Tort Litigation - The New Case for the Seat Belt Defense - Norwest Bank New Mexico, N.A. v. Chrysler Corporation

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I. INTRODUCTION

In Norwest Bank New Mexico, N.A. v. Chrysler Corporation,¹ the New Mexico Court of Appeals held, as a matter of first impression, that non-specific evidence that a manufacturer had a general policy of encouraging the use of seat belts was admissible for the purpose of mitigating a plaintiff’s demand for punitive damages. This holding represents the most recent breach of the fiercely guarded prohibition on the introduction of seat belt evidence in civil lawsuits. While Judge Bosson’s majority opinion in this case treats the prohibition of specific seat belt evidence as if it were settled law, Judge Hartz’ special concurrence shows that such is not necessarily the case. Differing interpretations of statutory law and the courts’ power to create common law to fill statutory voids lie at the heart of this debate.

This Note questions the ability of the court to allow the so-called “seat belt defense” and the wisdom of so doing. Part II of this Note offers some background information on the seat belt defense, its origins, and current status in New Mexico and in other jurisdictions. Part III presents the facts and procedural history of Norwest. Part IV articulates the court’s rationale in deciding that non-specific seat belt evidence may be admitted to mitigate punitive damages and explores the differing opinions of Judge Bosson’s majority and Judge Hartz’ special concurrence on the admissibility of case-specific seat belt evidence. Part V analyzes the restrictions placed on the seat belt defense by New Mexico statutory and common law, and considers the ability of the New Mexico Supreme Court to alter the current status of the defense. Finally, part VI discusses the implications of the Norwest ruling for future cases.

II. BACKGROUND

The roots of the seat belt defense date back to the early 1960s, when defendants in personal injury lawsuits, arising out of automobile accidents, first attempted to decrease damage awards to plaintiffs who were not wearing seat belts.² The seat belt defense prevents an auto accident victim from recovering for injuries which could have been avoided had that person worn an available seat belt. The first use of the seat belt defense was in 1964 when a Wisconsin jury effectively found a plaintiff negligent for failing to wear her seat belt and reduced her recovery by ten percent.³ Thus began the checkered history of the seat belt defense.

A. General History of the Seat Belt Defense

By 1964, most of the states in the Union had enacted legislation requiring that seat belts be installed at least in the front seats of all automobiles manufactured or

assembled after a specified date. Almost immediately following these enactments, defendants began to raise the seat belt defense in tort actions. Courts were, however, initially reluctant to recognize the defense for a number of reasons, including: (1) the idea that under contributory negligence the plaintiff should not be barred from recovery for his failure to wear a seat belt when such failure did not cause the accident, (2) the lack of evidence that seat belts reduced the severity of injuries, (3) the perception that most people did not use seat belts, (4) concerns that introduction of evidence of seat belt use/nonuse would lead to jury speculation, (5) the worry that the introduction of expert testimony would require longer, more expensive trials, and (6) a reluctance to impose a common law duty on plaintiffs when the legislature had not made seat belt use mandatory.

In more modern times, changes in tort law and new evidence of the effectiveness of seat belts in saving lives have virtually eliminated the first two concerns. With many states abandoning contributory negligence in favor of comparative negligence, the harshness of the results of allowing evidence of seat belt nonuse on the part of the plaintiff has been greatly reduced. Further, recent data indicates that the effectiveness of seat belts in preventing or reducing injury is far greater than believed in the 1960s. The third argument—that most people do not wear seat belts—is no longer statistically true. According to the National Highway Traffic Safety Administration (NHTSA), the current seat belt use rate in America is 69 percent. While seat belt use was quite low until the early 1980s, seat belt use increased from 14 percent in 1984 to 42 percent in 1987. This change was in part due to the passage of seat belt use laws in thirty-one states. The use rate has grown since 1987, but has slowed in the latter part of the 1990s. Nevertheless, from the current use rate, it is clear that the argument that most people do not use seat belts is no longer valid.

5. See Thomas I, 102 N.M. at 420, 696 P.2d at 1013.
9. See id. at 71.
11. See Thomas II, 102 N.M. at 327, 695 P.2d at 477.
13. According to the U.S. Department of Transportation, National Highway Traffic Safety Department (NHTSD), "[s]eat belts are the most effective safety devices in vehicles today, estimated to save 9,500 lives each year." The Facts: It’s Time to Buckle Up (visited Feb. 26, 2000) <http://www.nhtsa.dot.gov/people/injury/airbags/seatbelt/its/its_time.htm>. “If 85% of Americans buckled up, we would prevent more than 4,100 additional deaths and 102,000 additional injuries annually.” Id. “Research has found that lap/shoulder belts, when used properly, reduce the risk of fatal injury to front seat passenger car occupants by 45 percent and the risk of moderate-to-critical injury by 50 percent.” NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP’T OF TRANSP., STANDARD ENFORCEMENT SAVES LIVES: THE CASE FOR STRONG SEAT BELT LAWS 5 (1999).
15. See id.
16. See id.
17. See id. at 5-6.
The fourth and fifth reasons why courts were reluctant to allow the seat belt defense—jury speculation and the need for expert testimony—are related. Deciding which injuries were caused by failure to wear a seat belt in an accident is difficult.\(^8\) The task of apportioning damages in a seat belt case, however, is at least as practicable as the task of juries in other cases of comparative negligence and contribution among joint tortfeasors.\(^9\) In any event, the seat belt defense is an affirmative defense, and the defendant who raises it has the burden of proving which injuries are attributable to nonuse.\(^20\) While such proof will almost undoubtedly require the testimony of experts, many trials already involve experts. The introduction of an additional expert to discuss seat belt related injuries need not unduly increase trial expenses or length.\(^2\) For example, local university professors, if provided the relevant information regarding the accident, can conduct studies and reach persuasive conclusions in many cases.\(^22\) Further, an industry of professionals has grown up around accident reconstruction, which surely will provide expert witnesses as required.

