August 2015

The Emerging Seat Belt Defense: Two Views

John A. Trerilla

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THE EMERGING SEAT BELT
DEFENSE: TWO VIEWS

Roberts v. Bohn,
26 Ohio App. 2d 50, 269 N.E. 2d 53 (1971)

The courts have recently been concerned
with the new problem of whether the law of torts
imposes a legal obligation upon individuals to
wear seat belts. The seat belt defense is in its
formative years. It was first presented less than
a decade ago, and has since been presented in
approximately fifty cases. To date, less than half
of the judicial jurisdictions in the country have
considered the defense.

Due to the initiation of this relatively recent
development of tort law and the generally
inconsistent court decisions, the Editorial Board
believes the Review's function will best be served
by presenting the following two analyses of the
same case. Although the two authors do not take
diametrically opposed positions, their analytical
approach and conclusions are not in complete
accord.

It is our hope that this technique will
enlighten the practicing bar, the judiciary and the
legal scholar concerning the emergence of this
new tort law principle.
I. WHAT THE COURTS HAVE DONE AND WHY

Roberts v. Bohn was an action for personal injuries sustained by a passenger in a motor vehicle which was involved in an accident with another motor vehicle. The jury rendered a unanimous verdict for the defendant. The plaintiff appealed on several questions of law, one of which concerned the questioning of plaintiff on cross-examination as to whether she was wearing an available seat belt, and her admission that she was not wearing a seat belt at the time of the accident. Plaintiff's counsel objected to such testimony as irrelevant, but the trial court ruled that the testimony could remain.

The Court of Appeals, in Roberts, noted that Ohio has enacted legislation which requires all motor vehicles manufactured after January 1, 1962, to be equipped with seat belts. The court further indicated that Bertsch v. Spears held that section 4513.262, of the Ohio Revised Code, does not require the wearing of seat belts, and that the failure to wear seat belts is not negligence per se. The appellate court, in Roberts, held, inter alia, that the questioning of plaintiff on cross-examination in regard to her nonuse of an available seat belt was irrelevant, and that the trial court erred in not striking this testimony from the record. The court concluded, however, that since defendant's counsel did not mention the failure of plaintiff to wear a seat belt in the closing argument, and since the trial court did not charge the jury on contributory negligence as to the nonuse of the seat belt, the error, standing alone, was not sufficiently prejudicial to warrant a new trial. It was expressly indicated in the court's charge that the seat belt defense was disfavored by the members of its bench.

The court's decision was in accord with the majority of the cases in other jurisdictions; to wit: (1) the determination as to whether an occupant of an automobile should or should not be required to wear a seat belt should be left to the legislature, (2) in the absence of a statute to the contrary, there is no common law duty imposed upon an occupant of a motor vehicle to wear a seat belt in ordinary highway travel, and (3) the failure to use an available seat belt is not contributory negligence as a matter of law. Therefore, evidence as to the nonuse of a seat belt is generally inadmissible in an action for personal injuries arising out of an automobile accident.

The court reasoned that, normally, there is no connection between the nonuse of seat belts and the cause of the accident; therefore, a

4 26 Ohio App. 2d at 58, 269 N.E. 2d at 59.
5 Id.
defendant should not escape the legal consequence of his negligence by imputing negligence to the plaintiff due to the plaintiff's failure to use an available seat belt. It must be noted that the reasoning process employed by the court — since nonuse of a seat belt is not connected to the cause of the accident, the nonuse does not constitute contributory negligence — is illogical under tort law principles. The question is whether there is a connection between the nonuse of a seat belt and the cause of the injury sustained. It is therefore suggested that the courts that have used such faulty reasoning have done so in order to arrive at what is considered a just result; namely, the nonuse of a seat belt should not constitute contributory negligence and bar recovery. The court seemed influenced by the fact that if the failure to wear available seat belts should be considered negligence, and defendant established by credible evidence that a specified portion of plaintiff's injuries, no matter how minimal, were the direct and proximate result of the omission to wear an available seat belt, then the plaintiff would be precluded from any recovery under the contributory negligence doctrine. The court rejected the contention that because it is common knowledge that in automobile accidents personal injuries or death may result, persons occupying automobiles have a duty to wear available seat belts for their own safety. The rejection was based on two premises. First, that there is material controversy as to whether the use of seat belts sufficiently contributes to the safety of persons wearing them, and second, there exists a lack of acceptance of the use of seat belts by a substantial percentage of the public. The court indicated that even if a general acceptance as to the value of, and need for, seat belts prevailed, there would evolve a significant question in regard to the existence of a legal duty to wear them, in the absence of a statute to the contrary. This is because "an automobile is not an inherently dangerous instrumentality," and "only becomes dangerous because of its negligent operation or because it is allowed to be out of repair." Finally, the court noted that an individual may rightfully assume that others will observe the law and use ordinary care; therefore, action based on this assumption, in the absence of contrary knowledge or notice, is not negligence. Thus, in the absence of a statute to the contrary, there is no duty, on the part of an automobile

6 Id. at 57, 269 N.E. 2d at 58-59.
8 Id. at 57, 269 N.E. 2d at 58.
9 Id. at 57, 269 N.E. 2d at 59.
10 Id.
11 Id.
occupant, to foresee another's negligence and thereby protect himself by using an available seat belt.\textsuperscript{15} It appears as if Ohio, in rejecting the "seat belt defense" has seemingly joined the ranks of the majority view. An investigation as to how the seat belt issue has been litigated in other jurisdictions may be enlightening.

\textbf{RELEVANT CASES}

The case ratio seems to be significantly against the acceptance of the seat belt defense. It should be noted, however, that in some cases\textsuperscript{16} the seat belt defense was rejected on some basis other than the actual merits of the defense. Notwithstanding the aforementioned cases, there has been litigation in which courts seemingly reject the seat belt defense on the merits.

