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Seat Belt Defense - Should Mississippi Courts Consider Seat Belt Nonuse as Evidence of a Failure to Mitigate Damages, The

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THE SEAT BELT DEFENSE — Should Mississippi Courts Consider Seat Belt Nonuse as Evidence of a Failure to Mitigate Damages?

INTRODUCTION

A substantial number of automobile accidents occur each year in which a seat belt is not in use.[1] The economic loss from these accidents reaches well into the billions of dollars annually.[2] A major objective behind the use of seat belts is to prevent not only the second collision[3] on the interior of the car, but also to keep the occupant from being ejected from the car on impact.[4] That the use of an available safety belt is one of the single most effective measures to protect an occupant in the event of an automobile collision is rarely doubted. The "seat belt defense" was developed with these thoughts in mind.[5]

In Mississippi the seat belt defense has not been addressed by the Mississippi Supreme Court since early 1971 when the defense was denied under a comparative negligence theory.[6] The purpose of this comment is to address the issue of whether evidence of the plaintiff's nonuse of an available and fully operational seat belt should be admissible in Mississippi as evidence of a failure to mitigate damages.[7] Although numerous articles have been

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1. In 1983, 34,840 persons died in automobile related accidents in the United States. Seat belts were in use in 2,333 of the cases. There were 26,186 cases in which seat belts were not in use and 6,321 cases in which it was unknown whether seat belts were in use. In Mississippi, the percentage of cases in which seat belts were not in use in automobile related accidents was just as great. Out of 613 total occupant fatalities in 1983, there were no confirmed cases of seat belt usage. Telephone interview with Ms. Lou Ann Hall, National Highway Traffic Safety Administration, Information Management Services Division (Feb. 26, 1985).

2. The economic loss to society from motor vehicle accidents which occurred in 1980 is estimated to have been $57.2 billion. *See* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, THE ECONOMIC COST TO SOCIETY OF MOTOR VEHICLE ACCIDENTS (1983).

3. "Second collision" generally refers to the collision between a passenger and an interior part of the vehicle following an accident. It has also been applied to ejection cases in which the second collision is between the occupant of the car and the ground. *See, e.g.* Jeng v. Witters, 452 F. Supp. 1349 (M.D.Pa. 1978), *aff'd without opinion*, 591 F.2d 1335 (3d Cir. 1979).

4. It has been estimated that the chance of full body ejection is increased by 500% and that nearly 80% of all ejectees would have survived the collision by using a lap seat belt. Bowman, *Practical Defense Problems - The Trial Lawyer's View*, 53 MARQ. L. REV. 191, 196 (1970).

5. The origin of the seat belt defense has been traced to the unreported decision of *Stockinger v. Dunisch*, Sheboygon County Cir.Ct. (Wis. 1964) discussed in 5 FOR THE DEFENSE 79 (1964). The principle behind the seat belt defense is to relieve the defendant from liability for those injuries to the plaintiff that an available seat belt would have prevented had one been in use.

6. D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971).

7. The defense was first used to establish that the failure to use a seat belt was evidence of contributory negligence whereby the plaintiff would be completely precluded from recovery. This theory has been rejected by most courts for two reasons. First, neither the common law nor state statutes requiring the installation of

written on the defense, recent developments in the law necessitate further analysis.[8]

Section one of this comment reviews the Mississippi cases in which the seat belt defense has been discussed. Section two identifies the different positions courts have traditionally taken when presented with the defense and a rule in Mississippi which, until recently, would defeat the defense. Section three analyzes recent legislation on seat belt use, particularly the various provisions dealing with noncompliance to determine the future impact on the seat belt defense.