The last concern expressed by courts in rejecting the seat belt defense—that the legislature and not the courts should be the force behind the creation of a duty to wear a seat belt—has been eroded in two ways. First, some courts have subsequently either expressly or impliedly recognized a common law duty to buckle up.\(^23\) Second, many states have adopted mandatory seat belt laws. Federal requirements have exerted pressure on state legislatures to enact a statutory duty to wear seat belts. Federal law now conditions states’ receipt of highway funds on the existence of state highway safety programs (including seat belt use initiatives) designed to reduce the severity of traffic accidents.\(^24\) In addition to encouraging safety programs, the federal government has required auto manufacturers to install seat belts in passenger vehicles since the mid 1960s.\(^25\) In 1984, the NHTSA amended Federal Motor Vehicle Standard Number 208 to require the installation of automatic occupant restraints (airbags, automatic seat belts or a combination of manual seat belts and a warning system) unless states with populations comprising two-thirds of the U.S. population enacted mandatory seat belt use statutes meeting NHTSA criteria by April 1989.\(^26\) One of NHTSA’s criteria

18. See Bartel, supra note 2, at 528
19. See Westenberg, supra note 3, at 907-08.
20. See id. at 908.
21. See id.
22. See id.
23. See, e.g., Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 449 (Fla. 1984) (holding failure to wear an available seat belt is a factor which the jury may consider in determining if plaintiff exercised due care to avoid injury to himself and to mitigate injury he would likely sustain), abrogated by Ridley v. Safety Kleen Corp., 693 So. 2d 934, 943 (Fla. 1996) (interpreting subsequent statute to eliminate two-tiered award reduction formula from Pasakarnis in favor of one calculation of comparative negligence, but affirming that seat belt defense should be raised as an affirmative defense); Spier v. Barker, 323 N.E.2d 164, 167 (N.Y. 1974) (superseded by statute codifying seat belt defense. N.Y. VEH. TRAF. LAW § 1229-c (McKinney 1999)); Bentzler v. Braun, 149 N.W.2d 626, 639 (Wis. 1967) (endorsing safety belt defense and imposing on vehicle occupants a common law duty to use available safety belt); Mount v. McClellan, 234 N.E.2d 329, 330-31 (Ill. App. Ct. 1968) (following Bentzler).
was that evidence of nonuse of an available seat belt be admissible to mitigate damages in personal injury cases. Though many states did enact mandatory seat belt use statutes as a result of this law, not enough met the NHTSA criteria to eliminate the requirement for automatic restraints.

With the advent of statutes requiring the use of seat belts, concern arose about their possible impact on tort liability. The failure to adhere to the statutory standard would be regarded in many jurisdictions as negligence per se. In other jurisdictions, it would give rise to a presumption of negligence, and in still others it would be considered evidence of negligence. As a result of this concern, many of the new state statutes requiring seat belt use include provisions that expressly limit their application in civil actions. The statutes of Illinois, Indiana, Oklahoma and Connecticut contain words to the effect that failure to wear a seat belt in violation of the statute shall not be considered negligence in any civil action nor limit or apportion damages. Other states, including Michigan, Nebraska and Missouri, provide that the violation of each state’s statute may be considered evidence of negligence, but subject to strict limits on any reduction in damages. Still others provide explicitly for the seat belt defense in their statutes.

Today, while the majority of states still refuse to admit evidence of seat belt nonuse to reduce damages, a sizable minority of states do allow it. In jurisdictions with mandatory seat belt use laws, courts may allow evidence of violation of the statute to constitute negligence per se. In other jurisdictions, courts have simply imposed a common law duty to wear an available seat belt. Others allow the seat belt defense on the theory that the plaintiff breached a duty to mitigate damages. Some jurisdictions even allow evidence of failure to use an available seat belt to show that the plaintiff either misused the vehicle or assumed the risk of harm. Even in jurisdictions recognizing the seat belt defense, however, a reduction in

27. See id. at S4.1.5.2 (c)(2).
28. See Bartel, supra note 2, at 537.
32. See CONN. GEN. STAT. § 14-100a (1987); 625 ILL. COMP. STAT. 5/12-603.1(c) (West 1993) ("Failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence.... shall not diminish any recovery for damages arising out of the... operation of a motor vehicle."); IND. CODE § 257.710e(6) (West 1997); OKLA. STAT. ANN. tit. 47 § 12-420 (West 1988).
36. See Bartel, supra note 2, at 519.
38. See id.
39. See id. at 450.
damages is predicated on the defendant’s ability to prove a causal relationship between the injury and the plaintiff’s failure to wear a seat belt.\textsuperscript{40}

B. History of Seat Belt Defense in New Mexico

The New Mexico Court of Appeals first heard arguments on the seat belt defense in 1974 in \textit{Sedalgo v. Commercial Warehouse Co. (Sedalgo I)}\textsuperscript{41}. In \textit{Sedalgo I}, the defendant attempted to raise the seat belt defense under the theory of mitigation of damages or the doctrine of avoidable consequences.\textsuperscript{42} The court finally settled the issue, ten years later in \textit{Sedalgo II}, holding that evidence of the use or nonuse of a seat belt involved pre-accident conduct and therefore did not fall within the doctrine of avoidable consequences which covers post-accident conduct.\textsuperscript{43} The court also noted that it found no authority that imposed a duty to fasten a seat belt, suggesting that the creation of such a duty rested with the legislature.\textsuperscript{44}

A decade later, however, in \textit{Thomas v. Henson (Thomas I)}\textsuperscript{45}, the court of appeals held that

where there is competent evidence to prove that a person acted unreasonably in failing to use an available seat belt under the circumstances of the particular case, and that failure produced or contributed substantially to producing at least a portion of plaintiff's damages, then the fact finder should be permitted to consider this factor together with other evidence in deciding whether damages otherwise recoverable should be reduced.\textsuperscript{46}

In other words, the court overruled its \textit{Sedalgo II} ruling on the seat belt defense and extended the plaintiff’s duty to care for his own safety by adopting the seat belt defense under the apportionment of damages concept.\textsuperscript{47} To support its holding, the court noted the recent adoption of the doctrine of comparative negligence to replace the harsher doctrine of contributory negligence.\textsuperscript{48} The court also pointed out more recent evidence that seat belts do significantly decrease the likelihood of injury or death,\textsuperscript{49} and the fact that recent decisions from several other states had either expressly or impliedly recognized a duty to wear seat belts despite legislative silence on the issue.\textsuperscript{50}

This newly created common law duty to wear a seat belt did not long survive, however. The New Mexico Supreme Court granted a writ of certiorari and reversed

\begin{itemize}
\item \textsuperscript{40} See id.
\item \textsuperscript{41} See id. at 582, 526 P.2d at 722. This case was decided before the New Mexico Supreme Court adopted the doctrine of comparative negligence in \textit{Scott v. Rizzo}, 96 N.M. 682, 634 P.2d 1234 (1981).
\item \textsuperscript{42} See id. at 420, 696 P.2d at 1013.
\item \textsuperscript{43} See id. at 420, 696 P.2d at 1013.
\item \textsuperscript{44} See id. at 421, 696 P.2d at 1014 (citing \textit{Insurance Co. of North America v. Pasakarnis}, 451 So. 2d 447 (Fla. 1984) and \textit{Spier v. Barker}, 323 N.E.2d 164 (N. Y. 1974)).
\end{itemize}
the court of appeals ruling, holding that “the creation of a ‘seat belt defense’ is a matter for the legislature, not for the judiciary.” In the same year, the New Mexico Legislature enacted the Safety Belt Use Act. This act created a statutory duty for drivers and front seat passengers to wear seat belts, but specifically provided that a failure to be secured by a seat belt “as required by [the Act] shall not in any instance constitute fault or negligence and shall not limit or apportion damages.” The Act is silent as to rear seat passengers.

