SHOULD FAILURE TO WEAR SEAT BELTS CONSTITUTE A DEFENSE?

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The rapid increase in automobile fatalities and injuries during the past five years[1] has prompted the federal and state governments to act in an effort to reduce the slaughter on America's highways. As a protective measure, federal motor vehicle safety standards[2] and statutes in most states[3] require the installation of seat belts in all passenger cars. In light of these facts, it is not surprising that enterprising defense lawyers have argued that failure of a plaintiff to wear a seat belt constitutes contributory negligence.[4] Some courts have accepted such a contention and have held that the defense is a proper question for jury consideration;[5] others have refused to let the jury consider it.[6] These latter courts fail to recognize that valid policy considerations underlie such statutes and as a result eliminate what could have been an effective stimulus to "buckling up."[7]

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[1] Automobile statistics compiled by the National Safety Council indicate the recent trend in automobile fatalities and injuries.

	1963	*1964*	*1965*	*1966*	*1967*
Fatalities	43,600	47,700	49,000	53,000	53,100
Injuries	1,600,000	1,700,000	1,800,000	1,900,000	1,900,000
Death Rate*	5.5	5.7	5.6	5.67	5.47

*Death rate computed on basis of number of deaths per 100,000,000 passenger miles traveled.

NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1964-1968 eds.).

[2] The authority to promulgate such standards is derived from the National Traffic and Motor Vehicle Safety Act of 1966, U.S.C. § 1392 (Supp. 1967). "The Secretary shall provide by order Federal motor vehicle safety standards." Motor Vehicle Safety Standard 208, 23 C.F.R. § 255.21 (1968), requires a seat belt for each passenger car seat. It also provides for shoulder harnesses for the outside passengers in the front seat. (Convertibles are exempt from the shoulder harness requirement.)

[3] For a list of states which have passed seat belt legislation see Note, *Torts — Contributory Negligence — Passengers' Failure to Use Seat Belts as Contributory Negligence,* 36 U. MO. KAN. CITY L. REV. 151, 152-53 (1968).

[4] For other law review articles dealing with various aspects of the seat belt problem, see Kleist, *The Seat Belt Defense — An Exercise in Sophistry,* 18 HAST. L.J. 613, (1967); Note, *Negligence: Failure to Use Seat Belts and Defense of Contributory Negligence: "Does the Reasonable Man Always Buckle Up?,"* 21 OKLA. L. REV. 88 (1968); Note, *Seat Belts and Contributory Negligence,* 12 S. DAK. L. REV. 130 (1967); Note, *Seat Belt Negligence in Automobile Accidents,* 1967 WIS. L. REV. 288.

[5] *E.g.,* Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967); Robinson v. Bone, 285 F. Supp. (D. Ore. 1968).

[6] Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967) (The court stated that it is too difficult for jurors to analyze the variables involved in failing to wear a seat belt.); *c.f.,* Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1963) (The court stated that due care apparently does not require the use of seat belts since only a small percentage of motorists use them).

[7] The abundance of legislation requiring *installation* of seat belts is to be contrasted with the dearth of legislation requiring the *use* of seat belts. Only two statutes were found requiring their use. R.I. GEN. LAWS ANN. § 31-23-41 (1956) requires drivers of public transportation vehicles to wear seat belts; CAL. VEH.

It is submitted that failure to wear a seat belt constitutes contributory negligence. In an attempt to support this contention, this comment will examine the reasonableness of plaintiff's choice not to wear a seat belt; problems of causation presented when asserting the defense; the effect on plaintiff's recovery if he is found to be contributorily negligent; other defenses that might be raised; and constitutional problems involved in statutes requiring the use of seat belts.

THE REASONABLENESS OF "BUCKLING UP"

Actionable negligence requires the existence of several elements, the first two of which are: (1) a duty to exercise due care, *i.e.*, to conform to a reasonable and prudent standard of conduct, and (2) a breach of that duty.[8] In applying these requirements to seat belt litigation, one court has indicated that due care does not require the use of seat belts since only a small percentage of motorists wear them.[9] While the acts of the majority often provide a good indication of reasonableness, such conduct is not determinative of the question. As Justice Holmes said, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[10] Justice Learned Hand observed that it is possible for everyone's conduct to fall below the required standard and thereby be negligent.[11] Finally, the *Restatement (Second) of Torts* provides that "[i]n determining whether conduct is negligent, the customs of the community, or of

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CODE § 27304 (Supp. 1967) provides that all drivers and passengers in driver-training vehicles must use seat belts.