THE SEAT BELT DEFENSE IN MISSISSIPPI

The first interpretation of the seat belt defense in Mississippi occurred in *Petersen v. Klos.*[9] In *Petersen*, applying Mississippi law in a wrongful death action, the Fifth Circuit reversed the district court, which had found the defendant guilty of contributory negligence for failing to use an available seat belt.[10] The lower court had determined that a causal connection existed between the plaintiff's injuries and the nonuse of the seat belt. Since there was no authority in Mississippi on the effect of a failure to wear a seat belt, the district court had to determine how a Mississippi court would rule if it were faced with the issue.

Although the circuit court held the question was "properly before the district court, as an affirmative defense,"[11] the district court did not have to answer the question because it found that the element of a causal connection between the plaintiff's injuries and the nonuse of seat belts had not been established. However,

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seat belts create a duty to use seat belts. Second, the failure to wear a seat belt does not cause the accident that gives rise to the injury. *See* Tempe v. Giacco, 37 Conn. Supp. 120, 442 A.2d 947 (1981); Brown v. Kendrick, 192 So. 2d 49 (Fla. Dist. Ct. App. 1966); Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Benson v. Seagraves, 445 So. 2d 187 (La. Ct. App. 1984); Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970); Barry v. Coca-Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974); Carnation Co. v. Wong, 516 S.W.2d 116 (Tex. 1974); Annot., 92 A.L.R.3d 9 (1979).

8. Additional articles addressing the subject include: Huelke, *Practical Defense Problems - The Expert's View*, 53 MARQ. L. REV. 203 (1970); Kircher, *The Seat Belt Defense - State of the Law*, 53 MARQ. L. REV. 172 (1970); Kleist, *The Seat Belt Defense - An Exercise in Sophistry*, 18 HASTINGS L.J. 613 (1967); Snyder, *The Seat Belt Defense As A Cause of Injury*, 53 MARQ. L. REV. 211 (1970); Werber, *A Multi-Disciplinary Approach to Seat Belt Issues*, 29 CLEV. ST. L. REV. 217 (1980); Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272 (1980); Note, *The Seat Belt Defense: Should Coloradoans Buckle Up For Safety?*, 50 U. COLO. L. REV. 375 (1979).

9. 426 F.2d 199 (5th Cir. 1970).

10. *Id.*

11. *Id.* at 203.

in dicta, the court of appeals cited the complete lack of record evidence "concerning the safety value of seat belts" [12] and stated that "[b]efore this new safety device can be said to modify the standard of ordinary care, there must be some consensus to its utility." [13]

The second application of the defense also concerned a federal case, *Glover v. Daniels*.[14] In *Glover*, another wrongful death suit, the district court determined that there was insufficient evidence to submit the issue to the jury. However, it did recognize that the seat belt defense would be appropriate under a proper record. The court stated:

> The burden was upon defendant to show that the failure of decedent to use the seat belt was a factor which contributed to his injuries. In other words, defendant had the burden to show by substantial evidence that decedent would not have suffered terminal injuries, if he had fastened the seat belt. Since the failure to fasten the seat belt could not have been a contributing cause of the collision, it was incumbent upon defendant to show by substantial evidence that such failure aggravated the injuries that decedent would otherwise have suffered. Conjecture and surmisel will not suffice.[15]

Once again a federal court was confronted with determining how the state court would resolve the question if it were faced with the issue. In its effort to determine the status of the defense in Mississippi, the district court cited the Mississippi case of *Rivers v. Carpenter*[16] as the only case making any reference to seat belts. The file of the *Rivers* case indicated that seat belt instructions had been granted to the defendant and that the jury considered the nonuse as evidence of contributory negligence. However, the granting of instructions was not assigned as error on appeal; thus, the issue was not considered by the court.[17]

Only one case concerning the seat belt defense has been before the Mississippi Supreme Court, *D. W. Boutwell Butane Company v. Smith*,[18] which was heard the year following *Petersen* and *Glover*. The court rejected an argument that the defendant was entitled to an instruction either finding the plaintiff guilty of comparative negligence as a matter of law or submitting the question to the jury for decision.[19] Once again no evidence was offered to establish a causal connection between plaintiff's injuries and