In 1991, the Legislature amended section 66-7-373 by deleting the subsection providing that violation of the law did not constitute fault or negligence and could not limit or apportion damages. Two years later it reinserted the provision. In the intermittent years, Mott v. Sun Country Garden Products, Inc. was filed. Based on the fact that section 66-7-373(B) was not on the books at the time the plaintiff brought the action, the defendant argued that the seat belt defense was not prohibited. The court of appeals brushed this argument aside, noting that even in the absence of a statutory prohibition on the introduction of the seat belt defense, under Thomas II there could be no common law recognition of such a defense. Since there was no common law and no statutory recognition of a duty to buckle up, the defendant had “no right or remedy with regard to seat belts prior to the adoption of section 66-7-373,” and no right after.

Here New Mexico law rested until the New Mexico Court of Appeals heard Norwest Bank New Mexico, N.A. v. Chrysler Corp.

III. STATEMENT OF THE CASE

The impetus for this crashworthiness case was a fatal automobile accident in which several passengers in a Chrysler minivan were thrown from the vehicle, sustaining serious injuries. Plaintiff-Appellant Minh Lien Jones and eight of her passengers (plaintiffs) brought suit against Chrysler Corp. and Huffines Chrysler Plymouth, Inc., (defendants) the automobile dealership that sold the minivan, claiming that a defective door latch caused five of the passengers to be ejected from the vehicle and suffer enhanced injuries.

On July 21, 1995, while driving on the interstate, Plaintiff Jones’ vehicle veered suddenly, crashed into the guardrail, then rolled several times. During the crash, five of the seven rear seat passengers were thrown from the minivan. Of the rear
seat passengers, one died and the others suffered severe injuries. None of the rear seat passengers were wearing seatbelts.

The trial jury found that the accident was the driver’s fault. However, at some point during the crash, the rear door of the minivan opened. Plaintiffs claimed the injured passengers were ejected from the vehicle through the open rear door, but defendants contested the claim. It was during this debate that the issue of the admissibility of seat belt evidence arose.

At trial, the district court prohibited all references to the seat belts installed in the particular minivan in question and their use or nonuse by the passengers. The court did, however, allow the introduction of “non-specific seat belt evidence for the limited purpose of showing the jury that [Chrysler Corp.] was not recklessly indifferent to consumer safety and therefore should not suffer an award of punitive damages.” The court granted this concession out of a strong concern for “fairness,” following plaintiffs’ expert testimony alleging a laundry list of Chrysler’s corporate misconduct and callous disregard for customer safety. Chrysler was, therefore, allowed to submit evidence that the company encouraged seat belt use as a safety matter. To limit the risk of unfair prejudice to plaintiffs, the court instructed the jury to limit its consideration of seat belt evidence to the issue of punitive damages.

From a defendants’ verdict, plaintiffs appealed, claiming that the district court erred in allowing defendants to introduce evidence of a corporate policy encouraging the use of seat belts in order to mitigate punitive damages. Plaintiffs argued that admission of seat belt evidence violated New Mexico statutory law.

The court of appeals ruled that evidence of a general policy of encouraging the use of seat belts was admissible for the limited purpose of mitigating the demand for punitive damages. The court of appeals noted that the district court had not abused its discretion in allowing the admission of such evidence to rebut “Plaintiffs’ evidence of Chrysler’s bad corporate character.”

In ruling that non-specific seat belt evidence is admissible at the lower court’s discretion, the court emphasized the narrow scope of its ruling, noting in dicta that the opinion should not be misread to permit the introduction of case-specific evidence of use or nonuse of seat belts, which is prohibited by Section 66-7-373(A)

63. *Id.* at 1219.
64. *See id.* at 408, 981 P.2d at 1226.
65. Plaintiffs also challenged the trial court’s instruction to the jury, on the special verdict form, to compare the negligence of the driver with that of the defendants; on its rulings on plaintiffs’ claims under the Texas Deceptive Trade Practices Act (DTPA); and argued that various evidentiary rulings deprived them of a fair trial. *See Norwest, 127 N.M. at 409-11, 981 P.2d at 1227-29.* On the first issue, the court of appeals ruled that, while “[n]o New Mexico case has yet decided the precise question of whether a defendant in a crashworthiness case may reduce its liability by comparing its own fault for the enhanced injury with the driver’s fault in causing the accident . . . because the jury found that the defective latch was not a proximate cause of the Plaintiffs’ injuries” the court need not decide on the issue. On the second issue, the court of appeals upheld the district court’s directed verdict in favor of defendants with regard to the DTPA claims for the non-purchaser passengers. *See id.* at 401, 981 P.2d at 1219. It also upheld the jury verdict that misrepresentation to the plaintiff-purchaser under the DTPA did not proximately cause the injuries and, therefore, would not likely have led to any different results. *See id.* at 411, 981 P.2d at 1229. Finally, with regard to plaintiffs’ claims of reversible error on evidentiary issues, the court of appeals found that the trial court had not improperly handled the issue or abused its discretion. *See id.*
66. *See id.* at 405, 981 P.2d at 1223; N.M. STAT. ANN. § 66-7-373(A) (Supp. 1998).
67. *Norwest, 127 N.M.* at 408, 981 P.2d at 1226.
of the New Mexico Statutes Annotated and applicable case law. In his special concurrence, however, Judge Hartz makes an interesting and enticing case for the admissibility of case-specific evidence of use or nonuse of seat belts.

