A Compromise between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform

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NOTES

A COMPROMISE BETWEEN MITIGATION AND COMPARATIVE FAULT?: A CRITICAL ASSESSMENT OF THE SEAT BELT CONTROVERSY AND A PROPOSAL FOR REFORM

On July 17, 1984, the National Highway Traffic Safety Administration (NHTSA) enacted Federal Motor Vehicle Safety Standard No. 208, requiring the installation of automatic restraints in all new cars beginning with model year 1990 unless, prior to that time, states have enacted mandatory seat belt use statutes that cover at least two-thirds of the United States population. Soon after, as manufacturers and other representatives of the automobile industry lobbied the state legislatures for compliance, twenty-six states enacted mandatory seat belt use laws. This Note focuses on the im-

2. Id.
3. Id.
4. To avoid the additional costs of air bag installation, “almost all car manufacturers supported belt use laws in lieu of some form of automatic restraint requirement.” 49 Fed. Reg. 28962, 28976 (July 17, 1984).
pact that these new state seat belt statutes will have upon the controversial "seat belt defense." The defense raises the issue of whether a defendant may introduce evidence of a plaintiff's nonuse of an available seat belt in an effort to reduce that plaintiff's recovery in a civil action for damages.

Prior to the enactment of the new mandatory seat belt measures, the majority of states had judicially refused to admit evidence of a plaintiff's nonuse of an available seat belt when offered to prove that the plaintiff was at fault or that he failed to mitigate any damages that were likely to occur in the event of an automobile accident. Additionally, five states had legislatively excluded the seat belt defense from admission in personal injury actions. This reflects the traditional hesitancy of courts and legislatures to impose a duty to wear seat belts, the breach of which constitutes negligence or a failure to mitigate. Courts have reasoned that a "preaccident" failure to use an available seat belt does not contribute to the occurrence of the accident itself, but merely furnishes a condition making

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ANN. art. 6701d, § 107c); Utah Code Ann. §§ 41-6a-181 to 186 (1986); Wash. Motor Veh. Safety Restraint Act, ch. 152 (June 11, 1986).

6. The "seat belt defense" is a concept that allows a negligent defendant to escape liability for injuries to the plaintiff that could have been avoided through the use of a seat belt. Note, The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts, 56 Notre Dame L. Rev. 272, 272 n.1 (1980).

7. Id.

8. The term "fault," as discussed in this Note, signifies a breach of a duty of ordinary care. See infra notes 35-37 and accompanying text.


injury possible.\footnote{11} Notwithstanding such hesitancy, however, a minority of states have judicially adopted the seat belt defense as a means of diminishing a plaintiff’s recovery for his failure to buckle up.\footnote{12}

This Note asserts that both the minority and majority rules are based upon faulty premises and are inequitable in their application. It asserts, furthermore, that the recent state statutes requiring mandatory seat belt use have similarly failed to apportion equitably the injuries sustained in an automobile accident on the basis of their respective causes. Finally, this author proposes a solution whereby the seat belt defense may be applied successfully within a system of comparative fault.

\section{I. THE TRADITIONAL THEORIES UNDERLYING THE SEAT BELT DEFENSE AND THE PROBLEMS INHERENT IN THEIR APPLICATION}

The two principal theories that courts have relied upon in admitting evidence of a plaintiff’s failure to use an available seat belt for the purpose of diminishing his recovery are the “mitigation of damages” approach (also known as the doctrine of avoidable consequences)\footnote{13} and the “comparative fault” approach.\footnote{14}


\footnote{14} Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). See W. PROSSER & W. KEETON, supra note 13 § 67, at 468-70. For the purpose of explaining the Bentzler approach, this author uses the phrases “comparative fault” and “comparative negligence” interchangeably. However, the phrase “comparative fault” is far more expansive in that it is meant to include not only “negligence,” but any type of “culpable conduct” on the part of the plaintiff. See infra notes 157-166 and accompanying text.
A. The Mitigation Of Damages Approach

In Spier v. Barker, the New York Court of Appeals, prior to the state's adoption of a comparative fault statute, ruled that a plaintiff's nonuse of an available seat belt constitutes a breach of his duty to mitigate any injuries he would likely sustain in an automobile accident. Thus, the court reasoned, since the plaintiff acted in disregard of his own interests, he should have his recovery reduced to the dollar amount of the injuries that he would have sustained had he used his seat belt.

Under the mitigation approach, the defendant bears the burden of proving, by use of expert testimony, which injuries, if any, the plaintiff could have avoided through use of a seat belt. In doing so, the defendant is, in effect, bifurcating the injuries into first and second collisions, and the defendant will not be liable for any of the

18. 35 N.Y.2d at 449, 323 N.E.2d at 167, 363 N.Y.S.2d at 920. The court was careful, however, in limiting this rule to the issue of damages, and clearly stated that a plaintiff's failure to wear a seat belt should not be considered by the trier of fact in resolving the issue of liability (fault). Id. The court used the Learned Hand risk-utility (negligence test) language, which was enunciated in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), in stating that the burden of using an available seat belt may be found by a jury to be less than the likelihood of injury when multiplied by its severity. 35 N.Y.2d at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 922. It is, therefore, quite possible that the New York Court of Appeals might have adopted the comparative fault approach to the seat belt defense, rather than the mitigation approach, if New York had a comparative fault statute at the time that Spier was decided. Thus, the court, when faced with the "all or nothing" rule of contributory negligence, opted to allow plaintiff at least partial recovery under the mitigation theory, rather than to disallow any recovery for being contributorily negligent for the nonuse of a seat belt.
20. The first collision injuries represent those injuries that would have occurred irrespective of whether or not plaintiff had used a seat belt.
21. The second collision injuries, as discussed in this Note, represent those add-on or enhanced injuries that could have been avoided through use of a seat belt. The garden variety
second collision (add-on) injuries. This rule is premised upon the axiom that

"one who has been injured either in his person or his property by the wrongful act or default of another is under an obligatory duty to make a reasonable effort to minimize the damages liable to result from such injury, and . . . if he does not make such reasonable effort he will be debarred from recovering for those additional damages which result from such failure."23

Thus, since a plaintiff "cannot recklessly enhance his injury and charge it to another,"24 the doctrine of avoidable consequences places the cost of the add-on injuries to the cheapest cost avoider—the plaintiff—who can control whether or not the seat belt is worn.25

second collision case usually involves injuries that were enhanced through one's misconduct, typically within a products liability suit against a manufacturer for failing to design the vehicle to prevent the second impact of the occupant with a portion of the vehicle's interior, or with an object outside the vehicle after ejection. For a comprehensive analysis of automobile manufacturers' second collision liability, see generally Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241 (2d Cir. 1981) (applying New York law); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Lahocki v. Contee Sand & Gravel Co., 41 Md. App. 579, 398 A.2d 490, rev'd on other grounds, 410 A.2d 1039 (1979). While this author recognizes that an occupant may suffer a second impact with a portion of the vehicle's interior even if he wears a seat belt, the scope of this Note will involve only the type of second collision that could have been avoided through use of a belt. Accordingly, such injuries will be labeled second collision injuries for the purpose of this author's analysis. All other injuries, including those traditional 'second impacts' that would have occurred irrespective of seat belt use, will be labeled first collision injuries.

22. W. PROSSER & W. KEETON, supra note 13 § 65, at 458. The authors therein pose an example to illustrate the differences between the doctrines of contributory negligence and avoidable consequences: "[I]f the plaintiff is injured in an automobile collision, his contributorily negligent driving before the collision will prevent any recovery at all, but his failure to obtain proper medical care for his injuries will bar only his damages for the subsequent aggravated injuries." Id. (emphasis added).


24. Lyons v. Erie Ry., 57 N.Y. 489, 491 (1874) (noting that plaintiff could act in good faith in attempt to minimize damages).

25. See Note, Reallocating the Risk of Loss in Automobile Accidents by Means of Mandatory Seat Belt Use Legislation, 52 S. Cal. L. Rev. 91, 133 (1978). The author utilizes a "Calabresian Economic Analysis" of the seat belt defense in stating: It might be argued that the [mitigation] rule represents a collective decision to prohibit seat belt nonuse, yet, if that were so, the rule would attach liability upon proof that the plaintiff had engaged in the prohibited activity, and the jury would have no decision to make. In fact, the [mitigation] rule requires a sufficient showing of proof and causation so [that] the jury can decide to place the costs on the cheapest cost avoider . . . . Thus, . . . a jury is allowed to decide whether the plaintiff was the
Although this approach appears to be equitable, it cannot be applied logically in the context of an accident case involving the injuries that were aggravated by a plaintiff’s failure to use a seat belt. The mitigation of damages approach presupposes that the defendant is not the best cost avoider for those second collision injuries over which he had no control. Therefore, this rule should apply only to postaccident conduct, which occurs “after a legal wrong has occurred, but while some damages may still be averted.” When applied to preaccident conduct, the plaintiff is no longer the cheapest cost avoider for the full extent of his second collision injuries because such injuries are not outside the defendant’s control.

Id.

26. Id.

27. W. PROSSER & W. KEETON, supra note 13 § 65, at 458. Most courts have rejected the mitigation approach because it cannot apply logically in a seat belt case, because the act of fastening a seat belt occurs prior to the occurrence of the accident. State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981); Hampton v. State Highway Comm’n, 209 Kan. 565, 580, 498 P.2d 236, 249 (1972); Romankevitz v. Black, 16 Mich. App. 119, 127, 167 N.W.2d 606, 610 (1969); Fields v. Volkswagen of Am., 555 P.2d 48, 62 (Okla. 1976). Thus, “[w]hile as a general rule one must use reasonable diligence to mitigate one’s damages once the risk is known . . . one is not required to anticipate negligence and guard against damages which might ensue if such negligence should occur.” Hampton v. State Highway Comm’n, 209 Kan. 565, 580, 498 P.2d 236, 249 (1972) (emphasis added) (citations omitted). Even the Spier court conceded that the mitigation approach applied only to postaccident conduct. “To do otherwise . . . would impose a preaccident obligation upon the plaintiff and would deny him the right to assume the due care of others.” Spier, 35 N.Y.2d at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921-22 (citing Kleist, The Seat Belt Defense—An Exercise in Sophistry, 18 Hastings L.J. 613, 616 (1967)).

The mitigation approach is also, in essence, an “assumption of risk with respect to the second collision” doctrine, which acts as a complete bar to any second collision recovery. In rejecting the assumption of risk doctrine as applied to the seat belt defense, the court in Miller v. Haynes, 454 S.W.2d 293, 300 (Mo. App. 1970), stated:

Before one can assume a risk he must know it exists. While travel in an automobile has reached the point where it can perhaps be said to be more dangerous than ever before, it has not reached the point where we could hold that an accident is so likely to occur that each and every time one gets into an automobile he must be held to have assumed the risk of injury.

