploration and development."

[75] 247 S.C. 467, 148 S.E.2d 154 (1966).

Mortensen v. Southern Pacific Co.[76] involved the use of a seat belt in a FELA context. The injured party was employed by the defendant to drive engineers for inspections along railroad lines in defendant's vehicle. He was killed when thrown from the vehicle after a collision with another car which caused decedent's car to roll over several times. Expert testimony was admitted to establish the protective value of seat belts and to offer the opinion that the decedent would not have incurred the fatal injuries had he not been thrown from the vehicle.[77] The appellate court concluded that a jury question was presented since the evidence was such that reasonable men could differ as to the inferences that could be drawn from the failure of the defendant to equip its vehicles with seat belts. The defendant argued that the sole proximate cause of death was the criminal negligence of the other driver. The court rebutted by noting that FELA requires merely that the defendant's negligence contributes "in part" to the injuries, observing that "[t]estimony as to the number of automobile collisions in the area in question . . . affords a basis for finding that a collision forcing a car off the roadway is reasonably foreseeable."[78]

The most recent decision on the subject is *Bentzler v. Braun*,[79] wherein an automobile passenger was injured when her driver ran into the rear of another vehicle which had slowed down so the occupant could yell to a stranded motorist on the shoulder of the road. One of the issues of the case centered around the plaintiff-passenger's failure to utilize an available seat belt and whether such conduct precluded recovery. The jury found that plaintiff was negligent with regard to the care to be exercised for her own safety, but allowed recovery because of a failure to find a causal connection between such negligence and the resultant injury. The defendants argued that the Wisconsin seat belt statute requiring installation likewise required use, but the court concluded that failure to use a belt was not negligence per se.[80]

The court did hold, however, that there was a duty to use the belt based on common-law principles, independent of any statutory mandate. After surveying recent statistics dealing with seat belt effectiveness and observing that an occupant of an automobile driven by another is bound to exercise such care as a reasonably prudent person would exercise under similar circumstances for his own safety, the court held that "in those cases where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat

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[76] 53 Cal. Rptr. 851 (Cal. Dist. Ct. App. 1966).
[77] *Id.* at 852.
[78] *Id.* at 854. *See* 16 CATHOLIC U.L. REV. 345 (1967).
[79] 34 Wis. 2d 362, 149 N.W.2d 626 (1967).
[80] *See* Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 290.

belts, it is proper and necessary to instruct the jury in that regard."[81] Nevertheless, the failure of the trial court to give a requested instruction which specifically required the jury to consider the plaintiff's actions with respect to the seat belt and whether use of the belt would have mitigated or eliminated her injuries was held not to be in error because of a lack of evidence of causation.

Commentary

These cases reveal the difficult problems which the seat belt fact pattern creates when common-law tort concepts are applied. The seat belt differs from most other pieces of safety equipment in an automobile in that it is not inherently involved in its operation. Its value demonstrates itself only at the time of a collision and the failure to use the belt does not contribute to the happening of the accident. Consequently, it has been argued that it is necessary to distinguish between contributory negligence which contributes to the damage of the automobile and such negligence which contributes to personal injury.[82] One may operate his automobile with due care and be involved in an accident solely because of the negligence of another. As a result, he may incur injury to his vehicle as well as to his person. For the former, there should be no reason why recovery should not be allowed, but as to the latter, if the court or jury decides to hold that failure to wear a seat belt constitutes contributory negligence, recovery must be denied.

An analogy may be drawn to the facts in the case of *Mahoney v. Beatman*.[83] The plaintiff's chauffeur was driving a Rolls Royce in a southerly direction at sixty miles per hour when it collided with the defendant's automobile, driven in a northerly direction, but in the plaintiff's lane. After the impact the plaintiff's chauffeur lost control of the vehicle, which, after making several maneuvers, struck a tree on the opposite side of the road. The trial court found that the defendant was on the wrong side of the road

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[81] Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626, 640 (1967). The court insisted that the proper way to frame the question was to inquire whether the guest's negligence contributed to the injuries, and not whether it caused the accident. *Compare* Kavanagh v. Butorac, 221 N.E.2d 824, 833 (Ind. App. 1966): "Our decision that failure to fasten a seat belt was not contributory negligence here is, of course, limited to the facts in this case. The collision would have occurred whether or not a passenger had his seat belt fastened." *See* Brown v. Kendrick, 192 So. 2d 49, 51 (Fla. Dist. Ct. App. 1966): "The plaintiff's failure to fasten her seat belt was not such negligence as to contribute to the occurrence of the accident, nor to be the proximate contributing cause of the injury in the absence of a showing that the accident could have been avoided in the absence of such a negligent act."