IV. RATIONALE OF THE COURT

The *Norwest* court based its ruling on narrow and specific grounds. First, the court held only that the district court had not abused its discretion in allowing the introduction of non-specific seat belt evidence. See id. at 409, 981 P.2d at 1227. Second, the court agreed with Chrysler's argument that it had a right to mitigate plaintiffs' demand for punitive damages under Uniform Jury Instruction 13-1827, and that this right was not eliminated by section 66-7-373(A) of the New Mexico Statutes Annotated. See id. at 408, 981 P.2d at 1226. Uniform Jury Instruction 13-1827 states in pertinent part: "If you find that the conduct of ... was [malicious], [willful], [reckless], [wanton], [fraudulent] or [in bad faith], then you may award punitive damages against [him] [her] [it]." N.M. U.J.I. Cirv. 13-1827. For the precise language of N.M. STAT. ANN. § 66-7-373(A), see supra note 53.

The court held that Chrysler's general policy of encouraging seat belt use was relevant to the question of punitive damages because it was used to rebut expert testimony plaintiffs presented attempting to show that Chrysler exhibited a corporate policy of "utter disregard for the safety of its customers." The court of appeals pointed out that it was within the trial court's discretion to decide whether to allow such evidence based on relevance and the possibility of prejudice. Only in cases where the trial court abuses its discretion will the court of appeals disrupt a trial court's decision, and in this case there was no such abuse.

The court further decided that Plaintiffs' case was not prejudiced by the mere mention of seat belts because the jury was instructed to limit its consideration of the seat belt evidence to punitive damages, and the court assumed the jury followed the instructions. Furthermore, there were other inadvertent and more damning references to seat belt use in the trial, and the court noted that plaintiffs did not move for a mistrial on the basis of these references.

The majority opinion also made it clear that, while neither section 66-7-373(A) nor New Mexico case law interpreting it prohibits the use of non-specific seat belt evidence in this case, the use of specific seat belt evidence and evidence about use or nonuse of seat belts by plaintiffs is strictly prohibited. Judge Hartz, however, took a different view. While he concurred in the result of the case, he did not agree with the majority's assertion that evidence that the plaintiff in a personal-injury

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68. See id. at 409, 981 P.2d at 1227.
69. See id. at 408, 981 P.2d at 1226. Uniform Jury Instruction 13-1827 states in pertinent part: "If you find that the conduct of ... was [malicious], [willful], [reckless], [wanton], [fraudulent] or [in bad faith], then you may award punitive damages against [him] [her] [it]." N.M. U.J.I. Cirv. 13-1827. For the precise language of N.M. STAT. ANN. § 66-7-373(A), see supra note 53.
70. *Norwest*, 127 N.M. at 407, 981 P.2d at 1225; see also N.M. R. EVID. 11-402 (indicating inadmissibility of evidence which is not relevant).
71. See *Norwest*, 127 N.M. at 408-09, 981 P.2d at 1226-27.
72. See id.
73. See id. at 407, 981 P.2d at 1225. The trial court's limiting instruction to the jury stated in part: I want to advise you [the jury] that the Defendants will be allowed to introduce evidence and testimony that in their communications with their customers, the federal government, and the general public, their corporate conduct encouraged the use of seat belts. This evidence may be considered by you solely on the issue of whether or not punitive damages should be awarded against the Defendants, and in what amount, if any.
74. See id. at 410, 981 P.2d at 1228.
75. See id. at 405-06, 981 P.2d at 1223-24.
action failed to use a seat belt should be inadmissible. He reasoned that, while under section 66-7-373(A) it would be improper to inform the jury that the failure to use a seat belt violated the New Mexico statute on the subject, the jury should be permitted to determine whether failure to use a seat belt constituted a failure to exercise due care to protect oneself, resulting in a reduction in recoverable damages in accordance with the law governing comparative fault.

Judge Hartz pointed out that the reason plaintiffs are so opposed to the admission of evidence indicating whether or not they wore a seat belt is that in this day and age most juries would find plaintiffs negligent for not wearing them. He further asserted that a majority of adults in the state would agree, out of their sense of justice, that juries should consider seat belt use, and that the failure to use an available seat belt would constitute negligence which should be considered in a damage award. It is for these reasons, Judge Hartz asserted, that the supreme court should overturn Thomas I and allow evidence of seat belt nonuse to reduce the liability of defendants.

Judge Bosson’s majority opinion, however, pointed out that New Mexico common law forbids consideration of a plaintiff’s use or nonuse of a seat belt. Judge Hartz countered with the well-worn adage that “[w]hen the common law has strayed so far from the sense of justice of ordinary persons ... it is time for a change.” For support, he also looked to Uniform Jury Instruction 13-1604, which reads that “[e]very person ... has a duty to exercise ordinary care for the safety of the person.” When a plaintiff fails to do this, he is negligent and his actions should be compared to others contributing to the injury in assessing damages.

Judge Hartz dispensed, as outdated, with three of the possible reasons for forbidding a jury to consider a plaintiff’s failure to use a seat belt. First, he reasoned that while at one time seat belts were not in common use, “those days are long gone.” Our modern society is far more likely to view seat belt use as the norm and nonuse as negligence than otherwise. Second, he pointed out that while under contributory negligence a New Mexico plaintiff would have suffered a complete bar to recovery if he was found negligent in not wearing a seat belt, under the comparative fault doctrine adopted by the supreme court in the early 1980s, that fear is no longer valid. A third argument for not allowing seat belt evidence—that

76. See id. at 413, 981 P.2d at 1231 (Hartz, J., specially concurring).
77. Id.
78. See id.
79. See id.
80. See id.
81. See id. at 405, 981 P.2d at 1223.
84. See Norwest, 127 N.M. at 413, 981 P.2d at 1231.
85. See id. at 413-14, 981 P.2d at 1231-32
86. Id. at 413, 981 P.2d at 1231
87. See id.
88. See id. at 413-14, 981 P.2d at 1231-32; see also Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).
the courts feared such evidence would make trials unwieldy and confuse juries—"lost all force" when New Mexico courts recognized crashworthiness cases. The prominent feature of these cases is that the "apportionment of the injury between what was caused by the crashworthiness defect and what would have occurred even if the vehicle had no such defect." Courts recognize such causes of action despite the fact that apportionment evidence is involved. With these arguments, Judge Hartz asserted that "if left to its own devices, the common law of New Mexico would now recognize the relevance in this case of Plaintiffs' failure to wear seat belts.

In response to the argument that the creation of a seat belt defense should be left to the legislature, Judge Hartz first noted that there is really no such thing as a "seat belt defense." In asserting the seat belt defense, defendants merely seek the standard jury instruction that "[e]very person . . . has a duty to exercise ordinary care for the safety of the person." Even if application of this instruction to seat belt use were to be construed as "creation" of such a defense, Judge Hartz noted that the New Mexico judiciary has not "hesitated to embrace major changes to the common law" in the past. While usually the modifications to the common law expand liability and favor plaintiffs, Judge Hartz pointed out that there are no restrictions against favoring defendants as a seat belt defense would.

