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Contributory Negligence—Failure to Use Automobile Seat Belts N.M. Stat.Ann § 64-20-75 (Supp. 1967)

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CONTRIBUTORY NEGLIGENCE—FAILURE TO USE AUTOMOBILE SEAT BELTS*

Today, both seat belts and shoulder harnesses are installed by United States manufacturers in all new automobiles. It has been estimated that if all passenger car occupants used seat belts 8,000 to 10,000 lives would be saved each year.[1] Seat belts are presently available to about two-thirds of all passenger car occupants; however, they are only being used about 40 per cent of the time.[2]

Seat belts are recognized as a valid safety device.[3] The failure of automobile occupants to use seat belts at the time they are involved in an automobile accident has created a legal issue which must be resolved.

It is very likely that New Mexico will soon have a case concerning the question of the non-use of available seat belts as contributory negligence. The purpose of this Comment is to discuss the issue of whether the failure of an automobile occupant to use an available seat belt may be found to be contributory negligence in a personal injury action.

This question was first raised at the appellate level in the South Carolina case of *Sams v. Sams*[4] in 1966, and since that time, it has been considered in at least sixteen appellate cases in fifteen different states.[5]

There appear to be two separate approaches which may be used to determine whether there is a duty to use automobile seat belts. First, is there a statutory duty which requires the use of seat belts in all new automobiles? Second, is there a common law duty based on the standard of ordinary care to use seat belts, independent of statutory mandate?

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* N.M. Stat. Ann. § 64-20-75 (Supp. 1967).

1. National Safety Council, Accident Facts 53 (1968).
2. *Id.*
3. *See* 16 Am. Jur. Proof of Facts *Seat Belt Accidents* §§ 27-42 (1965).
4. 247 S.C. 467, 148 S.E.2d 154 (1966); Annot., 15 A.L.R.3d 1423 (1967).
5. Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. App. 1966); Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966); Mortensen v. Southern Pacific Company, 245 Cal. App. 2d 241, 53 Cal. Rptr. 851 (1966); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967); Lipscomb v. Diamiani, 226 A.2d 914 (Del. 1967); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Tom Brown Drilling Co. v. Nieman, 418 S.W.2d 337 (Tex. Civ. App. 1967); Brown v. Bryan, 419 S.W.2d 62 (Mo. 1967); National Dairy Products Corp. v. Durham, 115 Ga. App. 420, 154 S.E.2d 752 (1967); Mount v. McClellan. 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Civ. App. 1968); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (1968); Siburg v. Johnson, 439 P.2d 865 (Ore. 1968).

I
STATUTORY DUTY TO USE SEAT BELTS

The first seat belt legislation was enacted in 1961 when Wisconsin passed a law making seat belts mandatory in all new passenger cars beginning with the 1962 models.[6] Since that time at least 34 states and the District of Columbia have passed similar legislation.[7] New Mexico's statute, passed in 1963 but not yet construed in any reported decision, provides:

> Safety belts required—It is unlawful for any person to buy, sell, lease, trade or transfer from or to New Mexico residents at retail an automobile, which is manufactured or assembled commencing with the 1964 models, unless the vehicle is equipped with safety belts installed for use in the left front and right front seats.[8]

Since the New Mexico statute specifically requires that seat belts be "installed for use," does it place a statutory duty on an occupant of an automobile to use them? This was the question raised in a recent lower court case in Wisconsin.[9] In that case, a motorist sued for personal injuries which occurred in an automobile accident due solely to the defendant's negligence. The plaintiff was not using an

6. Wis. Stat. Ann. § 347.48(1) (Supp. 1968):

> It is unlawful for any person to buy, sell, lease, trade or transfer from or to Wisconsin residents at retail an automobile, which is manufactured or assembled commencing with the 1962 models, unless such vehicle is equipped with safety belts installed for use in the left front and right front seats thereof, *and no such vehicle shall be operated in this state unless such belts remain installed.* (The last phrase was added by amendment in 1963).