[82] Note, *Seat Belts and Contributory Negligence*, 12 S.D.L. Rev. 130, 134 (1967).

[83] 110 Conn. 184, 147 A. 762 (1929).

and that plaintiff's speed was unreasonable but did not contribute to the collision, although it did hamper the chauffeur's control of the car. The bulk of the injuries to the car resulted not from the impact, but from the car hitting the tree, which occurred solely because of the loss of control occasioned by the unreasonable speed.

In discussing the *Mahoney* holding, Professor Charles O. Gregory has suggested that:

> [T]he trial judge would appear to be justified in drawing the inference that the plaintiff was not contributorily negligent with respect to the impact but was, with respect to its aftermath. Hence, if he is trying the case without a jury, it is likely that his judgment will reflect these inferences; and if he is trying it before a jury, he will probably instruct it carefully so that the jury may exculpate the plaintiff as far as the impact is concerned but may deny him recovery for the balance of his damages which were caused not only by the impact but also by his own too great speed and resulting lack of control.[84]

The basis of Professor Gregory's premise that the plaintiff could be deemed contributorily negligent with respect to the aftermath, but not with respect to the accident itself, is grounded in the foreseeability test. He contends that "if the chauffeur was negligent with respect to the risks and hazards of loss of control *after* the impact, then his negligence *and* the defendant's negligence both contributed to the harm occurring after the impact."[85] The risk foreseeably involved in driving at excessive speeds is loss of control of the vehicle. Therefore, while the plaintiff might not be held accountable for the impact damages, such not being within the realm of foreseeable consequence of speedy driving, he should be held accountable with respect to damages caused by loss of control occasioned by excessive speed.[86]

This argument could be employed in the seat belt situation. The risks foreseeably involved in failing to use a seat belt are being ejected from the vehicle or being thrown against the steering wheel. Thus, while the plaintiff should be allowed to recover for damages to the vehicle occasioned by the impact, such not being within the reasonable foreseeability for failing to use a seat belt, he should be precluded from recovering for personal injuries resulting solely because of failure to use the belt. This mitigation of damages approach has won the sympathy of some writers in this field.[87]

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[84] Gregory, *Justice Maltbie's Dissent in Mahoney v. Beatman*, 24 CONN. B.J. 78, 85-86 (1950).

[85] *Id.* at 87.

[86] *Id.* at 90. *See generally* Green, *Mahoney v. Beatman: A Study in Proximate Cause*, 39 YALE L.J. 532, 535 (1930).

[87] Levine, *Legal Problems Arising From Failure to Wear Seat Belts*, N.Y.L.J., Oct. 4, 1966, at 4, col. 1; Note, *Automobile Seat Belts: Protection for Defendants as Well as for Motorists?*, 38 S. CAL. L. REV. 733 (1965).

There exists one significant flaw in the argument. Among the major notions which have been offered as justification for the doctrine of contributory negligence have been (1) the reluctance of the law to apportion the wrong between the two negligent parties; (2) the clean hands doctrine, disallowing one to recover for his own wrong; and (3) the attempt to make the personal interests of the parties dependent upon due care.[88] The suggested approach would necessitate apportioning the damages between the two parties, holding the defendant accountable for those damages resulting from the impact which would have been incurred even if the belt had been worn.[89] The plaintiff would be allowed to recover notwithstanding the fact that he attempts to redress his wrongs by going to the court without clean hands.[90] The doctrine disallowing recovery for one's own wrongs can be circumvented by arguing that one is recovering for only those injuries which would have been incurred even if the belt were used. For those injuries caused by the plaintiff's wrong, he is not allowed to recover. But this still necessitates apportionment.