Another court, in McCord v. Green, 362 A.2d 720, 725 (D.C. 1976), utilized a common law “last clear chance” analysis, and stated:

[I]n the split second prior to a crash in which plaintiff and her host driver were aware that a collision was imminent, there was not time to buckle on the belt. If negligence cannot be attributed to the plaintiff for a failure to use a seat belt when her . . . journey in the car began, it would be absurd to hold her culpable for not remedying the situation when no last clear chance of doing so was provided her.

28. In Dean Prosser’s example, at supra note 22, it is clear that the plaintiff is the cheapest cost avoider for injuries that arose after the accident for which the defendant was in no way responsible. When the plaintiff’s conduct in question occurs before the accident, how-
Dean Prosser has suggested that the mitigation approach is applicable only when damages can be accurately attributed to their respective proximate causes. Therefore, proponents of the mitigation theory argue that a defendant should not be responsible for injuries resulting from a plaintiff's failure to use a seat belt. Such proponents have failed to consider, however, that the negligent conduct of the defendant is both a cause-in-fact and proximate cause of the totality of the plaintiff's injuries. Where a defendant's negligence causes a first collision, it is also an immediate cause of the second collision as a matter of law. Accordingly, "the second collision injuries are an amalgam of the defendant's fault in causing the [accident] and the plaintiff's fault in failing to wear his seat belt." Since a negligent defendant should be liable to the extent that his fault contributed to the plaintiff's injuries, the defendant should not be fully absolved from second collision liability because his negligence is a contributing cause of that second collision.

ever, it can no longer be said that the defendant was not responsible, because the defendant's act of negligence occurred subsequent to the conduct of the plaintiff. Therefore, it can just as easily be said that the defendant was the cheapest cost avoider for the second collision, which would not have occurred had he exercised due care. See, e.g., Penzell v. State, 120 Misc. 2d 600, 605, 466 N.Y.S.2d 562, 566 (Ct. Cl. 1983) ("Where the wrongful acts of two parties were not precisely concurrent in point of time, liability may nevertheless be imposed on each where . . . several acts of neglect concurred to produce the injury."). See also DiMauro v. Metropolitan Suburban Bus Auth., 105 A.D.2d 236, 247, 483 N.Y.S.2d 383, 393 (1984), where the court stated that juries have shown "a certain disinclination to strictly apply the Spier rule, . . . apparently sensing the injustice which can result from the failure to apportion liability for the injuries caused by the so-called "second collision" amongst its contributors e.g., the unbelted passenger and the various operators of the vehicles involved."

29. See W. PROSSER & W. KEETON, supra note 13 § 65, at 458-59; Note, supra note 6, at 275-76.

30. Note, supra note 6, at 275.

31. One court went so far as to state that allowing evidence of seat belt nonuse to be admissible to mitigate a plaintiff's damages would "do violence to such well-settled principles of tort liability as proximate causation, foreseeability, and the standard of care exercised by a reasonably prudent man." McCord v. Green, 362 A.2d 720, 722 (D.C. 1976). Thus, the mitigation approach absolves the negligent defendant from a portion of the injuries which he proximately caused. See infra notes 32-34 and accompanying text.

32. Twerski, From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297, 327-28 (1977) [hereinafter Twerski, From Defect to Cause]. See also Twerski, The Use and Abuse of Comparative Negligence in Products Liability, 10 IND. L. REV. 797, 822 (1977) [hereinafter Twerski, Use and Abuse].

33. See Prosser, Comparative Negligence, 41 CAL. L. REV. 1, 33 (1953).

34. See Fischer v. Moore, 183 Colo. 392, 394-95, 517 P.2d 458, 459 (1973) (court rejected mitigation approach, stating that since the tortfeasor must accept the plaintiff as he finds him, he "may not rely upon the injured party's failure to utilize a voluntary protective device to escape all or a portion of the damages" caused by his negligence). See also Twerski, From Defect to Cause, supra note 32, at 329 n.81, where Professor Twerski, in criticizing the
B. The Comparative Fault Approach

In Bentzler v. Braun,55 the Wisconsin Supreme Court ruled that there is a duty, based on the common law standard of ordinary care, to use an available seat belt.56 Where there is evidence that a causal relationship exists between the failure to wear a seat belt and the aggravation of plaintiff’s injuries, a jury may find a plaintiff negligent in failing to buckle up.37 Accordingly, the jury will attribute to the plaintiff a percentage of fault to be compared with the fault of the defendant, and the plaintiff’s recovery will be reduced by the percentage of his fault. Thus, the Bentzler court opted not to bifurcate the injuries into first and second collisions as under the mitigation approach. It decided instead to throw the seat belt issue into a comparative fault evaluation to be applied to the totality of the plaintiff’s injuries.

While the comparative fault approach appears to be more equi-
table than the mitigation approach,\textsuperscript{38} it is, nevertheless, problematic. One problem that arises when the seat belt issue is thrown into comparative fault is theoretical in nature. Comparative negligence has often been viewed as a liability doctrine, rather than a damage doctrine.\textsuperscript{39} Traditionally, one can be contributorily negligent only where his conduct has contributed to the cause of the accident itself.\textsuperscript{40} Except in rare circumstances,\textsuperscript{41} a plaintiff’s failure to use a seat belt does not contribute to the accident,\textsuperscript{42} but merely furnishes a condition making injury possible. It would therefore be unfair to reduce the recovery of a plaintiff whose injuries were sustained in an accident for which he was in no way responsible. The seat belt defense “would soon result in windfalls to tortfeasors who would pay only partially for the harm their negligence caused.”\textsuperscript{43}

A second problem in reducing the plaintiff’s recovery by the percentage of his fault attributable to nonuse of a seat belt arises out

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\item \textsuperscript{38} See Twerski, \textit{From Defect to Cause}, supra note 32, at 329; Twerski, \textit{Use and Abuse}, supra note 32, at 822. Professor Twerski believes that the comparative fault approach is more equitable than that of mitigation because, unlike mitigation, it does not fully absolve the defendant from second collision liability.
\item \textsuperscript{39} See W. PROSSER & W. KEETON, supra note 13 § 65, at 451-55.
\item \textsuperscript{40} RESTATEMENT (SECOND) OF TORTS § 463 (1965); Comment, \textit{Legislative Enactment of the Seat Belt Defense}, 58 IOWA L. REV. 730, 738 (1973).
\item There are rare circumstances where a plaintiff’s failure to wear a seat belt contributes to the cause of the accident itself. \textit{See}, e.g., Curry v. Moser, 89 A.D.2d 1, 2-3, 454 N.Y.S.2d 311, 312-13 (1982) (plaintiff, a front seat passenger who failed to use a seat belt, fell from defendant’s car when the front passenger door swung open, and was struck by an oncoming car).
\item Hansen v. Howard O. Miller, Inc., 93 Idaho 314, 318, 460 P.2d 739, 743 (1969); Fontenot v. Fidelity & Casualty Co., 217 So. 2d 702, 705 (La. App. 1969); Romankewiz v. Black, 16 Mich. App. 119, 126-27, 167 N.W.2d 606, 610 (1969). Some courts, however, have implied that notwithstanding the fact that nonuse of a seat belt is not a contributing cause of the accident, such nonuse may still constitute negligence under “exceptional circumstances.” For example, the court in Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373, 377 (1969), held that in a case where plaintiff had failed to wear an available seat belt, there exists a question of fact as to whether, in the exercise of ordinary care, a seat belt should have been used. Furthermore, such a determination should be answered after considering all of the facts and circumstances, as well as expert evidence. \textit{Id. See also} Franklin v. Gibson, 138 Cal. App. 3d 340, 344, 188 Cal. Rptr. 23, 25 (1982), where the court applied the “exceptional circumstances” doctrine of Truman, yet modified it by placing the burden on the defendant to prove, by use of experts, the actual extent of the second collision injuries. This case was decided under a system of comparative fault, and therefore, the burden of proof which was placed on the defendant was intended to enable a jury to assign a proper percentage of fault to the plaintiff’s nonuse of a seat belt. \textit{See infra note 193}.
\item Note, supra note 6, at 285. \textit{See also} Fischer v. Moore, 183 Colo. 392, 395-96, 517 P.2d 458, 460 (1973) (refusing to admit evidence of seat belt nonuse, because “it would be improper for an injured driver or passenger to be penalized in the eyes of the jury [and t]he seat belt defense would soon become a fortuitous windfall to tort-feasors . . ..”).
\end{itemize}
of the disparity between the kinds of risks created by plaintiff and those created by the defendant. In the encounter between a negligent defendant and a contributorily negligent plaintiff, the faults of both parties create a classic "one-on-one" situation. "Equitable considerations [thereby] preclude a plaintiff from total recovery when the plaintiff's conduct is similar in scope and in nature to that of the defendant." Therefore, only where the types of fault attributable to both parties are similar can they logically be compared. In a seat belt case, however, the defendant is not facing the plaintiff on a one-to-one basis because the risks created by the defendant's conduct are far broader in scope than those created by the plaintiff. The defendant's fault in causing the accident distributed risks to the world at large and was capable of causing some degree of damage to any plaintiff within the sphere of foreseeability. Conversely, a plaintiff's failure to use a seat belt creates no risk to others, but merely exposes himself to a risk. Furthermore, the extent of the plaintiff's injuries are wholly contingent upon what the defendant does to him. While a defendant, by exercising due care, can fully

44. See Twerski, Use and Abuse, supra note 32, at 799-800. Professor Twerski advanced this argument from a products liability perspective and labeled it "Multi-risk Product Exposure v. Uni-risk Plaintiff Exposure." Id. at 799. Since an unreasonably dangerous product which is placed on the market will cause injury to a calculable percentage of users, such users should not have their recovery reduced by their own negligence.

Thus, for example, if a drill press is designed without a safety guard, there is little question that somewhere in the manufacturing community there will be a plaintiff who is destined to have his hand severed, due either to his negligence or to inadvertence. One noted author has likened this to an intentional tort. In essence, once a product with a design defect is marketed, we know with substantial certainty that there will be a victim—we just do not know his name. Thus, it seems to me that, whether the theory is strict liability or negligence, we should be reluctant to reduce plaintiff's recovery.

Id. at 800 (emphasis added) (footnote omitted). This is analogous to the disparate risks created by the defendant's active fault and the plaintiff's passive fault in failing to buckle up. See infra notes 45-49 and accompanying text.

45. See Twerski, Use and Abuse, supra note 32, at 800. The "one-on-one" situation involves two parties; in a products liability scenario, however, defendant's distribution of products throughout the world will, in a certain percentage of cases, bring harm to the user. Id.