7. Cal. Veh. Code § 27309 (Supp. 1967); Conn. Gen. Stat. Ann. tit. 14, § 14-100A (Supp. 1968); Fla. Stat. Ann. § 317.951 (Supp. 1966); Ga. Code Ann. tit. 68, § 68-1801 (1967); Ill. Ann. Stat. ch. 95½, § 217.1 (Supp. 1967); Ind. Ann. Stat. § 47-2241 (Repl. 1965); Iowa Code Ann. § 321.445 (1966); Kan. Stat. Ann. ch. 8-5,135 (Supp. 1967); Me. Rev. Stat. Ann. tit. 29, § 1368-A (Supp. 1967); Md. Ann. Code art. 66½, § 296A (Repl. 1967); Mass. Ann. Laws ch. 90, § 7 (Supp. 1967); Mich. Comp. Laws Ann. § 257.710 (1967); Minn. Stat. Ann. § 169.685 (Supp. 1967); Miss. Code Ann. § 8254.5 (Supp. 1966); Mo. Stat. Ann. § 304.555 (1963); Mont. Rev. Code Ann. § 32-21-150.1 (Supp. 1967); Neb. Rev. Stat. § 39-7,123.05 (Supp. 1965); N.J. Stat. Ann. § 39:3-76.2 (Supp. 1967); N.M. Stat. Ann. § 64-20-75 (Supp. 1967); N.Y. Veh. & Traf. Law § 383 (Supp. 1968); N.C. Gen. Stat. § 20-135.2 (1965); N.D. Cent. Code Ann. § 39-21-41.1 (Supp. 1967); Ohio Rev. Code Ann. § 4513.26.2 (Supp. 1967); Okla. Stat. Ann. tit. 47, § 12-413 (Supp. 1967); Ore. Rev. Stat. § 483.482 (1965); Pa. Stat. Ann. tit. 75, § 843 (1960); R.I. Gen. Laws Ann. § 31-23-39 (Supp. 1966); Tenn. Code Ann. § 59-930 (Repl. 1968); Utah Code Ann. § 41-6-148.10 (Supp. 1967); Va. Code Ann. § 46.1-309.1 (Repl. 1967, Supp. 1968); Vt. Stat. Ann. tit. 23, § 4(29) (Supp. 1966); Wash. Rev. Code Ann. § 46.37.510 (Supp. 1967); W. Va. Code § 17C-15-43 (1966); Wis. Stat. Ann. § 347.48 (Supp. 1968).

8. N.M. Stat. Ann. § 64-20-75 (Supp. 1967).

9. Stockinger v. Dunisch (Cir. Ct. Sheboygan Cty., Wis. 1964) reported in 5 For the Defense 79 (Dec. 1964).

available seat belt in her 1962 automobile. A Wisconsin statute required that seat belts be "installed for use"[10] in any automobile beginning with the 1962 models. The judge instructed the jury: "It . . . must follow that the legislature intended that these seat belts be used in certain circumstances."[11] The court asked the jury if the motorist was contributorily negligent by failing to use an available seat belt. The jury answered in the affirmative and, under the Wisconsin comparative negligence statute, assessed the negligence at 10 percent. The motorist's recovery was reduced by that amount.

However, in the more recent case of *Bentzler v. Braun*,[12] the Wisconsin Supreme Court reached a contrary result: "It seems apparent that the Wisconsin legislation, which does not require by its terms the use of seat belts, cannot be considered a safety statute in the sense that it is negligence *per se* for an occupant of an automobile to fail to use available seat belts."[13] It appears, therefore, that the Wisconsin statute does not require the use of available seat belts even though it uses the language "installed for use." The wording of the New Mexico statute is identical to that of Wisconsin as well as the statutes of several other states. Since Wisconsin was the first state to pass a statute in the seat belt area, it appears that other states have used it for a model when passing similar legislation.

The Wisconsin court indicated there were several reasons to believe their statute does not require the use of seat belts. First, seat belts are required to be installed only in automobile models of the year 1962 or later, and second, they are required to be installed only in the front seat.[14]

> Thus, the statute does not appear to be an absolute safety measure. If the legislature was concerned with implementing the use of seat belts, it seems plausible belt installation would have been required for all cars in all seats.[15]

These arguments might also be made in regard to the New Mexico statute which requires installation only in the front seat of automobiles beginning with the 1964 models.