Turning to New Mexico statutory law, Judge Hartz looked closely at the text of the law and at historical context to determine that section 66-7-373(A) does not preclude a common law seat belt defense. While section 66-7-373(A) states that "[f]ailure to be secured by a child passenger restraint device or by a safety belt as required by the Safety Belt Use Act" shall not constitute fault or negligence, it does not say that any failure to wear seat belts shall not constitute negligence. Judge Hartz determined that the "most reasonable interpretation of section 66-7-373(A) is that a defendant cannot use the Safety Belt Use Act to help prove that a Plaintiff
was negligent. In other words, defendants cannot use evidence that a plaintiff did not use a seat belt in violation of the statute in a negligence per se argument. According to Judge Hartz, if the New Mexico Legislature had been unalterably opposed to the seat belt defense, it would have written the Act to clearly foreclose the possibility of using any evidence of failure to use a seat belt instead of mere failure to use a seat belt "as required" by the law. Because the legislature did not take that path, the Safety Belt Use Act does not alter common law and does not preclude the supreme court from modifying it as, in Judge Hartz' view, the court should "at the next opportunity."

V. ANALYSIS

Judge Bosson's majority opinion in Norwest reiterated the history of the seat belt defense in New Mexico and concluded that given such history, to attempt again to create a common law duty to wear a seat belt as urged by defendants in this case would "place [the court of appeals] in direct conflict with our supreme court and the Legislature." Neither of these conclusions, however, is clear from the courts reasoning or from the judicial and legislative history.

Judge Bosson's opinion itself stated that "no New Mexico case has yet held seat belt evidence inadmissible in a crashworthiness lawsuit against a manufacturer arising out of a single-car accident." He went on to say that the court need not rule on that issue in this case. If the supreme court has not ruled on such an issue, allowing the seat belt defense in a crashworthiness case would not be in direct conflict with the supreme court’s rulings. Nevertheless, if one looks at the rulings on the seat belt defense in general, it is still not clear that allowing such a defense would contradict the supreme court’s rulings. In Thomas II, the supreme court held only that the "creation of a "seat belt defense" [was] a matter for the Legislature." Subsequently, the legislature acted, but in such a way as not to altogether foreclose the seat belt defense in New Mexico.

New Mexico Statute section 66-7-373(A) does not clearly reflect an intent on the part of the legislature that evidence of nonuse of an available seat belt be completely inadmissible, as asserted by Judge Bosson’s opinion. Judge Bosson, citing the Mott case, stated that "the language of section 66-7-373(A) does not indicate any intent to allow the introduction of evidence of failure to use seat belts for any purpose in a negligence action."

Judge Hartz’ concurrence, however, convincingly argued that this was not the case. As Judge Hartz noted, the law says that failure to wear a seat belt in violation of the statute shall not be considered fault

100. Id.
101. See id.
102. See id.
103. See id.
104. Id. at 406, 981 P.2d at 1224.
105. Id.
106. See id.
108. Norwest, 127 N.M. at 405, 981 P.2d at 1223 (citing Mott v. Sun County Garden Prods., Inc., 120 N.M. 261, 267, 901 P.2d 192, 198 (Ct. App. 1995)).
109. See id. at 415-16, 981 P.2d at 1233-34.
or negligence. If the legislature had wanted to indicate a bar to the use of any evidence related to seat belt use, it could have done so more clearly. The fact that the Safety Belt Use Act does not address rear seat passengers, further supports Judge Hartz’ interpretation. The Act remains silent on whether or not a rear seat occupant’s duty to wear a seat belt.

A. The Meaning of Legislative Silence

Legislative silence is a problem with which courts have wrestled since the inception of this nation. There are two ways in which courts have interpreted legislative silence or inaction: (1) lacking explicit legislation, the legislature has not spoken on an issue and no legislative will exists; or (2) in some circumstances, there is an implied meaning in legislative silence through which the legislature communicates its will. Adherents to the first interpretation view the words of the statute, not the legislative intent, as the crucial element in the statute’s legal force and interpretation because only the words, and not the discussion from which they were born, successfully emerge from the legislative process. This is a textual argument, which asserts that only legislative enactments in positive terms, worded in clear and unmistakable language, are due the full force of law. Adherents to the second interpretation “hear legal music in the sounds of silence.” They see legislative inaction when an intervening interpretation by the courts has emerged as evidence that the legislature intended that interpretation to have the force of law. Judge Bosson and Judge Hartz square off on this age-old issue in Norwest.

What is the meaning of an unclear legislative enactment? Judge Bosson’s majority opinion relied on the second interpretation of legislative silence, more fully discussed in Mott, in its assertion that evidence of the nonuse of seat belts is inadmissible in New Mexico civil actions. The Mott opinion pointed to certain legislative history to support its view that section 66-7-373(A) does not “indicate any intent to allow the introduction of evidence of failure to use seat belts for any purpose in a negligence action.” These include the legislatures’ failure to adopt a senate bill proffered in 1985 which stated that evidence of the failure to wear seat belts “shall be admissible concerning mitigation of damages, apportionment of damages or comparative fault” in tort actions, and the deletion of the subsection of 33-7-373(B), which was the equivalent of section 66-7-373(A), in 1991, only to reinstate it in 1993.
Although he did not specifically do so, Judge Bosson could also have based his position on the argument that the New Mexico Supreme Court, in *Thomas* II, explicitly stated that it was for the New Mexico Legislature to create a duty to wear a seat belt if such a duty was to exist in New Mexico. Since the legislature chose not to act, and when compelled to act at all on seat belts by federal law and incentives, it enacted the bare minimum—a requirement for front seat belt use and child restraint devices, but inadmissibility of non-compliance in civil actions—then the legislature, in essence, has decreed that no such duty exists or should exist. This interpretation rejects the textualists' exclusive reliance on the words of the statute as the "'best evidence of what [the legislature] wanted," making what [the legislature] wanted the very object of [the court's] search rather than merely the frame for our understanding of what [the legislature] said." This argument has found favor in some cases, usually related to the argument that where a judicial/agency interpretation of a legislative enactment goes unchallenged by the legislature for a long period of time, the legislature has tacitly approved such interpretation by shirking its responsibility to reject it.2

There are some problems with this interpretation, however. As William Popkin points out, "[r]eenactment and inaction are often such flimsy evidence of legislative intent to ratify an intervening interpretation that commentators have looked for other explanations for decisions invoking these doctrines." One such explanation is to "give a legislative pedigree for a prior interpretation that might not stand on its own." Another explanation is the idea that the legislature has the responsibility to reject the intervening interpretation of the judiciary if it disagrees with it.2