46. Id. (emphasis added). Where both parties are at fault in causing the accident, each party exposes the other to similar risks, which can be "compared" within a comparative fault analysis. In a seat belt scenario, however, the risks created by the defendant's active fault are broader both in scope and in nature than those created by plaintiff's nonuse of a seat belt. Hypothetically, an actively negligent driver may create risks to multiple parties and may cause a variety of injuries, ranging from the superficial to those that are gravely serious. A plaintiff's failure to buckle up, on the other hand, creates an uncertain risk only to himself.

47. Twerski, Use and Abuse, supra note 32, at 800.

48. See id.
prevent the risk of injury to a plaintiff, the plaintiff can only fasten his seat belt and hope for the best. Thus, "[t]he defendant's negligence in causing the collision and the plaintiff's negligence in aggravating his injuries by failing to 'buckle up' are not truly comparable."49

Any attempt to compare these dissimilar types of conduct may yield inequitable results.50 One such result is that, while the negligence attributable to a plaintiff's nonuse of a seat belt caused only his second collision injuries, the jury-determined percentage of comparative fault will be applied to the totality of his injuries. Thus, the passively negligent plaintiff (who created risks only to himself) must bear the costs of a portion of his first collision injuries for which the defendant's "active" negligence51 was the sole cause.52

A third problem with the comparative fault approach arises when the plaintiff, in addition to being passively negligent for failing to use a seat belt, is actively negligent in contributing to the cause of the accident itself. In determining the percentage of plaintiff's comparative fault, a jury must now compare his passive conduct (which caused his second collision injuries) with his active fault (which caused both the first and second collisions)53 in arriving at a single

49. Twerski, From Defect to Cause, supra note 32, at 327 n.80.
51. Active negligence or fault, as referred to in this Note, represents the fault which contributes to the occurrence of the accident, such as speeding, or failure to look out for oncoming traffic.
52. This was one of the rationales relied upon by the Spier court in deciding to use the mitigation approach over that of contributory fault. See supra notes 15-18 and accompanying text. The New York Court of Appeals stated that "holding a nonuser contributorily negligent would be improper since it would impose liability upon the plaintiff for all his injuries though use of a seat belt might have prevented none or only a portion of them." 35 N.Y.2d at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921 (footnote omitted). For example, in Professor Twerski's hypothetical, Twerski, From Defect to Cause, supra note 32, at 329 n.81, while the $90,000 in second collision injuries would be distributed more equitably under comparative fault, the plaintiff should not have his $10,000 first collision recovery reduced where his fault had only contributed to the cause of the second collision. Such a comparative fault analysis becomes even more inequitable where the dollar value of plaintiff's first collision injuries exceeds that of the second collision. For example, a reversal of the aforementioned numerical figures would yield $90,000 in first collision injuries and $10,000 in second collision injuries. Under the comparative fault approach, plaintiff's fault percentage attributable to nonuse of a seat belt would be applied to the totality of his injuries and as a result, plaintiff would bear the costs for a portion of his $90,000 first collision injuries which his conduct did not cause. See supra note 34. It should be noted that the plaintiff is presumed to be without any active fault in this hypothetical.
53. See supra notes 32-34 and accompanying text. Just as the defendant's active fault is a contributing cause of both collisions, any active fault of the plaintiff will similarly contribute
percentile figure. That percentage of plaintiff's fault must then be compared with the fault of the defendant, which was also a cause of both collisions. This author concludes that to throw the seat belt issue into comparative fault, without first bifurcating the injuries into first and second collisions, would result in a failure to apportion damages equitably on the basis of their respective causes.

II. THE MAJORITY APPROACH: AN APPLICATION OF THE NO DUTY RULE IN THE LAW OF TORTS

A majority of courts have recognized the problems inherent in both the mitigation and comparative fault approaches, and, therefore, have refused to allow the introduction of evidence of a plaintiff's nonuse of an available seat belt to reduce the plaintiff's recovery. This reasoning is motivated by policy considerations and represents a prime example of the "no duty" rule in the law of torts.

In analyzing directed verdict practice in the area of design defect litigation, Professor Twerski has advanced the theory that, while courts often highlight one factor or another as the reason for directing a verdict, it is usually possible to identify a cluster of factors behind a court's determination that one party owed no duty to another. These factors may be reduced to two general categories: (1) institutional limitations on the courts' capacity to litigate successfully the complex issues involved; and (2) whether or not alternative

54. This process is extremely problematic because it entails a comparison of two distinct forms of conduct which are neither similar in scope nor in nature. See supra notes 44-49 and accompanying text. If it is illogical to compare the passive fault of the plaintiff with the active fault of the defendant, it is similarly illogical to merge both types of the plaintiff's fault into a single percentile figure.

55. See Twerski, The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation, 29 MERCER L. REV. 403, 413-14 (1978) [hereinafter Twerski, The Many Faces of Misuse]. Professor Twerski has proposed that since "[n]o one can really half cause an accident," juries should be allowed to consider the probability, on a percentage basis, that the conduct of each party caused the harm. Id. at 413.

56. See supra note 9 and accompanying text.


decisionmaking mechanisms exist so that the courts could defer the issue to another forum which has the institutional capability to render a decision. Consideration of these two factors led the majority of courts to determine that a plaintiff has no duty to wear a seat belt.

A. Institutional Limitations on the Ability of Courts to Adjudicate Seat Belt Cases

In deciding whether to allow a cause of action, judges often "look over their shoulders" and examine the potential difficulties that they would encounter should the case be litigated. For example, a review of the evidence might reveal that the court was confronted with a very difficult question or with causation problems of such complexity as to allow for nothing better than an educated guess. Accordingly, some courts have refused to admit evidence of seat belt nonuse, because admitting such evidence would allow juries to engage in sheer speculation as to the circumstances in which a duty should be imposed, or the extent of the plaintiff's second collision injuries. These courts have shown reluctance "to turn the courtroom into a theater for accident reconstruction games in which experts testify as to the hypothetical results which would have oc-

59. Id.
60. See supra notes 8-9 and accompanying text.
61. Twerski, From Risk-Utility to Consumer Expectation, supra note 57, at 869.
62. Id. A complex causation problem is often a motivating force behind the inception of no duty rules. Thus, it has been said:

Causation has an accordion-like quality which can be expanded or contracted to fit the case and the policy demands of the cause of action at hand. As an instrument in the hands of a sensitive trial judge it can be used to either choke off cases at their very inception or to allow them to go to the jury when the objective evidence at hand is slim at the very best.


63. Britton v. Doehring, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970); Miller v. Miller, 273 N.C. 228, 239-40, 160 S.E.2d 65, 69-70 (1968); Amend v. Bell, 89 Wash. 2d 124, 133, 570 P.2d 138, 143 (1977). See also Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967), where the court summarized the problem of defining the standard of care in cases involving a plaintiff's failure to wear a seat belt. The court stated that while it is possible to analyze the many variables involved in the actual operation of a vehicle, it is difficult to determine whether a plaintiff breached his duty of ordinary care in failing to buckle up, which occurs before the vehicle is operated. Id. at 917. Thus, the court concluded, "[t]o ask the jury to do so is to invite verdicts on prejudice and sympathy contrary to the law. It is an open invitation to unnecessary conflicts in result and tends to degrade the law by reducing it to a game of chance." Id. The court, therefore, recognized its own institutional limitations and refused to grapple with the seat belt issue.
curred had the plaintiff been wearing his seat belt." Other courts have similarly refused to admit evidence of seat belt nonuse because the seat belt defense would contradict such traditional tort principles as a plaintiff's right to assume the due care of others and the well-settled doctrine that the negligent defendant must take the plaintiff as he finds him. Such reasoning is exemplified by the comprehensive discussion by the Washington Supreme Court in *Derheim v. North Fiorito Co.* The court stated that its institutional limitations stem from the fact that the seat belt defense does not fit conveniently into traditional tort doctrines. For example, conduct constituting contributory negligence is usually viewed as conduct which contributes to the cause of the first collision. A plaintiff's failure to wear a seat belt, however, does not bear such a causal relation to the first collision. In addition to this substantive problem, the court also acknowledged that the doctrines of contributory negligence and assumption of risk completely bar a plaintiff's recovery, and therefore, it would be unjust to apply them in seat belt cases. Similarly, "the doctrine of avoidable consequences has been suggested, . . . but here again, the problem is one of appearing to stretch the doctrine to fit an unusual fact pattern."


66. *See*, e.g., *Britton v. Doehring*, 286 Ala. 498, 508, 242 So. 2d 666, 675 (1970) (court stated that to require a plaintiff to wear a seat belt would impose upon him the duty to anticipate the negligent acts of other drivers); *Miller v. Miller*, 273 N.C. 228, 232, 160 S.E.2d 65, 68-69 (1968) (quoting Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613, 617 (1967)) (court stated that even if "the reasonable man is aware of the general likelihood of accidents and knows subconsciously that one might happen to him, he drives or rides in the belief that he 'need not truss himself up in every known safety apparatus before proceeding on the highway'").

67. *Fischer v. Moore*, 183 Colo. 392, 394-95, 517 P.2d 458, 459 (1973) (court stated that "the common law dictates that the tortfeasor may not rely upon the injured party's failure to utilize a voluntary protective device . . . ").

68. *Id.* at 167-68, 492 P.2d at 1035. In addition to these legal problems, the court was troubled by practical problems in admitting seat belt evidence. "[C]ourts are concerned about
Any one or a combination of these problems may have prompted a majority of courts to refuse to squeeze the seat belt issue into traditional tort ideology by developing a no duty rule regarding use of a seat belt.

B. The Existence of Alternative Decisionmaking Bodies For Resolution of the Seat Belt Controversy

Once a court has determined that it faces serious institutional limitations, it should then determine whether alternative decision-making mechanisms exist to shift the burden of decisionmaking onto a better decisionmaker. In cases involving the plaintiff's non-use of a seat belt, most courts have refused to mandate a duty to wear seat belts judicially, deciding instead to defer the issue to the best alternative decisionmaker available—the state legislature. The unduly lengthening trials and if each automobile accident trial is to provide an arena for a battle of safety experts, as well as medical experts, time and expense of litigation might well be increased.” Id. at 168-69, 492 P.2d at 1035.