The Court of Appeals of Maryland was faced with the same question and reached a very similar result. "We agree, as did the Wisconsin court, with the courts that have held it is not negligence

10. *Supra* note 6.
11. *Supra* note 9.
12. 34 Wis. 2d 362, 149 N.W.2d 626 (1967).
13. 149 N.W.2d at 639.
14. *Id.*
15. *Id.*

per se to fail to use a seat belt where the statute[16] requires only its installation in the vehicle and we so hold."[17] Several other courts have reached the same result.[18]

No appellate case has held there is a statutory duty to use available seat belts. However, there appear to be at least two states which have statutes requiring the use of seat belts in particular instances. A Rhode Island statute[19] requires that seat belts be used in certain specified public service vehicles, while a California statute[20] requires use of seat belts in drivers training vehicles. Both of these states have two separate statutes, one requiring the installation of the seat belts and the other requiring their use in particular vehicles.[21] Also, the wording of the statutes in both states requiring the installation of the seat belt is almost identical to the Wisconsin statute. This indicates that these states, like New Mexico, copied the Wisconsin statute and felt that it did not require use of seat belts, but required only their installation. Thus, it might be argued, by comparison, that the New Mexico statute was also aimed only at the installation of the seat belts and not their use.

Although most states have enacted legislation concerned with installation of seat belts, no state has passed a statute which "specifically" imposes a penalty for non-use in other than carefully circumscribed situations.[22] Five states provide that their statutes are not to be used as a standard of care in a civil negligence action.[23]

16. Md. Ann. Code art. 66½, § 296A (1967).

17. Cierpisz v. Singleton, 247 Md. 215, ——, 230 A.2d 629, 635 (1967).

18. Miller v. Miller 273 N.C. 228, 160 S.E.2d 65 (1968); Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. App. 1966); Brown v. Kendrick, 192 So.2d 49 (Fla. App. 1966).

19. R.I. Gen. Laws Ann. § 31-23-41 (Supp. 1966):

> Every jitney, bus, private bus, school bus, trackless trolley coach, and authorized emergency vehicle, when operated upon a highway, shall be equipped with a driver's seat safety belt device . . . . Every person when driving any such vehicle shall use and have his body anchored by such seat safety belt. Violation of this section shall constitute a misdemeanor.

20. Cal. Veh. Code § 27304 (Supp. 1968):

> All vehicles owned and utilized in driver training by a driver training school . . . shall be equipped with a seat belt for the driver and each passenger.
>
> It shall be unlawful for any driver or passenger to operate or ride in such a vehicle while it is being operated for the purposes of driver training, unless such person is utilizing an installed seat belt in the proper manner.

21. *Compare* Cal. Veh. Code § 27314 (Supp. 1968), with Cal. Veh. Code § 27304 (Supp. 1968), *and compare* R.I. Gen. Laws Ann. § 31-23-39 (Supp. 1966), with R.I. Gen. Laws Ann. § 31-23-41 (Supp. 1966).

22. *Supra* notes 19 & 20: An example of statutes which impose a penalty for non-use of seat belts in particular situations.

23. Iowa Code Ann. § 321.445 (1966):

> The fact of use, or nonuse, of seat belts by a person shall not be admissible or material as evidence in civil actions brought for damages.
>
> Failure to use seat belts installed in a motor vehicle shall not be a crime or a public offense.

It is interesting to note that the original bill introduced in the New Mexico House of Representatives contained a subsection which read: "E. Failure to use the seat safety belts after installation shall not be considered negligence."[24] After its introduction, the bill was referred to the Transportation Committee. When the bill was reported out of committee it was completely reworded so that it was identical in wording to the Wisconsin statute.[25] At the time the New Mexico statute was passed there had not yet been a case concerned with the question of the non-use of seat belts as contributory negligence. There is no indication in the legislative history that by rewording the bill the Transportation Committee intended to make the non-use of seat belts contributory negligence. It appears that the committee intended to pass a statute in the seat belt area and simply used the Wisconsin statute as a model, as had been done by several other states, following the present trend toward passing "uniform" state laws.