12. *Id.* at 204.
13. *Id.*
14. 310 F. Supp. 750 (N.D. Miss. 1970).
15. *Id.* at 761.
16. 203 So. 2d 574 (Miss. 1967).
17. *Glover*, 310 F. Supp. at 753.
18. 244 So. 2d 11 (Miss. 1971).
19. *Id.*

the nonuse of a seat belt. Indeed, the only evidence came from the plaintiff "who admitted the belts were there and that she understood that if the belt were 'properly' adjusted they might contribute to her safety. This was merely a conclusion of the young lady unsupported by any evidence or facts."[20] Nevertheless, the court did not reject the holding of *Glover*—that the defense is available in Mississippi under a proper record.

THE SEAT BELT DEFENSE UNDER THE MITIGATION THEORY

Just as the seat belt defense has been rejected under a theory of contributory negligence,[21] attempts under a comparative negligence basis have met with similar results.[22] The primary reason for the rejection is that both address the issue of liability. Only in the most unusual situation will the failure to wear a seat belt be the proximate cause of the accident.[23] Under the mitigation theory, nonuse of the seat belt is addressed to the issue of damages rather than the issue of liability. Those jurisdictions which have traditionally accepted the seat belt defense have done so primarily under this theory.[24] Despite the acceptance by some courts, the

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20. *Id.* at 12. Further language indicates that the decision was based on an inadequate evidentiary record. The court stated: "There are many factors to be considered as to [the use of seat belts]. So many questions as to the efficacy of seat belts remain unanswered that we are unwilling now to lay down a rule that the failure to use them is negligence." 244 So. 2d at 12.

21. *See supra* note 7.

22. *See, e.g.*, Schmitzer v. Misener-Bennett Ford, Inc., 354 N.W.2d 336 (Mich. Ct. App. 1984); Amend v. Bell, 570 P.2d 138 (Wash. 1977); Annot., 95 A.L.R.3d 239 (1979). Comparative negligence has been adopted in one form or another in 40 states. As of early 1983, the ten remaining contributory negligence jurisdictions were Alabama, Arizona, Delaware, Kentucky, Maryland, Missouri, North Carolina, South Carolina, Tennessee, and Virginia. W. PROSSER AND W. KEETON, THE LAW OF TORTS, § 67 (5th ed. 1984).

23. *See, e.g.*, Curry v. Moser, 89 A.D.2d 1, 454 N.Y.S.2d 311 (1982).

In *Curry*, the plaintiff fell out of the passenger door of the vehicle as it was turning and was struck by another vehicle. She was not wearing a seat belt and testified that she had not touched nor leaned against the door. At trial, it was established that when the plaintiff had tried the door that morning it would not open, and the plaintiff had to enter the car through the driver's door. While the car was in motion, the plaintiff turned sideways with her back to the door to talk with a back seat passenger. The court found under these circumstances that plaintiff's failure to wear a seat belt could be evidence of contributory negligence noting that this exception to the general rule occurs when plaintiff's failure is alleged to be a cause of the accident.

24. Cases accepting seat belt evidence to mitigate damages are: Truman v. Vargas, 275 Cal. App. 976, 80 Cal. Rptr. 373 (1969); Allstate Insurance Co. v. Lafferty, 451 So. 2d 446 (Fla. 1984); Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); Old Second National Bank v. Bauman, 86 Ill. App. 3d 547, 408 N.E.2d 224 (1980); Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974); Brodvin v. Hertz Corp., 487 F. Supp. 1336; (S.D.N.Y. 1980); Benner v. Interstate Container Corp., 73 F.R.D. 502 (E.D. Pa. 1977); Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867 (W.D. Pa. 1975); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). *See also* Annot., 80 A.L.R.3d 1033 (1977).

majority of courts that have addressed the issue have denied the use of seat belt evidence in mitigation of damages.[25]