In a notable Louisiana decision,\textsuperscript{17} a Court of Appeals held that the plaintiff who was thrown from his car, due to a collision with defendant's car, was not guilty of contributory negligence in failing to utilize an available seat belt. The court concluded that the plaintiff's nonuse of the available seat belt did not contribute to the occurrence of the accident and was not the proximate cause of the accident.\textsuperscript{18} It was further indicated that a statutory mandate, prescribing that failure to use an available seat belt would be negligence per se, is needed in order to find nonuse of an available seat belt as constituting a proximate cause of the accident.\textsuperscript{19} Other jurisdictions have rejected the seat belt defense on essentially the same grounds.\textsuperscript{20}

\textsuperscript{15}26 Ohio App. 2d at 58, 269 N.E. 2d at 59.
\textsuperscript{16}See generally Fontenot v. Fidelity & Cas. Co. of N.Y., 217 So. 2d 702 (La. App. 1969); Schomer v. Madigan, 120 Ill. App. 2d 107, 225 N.E. 2d 620 (1970) (Plaintiff's nonuse of an available seat belt was not established); Brown v. Bryan, 419 S.W. 2d 62 (Mo. Sup. Ct. 1967) (There was no request that the trier of fact be instructed as to the seat belt issue); Lentz v. Schafer, 404 F. 2d 516 (7th Cir. 1968) (The pleadings failed to raise the seat belt defense).
\textsuperscript{17}Lawrence v. Westchester Fire Ins. Co., 213 So. 2d 784 (La. App. 1968).
\textsuperscript{18}Id. at 786-787.
\textsuperscript{19}Id. at 786.
\textsuperscript{20}See generally Cierpisz v. Singleton, 247 Md. 215, 230 A. 2d 629 (1967). Here, a Maryland Court of Appeals held that failure to wear an available seat belt is not negligence per se since the state statute, Md. ANN. CODE Art. 66\textsuperscript{6}, §12-412 (repl. vol. 1970), required only installation and not use of the belts; and that, in the absence of proof that plaintiff's injuries were caused or aggravated by his nonuse of the belt, the trial court properly refused to submit the question of contributory negligence to the jury; Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966). A Florida appellate court held, \textit{inter alia}, that plaintiff's nonuse of an available seat belt neither contributed to the occurrence of the accident nor was the proximate cause of the injuries sustained; therefore, the trial court properly refused to allow the defendant to offer evidence as to plaintiff's nonuse of seat belts as constituting contributory negligence; Myles v. Lee, 209 So. 2d 533 (La. App. 1968); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A. 2d 273 (1967). Both courts held that the nonuse of an available seat belt at the time of the accident, by the plaintiff, was no defense since such nonuse was not a contributing factor in the occurrence of the accident.
The contention that nonuse of an available seat belt constitutes contributory negligence has been rejected on other grounds. The Supreme Court of New York has held,\textsuperscript{21} \textit{inter alia}, that the nonuse of an available seat belt did not raise an inference of contributory negligence since such nonuse did not contribute to the occurrence of the accident which caused the injuries. The court concluded that it was up to the legislature to determine whether the wearing of seat belts is to be mandatory, and whether the failure to utilize them shall preclude recovery. In \textit{Noth v. Scheurer}\textsuperscript{22} it was indicated that under New York law, a failure to use an available seat belt is not related to the cause of the accident and therefore is not considered as contributory negligence. The court noted that there was no New York authority which holds that there is a duty to wear a seat belt.\textsuperscript{23} The court did indicate, however, that nonuse of seat belts may be a causative factor in determining the extent of damages that the plaintiff would be entitled to recover.\textsuperscript{24}

The advocates of the seat belt defense have attempted to invoke the doctrine of avoidable consequences in an effort to mitigate damages. An Indiana appellate court has held,\textsuperscript{25} \textit{inter alia}, that plaintiff's failure to use an available seat belt is not contributory negligence as a matter of law. The defendant contended that nonuse of an available seat belt is a bar to recovery due to the doctrine of avoidable consequences. Defendant's argument was essentially that where one person has committed a tort against another, it is incumbent upon the latter to utilize such means as are reasonable under the circumstances in an effort to avoid or minimize the damages. The aggrieved party is therefore denied recovery for any item of damage which could have been avoided.\textsuperscript{26} The court concluded that the doctrine was not a defense, but was merely a rule of damages.\textsuperscript{27} The court did speculate, however, that the doctrine might possibly apply to some future case in which it was clearly shown that a specified part of the injury would not have occurred except for the fact that plaintiff failed to avoid the consequence of the tort by not fastening his seat belt.\textsuperscript{28} The doctrine of avoidable consequences, as applied to the

\textsuperscript{21} Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S. 2d 14 (1968).
\textsuperscript{22} 285 F. Supp. 81 (E.D. N.Y. 1968).
\textsuperscript{23} Id. at 85.
\textsuperscript{24} Id.
\textsuperscript{25} Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E. 2d 824 (1966). \textit{But see} Mays v. Dealers Transit, Inc., 441 F. 2d 1344 (7th Cir. 1971), where the U.S. Court of Appeals held, under Indiana law, that the use of seat belts is sufficiently involved in the matter of exercise of reasonable care; therefore Indiana law does not preclude the trier of fact from considering the seat belt issue.
\textsuperscript{26} C. McCormick, \textit{DAMAGES}, §33 (1935).
\textsuperscript{27} 140 Ind. App. at 149, 221 N.E. 2d at 830.
\textsuperscript{28} Id.
plaintiff's nonuse of an available seat belt, has been argued, without success, in other jurisdictions. 29

In order for the seat belt defense to emerge as a viable defense theory, it must be established that there is a legal duty to wear seat belts. The Supreme Court of North Carolina has held, 30 inter alia, that since due care is measured by the conduct of the reasonably prudent man, the scant use which the average motorist makes of his seat belt plus the fact that there is no standard for deciding when it is negligent not to use an available seat belt, indicates that no duty should be imposed upon motorists to use them during routine highway travel. 31 The court noted that if such duty is to be imposed, it should be by legislation. 32 The court reasoned that in jurisdictions that do not employ the doctrine of comparative negligence, it would be unduly harsh and unsound to invoke a rule that would preclude all recovery to a plaintiff whose mere failure to use an available seat belt did not contribute to the occurrence of an accident, and to exonerate the tort-feasor but for whose negligence the plaintiff's omission would have been harmless. 33 The court did indicate, however, that conceivably a situation could arise in which a plaintiff's failure to use an available seat belt might constitute negligence. 34 Such a situation, in the court's opinion, must involve circumstances where a plaintiff with prior knowledge of a specific hazard — one not generally associated with highway travel and one from which a seat belt would have protected him — had failed to use his seat belt. The court indicated that if this were the case, whether such conduct be called assumption of risk or contributory negligence, it would preclude recovery. The court's conclu-

29 See Lipscomb v. Diamiani, 226 A. 2d 914 (Del. 1967), where a Superior Court of Delaware concluded that since contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant, and the avoidable consequence arises after the wrongful act of the defendant, then the seat belt issue is not controlled by the doctrine of avoidable consequences because the failure to fasten the seat belt occurred before defendant's negligence and before plaintiff's injury. Therefore, the failure to use an available seat belt is not grounds for a reduction of the plaintiff's damages. See also Romankevitz v. Black, 16 Mich. App. 119, 167 N.W. 2d 606 (1969), where a Michigan court of appeals held that plaintiff has no duty to use a seat belt, and the failure to do such is not contributory negligence, and is not appropriate as a damage-mitigating factor under the avoidable consequences doctrine. The court reasoned that an unbuckled seat belt does not cause an accident, and since there is no duty to buckle the failure to do such cannot be deemed a breach of duty to avoid consequences or minimize damages.