70. Twerski, From Risk-Utility to Consumer Expectation, supra note 57, at 869-70.

71. Id. Professor Twerski poses an interesting analysis by using the opinion of the district court in Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352 (D. Colo. 1977), rev'd, 601 F.2d 516 (10th Cir.), cert. denied, 444 U.S. 931 (1979), which involved an alleged battery inflicted by one professional football player against another while on the football field. The district court first conceded that it had limited judicial competence to set successfully “an appropriate standard of care for an alien world [professional football] in which violence was the norm.” Twerski, From Risk-Utility to Consumer Expectation, supra note 57, at 877. The court then tried to tackle the causation problem—what would have happened to the plaintiff had the defendant not battered him? This would entail the seemingly impossible problem of separating or apportioning out the add-on injuries created by the alleged battery from all of the other injuries caused by non-tortious harmful contact that occurs daily in professional football. Id. The district court ultimately decided to defer the issue to an alternative decisionmaking body, the National Football League, which is “a well respected body that had set standards” for conduct in the sport of professional football. Id. For the complete factual analysis, see id. at 875-78.

policy behind the adoption of comparative fault by a vast majority of states was to eliminate the "all or nothing" rules of recovery such as mitigation and contributory negligence.\textsuperscript{73} Whereas the old rule of contributory negligence was traditionally a total bar to a plaintiff's recovery, its successor doctrine, comparative fault, will preclude a plaintiff from recovering only that portion of his injuries for which his conduct was responsible.\textsuperscript{74} Since nonuse of a seat belt does contribute to the cause of the second collision, the no duty rule adopted by the majority of courts constitutes an illogical exception to the doctrine of comparative fault.\textsuperscript{75}

If properly administered, however, our present system of comparative fault may allow courts to apportion seat belt injuries equitably; under the current system, the judiciary, rather than the state legislature, is the proper forum for resolution of the seat belt issue.\textsuperscript{76}

III. THE LEGISLATIVE RESPONSE TO THE SEAT BELT DEFENSE

The deference of the seat belt issue to alternative decisionmaking bodies has been unsuccessful; those state legislatures that have enacted mandatory seat belt use statutes have done little to resolve the problems underlying both the mitigation and comparative fault approaches to the seat belt defense. In response to NHTSA's Federal Motor Vehicle Safety Standard No. 208,\textsuperscript{77} twenty-six states have enacted mandatory seat belt use laws.\textsuperscript{78} In order to comply with

\textsuperscript{73} Contributory negligence has been regarded as an "all or nothing" rule because any degree of negligence on the part of the plaintiff served as a complete bar to that plaintiff's recovery. W. Prosser & W. Keeton, supra note 13 § 65, at 451-53. This rule placed "upon one party the entire burden of a loss for which two are, by hypothesis, responsible." Id. § 67, at 468-69. The obvious harshness of this rule has prompted over forty states to adopt, either legislatively or judicially, some general form of comparative fault. Id. § 67, at 471-74.

The mitigation rule is similar to that of contributory negligence in that it is an "all or nothing" rule with respect to the second collision. Under mitigation, the plaintiff cannot recover for any of his second collision injuries, despite the fact that the defendant's negligent conduct was a contributing cause of the second collision. See supra notes 19-25, 31-32 and accompanying text.

\textsuperscript{74} See generally W. Prosser & W. Keeton, supra note 13 § 67, at 471-79. Hence, a plaintiff recovers for injuries caused by a negligent defendant until the point at which he is responsible for his own injuries and must shoulder the costs.

\textsuperscript{75} See supra notes 57-66 and accompanying text.

\textsuperscript{76} Insurance Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 451 (Fla. 1984).

\textsuperscript{77} 49 C.F.R. § 571.208 (1985).

\textsuperscript{78} See supra note 5. Some of these statutes have been challenged on constitutional grounds. See, e.g., Wells v. State of New York, 130 Misc. 2d 113, 495 N.Y.S.2d 591 (Sup. Ct. 1985); People v. Weber, 129 Misc. 2d 993, 494 N.Y.S.2d 960 (Amherst Town Ct. 1985). In Wells, the plaintiff was issued a traffic citation for failing to wear his seat belt in violation of N.Y. Veh. & Tr. Law § 1229-c. Wells, 130 Misc. 2d at 114, 495 N.Y.S.2d at 592. Plaintiff
the federal standard, however, the statute must contain, inter alia,

[a] provision specifying that the violation of the belt usage requirement may be used to *mitigate damages* with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries from the accident.\(^7\)

Thus, the federal “automatic restraint” installation requirement will be imposed upon automobile manufacturers unless those states legislatively adopt one of the approaches to the seat belt defense.\(^8\)

A majority of states that have enacted mandatory seat belt use laws\(^8\) rejected NHTSA’s “mitigation” requirement by including a clause which provides that evidence of plaintiff’s failure to use an

then commenced an action for declaratory judgment, claiming that the seat belt law violated his right to privacy and those rights guaranteed by the fourth, ninth, tenth, and fourteenth amendments of the United States Constitution. *Id.* The plaintiff also claimed that the enactment of such a law was beyond the power granted to the legislature by the New York State Constitution in that it “deprives [him] of his right to make an intelligent decision which pertains solely to his person and his personal safety.” *Id.* at 594. The New York Supreme Court upheld the constitutionality of the seat belt law as a valid exercise of the state’s police power. *Id.* at 595, 598. The court reasoned that any statute that mandates public conduct while restricting individual choice is within the State’s police power if it “advances the State’s interest in protecting the health, safety and welfare of its citizens.” *Id.* at 595. The mandating of seat belt use by New York motorists clearly promotes that interest. *Id.* at 595-97.


\(^8\) See supra note 79. The phrase “mitigate damages,” as used in this provision, does not necessarily refer to only the mitigation approach to the seat belt defense. It may refer to any approach, including that of comparative fault, that serves to reduce a plaintiff’s recovery for nonuse of a seat belt somehow.

available seat belt is not admissible in a civil action for damages.82 Four states, however, have legislatively adopted the mitigation approach,83 but not without substantial modification.84 While the defendant still has the burden of introducing expert evidence to prove that the plaintiff’s nonuse of a seat belt somehow enhanced or aggri-

82. Id. See, e.g., IND. CODE ANN. 9-8-14-5 (West Supp. 1985), which states that “[f]ailure to comply with this chapter does not constitute fault . . . . Evidence of the failure to comply with this chapter may not be admitted in any civil action to mitigate damages.” These states have refused to adopt an approach to the seat belt defense legislatively because they wished to be exempt from the “two-thirds of the U.S. population” calculus of NHTSA’s federal regulation. Noncompliance with NHTSA’s mitigation requirement renders that particular state, and its population, exempt from the calculus. See supra note 79.

Some state mandatory seat belt use laws actually express a policy toward being exempt from NHTSA’s population calculus so that NHTSA’s “automatic restraint” regulation will go into effect. See, e.g., CAL. VEH. CODE § 27315(a) (West Supp. 1986), which states that “this Section is intended to be compatible with support for federal safety standards requiring automatic crash protection [e.g. air bags] and should not be used in any manner to rescind federal requirements for installation of automatic restraints in new cars.” Hawaii’s mandatory use law is particularly interesting in that it has attempted to evade NHTSA’s calculus in two ways. First, it includes a clause providing that “[i]t is hereby declared to be the policy of the State of Hawaii not to include the failure to wear a seat belt as an element in the damage calculation for personal injury cases.” HAW. REV. STAT. § 291(e)(1) (1985). This is an obvious noncompliance with NHTSA’s mitigation requirement because the seat belt issue has never been ruled upon by the Hawaii courts. Second, the statute provides for a $15 fine for violation. HAW. REV. STAT. § 291(e)(1985). The underlying purpose for the $15 fine was expressed in the CONFERENCE COMM. REPORT No. 17, at 2 (Apr. 16, 1985), which states:

Moreover, your Committee believes that any fine should be set at less than $25 in order to avoid a federal rule that would make it unnecessary for manufacturers of cars to provide automatic passive restraint systems if two-thirds of the population of the United States reside in states that have passed mandatory seat belt laws meeting certain federal requirements. Imposing a fine of less than $25 assures that our law will fall short of those federal requirements.

Your Committee believes that Hawaii’s passage of a mandatory seat belt law should not be part of any effort to prevent manufacturers from being required to install automatic protection systems in all automobiles manufactured after September 1, 1989.

See also CONN. GEN. STAT. ANN. § 14-100a (West Supp. 1986); MO. ANN. STAT. § 307.178 (Vernon Supp. 1986); N.C. GEN. STAT. § 20-135.2A (Supp. 1985). These states also express a policy toward being exempt from NHTSA’s population calculus.


84. New York was the only state that legislatively adopted the “pure” Spier v. Barker mitigation approach without any modification. See N.Y. VEH. & Traf. Law § 1229-c(8) (McKinney 1986), which provides that:

Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense.
vated his injuries, these statutes place a ceiling on the amount that plaintiff’s damage award can be reduced. For example, the Louisiana seat belt statute provides that while a plaintiff’s nonuse of an available seat belt may be admitted to mitigate damages, the damages may not be reduced by more than two percent for the nonuse of a safety belt. The Missouri seat belt statute contains a similar clause, which places a one percent reduction ceiling on the amount of damages that can be reduced for a plaintiff’s failure to mitigate. Thus, it appears that these state legislatures have recognized the inequities produced by the all or nothing second collision result created by the use of a Spier v. Barker pure form of mitigation.

Interestingly, Michigan has legislatively adopted the Bentzler v. Braun comparative fault approach to the seat belt defense, but not without substantially limiting the percentage amount of fault that a jury can attribute to the nonuse of a seat belt. The Michigan statute provides:

Failure to wear a seat belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, such negligence shall not reduce the recovery for damages by more than 5%.

By placing a ceiling on the percentage of fault that a jury can attribute to a plaintiff’s nonuse of a seat belt, the legislature has minimized the unfairness of comparing the passive fault of the plaintiff

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85. See supra note 19 and accompanying text.
86. La. Rev. Stat. Ann. § 32:295.1(E) (West Supp. 1986). This statute, however, is slightly ambiguous, as it states: Failure to wear a safety belt in violation of this Section may be admitted to mitigate damages, but only when the party offering such evidence proves [inter alia] that: . . . (4) The use of a safety belt would have reduced the injured party’s damages in an amount equal to or in excess of the amount of mitigation sought. This language makes it unclear whether a defendant who is unable to meet this burden can nevertheless reduce plaintiff’s damages by 2% where he proves at least that 2% of plaintiff’s injuries were second collision injuries. For example, if defendant claims that plaintiff could have avoided 50% of his injuries and, at trial, it is proven that 40% could have been avoided, does the defendant fail to meet his burden with respect to the mitigation defense, even though he has proven that there are some second collision injuries?
88. See supra notes 15-34 and accompanying text.
89. See supra notes 35-37 and accompanying text.
91. Id. (emphasis added).
(which creates risks to himself alone) with the active fault of the
defendant (which creates risks to the world at large). Furthermore,
if the comparative fault percentage attributable to seat belt nonuse is
to be applied to the totality of plaintiff's injuries, the five percent
ceiling further minimizes the resulting inequity. Finally, in the
event that the plaintiff is actively negligent in contributing to the
cause of the accident, the language of this statute appears to indicate
that a jury can separate the active and passive fault of the plaintiff
and allocate separate fault percentages for each type.