The proposition has been advanced that the purpose of legislation requiring installation of seat belts was to promote use, and that, therefore, a statutory duty to wear belts should be recognized. Courts have rejected this reasoning, stating that if a duty is to be established, it is up to the legislatures to so provide. Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966). Supporting this position, five state statutes provide that evidence of plaintiff's failure to wear a seat belt is not admissible at trial. IOWA CODE ANN. § 321.445 (1966); ME. REV. STAT. ANN. tit. 29, § 1368A (Supp. 1967); MINN. STAT. ANN. § 169.685 (Supp. 1967); TENN. CODE ANN. § 59-930 (Supp. 1967); VA. CODE ANN. § 46.1-309.1 (Supp. 1968).

A look at the history of the judicial process indicates this view is entirely inapposite to the concept of the growth of the common law. As stated by Justice Cardozo, quoting from the Swiss Code of 1907:

> The statute governs all matters within the letter or spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of a custom according to the rules which he would establish if he were to assume the part of a legislator. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 140 (1921).

[8] W. PROSSER, TORTS § 30 at 146 (3d ed. 1964). *See* General Electric Co. v. Rees, 217 F.2d 595 (9th Cir. 1954); Russell, Poling & Co. v. United States, 151 F. Supp. 11 (S.D.N.Y. 1957); McHugh v. National Lead Co., 60 F. Supp. 17 (E.D. Mo. 1945); Shafer v. Monte Mansfield Mtrs., 91 Ariz. 331, 372 P.2d 333 (1962).

[9] Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

[10] Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903).

[11] New England Coal & Coke Co. v. Northern Barge Corp. (The T.J. Hooper), 60 F.2d 737, 740 (2d Cir. 1937).

others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."[12] Thus, it may be argued that reasonable conduct requires the use of seat belts even though the majority of motorists do not wear them.[13]

It would appear that the test should be one similar to that set forth by Dean Prosser in his treatise on torts, which has been adopted by many courts.

> It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in light of the social value of the interest threatened, and the probability and extent of harm, against the value of

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[12] RESTATEMENT (SECOND) OF TORTS § 295A (1965).

[13] The National Safety Council annually estimates the incidence of seat belt usage for all motorists. This percentage is an indication of "the per cent of all exposure hours during which passenger car occupants are using seat belts."

1962	*1963*	*1964*	*1965*	*1966*	*1967*
5%	N.A.	15%	16%	20-25%	25%

NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1963-1968 eds.).

According to a recent Arizona survey, seat belts were in use in approximately 17%* of the vehicles involved in accidents during 1967. TRAFFIC SAFETY DIVISION, ARIZONA HIGHWAY DEP'T, ARIZONA'S TRAFFIC ACCIDENT SUMMARY FOR 1967 at 12 (1968).

	Number of Vehicles Involved in Accidents
No Belts	27,726
Belts not in use	12,397
Belts in use	7,906
Unknown*	24,591
Total	72,620

*Percentage of seat belts in use calculated excluding vehicles for which information was unavailable.

Why are motorists reluctant to "buckle up?" The answer may lie in the belief that seat belts can increase the likelihood of certain types of injuries. *See* Kleist, *The Seat Belt Defense — An Exercise in Sophistry*, 18 HAST. L.J. 613, 614 (1967); NEWSWEEK, June 19, 1967, at 92 (use of seat belts in high speed accidents may increase the severity of back injuries). Further, reluctance may be due to a fear of being trapped in a burning or submerging vehicle, or to the inconvenience involved in buckling and unbuckling a seat belt. These explanations appear somewhat unfounded, however, in light of several statistical studies. For example, it has been established that the odds of surviving a traffic accident are much greater when a motorist remains inside the vehicle. Tourin, *Ejection and Automobile Fatalities*, 73 U.S. HEALTH REPORTS 381 (1958).

	Not Fatally Injured	Fatally Injured	Total	Percent Fatally Injured
Ejected	876	121	997	12.5
Not Ejected	5843	147	5990	2.5
Total	6719	268	6987	3.8

Moreover, it has been shown that fire and submersion occur in less than 1% of all automobile accidents. Gagen, *Seat Belts: No Longer Why, But Why Not?* TODAY'S HEALTH, July 1960, at 26. Furthermore, a recent study indicates that injuries to the abdomen, pelvis and lumbar spine are substantially the same among seat belt users and nonusers. This study is set forth in Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

the interest which the actor is seeking to protect, and the expedience of the course pursued.[14]

An examination of recent traffic statistics illustrates the operative effect of this balancing concept. In 1967, there were 53,100 traffic fatalities.[15] In addition, there were approximately 1,900,000 injuries,[16] bringing the total number of injured and killed to almost 2,000,000.[17] Although a large number of persons suffered injuries, percentage-wise the probability of any one individual becoming involved was remote.[18] On the other hand, studies indicate that injuries and fatalities are substantially greater among non-users of seat belts.[19] Therefore, while the risk of injury resulting from an auto accident is fractional, the risk of greater injury on the part of a non-user is substantial.[20] Balancing this greater risk of harm to human life against the negligible inconvenience of buckling up, it would seem that the slight inconvenience involved in fastening the belt is outweighed by the probability and gravity of the harm resulting from non-use. Thus, it appears that a motorist who fails to wear a seat belt is acting unreasonably.

