The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law

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THE SEAT BELT DEFENSE RECONSIDERED:
A RETURN TO ACCOUNTABILITY IN TORT LAW?
ROBERT M. ACKERMAN*

I. INTRODUCTION

The recent enactment of mandatory seat belt laws in several states1 has sparked new debate regarding the seat belt defense in personal injury actions involving automobile collisions. Long scorned by many courts due to the lack of widespread seat belt use, the seat belt defense may acquire new life as legislatures consider statutes requiring the use of seat

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1. As of October, 1985 mandatory seat belt laws had been enacted in fifteen states:
   
   
   New Jersey: Passenger Automobile Seat Belt Usage Act, ch. 179, 1984 N.J. Sess. L. Serv. 13 (West) (codified at N.J. STAT. ANN. §§ 39:3-76.2e to 39:3-76.2k (West 1985)).
   
   
   
   
   
   
   Indiana: Act of April 17, 1985, No. 1957 (to be codified at IND. CODE §§9-8-14-1—9-8-14-6).
   
   
   
   
   
   
   Louisiana: Act of July 10, 1985, No. 377 1985 La. Sess. Law Serv. 327 (West) (to be codified at LA. REV. STAT. ANN. §§32:1(96) and (97) and 295.1).
   

Mandatory seat belt laws are under consideration in several other states. Consideration has been prompted, at least in part, by a U.S. Department of Transportation (DOT) rule requiring installation
belts, with criminal sanctions for nonuse. It is, therefore, an appropriate time to evaluate the potential effect of such statutory enactments and to consider the application of the seat belt defense in various contexts.

This article, after presenting a brief history of the seat belt defense, will address the viability of the defense in light of recent statutory enactments. We will see how many such enactments actually serve to thwart, rather than promote, the defense. We will then discuss the application of the defense in terms of the damages recoverable by plaintiffs in auto collision cases. The defense will then be considered in the context of the relationship to notions of autonomy and accountability. This discussion will suggest that the seat belt defense has important implications in terms of both economic efficiency and individual accountability.

II. A BRIEF HISTORY OF THE SEAT BELT DEFENSE

The seat belt defense precludes an automobile accident victim from recovering for injuries which would have been prevented had he/she worn a seat belt. To date, the defense has gained limited acceptance. While some jurisdictions have accepted the defense, the more prevalent judicial reaction to date has been to reject it. Some courts have rejected the defense because of difficulty in categorizing it. These courts have reasoned that the seat belt defense does not fall under the rule of avoidable consequences, because the rule deals only with post-accident conduct. Iron-
ically, many of the same courts have stated that the seat belt defense is not an example of contributory negligence, because contributory negligence must play a role in causing the accident. Apart from this reasoning’s formalistic adherence to legal pigeonholes, it is clear that the failure to fasten one’s seat belt does, in fact, play a role in causing the accident, or, more importantly, the injury ultimately sustained. It is hornbook law that the final element of a cause of action in negligence is injury, toward which the other elements (duty of care, breach of duty, causation) must be directed. An automobile accident, and the injuries related thereto, should not be viewed as including merely the initial collision, but also as encompassing the events immediately subsequent thereto. The accident does not end until after the vehicle has stopped tumbling down the ravine or the occupants have come to rest against a utility pole after having been propelled through the windshield. Obviously, the failure to fasten the seat belt has played a role in many (if not most) post-collision injuries sustained

c (1985). Thomas v. Henson, 102 N.M. 417, 423, 696 P.2d 1010, 1016 (Ct. App. 1984), rev’d 102 N.M. 326, 695 P.2d 476 (1985). In reversing the Court of Appeals, the New Mexico Supreme Court acknowledged that the lower court opinion was “well-reasoned, carefully thought out, and logical in its conclusion,” but stated that “the creation of a ‘seat belt defense’ is a matter for the Legislature, not for the judiciary.” Id. at 327, 695 P.2d at 477.

6. Indeed, even courts accepting the seat belt defense have been reluctant to call it contributory negligence, preferring the terms “avoidable consequences” or “mitigation of damages.” See, e.g., Spier, 35 N.Y.2d at 451-52, 323 N.E.2d at 168, 363 N.Y.S.2d at 921-22; Mount v. McClellan, 91 Ill. App. 2d 1, 5, 234 N.E.2d 329, 331 (1968). Nomenclature aside, however, the defense is most logically applied in a manner similar to that used for contributory or comparative negligence. This is particularly true in comparative negligence jurisdiction. See infra text accompanying notes 66-81.

7. Prosser (and his revisers) apparently accept this view. Suggesting that “the doctrines of contributory negligence and avoidable consequences are in reality the same,” Keeton’s revision of Prosser states:

In a limited number of situations, the plaintiff’s unreasonable conduct, although it is prior or contemporaneous, may be found to have caused only a separable part of the damage. In such a case, even though it is called contributory negligence, the apportionment will be made. . . . A more difficult problem is presented when the plaintiff’s prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages. In such a case, upon a finding that the plaintiff’s excessive speed in driving was not responsible for a collision, but greatly increased the damages resulting from it, the Connecticut court refused to make any division, and held that the plaintiff could recover the entire amount. In analogous situations, however, other courts have apportioned the damages, holding that the plaintiff’s recovery should be reduced to the extent that they have been aggravated by his own antecedent negligence. This may be the better view, unless we are to place an artificial emphasis upon the moment of impact, and the pure mechanics of causation. . . .

W. PROSSER & W. P. KEETON, LAW OF TORTS, 459 (5th ed. 1984); see also W. PROSSER, LAW OF TORTS, 423-24 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 465 comment c (1965), calling for apportionment of damages “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.”

by occupants of motor vehicles. The occupant’s failure to fasten the seat belt may be seen as being a cause (although clearly not the only cause) of that chain of events that may be described as the “accident,” leading to injury.9

Some courts have refused to accept the seat belt defense because the plaintiff is under no duty to anticipate the negligence of another.10 This view is at odds with the usual view of proximate cause, in which the intervening negligent acts of third parties are usually deemed foreseeable.11 Many courts have rejected the defense due to the absence of any statutory duty to buckle one’s seat belt.12 Of course, while a duty of care may be imposed by statute,13 it may also arise as a matter of common law in the absence of any statutory standard.14 In any event, the enactment

9. Second collision cases, in which courts have imposed liability on auto manufacturers for failure to design crashworthy vehicles, are consistent with the premise that our inquiry may extend beyond the initial collision. E.g., Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); McMullen v. Volkswagen of America, 274 Or. 83, 545 P.2d 117 (1976). Like the seat belt defense, these cases involve pre-accident conduct which increases the likelihood of post-collision injury. (For further discussion of second collision cases, see infra note 11 and text accompanying note 116.)


One commentator has noted an ironic twist in the arguments of plaintiffs’ counsel regarding the foreseeability of highway accidents:

It is interesting to note, however, the inconsistent positions adopted by plaintiffs’ personal injury counsel, depending on the identity of the defendant. Where an injured plaintiff sues an automobile manufacturer for injuries sustained in a “second collision,” i.e., the impact with allegedly defective or unnecessarily sharp components in an automobile interior, plaintiffs’ counsel have argued that collisions are a frequent and inevitable contingency of normal automobile use; thus, the argument continues, the manufacturer is under a duty to anticipate such collisions and to design the vehicle accordingly so as to prevent an unreasonable risk of injury. The Eighth Circuit Court of Appeals has accepted such an argument and, in one of the leading automobile design defect cases, has held the manufacturer to a duty to anticipate collisions. Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). On the other hand, where a plaintiff sues an individual defendant for injuries sustained in an ordinary automobile accident and the defendant argues that plaintiff had a duty to anticipate a collision and therefore should have been wearing a seat belt, plaintiff’s counsel will argue that to impose such a duty would require him to anticipate another’s negligence; consequently, plaintiff should not be held to a duty to fasten a seat belt and thus take reasonable precautions for his own safety. [Citation omitted.]

Fuchs, Reallocating the Risk of Loss in Automobile Accidents by Means of Mandatory Seat Belt Use Legislation, 52 So. CAL. L. Rev. 91, 109 n.114 (1978) [hereinafter cited as Fuchs].

12. Britton, 286 Ala. at 498, 242 So. 2d at 666; Derheim, 80 Wash. 2d at 161, 492 P.2d at 1030; Selgado, 88 N.M. at 579, 544 P.2d at 719.

13. See infra text accompanying notes 41-47.

14. See infra text accompanying notes 26-29. Indeed, the Supreme Court of Wisconsin found “a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.” Bentzler v. Braun, 34 Wis. 2d 362, 385, 149 N.W.2d 626, 639 (1967).
of criminal statutes requiring the use of seat belts would now dispose of
the "statutory duty" rationale. 15

Some courts have rejected the seat belt defense because some cars are
not equipped with seat belts. 16 Presumably, the defense would place an
impossible burden on occupants of vehicles without seat belts. That bur-
den, however, could be eliminated by limiting the defense to the failure
to use an available seat belt. However, this formulation of the defense
would impose an unequal (although hardly unreasonable) burden on oc-
cupants of cars equipped with seat belts. 17 Whatever the logic of this
rationale, the federal requirement that all automobiles manufactured after
January 1, 1968 be equipped with seat belts 18 has, by now, rendered it
virtually obsolete.