The Michigan statute falls short of providing a satisfactory remedy for two reasons. First, the statute lacks any provision for an apportionment or bifurcation of the injuries into collisions. Thus, despite the presence of a five percent ceiling on the plaintiff's passive fault, such fault will, nevertheless, be applied to the plaintiff's first collision injuries. This fails to apportion adequately damage responsibility on the basis of its causes. Second, with respect to the second collision, the plaintiff's passive fault, while not a cause of the first collision, is as much a cause of his second collision injuries as was the active negligence of the defendant. Thus, by providing for a reduction ceiling as low as five percent, this statute may create a windfall for plaintiffs whose passive fault in failing to buckle up may have caused substantially more than five percent of their second collision injuries.

A. New Jersey's Mandatory Seat Belt Use Law

Unlike the seat belt statutes of other states, which either adopt
one of the approaches to the seat belt defense or hold evidence of
seat belt nonuse as inadmissible, the enactment of New Jersey's

92. See supra notes 44-49 and accompanying text. Since, under a pure comparative fault analysis, it may be unfair to compare the plaintiff's passive fault with the active fault of the defendant, this statute places a ceiling on the percentage of fault that may be attributed to such passive conduct. Thus, the legislature has implicitly acknowledged that since the defendant's active fault is so much broader in scope and in nature than the plaintiff's nonuse of a seat belt, the disparate fault percentages between these two types of conduct will parallel the disparate risks created by the conduct of plaintiff and defendant.

93. See supra notes 50-52 and accompanying text. While the percentage of comparative fault attributable to plaintiff's nonuse of a seat belt will serve to reduce plaintiff's recovery of his first collision injuries, this five percent ceiling will, in many cases, allow plaintiff a greater recovery than would the Bentzler approach in its pure form.

94. See infra notes 132-141 and accompanying text.
95. See supra notes 50-52 and accompanying text.
96. Id.
97. See supra notes 29-34 and accompanying text.
"Passenger Automobile Seat Belt Usage Act" has left the present status of the seat belt defense unsettled. The statute merely provides, in pertinent part, that "[t]his act shall not be deemed to change existing laws, rules, or procedures pertaining to a trial of a civil action for damages for personal injuries or death sustained in a motor vehicle accident." This language is problematic because the New Jersey courts have failed to adopt a clear approach to the seat belt issue.

In a leading case, *Barry v. Coca Cola Co.*, the New Jersey Superior Court held that the failure to use an available seat belt does not constitute contributory negligence sufficient to bar plaintiff’s recovery where it was not the proximate cause or a substantial factor in causing the accident. The *Barry* court further concluded that the failure to use an available seat belt may not be considered by a jury in diminution of plaintiff’s damages where there was no evi-

98. N.J. STAT. ANN. § 39:3-76.2e to 76.2k (West Supp. 1986).
99. N.J. STAT. ANN. § 39:3-76.2h (West Supp. 1986). See also HAW. REV. STAT. § 291-11.6(d) (1985), which contains the same language as the New Jersey statute.
101. *Id.* at 273, 239 A.2d at 275. The court stressed "the necessity of distinguishing between negligence contributing to the accident, and negligence contributing to the injuries sustained." *Id.* (emphasis in original).
102. The court was confronted with the question of whether or not the jury should be permitted to apportion plaintiff’s damages “so as to subtract from his total damages such amount thereof as may have been due to the failure to use seat belts.” *Id.* at 272, 239 A.2d at 274. A problem existed, however, in deciding how to apportion the damages of a plaintiff whose conduct did not contribute to the occurrence of the accident, yet must be deemed contributory negligence because it was preaccident conduct. The court’s solution was a confusing apportionment of damages within the context of contributory negligence, rather than avoidable consequences. For instance, the court distinguished between the two approaches by reasoning that the doctrine of avoidable consequences (mitigation) should apply only when plaintiff’s carelessness occurs after the defendant’s negligent conduct. *Id.* at 275, 239 A.2d at 276. Contributory negligence, on the other hand, should apply when plaintiff’s carelessness occurs prior to the negligence of the defendant. *Id.* Traditionally, however, contributory negligence has been an all or nothing rule which acts as a total bar to a plaintiff’s recovery, and therefore, does not allow for any damage apportionment. In order to apportion damages in such a case, the court relied on the confusing language of W. Prosser, *Law of Torts* § 64, at 433-34 (3d ed. 1964), which states:

In a limited number of situations, the plaintiff’s unreasonable conduct, although it is prior or contemporaneous, may be found to have caused only a separable part of the damage . . . . In such a case, even though it is called contributory negligence, the apportionment will be made. This is true, for example, where plaintiff and defendant both pollute the same stream, or flood the plaintiff’s property, or cause other damage similar in kind but capable of logical division. A more difficult problem is presented when the plaintiff’s prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages.

99 N.J. Super. at 275-76, 239 A.2d at 276. See also W. PROSSER & W. KEETON, supra note
dence\textsuperscript{103} that such failure was a substantial contributing factor in increasing plaintiff's injuries.\textsuperscript{104}

The court, however, limited its holding to the specific facts presented, and did acknowledge that it may have ruled otherwise had the defendant produced expert evidence of a causal link between plaintiff's failure to wear a seat belt and his injuries.\textsuperscript{105} The defendant's burden of producing effective expert testimony would nevertheless be difficult because any attempt by a jury to apportion the plaintiff's injuries into first and second collisions "would be the purest kind of speculation."\textsuperscript{106} Consequently, the \textit{Barry} court refused to adopt an approach to the seat belt defense and left such a determination to the legislature.\textsuperscript{107}

Ten years later, in \textit{Polyard v. Terry},\textsuperscript{108} the court recognized

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13 § 65, at 459. Thus, while any apportionment of damages becomes problematic in the case of a contributorily negligent plaintiff, the problems intensify when such negligence was not a contributing cause of the first collision.

The court then utilized the theory enunciated in \textit{Restatement (Second) of Torts} § 465 comment c (1965), which allows for damage apportionment in cases where plaintiff's contributory negligence does not cause the first collision, only if there is satisfactory evidence to support a finding that such negligence was a "substantial contributing factor in increasing the harm which ensues." 99 N.J. Super. at 274, 239 A.2d at 276 (emphasis added). See also \textit{Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc.}, 53 N.J. 157, 249 A.2d 382 (1969), where the New Jersey Supreme Court stated:

\textit{It has been said that in most situations it is better to fasten a seat belt than to ignore it. Even if we assume, as we do for the purpose of the argument only, that a reasonable man would fasten an available seat belt, nevertheless those cases which make the same assumption hold that the only way the seat belt defense can go to the jury is if the defendant comes forward with specific evidence demonstrating the causal link; i.e., the relationship between failure to fasten the belt and the plaintiff's injuries.}

53 N.J. at 162-63, 249 A.2d at 385 (emphasis in original) (footnote and citations omitted).

103. The \textit{Barry} court stated that there is no evidence in this case as to whether (a) the use of seat belts by plaintiff here would have prevented any particular movement of his body or impact of his face with the windshield or other part of the car, or (b) seat belts would, or would not have, produced more serious injuries.

99 N.J. Super. at 281, 239 A.2d at 279. In essence, the court stated that the defendant had failed to prove the existence of any second collision injuries.

104. \textit{See supra} note 102.

105. 99 N.J. Super. at 275, 239 A.2d at 276.

106. \textit{Id.}

107. \textit{Id.} at 279, 239 A.2d at 278. The court stated that however much any one of us might feel that seat belts are desirable as protective devices, we cannot say that we may take judicial notice of the fact that they are, at least to the extent of imposing a duty on a passenger to use them. The Legislature may, after some study, reach that determination.

\textit{Id.}


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that, despite dictum in some New Jersey opinions, the status of the seat belt defense in New Jersey remained unclear.\textsuperscript{109} While the Polyard court viewed Barry as implying that, given sufficient evidence, there may be circumstances where the nonuse of a seat belt would justify an apportionment of damages,\textsuperscript{110} it refused to "apply that doctrine to passiveness of a plaintiff or inaction in putting on seat belts, absent \textit{controlling} New Jersey appellate authority mandating such a rule."\textsuperscript{111}

The New Jersey state legislature mandated the use of seat belts,\textsuperscript{112} yet failed to provide the critically needed solution to the seat belt problem. While the courts have deferred the issue of the seat belt defense to the legislature, the legislature has, in turn, now left it

\textsuperscript{109} Id. at 214, 372 A.2d at 384. See also Devaney v. Sarno, 125 N.J. Super. 414, 311 A.2d 208 (App. Div. 1973), aff'd, 65 N.J. 235, 323 A.2d 449 (1974). In Devaney, the plaintiff purchased from the defendants an automobile that was equipped with a defective seat belt. During the period that a new seat belt had been ordered, but had not been installed, plaintiff continued to drive without fastening the defective belt and was injured in a subsequent automobile accident. \textit{Id.} at 416, 311 A.2d at 209. The plaintiff brought a products liability action against the defendants and the defendants \textit{moved for summary judgment} on the grounds that the plaintiff "voluntarily and unreasonably proceed[ed] 'to encounter a known danger'" by knowingly driving a car with a defective seat belt. \textit{Id.} at 418, 311 A.2d at 209-10 (quoting \textsc{Restatement (Second) of Torts} \textsection{} 402A comment n, at 356 (1965) (emphasis in original)). In essence, the defendants asserted the defenses of contributory negligence and assumption of risk, the difference of which, according to the court, "is merely a problem in semantics." \textit{Id.} at 418, 311 A.2d at 209. Interestingly, the court held that although the plaintiff voluntarily assumed a known risk, whether or not that voluntary assumption was "unreasonable" was an issue for the jury. \textit{Id.} at 418, 311 A.2d at 210. The court recognized that this was not a typical products liability suit because the defect in the product was not the proximate cause of the accident. \textit{Id.} at 419, 311 A.2d at 210. Furthermore, this case did not fall within the classic second collision seat belt scenario where defendant claims, as a defense, that plaintiff's failure to wear a seat belt increased the severity of his injuries. \textit{Id.}

A similar case arose in New York, in DiMauro v. Metropolitan Suburban Bus Auth., 105 A.D.2d 236, 483 N.Y.S.2d 383 (1984), where instead of distinguishing its facts from the classic second collision scenario, the court held that the plaintiff's voluntary decision to sit in a seat with a defective belt, rather than in another seat with a working seat belt, was the equivalent of failing to use an \textit{available} seat belt. \textit{Id.} at 243-44, 483 N.Y.S.2d at 390-91 (emphasis added). Such a failure, stated the court, constitutes a failure to mitigate under the \textsc{Spier} rule. \textit{Id.}

\textsuperscript{110} 148 N.J. Super. at 214, 372 A.2d at 384.