31 273 N.C. at 238, 160 S.E. 2d at 73.

32 Other courts have also indicated that the determination as to whether an occupant of a car involved in normal every day driving should or should not be required to wear a seat belt should be left to the legislature. See Lipscomb v. Diamiani, 226 A. 2d 914 (Del. 1967); Romankevitz v. Black, 16 Mich. App. 119, 167 N.W. 2d 606 (1969); Dillon v. Humphreys 56 Misc. 2d 211, 288 N.Y.S. 2d 14 (1968); Robinson v. Lewis, 254 Ore. 52, 457 P. 2d 483 (1969).

33 273 N.C. at 233, 160 S.E. 2d at 73.

34 Id. at 238, 160 S.E. 2d at 70.
sion that, since there is no duty to use seat belts, nonuse does not constitute a defense, has been upheld in other jurisdictions.\textsuperscript{35}

A difficult problem exists as to the production of evidence indicating that use of a seat belt would have prevented or reduced the injuries sustained. The Supreme Court of South Carolina upheld,\textsuperscript{36} \textit{inter alia}, the trial court's decision to strike from the pleadings the defendant's affirmative defense of contributory negligence in that plaintiff omitted to utilize an available seat belt. The Supreme Court's decision was based on the fact that there was no evidence indicating that plaintiff's failure to use an available seat belt contributed in any way to the occurrence of the accident, or that the injuries would have been reduced if the seat belt had been worn.\textsuperscript{37} It should be noted that the South Carolina Supreme Court has seemingly overruled a decision it had rendered three years previously\textsuperscript{38} where it had held that the defendant's pleadings, which alleged that the plaintiff was guilty of contributory negligence in failing to wear an available seat belt, should not have been stricken by the trial judge.

There are cases in which the courts have accepted, in varying degrees, the validity of the seat belt defense. The defense has prevailed in some courts by a finding that there is a legal duty to wear seat belts. The Supreme Court of Wisconsin and an appellate court in Illinois have held,\textsuperscript{39} \textit{inter alia}, that although it is not negligence per se to fail to use an available seat belt — since the statutory standard requires only the installation of seat belts in the vehicle — there is a duty to use available seat belts based on the common law standard of ordinary care. Both courts reasoned that it is obvious that persons using seat belts are less likely to sustain injury, and if injured, the injury is likely to be less serious. Consequently, an occupant of a motor vehicle either knows or should know of the additional safety factor produced by using seat belts. The Wisconsin Supreme Court in \textit{Bentzler},\textsuperscript{40} stressed that the appropriate jury question is not whether plaintiff's negligent failure to use the seat belt contributed to the cause of the accident, but whether it contributed to the injuries sustained. Therefore, there must be a causal relation between the negligent nonuse of the seat belt and its contribution to the injuries.

\textsuperscript{35} See Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969), where a U.S. District Court in Florida held, Under Oklahoma law, that there is no duty on the part of an occupant of an automobile to use an available seat belt; therefore, it is improper to submit this issue to the jury. See also Robinson v. Lewis, 254 Ore. 52, 457 P. 2d 483 (1969), where the Oregon Supreme Court declared that there is no common law duty to wear seat belts in ordinary vehicular travel.


\textsuperscript{37} Id. at 271, 166 S.E. 2d at 103-104.


\textsuperscript{39} Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W. 2d 626 (1967); Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E. 2d 329 (1968).

\textsuperscript{40} 34 Wis. 2d at 387, 149 N.W. 2d at 640.
Although most courts have seemingly been reluctant to invoke the doctrine of contributory negligence for nonuse of an available seat belt, the doctrine has been employed by some courts. In Texas, recovery was denied to a plaintiff who omitted to use an available seat belt.\(^{41}\) An expert witness testified that if the belt had been worn, the plaintiff would not have hit the windshield. The jury concluded that the plaintiff was guilty of contributory negligence and that 95% of his injuries would have been avoided if the belt had been worn. In another Texas case\(^ {42}\) an appellate court declared that the duty to use an available seat belt, if any, should be considered in mitigation of damages rather than as contributory negligence.\(^ {43}\) The court reasoned that the seat belt issue should be considered in connection with damages rather than liability because the nonuse of an available seat belt may cause or aggravate the injury, but would not be a contributing cause to the accident.

The seat belt defense has not met the aforementioned obstacles when litigated in a comparative negligence jurisdiction. Perhaps the defense has a better chance of succeeding in such a jurisdiction because contributing negligence on the part of a plaintiff is not a total bar to recovery. The defense is aimed at damage mitigation, and these courts are well acquainted with this kind of approach. Two Wisconsin cases,\(^ {44}\) under the comparative negligence doctrine, have held the plaintiff guilty of negligence for nonuse of an available seat belt.

Many of the aforementioned cases made reference to the apparent lack of legislation as to the seat belt issue. It would indeed be quite helpful to investigate the statutes that have been enacted in regard to seat belts.

**RELEVANT STATUTES**

Of the twenty-nine states\(^ {45}\) that have enacted legislation requiring the installation or equipment of seat belts, none explicitly require the occupant of the motor vehicle to use them. Fourteen states\(^ {46}\) merely require

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\(^{41}\) Vernon v. Droeste (District Court of Brazos County, Tex., 1966), reported in 7 FOR THE DEFENSE, No. 7 (Sept. 1966).

\(^{42}\) Sonnier v. Ramsey, 424 S.W. 2d 684 (Tex. App. 1968).

\(^{43}\) Id. at 689.


\(^{45}\) See Appendix I, infra.

\(^{46}\) See Appendix 1 infra. A typical example of this type of statute is found in GEORGIA CODE ANN. §68-1801 (1964), which indicates that after January 1, 1964, no new private passenger automobile is to be sold to the public unless equipped with two sets of seat belts in the front seat.
that seat belts be equipped within the vehicle. Fifteen states require seat belts to be installed for use. There are five states which specify that a failure to use a safety belt, after installation, is not to be considered as negligence or that evidence as to nonuse of a seat belt is inadmissible. These five states have statutes which therefore indicate that the nonuse of an available seat belt is not to be used as a standard of care in a civil action. There are, however, two statutes which require the use of seat belts; but, these enactments apply only to the drivers of certain public transportation, government vehicles, and to occupants of driver training vehicles.

THE SIGNIFICANCE OF ROBERTS v. BOHN

The significance of *Roberts* lies in its implications for the future of the seat belt defense in Ohio. In the cases which indicate that a plaintiff's nonuse of an available seat belt raised a jury question of contributory negligence the material factors were:  
1. a judicial finding that a duty exists to use ordinary care by “buckling up” one's belt, and  
2. credible evidence that seat belts prevent, reduce, or minimize injuries.