One proponent of the mitigation argument contends that it can apply with equal force to contributory negligence jurisdictions because "it is nothing more than the application of the principle of mitigation of damages, a principle accepted by most jurisdictions."[91]

As applied to the law of torts, a defendant may show that the plaintiff has not suffered damages to the extent purported by him because, for example, he has received compensation directly from the original wrongdoer or from a fund established by him,[92] such

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[88] Davis v. Guarnieri, 45 Ohio St. 470, 477, 15 N.E. 350, 360 (1887).

[89] "The common law refuses to apportion damages which arise from negligence. This it does upon considerations of public convenience and public policy, and upon this principle . . . depends also the rule which makes the contributory negligence of a plaintiff a complete defense. . . . The policy of the law in this respect is founded upon the inability of human tribunals to mete out exact justice." C. BEACH, JR., CONTRIBUTORY NEGLIGENCE § 12 (2d ed. 1892).

[90] "In a number of well known fields the law has manifested its unwillingness to come to the aid of persons whose conduct does not conform to legal standards. . . . The doctrine of contributory negligence has been variously explained, but however it be explained it is in its operation clearly another manifestation of the law's unwillingness to aid persons whose conduct, here taking the form of neglectfulness, is deemed reprehensible, if this conduct has proximate causal connection with the very injury for which they seek reparation." Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131-32 (1932). For a criticism of this justification for the contributory negligence doctrine, see 2 F. HARPER & F. JAMES, JR., TORTS § 22.2 (1956).

[91] Walker & Beck, *Seat Belts and the Second Accident*, 34 INS. COUNSEL J. 349, 355 (1967).

[92] Adams v. Turner, 238 F. Supp. 643 (D.C. 1965); Christopher v. United States, 237 F. Supp. 787 (E.D. Pa. 1965); Yarrington v. Thornburg, 205 A.2d 1 (Del. Sup. Ct. 1964).

as an insurance policy, or because of partial satisfaction from the defendant's co-tortfeasor.[93]

But only a minority of jurisdictions apply the principle to mitigate a plaintiff's damages where his negligent conduct does not proximately contribute to the cause of the injury, but rather, to the intensity of the resultant damages.[94] On the other hand, if contributory negligence is established because the defendant is able to prove proximate causality between the plaintiff's negligence and the resultant injuries, most courts hold that it is a complete and not a partial defense.[95]

One writer suggests that the easiest of the problems created by attempting to apply the contributory negligence doctrine to the seat belt situation is declaring that a duty exists on the part of the occupant of an automobile to utilize an available seat belt. When confronted with the statistical data available pertaining to seat belt effectiveness, it is argued that a reasonably prudent man, in the exercise of ordinary care, will use the belt as a means to preclude self-injury.[96]

A basic tort principle comes to mind when the idea of holding a plaintiff contributorily negligent for failure to use an available seat belt is entertained. An individual may go through life naively assuming that others will act with due care and will never breach a duty owing to him, absent some circumstances which would put a person on notice as to possible negligent conduct.[97] This doctrine may apply with great force to the automobile situation. One using a public highway may assume that others on the road will drive with due care and observe the laws of the road.[98] To hold that

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[93] Anderson v. Kemp, 279 Ala. 321, 184 So. 2d 832 (1966); Anti v. Boston Elevated Ry., 247 Mass. 1, 141 N.E. 598 (1923); Bellamy v. Prime, 25 App. Div. 2d 923, 270 N.Y.S.2d 93 (3d Dep't 1966); Hunt v. Aufderheide, 330 Pa. 362, 199 A. 345 (1938).

[94] Atlantic Coast Line R.R. v. Wallace, 61 Fla. 93, 54 So. 893 (1911); O'Keefe v. Kansas City Western Ry., 89 Kan. 322, 124 P. 416 (1912); Smith v. Boston & M. R.R., 89 N.H. 246, 177 A. 729 (1935). For cases allowing the plaintiff to recover the entire amount despite the fact that his conduct, although not a proximate cause of the injury, intensified the extent of resultant injury, see Mahoney v. Beatman, 110 Conn. 184, 147 A. 762 (1929); Guile v. Greenberg, 192 Minn. 548, 257 N.W. 649 (1934).