\textsuperscript{111} \textit{Id.} at 215, 372 A.2d at 384 (emphasis added). The court held that nonuse of an available seat belt does not constitute fault on the part of the plaintiff, as a matter of law, where plaintiff is killed in the accident. \textit{Id.} The court reasoned that "[i]t would certainly have been mere speculation and conjecture to attempt division of damages . . . . in this case where death occurred . . . . Would the jury be asked for this purpose to consider damages as if plaintiff had not died? This question answers itself." \textit{Id.}

\textsuperscript{112} \textit{See supra} note 98 and accompanying text.
to the courts.  

B. New York's Mandatory Seat Belt Use Law

While New York's Automobile Seat Belt Law appears to codify the pure form of mitigation enunciated in Spier v. Barker, it nevertheless leaves some important questions unanswered. In rejecting the Bentzler v. Braun comparative fault approach, the New York Court of Appeals acknowledged that "[n]ot involved in this case, and not considered, is an issue in which the failure to wear a seat belt is an alleged cause of the accident." It is interesting to note that Hawaii's mandatory seat belt use law yields the same result. See HAW. REV. STAT. § 291-11.6(d) (1985), supra note 82. There has been no opinion by a Hawaii court to date involving any aspect of the seat belt defense. Accordingly, the enactment of Hawaii's mandatory seat belt use law has done nothing to resolve the seat belt issue. The Hawaii state legislature drafted its statute loosely "to minimize the intrusion of this law upon personal freedoms." See CONFERENCE COMM. REPORT No. 17, at 3 (Apr. 16, 1985). This stems from the constitutional challenge to the statute requiring motorcyclists to wear safety helmets, which the Hawaii Supreme Court held to be constitutional as within the proper exercise of the state's police power. See State v. Lee, 51 Haw. 516, 465 P.2d 573 (1970). The dissent noted, however, that:

Now, the majority having upheld the statute, it would appear that our legislature along the same reasoning could require drivers and passengers in motor vehicles to wear seat belts and shoulder straps, under pain of criminal punishment for their failure to do so. Also, it could require individuals who may use public streets and highways at nights [sic] to wear certain clothing manufactured from materials having reflectory characteristics for their personal safety.

Then why can't the legislature enact criminal legislation prohibiting the smoking of cigarettes . . . or restricting or regulating foods to be consumed, for example, non-fattening food products to prevent obesity?

51 Haw. at 527, 465 P.2d at 579-80 (Abe, J., dissenting). Thus, in enacting the mandatory seat belt use law, the Hawaii legislature has tried to minimize such liberty constraints by mandating the use of seat belts for front seat passengers only, and by providing for a small penalty. See CONFERENCE COMM. REPORT No. 17, at 3 (Apr. 16, 1985).

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51 Haw. at 527, 465 P.2d at 579-80 (Abe, J., dissenting). Thus, in enacting the mandatory seat belt use law, the Hawaii legislature has tried to minimize such liberty constraints by mandating the use of seat belts for front seat passengers only, and by providing for a small penalty. See CONFERENCE COMM. REPORT No. 17, at 3 (Apr. 16, 1985).


115. See supra note 84.


117. 34 Wis. 2d 362, 149 N.W.2d 626 (1967). See supra notes 35-37 and accompanying text.

118. 35 N.Y.2d at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3. The court's rejection of the Bentzler approach was premised upon the fact that "the doctrine of contributory negligence is applicable only if the plaintiff's failure to exercise due care causes,
This very issue arose, however, in the later case of *Curry v. Moser*, where the Appellate Division held that a plaintiff's nonuse of a seat belt may constitute negligence sufficient to trigger a comparative fault analysis where it is found to be a contributing cause of the accident itself.\(^{120}\)

The plaintiff in *Curry* was an unbuckled passenger in the front seat of a car owned and operated by the defendant.\(^{121}\) As the plaintiff sat sideways in the front passenger seat, the defendant made a left hand turn, at which time the front passenger door swung open, and plaintiff fell from the car and was struck by an oncoming vehicle.\(^{122}\) The defendants made a pretrial application to introduce evidence of the plaintiff’s nonuse of the seat belt during the liability (fault) phase of the trial\(^{123}\) on the ground that plaintiff’s failure to

in whole or in part, the accident, rather than when it merely exacerbates or enhances the severity of his injuries." *Id.* at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921 (emphasis in original). See also *Abrams v. Woods*, 64 Misc. 2d 1093, 1094, 316 N.Y.S.2d 750, 751 (Sup. Ct. 1970) (court held, prior to *Spier*, that absent a causal relation between nonuse of a seat belt and the occurrence of the accident, such nonuse would not constitute contributory negligence under common law); *Dillon v. Humphreys*, 56 Misc. 2d 211, 216, 288 N.Y.S.2d 14, 19 (Sup. Ct. 1968) ("A plaintiff's carelessness does not serve to immunize a defendant from tort liability unless such conduct contributed to the accident which caused plaintiff's injuries."). *But see* *Penzell v. State*, 120 Misc. 2d 600, 607, 466 N.Y.S.2d 562, 567 (Ct. Cl. 1983) (court acknowledged that the *Spier* decision "left open the possibility that, where failure to use a seat belt is a cause of an accident, such conduct may be germane to the question of liability"); *Miller v. Miller*, 273 N.C. 228, 234, 160 S.E.2d 65, 70-71 (1968), where the court stated:

Conceivably a situation could arise in which a plaintiff's failure to have his seat belt buckled at the time he was injured would constitute negligence . . . . For instance, suppose a case in which the defendant driver tells the plaintiff-passenger to buckle his seat belt because the door on his side has a defective lock and might come open at any time. The passenger fails to buckle the belt and, in consequence, falls out of the automobile when the door comes open on a curve. Whether the plaintiff's conduct be called assumption of risk or contributory negligence, nothing else appearing, his failure to fasten the belt should bar his recovery for injuries thus received.\(^{119}\)

\(^{119}\) 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982). See supra note 41. See generally *Developments in New York Law—Plaintiff's failure to use available seatbelt may be considered as evidence of contributory negligence when the nonuse allegedly causes the accident*, 57 St. John's L. Rev. 430 (1983).

\(^{120}\) 89 A.D.2d at 7, 454 N.Y.S.2d at 315.

\(^{121}\) *Id.* at 2-3, 454 N.Y.S.2d at 312-13 (vehicle was equipped with a seat belt on the passenger side of the front seat).

\(^{122}\) *Id.* at 3, 454 N.Y.S.2d at 313 (driver of the oncoming vehicle was also named as a defendant in the case).

\(^{123}\) In New York, all personal injury trials are bifurcated into separate trials for liability and damages. N.Y. COMP. CODES R. & REGS. tit. 22, § 699.14(a)(1984). Thus, evidence pertaining to damages, including evidence of a plaintiff’s nonuse of a seat belt for the purpose of mitigating damages, is generally inadmissible in the liability trial. The defendants in *Curry* contended that since plaintiff's nonuse of a seat belt was a contributing cause of the accident, the case should fall within the exception enunciated in *Spier*, and therefore, such evidence

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wear the seat belt was a cause of the accident. This application was denied, and although the jury found that one hundred percent of the plaintiff's injuries were caused by her failure to buckle up, plaintiff's damages award was reduced by only thirty percent under a failure to mitigate theory. The Appellate Division reversed, and held that, "under the unique facts of this case and contrary to the general rule announced in Spier v. Barker, the defendants should have been permitted to raise the plaintiff's failure to wear her seat belt as bearing on the question of liability." Thus, since the all or nothing doctrine of contributory negligence no longer existed, the court ruled that nonuse of a seat belt can constitute comparative fault and is a question of fact for the jury.

The law mandated by the New York state legislature, on the other hand, specifically provides, without exception, that evidence of

should be admissible in the liability trial. See 89 A.D.2d at 3, 454 N.Y.S. 2d at 313.

124. 89 A.D.2d at 3, 454 N.Y.S.2d at 313.

125. Id.

126. Id. at 3-4. In essence, the jury applied both the comparative fault and mitigation approaches. The jury first found that 30% of plaintiff's injuries were second collision injuries and reduced plaintiff's damages award accordingly. The jury then found the plaintiff to be 25% at fault for not using a seat belt, which contributed to causing the first collision, and further reduced plaintiff's recovery by 25%. Thus, the jury imposed upon the plaintiff a double deduction for nonuse of a seat belt. In response, the Second Department stated that "[t]he jury's resolution of the damage issue is obviously inconsistent and reflects an apparent misunderstanding of the trial court's instructions." Id.

127. Id. at 2, 454 N.Y.S.2d at 312 (citations omitted). The court reasoned that the facts of this case were unique in that the accident would not have occurred had plaintiff been wearing an available seat belt. Id. at 7, 454 N.Y.S.2d at 315. Unlike the typical second collision scenario, where failure to buckle up results in add-on injuries following the first collision, this case did not involve a first collision. Id. at 7-8, 454 N.Y.S.2d at 315. The court determined that it was the combined causes of the opening of the door and the failure to wear the seat belt which led to the plaintiff's injuries . . . . The instant case would thus appear to present the very situation anticipated by the Spier court in its footnote, in which the plaintiff's failure to wear a seat belt is alleged to be a cause of the accident.

Id. at 8, 454 N.Y.S. 2d at 315.

128. Id. at 8, 454 N.Y.S.2d at 316. The court made it clear that "unlike Spier, which was decided under a state of law which absolutely barred recovery by a contributorily negligent plaintiff, the cause of action in the instant case . . . is governed by the comparative negligence doctrine . . . ." Id.


130. See supra note 84.
seats belt nonuse is not admissible in regard to the issue of liability. Thus, even in the rare cases where nonuse of a seat belt contributes to the cause of an accident, it is unclear whether this statute leaves room for courts to apply the Curry exception.

IV. A PROPOSED SOLUTION TO THE SEAT BELT DILEMMA

Since our present system of comparative fault is aimed at distributing damages equitably among the negligent parties, one commentator has proposed that the plaintiff should have his recovery reduced according to the role that his conduct played in comparatively causing his injuries. The failure to wear an available seat belt is a contributing cause of a portion of the plaintiff's second collision injuries. Despite the fact that the mitigation and comparative fault approaches to the seat belt defense do not fit comfortably into traditional tort doctrine, it is nevertheless unfair to allow plaintiff to recover fully for an "injury event" in which his conduct played an important role.

The proposed solution, therefore, would allow the introduction of evidence of a plaintiff's nonuse of a seat belt as probative of comparative fault. Once this is achieved, the court should "first apportion damages and then . . . accomplish the fault comparison on the second-collision or add-on injuries." The rationale is that the defendant is solely responsible for the full extent of plaintiff's first collision injuries, and therefore, the plaintiff is entitled to an undiminished recovery for those injuries. The second collision injuries, however, are the result of "joint fault" between the plaintiff, who failed to buckle up, and the defendant, whose active negligence caused the accident.