The Ohio court, in *Roberts*, rejected the above factors in favor of the arguments used in holding that a plaintiff's failure to use an available seat belt is not contributory negligence:  
1. the affirmative defense of contributory negligence should be eliminated or contracted, not expanded,  
2. because it is not clearly shown that the use of seat belts do in fact protect the wearer, the argument that nonuse is contributory negligence is conjectural;  
3. the legislature should decide if seat belts are to be worn, and  
4. a plaintiff need not foresee the possible negligence of others because he has the right to assume that other people will not act in a negligent manner.

Finally, the court, in *Roberts*, has concurred with another rationale used to reject the seat belt defense; that is, notwithstanding the evidence supporting the beneficial results of seat belt use, acceptance of the seat belt by the public has not been realized. As a result, the social utility of

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47 See Appendix I *infra*. A typical example of this kind of statute is found in INDIANA STATUTES ANN. 47, §2241 (1963), which indicates that it is unlawful to buy, sell etc. an automobile (starting with the 1964 models) unless the automobile is equipped with safety belts installed for use in the front seat.

48 See Appendix I *infra*. An example of this type of statute is Virginia's statute, VIRGINIA CODE 46.1-309.1 (Supp. 1970) which reads: "Failure to use such safety belt ... after installation shall not be deemed to be negligence." Another example is IOWA CODE ANN. 321.445 (1965) which reads: "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."


50 See 42 OHIO BAR 2 at 26 (1969).

51 Id. at 29.
wearing a seat belt must be established in the mind of the public before nonuse can be deemed as negligence. Otherwise, the courts would be imposing a standard of conduct rather than applying a standard of care accepted by society.52

It appears as if Ohio will remain with the majority view in regard to the seat belt defense issue. The result for Ohio motorists might in fact be that a driver or passenger of a motor vehicle may be risking either life or aggravated injury by not buckling up, but will not be risking his right to recover for a tortious wrong.

CONCLUSION

Over 49,000 Americans died as a result of automobile accidents in 1965. An additional 3,600,000 were injured. The financial loss from these deaths and injuries was $8,500,000,000.53 It is predicted that in 1975 approximately 100,000 Americans will perish in highway accidents.54 Well-documented studies have indicated that seat belts are effective in preventing deaths and reducing injuries caused by automobile accidents.55 Notwithstanding the aforementioned data, the majority view is that tortious significance should not be attached to the failure to use an available seat belt.

Until the following arguments are overcome the majority view's position seems likely to prevail in the future. There are conflicting opinions concerning the safety value of seat belts; therefore, it would seem as if a legislature directive is needed before the courts should impose a duty of use of the seat belt. The evaluation of seat belt effectiveness could best be determined by the legislature and should not be a judicial function. If the court decided to take on the burden of determining seat belt effectiveness, an even more difficult burden would be placed on the jury. Not only would the jury be required to weigh the variables and the conflicting expert opinions in regard to the value of the seat belts in order to determine whether a particular plaintiff was negligent, but the jury would need to determine the difficult question of causation. Due to the numerous variables which are involved in an automobile accident, could the jury confidently say that the plaintiff's injuries would not have occurred had the seat belt been worn?56

52 See Roethe, Seat Belt Negligence in Automobile Accidents, 1967 Wis. L. Rev. 288, 297.
There are other arguments which indeed support the soundness of the majority view's position. The application of the contributory negligence doctrine to nonuse of available seat belts might in fact undermine the judicially recognized presumption that until reasons to the contrary be established, other users of the highways will act with due care. The trend in contemporary tort law has been to more effectively compensate the victim for loss. A manifestation of this trend has been the contraction of unduly severe doctrines which entirely preclude recovery.\textsuperscript{57}

The advocates of the minority view (tortious significance should be attached to the failure to use an available seat belt) should be reminded that there are indeed some inherent rebuttable presumptions to be considered in relation to the arguments that urge the application of the seat belt defense. The apparent inability to prove a relationship between the injuries sustained and the failure to use an available seat belt is a material problem that should be resolved before nonuse can be deemed as contributory negligence.\textsuperscript{58}

Another dilemma evolves in regard to the availability of seat belts. The state seat belt statutes require installation of the belts after a specified date of manufacture, sale, or other transfer of the vehicle;\textsuperscript{59} and most statutes require only installation of front seat belts.\textsuperscript{60} Therefore, an argument can be asserted that it would be inequitable and unsound to place tortious significance only to the occupants of cars manufactured after the prescribed date within the state statute, and perhaps only to the front seat occupants. A second argument would be related to the state statutes, of which fourteen states are involved,\textsuperscript{61} which require merely that the vehicle be equipped with seat belts. The dilemma would be the...

\textsuperscript{57} Id. at 391-392.


\textsuperscript{60} Id.

\textsuperscript{61} See Appendix I infra.
situation in which the vehicle was equipped with seat belts but for some reason they were not readily available for use. The jury would be hard pressed to decide when a particular plaintiff would be justified in nonuse of the belt due to the fact that it was not readily available for use.

Another difficult problem arises as to the doctrine of avoidable consequences. Could a jury, indeed could an expert, adequately determine what portion of the plaintiff's injury was received because of nonuse of the seat belt? Is this a determination that can be made rationally; or is it one that might breed prejudice, emotionally based verdicts, or pure speculation?

The advocate of the seat belt defense would assert that a reasonable man would in fact use an available seat belt. Is it a valid statement that a substantial percentage of the public accept all the safety facts espoused by experts as to the effectiveness of the seat belt? The fact that some experts challenge the effectiveness of the seat belt as a safety device, coupled with the fear that some people have in regard to the seat belt as related to an accident involving either fire or water, gives rise to the question of does, or would, a reasonable man use a seat belt.

Another problem arises as to the fact that in spite of the studies indicating the effectiveness of the seat belt as a safety device, acceptance of the belt by the public has not been realized. Legally, it might be wiser to insist that the social utility of wearing seat belts be established in the minds of the public before nonuse is deemed as negligence. The courts, in tort law, should avoid imposing a standard of due care that fails to actually represent that of the general public.

Finally, is the risk of an automobile accident so high, when considered on a percentage basis, that the courts should hold that there is a duty to foresee another person's possible negligence and to therefore protect yourself by wearing a seat belt? What is troublesome here is just where does foreseeability stop in tort law? If a plaintiff would have the duty to foresee another driver's possible negligence and thus protect himself by using a seat belt, might it be argued, by analogy, that the same plaintiff had the duty to foresee such possible negligence and therefore should have stopped at a green light? If the courts expand the foreseeability element too far, absurd results shall emerge.