Professor Tribe also offers criticism of the assertion that a legislature’s failure to act signifies its acceptance of a judicial interpretation. He asserts that "[i]n its most extreme form, such treatment subsumes statutes within the common law model, viewing legislative enactments as mere pieces of a legal puzzle—pieces judges may feel free to rearrange as they ‘discern’...what law makers once assumed or wanted has since grown obsolete." Thus, the interpretation of statutory law may be swayed by

**two overriding temptations:** the judicial—indeed, universally human—temptation to pass responsibility on to others by saying that one is describing their will when one is, in truth prescribing what is to be; and the temptation to look not just to text but to context of which silence—the very boundary of speech—is necessarily a part.2

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125. *Id.* at 544.
126. *See* id. at 548.
127. *TRIBE, supra* note 112, at 35.
128. *Id.*
Popkin points out some additional political reasons why legislative inaction "is not much of a guide to identifying legislative intent regarding an intervening interpretation." These include legislative inertia, blocking of legislation by minorities (proving that legislative silence "indicates at most a minority approval, not a majority support") and the public choice theory, which suggests that legislative silence merely reflects a current legislature's desires "with respect to the particular provision in isolation," instead of the way the law was initially enacted.

Judge Hartz, on the other hand, took the textualist view, that unless the text of the law clearly states that "failure to be secured by . . . a safety belt shall not in any instance constitute fault or negligence and shall not limit or apportion damages" then that is not what it means. For Judge Hartz, the words "as required by [this law]" completely change the landscape. His argument culls support from various sources including Justice Jackson’s concurrence in *Schwegmann Brothers v. Calvert Distillers Corp.*

Since it is only the words of the bill that the House and Senate pass and that the President endorses, and since all other materials are outside the enactment process proper and are only haphazardly available to the general public, it seems difficult to justify even giving legal effect to "legislative history." Indeed, early on the U.S. Supreme Court, in *Murdoch v. Memphis*, held that the omission by the legislature of certain sentences which had previously been found in a reenacted law should not be treated as a de facto enactment of the opposite principle . . . noting that it was impossible to tell why various members of Congress had chosen to reenact [the sentences] and stressing that, had Congress intended to do an about-face on such an important subject, it could—and hence should—have said as much ‘in positive terms; . . . [in] plain, unmistakable language.'

Judge Hartz' interpretation of section 66-7-373(A), that the Legislature meant to prohibit defendants from using evidence of violation of the Seat Belt Use Act to prove negligence per se on the part of the plaintiff, is not contrived when one takes into account the fact that New Mexico has been a negligence per se state since 1963. The Committee Comment to Uniform Jury Instruction 13-1501 states that New Mexico law is specific that the violation of the statute which is enacted for the benefit or protection of the party claiming injury from the violation or for the

129. Popkin, supra note 112, at 540.
130. Id. at 541.
131. Id. (quoting Johnson v. Transp. Agency Santa Clara County, 480 U.S. 616, 671 (1987)).
133. Id.
134. 341 U.S. 384 (1951) (Jackson J., concurring)
135. Thibe, supra note 112, at 30 (quoting Schwegmann Brothers, 341 U.S. 384, 395-97 (1951)).
136. Id. at 31 (quoting Murdock v. City of Memphis, 87 U.S. 590 (1875)).
137. See Norwest, 127 N.M. at 416, 981 P.2d at 1234.
138. Judge Hartz illustrates his point using the case of Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967), but New Mexico has been a negligence per se state since Hayes v. Hagermeier, 75 N.M. 70, 400 P.2d 945 (1965).
benefit or protection of a class of the public to which such person is a member is negligence per se.\textsuperscript{139}

The jury instruction itself provides that "[i]f you find from the evidence that _______ violated [the] statute[s], then _______’s conduct constitutes negligence as a matter of law," barring excuses or justification.\textsuperscript{140} The introduction to Chapter 15 of the New Mexico Rules Annotated states explicitly that this jury instruction is to be "used exclusively in the large volume of motor vehicle lawsuits which flood the courts."\textsuperscript{141}

New Mexico courts "presume the legislature is aware of existing law when it enacts legislation."\textsuperscript{142} It is therefore presumed that the Legislature was aware that violation of a statute constituted negligence per se in New Mexico. Hence, the conclusion that section 66-7-373(A) was drafted to preclude the negligence per se argument is reasonable. This interpretation is also textually supported by the language in the statute stating that failure to use a seat belt "as required by the Safety Belt Use Act" shall not be considered fault or negligence.\textsuperscript{143} Had the legislature wished to say that evidence of nonuse of a seat belt is inadmissible in a civil action, it could have done so.\textsuperscript{144}

As the debate between Judge Bosson and Judge Hartz illustrates, statutory foreclosure of the seat belt defense for front seat occupants is arguable. Even if the legislature has eliminated the seat belt defense for front seat occupants, however, the statute is silent as to the duty, or lack thereof, of rear-seat occupants to buckle up. This is precisely the issue presented in \textit{Norwest}.

\textbf{B. History of the New Mexico Supreme Court’s Treatment of Legislative Silences: The Dram-Shop Cases}