This approach accomplishes a compromise between the theories of mitigation and comparative fault, and seems to encompass the...
best of both worlds. The mitigation component is in the apportionment of damages into first and second collisions. The defendant seeking to reduce the plaintiff’s recovery for nonuse of a seat belt bears the burden of bifurcating the collisions by introducing expert evidence. Once this apportionment is achieved, the jury will run a comparative fault analysis on the second collision, comparing the plaintiff’s fault in failing to wear his seat belt with the defendant’s active fault in causing the accident.

This approach may become troublesome, however, when the plaintiff is actively negligent in contributing to the occurrence of the accident. When such active fault exists, the plaintiff can no longer receive an undiminished first collision recovery. Moreover, the plaintiff’s active fault must also be considered in applying the comparative fault analysis on the second collision, since the active fault of the plaintiff contributed to his second collision injuries.

A reasonable solution, therefore, would be to apportion the damages and to perform separate fault comparisons on the first and second collisions. Thus, when the defendant introduces the requisite expert evidence to bifurcate the injuries, the jury should first determine the percentage of comparative fault attributable to the active negligence of both parties. Once this has been accomplished, the jury should then single out the plaintiff’s passive fault in failing to buckle up and attribute to it a separate fault percentage. This would allow a court to accomplish the fault comparison on each separate collision.

140. See supra notes 19-25 and accompanying text.

141. See supra notes 35-38 and accompanying text.

142. See supra notes 29-39 and accompanying text. Where the plaintiff has been actively negligent in causing the first collision, the second collision is caused by three contributing factors: the active fault of both plaintiff and defendant, as well as the plaintiff’s passive fault in failing to use a seat belt.

143. In doing so, the jury may take into account the attendant circumstances, such as the weather conditions, conditions of the road, and the condition of the vehicle itself. See Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373, 377 (1969) (jury may determine, from the evidence, that a plaintiff was negligent in failing to buckle up); Remington v. Arndt, 28 Conn. Supp. 289, 292, 259 A.2d 145, 146 (1969) (failure to wear a seat belt can constitute negligence where circumstances exist in which plaintiff should anticipate a collision).

144. One commentator proposes a similar solution and labeled it “the successive tort approach.” See McChrystal, Seat Belt Negligence: The Ambivalent Wisconsin Rules, 68 MARQ. L. REV. 539, 552-54 (1985). For the purpose of allowing a plaintiff’s failure to wear a seat belt to constitute comparative negligence, the second collision would be considered a “separate tort” occurrence. Id. at 552 (emphasis added). The first and second collision damages would be apportioned into individual torts, and Wisconsin’s Comparative Negligence statute, Wis. STAT. § 895.045 (1983), would apply in each tort. The tort representing the first collision...
If the jury finds plaintiff to be without any active fault with regard to first collision injuries, he should recover those damages in full. If, however, the jury determines plaintiff to be actively negligent, the court should compare the percentages attributed to the active fault of both parties and distribute those first collision damages accordingly.

With regard to the second collision, the total percentage of plaintiff's comparative fault should equal the sum of his predetermined active fault percentage and the predetermined percentage of his passive fault that was solely attributable to nonuse of a seat belt. The plaintiff's total percentage of fault should then be compared with the fault of the defendant in distributing the costs of the second collision injuries. Let us assume, for example, that the defendant has introduced the requisite expert evidence, which apportions the damages into $10,000 for the first collision and $20,000 for the second collision. Let us further assume that the jury has found plaintiff to be fifty percent at fault for his active negligence in causing the accident, and twenty percent at fault for his passive negligence in failing to buckle up. As the court accomplishes a fault comparison on each collision individually, the result would yield fifty percent fault(plaintiff)/fifty percent fault(defendant) for the first collision, and seventy percent fault(plaintiff)/thirty percent fault(defendant) for the second collision. Accordingly, the plaintiff would recover $5,000 of his first collision injuries and $6,000 of his second collision injuries, for a total recovery of $11,000.

A comparison of these results with the results that would have occurred under the mitigation and comparative fault approaches reveals that this proposal is more equitable. Under the Spier v. Barker mitigation approach, for example, the plaintiff's total recovery would be only $5,000, because the plaintiff could recover fifty

injuries would involve a comparison of the active negligence of both parties, while the tort representing the second collision would involve a comparison of only the plaintiff's passive "seat belt" negligence with the active negligence of the defendant. Id. However, by viewing plaintiff's second collision injuries as a separate tort, this approach merely isolates plaintiff's passive negligence, yet leaves no room for a consideration of any active negligence on the part of the plaintiff in its second collision negligence comparison. Since the active fault of the defendant would be a contributing cause of the second collision, see supra notes 31-32 and accompanying text, the plaintiff's active fault contributes to that second collision as well. Thus, while the classic seat belt scenario does involve separate collisions, it cannot be viewed as separate or "successive" torts for the purpose of isolating the negligence attributable to seat belt nonuse.

145. The 70% figure for the fault of the plaintiff represents his total percentage of fault with respect to the second collision, i.e., the sum of his active and passive fault percentages.
percent of his first collision injuries but none of his second collision injuries. Under the Bentzler v. Braun comparative fault approach, where there is no apportionment of the damages, the jury must arrive at a single comparative fault percentage to be applied to the totality of the plaintiff's injuries. This single fault percentage must represent both the active and passive fault of the plaintiff. Assuming that a jury will arrive at a seventy percent figure for the combined fault of the plaintiff, that plaintiff will recovery only $9,000 of his injuries, as opposed to the $11,000 he would recover under the proposed solution. Furthermore, this seemingly nominal difference in recovery will increase as the damages become proportionately higher in value. Accordingly, this proposed solution to the seat belt defense would eliminate the inequities of applying either the mitigation or comparative fault theories individually, and would utilize the best aspects of both within a system of pure comparative fault.

146. Furthermore, it has been argued that, in a system of comparative fault, the mitigation approach to the seat belt defense would result in a double deduction of the plaintiff's damages. This is because juries may inadvertently consider seat belt evidence in their assessment of the plaintiff's comparative fault percentage, even though such evidence is admissible only as to mitigation of damages. See Clarkson v. Wright, 108 Ill.2d 129, 483 N.E.2d 268, 268-69 (1985). See also supra notes 20-23 and accompanying text.

147. See supra notes 35-38 and accompanying text.

148. To be consistent with the aforementioned figures, it is assumed that if the jury were to find plaintiff to be 50% actively negligent and 20% passively negligent in failing to buckle up, his combined percentage of comparative fault would be 70%. This 70% comparative fault figure would be applied to the full $30,000 of his injuries. Thus, the plaintiff can only recover for 30% of his injuries, which amounts to $9,000. Since the jury has great latitude to decide upon an arbitrary number, an unfair verdict may occur. This accounts for the bifurcation of collisions, and the bifurcation of plaintiff's negligence in each.

149. Let us assume, for example, that both parties will possess the same fault percentages as in the aforementioned hypothetical. The plaintiff will therefore be 50% actively negligent and 20% passively negligent. If we proportionally enhance the value of plaintiff's injuries tenfold, however, to the extent that they are $100,000 for the first collision and $200,000 for the second, the disparity in result is no longer nominal. Under the comparative fault approach, the plaintiff is 70% at fault and may recover only 30% of his $300,000 worth of injuries. The result would yield a recovery of $90,000. Under the proposal suggested by this author, the injuries are bifurcated, and separate comparative fault analyses will be accomplished on each collision individually. Thus, as stated in the aforementioned hypothetical, the fault comparisons would amount to 50% fault(plaintiff)/50% fault(defendant) for the first collision, and 70% fault(plaintiff)/30% fault(defendant) for the second collision. The plaintiff will therefore recover $50,000 of his first collision injuries and $60,000 of his second collision injuries for a total of $110,000 — a full $20,000 more than what plaintiff would have recovered under the comparative fault approach.
V. APPLICATION OF THE PROPOSED SOLUTION UNDER NEW YORK LAW

This proposed solution can be applied successfully under New York law. There are two major issues, however, which must be addressed. First, how can the nonuse of a seat belt, which does not contribute to the cause of a first collision, be labeled "negligence" for the purpose of accomplishing a comparative fault analysis? Second, under New York law, which mandates the bifurcation of personal injury actions into separate trials for liability (fault) and damages, how can a jury arrive at a fault percentage for a plaintiff's nonuse of a seat belt? Specifically, how can a jury attribute fault to seat belt nonuse during the liability trial without hearing the requisite expert evidence as to the extent of second collision injuries, which can only occur in the separate trial for damages?

A. Nonuse of a Seat Belt as "Culpable Conduct" under New York's Comparative Fault Statute

Prior to the adoption of a comparative fault statute, the New York Court of Appeals, in Spier v. Barker, rejected the Bentzler v. Braun comparative fault approach, reasoning that the doctrine of contributory negligence should apply only if the plaintiff's failure to exercise due care actually caused an accident, rather than merely enhancing the severity of injuries. Thus, as an all or nothing rule, contributory negligence would function as a total bar to a plaintiff's recovery, despite the fact that his nonuse of a seat belt may have contributed only to causing a small portion of his injuries. This reasoning is no longer valid in the age of comparative fault.

The New York comparative fault statute (CPLR 1411) was designed to eliminate the all or nothing rule of contributory negli-
gence, and, instead, to distribute equitably the damages between plaintiff and defendant. The objective was to reduce a plaintiff’s recovery only in proportion to his share of fault. Even more important, however, is the fact that CPLR 1411 was also designed to include any breach of a legal duty within a comparative fault analysis:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant . . . shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant . . . bears to the culpable conduct which caused the damages.

The statute’s use of the term “culpable conduct,” rather than “negligence,” indicates that the rationales relied upon by the Spier court have become outdated. Accordingly, a plaintiff’s failure to use an available seat belt should be included within the meaning of the phrase “culpable conduct” for the purpose of admitting such evidence to prove comparative fault.

Since the inception of CPLR 1411, the New York courts have uniformly held that the use of the term “culpable conduct” indicates a clear legislative intention to expand the concept of damage apportionment from the traditional confines of negligence cases to encompass any breach of a legal duty. The phrase is, therefore, “meant to cover all conduct by the plaintiff, negligent or otherwise, that may

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162. See supra notes 15-18 and accompanying text.

be considered in diminishing recovery."\(^\text{164}\) The focus of plaintiff's conduct is no longer on negligent conduct that causes an accident, but on culpable conduct that causes or contributes to causing one's injuries.\(^\text{165}\) As one commentator has stated:

[T]he term "comparative negligence" as applied to the New York rule is inaccurate, and a better description would be "comparative fault" law. The Judicial Conference report on CPLR 1411 states the following:

"The phrase 'culpable conduct' is used instead of 'negligent conduct' because this article will apply to cases where the conduct . . . will be found to be not negligent, but will nonetheless be a factor in determining the amount of damages."\(^\text{166}\)

Since the continuing judicial development of the concept of culpable conduct is consistent with the goals of CPLR 1411, the mitigation approach of Spier can be merged successfully into the present system of comparative fault for the purpose of applying this author's proposed solution.