In conclusion, it may reasonably be asserted that tortious significance should not be attached to a plaintiff's nonuse of an available seat belt. Most courts that have reviewed the seat belt defense have looked with disfavor upon a defendant's attempt to invoke the seat belt defense. It would seem wiser, as many courts indicated, to leave the seat belt issue to the legislature's determination. It should be noted that U.S. Department
of Transportation has proposed a plan to force manufacturers to install seat belts with ignition interlocks. Under this proposed plan, manufacturers would install seat belts with ignition interlocks in the front seating positions. The interlock system would prevent the engine from starting if a front seat occupant failed to buckle his seat belt. However, unfastening the seat belt would not stop the engine after it was started. The aforementioned plan is evidence as to the government’s involvement in regard to the seat belt. The executive and legislative branches are better equipped to evaluate the effectiveness of the seat belt as a safety device; and it would therefore seem logical to leave such a determination to them. If the courts should undertake such a determination, and attach legal consequences to the conclusion drawn, the danger of confusion and/or conflict with the seemingly oncoming legislative/executive determination is apparent.

JOHN P. MURPHY, JR.

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APPENDIX I

This appendix indicates the various types of seat belt legislation relevant to this casenote.

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<th>STATUTE</th>
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*The state statutes in Column I indicate that seat belts are to be equipped in the motor vehicle. Those in Column II indicate that seat belts are to be installed for use within the motor vehicle. The statutes in Column III expressly declare that nonuse of seat belts is inadmissible in an action brought for damages; or, that nonuse of a seat belt is not deemed as negligence and not to be considered as a damage mitigating factor.
II. WHAT THE COURTS SHOULD DO AND WHY

ROBERTS v. BOHN\(^1\) represents only the second reported decision in this state confronting the Ohio judiciary with the “Seat-Belt Defense.” Consistent with their previous decision in BERTSCH v. SPEARS,\(^2\) the court in ROBERTS said that:

In the absence of a statute to the contrary, there is no common law duty imposed upon an occupant of an automobile to wear a seat belt in ordinary vehicular travel and the failure to use an available seat belt is not contributory negligence as a matter of law.\(^3\)

Upon closer scrutiny of the instant case, the court’s disposition of the seat-belt defense seems cursory and its unreserved negation of the defense’s applicability in tort law appears untenable. Indeed, as shall be made clear, only a few jurisdictions, having been confronted with the defense, have remained pertinacious to the belief that seat belt use is a matter for the legislature. Those few jurisdictions contend that without a legislative mandate, the defense continues to be in no way apposite to an automobile negligence action.

In reality, the judiciary’s call for legislative action has been answered. Legislative regulation concerning seat belts has been enacted to the extent that obvious practical limitations permit.\(^4\) In the end, the burden rests with the legal profession and more particularly, with the bench.

The plaintiff in ROBERTS sustained personal injuries when her vehicle collided with that of the defendant. A general verdict was rendered at the trial level in favor of the defendant. The plaintiff’s appeal was founded upon several assignments of error, five of which specifically concerned the seat belt defense; their disposition is set out below:

1. The determination as to whether an occupant of an automobile should or should not be required to wear a seat belt should be left to the Legislature.

2. In the absence of a statute to the contrary, there is no duty on an occupant of an automobile to wear a seat belt in ordinary vehicular travel, and the failure to use an available seat belt is not contributory negligence as a matter of law.

3. Evidence of the failure of an occupant of an automobile to use an available seat belt is generally not admissible in an action for personal injuries arising out of an automobile accident.

\(^1\) 26 Ohio App. 2d 50, 269 N.E. 2d 53 (1971).
\(^3\) 26 Ohio App. 2d at 56, 269 N.E. 2d at 58.
\(^4\) This point is discussed infra beginning at page 148 and continuing through page 150 of the text.
4. An automobile is not an inherently dangerous instrumentality. It only becomes dangerous because of its negligent operation or because it is allowed to be out of repair.

5. In the absence of any statute to the contrary, there is no duty on the part of an occupant of an automobile to anticipate another's negligence and to protect his own safety by such precautions as wearing available seat belts.5

To define the seat belt defense would be to obfuscate its scope and straiten its applicability. It seems to have originated from an automobile negligence action in a Wisconsin Circuit Court in 1964.6 The plaintiff was not using her seat belt when her vehicle collided with that of the defendant. The trial judge submitted the issue of her failure to use the installed seat belt to the jury. The jury found the omission to be negligence and reduced her award by ten per cent. There is no statutory mandate in Wisconsin that seat belts are to be utilized. The Wisconsin statute, Section 347.48, only requires seat belts to be installed. Noting this limited statutory directive, the trial judge concluded, "It...must follow that the legislature intended that these seat belts be used in certain circumstances."7

In less than a decade since Stockinger, the defense has been presented numerous times. In 1967, the Wisconsin Supreme Court ruled that since their statute, compelling seat belt installation in automobiles after 1962,8 did not also compel their use, it was not negligence per se to fail to use them.9 However, the court did conclude there was a duty, founded on common law standards, to use an available seat belt. Explaining, they said, "[I]t is obvious that, on the average, persons using seat belts are less likely to sustain serious injury and if injured, the injuries are likely to be less serious."10

The significance of this case is to be found in the holding of the Wisconsin Supreme Court that:

...[W]here seat belts are available and there is evidence before the jury indicating a causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard.11

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5 26 Ohio App. 2d at 50-51, 269 N.E. 2d at 53.
6 Stockinger v. Dunisch (Sheboygan County Circuit Court, Wisconsin, 1964), reported in 5 FOR THE DEFENSE, No. 10 at 79 (1964).
7 Id.
9 Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W. 2d 626 (1967).
10 Id. at 386, 149 N.W. 2d at 640.
11 Id.
In Texas, the defense was not only presented, but was also accepted. The jury, deciding the case of *Vernon v. Droeste*, found that the plaintiff’s failure to wear the available safety harness with which the car was equipped, constituted contributory negligence. The plaintiff’s recovery was therefore reduced ninety-five per cent.

Texas is a contributory negligence state and has no statute making the installation of seat belts mandatory. However, in the *Vernon* case, the duty to wear an available seat belt or safety harness and the apportionment of damages attributed to the plaintiff’s contributory negligence, were based on the common law principles discussed in Defense Memo, “Seat Belt Liability.” Two of these principles are that the plaintiff has a duty to use reasonable care for his own safety and that where the plaintiff’s prior conduct does not bring about the impact or accident but has aggravated the ensuing damages, the plaintiff’s recovery is reduced to the extent that his damages have been aggravated as a result of his own conduct.

In spite of the foregoing, the court in *Roberts* states they prefer the authority of the majority of cases that:

... [T]he determination as to whether an occupant of an automobile should or should not be required to wear a seat belt should be left to the Legislature. In the absence of a statute to the contrary, there is no common law duty imposed upon an occupant of an automobile to wear a seat belt in ordinary vehicular travel, and the failure to use an available seat belt is not contributory negligence as a matter of law.