[95] Ferrell v. Chicago Transit Auth., 33 Ill. App. 2d 321, 179 N.E.2d 410 (1961); Frandeka v. St. Louis Public Serv. Co., 361 Mo. 245, 234 S.W.2d 540 (1950). *See generally* Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 304 (1950), for a discussion of the various ways some jurisdictions have manipulated, in certain circumstances, the contributory negligence doctrine so as to reap the advantages of the mitigation of damages feature of the comparative negligence theory.

[96] Walker & Beck, *Seat Belts and the Second Accident*, 34 INS. COUNSEL J. 349, 355 (1967).

[97] 2 F. HARPER & F. JAMES, JR., TORTS § 22.10 (1956).

[98] Harrington v. Sharff, 305 F.2d 333 (2d Cir. 1962); Fahrlander v. Mack, 341 Ill. App. 665, 94 N.E.2d 693 (1950); Kuehn v. Jenkins, 251

the plaintiff is contributorily negligent for failure to use a seat belt is to assume that there is incumbent upon him the responsibility of foreseeing an accident occasioned by the negligence of another (assuming that the plaintiff drives with due care). What then happens to this well-entrenched tort notion that one is not negligent for failing to anticipate the negligence of another?[99]

Some may argue that the seat belt situation should be carved as an exception to the general rule; that a duty should be imposed by common-law principles to stimulate defensive driving. To say that one can rely on the fact that others will act with due care is patently contrary to the facts as we know them.

However, this argument ignores the fact that the effectiveness of the seat belt is not a settled question. Although in recent years most experts have endorsed the belt, some still fear injury to the abdomen, for example. Others show concern about the possibility of fire and the inability of the passenger to free himself. Furthermore, the Cornell study referred to earlier showed that drivers using belts have a tendency to speed and assume greater risks which is possibly occasioned by a false illusion of safety created by the belt. It would be absurd to deem the ordinarily prudent man negligent for failing to exercise proper care for his own safety by not using the belt when experts, far more familiar with the problem than he, cannot agree as to the belt's worth.

If the duty be imposed, and an exception be established to a well-entrenched tort notion, it would necessitate its own exceptions and be difficult in application. For example, at what age should children be required to use belts? At what stage of pregnancy will a woman be free to ride in a car without the belt? Furthermore, such reasoning might lead the courts to require the use of harnesses or crash helmets, or other equally valuable safety devices.

Some argue that the possibility of imposing such a duty can be derived from the seat belt statutes rather than from the traditional common-law standard of ordinary care.[100] Just as a plaintiff, in attempting to establish a duty owing to him from the defendant and a breach of such duty, may prove the violation of a criminal statute, the defendant may attempt to make the plaintiff's violation

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Iowa 557, 100 N.W.2d 604 (1960); Carpenter v. Strimple, 190 Kan. 33, 372 P.2d 571 (1962); Knoellinger v. Hensler, 331 Mich. 197, 49 N.W.2d 136 (1951); Van Rensselaer v. Viorst, 136 N.J.L. 628, 57 A.2d 49 (1948); Robinson v. Hartman Fuel Co., 119 N.Y.S.2d 127 (City Ct. N.Y. 1953).

[99] *See* Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613, 615 (1967).

[100] *See* Note, *Automobile Seat Belts: Protection for Defendants as Well as for Motorists?*, 38 S. CAL. L. REV. 733 (1965); Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288.

of a statute the basis for precluding recovery.[101] Essentially, the argument runs that the statutes requiring mere installation of seat belts impliedly require their use, any ruling to the contrary undermining any possible value to the legislation. Consequently, the unexcused failure to use the belt constitutes negligence per se.

It may safely be admitted that a well-defined rule of statutory construction allows the court to go beyond the letter of a statute in order to fulfill the spirit or intention of the law and avoid a frustration of its apparent purpose.[102] The legislative intent prevails over the letter of the law.[103] In compliance with this rule, words may be modified or rejected and others substituted.[104] However, in order for this principle to be properly applied, there must exist some ambiguity in the language of the statute,[105] but an unambiguous statute must be given effect in accordance to its plain and obvious meaning.[106]