Other courts have refused to accept the seat belt defense because of
the difficulty in applying rules of causation. 19 Admittedly, the task of
deciding just which injuries would have been avoided through the use of
the seat belt is not always an easy one. However, this task is not unlike
that confronted by juries in other cases of contributory (or comparative)
negligence. Moreover, as the seat belt defense is an affirmative defense,
the burden of proving the causal relationship between failure to fasten
one's seat belt and subsequent injury should be on the defendant. 20 Thus,
the plaintiff is not seriously prejudiced by problems associated with proof
of causation. 21

Finally, many courts have rejected the seat belt defense in light of the
fact that most people do not fasten their seat belts. 22 Surveys have
indicated that upwards of 80% of all automobile passengers do not fasten
their seat belts. 23 Many courts have interpreted this widespread conduct
as indicative of the absence of an accepted standard of care with respect

15. Unfortunately, many such statutes expressly prohibit or limit their use to establish a breach
of duty in civil actions. See infra notes 48-60 and accompanying text.
16. Britton, 286 Ala. at 508, 242 So. 2d at 675; Amend, 89 Wash. 2d at 124, 570 P.2d at 143.
17. Britton, 286 Ala. at 508, 242 So. 2d at 675.
18. 23 C.F.R. § 255.21 (1968) (Standard 208).
20. Spier, 35 N.Y. 2d at 450, 323 N.E.2d at 167, 363 N.Y.S.2d at 920. See also Franklin v.
Gibson, 138 Cal. App. 3d 340, 344, 188 Cal. Rptr. 23, 25 (1982); Mount, 91 Ill. App. 2d at 1,
234 N.E.2d at 329.
21. The New Mexico Court of Appeals has noted that the added cost to plaintiffs of meeting the
defendants' proof "pales in comparison to the untold billions, not to mention the loss of life and
severity of injuries . . . that could be saved if motorists and their passengers utilized this safety
device." Thomas, 102 N.M. at 426, 696 P.2d at 1019, rev'd 102 N.M. at 326, 695 P.2d at 476.
n.9, 239 A.2d at 276 n.9; Miller, 273 N.C. at 228, 160 S.E.2d at 73; Amend, 89 Wash. 2d at 124,
570 P.2d at 143.
23. Why Don't We Buckle Up?, SCI. DIS., Feb. 1985, at 22 (85% nonusage rate); HIGHWAY
USERS FEDERATION AND AUTOMOTIVE SAFETY FOUNDATION, THE SAFETY BELT PROponent'S GUIDE,
5, (undated) (14% usage rate); Fuchs, supra note 11, at 93 n.12 (20% usage rate).
to the use of seat belts. It would appear that these courts have ignored Holmes' maxim, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Simply put, while conformity with custom may be evidence of non-negligence, it is not dispositive of the issue, particularly where application of more general negligence standards (e.g., the utility/risk test of Restatement (Second) of Torts §291) would suggest that reasonable care was not exercised.

Clearly, the seat belt situation is one in which most of the public does not conform to a standard of reasonable care. The great weight of evidence regarding the effectiveness of seat belts in reducing the likelihood of serious injury bears this out. As the New York Court of Appeals stated in Spier v. Barker, "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." The court was obviously alluding to Judge Learned Hand's famous formula for negligence, as expressed in United States v. Carroll Towing Co. The few seconds involved in buckling the seat belt, together with the mild discomfort felt by some people in wearing the belt, falls far short of the product of the probability of an accident and the gravity of the injury that would be avoided through the fastening of the seat belt.

25. RESTATEMENT (SECOND) OF TORTS §291 (1965) provides as follows:

§ 291. Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct
Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

27. 35 N.Y.2d at 452, 323 N.E.2d at 168, 363 N.Y.S.2d at 922.
28. 159 F.2d 169 (2d Cir. 1947). Under the Hand formula, liability depends upon whether B (the burden of adequate precautions) is less than P (the probability of injury) multiplied by L (the gravity of injury).
29. Circumstances will, of course, arise under which application of the Learned Hand formula will produce a result which does not support the use of seat belts, e.g., the driver backing a few feet out of the garage before leaving the car to close the garage door, the delivery person whose job requires frequent exits from the vehicle separated by brief periods of slow-speed travel, etc. The defense should therefore proceed on a case-by-case basis, at least until such time as all possible variations have been considered. See Pokora v. Wabash Ry. Co., 292 U.S. 98, 103 (1934), in which
In light of the above reasoning, the seat belt defense has been recognized in a handful of jurisdictions, even in the absence of statutes mandating their use. Besides New York, the seat belt defense has been adopted by judicial decisions in Wisconsin, California, Illinois, Indiana, Mississippi, Pennsylvania and South Carolina. The defense has been described as contributory negligence, an application of the duty to mitigate damages, the avoidable consequences rule, or simply as a rule for reduction of recoverable damages.

The failure to fasten one's seat belt might even be characterized as assumption of risk, in light of the well-known dangers of the highway. This view is quite plausible. However, if viewed as assumption of risk, the failure to fasten one's seat belt should be classified as a secondary, implied, unreasonable (or qualified) assumption of risk. Because of the difficulty in distinguishing this form of assumption of risk from contributory negligence, together with judicial reluctance to impose the complete defense usually created by assumption of risk, the emerging view is to treat this form of assumption of risk in the same manner as contributory negligence in a jurisdiction which has adopted a comparative negligence scheme. In jurisdictions in which contributory negligence is still a complete bar to recovery, contributory negligence and assumption of risk have the same practical effect. For this reason (and for reasons indicated earlier) the seat belt defense will be treated, for purposes of our discussion, as an example of contributory (or comparative) negligence.

Justice Cardozo explains "the need for caution in framing standards of behavior that amount to rules of law."

The utility/risk balancing test of RESTATEMENT (SECOND) OF TORTS § 291, supra note 25, produces a result quite similar to that produced by the Learned Hand formula. The risk side may be seen as the product of the probability of injury and the gravity of injury; except for certain exigent circumstances (as noted earlier in this footnote), neglecting to fasten one's seat belt has virtually no utility (particularly in relation to the risk side of the balancing test).
III. EFFECT OF MANDATORY SEAT BELT USE LEGISLATION

Even in those jurisdictions that have rejected the seat belt defense to date (and particularly where the rationale has been either the absence of statutory duty or the custom of nonuse) the enactment of legislation imposing criminal sanctions for failure to wear a seat belt could add a new dimension. A statutory requirement that all occupants of the vehicle wear a seat belt should shift the presumption as to customary usage. Furthermore, failure to adhere to the statutory standard would be regarded in many jurisdictions as negligence per se, or as conduct giving rise to a rebuttable presumption, or at least a permissible inference, of contributory negligence.

Indeed, at least one authority has suggested that the presumption (or inference) of negligence raised by a statutory violation relates to the use of custom in negligence law, because it is customary to obey the law. Whether or not that is indeed true, the statutory enactment may have the effect of a legislative declaration regarding the standard of care. Thus (depending upon the treatment of violation of statute in a given jurisdiction), the violation of a mandatory seat belt law should, in the very least, give rise to an inference of contributory negligence, and in some jurisdictions give rise to a rebuttable presumption of contributory negligence or "negligence per se."

Perhaps out of an awareness of their possible impact on tort liability, most of the recently enacted statutes requiring seat belt use include provisions expressly limiting their application in civil cases. The Illinois statute provides that "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

15. Widespread disregard for the 55 m.p.h. speed limit may give one pause. See Peterson, Raising the Speed Limit in Rural Areas, N.Y. Times, Feb. 6, 1985, at B24.
17. Where a statutory violation gives rise to a rebuttable presumption of negligence, the burden shifts to the defendant (or, in the case of contributory negligence, the plaintiff) to rebut the presumption by showing the violation was excused. Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976). There may be very little (if any) difference between this result and the result where the unexcused statutory violation is negligence per se, as in Martin, 228 N.Y. at 164, 126 N.E. at 814.

45. Widespread disregard for the 55 m.p.h. speed limit may give one pause. See Peterson, Raising the Speed Limit in Rural Areas, N.Y. Times, Feb. 6, 1985, at B24.
46. See Martin, 228 N.Y. at 164, 126 N.E. at 814 (Cardozo, J.); cf. Clinkscales v. Carver, 22 Cal. 2d 72, 75-76, 136 P.2d 777, 778 (1943) (Traynor, J.).
47. Where a statutory violation gives rise to a rebuttable presumption of negligence, the burden shifts to the defendant (or, in the case of contributory negligence, the plaintiff) to rebut the presumption by showing the violation was excused. Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976). There may be very little (if any) difference between this result and the result where the unexcused statutory violation is negligence per se, as in Martin, 228 N.Y. at 164, 126 N.E. at 814.