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[14] W. PROSSER, TORTS § 31 at 152. To appreciate the significance of this definition it may be helpful to diagram the relationship of these variables to one another.

Value of interest actor seeking to protect

Value of interest threatened

Expedience of course pursued

Probability and extent of harm

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See also North American Smelting Co. v. Moller, 204 F.2d 384 (3d Cir. 1953); United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Merrill v. Buck, 25 Cal. Rptr. 456, 375 P.2d 304 (Sup. Ct. 1962); RESTATEMENT (SECOND) OF TORTS § 291-93 (1965), in which a similar balancing approach is adopted.

[15] NATIONAL SAFETY COUNCIL, *supra* note 1.

[16] *Id.* Injuries as defined by ACCIDENT FACTS were those which caused disability beyond the date of injury.

[17] *Id.*

[18] *Id.*

[19] *See* note 13, *supra.*

[20] TRAFFIC SAFETY DIVISION, ARIZONA HIGHWAY DEP'T, ARIZONA'S TRAFFIC ACCIDENT SUMMARY FOR *1967* at 12 (1968). It can be seen from the statistics presented that seat belts do significantly affect the number of fatalities.

	Number of Vehicles			
	Total Accidents	Fatal Injuries	Non-fatal Injuries	Percent* Fatally Injured
No Belts	27,726	343	11,013	3.2
Belts not in use	12,397	135	4,852	2.8
Belts in use	7,906	43	2,794	1.5
Unknown	24,591	183	7,310	2.4
Total	72,620	704	25,969	

*Author's addition.

NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 53 (1965-1968 eds.) estimates that numerous lives could have been saved if all motorists had worn seat belts These estimates for the last four years were: 1964: 750; 1965: 900; 1966: 2,000; and 1967: 2,000. A study done on the Fourth of July and Labor Day weekends in 1965 indicated that fatalities were 75% lower among users of seat belts. *Id.* at 53 (1966). *See also* note 12, *supra.*

Once failure to wear a seat belt is determined to be unreasonable, there is a further question as to whether the plaintiff's unreasonableness can bar recovery. In *Brown v. Kendrick*,[21] the Florida Court of Appeals stated that the failure of plaintiff to wear a seat belt must be the proximate cause of the *accident* in order to bar recovery. This view precludes the use of the defense in seat belt cases since failure to wear a seat belt can never proximately cause the *accident*.

This theory has not been accepted in Arizona. In *MacDonald v. Eichenauer*,[22] the Arizona Supreme Court stated that contributory negligence is "an act or failure to act that does not constitute the exercise of ordinary care under the circumstances and is the *proximate cause or a contributing cause of the injury received.*" As recently as 1967, the Arizona Court of Appeals in *O. S. Stapley Co. v. Miller*,[23] denied recovery to the plaintiff, finding that the doctrine of contributory negligence is applicable where the plaintiff's negligence, while not contributing to the cause of the *accident*, contributes or adds to the *injuries* received. Thus, in Arizona, it is at least conceptually possible to assert the defense of contributory negligence in seat belt cases.[24] Since a plaintiff is no less culpable when his negligence contributes to the *injury* rather than to the cause of the *accident*, Arizona's position would seem to be the better of the two.

Once the plaintiff's contributory negligence can be asserted as a defense, there remains the problem of proving that such negligence was the "legal cause"[25] of the injuries received. It would appear that

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[21] 192 So. 2d 49 (Fla. Dist. Ct. App. 1966).

[22] 77 Ariz. 252, 269 P.2d 1057 (1954).

[23] 6 Ariz. App. 122, 430 P.2d 701 (1967), *vacated on other grounds*, No. 9100-PR (Sup. Ct. Nov. 20, 1968).