According to Prosser, the plaintiff's duty to mitigate damages stems from the doctrine of avoidable consequences, which denies recovery for any damages that could have been avoided by reasonable conduct on the part of the plaintiff.[26] Under this basis the defendant would not be liable for those injuries which a seat belt would have prevented. Ordinarily, however, the doctrine has been applied to post-accident conduct. Opponents of the seat belt defense argue that to apply the doctrine to seat belt use would impose a preaccident obligation upon the plaintiff and would deny him the right to assume the due care of others.[27]

A theory of apportionment, comparable to mitigation, is recognized by the Restatement (Second) of Torts, Section 465. Referring to the causal connection between harm and the plaintiff's negligence, Comment c states:

> Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation.[28]

The Restatement theory was accepted in *Pritts v. Walter Lowery Trucking Company*[29] and by the Wisconsin Supreme Court

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25. Cases rejecting seat belt evidence to mitigate damages are: Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970); Nash v. Kamrath, 21 Ariz.App. 530, 521 P.2d 161 (1974); Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973); Lipscomb v. Diamiani, 226 A.2d 914 (Del. 1967); McCord v. Green, 362 A.2d 720 (App. D.C. 1970); State v. Ingram, 427 N.E.2d 444 (Ind. 1981); Hampton v. State Highway Comm'n., 209 Kan. 565, 498 P.2d 236 (1972); Taplin v. Clark, 6 Kan. App. 2d 66, 626 P.2d 1198 (1981); Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Roberts v. Bohn, 26 Ohio App. 2d 50, 269 N.E.2d 53, *rev'd on other grounds*, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1971); Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Amend v. Bell, 570 P.2d 138 (Wash. 1977).

26. W. PROSSER AND W. KEETON, THE LAW OF TORTS § 67 (5th ed. 1984), *see also* 22 AM. JUR. 2D *Damages* § 200 (1965).

27. *See, e.g.*, Kleist, 18 HASTINGS L.J. 613, 616 (1967). *But see* Spier v. Barker, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974). In *Spier*, the court of appeals addressed this very issue and stated:

> We concede that the opportunity to mitigate damages prior to the occurrence of an accident does not ordinarily arise, and that the chronological distinction on which the concept of mitigation rests, is justified in most cases. However, in our opinion, the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages *prior* to the accident. Highway safety has become a national concern; we are told to drive defensively and to "watch out for the other driver." When an automobile occupant may readily protect himself, at least partially, from the consequences of a collision, we think that the burden of buckling an available seat belt may, under the facts of the particular case, be found by the jury to be less than the likelihood of injury when multiplied by its accompanying severity.

Spier, 35 N.Y.2d at 452, 363 N.Y.S.2d at 922, 323 N.E.2d at 168.

28. RESTATEMENT (SECOND) OF TORTS § 465, Comment c (1965).

29. 400 F. Supp. 867 (1975).

in *Bentzler v. Braun*[30] where the court held that "in those cases where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to wear seat belts, it is proper and necessary to instruct the jury in that regard."[31]

Two additional "hybrid" theories, similar to the mitigation theory, have recently been articulated.[32] The first, labelled the "exceptional circumstances" theory,[33] has been recommended for adoption as a good compromise between those views that have permitted seat belt evidence and those that have not.[34] The second theory becomes operative in wrongful death actions.[35]

Numerous reasons have been expressed by the courts in opposition to the seat belt defense under a mitigation of damages theory. Common reasons include: (1) although statutes require the installation of safety belt equipment in new automobiles, there are no statutory requirements that seat belts be used by the occupant;[36] (2) if the evidence is allowed the same result would be reached as if comparative negligence were applied;[37] (3) the comparison of the defendant's negligence with the plaintiff's failure to wear a seat belt would lead to jury confusion and speculation;[38] and (4) the matter is best suited for legislative resolution.[39]

At the root of all decisions rejecting the seat belt defense there appears to be a reluctance by the courts to impose a duty upon the plaintiff to wear a seat belt.[40] When the accident is caused by the defendant's negligent conduct it is understandable that a court would not want to diminish the plaintiff's recovery simply

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30. 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

31. *Id.* at 387, 149 N.W.2d at 640.