The court quite correctly echoed the status of seat belt use pursuant to the concept of negligence as a matter of law, to wit: the failure to use the available belt absent a compelling statute, is not negligence as a matter of law. However, it is from this accepted rule that the court concludes:

Therefore, evidence on the failure of an occupant of an automobile to use an available seat belt is generally not admissible in an action for personal injuries arising out of an automobile accident.

The above quotation, in the context it is written and used by the court, must be considered a *non-sequitur*. It illogically ignores any rational argument founded upon common law principles as to a duty to use seat belts (which arguments, the court denounced later therein).

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13 7 For The Defense, No. 2, Feb. 1966. See also 7 For The Defense, No. 6, June 1966.
14 *Supra* note 12, at 53.
15 26 Ohio App. 2d at 56, 269 N.E. 2d at 58.
16 *Id.*
Contrary to the opinion of the Ohio court, Justice Moran, commenting in his opinion in the Illinois case of *Mount v. McClellan*, said:

> It seems to us the better reasoning favors the admissibility of the evidence. . . . The use or non-use of seat belts, and expert testimony, if any, in relation thereto, is a circumstance which the trier of the facts may consider, together with all other facts in evidence, 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.\(^{17}\)

As to whether the court in *Roberts* was correct in stating their position was aligned with the “majority,” one need only analyze the relevant cases to cast the necessary doubt. Approximately forty-one decisions have been rendered wherein the defense was argued, but these concern the law of only twenty-three jurisdictions.\(^{18}\) Only half these jurisdictions have seen the defense at the appellate level.\(^{19}\) At the highest court, only five states and one Canadian province have confronted the defense, with three of these courts approving it,\(^{20}\) only two rejecting it,\(^{21}\) and one failing to consider its merits at all, due to other factors in the case.\(^{22}\)

To compile the cases in categorical fashion, *i.e.*, defense rejected or defense accepted, would be numerical surplusage. It is only under the harsh light of objective scholarship that their force and value become apparent. Needless to say, because the defense was accepted, it does not necessarily follow it was also successful. It is unfortunate that this distinction is not made more often concerning the defense discussed herein, for in many situations the defense was not even considered due to other factors in the case. Included therein would be such situations as: (a) the pleadings did not raise the defense;\(^{23}\) (b) whether or not plaintiff neglected to use the available belt was not established;\(^{24}\) (c) pursuant to the damages issue, it was not shown that seat belt use would have lessened

\(^{17}\) 91 Ill. App. 2d 1, 4, 234 N.E. 2d 329, 330-331 (1968).

\(^{18}\) See Appendix I infra.

\(^{19}\) Id.


\(^{22}\) Brown v. Bryan, 419 S.W. 2d 62 (Mo. S. Ct. 1967).

\(^{23}\) Lentz v. Schafer, 404 F. 2d 516 (7th Cir. 1968).

the severity of the injuries or prevented them altogether; and finally (d) the defense made no request the jury be instructed as to the seat belt issue. Thus, despite the fact that the seat belt defense may have been interposed in the above fourteen cases, for one to thereby assert that its failure indicates a rejection on the merits in all phases of its application, would be completely inaccurate. Indeed, unlike the court in the instant case, one could readily conclude that the defense was at least accepted to the extent that its elements were admissible as evidence. That those elements were not properly presented or proven should not reflect upon the admissibility of the argument.

Having placed Ohio's "majority" in its proper perspective, we look to those decisions where the defense was considered on its merits and determine the alternatives.

Absent a statutory mandate compelling a person to wear his or her safety belt, these courts have all concluded the failure to use one's safety belt is not negligence as a matter of law. But what of the consideration courts have given to the argument that, "under the circumstances of a given case, a reasonable man of ordinary prudence would have made use of the available belts?"

The Roberts court would have one believe there could never be a common law duty to wear seat belts without legislation and the omission could not be negligence as a matter of law (Emphasis added). It is interesting to note the court included the phrase "as a matter of law." We shall dispose of this impossibility when discussing the practical limitations of legislative action and the extent to which such action has gone to increase seat belt utilization. Aside from this, the court neglects to look further and entertain the thought that perhaps there is a common law duty based upon the standard of ordinary care.


26 Brown v. Bryan, 419 S.W. 2d 62 (Mo. 1967).


28 26 Ohio App. 2d at 56, 269 N.E. 2d at 58.
Initially, it must be recognized that five states, Iowa, Maine, Minnesota, Tennessee and Virginia, have legislative provisions to the effect that failure to use seat belts shall not be considered as negligence, or that the proof of the lack of their use is inadmissible in any civil action for personal injury damages. That these five states would find such a provision necessary is a strong indication of the plausibility of the seat belt defense. Certainly the argument could be made that without such provisions, non-use might be considered contributory negligence.

Further, in the instant case, the court said that: "in the absence of any statute to the contrary, there is no duty on the part of an occupant of an automobile...to protect his own safety by such precautions as wearing available seat belts." 30

Looking to the Restatement (Second) of Torts, there is apparent disagreement. There, contributory negligence is conduct which involves an undue risk of harm to the actor himself. It is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered. 31 Commenting further, the Restatement says:

An actor is not necessarily required to pursue the same course of conduct for his own protection as is demanded of him for the protection of others. There may be circumstances in which a jury may reasonably conclude that a reasonable man would take more, or less, precaution for the protection of others than for his own safety. 32

The concern however, is not so much with the Ohio court’s holding on seat belt utilization not being a matter of law. The fear is in the dictum of the Roberts decision that:

... [E]ven if there was general acceptance of the value of and need for using seat belts while occupying a motor vehicle, we feel that there is a serious question as to any legal duty to wear seat belts in the absence of a statute to the contrary. 33

Such a statement is portentous to the future of this tort trend, when precipitated by a perfunctory refusal to even consider the merits of the defense. Such an adumbration for the future should be preceded by an extensive, if not exhaustive, analysis of the relevant law in that field, as well as its legislative history.