The language of the statute appears to be directed at the retail transfer of an automobile commencing with the 1964 models. There is no indication in the statute that a person cannot remove the seat belts after they have been installed if he does not "buy, sell, lease, trade or transfer"[26] the automobile at retail. Thus, it does not appear that the New Mexico legislature intended to make the use of seat belts mandatory as an absolute safety measure.

II
COMMON LAW DUTY TO USE SEAT BELTS

Is there a common law duty based on the standard of ordinary

Me. Rev. Stat. Ann. tit. 29, § 1368-A (Supp. 1967):

> In any accident involving an automobile, the nonuse of seat belts by the driver of or passengers in the automobile shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident.

Minn. Stat. Ann. § 169.685(4) (Supp. 1967):

> Proof of the use or failure to use seat belts . . . shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.

Tenn. Code Ann. § 59-930 (Repl. 1968):

> Provided that in no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belt be considered in mitigation of damages on the trial of any civil action.

Va. Code Ann. § 46.1-309.1(b) (Supp. 1968):

> Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence.

24. N.M. House Bill No. 12, 26th Legislature, 1963, which was superceded by N.M. Stat. Ann. § 64-20-75 (Supp. 1967).

25. *Compare* note 6 *supra* with note 8 *supra.*

26. *Supra* note 8.

care to use available seat belts? Several courts appear to have answered this question in the affirmative.[27] In *Bentzler v. Braun* the Wisconsin court said:

> While we agree with those courts that have concluded that it is not negligence *per se* to fail to use seat belts where the only statutory standard is one that requires the installation of the seat belts in the vehicle, we nevertheless conclude that there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate.[28]

The general pleading of a common law duty to use available seat belts is expressed by the court in the Illinois case of *Mount v. McClellan:*

> The plaintiff argues that in order for there to be negligence there must be a duty. He continues, that if there is no duty then there can be no breach and consequently, no negligence. On the other hand, the defendant argues that, even though there was no statutory duty to have seat belts at the time of the accident, there was the common law duty to use care for one's own safety and whether or not seat belts were installed in the car is an evidentiary factor which the jury could properly consider in determining the question of the plaintiff's due care for himself.[29]

The first problem which arises is whether the courts will admit evidence of plaintiff's failure to use available seat belts when considering the question of proximate cause.

The courts of the different states are not in agreement on the question of whether evidence can be admitted regarding the use or non-use of available seat belts.[30]

A second problem is presented in those jurisdictions which admit evidence of non-use of available seat belts on a common law duty theory that a reasonably prudent man would use them to avoid injury to himself. This problem deals with the consequences of a breach of that duty.

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27. Bentzler v. Braun, 34 Wis.2d 362, 149 N.W.2d 626 (1967); Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968).

28. Bentzler v. Braun, 34 Wis. 362, 149 N.W.2d 626, 639 (1967).

29. Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.5.2d 329, 330 (1968).

30. *Compare* Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966) which admitted evidence of the failure to use seat belts with Miller v. Miller, 273 N.C. 288, 160 S.E.2d 65 (1968); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct. 1968); Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966); and Lipscomb v. Diamiani, 226 A.2d 914 (Del. 1967) which did not.

Although the non-use of an available seat belt may contribute to the injuries suffered by the plaintiff, it almost never contributes to the cause of the accident:

> The use, or non-use of seat belts, and expert testimony, if any, in relation thereto, is a circumstance which the trier of facts may consider, together with all other facts in evidence, in arriving at its conclusion as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain. However, this element should be limited to the damage issue of the case and should not be considered by the trier of facts in determining the liability issue.[31]

Assuming that it can be reasonably determined what percent of the injuries could have been avoided if the plaintiff had used an available seat belt,[32] a final problem arises. If the failure to use an available belt is contributory negligence what effect does it have on plaintiff's recovery? There appear to be two possible approaches to this problem.