One lower court, in Bellier v. Bazan,\(^\text{167}\) has taken the lead and has held that since CPLR 1411 speaks of "culpable conduct which caused the damages,"\(^\text{168}\) a plaintiff's failure to mitigate damages may constitute such culpable conduct in an action for lack of informed consent.\(^\text{169}\) The court was circumspect, however, reasoning that such culpable conduct can occur contemporaneously with the accident, when it will involve the issue of fault, or subsequent to the accident.

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165. Arbegast v. Board of Educ., 65 N.Y.2d 161, 168, 480 N.E.2d 365, 370, 490 N.Y.S.2d 751, 756 (1985). The New York Court of Appeals described this as "comparative causation." Any culpable conduct of the plaintiff should reduce his recovery according to the role that such conduct played in comparatively causing his injuries. Id.


168. Id. at 1058, 478 N.Y.S.2d at 565 (quoting N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976)).

169. Id. In this case, the plaintiff brought a malpractice action against the defendant physician for lack of informed consent. The defendant, in turn, raised the "culpable conduct" defense of CPLR 1411, claiming that the postoperative conduct of the plaintiff constituted a failure to mitigate, which served to enhance the extent of her scarring. Id. at 1056-57, 478 N.Y.S.2d at 563-64.
occurrence of the accident, when it will mitigate damages. The court qualified its language, stating that "[f]or example, failure to use a seat belt has been deemed [to constitute a failure] to mitigate damages when such action did not contribute to the accident . . . [o]r it has been held to bear upon liability when it was a partial cause of the accident itself." This language is particularly confusing in its use of Spier to exemplify mitigation, because Spier involved a preaccident failure to mitigate, while the Bellier case involved alleged postaccident conduct. Thus, although the Bellier court included a plaintiff's failure to mitigate within the meaning of the term "culpable conduct," whether or not such inclusion was only intended to cover a postaccident failure to mitigate remains unclear. If conduct occurring subsequent to the accident is included within the meaning of CPLR 1411, all preaccident conduct should be included as well.

The court in Fernandez v. Vukosa took the analysis even further, and held that a plaintiff's failure to wear an available seat belt could be pleaded within the ambit of the "culpable conduct" language of CPLR 1411. This case was an action for personal injuries arising out of an automobile collision; the plaintiff admitted to not wearing a seat belt. While the defendant's answer to plaintiff's complaint failed to plead specifically the plaintiff's nonuse of a seat belt as an affirmative defense, it did contain the culpable conduct (comparative fault) defense. When the defendant later attempted to introduce seat belt evidence at trial, the plaintiff claimed that such evidence was rendered inadmissible by defendant's failure to plead specifically the seat belt issue as an affirmative defense. The court disagreed, and stated:

It appears that CPLR 1411 was designed to cover all types of cul-

170. Id. at 1058, 478 N.Y.S.2d at 564. The court stated that the "distinction between these two concepts many times is blurred and is resolvable only in terms of when, from the standpoint of the defendant's fault, plaintiff's wrongful conduct occurred." Id.
171. Id.
172. 124 Misc. 2d at 1057-58, 478 N.Y.S.2d at 564-65.
174. Id. at 51, 436 N.Y.S.2d at 922.
175. Id. at 48, 436 N.Y.S.2d at 920.
176. Id. at 49-50, 436 N.Y.S.2d at 921. The Court of Appeals in Spier required additionally that the seat belt defense be pleaded as an affirmative defense. New York's mandatory seat belt use law also contains this requirement. See N.Y. VEH. & TRAF. LAW § 1229-c(8) (McKinney 1986); supra note 84.
177. 108 Misc. 2d at 50, 436 N.Y.S.2d at 921.
178. Id.
pable conduct. The statute encompasses not only contributory negligence and assumption of risk but also, for example, the defense of product misuse in a strict products liability case . . . . Moreover, the statute uses the words "culpable conduct which caused the damages" rather than "culpable conduct which caused the occurrence". The clear inference is that the statute was intended to cover not only conduct which caused the accident but also culpable conduct which caused or failed to minimize the damages arising from the accident.\textsuperscript{179}

This language indicates that the inclusion of the seat belt defense within a comparative fault analysis is consistent with the spirit of CPLR 1411. While the lower courts have been reluctant to adopt any such theory because of the controlling precedent of Spier,\textsuperscript{180} the New York state legislature should have provided for comparative fault analysis in its Automobile Seat Belt Law.\textsuperscript{181} Furthermore, to alleviate any fears that a jury would attribute excessively harsh fault percentages to the nonuse of a seat belt, such a statute could have provided for a ceiling on the percentage of fault that could be attributed to seat belt nonuse.\textsuperscript{182} Instead, New York's mandatory seat belt use law\textsuperscript{183} merely codified the Spier pure form of mitigation, thereby creating an illogical exception to the doctrine of comparative fault enunciated in CPLR 1411 and the lower court opinions.

B. Cases Involving the Seat Belt Defense Warrant a Single Trial on the Combined Issues of Liability and Damages

New York statutorily mandates the bifurcation of all personal

\textsuperscript{179} 108 Misc. 2d at 51, 436 N.Y.S.2d at 922 (emphasis added). New York is not the only state that follows such a broad interpretation of conduct constituting fault for comparative fault purposes. See, e.g., California Casualty Gen. Ins. Co. v. Superior Court, 173 Cal. App. 3d 274, 218 Cal. Rptr. 817 (1985), which held that in a negligence action against an insurance company, "bad faith" on the part of the insured party is included within the meaning of comparative fault. Id. at 283, 218 Cal. Rptr. at 823. Thus, the court recognized a "comparative bad faith" defense to negligence.


\textsuperscript{181} See supra note 114.

\textsuperscript{182} See, e.g., Michigan's mandatory seat belt use statute, supra notes 96-97 and accompanying text, which places a 5% ceiling on the amount that plaintiff's recovery may be reduced. This percentage appears to be too low where, for instance, a fault comparison on the second collision may result in the attribution of 50% fault to the plaintiff for his nonuse of a seat belt. Since failure to wear a seat belt may be just as much a cause of the second collision injuries as was the active negligence of the defendant, those second collision injuries should be distributed on the basis of a "pure" comparative fault analysis, without a ceiling.

\textsuperscript{183} N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 1986).
injury trials into separate trials for liability and damages.\textsuperscript{184} The policy behind this system of bifurcated trials is to facilitate the settlement of cases during the trial process.\textsuperscript{185} Bifurcation creates a problem in cases involving the seat belt defense, however, because the issues of liability and damages are mutually dependent. Since a plaintiff's nonuse of a seat belt should constitute culpable conduct or fault with regard to only the second collision,\textsuperscript{186} it would be unreasonable for a jury to give it a fault percentage during the liability trial without knowing the extent of the plaintiff's second collision injuries, if any. This can be determined only in the damages trial. Fortunately, the New York statute contains an escape clause that allows the trial judge to order a single trial on the combined issues of liability and damages in "exceptional circumstances."\textsuperscript{187} Courts have utilized this "exceptional circumstances" clause where the issues of liability and damages are intertwined.\textsuperscript{188} Thus, for example, "where there is a serious question as to whether the defendant's conduct was the proximate cause of the particular injury suffered, the Court should consider the two items simultaneously and a bifurcated trial [should not be ordered]."\textsuperscript{189}

This reasoning was followed by the Appellate Division in \textit{Curry v. Moser},\textsuperscript{190} where the court held that where the nonuse of a seat

\textsuperscript{184} N.Y. COMP. CODES R. & REGS. tit. 22, § 699.14(a) (1984), which states in pertinent part: "In all negligence actions to recover damages for personal injury, the issues of liability and damages shall be severed and the issue of liability shall be tried first . . . ."


\textsuperscript{186} See supra notes 50-52, 114-120 and accompanying text.

\textsuperscript{187} N.Y. COMP. CODES R. & REGS. tit. 22, § 699.14(a)(1984). The clause states: In exceptional circumstances, for reasons to be stated in the record, where, in the discretion of the judge . . . good cause exists as to why such a severance [bifurcation] should not be granted, he may order a single trial on the issues of liability and damages.


\textsuperscript{190} 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982). See supra notes 119-129 and accompany-
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belt is proven to contribute to the cause of the accident, an exceptional circumstance sufficient to warrant a unified trial exists.\textsuperscript{191} This reasoning should apply in all cases involving the seat belt defense.

Under the theory proposed in this Note, the court should allow evidence of seat belt nonuse to be admissible to prove comparative fault; the court should then apportion damages to accomplish fault comparisons on the first and second collisions individually. Accordingly, while any active fault of the plaintiff should be relevant with respect to both the first and second collisions, any passive fault attributable to nonuse of a seat belt should be relevant with respect to the second collision only.\textsuperscript{192} A jury cannot attribute fault to a plaintiff's nonuse of a seat belt without a unified trial in the combined issues of liability and damages, because there must be a proven second collision before any liability can be assessed to it.\textsuperscript{193} A unified trial is, therefore, necessary in all cases involving the seat belt defense.

CONCLUSION

The seat belt defense can be restructured within the comparative fault system to distribute equitably the costs of first and second collision injuries on the basis of their respective causes. The recent state mandatory seat belt use laws, however, have failed to accomplish this goal and the judiciary may prove to be the proper forum for resolution of the seat belt controversy. Whether by court or by state legislature, the seat belt controversy warrants a resolution. The solution proposed in this article fits comfortably within traditional tort principles and within the spirit of comparative fault.

Michael B. Gallub

\textsuperscript{191} 89 A.D.2d at 9, 454 N.Y.S.2d at 316. \textit{Cf.} DiMauro v. Metropolitan Suburban Bus Auth., 105 A.D.2d 236, 246, 483 N.Y.S.2d 383, 392 (1984) (where plaintiff failed to wear a seat belt in mitigation of her damages, there was not "such an inextricable relationship between liability and damages as to require a unitary trial").

\textsuperscript{192} \textit{See supra} notes 122-124 and accompanying text.

\textsuperscript{193} \textit{See, e.g.,} Franklin v. Gibson, 138 Cal. App. 3d 340, 344, 188 Cal. Rptr. 23, 24-25 (1982) (citing Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969) (court imposed upon defendant the burden of proving, by use of expert evidence, the extent of plaintiff's second collision injuries so that the jury could properly attribute to it a percentage of comparative fault). A unified trial, within the exception of N.Y. COMP. CODES R. & REGS. tit. 22, § 699.14(a)(1984), would enable the jury to hear all the evidence, both as to liability and damages. Thus, not only would the jury be able to attribute a fault percentage to plaintiff's nonuse of a seat belt, but additionally, separate fault comparisons could be accomplished for the first and second collisions individually.