Most seat belt statutes leave no room for debate as to the meaning of their terms, precluding the possibility of a court extending its meaning as is suggested. There is a notable absence of any legislative history supporting the contention that, by requiring installation, the legislatures impliedly required use. As to the argument that the installation statutes are meaningless unless construed to require use, an equally feasible purpose for the statute is that it is used as a means of implementing the seat belt safety campaign.[107]

Another observation must be made when considering the application of contributory negligence to the seat belt situation. Accepting the proposition that the contributory negligence doctrine

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[101] Note, *Negligence—Violation of Statute or Ordinance as Negligence or Evidence of Negligence—Rules in Minnesota*, 19 MINN. L. REV. 666 (1935); Note, *The Plaintiff's Breach of Statutory Duty as a Bar in an Action of Tort*, 39 HARV. L. REV. 1088 (1926).

[102] People v. Steel, 35 Cal. App. 2d 748, 92 P.2d 815 (1939); Collision v. State *ex rel.* Green, 39 Del. 460, 2 A.2d 97 (1938); Gautreau v. Board of Electrical Examiners, 167 So. 2d 425 (La. Ct. App. 1964); Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 104 A.2d 310 (1954).

[103] People v. Rankin, 160 Cal. App. 2d 93, 325 P.2d 10 (1958); Inship v. Board of Trustees, 26 Ill. 2d 501, 187 N.E.2d 201 (1962); Willmeth v. Harris, 195 Kan. 322, 403 P.2d 973 (1965); Astman v. Kelly, 2 N.Y.2d 567, 141 N.E.2d 899, 161 N.Y.S.2d 860 (1957).

[104] Long v. Dick, 87 Ariz. 25, 347 P.2d 581 (1959); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

[105] Addison v. Holly Hill Fruit Prod., 322 U.S. 607 (1944); Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947); Public Serv. Coordinated Transport v. Super Serv. Bus Co., 82 N.J. Super. 371, 197 A.2d 700 (1964).

[106] State v. Reidy, 152 Conn. 419, 209 A.2d 674 (1965); Berwyn Lumber Co. v. Korshak, 34 Ill. 2d 320, 215 N.E.2d 240 (1966); Board of Comm'rs v. Board of School Comm'rs, 130 Ind. App. 506, 166 N.E.2d 880 (1960); Roda v. Williams, 195 Kan. 507, 407 P.2d 471 (1965).

[107] Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288.

has been long criticized as being unduly harsh, a discernible trend in modern tort law, both in legislation and judicial decisions, is to either discount entirely the fact of the plaintiff's negligence or diminish the plaintiff's recovery or otherwise mitigate the harshness of the rule.[108] The types of actions in which the defense is effectual are continually being limited,[109] while, on the other hand, there has been an "increasing expansion of the concept of negligence where that will lead to compensating an accident victim for his loss." [110] The future of contributory negligence promises the development of additional means to circumvent its application and the "rule [will be] continually chiseled away."[111]

The defense has been modified by the common law in three respects: (1) it is unavailable as a defense to an intentional tort; (2) it cannot be applied when the action is founded upon defendant's violation of a statute intending to protect the plaintiff from his own wrong, such as statutes prohibiting sale of liquor to minors; and, (3) when the elements of the last clear chance doctrine are satisfied.[112]

In light of this clear trend, it has been forcefully suggested that the application of the contributory negligence doctrine to the seat belt fact pattern "would be a complete contradiction to the whole modern trend of tort law. It would expand the scope of contributory negligence beyond its broadest application."[113]

Conclusion

It may be fairly concluded that tortious significance should not be attached to the failure to use an available seat belt. Most courts which have reviewed the problem have looked with disfavor upon a defendant's attempts to invoke the doctrine in this area. As previously suggested, there are essentially three reasons for this attitude. First and primarily, as espoused by the *Brown* and *Lipscomb* courts, conflicting opinions concerning the value of the belt require a legislative directive before a duty of use is found to

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[108] Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

[109] 2 F. HARPER & F. JAMES, JR., TORTS § 22.4 (1956).

[110] *Id.*

[111] *Id.* at § 22.3.

[112] Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 470-71 (1953). For further discussion of the attempts to limit the application of the doctrine, see generally 2 F. HARPER & F. JAMES, JR., TORTS §§ 22.4-22.9 (1956).

[113] Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613, 619 (1967).

exist, *i.e.*, the evaluation of seat belt effectiveness is a legislative and not a judicial function.