Sometimes the excuse can be found within the statute. All of the mandatory seat belt laws enacted to date exempt certain classes of persons from compliance. Illinois, for example, exempts, inter alia, delivery people, persons with medical excuses, drivers operating a vehicle in reverse, drivers of vehicles for which seat belts are not required by law, and rural letter carriers. Act of Jan. 8, 1985, No. 83-1507, § 1(b) (codified at ILL. REV. STAT. ch. 95 1/2, § 12-603.1 (1985)).
arising out of the ownership, maintenance, or operation of a motor vehicle. 48 Statutes subsequently enacted in New Mexico, Indiana, Oklahoma, Texas and Connecticut contain similar provisions. 49 The legislatures of these states not only squandered an opportunity to create a new statutory standard of care to be applied by the courts in civil actions, but went so far as to deny the courts the opportunity to find such a standard of care on their own. 50 In Illinois and Indiana, where the courts had previously accepted the seat belt defense, 51 the effect of these provisions is particularly telling. As far as acceptance of the seat belt defense in civil actions is concerned, then, this legislation must be viewed as a step backward.

The Michigan statute provides that its violation may be considered evidence of negligence, but limits any reduction in damages to five percent. 52 The Missouri statute precludes a finding of comparative negligence due to one’s failure to wear a seat belt, but allows evidence of violation of the mandatory seat belt use law to mitigate damages, subject to a one percent limitation. 53 Nebraska’s similarly worded legislation includes a five percent limitation. 54 Louisiana’s contains a two percent limitation. 55

50. It would appear that the seat belt legislation in these states was a product of political compromise between the automobile industry (which wants mandatory seat belt laws enacted in order to avoid the DOT rule) and the plaintiffs’ trial bar (which is willing to tolerate such laws so long as they do not have the effect of limiting recovery in tort). That this development took place in Connecticut, a center of the insurance industry, might be explained by the fact that mandatory seat belt use statutes not calling for mitigation of damages in civil actions fall out of compliance with the DOT rule, and therefore cannot be used to trigger relaxation of DOT’s passive restraint requirement. 49 C.F.R. § 571.208 (1984). The insurance industry has been a traditional supporter of passive restraints.
51. Mount, 91 Ill. App. 2d at 1, 234 N.E.2d at 329; Kavanagh, 140 Ind. App. 2d at 139, 221 N.E.2d at 824. The Mount decision has been recently overturned in Clarkson v. Wright, No. 59766, slip op. (Ill. 1985). As an unpublished opinion subject to revision or withdrawal, coming after Illinois’ enactment of mandatory seat belt use legislation but dealing with facts arising prior to its effective date, the Clarkson decision is of little precedential effect.
52. Act of Mar. 8, 1985, No. 85-1, § 5, Mich. Legis. Serv. 1 (West) (to be codified at Mich. Comp. Laws Ann. §§ 257.710c—257.710F (West)). It is apparently as yet unclear whether the 5% limitation applies to only those damages attributable to non-use of the seat belt, or to all damages stemming from the accident. This token mitigation of damages provision may have been inserted to place this auto industry-dependent state in compliance with the DOT rule.
Thus, the legislatures of Michigan, Missouri, Nebraska and Louisiana substantially diluted the potentially far-reaching effect of their respective seat belt statutes.

New York’s statute retains the seat belt defense as previously set forth by the courts of that state.\(^{56}\) California’s statute states that its violation “shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation.”\(^{57}\) An early version of New Jersey’s seat belt bill included a provision similar to Illinois’ which would have barred consideration of non-use of a seat belt in civil litigation.\(^{58}\) The legislature deleted this provision in favor of one which reads, “This act shall not be deemed to change existing laws, rules, or procedures pertaining to a trial of a civil action for damages for personal injuries or death sustained in a motor vehicle accident.”\(^{59}\) Similar language was subsequently enacted by North Carolina and Hawaii.\(^{60}\) The effect of this language is unclear, particularly in a state like New Jersey, where the courts appear to have previously rejected the seat belt defense.\(^{61}\) The provision would appear to preclude the courts from finding that the statute created a standard of care, the breach of which was negligence per se. But what if near-universal compliance with the statute results in a custom of seat belt usage?\(^{62}\) Can this custom allow the New Jersey courts to find a new standard of care, based not on the statute itself, but on community mores which had their


\(^{57}\) Act of Oct. 1, 1985, A.B. 27 § 1.5(i) (to be codified at CAL. VEH. CODE, § 12810.2 and § 27315).

\(^{58}\) The rejected provision reads as follows:

Failure to wear a safety seat belt system, in violation of this act, shall not be considered evidence of negligence nor limit liability of an insurer nor diminish recovery for damages arising out of the ownership, maintenance, or operation of a passenger automobile. In no event shall failure to wear a safety seat belt system be considered as contributory negligence, nor shall the failure to wear a safety belt system be admissible as evidence in the trial of any other civil action.

\(^{59}\) Passenger Automobile Seat Belt Usage Act, ch. 179, § 4, 1984 N.J. Sess. Law Serv. 13 (West) (codified at N.J. STAT. ANN. §§ 39:3-76.2a—39:3-76.2k (West 1985)).

\(^{60}\) Act of April 19, 1985, § 291(d) (to be codified at HAW. REV. STAT. § 291(d)); Act of May 23, 1985, ch. 222, § 20-135.2A(d), 1985 N.C. Sess. Laws 76 (to be codified at N.C. GEN. STAT. § 20-135.2A(d)).

\(^{61}\) Barry, 99 N.J. Super. at 270, 239 A.2d at 273. The language in Barry is somewhat qualified; the law of New Jersey on this issue might best be described as unsettled.

\(^{62}\) Early samplings indicate that 70 percent of front-seat occupants in New York wear seat belts now that New York’s mandatory seat belt law is in effect. N. Y. Times, February 28, 1985 at B5. An April, 1985 Gallup Poll indicates a 40 percent adult seat belt usage rate nationwide up from 17 percent in 1982. N.Y. Times, May 9, 1985, at A13 col. 5.
origin in the statute? Have the legislatures of New Jersey, North Carolina and Hawaii, in attempting to treat the situation gingerly, indirectly promoted a standard of care for civil actions? Or would such a result be construed as antithetical to the enacted provisions, with the resultant hamstringing of the courts’ ability to adapt law to changing community practices and expectations? As Roland Hedley would say, "Only time will tell."

IV. EFFECT OF SEAT BELT DEFENSE ON DAMAGES

Despite the legislative action described above, the seat belt defense remains viable in a minority of states,64 with the possibility of wider acceptance as seat belts gain more widespread use. Precisely what bearing the seat belt defense should have on the plaintiff’s right to recover damages remains for consideration. To deny any recovery whatsoever, even for those injuries which could not have been avoided through the use of seat belts, would be unduly harsh and represent a windfall to the defendant. It would also be at odds with basic rules of causation. The courts are therefore more likely to adopt one of the following views:

Alternative 1. Some courts have treated the seat belt defense in a manner similar to the avoidable consequences rule (i.e., denying the plaintiff any recovery for injuries which would have been prevented through the use of seat belts).66 This treatment is probably an appropriate one in a jurisdiction which adheres to the rule that contributory negligence bars any recovery on the part of the plaintiff. The plaintiff should still be entitled to recover for injuries which could not have been avoided through use of the seat belt, because failure to fasten the seat belt was not a cause-in-fact of these injuries.