[24] Other cases supporting the Arizona Supreme Court's view are: Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

[25] Limitations on the tort liability of a negligent defendant traditionally have been expressed by the requirement that defendant's negligence be the "proximate cause" of plaintiff's injury. Under this formula, if the plaintiff's harm was a natural or direct consequence of defendant's negligence, defendant may be held liable even though the resultant injury was not foreseeable; but if plaintiff's harm was an indirect consequence, in that there were other contributing causes, it may be said that plaintiff's injury or the intervening causes must have been foreseeable. Recently, the "risk theory" of tort liability has emerged as an alternative approach to the question of legal causation in negligence cases. Under this theory, the defendant can be held liable if, but only if, the harm suffered by plaintiff was within the risk created by defendant's conduct. Under both approaches to the meaning of legal causation, it is agreed that in order for plaintiff to recover it is essential that he establish that the defendant's negligence was a "cause-in-fact" of the damage suffered, *i.e.*, that defendant's conduct was a substantial factor in bringing about plaintiff's harm. Since the problem is primarily one of semantics, in an effort to avoid confusion, this comment will hereinafter use the term "legal cause" when referring to the entire area of legal causation, which encompasses both the risk theory and proximate cause, as well as notions of cause-in-fact. *See generally* RESTATEMENT (SECOND) OF TORTS § 431-35 (1965); Seavy, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1938); Note, *The Risk Theory and Proximate Cause — A Comparative Study*, 32 NEB. L. REV. 72 (1953).

expert testimony, supported by statistical studies would be necessary to establish guidelines by which the jury could determine the effects of failure to wear a seat belt in a particular case. In all cases, defendant's evidence should include: (1) medical testimony to establish the extent of actual injuries; (2) statistics contrasting injuries in similar cases in which seat belts were worn with those in which seat belts were not worn; and (3) testimony of automotive safety experts as to how these statistics relate to that particular accident and whether the injuries would have been significantly reduced had a seat belt been worn. In some cases establishing "legal cause" may be impossible, but this is not a novel problem in negligence actions. In those instances in which a defendant can introduce evidence establishing the required causal connection between plaintiff's failure to wear a seat belt and the injuries suffered, the defense of contributory negligence should be available.[26]

EFFECT ON PLAINTIFF'S RECOVERY

Assuming that the evidence needed to establish the defense may be obtained, it is necessary to consider the effect of a finding of contributory negligence upon a plaintiff's recovery. In the majority of states, contributory negligence is a complete bar to recovery.[27] However, if it can be shown that plaintiff's negligence caused only a separable part of the damages, plaintiff should be allowed to recover for whatever injuries were not "legally caused" by his negligence.[28] For example, if the accident causes damage to the plaintiff's car and also results in bodily injury to the plaintiff as a result of his failure to wear a seat belt, he should be permitted to recover for the property damage to his automobile, but not for his personal injuries. Likewise, if the plaintiff receives abrasions and lacerations from being hurtled through the windshield and also suffers extensive burns, which are in no way connected with his failure to "buckle up," he should be permitted to recover for the burns, but not for the abrasions and lacerations. Unfortunately, this view has not been widely accepted.[29]

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[26] Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (Ct. App. 1967); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

[27] In contrast to the states following the rule that contributory negligence acts as a complete bar, a recent commentary indicates that six states (Arkansas, Georgia, Mississippi, Nebraska, South Dakota & Wisconsin) have comparative negligence statutes. Note, *Seat Belts and Contributory Negligence*, 12 S. DAK. L. REV. 130, 136 (1967). Arizona adds a unique variation to the traditional views, following the rule that a plaintiff who is found contributorially negligent *may* be barred from recovery. See discussion, p. 529 *infra*.

[28] W. PROSSER, *supra* note 8, § 64 at 433.

[29] F. HARPER & F. JAMES, THE LAW OF TORTS § 22.10, at 1231-1232 (1956) suggest that this type of situation is not actually a case of contributory negligence, but rather one in which each party is responsible for the damage flowing from his own act. Prosser, in suggesting that contributory negligence and avoidable consequences are in reality the same, advances the proposition that the one (avoidable

On the other hand, under the comparative negligence doctrine, proof of plaintiff's negligence results in a reduction of any judgment in his favor.[30] Thus, if it is shown that plaintiff's negligence was 20% responsible for the accident, he will be permitted to recover for only 80% of his injuries. This result is similar to that which is produced under the separable damage theory.

The Arizona Supreme Court, in *Layton v. Rocha*,[31] indicated that Arizona, like comparative negligence jurisdictions, is aware of the harshness of the "complete bar" theory of contributory negligence. In *Layton* the court, interpreting the Arizona Constitution, approved a jury instruction to the effect that if the jury found that the plaintiff was contributorially negligent, he *may* be barred from recovery. Applying this unique view to seat belt cases, an Arizona jury would be permitted to return a verdict for the plaintiff, even though they found him negligent in failing to wear a seat belt. Under the *Layton* doctrine there can be no apportionment of damages, but it would seem that a jury, although instructed that contributory negligence may act as a complete bar to recovery, could consider the negligence of both parties and adjust their verdict accordingly.