The first approach is that if the failure to use seat belts is the proximate cause of any of plaintiff's injuries he is barred from any recovery on the theory of contributory negligence.

The second approach is that of comparative negligence. Under this approach the percent of plaintiff's injuries caused by the failure to use seat belts is determined and his recovery is reduced by that percentage. This approach may have difficulty in being accepted in jurisdictions, like New Mexico, which follow the doctrine of contributory negligence.

New Mexico does not recognize the doctrine of comparative negligence[33] and has held that "(t)here can be no recovery unless defendant's negligence was the proximate cause of the injury and plaintiff's contributory negligence did not proximately contribute thereto."[34] Therefore, in New Mexico, if non-use of available seat belts is held to be contributory negligence the plaintiff is denied recovery. "To bar recovery because of contributory negligence, the question to be answered is whether the plaintiff's conduct meets the standard that a reasonably prudent person would adopt to avoid injury. . . ."[35] Can it be said that a reasonably prudent person

31. Mount v. McClellan, 91 Ill. App. 2d 1, ——, 234 N.E.2d 329, 331 (1968).

32. *See* Am. Jur. Proof of Facts *Seat Belt Accidents* §§ 55-58 (1965) for a discussion of the use of expert testimony to prove the non-use of seat belts and the injuries resulting therefrom.

33. Jones v. Pollock, 72 N.M. 315, 383 P.2d 271 (1963).

34. Johnson v. Primm, 74 N.M. 597, 601, 396 P.2d 426, 429 (1964).

35. *Id.*

would always use a seat belt? As has been indicated, seat belts are being used only about 40 per cent of the time, on the average.[36] This indicates that a majority of the people do not use seat belts a majority of the time, and may also be some indication that seat belts have not been entirely accepted by the public.

It has been suggested that states which hold that contributory negligence is a complete bar could recognize a different rule in seat belt liability cases. A distinction can be made between the negligent acts of the defendant which caused the accident and the contributorily negligent acts of the plaintiff by not wearing seat belts which was a substantial contributing factor in causing his injuries.[37] Acceptance of this rule would reduce plaintiff's recovery to the degree that his injuries were aggravated by his own negligent conduct in failing to use seat belts. Thus by expert testimony the injury attributable to the non-use of seat belts could be determined and the plaintiff's recovery reduced by that amount. This rule was applied in the Texas case of *Vernon v. Droeste*.[38] Texas does not have a comparative negligence statute, and contributory negligence is generally a complete bar. The court, however, apportioned the damages between the plaintiff and the defendant.

The approach of the Texas court would seem to be the most equitable solution for the New Mexico courts to adopt. It would definitely be more equitable than completely denying plaintiff's recovery simply because he failed to wear his seat belt, when the defendant was solely responsible for the accident.

III
CONCLUSION

It may be too early to hold that non-use of seat belts is contributory negligence. As has been indicated, no state has held that there is a statutory duty to use available seat belts under all circumstances.

The effectiveness of seat belts in reducing injuries has been proven, however, and they are now being installed in all new automobiles. It is possible that the legislature will eventually impose some duty on an automobile occupant to use a seat belt, but this is not the law today. Therefore, it may be too early for the courts to impose a common law duty on a person to use an available seat belt. This writer feels that the imposition of a duty to use seat belts

36. *Supra* note 2.

37. 7 For the Defense, No. 2 (Feb. 1966).

38. Dist. Ct. Brazos Cty., Tex. (1966) reported in 7 For the Defense, No. 7 (Sept. 1966).

should be left to the legislature, at least until the public begins to realize the advantages of using seat belts.

In the event the court feels obligated to impose a common law duty to use seat belts under certain circumstances, a distinction between the cause of the accident and the cause of the injury should be made. This is especially true in jurisdictions in which contributory negligence is a complete defense. Under this view the defendant is liable for all of the damage and injury caused by his negligent act, and the plaintiff's recovery is reduced by the per cent of injuries he sustained as a result of his failure to use his seat belt. This may be the most equitable remedy, and it can be used consistently with the doctrine of contributory negligence.

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