Alternative 2. In a jurisdiction which has adopted a rule of comparative negligence, failure to fasten the seat belt should be treated like any contributory negligence on the part of the plaintiff (i.e., it should reduce, but not entirely eliminate, recovery for those injuries which would have been avoided through the use of the seat belt). The initial negligence of the defendant, which triggered the accident, remains a cause-in-fact of all of the plaintiff’s injuries. This is true under both the “but for” and

63. Apologies to Doonesbury creator Garry Trudeau.
64. See supra notes 30-37 and accompanying text.
66. E.g., Spier, 35 N.Y.2d at 444, 323 N.E.2d at 164, 363 N.Y.S.2d at 916.
67. "The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it." W. PROSSER & W.P. KEETON, LAW OF TORTS 266 (5th ed. 1984).
substantial factor\textsuperscript{68} tests for cause-in-fact. The plaintiff’s intervening negligence does not eliminate the defendant’s negligence as a proximate cause of the subsequent injuries.\textsuperscript{69} Given the current state of affairs, the plaintiff’s failure to fasten his/her seat belt is certainly foreseeable, and even if mandatory seat belt laws were to inspire almost universal compliance, the intervening negligence of the plaintiff should interrupt the causal sequence no less than the intervening product design defect which renders an automobile less crashworthy.\textsuperscript{70}

Operation of this rule of comparative negligence would require the trier of fact to make two apportionments. First, the trier would have to determine which of the plaintiff’s injuries would have been avoided through the use of seat belts and which would have been unavoidable in any event. The aid of accident reconstruction experts would be essential here. The initial burden of producing these experts would be on the defendant, who would have the burden of proving not only that the plaintiff was contributorily negligent (i.e., neglected to fasten his/her seat belt), but also that this contributory negligence was the cause-in-fact of certain injuries.\textsuperscript{71}

The second apportionment would be similar to those made in other comparative negligence cases. With respect to only those injuries attributable to failure to use the seat belt, the trier would be required to make an apportionment of fault between plaintiff and defendant. As in other comparative negligence cases, a decision would have to be made as to whether this apportionment should take into account the nature of each party’s conduct, the extent of the causal relation between the conduct and the injuries, or a combination of both.\textsuperscript{72} Where the nature of the parties’ conduct is of primary importance, the defendant is likely to be found more at fault (at least given current attitudes regarding the use of seat belts), whereas if the causal relationship between conduct and injury is regarded as paramount, the plaintiff is likely to be found more at fault. This is of particular importance in those jurisdictions using one of the

\textsuperscript{68} Id. at 267-68. See also Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920).

\textsuperscript{69} See supra text accompanying notes 7-9.

\textsuperscript{70} See supra note 11 and accompanying text.

\textsuperscript{71} See supra note 20 and accompanying text.

\textsuperscript{72} The Uniform Comparative Fault Act takes the position that “[i]n determining the percentage of fault, 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 damages claimed.” UNIF. COMP. FAULT ACT § 2(b), 12 U.L.A. 43 (Supp. 1985). For discussions of the relative merits of the “causation” approach and “negligence” approach to comparative negligence, see Rizzo and Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 COLUM. L. REV. 1399 (1980); Pearson, Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives, 40 LA. L. REV. 343 (1980).
variations of the fifty percent rule of comparative negligence. In these jurisdictions, a plaintiff found to be more at fault than the defendant is completely precluded from recovery. A plaintiff in this situation should still be able to recover for all injuries which would not have been avoided through the use of seat belts.

In a comparative negligence jurisdiction adopting the above view (preferred by the author), a hypothetical case would look like this: Peter Plaintiff is injured in an accident which began when Dan Defendant (the driver of an oncoming vehicle) crossed the center line, hitting Peter's car head-on. Had Peter been wearing a seat belt, he would have suffered relatively minor cuts and bruises, which, when both special and general damages were considered, would have entitled him to $5,000. However, because Plaintiff has neglected to buckle his seat belt, he is thrown from the vehicle, strikes his head on a tree, and suffers irreversible brain damage for which he would be entitled to $1 million in damages in the absence of the seat belt defense. With the seat belt defense in place, Plaintiff would receive the $5,000 representing the cuts and bruises he would have suffered in any event. The remaining $1 million in damages would be apportioned in accordance with the jurisdiction's comparative negligence formula.

Note that the above resolution, though easily stated, may give rise to a number of problems. First, there is the practical difficulty of accident reconstruction. It may not always be an easy task to distinguish between those injuries which were likely to have been prevented through the use of a seat belt and those which would have been suffered in any event. Second, there is the aforementioned problem regarding the considerations that should be paramount in the comparative negligence formula. Third,

73. In jurisdictions employing a "fifty percent" rule, a plaintiff is entitled to recover only if his/her negligence was "not as great as" (e.g., COLO. REV. STAT. §13-21-111 (1974)) or "not greater than" (e.g., 42 PA. CONS. STAT. ANN. §7102(a) (Purdon 1982)) that of the defendant. The two formulations produce markedly different results where the jury has apportioned the plaintiff's and defendant's negligence on a fifty-fifty basis.

74. Cf. Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W.2d 824 (1983), in which the Wisconsin Supreme Court stated that a plaintiff's negligent failure to wear an available seat belt should be used to reduce damages, but not to determine whether the plaintiff's negligence was greater than that of the defendant and is therefore barred from any recovery.

75. This assumes that the cuts and bruises are still sustained.

76. This would appear to be the view adopted under the Uniform Comparative Fault Act. UNIF. COMP. FAULT ACT §1(b), 12 U.L.A. 41 (Supp. 1985). See also Wade, Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act, 29 MERCER L. REV. 373, 385-86 (1978).

77. Of course, this problem is common to all cases of comparative negligence. See Daly v. General Motors Corp., 20 Cal.3d 725, 747-50, 575 P.2d 1162, 1175-77, 144 Cal. Rptr. 380, 393-95 (1978) (Clark, J., concurring). Requiring a trier of fact to place a percentage allocation on relative fault may well be viewed as subjectivity masquerading as objectivity.
cases may arise in which some injuries would have been prevented through the use of seat belts, while others might have occurred because of the use of seat belts.\textsuperscript{78} What of the admittedly rare accident in which the plaintiff suffers injuries due to his/her failure to use a seat belt, but would have suffered even greater injuries (perhaps from being crushed inside the vehicle) had he/she worn a seat belt?\textsuperscript{79} If we are reducing recovery where plaintiff’s conduct is the cause-in-fact of additional injuries, what happens to the case in which plaintiff’s negligent conduct is, ironically, the cause-in-fact of reduced injuries? While we cannot allow the plaintiff to recover for injuries not suffered, the resultant lack of symmetry must give us pause.

Alternative 3. Yet another alternative would be to allow a comparative negligence apportionment to be made with respect to all of the plaintiff’s injuries, including those which would not have been avoided through the use of seat belts. The percentage allocated to “seat belt negligence” presumably would be smaller in the context of all injuries as opposed to just those attributable to failure to wear a seat belt, as in Alternative 2. It would appear that this alternative represents the view taken most frequently by the courts.\textsuperscript{80} While this view lacks the precision of the second alternative, it is easier to explain to the jury and probably produces a rough approximation of a just result.\textsuperscript{81}

One of the few courts to consider carefully the role of the seat belt defense on apportionment of damages is the Supreme Court of Wisconsin.\textsuperscript{82} In \textit{Foley v. City of West Allis},\textsuperscript{83} that court recognized that any reduction in damages attributable to a party’s non-use of an available seat

\textsuperscript{78} Under our hypothetical, for example, suppose Peter Plaintiff suffers the permanent brain damage, but none of the minor scrapes and bruises which would have been suffered had he remained in the vehicle through use of a seat belt. Should the reduction in Plaintiff’s recovery for failure to use a seat belt be offset by an amount representing those injuries avoided through non-use of a seat belt?

\textsuperscript{79} Studies have indicated that “a person is 25 times more likely to be fatally injured if ejected from the vehicle than if inside and buckled up.” See Highway Users Federation, \textit{The Safety Belt Proponent’s Guide} (1984) at 6.

\textsuperscript{80} As most courts recognizing the seat belt defense have yet to carefully consider its effect on apportionment of damages, the ultimate position of the courts on this issue is still unclear. However, a few cases at least imply that the plaintiff’s negligent failure to fasten his/her seat belt will be compared to the defendant’s negligence in the context of all of the injuries suffered by the plaintiff. See, e.g., \textit{Spier}, 35 N.Y.2d at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920; \textit{Bentzler}, 34 Wis. 2d at 362, 149 N.W.2d at 626.

\textsuperscript{81} Presumably, a jury instructed to allocate fault in this manner would take into account not only the relative fault of the parties, but also the causal relationship of the respective fault of each party to the resulting injuries, thus reaching a result approximating that under Alternative 2. This is one possible interpretation of the opinion in \textit{Foley}. See 113 Wis. 2d at 490-96, 335 N.W.2d at 831-34.

\textsuperscript{82} Wisconsin is viewed as a leader in this area of law. It was one of the first states to enact a comparative negligence statute. \textit{Wis. STAT.} § 895.045 (1973). It was also among the first to recognize the seat belt defense. \textit{Bentzler}, 34 Wis. 2d at 362, 149 N.W.2d at 626.

\textsuperscript{83} 113 Wis. 2d 475, 335 N.W.2d 824 (1983).
belts should be applied to only those damages which would have been averted through the use of the belt mechanism. Taking into account the fact that the plaintiff may have also been responsible for contributory negligence which played a role in causing the initial collision (described by the court as "active negligence") the court adopted a procedure under which the plaintiff's damages were first reduced by the percentage attributable to his active negligence, and then further reduced by the percentage of negligence attributable to the plaintiff's failure to wear the seat belt. Some ambiguity remains as to whether this latter reduction eliminates all recovery for damages which would have been avoided through seat belt use (as in Alternative I), or merely reduces recovery in such a way that the defendant's causal relationship to these damages is also taken into account (as in Alternative 3).  