In light of the inequities resulting from barring all recovery by a plaintiff failing to wear a seat belt, it would seem that an apportionment, or separation of damages would be the most equitable solution to the problem of the effect of contributory negligence on plaintiff's ability to recover.

Other Defenses

It has been suggested that other defenses may be asserted, in lieu of contributory negligence, against a plaintiff who fails to wear his seat belt. One such defense is that of avoidable consequences under which a plaintiff is denied recovery to the extent that he unreasonably aggravates injuries caused by defendant's negligence.[32] Some courts and writers have contended that this doctrine is more desirable than contributory negligence since the latter is difficult, if not impossible, to establish, and when established, it may constitute a complete bar to

consequences) assigns damages to separable causes, the other (contributory negligence) does not. W. Prosser, *supra* note 8, § 64 at 434. The cases cited in support of a separation of damages apply to the maintaining of a nuisance and plaintiff's act in adding to that nuisance, but it would appear that the same principle of separation of damages should be applicable to seat belt cases.

[30] W. Prosser, *supra* note 8, § 66 at 447. For a discussion of the effect of the various statutes see Note, *Seat Belts and Contributory Negligence*, 12 S. Dak. L. Rev. 130, 136 (1967). *See also* Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. Pa. L. Rev. 572 (1951).

[31] 90 Ariz. 369, 368 P.2d 444 (1962).

[32] Hunter v. Croysdill, 169 Cal. App. 2d 307, 318, 337 P.2d 174, 181 (1959); W. Prosser, *supra* note 8, § 64 at 433.

recovery.[33] Those who advance this theory have extended the defense to apply to conduct of the plaintiff prior to his injury.[34] It is submitted, however, that the defense of avoidable consequences should not be available in seat belt cases since plaintiff's unreasonable conduct takes place prior to any accident.[35]

It also has been suggested that the defense of assumption of the risk can be applied to seat belt cases where the plaintiff knows and understands the danger involved in failing to buckle up, and therefore voluntarily assumes the risk of greater injury. Essentially, assumption of the risk differs from avoidable consequences in that the former involves a voluntary assumption of a known risk, while the latter concerns unreasonable conduct aggravating previously inflicted injuries.[36] Under the doctrine of assumption of the risk, if it can be shown that plaintiff was aware of the safety value of seat belts and yet voluntarily chose not to wear them, he would be deemed to have assumed the risk of greater injury and would be denied recovery for injuries resulting from his failure to buckle up. Of course, as is the case with contributory negligence, the injuries for which recovery is sought to be barred must have been "legally caused" by the risk assumed.[37]

In a jurisdiction such as North Carolina, where the court has indicated that a reasonable man would not necessarily wear a seat belt,[38] assumption of the risk may well be the only defense available, since its application is not dependent upon the reasonableness of plaintiff's conduct.[39] Yet, in order to maintain the defense, defendant must establish that plaintiff not only knew and understood that there was an appreciable risk of harm involved, but also that he voluntarily exposed

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[33] Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966). *See generally* Note, *Seat Belts and Contributory Negligence*, 12 S. DAK. L. REV. 130, 134 (1967); Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 297.

[34] *See, e.g.*, Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966); Note, *Seat Belts and Contributory Negligence*, 12 S. DAK. L. REV. 130, 139-140 (1967). The reason advanced for extending avoidable consequences to include the seat belt defense is that while contributory negligence acts as a complete bar to recovery, avoidable consequences permits an apportionment of damages.

[35] As Prosser points out, the time element is one of the primary distinguishing characteristics made between contributory negligence and avoidable consequences. W. PROSSER, *supra* note 8, § 64 at 433; Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947, 951 (5th Cir. 1956); *See* Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967). In conclusion, however, Prosser does suggest that avoidable consequences and contributory negligence are in reality the same, the distinction being made that the former permits a separation of damages. W. PROSSER, *supra* note 8, § 64 at 434.

[36] Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947, 951 (5th Cir. 1956); Beckett v. Kiepe, 369 S.W.2d 258, 261 (Mo. Ct. App. 1963).

[37] Bazzoli v. Nance's Sanitarium, 109 Cal. App. 2d 232, 240 P.2d 672 (1952); Schoof v. Byrd, 197 Kan. 38, 415 P.2d 384 (1966).

[38] Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968).

[39] Knutson v. Arrigoni Bros. Co., 275 Minn. 408, 412, 147 N.W.2d 561, 565 (1966); Beckett v. Kiepe, 369 S.W.2d 258, 261 (Mo. Ct. App. 1963); W. PROSSER, *supra* note 8, § 67 at 461.

himself to such danger.[40] Of course, certain risks are presumed to be known by everyone and, in such instances, defendant is not required to show plaintiff's knowledge.[41] It is doubtful, however, that public knowledge of the safety value of seat belts is at present so wide-spread as to raise such a presumption. Until that time comes, defendant must sustain the difficult burden of proving the plaintiff's state of mind at the time he exposed himself to the risk of harm.