This is not the first time that the New Mexico Supreme Court has been met with legislative silence in response to its express invitation to act. In the dram-shop cases, the court wrestled with a similar inertia on the part of the legislature. In 1977, in \textit{Marchiando v. Roper}, the New Mexico Supreme Court held that the court would not establish a cause of action for third parties injured by a tavernkeeper’s negligent sale of intoxicating liquor to an inebriated customer.\textsuperscript{145} In that opinion, Justice Sosa stated that the creation of dram-shop liability was "within the province of the legislature and [the court] should not through judicial action establish the equivalent of such legislation."\textsuperscript{146} The court also stated "[w]e do not, however, feel that it would be improper for this court to address this issue in the future if the legislature chooses not to act."\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{139} N.M. U.I.J. Civ. 13-1501.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id. at 217.
\item \textsuperscript{142} State ex rel. Human Servs. Dept., 118 N.M. 563, 569, 883 P.2d 149, 155 (1994).
\item \textsuperscript{143} N.M. STAT. ANN. § 66-7-373 (Supp. 1998); see also \textit{Norwest}, 127 N.M. at 397, 415, 981 P.2d at 1215, 1233.
\item \textsuperscript{144} For an example of a clearer statute, see KAN. STAT. ANN. § 8-2504(c) (1991).
\item \textsuperscript{146} \textit{Marchiando}, 90 N.M. at 368, 563 P.2d at 1161 (quoting \textit{Hall}, 76 N.M. at 595, 417 P.2d 1165).
\item \textsuperscript{147} Id. at 369, 563 P.2d at 1162.
\end{itemize}
Five years later, the court decided it had waited long enough. In *Lopez v. Maez*, in 1982, the supreme court overruled *Marchiando* stating ""[w]e believe that the time has come for this Court to address this issue." The *Lopez* court, in overruling the earlier case, created a common law duty upon tavernkeepers not to sell alcohol to inebriated customers. Breach of such duty, the court said, might result in the tavernkeeper being liable for damages to third parties injured by the customer. The court made it clear that prior to this ruling there had been no common law duty imposed on tavernkeepers mainly because "the proximate cause of the injury was not the furnishing of the liquor, but the drinking of it." Even if the liquor caused the customer's inebriation, that the customer would later injure a third party was thought an unforeseeable result of the sale of alcohol to the customer. In justifying its reversal, the court noted that because the common law is judicially created, the judiciary has the power to change it. ""Merely because a common law doctrine has been in effect for many years, it is not rendered invulnerable to judicial attack." New Mexico's appellate courts "have declined to adhere to ancient common law doctrines when those doctrines became out of tune with today's society." To illustrate this point, the *Lopez* court used the case of *Scott v. Rizzo* wherein the court eliminated the doctrine of contributory negligence, which had become "obsolete," in favor of the doctrine of comparative negligence.

The case of *Torrance County Mental Health Program, Inc. v. New Mexico Health and Environment Department* further supports Judge Hartz' contention in *Norwest* that the text of the statute alone dictates the legislative will, and that any voids may be filled in by the judiciary. In that case, the court held that a New Mexico statute could not be read to express "an intention to waive immunity for punitive damages in contract actions, even though in the same act the legislature, dealing with the major subject of the legislation (tort claims against the state), expressly granted immunity for punitive damages in tort cases." The *Torrance County* court agreed with Professor Tribe's proposition that "giving positive legal effect to bare legislative silence is to be assiduously avoided." The court concludes that "whether by legislative drafting oversight or otherwise, the legislature simply failed to express its will on this subject," and the court was therefore "free to decide the issue . . . based on such policy considerations as [it] deem[ed] pertinent." In so ruling, the supreme court asserted its authority to shape the common law on the basis of policy where the legislature had failed to positively

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149. See id. at 631, 651 P.2d at 1276.
150. See id. (citing Ono v. Applegate, 612 P.2d 533 (Haw. 1980)).
151. Id. at 628, 651 P.2d at 1272.
152. See id.
153. See id. at 629, 651 P.2d at 1273.
156. See id. (citing Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981)).
158. Id. at 598, 830 P.2d at 150.
159. Id.
160. Id.
161. Id. at 599, 830 P.2d at 151.
act even though there were related actions apparent in the statute which could have been construed to indicate legislative intent on the issue.

C. Doctrine of Absurd Results

Finally, Judge Bosson relied on the doctrine of absurd results to support the majority opinion that section 66-7-373(A) prohibits the introduction of evidence of seat belt nonuse in tort cases. He questioned the logic of allowing such evidence to be introduced in the case of rear seat passengers, for whom the law is silent, while at the same time prohibiting such evidence for front seat passengers. This argument, however, assumes there is no common law prohibition on the introduction of such evidence subsequent to passage of the statute, a false assumption in this case according to Judge Hartz.

D. New Mexico Common Law Treatment of the Seat Belt Defense

In Thomas II, the New Mexico Supreme explicitly struck down the common law duty to wear a seat belt created by the court of appeals. Hence, the common law in New Mexico, as it stands, does not recognize a duty to wear an available seat belt in personal injury cases arising out of two-car accidents. That is all that can be said with any definitiveness about the prohibition of the seat belt defense in civil actions. The court of appeals' interpretation of New Mexico Statutes Annotated section 66-7-373(A)—that it prohibits the seat belt defense—is questionable at best, as pointed out by Judge Hartz in Norwest. The court of appeals' reliance on its own interpretation of what it thinks the supreme court might say about the statute is unpersuasive. The supreme court has not ruled on the court of appeals' interpretation of section 66-7-373(A). It has merely not overturned its own judicially created prohibition on the seat belt defense in Thomas II. The court of appeals can point only to Mott to support its assertion that statutorily there is no seat belt defense, and that case was decided based as much on common law as on statutory law.

Nor can the majority in Norwest rely on the supreme court's denial of certiorari in both the Mott and Norwest cases as supreme court approval of its interpretation, because a denial of certiorari does not speak to the substantive issues presented in the case. The court may deny certiorari for any number of unknown reasons. The only thing to be gleaned from such a denial is that the particular case denied is finally settled. Therefore, if Judge Hartz' interpretation of section 66-7-373(A) is accepted, all that would remain before the seat belt defense could become effective in New Mexico is for the supreme court to overrule its holding in Thomas II, as

162. See Norwest, 127 N.M. at 397, 406, 981 P.2d at 1215, 1224.
163. See discussion supra parts II, IV.
164. See Thomas II, 102 N.M. at 326, 327, 695 P.2d at 476, 477.
165. See id.
167. See Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 942-46 (1978), ("[A] denial of ... certiorari ... carries with it no implication whatever regarding the Court's views on the merits of the case . . . ." (Stevens, J., opinion) (quoting Justice Frankfurter's opinion respecting the denial of the petition for writ of certiorari in Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-919 (1950)).
Lopez overturned Marchiando. Such an act would open the door to Judge Hartz' argument for the creation of a common law duty to wear an available seat belt.

Since 1985, when the supreme court ruled in Thomas II, virtually all of the reasons to abstain from the creation of a common law duty to wear a seat belt have been eliminated, and many good policy reasons to create such a duty have arisen. The effectiveness of seat belts is no longer in question. With a nationwide use rate of 69 percent, and with a 1997 New Mexico use rate of 88 percent, it can no longer be said that most people do not use them. While the New Mexico statute requiring belt use precludes use of evidence of violation of that statute in civil actions, it is not unfathomable that there has developed a new societal standard of care requiring the use of seat belts, "based not on the statute itself, but on community mores which had their origin in the statute." The evidence of exponentially rising seat belt use over the past decade supports such a conclusion. Hence, the only argument previously expressed by New Mexico courts for not creating a duty to wear a seat belt which remains is the legal argument that the legislature should be the one to create such a duty, not the judiciary. That doctrine, however, is not written in stone, as Lopez' overruling of Marchiando makes clear.