84. Id. at 484, 335 N.W.2d at 828.  
85. Only this "active negligence" would be considered when determining the plaintiff's contributory negligence for purposes of Wisconsin's 50% rule of comparative negligence. Id. at 488-89, 335 N.W.2d at 830-31.  
86. The full procedure was set forth as follows:  
(1) Determine the causal negligence of each party as to the collision of the two cars;  
(2) apply comparative negligence principles to eliminate from liability a defendant whose negligence causing the collision is less than the contributory negligence of a plaintiff causing the collision;  
(3) using the trier of fact's calculation of the damages, reduce the amount of each plaintiff's damages from the liable defendant by the percentage of negligence attributed to the plaintiff for causing the collision;  
(4) determine whether the plaintiff's failure to use an available seat belt was negligence and a cause of injury, and if so what percentage of the total negligence causing the injury was due to the failure to wear the seat belt;  
(5) reduce the plaintiff's damages calculated in step (3) by the percentage of negligence attributed to the plaintiff under step (4) for failure to wear an available seat belt for causing the injury.  
Id. at 490, 35 N.W.2d at 831.  
87. See supra text accompanying note 66. This possibility is raised by the court's suggestion that the Wisconsin Civil Jury Instructions Committee draft an instruction under which "The jury must determine what percentage of the total damages for that person's personal injuries was caused by his or her failure to wear a seat belt," id. at 495, 335 N.W.2d at 833, as well as an earlier statement that "We should seek to treat the plaintiff and defendant in such a way that the plaintiff recovers damages from the defendant for the injuries that the defendant caused, but that the defendant is not held liable for incremental injuries the plaintiff could and should have prevented by wearing an available seat belt." Id. at 489, 335 N.W.2d at 830-831. Under this interpretation, failure to wear a seat belt would be treated as a superseding cause, an odd result in a state which is considered a leader in comparative negligence doctrine. At least one author believes that Foley dictates this result. "The Foley formula categorically holds that injuries caused in part by seat belt negligence will be attributed solely to seat belt negligence, irrespective of other causes which necessarily contributed to the result." McChrystal, Seat Belt Negligence: The Ambivalent Wisconsin Rules, 68 MARQ. L. REV. 539, 547 (1985) [hereinafter cited as McChrystal].  
88. See supra text accompanying notes 79-80. This interpretation is suggested by the language set forth in step 4 of the process described in note 85, and by Wisconsin's general view that contributory negligence is not a total bar to recovery, due to its comparative negligence statute. The Foley opinion, however, appears to take the view that "seat belt negligence" should be given different treatment than that accorded "active negligence" under the statute. 113 Wis. 2d at 488, 335 N.W.2d at 830. Professor McChrystal has noted the apparent inconsistency of the language in Foley. McChrystal, supra note 87, at 549-50.
The lack of judicial clarity regarding the application of the seat belt defense may be attributable, at least in part, to the nomenclature being used. Several courts, reluctant to classify failure to use a seat belt as contributory negligence or assumption of risk, nevertheless have accepted the defense, either equating it with the avoidable consequences rule or failure to mitigate damages or creating a new category in which the defense is allowable as a means of reducing damages. The seat belt defense is, therefore, often applied outside the usual framework of contributory or comparative negligence. The trend away from traditional apportionment of damages (as suggested by Alternative 2) and in favor of percentage allocations applicable to all damages (as suggested by Alternative 3 and perhaps modern rules regarding comparative fault) may also play a role in the apparent tendency toward the "jury friendly" Alternative 3 solution rather than the more mathematically precise apportionment suggested under Alternative 2. The distinction between these solutions was not lost on Professor Prosser, however, who suggested "that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not." Where different damages are attributable to different causes, then, apportionment (and application of rules of comparative negligence within the apportionment) is at least theoretically appropriate; the real (and practical) problem is one of proof.

V. THE SEAT BELT DEFENSE IN PRODUCTS LIABILITY ACTIONS

A. Contributory negligence and products liability: a digression

Assuming that the seat belt defense is available to the defendant driver whose negligence is a cause-in-fact of a motor vehicle accident, should it also be available to the manufacturer of a vehicle defending a products liability action? A discussion of the role of contributory negligence in products liability cases is in order here. In cases involving strict products liability, the contributory negligence defense has traditionally played a

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89. See supra text accompanying notes 4-6. This reluctance may also have been attributable to the role of contributory negligence as a complete bar to recovery, which should be less of a factor with the advent of comparative negligence. Kircher, The Safety Belt Defense—Current Status, 16 FOR THE DEFENSE 45, 46 (1975).
90. E.g., Spier, 35 N.Y.2d at 444, 323 N.E.2d at 164, 363 N.Y.S.2d at 916.
limited role. Several states (particularly before the introduction of comparative negligence) have followed comment n to Restatement (Second) of Torts §402A, which states in part:

... Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.93

Thus, under the Restatement view, contributory negligence bars the user or consumer of a defective product from recovery only when his/her contributory negligence (i.e., unreasonable conduct) combines with elements of assumption of risk (i.e., voluntary encounter of a known danger). This overlap of contributory negligence and assumption of risk concepts is described in some circles as “secondary, implied, qualified (or unreasonable) assumption of risk.”94 Application of this defense to failure to fasten an available seat belt should not be too difficult (at least where adult plaintiffs are involved), in light of the known dangers accompanying failure to wear a seat belt.95

However, some courts have not stopped at the Restatement view in limiting defenses to products liability actions. Wary of the application of negligence terms to strict products liability actions, many courts have rejected the term “contributory negligence” in favor of a defense of “consumer misuse.”96 Consumer misuse might be viewed as an application of contributory negligence to the specialized field of products liability, were it not for the tendency of some courts to hold that consumer misuse is not a defense if the misuse is foreseeable.97 This development is probably an unfortunate one. As Professor Richard Epstein has said, “It may be quite foreseeable that individuals will drive while drunk, not

93. RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).
94. See supra notes 38-39 and accompanying text.
95. The author concedes that this may be considered a question of fact upon which reasonable persons might differ, particularly given the subjective nature of assumption of risk. See W. PROSSER & W. P. KEETON, LAW OF TORTS, 487 (5th ed. 1984).
use their safety belt, or run red lights. It does not follow that they should be able to escape the consequences of their own neglect.”

Opponents of the contributory negligence defense in strict products liability cases frequently make the "apples and oranges" argument; i.e., the negligence of the plaintiff cannot be equated or, in comparative negligence jurisdictions, compared with the strict liability of the defendant. The irony of this argument is that it would preclude a defense recognized in an action where the defendant is negligent from being used in a strict liability action which requires something less than negligence on the part of the defendant. If we are dealing with apples and oranges, a negligent plaintiff's fruit would appear to be far more tainted than that of a defendant against which no negligence has been proven. As Professor Victor Schwartz has written, "...there seems no reason why a negligent plaintiff should not be made to bear a loss which is due only in part to the defendant's defective product or abnormally dangerous activity." As a practical matter, we may not be comparing apples and oranges at all. Particularly in a jurisdiction accepting the benefit/risk test for product defects (and despite the protestations of some courts to the contrary), the decision as to whether a product is defective is, in the final analysis, not unlike a negligence determination, in which the utility of the defendant's conduct is compared with the risk generated thereby. Even in those jurisdictions employing only a consumer expectation test for product defects, the results are unlikely to vary substantially from a negligence test once constructive knowledge of the product defect has been imposed on the manufacturer.

Contributory negligence or "consumer misuse" is considered by some as inappropriate to strict products liability because of the risk-spreading

99. Daly, 20 Cal. 3d at 750-57, 575 P.2d at 1177-81, 144 Cal. Rptr. at 395-99 (Jefferson, J., dissenting). Apparently, apples and oranges did not present a stark enough contrast to Justice Jefferson, who likened a comparison of the plaintiff's negligent conduct and a defendant's defective product to a comparison between a quart of milk and a metal bar three feet in length. Id. at 751, 575 P.2d at 1178, 144 Cal. Rptr. at 396.
100. Schwartz, supra note 92, at 177.
102. Id. at 418, 573 P.2d at 447, 143 Cal. Rptr. at 229.
objectives of this doctrine.\textsuperscript{106} Strict products liability is viewed as an example of enterprise liability,\textsuperscript{107} under which a risk-generating enterprise is held liable for all injuries it causes; the costs of these injuries are internalized as a cost of the enterprise. Blanket application of this doctrine to products liability cases, however, frequently ignores the fact that the user of the product is, like the manufacturer, an active and willing participant in the risk-creating enterprise.\textsuperscript{108} Real cost internalization in terms of both economic efficiency and fairness, therefore, demands that the user of the product be held accountable to the extent his activity has created risks, particularly where the manufacturer has taken reasonable steps to eliminate or reduce these risks (e.g., by installing seat belts in automobiles). To spread losses by imposing liability on the manufacturer alone only forces careful consumers (who, for example, buckle their seat belts) to subsidize the risk-generating conduct of careless consumers (who don’t buckle their seat belts) through the payment of higher prices for products.