32. *See* 56 NOTRE DAME LAW. at 278.

33. Under this theory a plaintiff's nonuse of an available safety belt is admissible where exceptional circumstances indicate that a belt should have been used. In Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968), 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. It would, however, have to be a situation in which the plaintiff, with prior knowledge of a specific hazard—one not generally associated with highway travel and one from which a seat belt would have protected him—had failed or refused to fasten his seat belt.

Id. at 234, 160 S.E.2d at 70.

34. 56 NOTRE DAME LAW. at 291.

35. The wrongful death theory has been applied by a court which recognized a distinction between causes of actions for injuries and causes for wrongful death. In a wrongful death action the use of an available seat belt could prevent the extreme result of death. *See* Noth v. Scheurer, 285 F. Supp. 81 (E.D.N.Y. 1968).

36. *See, e.g.*, Taplin v. Clark, 6 Kan. App. 2d 66, 626 P.2d 1198 (1981). *But see* note 72 *infra* and accompanying text.

37. *See, e.g.*, Britton v. Doehring, 287 Ala. 498, 242 So. 2d 666 (1970).

38. *See, e.g.*, Fischer v. Moore, 18 Colo. 392, 517 P.2d 458 (1973).

39. *See, e.g.*, Schmitzer v. Misener-Bennett Ford, Inc., 354 N.W.2d 336 (Mich. App. 1984).

40. *See, e.g.*, cases listed at note 25 *supra*.

because a seat belt was not in use at the time of the accident. In addition, it has been noted that the problem before the court concerns a comparison between the defendant's active negligence and the plaintiff's passive negligence.[41] Although the court should avoid granting the defendant a windfall, the argument in behalf of the seat belt defense is not without merit.

It is important to note that the seat belt defense is applicable to products liability actions as well as ordinary negligence actions.[42] Under a normal fact situation the dialogue assumes a predictable form. The defendant will argue that the plaintiff has a duty to conduct himself as a reasonable man of ordinary prudence would under the same or similar circumstances.[43] Further, because automobile accidents are foreseeable,[44] defendant will argue that a reasonable man would wear a seat belt while driving an automobile. To this statement the plaintiff would respond that since the ordinary person does not wear a seat belt, the failure to use an available seat belt cannot be evidence of unreasonable conduct.[45] The turning point in resolving these arguments in seat belt cases hinges on the establishment of a sufficient causal connection between the injuries and the nonuse of the available seat belt.

In Florida an effective approach for addressing the causation issue has been established. Florida departed from its rule denying the seat belt defense, announced in *Brown v. Kendrick*,[46] in the recent case of *Insurance Company of North America v. Pasakarnis*.[47] In *Insurance Company of North America*, the court ruled that evidence

41. *See, e.g.*, Note, *The Seat Belt Defense Under Comparative Negligence*, 12 IDAHO L. REV. 59, 64 (1975); Note, 56 NOTRE DAME LAW. at 289.

42. The status of the seat belt defense in products liability actions is as much in a state of flux as in ordinary personal injury suits. Often the argument is made that the design of an automobile must be considered as a whole to determine the crashworthiness of a vehicle. Further, if the plaintiff is alleging a design defect, since safety belts are installed as a safety feature, the nonuse of a seat belt is obviously relevant. *See* McCleod v. American Motors Corp., 723 F.2d 830 (11th Cir. 1984) (defense inadmissible where expert testified that injury would have been more serious had seat belts been used); Sours v. General Motors Corp., 717 F.2d 1511 (6th Cir. 1983) (restrained from answering since status of state law was so much in doubt); Hermann v. General Motors Corp., 720 F.2d 415 (5th Cir. 1983) (admissible); Ciazzo v. Volkswagenwerk, A.G., 468 F. Supp. 593 (E.D.N.Y. 1979), *aff'd in part, rev'd on other grounds*, 647 F.2d 241 (2d Cir. 1981) (admissible); Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368 (E.D. Va. 1978) (admissible); Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78, (1976) (inadmissible); McElroy v. Allstate Insurance Co., 420 So. 2d 214 (La. Ct. App. 1982), *cert. denied*, 422 So. 2d 165 (La. 1982) (admissible); Schmitzer v. Misener-Bennett Ford, Inc., 354 N.W.2d 336 (Mich. Ct. App. 1984) (inadmissible); DeGraat v. General Motors Corp., 352 N.W.2d 719 (Mich. Ct. App. 1984) (inadmissible).