Undoubtedly, the legislatures have not enacted seat belt legislation so as to add aesthetic beauty to the motor car. Why then, do some courts still

30 26 Ohio App. 2d at 58, 269 N.E. 2d at 59.
31 RESTATEMENT (SECOND) OF TORTS, §463, Comment b (1965).
32 Id. at §464, Comment f.
33 26 Ohio App. 2d at 57, 269 N.E. 2d at 59.
await statutes mandating the use of seat belts? I suggest the legislatures can do no more without exceeding the bounds of logical discretion. Seat belt installation statutes originated around 1962. By 1970, thirty states had statutes requiring the installation of safety harness or seat belt devices in automobiles. Neither the federal standards nor the state statutes required their use, except in very limited situations. Legislation requiring seat belt use would be fraught with inequities. Since the statutes generally require the installation of belts after a specified date of the manufacture of the vehicle, the question remains as to what date shall be so specified and what of the vehicles manufactured prior thereto? Certainly it would not be feasible to require all vehicles to be equipped with seat belts so a statute compelling their use could be equitably administered. Moreover, what does one do about the particular situations that develop preventing compliance with the statute? Persons recovering from or suffering from certain abdominal disorders, complicated pregnancies or other medical conditions, might be advised that, medically, seat belt use could be hazardous. Clearly, these persons would be in violation of the statute and subject to a ruling of negligence per se. Of course, the legislators could foresee such contingencies and thereby specifically exclude them from compliance. Yet, can anyone foresee all the possible exclusory circumstances? I think not, and it is therefore understandable we have no such compelling legislation. To ask the courts to enforce such legislation would be to compel them to inequitably administer a standard of conduct; a far removed thought from the hitherto generally accepted imposition of a standard of ordinary care. Notwithstanding the legislative preclusion of such standards, there could certainly be circumstances wherein the non-use of seat belts would not be a breach of a common law duty of care. Such exceptions can and do exist in the law of negligence where extenuating circumstances compel such non-conformity from standard behavior.

Recent legislative developments serve only to substantiate what has been set out above. They are attempting to compel seat belt use, short of explicitly commanding so. A recent notice from the National Highway Traffic Safety Administration, Department of Transportation, proposes:

... [T]o allow manufacturers to install seat belts with ignition interlocks for the period up to August 15, 1975.

... (2) An interlock system would prevent the engine from starting if any front seat occupants did not have their belts fastened.

34 See Appendix II infra.
35 Id.
In order to prevent defeating the systems by leaving the belts fastened permanently, it would be necessary to fasten the belts after an occupant is seated, i.e., the seat sensor and the belt switch would have to operate sequentially, to start the engine.\(^\text{38}\)

This option is a response to several manufacturers' requests to delay the date when passive protection must be provided.

It is intended by this option to provide a high level of seat belt usage, and to increase the life- and injury-saving effectiveness of installed belt systems, in the interim period before passive systems are required.\(^\text{39}\)

I maintain that in light of the above, legislators have done all, save buckle the belt for you, and that their intent is clear: they (the legislators) have recognized the need for and value of seat belts and they implicitly seek to compel their use.

In view of the above, it remains only to consider the judiciary's role in the seat belt defense consonant with the principles of negligence.

We know contributory negligence is that conduct of the plaintiff which involves or results in an undue risk of harm to himself.\(^\text{40}\) Further, "... the duty of a guest in a car is to exercise reasonable care to avoid injury."\(^\text{41}\) That an automobile is not an inherently dangerous instrumentality is also well recognized.\(^\text{42}\) However, the fact that seat belts do prevent or reduce injuries, and deaths, is one so generally recognized, that it could very easily be a matter for judicial notice.\(^\text{43}\) The National Safety Council forever reminds the general public to "Buckle Up For Safety," and there are enough thoroughly documented studies that prove conclusively that seat belts are effective devices to prevent or lessen injuries and death.\(^\text{44}\)

With the incessant education we have received of late, the general public either knows, or should know, of the increased risk of being involved in an automobile accident and the effectiveness of the seat belt protective devices available to them.

Yet, the Roberts court, in the face of overwhelming statistical data, clings tenaciously to what seems to be, at best, a tenuous proposition of law that, "... in spite of an intensive campaign to promote their use, seat


\(^{40}\) Supra note 31.


\(^{43}\) See 29 AM. JUR. 2d Evidence, §§18, 19 (1963).

\(^{44}\) See studies referred to in 1967 Wis. L. Rev. 288, 292.
belts are not being used by the general public."45 Might one be too presumptuous to conclude that the experts know something the laymen refuse to acknowledge? We all know how easy it is to adopt the "it can't happen to me attitude." Cigarette smoking in light of the Surgeon General's Report is indicative of this attitude.

Despite the court's reference to the public's non-use of seat belts, should the standard of ordinary care represent the custom of the general public? Custom is not conclusive, nor does it necessarily meet the test of reasonableness espoused in tort law. Perhaps one need be reminded that the reasonable man of ordinary prudence is a fictitious person.46

The actor is required to do what such an ideal individual is supposed to do in his place. . . . He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard . . . he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment.47 (Emphasis added).

How then, can the Ohio judiciary imply that such a paragon of prudence would openly flaunt the factual effectiveness of seat belts as well as the legal principles that require he use reasonable care for his own safety? Further, if it is to be the jury's social judgment that must characterize the particular behavior acceptable to that community, and not the court's, it is clear that the court invaded the province of the jury in refusing to admit the evidence. Indeed, stating later that were such conduct (not wearing seat belts) unacceptable to the particular community, the court hints at continuing to refuse its admissibility.48

I would hope it foreseeable by now that there is at least a plausible argument that there may be a common law duty to wear an available seat belt, the breach of which may constitute contributory negligence under certain circumstances. Hopefully, when next confronted with such a defense, the Ohio court will permit the jury to decide the issue.

Further, in analyzing foreseeability as an element that might create the duty to wear available seat belts, the Roberts court said: "there is no duty on the part of an occupant of an automobile to anticipate another's negligence and to protect his own safety by such precautions as wearing available seat belts."49

It cannot be gainsaid that this is a standard to which the "ever prudent reasonable man" would adhere. Accident probability is very high

45 26 Ohio App. 2d at 56, 269 N.E. 2d at 58.
46 Supra note 37, at 150.
47 Id. at 150-151, n. 19-20.
48 26 Ohio App. 2d at 57, 269 N.E. 2d at 59.
49 Id. at 58, 269 N.E. 2d at 59.
today and it is common knowledge that its ever increasing frequency and severity are becoming a national problem. For one to posit that others will exercise proper care is hardly a safe absolute. Since the risk of auto accidents has increased, as has the danger of severe damage, it seems hardly unreasonable to anticipate possible negligence by any man.

In view of recent highway safety campaigns by the National Safety Council and other national groups, it is virtually inconceivable that prudence would permit a reasonable man to engage in vehicular travel with little or no concern for defensive behavior. The emphasis today is certainly that a motorist cannot rely on the assumption that others will obey the rules of the road. Hence, the slogan, "Watch out for the other guy!" Advertisements through members of the media admonish today's motorist that if he relies on the fact he has the right of way, he may be right but "dead right." Similarly, driver educational programs have been implemented nationwide to facilitate the public's knowledge of defensive driving. With such a national recognition that one must anticipate the possible negligence of others, it is indefensible that one could be considered reasonably prudent when not employing his or her seat belt.