The advent of comparative negligence has led some courts to take a more hospitable view toward the role of contributory negligence in products liability cases. For example, in \textit{Duncan v. Cessna Aircraft Co.},\textsuperscript{109} the Texas Supreme Court recognized a comparative negligence scheme for products cases,\textsuperscript{110} even though it found strict liability outside the coverage of Texas' comparative negligence statute.\textsuperscript{111} The court noted the

\textsuperscript{106} See, e.g., Daly, 20 Cal. 3d at 762, 575 P.2d at 1184-85, 144 Cal. Rptr. at 402-03 (Mosk, J., dissenting); see also Calabresi and Hirschoff, \textit{Toward a Test for Strict Liability in Tort}, 81 \textit{YALE L.J.} 1055, 1078 (1972) [hereinafter cited as Calabresi and Hirschoff]; cf. Schwartz, supra note 92, at 179.


\textsuperscript{108} Admittedly, the same argument has been made in the past with respect to the “unholy trinity” of defenses (contributory negligence, assumption of risk and the fellow servant rule) which existed in cases involving workplace injuries prior to the advent of workers compensation. However, important factual differences distinguish these situations. Given the almost total absence of employee bargaining power, only the most formalistic of observers could claim that the nineteenth century worker assumed the risk of dangers in the workplace. An analogous situation may exist in the products field, insofar as the consumer is faced with an absence of choice among competing products, or where the defect is a latent one. \textit{See Henningsen v. Bloomfield Motors, Inc.}, 32 N.J. 358, 161 A.2d 69 (1960); Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex. App. 1982). But where (as in the seat belt defense cases) the user of a product is presented with the option of using a readily available device which he knows (or reasonably should know) will afford substantial protection from obvious risks, the analogy to the nineteenth century workplace is inapposite. \textit{See Henderson, Coping with the Time Dimension in Products Liability}, 69 \textit{CAL. L. REV.} 919, 965 (1981).

\textsuperscript{109} 665 S.W.2d 414 (Tex. 1984). This case includes an excellent summary of the history of the comparative negligence defense in strict products liability actions.

\textsuperscript{110} Wary of the “apples and oranges” argument, the Texas court adopted the term “comparative causation.” \textit{Id.} at 427. Other courts have also tried to avoid negligence terminology. See, e.g., Daly, 20 Cal. 3d at 725, 575 P.2d at 1162, 144 Cal. Rptr. at 380 (“comparative fault”), Suter, 81 N.J. at 150, 406 A.2d at 140 (“comparative fault”).

\textsuperscript{111} 665 S.W.2d at 426-27.
paradox created by prior law, which had rejected ordinary comparative negligence as a defense to strict products liability, but allowed assumption of risk to act as a total bar to recovery.112 Under the new “comparative causation” scheme, both defenses would henceforth serve to reduce, but not bar, a plaintiff’s recovery. Similarly, the Uniform Comparative Fault Act includes in its definition of “fault” both strict liability and product misuse, applying its apportionment rules to both.113

Thus, the availability of less Draconian means of dealing with plaintiffs’ fault has prompted reconsideration of contributory negligence in products liability actions. This is a welcome development. As Professor Epstein has noted, “A party who runs a red light is barred from recovery against the driver of another automobile. There is nothing special or unique about the rules of products liability that makes it appropriate for that same driver to recover for those same injuries against the manufacturer of his own car.”114 Similarly, it would be unreasonable to allow the seat belt defense to be used by the negligent driver who brought about an accident (e.g., by crossing the center line as in our earlier hypothetical), but not by the automobile manufacturer whose alternative design could have conceivably prevented injury, albeit at greater expense.

B. Application of seat belt defense to products liability actions

In products liability cases in which a product defect is the precipitating cause of an accident,115 the seat belt defense should be applied in the same manner as suggested earlier with respect to the ordinary negligence case; i.e., the fault of both plaintiff and defendant should be compared, with the resulting percentages applied to only those injuries which would have been prevented through the use of the seat belt. However, where the alleged product defect involves the crashworthiness of the vehicle, additional questions arise. In the “second collision” case, the plaintiff alleges not that a product defect precipitated the accident, but that a properly designed vehicle would have protected him/her from many of the injuries that ensued.116 The problems involved in such a case may be

112. 665 S.W.2d at 423-25.
113. § 1(b), 12 U.L.A. 39, 41 (Supp. 1985). To date, no legislature has adopted this uniform act, but the act has been judicially adopted in Missouri. Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983). Under this Act (and in many jurisdictions that have adopted comparative negligence), implied, secondary, unreasonable assumption of risk is treated in the same manner as contributory negligence. § 1(b), 12 U.L.A. at 41. The automobile passenger who, knowing of the hazards of the road, consciously decides not to use seat belts, probably falls into this category.
114. Epstein, supra note 98, at 655.
116. See cases cited supra note 9.
demonstrated by adding the following facts to our earlier hypothetical involving Peter Plaintiff.¹¹⁷

Assume, in addition to the facts already given, that Plaintiff’s injuries which would have been avoided through the use of a seat belt also could have been avoided through the auto manufacturer’s installation of passive restraints (i.e., an air bag system)¹¹⁸ in the vehicle. However, let us assume that while seat belts could be provided at a total cost of $80 and buckled with the investment of just a few seconds of time by the passenger, installation of an air bag system would have cost at least $500. In a products liability action against the manufacturer, we can easily see how Plaintiff’s contributory negligence (in failing to fasten his seat belt) should sharply reduce the liability of the defendant manufacturer, assuming that our jurisdiction has a comparative negligence scheme in place.¹¹⁹ Somewhat more problematic is the treatment that should be given to Plaintiff’s failure to use an available seat belt in the context of the question whether the failure to install air bags amounts to a defect at all. Should the auto manufacturer be at all liable for failure to install the passive restraint system, at great cost to itself and, ultimately, the consumer, when the passenger could have provided for his own safety with great ease and at far less expense? Or, to use a phrase coined by Professor Guido Calabresi, has not the passenger become the “cheapest cost avoider”?¹²⁰ Do the interests of economic efficiency dictate that we place the entire loss on

¹¹⁷. See supra text accompanying notes 75-76.

¹¹⁸. Because the seating arrangements in many vehicles are incompatible with other passive restraint systems, passive restraint systems usually require the employment of air bags. See Fuchs, supra note 11, at 102-03.

¹¹⁹. Of course, this reduction (as well as the defendant’s liability) would pertain to only those injuries that could have been avoided through the use of a seat belt or the installation of air bags. See supra text accompanying note 65.

¹²⁰. Professor Calabresi has defined the “cheapest cost avoider” as the party who “is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.” Calabresi and Hirschoff, supra note 106, at 1060 (emphasis omitted). See also Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 84 (1975); G. Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). For a more thorough discussion of Calabresian doctrine in the context of seat belt legislation, see Fuchs, supra note 11, at 121-39.

Calabresi would probably want us to ask whether a rule under which the passenger bears losses attributable to non-use of seat belts presents a realistic choice to the user/consumer. See Calabresi and Hirschoff, supra note 106, at 1070-76. Because seat belts are generally available in passenger vehicles, and the ordinary user/consumer is (or should be) aware of the dangers of seat belt non-use, a realistic choice is available. Granted, most user/consumers may be unaware of the effect of their choices on tort liability, but what is of central importance here is knowledge concerning the risk of injury, and the ability to act on that knowledge, not a sophisticated understanding of tort law.
the cheapest cost averter, provided that such person has adequate information to take the steps necessary to avoid injury?

The paucity of cases presenting the above scenario can be attributed, at least in part, to the adoption by many courts of the "consumer expectation" test for strict products liability set forth in Restatement (Second) of Torts §402A, comment i. Because the ordinary automobile purchaser or passenger does not expect the protection afforded by air bags, injured passengers are not storming the courts claiming that the failure to install air bags amounts to a design defect. However, a portent of things to come may have been suggested by Turner v. General Motors Corp., in which the injured driver of a Chevrolet which had overturned in an accident avoidance maneuver claimed that his automobile was defective due to the absence of a roll bar. The court found comment i to be applicable to crashworthiness and reversed a defendant's judgment, stating that "the average consumer . . . may well expect the roof of [his] car to maintain its structural integrity in a roll-over accident." Installation of roll bars, like air bags, is likely to involve far greater expense than the fastening of seat belts. Should a passenger be allowed any recovery due to the absence of a roll bar if the injuries which could have been prevented by this device also could have been prevented by his merely buckling his seat belt? Should consumer expectations alone control when the consumer is (or should be) aware of a readily available device to protect himself?