43. W. PROSSER AND W. KEETON, THE LAW OF TORTS § 32 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 283 (1965).

44. *See Insurance Co. of North America*, 451 So. 2d at 453.

45. *See, e.g.*, McCord v. Green, 362 A.2d 720 (App. D.C. 1976); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).

46. 192 So. 2d 49 (Fla. Dist. Ct. App. 1966). *Brown*, often cited for the view that the seat belt defense is inadmissible, had long been the rule in Florida that there is no duty to wear a seat belt and that the issue is best suited for legislative resolution.

47. 451 So. 2d at 447.

of a plaintiff's failure to use an available and fully operational seat belt is a factor which the jury can consider in assessing damages.[48] A companion case to *Insurance Company of North America, Allstate Insurance Company v. Lafferty*, was also quashed on the authority of *Insurance Company of North America*.[49]

Insurance Company of North America illustrates the awareness that seat belts are an effective means of preventing the frequency and severity of injuries in automobile accident cases.[50] The opinion is important because the court does not absolutely reject the theory that the failure to wear an available seat belt may be evidence of unreasonable conduct. Under the new theory in Florida, nonuse of a seat belt is evidence of unreasonable conduct when (1) the defendant satisfies his burden of pleading and proving the plaintiff's failure to use the seat belt; (2) the nonuse is a proximate cause of the accident;[51] and (3) competent evidence proves the nonuse produced or contributed substantially to producing at least a portion of the plaintiff's damages.[52]

The dissent in the district court opinion provided the rationale for the decision to allow the seat belt defense.

> [T]he failure to expend the minimal effort required to fasten an available safety device which has been put there specifically in order to reduce or avoid injuries from a subsequent accident is, on the very face of the matter, obviously pertinent and thus should be deemed admissible in an action for damages, part of which would not have been sustained if the seat belt had been used.[53]

Another feature of the Florida approach is a conscious effort to avoid jury confusion by using a series of interrogatories to distinguish between a person's negligent contribution to the accident as opposed to the negligent contribution to his damages.[54] Utili-

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48. *Id.*

49. 451 So. 2d 446 (1984).

50. *See* notes 1-4 *supra* and accompanying text.

51. *See* note 23 *supra* and accompanying text.

52. 451 So. 2d at 454.

53. *Insurance Co. of North America*, 451 So. 2d at 453 (quoting Insurance Co. of North America v. Pasakarnis, 425 So. 2d 1141, 1143 (Fla. Dist. Ct. App. 1982) (Schwartz, J., dissenting)).

54. The following interrogatories are added to the verdict form in automobile cases:

(a) Did defendant prove that the plaintiff failed to use reasonable care under the circumstances by failing to use an available and fully operational seat belt?

_____ yes _____ no

If your answer to question (a) is no, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (a) is yes, please answer question (b).

(b) Did defendant prove that plaintiff's failure to use an available and fully operational seat belt produced or contributed substantially to producing at least a portion of the plaintiff's damages?