STATUTES REQUIRING SEAT BELT USE

To this point the discussion has been limited to the possibility of establishing a common law defense. Although presently there are no statutes which require the use of seat belts by *private* motorists,[42] it is possible that such legislation will be enacted in the not too distant future since several courts have indicated they will not permit the defense of contributory negligence in absence of a statute.[43] Moreover, the requirement of use appears to be a logical and obvious extension of the present requirement of installation.[44]

It would appear that a statute prescribing the use of seat belts could either provide for the imposition of a penalty for failure to wear a seat belt, or for the creation of a presumption of negligence when it is shown that the seat belt was not used. If the constitutional validity of such measures can be established, either would provide a basis for the defense of contributory negligence by establishing a statutory standard of care.[45]

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[40] One advantage of using assumption of the risk is that it *may* be available in cases of willful and wanton conduct, Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885, 888 (1960). *Contra,* Blount Bros. Const. Co. v. Rose, 274 Ala. 429, 149 So. 2d 821 (1963) (contributory negligence is not). Galvin v. Jennings, 289 F.2d 15, 19 (3d Cir. 1961); Ridgeway v. North Star Terminal & Stevedore Co., 378 P.2d 647, 651 (Alas. 1963).

[41] Brown v. San Francisco Ball Club, 99 Cal. App. 2d 484, 222 P.2d 19 (1950) (spectator at a baseball game held to have assumed risk of being hit by a baseball although it was not shown she was aware of the danger).

[42] *See* note 7 *supra.*

[43] *Id.*

[44] It has been argued that when the legislatures enacted statutes requiring the installation of seat belts they intended that the belts be used, and that therefore, any person who was not wearing a seat belt at the time of an accident was negligent per se. To date this argument has been rejected. *See* Note, *Negligence: Failure to Use Seat Belts and Defense of Contributory Negligence: "Does the Reasonable Man Buckle Up?"* 21 OKLA. L. REV. 88, 89 (1968); Note, *Torts — Contributory Negligence — Passenger's Failure to Use Seat Belt as Contributory Negligence,* 36 U. MO. KAN. CITY L. REV. 151, 152-54 (1968); Comment, *Seat Belt Negligence in Automobile Cases,* 1967 WIS. L. REV. 288, 289-291.

[45] A majority of courts hold that violation of a statute which prescribes certain acts, constitutes negligence per se. Deering v. Carter, 92 Ariz. 329, 333, 376 P.2d 857, 860 (1962); Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E.2d 896, 899 (1951). One minority view holds that violation of a statute creates a rebuttable presumption of negligence. *E.g.,* Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 588, 177 P.2d 278, 285 (1947). Another minority view holds that a showing of violation of a statute is merely evidence of negligence. *E.g.,* Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597, 601 (Ark. 1938). *See generally* RESTATEMENT (SECOND) OF TORTS, §§ 286-88 (1965). Under any of these views it is necessary

Statute imposing a penalty

Legislation has recently been enacted in several states,[46] including Arizona,[47] requiring that motorcyclists wear safety helmets. There have been several cases in which defendants who were fined for failure to wear a helmet have challenged the constitutionality of such statutes,[48] contending that the state has no right to regulate an individual's conduct when it has no relationship to the "safety and well-being of the public at large . . . ."[49] The Rhode Island Supreme Court rejected this argument and held that such legislation was a valid exercise of the state's police power.[50] The court reasoned that objects kicked up by passing vehicles could so affect a motorcyclist as to cause him to momentarily lose control of his cycle and thus become a menace to other motorists.[51] The court indicated that such a statute may be valid even in the absence of this consideration, but did not develop the point further.[52]

On the other hand, the Michigan Court of Appeals in *American Motorcycle Association v. Davids*[53] found the "lack of public purpose" argument compelling and declared a similar state statute unconstitutional. The court found that the legislative intent was clearly to prevent

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to show that violation of the statute was the "legal cause" of the injury complained of, that the harm was of the type the statute sought to prevent, and that the plaintiff was within the class of persons the statute was passed to protect. *See, e.g.*, Couch v. Donahue, 259 F.2d 325, 327 (5th Cir. 1958); Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 137 So. 2d 298, 304 (1962); Langlois v. Rees, 10 Utah 2d 272, 351 P.2d 638, 641 (1960); RESTATEMENT (SECOND) OF TORTS, § 288B, Comment (1)(b) (1965).