Application of a benefit/risk test for failure to install air bags (or roll bars) as called for under ordinary negligence rules or as an alternate test for design defect under Barker v. Lull Engineering might well result

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121. Restatement (Second) of Torts §402A comment i (1965) provides in pertinent part as follows:

The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

123. Id. at 505.
124. The consumer expectation test, combined with the view that consumer misuse is not a defense when it is foreseeable, becomes both over and underinclusive: overinclusive because it allows recovery by a consumer who fails to take reasonable steps to protect him or herself; underinclusive because it fails to protect the innocent bystander victim of unreasonably dangerous products which perform in a manner consistent with consumer expectations (e.g., the handgun victim).
125. Restatement (Second) of Torts §291 (1965), set forth supra note 25.
126. See Barker, 20 Cal. 3d at 435, 573 P.2d at 456-58, 143 Cal. Rptr. at 239-40. The benefit/risk test is preferred by the author, because it better embodies tort principles (as distinguished from the contract/warranty principles suggested by the consumer expectation test) and therefore affords better protection to third parties who, while foreseeable victims of defective products, are strangers to the transaction between manufacturer and consumer. Fusion of the benefit/risk test with the defenses of contributory negligence and assumption of risk protects these third parties without being overprotective of consumers who engage in foreseeable misuse of the product.
in a *prima facie* case for negligence or defective design. While *Barker*'s benefit/risk test involves a comparison between the design used and alternative designs in terms of mechanical feasibility, cost and adverse consequences to the product, it does not call for a comparison between the burden to the defendant of an alternative design and the burden to the plaintiff of taking measures for his own safety. Employing a *Barker*-type test, a jury might conclude that an automobile lacking air bags is defective, even with respect to injuries which could have been avoided through the use of seat belts. A more satisfactory test would consider, in addition to the factors suggested in *Barker*, whether the product already had design features which could eliminate or substantially reduce the risks involved, if properly employed by the plaintiff. The plaintiff’s burden in employing these features would also be a factor. In the case of seat belts, that burden ordinarily would be quite light. To use terminology suggested by Learned Hand, the test would ask not only whether, from the manufacturer’s view, the burden of remedial measures is less than the product of the probability of injury and the gravity of injury, but also whether the manufacturer’s burden was greater or less than that of the user or consumer. Such a Calabresian test (i.e., who is the cheapest cost avoider?) is more likely to produce an economically efficient result.

A case that appears to endorse the above theory is *Daly v. General Motors Corp.* In *Daly*, the plaintiffs’ decedent’s Opel, while traveling at high speed, collided with a metal divider fence. After the initial impact with the fence, the driver’s door was thrown open and Daly was forcibly ejected from the car, sustaining fatal head injuries. It was undisputed that had Daly remained in the Opel his injuries probably would have been relatively minor. Daly’s survivors claimed that his Opel was defective due to an exposed pushbutton on the door latch which, they claimed, enabled the door to pop open upon impact with the metal divider. Regarding Daly’s own conduct, evidence indicated that he was intoxicated, that he may have been traveling at an excessive speed, that he lost control of the vehicle, that he had failed to fasten the seat belt and shoulder

127. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
128. Here, the burden of remedial measures is synonymous with the disutility of an alternative design. Again, no apologies for roughly equating *Barker*’s benefit/risk test with the utility/risk test employed in negligence cases.
129. See *supra* note 120. See also Calabresi and Hirschoff, *supra* note 106, in which the authors suggest that “the correct optimizing rule, under the Learned Hand test, would be to have a doctrine of contributory negligence, but to apply it only where the cost of injurer avoidance exceeds the cost of victim avoidance.” *Id.* at 1058.
130. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).
131. *Id.* at 730, 575 P.2d at 1164, 144 Cal. Rptr. at 382.
harness with which the car had been equipped, and that he had failed to utilize the inside door lock. The defendant contended that if either the seat belt-shoulder harness system or the door lock had been used, Daly would not have been ejected from the vehicle, and serious injury would not have resulted.

The Daly case is known primarily for California’s extension of comparative fault to strict liability cases. Under the court’s holding, a jury would be allowed to apportion liability between Daly and the defendant manufacturer, taking into account both the defective design of the product and the contributory negligence of the plaintiff. Almost lost in the shuffle was the court’s statement that in considering whether the vehicle was defective in the first place, the jury should consider not only the dangers inherent in the door latch but also the safety features already provided, such as the seat belts and the inside door locks. Thus, the opinion indicates that seat belt availability and use are relevant not only as a defense capable of reducing liability under a comparative fault scheme, but also with respect to the threshold issue of whether any design defect exists.

To incorporate this reasoning into Barker’s benefit/risk test, the author would suggest the following procedure: The trier should first compare the burden to the defendant of employing an alternative, less risky design with the burden to the plaintiff of using available safety devices (e.g., seat belts and door locks). If the defendant’s burden is found to be greater, the trier should then apply a benefit (or utility)/risk test to the

132. Id. at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383.
133. Id.
134. Id. at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.
135. Id. at 746-47, 575 P.2d at 1175, 144 Cal. Rptr. at 392-93. The California Supreme Court nevertheless reversed the defense verdict in Daly because in the absence of a limiting instruction, evidence of Daly’s intoxication and failure to use available safety devices may have been improperly regarded by the jury as authorizing a verdict barring all recovery. Id. at 745-46, 575 P.2d at 1174, 144 Cal. Rptr. at 392.
136. Id. This view had been taken earlier by Professor Wade, who had included among the factors to be used in determining the existence of a design defect “[t]he safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury,” and “[t]he user’s ability to avoid danger by the exercise of care in the use of the product.” Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L. J. 825, 837 (1973). See also McElroy v. Allstate Ins. Co., 420 So. 2d 214, 217 (La. App. 1982) (evidence of existence of seat belt was properly before the jury on the issue of whether a defect existed).
137. This burden would incorporate both cost and inconvenience, and would in effect measure the benefit (or utility) of the design used over the alternative design. It should represent the increased costs and inconvenience of the alternative design, just as the right-hand side of the Learned Hand formula should measure the marginal reduction in risk obtained through the alternative design.
138. We have already determined, with respect to seat belts, that the burden of availing oneself of these devices is ordinarily far less than the risks posed by their non-use. See supra text accompanying notes 26-29. That the same can be said of door locks there is little doubt. Were the burden of using these safety devices to outweigh the risks prevented, this procedure would not be used, and the next step, a discounting of the risk for available safety devices, would be inappropriate.
defendant’s design choice. However, the risk should be discounted in light of the first finding, i.e., that there are safety measures available to the plaintiff at relatively little cost.  

Applying these rules to the facts in Daly, the trier may find an alternative design (e.g., a hinge-type, recessed door latch) no more costly (in terms of both dollars and convenience) than a push-button door latch. The manufacturer’s burden would therefore be too light to offset even the minuscule burden to the plaintiff of fastening the seat belt and locking the door. A design defect would therefore be found; the trier would still proceed to the issue of comparative negligence for what, in this case, would probably result in a substantial reduction in damages.

In our air bag hypothetical, however, a different result would obtain. Because the manufacturer’s burden of installing air bags is well in excess of Plaintiff’s burden of fastening his seat belt, the risks imposed by a vehicle without air bags should be discounted in light of the means readily available to Plaintiff to avoid these risks. We should, of course, take care to discount only those risks which would be eliminated through the use of seat belts. To the extent air bags eliminate risks not eliminated by seat belts, or even further reduce risks only partially reduced by seat belts, the discount should not apply.

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139. This procedure is represented mathematically as follows:

1. Determine whether \( B_d > B_p \), where \( B_d \) represents defendant’s burden of employing an alternative, less risky design and \( B_p \) represents plaintiff’s burden of using available safety devices;

2. If \( B_d > B_p \), determine whether \( B_d < (P_1 \times L_1) - (P_2 \times L_2) \), where \( P_1 \times L_1 \) represents the risk after plaintiff has availed him/herself of available safety devices and \( P_2 \times L_2 \) represents the risk that remains after defendant has employed the alternative design. The difference between these two products represents the marginal reduction of risk represented by the alternative design.

The above formulation recognizes that only in the rarest of instances is a risk eliminated entirely.

140. The transaction costs of redesigning and retooling play no role here; assuming that the technology was available at the time of the original design, we can simply second-guess the design choice made at that time. See Boatland of Houston v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980).

141. See supra text accompanying notes 118-19.

142. These remaining risks may well be sufficient to justify the installation of air bags, and to render a car not so equipped to be defective under a benefit/risk test, if not a consumer expectation test. If this proves to be true (and the author strongly suspects it is), a cause-in-fact problem arises in a case in which air bags would have provided protection equal to, but not greater than, use of available seat belts. Should the vehicle be considered defective due to the increased protection generally afforded by air bags, or should it be considered non-defective because it would have provided no greater protection under the facts of this particular case? A traditional view of cause-in-fact would suggest the latter result; public policy considerations might, however, suggest a finding of defectiveness. Compare Conti v. Ford Motor Co., 743 F.2d 195 (3d Cir. 1984) (requiring affirmative proof of causation in a failure-to-warn case) with Frankel v. Lull Engineering Co., 334 F. Supp. 913, 925-26 (E.D. Pa. 1971) (relaxing causation requirement).