Nor is the creation of a common law duty to wear an available seat belt without precedent. In Arizona, for example, there is no mandatory seat belt law. In the face of this unquestionable legislative silence on the issue, however, Arizona courts have created a common law duty to buckle up under the umbrella of comparative fault, stating that "each person is under an obligation to act reasonably to minimize foreseeable injuries and damages. Thus, if a person chooses not to use an available, simple safety device, that person may be at 'fault.'" This same argument is put forth by Judge Hartz in his Norwest concurrence when he points out that

[when a plaintiff fails to exercise ordinary care for his or her own safety, the plaintiff is negligent. If that negligence contributes to the plaintiff's injuries, the jury compares the plaintiff's negligence to the negligence of the others contributing to the injury, and the plaintiff's recovery of damages is reduced accordingly.]

Of note is the fact that even in states where the legislature has enacted seat belt use laws equal to or more restrictive than New Mexico's, courts allow evidence of nonuse of a seat belt by a plaintiff in crashworthiness cases. In Kansas, for example, evidence that a seat is equipped with a seat belt which the passenger did not use is admissible to determine whether the overall design of the car is safe, even though Kansas' statute states that "evidence of failure of any person to use a safety belt

168. See discussion supra part II.
169. See STANDARD ENFORCEMENT SAVES LIVES, supra note 13, at 5
172. See supra note 23.
175. See Gardner v. Chrysler Corp., 89 F.3d 729, 737 (10th Cir. 1996).
shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damage."176 The Delaware Supreme Court also ruled that seat belt evidence is admissible in crashworthiness cases to prove proximate causation of enhanced injuries and to establish the importance of seat belts in a vehicle’s overall safety design.177 That court said:

[permitting a plaintiff to allege that she was injured by a defective vehicular design, while at the same time, preventing the defendant manufacturer from introducing evidence that the plaintiff’s failure to use an essential safety device designed and supplied by the manufacturer was the supervening cause of the plaintiff’s injuries, would essentially remove the issue of proximate cause in crashworthiness litigation.]178

Proximate cause, although avowedly one of the most nebulous concepts in tort law, is merely the legal embodiment of the idea that an actor should be responsible for the consequences of his conduct.179 The New Mexico Supreme Court gave exactly this reason in Scott v. Rizzo for its adoption of the pure form of comparative negligence in order to “hold[ ] all parties responsible for their own respective acts . . . [and to] den[y] recovery for one’s own fault.”180 It is in this respect that the continued reliance on a lack of a common law duty to protect oneself in an automobile by buckling up is stripped of its cloak of legitimacy. New Mexico’s refusal to hold “individuals fully accountable for their conduct when they seek compensation for injuries which they themselves have caused in part” has previously come under fire; and the State’s treatment of the seat belt defense has been described by one author as “the worst of [all relevant legal] worlds.”181

VI. IMPLICATIONS

The ruling of the Norwest court that non-specific seat belt evidence is admissible in a crashworthiness case at the discretion of the trial court is of limited value. Certainly Norwest is a chink in the armor of the steadfast champion of the foes of the seat belt defense. As such it will be of interest to the defenders of auto manufacturers, especially those faced with a laundry list of crimes against unsuspecting consumers for which the defendant manufacturer is alleged responsible. However, it is Judge Hartz’ arguments urging the supreme court to allow the seat belt defense which are of greatest import. Judge Bosson’s majority failed “to detect any groundswell of opposition to the rule” that specific evidence of seat belt use/nonuse is inadmissible in a tort action.182 Judge Bosson noted that the members of the New Mexico Bar have let slip by “innumerable opportunities to challenge Thomas II anew . . . [and that the] silence since 1985 suggests that the rule does not offend community norms to the degree

176. Id. at 733 (discussing KAN. STAT. ANN. §8-2504(c) (1998)).
177. See General Motors Corp. v. Wolhar, 686 A.2d 170, 176-77 (Del. 1996).
178. Id. at 176.
180. 96 N.M. 682, 690, 634 P.2d 1234, 1242.
181. Ackerman, supra note 171, at 248.
182. See Norwest, 127 N.M. at 406 n.4, 981 P.2d at 1224 n.4.
intimated” in Judge Hartz’ concurrence. In so noting, Judge Bosson implied that if there were a “groundswell of opposition” to the status quo, it could be changed.

If the judiciary is to be lobbied, Judge Hartz’ textualist interpretation may be argued with the assurance that it is equally as plausible as, if not more so than, Judge Bosson’s majority interpretation of section 66-7-373(A). The supreme court should be urged not to hear music in the New Mexico Legislature’s silence on the issue of the seat belt defense. As Professor Tribe puts it,

reading in the “silence of [the legislature]” an indication of its “will” represents an attempt by judges to disclaim responsibility for altering the legal landscape by passing the buck to [the legislature]—and thus is, as Clarence Shenton wrote, “an especially palpable attempt to make it appear that the power exercised by the Supreme Court proceeds from [the legislature].”

“Worse still,” says Tribe, “[the legislature] itself may well conspire in this buck-passing—for having said nothing, its members are free in turn to point right back to the courts when called upon to defend what the courts claim that [the legislature] has, by its silence, brought to pass.”

What is right is not always popular and the legislature’s and judiciary’s insistence on pointing the finger at one another to indicate responsibility accomplishes nothing. Just because the Thomas II court refused to address the issue, deferring to the legislature, does not make it the right decision, or indeed the final decision, as Lopez illustrates. It has always been within the power of the judiciary, as that body of government most able to make up for the vagaries of political compromise, to fill the voids left in statutory law.

VII. CONCLUSION

The time is ripe for the New Mexico Supreme Court to recognize a common law duty to protect oneself by wearing an available seat belt and to allow the introduction of evidence that a party breached this duty in civil lawsuits. Such a course of action is not precluded by the operation of Section 33-6-373(A), as Judge Hartz pointed out in his Norwest concurrence, and is far more in tune with modern life than the current rule. These are different times from those of the 1960s, 70s and even 80s. If the court were to reconsider its ruling in Thomas II and take another look at the policy surrounding the question of admissibility of seat belt use/nonuse evidence in civil cases, it would see a vastly different landscape than the one it saw in 1984, and one far more hospitable to the seat belt defense.

KATHERINE NIELSEN

183. Id.
184. TRIBE, supra note 112, at 33-34 (quoting Clarence Shenton, Interstate Commerce During the Silence of Congress, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 842 (1938)).
185. Id. at 34.