[46] MICH. STAT. ANN. § 9.2358 (Supp. 1968); N.Y. VEH. & TRAF. LAW 381(6) (McKinney Supp. 1967); R.I. GEN. LAWS ANN. § 31-10.1-4 (Supp. 1967).

[47] ARIZ. REV. STAT. ANN. § 28-964A (Supp. May 1968).

> The operator and passenger of a motorcycle or motor driven cycle shall at all times, while operating or riding on such motorcycle or motor driven cycle, wear a protective helmet on his head in an appropriate manner safely secured. The operator and passenger of a motorcycle or motor driven cycle shall also wear protective glasses, goggles, or a transparent face shield of a type approved by the commission unless the motorcycle or motor driven cycle is equipped with a protective windshield. The provisions of this sub-section shall not apply to motor driven cycles designed to travel on three wheels. [effective date, January 1, 1969.]

[48] Commonwealth v. Howe, —— Mass. ——, 238 N.E.2d 373 (1968); American Motorcycle Assoc. v. Davids, —— Mich. ——, 158 N.W.2d 72 (Ct. App. 1968); People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee County Ct. 1967); People v. Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290 (Erie County Ct. 1967); People v. Smallwood, 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (Monroe County Ct. 1967); State v. Lombardi, —— R.I. ——, 241 A.2d 625 (1968).

[49] American Motorcycle Assoc. v. Davids, —— Mich. ——, 158 N.W.2d 72 (Ct. App. 1968).

[50] State v. Lombardi, —— R.I. ——, 241 A.2d 625 (1968).

[51] *Id.* at 627.

[52] *Id.* In answer to defendant's contention that the state's police power does not include the power to protect individuals from their own carelessness, the court said:

> The defendant's contention to the contrary presupposes that protection for the motorcycle operator was the sole motivation for the general assembly's action. Even if this were so, we are not persuaded that the legislature is powerless to prohibit individuals from pursuing a course of conduct which could conceivably result in their becoming public charges.

[53] —— Mich. ——, 158 N.W.2d 72 (Ct. App. 1968).

cranial injuries to cyclists[54] and, admitting that such action was commendable, concluded that the state has no right to protect an individual motorcyclist from himself, since such protection has no relationship to the public health, safety and welfare.[55]

The helmet cases involve the same constitutional question presented by a statute requiring the use of seat belts. If the Michigan court's reasoning is adopted, a statute requiring the use of seat belts could meet the same fate as the Michigan safety helmet statute, since the primary purpose in requiring use of seat belts would seem to be protection of the user. It is submitted, however, that such a conclusion would be erroneous and that a statute aimed primarily at the protection of the individual is not *per se* an unconstitutional exercise of the state's police power. Rather, if it can be shown that the measure is reasonably related to the public health, safety and welfare, the statute should be upheld.[56] It would appear that statistics establish a sufficient rational connection between the use of seat belts and the resulting protection of the public health, safety and welfare. How can it possibly be argued that such legislation is not reasonably related to the public health, safety and welfare? This past year alone, almost two million motorists were killed or injured on American highways,[57] the cost of injuries and insurance administration was more than seven billion dollars,[58] and it is estimated that 2,000 lives could have been saved had all motorists worn seat belts.[59]

If courts are unwilling to accept this argument, it would seem that the constitutionality of seat belt use statutes still could be upheld by adopting Rhode Island's position, namely, by considering the indirect consequences of a lack of such legislation in an effort to show a reasonable relation to the public health, safety and welfare. For example, in the absence of such a statute, a negligent defendant would be required to reimburse a plaintiff for injuries sustained through plaintiff's failure to "buckle up." If the defendant carries insurance, this burden will be spread among the members of the community through increased premiums. Although the increased insurance cost reflected in a single accident may be infinitesimally minute, when this figure is multiplied by the number of injuries each year, it looms as a most significant factor.

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[54] *Id.* at —, 158 N.W.2d at 75.
[55] *Id.* at —, 158 N.W.2d at 76.
[56] Meyer v. Nebraska, 262 U.S. 390 (1922); Jones v. Portland, 245 U.S. 217 (1917).
[57] *See* note 1 *supra.*
[58] Motor-vehicle injury costs consist of:

Loss of wages	$2,700,000,000
Medical expenses	700,000,000
Insurance admin. costs	3,900,000,000
Total	$7,300,000,000

NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 5 (1968).
[59] *See* note 20 *supra.*

Further, if the plaintiff is permanently disabled and unable to care for himself, he may become a ward of the state. Other members of the plaintiff's family may be seriously affected; even with insurance there will be additional expenses and loss of income which may result in another member of the family having to work. Such arguments can go on and on, and admittedly are somewhat tenuous. However, such arguments are by far preferable to the position taken by the Michigan court in *Davids*, and when considered together, they are sufficient to support a statute requiring use of seat belts.[60]