Notwithstanding whether a car lacking air bags is defective, one cannot help but wonder why no domestic auto manufacturer offers these devices as an option available at additional cost. The author, for one, would be willing to forego extra chrome, whitewalls, pinstriping and other generally available options for the extra margin of safety provided by air bags.
One might question the fairness of allowing the plaintiff's failure to fasten his seat belt to be used not only to reduce damages under a comparative negligence scheme, but also to initially determine whether a defect exists. But as Professor Wade has noted, "one must draw a distinction between the situation in which there is no breach of duty by the defendant (i.e., the product is not dangerously defective and therefore not actionable) and the situation in which the defendant has breached his duty but plaintiff is also at fault." This concept may be demonstrated by using an analogous negligence case: Suppose the driver of an automobile uses reasonable care. She drives at a reasonable speed, looks out for other vehicles and pedestrians, and is not otherwise distracted. Suddenly, a pedestrian darts in front of the vehicle, and is struck and injured, due to no fault of the driver. We might say that the pedestrian was contributorily negligent, but the issue of contributory or comparative negligence is never reached, because the driver is not negligent in the first place. In like manner, strict liability first requires the finding of a defect. It does no damage to the principle of comparative negligence to preclude the weighing of relative fault when a defect has not been found in the first instance. Nor need we limit our inquiry to only one isolated aspect of a product's design; other aspects of the design may render an otherwise defective product non-defective.

It is one thing to protect the unknowing plaintiff from a latent defect about which the manufacturer has knowledge or, through imposition of constructive knowledge, is assumed to have knowledge. It is quite another thing to protect the plaintiff from a "defect" about which both plaintiff and manufacturer are equally aware, and which can be remedied by the plaintiff at far less cost and with little inconvenience. A denial of recovery in the latter case (or at least a severe reduction under comparative fault principles) not only makes economic sense, but is also consistent with a social policy based on individual accountability.

143. Wade, supra note 92 at 384. Professor Wade's statement is directed primarily toward the unforeseeable misuse of an otherwise non-defective product. I would also apply it to the plaintiff's foreseeable, but unreasonable misuse where the defendant's burden of preventing such misuse is greater than the plaintiff's burden of foregoing such misuse.

144. "Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop. Similarly, a product's components are not developed in isolation, but as part of an integrated and interrelated whole." Daly, 20 Cal. 3d at 746, 575 P.2d at 1175, 144 Cal. Rptr. at 393.


146. See e.g., Nowak, 638 S.W.2d at 582; Lenhardt v. Ford Motor Co., 102 Wash. 2d 208, 683 P.2d 1097 (1984). Both of these "park to reverse" cases involved a latent design defect in a vehicle's gear shift mechanism.

147. One author applying a Calabresian analysis has suggested that a rule mandating the installation of air bags: requires the twenty percent of the population currently using seat belts to incur a substantial expense to obtain a level of protection no better than and possibly
VI. A NOTE ON INDIVIDUAL ACCOUNTABILITY

One may question why an article which places such importance on notions of individual accountability has as its point of departure the enactment of statutes imposing criminal sanctions for failure to protect oneself. Indeed, in a perfect world, we might wish to rely upon the general deterrence of a rule denying recovery in tort rather than the specific deterrence of a criminal sanction for non-use of seat belts. However, the enactment of mandatory seat belt laws, while eliminating the element of choice (assuming that one has no choice but to obey the law), does not eliminate considerations of individual responsibility. Ironically, while criminal sanctions for non-use of seat belts may well prove unenforceable, mandatory seat belt laws, if appropriately framed, could have their greatest impact by setting a standard of care that is carried over into the field of torts. The major failure of the New Mexico-type statutes is that they provide for criminal sanctions, but expressly preclude the use of evidence of failure to use a seat belt in civil actions. The Missouri, inferior to the one they are currently enjoying. This is because the air bag mandate externalizes the costs of accident reduction on the entire car-buying population rather than on non-car-owning occupants who may in fact be the best [cost] avoiders.

Fuchs, supra note 11, at 135.

148. Mandatory seat belt bills have been criticized in some legislatures as being too restrictive of individual liberty and posing a risk of excessive government meddling (a criticism also directed at laws requiring the use of motorcycle helmets). Maryland House Panel Kills Mandatory Seat Belt Bill: Distrust of Government Interference Cited, Wash. Post, March 8, 1985, at B7; Virginia Committee Kills Mandatory Seat Belt Bill, Wash. Post, Feb. 16, 1985, at B1. The author is more inclined to agree with columnist Russell Baker, who has written:

...[T]his nonsensical attempt to identify Madison, Jefferson and Hamilton with the urge to endanger one's life needlessly during the operation of machinery has caught on among politicians since the issue of mandatory seat-belt laws has appeared in the legislatures. . . .

* * *

...The same argument, of course, can be made against requiring drivers to apply brakes when encountering a red light at a busy intersection. If you are willing to risk being broadsided by a highballing 18-wheeler while expressing your resistance to government meddling at intersections, isn't that your Madison-Jefferson-Hamilton-given constitutional right?

It is an absurd argument...but when you debate with fools by taking their arguments at face value, absurdity is inescapable.


The ultimate absurdity is reached when one argues that it is one's constitutional right to refuse to fasten one's seat belt, but that others should be forced to pay for the consequences.

149. For an argument in favor of a rule of specific deterrence in the form of mandatory seat belt use laws, see Fuchs, supra note 11, at 136-39.

150. There are obvious problems in detection here, particularly with respect to rear seat lap belts. By the time the state trooper who suspects non-use saunters up to the offending vehicle, the occupants may have been able to fasten previously unused seat belts (if they can find them). Taking things a step further, Oklahoma's mandatory seat belt use law prohibits routine stops of motorists for purposes of enforcement. Act of May 22, 1985, § 2D 1985 Okla. Sess. Law Serv. 340 (West) (to be codified at Okla. Stat. tit. 47, §§ 12-416—12-420).

151. See supra notes 48-51 and accompanying text.
Michigan, Nebraska and Louisiana statutes, which limit any reduction in damages to 1%, 5%, 5% and 2% respectively, are not much better in this respect. Thus, individual liberty and autonomy are arguably restrained, while courts are barred from holding individuals fully accountable for their conduct when they seek compensation for injuries which they themselves have caused in part. But for the possible protection that mandatory seat belt laws afford to third parties, the New Mexico-type statutes (and to a lesser extent, their Michigan-type counterparts) may be regarded as representing the worst of both worlds.

For those who view the tort law only as a means of effecting compensation to accident victims, the seat belt defense may appear unpalatable. This is particularly true in products liability actions, where judgments against defendant manufacturers are likely to result in wider distribution of risks through the pricing mechanism. However, to the extent that compensation (without respect to fault or cause) is our goal, it may be more rationally and fairly achieved through either a system of compulsory first-party insurance or a state-run social insurance program. It is inefficient as well as unfair to lay all responsibility at the feet of a manufacturer whose role in the elimination of risk is relatively minor, and who is likely to distribute the risk through a pricing mechanism which penalizes the careful and careless user/consumer in equal fashion.

VII. CONCLUSION

As we have seen, the seat belt defense is a logical application of the generalized standard of care in negligence cases. The enactment of statutes imposing criminal penalties for failure to fasten an automobile seat belt would normally present an excellent opportunity for courts to impose a duty to use this safety mechanism. However, by enacting statutory provisions precluding or limiting the admission of evidence of non-use in civil actions, legislatures squander this opportunity.

The seat belt defense is, at its essence, one of contributory negligence

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152. See supra notes 52-55 and accompanying text.
153. The dangers and costs imposed on others by one's failure to use a seat belt may nevertheless justify specific deterrence in this area. See Letter of Illinois Governor James R. Thompson to Illinois General Assembly, Jan. 8, 1985 (suggesting that non-use of seat belts might cause drivers to lose control of their vehicles during emergency situations). In support of Illinois' mandatory seat belt use law, Gov. Thompson also cited the increased societal costs of caring for those who have failed to fasten their seat belts. Id. An extreme libertarian would, of course, respond that society should not be responsible for such costs.

The potential harm to others through a driver's non-use of a seat belt distinguishes this device from the motorcycle helmet (also a subject of controversial compulsory use laws). Concern over societal costs related to injured non-users exists with respect to both devices.
154. Epstein, supra note 98, at 660.
and, therefore, should be treated in the same manner as contributory negligence under a comparative negligence or comparative fault scheme. This defense should be available in products liability actions to promote both economic efficiency and individual accountability. Until such time as a policy choice is made to move to a general system of compensation for all injuries, regardless of cause, the tort system should be designed to hold all parties accountable for their conduct. The seat belt defense is consistent with this premise.