Despite the fact that one may now be convinced that either there is a common law duty to wear an available seat belt or that the argument as a defense is at least plausible, the inherent difficulty still remains in the contributory negligence states like Ohio, that such negligence, however slight, completely bars recovery. The hesitation, of course, is that the failure to wear a seat belt could rarely be a proximate cause of the accident, so to bar recovery is thought too harsh.

The author feels, however, this inquiry is not consistent with the elements of a defense founded upon the theory of contributory negligence.

Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.\(^{50}\)

The above rather strongly suggests that the appropriate question is not whether the plaintiff's negligence contributed to the cause of the accident, but rather whether it contributed to the harm the plaintiff has suffered. By way of illustration, the Restatement confirms the above:

A is negligently driving an automobile at excessive speed. B's negligently driven car crosses the center line of the highway and scrapes the side of A's car, damaging its fenders. As a result A loses control of his car, which goes into the ditch, where A's car is wrecked and A suffers personal injuries. The evidence supports the conclusion that A's excessive speed was not a contributing cause of the collision,

\(^{50}\) Supra note 31, at §463.
but was a substantial factor in causing his car to go into the ditch. On the basis of such evidence, A may recover for the damage to his fenders but not for the subsequent damage to his car or for his personal injuries.\footnote{Id. at §465, Comment c.}

If the inquiry as to the plaintiff's contributory negligence was restricted to "cause of the accident," the plaintiff would have been found free from such negligence and entitled to full recovery. However, since the proper analysis is whether the plaintiff's act or acts contributed to the harm, the finding of contributory negligence is sustained.

This example further illustrates the need for the courts to spawn a bifurcated theory of negligence. Such a development would further dispel the courts' fears of applying contributory negligence to the seat belt defense. Indeed this dichotomy need exist since a plaintiff's failure to "buckle-up" should not necessarily preclude recovery for damage to his vehicle. If the plaintiff's negligent conduct, along with that negligent conduct of the defendant, was found to be the proximate cause of the accident, the plaintiff should not expect to recover for damages so occasioned to his property or person. If, on the other hand, the plaintiff's negligent conduct contributed only to his personal injuries, then it necessarily follows that he is contributorily negligent solely in that regard and accordingly should be barred from recovering those damages consistent therewith.

In the end, the error seems to have been the court's misapplication of the concept of "proximate cause" and to what inquiry that concept should be directed. Certainly the consideration must be directed to the damages for without damages, there is no tort.\footnote{Supra note 37, at §30.} Additionally, "it follows that the statute of limitations does not begin to run against a negligent action until some damage has occurred."\footnote{Id.}

This very misapplication or confusion leads one to believe that perhaps there is credence to the following:

(c) The very confusion and lack of meaning in the term "proximate cause" has sometimes allowed courts to avoid the logical consequences of an undesirable doctrine when they are unwilling to repudiate it or to undertake the intellectual rigor required for working out rational exceptions to it.\footnote{James, Contributory Negligence, 62 Yale L.J. 691, 726-27 (1953).}

In such a situation, there is perhaps another doctrine, similar to contributory negligence, which may be utilized. The rule of "avoidable
"avoidable consequences" denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff.\textsuperscript{55}

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.\textsuperscript{56}

At this point we should refer again to Justice Moran who restricted the applicability of the seat belt defense by saying:

However, this element should be limited to the damage issue of the case and should not be considered by the trier of the facts in determining the liability issue. Whether a person has or has not availed himself of the use of seat belts would have no relevancy in determining the cause of an accident.\textsuperscript{57}

Thus, it appears that though the doctrine of contributory negligence may seem too harsh, for the present, for some courts, at least the concept of avoidable consequences should be acceptable for apportioning damages. The damages are to be compensatory, not profitable. As such, the plaintiff should not be permitted to further recover for those damages which through his own negligence he could either have avoided or perhaps prevented.

In the last analysis, the only conclusion that can be drawn with any degree of certainty is that a mere installation statute, coupled with non-use of the seat belt, is not negligence per se. Contrary to the assertion of the Ohio court, the number of courts which have rejected all phases of the defense is relatively small. Most courts seem to have either accepted the defense, rejected only one phase of it, or indicated it would be acceptable in the proper circumstance. Unfortunately, the majority of courts have yet to even face the defense.

One thing is certain: the case of \textit{Roberts v. Bohn} should have given the seat belt defense more consideration. \textit{Roberts'} surface treatment of the law in this area cannot be considered definitive or exhaustive. The better rule seems to be, therefore, that if competent evidence can show a causal connection between the failure to use seat belts and the resultant injuries, the admissibility of such evidence should not be withheld from the jury, simply because the court objects to the particular legal theory as a defense. If the legal theory can properly place the fault upon he who caused the harm, then justice would best be served by admitting the facts and instructing the jury thereby permitting the trier of the facts to serve their function. I see none of the courts' fear in so doing.

\textbf{JOHN A. TERILLA}

\textsuperscript{55} \textit{Supra} note 37, at 423.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} Mount v. McClellan, 91 Ill. App. 2d at 5, 234 N.E. 2d at 331 (1968); \textit{e.g.}, Sonnier v. Ramsey, 424 S.W. 2d 684 (Texas Civ. App. 1968).
APPENDIX I

Index of Cases Considering The Seat Belt Defense

Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W. 2d 626 (1967).
Brown v. Bryan, 419 S.W. 2d 62 (Mo. 1967).
General Motors v. Walden, 406 F. 2d 606 (10th Cir. 1969).
Lentz v. Schafer, 404 F. 2d 516 (7th Cir. 1968).
Mays v. Dealers Transit, 441 F. 2d 1344 (7th Cir. 1971).
Stockinger v. Dunisch (Sheboygan County Circuit Court, Wisconsin, 1964).
Turner v. Pfugler, 407 F. 2d 648 (7th Cir. 1969).
Vernon v. Droeste (District Court of Brazos County, Texas, 1966).
APPENDIX II

Seat Belt Installation Statutes

CONNECTICUT GEN. STAT. ANN. §14-100a (Supp. 1970).
ILLINOIS STAT. ANN. 95 1/2, §12-603 (Supp. 1972).
KENTUCKY REV. STAT. ANN. 189.125 (1962).
MICHIGAN LAWS ANN. §257.710b (1963).
MISSISSIPPI CODE ANN. §8254.5 (1962).
MONTANA REV. CODE 32.21, 150.1 (1965).
NEBRASKA REV. STAT. 39-7, 123.05 (1968).
NEW JERSEY STAT. ANN. 39:3-76.2 (Supp. 1965).
NEW MEXICO STAT. 64-20-75 (Supp. 1963).
NEW YORK VEH. AND TRAFFIC LAWS §383 (Supp. 1968).
OKLAHOMA STAT. ANN. 47, §12-413 (1965).
OREGON REV. STAT. §483.482 (1963).