Statute creating a presumption

Alternatively, a statute could be drafted which would create a presumption of negligence on the part of those failing to use seat belts. Statutes which create presumptions of one type or another are common.[61] If the fact presumed by such a statute bears a rational relation to the

[60] It should be noted that an argument may be presented against the constitutionality of these statutes on the basis of Griswold v. Connecticut, 381 U.S. 479 (1965). There the United States Supreme Court held that a statute prohibiting the use of dissemination of information concerning contraceptives was an unconstitutional invasion of the right of privacy of married persons. Justice Douglas, writing the majority opinion, stated: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. In a concurring opinion, Justice Goldberg emphasized the effects of the ninth amendment on the right to marital privacy stating that the liberty protected against infringement by the federal and state governments is not limited to those rights enumerated under the first eight amendments. *Id.* at 493.

Adopting the reasoning of this opinion, it could be argued that the privilege to regulate one's conduct is a protected "right" when the exercise of it does not interfere with, or endanger others. It is necessary to keep in mind, however, that the conduct which Connecticut was attempting to regulate in Griswold was not in any way harmful to the parties engaging in it.

Extending this argument of a "right" to regulate one's conduct, the courts have recognized the "right to die," when exercised under the guise of the first amendment freedom of religion. *See* Note, *The Right to Die*, 18 U. FLA. L. REV. 591 (1965-66). For example, it is an accepted religious belief among Jehovah's Witnesses that the taking of another's blood into their bodies denies them eternal life. As a result of this belief, Jehovah's Witnesses have on occasion refused to submit to a blood transfusion which doctors considered essential. In deciding whether to compel a member of this sect to submit to a transfusion, the courts have considered how such a transfusion, or the denial thereof, would affect others. If it is determined that the refusal will have no adverse affects on others, the courts in general have refused to order the transfusion. *In re* Brooks Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); Ericken v. Dilgord, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1964).

It would seem that if an individual does possess the "right to die," it follows that a person should be able to be the sole regulator of other phases of his life, so long as his conduct does not affect others. The right to die, however, when accepted by the courts has been included under the first amendment guarantees. Whether such a right exists in the absence of an enumerated freedom is questionable.

Extending the reasoning of the *Griswold* case and the reasoning of the courts in cases concerning blood transfusions, it is possible to contend that since the refusal to wear a seat belt has no effect on others, the choice to wear or not wear the belt should be left to the individual. The apparent fallacy in this argument is that the refusal to wear a seat belt does affect others. See discussion, p. 533 *supra*.

[61] *See, e.g.*, ARIZ. REV. STAT. ANN. § 26-168 B (1956) (civilian in possession of military equipment shall be presumed to have obtained the equipment unlawfully); ARIZ. REV. STAT. ANN. § 44-2556 B (1956) (in certain instances the measure of liability on negotiable instruments will be presumed to be their face value).

fact proven, the presumption is valid.[62] Since recent studies have demonstrated the substantial effect that the use of seat belts can have in reducing traffic deaths and injuries,[63] it would appear that the rational connection test may be easily met.

CONCLUSION

It is apparent from the foregoing analysis that the primary obstacle which will be encountered in an attempt to assert the defense of contributory negligence in seat belt cases is proof of "legal cause." There are, however, certain situations in which the causal relation will be fairly apparent, as when the plaintiff is thrown from the car or hurled through the windshield. As statistical information is accumulated and analyzed, opportunities to raise the defense and the probability of its success will be increased. For the present, however, when a situation is presented in which a defendant can establish that the injuries which the plaintiff received were "legally caused" by the plaintiff's own negligence, the defendant should not be required to compensate the plaintiff.

As to other possible defenses, it would seem that the doctrine of avoidable consequences cannot be stretched to apply to seat belt cases. However, when it is shown that plaintiff knew of the danger involved, assumption of the risk should be available; in which case, the same problem of "legal cause" would be present. This defense presents another problem, in that proof of plaintiff's actual knowledge of the risk is required.

In light of the expressed concern of state legislatures over highway fatalities, it would seem appropriate that legislation be enacted either requiring the use of seat belts by all motorists, or, in the alternative, creating a presumption of contributory negligence on the part of one who fails to "buckle up." In either case, such a statute can be used as a basis for the defense of contributory negligence. Although it would appear that a statute requiring use of seat belts by all motorists would be more effective, either type should increase the incidence of use of seat belts. Constitutional questions exist, but they do not appear insurmountable. The problems of "legal cause" create the only real barrier to the statutory defense of contributory negligence.

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[62] Tot v. United States, 319 U.S. 463 (1943).
[63] *See* note 20 *supra.*