Second, if the court decided to take on the burden of determining seat belt effectiveness, a difficult burden would be placed upon the jury. Not only must the jury weigh the variables and the conflicting expert opinions as to seat belt value in order to determine whether a particular plaintiff was negligent, but it must decide the difficult question of causality. In the light of the number, degree and direction of various forces which come to play in an automobile collision, can the jury confidently say that the plaintiff's injuries would not have occurred had the belt been used?

Third, the use of the contributory negligence doctrine in the seat belt situation tends to undermine (1) the judicially recognized presumption that, until reason for the contrary be manifested, other users of the roads will act with due care, and (2) the trend in modern tort law which more effectively compensates a victim for loss and disfavors unduly severe doctrines which entirely preclude such recovery.

Proper consideration being given all the relevant doctrines and practical difficulties, the course of action of the *Sams* court should be discounted as unduly superficial. When a new principle is unsuccessfully offered as a defense to the trial court, an appellate court should not reject the trial court's action by merely saying that striking a pleading is a severely harsh procedure which should be employed sparingly. If the defendant in a negligence action invokes the doctrine of contributory negligence as a defense, the trial court should initially determine whether the rule which allegedly establishes the plaintiff's negligence was in fact designed to immunize from liability one in the defendant's position.[114] If the rule is established for such a reason, the case goes to the jury for factual consideration; if it is not, the court must strike the defense as a matter of law.

On appellate review, the court must center its attention upon the defense and the reason for the rule's existence to determine whether there was an abuse of discretion. The court should not reverse by merely declaring that striking the pleading was unduly harsh without itself delving into the issue and evaluating the principles offered. To follow the lead of the *Sams* court is merely to invite trial judges to improperly delegate their responsibilities to the jury by redrafting a question of law, namely, whether the rule invoked by the defendant was designed to protect one in his position, into a question of fact, which is for the inexperienced jury to consider, namely, was the plaintiff's failure to use an available seat belt the proximate cause of his injury.

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[114] *See* Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927).

To apply contributory negligence to the seat belt fact pattern emphatically demonstrates the conflicting arguments concerning the doctrine. On the one hand, barring the plaintiff from recovery solely because of the failure to use the belt, which contributes not even an iota to the happening of the accident but may aggravate the injury, amply corroborates those who scorn the harshness of the contributory negligence rule. On the other hand, to travel only half the course and allow recovery for only those injuries not attributable to his conduct is to directly encounter the difficult problems which the doctrine attempts to avoid, especially that of apportionment.

As the question comes before the appellate court of each jurisdiction, an opportunity will be afforded to properly evaluate the arguments concerning the defense of contributory negligence and to make a decision for or against the encouragement of its continued existence. The court should carefully study the traditional arguments for the defense and take proper cognizance of the trend bringing about the decline of the doctrine and expanding the concept of negligence to compensate the victims of a wrong. It is submitted that if the proper balance is reached, this trend should be given a needed stimulant by refusing to entertain evidence of a plaintiff's failure to use an available seat belt. Such a holding could be precedent for preventing the defense of contributory negligence where plaintiff's alleged negligence is not a contributing cause of the injury, but merely a contributor to its severity.

APPEALABILITY OF AN ORDER REVOKING PROBATION

Probation is a relatively recent development in criminal law. It is the power, exercised in the discretion of the trial judge,[1] to suspend the sentence of a criminal offender and release him subject to the performance of certain conditions set forth by the trial judge. Violation of any one of these conditions may be the basis for revocation of the probation.

> [T]he defendant has the right to retain his probation status as long as he complies with the conditions attached thereto. Consequently to justify revocation of the probation, it must be shown that without excuse, he has committed such a breach of the conditions of the probation as justify its revocation. Otherwise stated, the revocation of probation must be fairly made, it must not be arbitrary, and the action of the court must be supported by reasonable grounds.[2]

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[1] *See, e.g.*, Comment, *Probationer's Right to Appeal; Appellant's Right to Probation*, 28 U. CHI. L. REV. 751, 752 (1961).

[2] 5 F. WHARTON, CRIMINAL LAW & PROCEDURE § 2194 (R. Anderson ed. Supp. 1967).