_____ yes _____ no

If your answer to question (b) is no, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (b) is yes, please answer question (c).

zation of the interrogatories addresses the criticism that the seat belt defense only serves to confuse the jury.[55]

A major criticism of the seat belt defense centers around the anticipated proliferation of seat belt experts that will spring up to establish the causal connection between the plaintiff's failure to use a seat belt and the ensuing injuries.[56] One additional concern expressed in *Insurance Company of North America*[57] is that the result is unsatisfactory because it focuses the attention on the plaintiff's failure to use a seat belt when the purpose of the trial is to establish liability on the defendant for his tortious conduct in causing the accident.[58]

ACCIDENT RECONSTRUCTION EXPERTS IN MISSISSIPPI

Expert testimony to establish a causal connection is a universal requirement in those decisions that have adopted the seat belt defense.[59] Yet, until the Mississippi Supreme Court recently decided *Hollingsworth v. Bovaird Supply Company*,[60] testimony by an accident reconstruction expert was inadmissible in Mississippi under the ultimate issue rule.[61] This rule, had it remained in effect, would defeat the seat belt defense prior to an analysis of the defense on the merits. By overruling *Hagan*,[62] Mississippi joined the majority position which allows testimony by accident reconstruction experts.[63]

(c) What percentage of plaintiff's total damages were caused by his (or her) failure to use an available and fully operational seat belt?

_____%.

451 So. 2d at 454.

55. *See* note 38 *supra* and accompanying text.

56. It has been suggested that expert testimony will be required to offer substantial evidence in the following areas: (1) the crash behavior of the vehicle; (2) the trajectory of the plaintiff's body in the crash; (3) the relationship of the vehicle crash event to occupant kinematics; (4) the particular injuries suffered; (5) the trajectory which a restrained occupant would have taken; and (6) the extent of lesser injuries which the restrained occupant would have sustained as a result of the impacts he would have made with the vehicle. Bowman, *Practical Defense Problems - The Trial Lawyer's View*, 53 MARQ. L. REV. 191, 197-202 (1970).

57. 451 So. 2d 447 (1984).

58. *Id.* at 456 (Shaw, J., dissenting).

59. *See* note 24 *supra* and accompanying text.

60. 465 So. 2d 311 (Miss. 1985).

61. *See, e.g.*, Gandy v. State, 373 So. 2d 1042 (Miss. 1979); Arrow Ford Distributor, Inc. v. Love, 361 So. 2d 324 (Miss. 1978); Lynch v. Suthoff, 220 So. 2d 593 (Miss. 1969); Jones v. Welford, 215 So. 2d 240 (Miss. 1968); Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 148 So. 2d 693 (1963); Schumpert v. Watson, 241 Miss. 199, 129 So. 2d 627 (1961).

Hagan had been the key case in Mississippi denying the introduction of testimony by an accident reconstruction expert, or accidentologist. Two reasons were offered for the rule. First, it was held that testimony such as this invaded the province of the jury. Second, the introduction of opinion evidence by the accidentologist amounts to a violation of the right to trial by jury because it is the function of the jury to make fact determinations.

62. *Hollingsworth*, 465 So. 2d at 311.

63. *Id.*, 9c BLASHFIELD CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6316 (Supp. 1964); MCCORMICK ON EVIDENCE § 12 (E. Cleary ed. 1984).

In *Hollingsworth*,[64] Rita Hollingsworth was killed when her car collided with a truck driven by Anthony Frazier. At trial Frazier testified that as he viewed the Hollingsworth car coming towards him he brought his vehicle to a virtual stop on the north edge of the road, the alleged point of impact. Frazier's wife, the only remaining eyewitness, corroborated the testimony.[65] Hollingsworth's attorney attempted to introduce the testimony of Medina, an accident reconstruction expert, who testified that there would have been no way for the vehicles to come to rest as they did if Frazier's truck had been stopped on the north edge of the road. However, objections to the testimony were sustained and the jury returned a verdict for the defense.[66] Holding that the new rule in Mississippi only puts automobile collision litigants on an equal footing with other litigants, the court reversed the case and remanded it to the circuit court.[67]

Although the ultimate issue rule did not appear applicable to products liability actions,[68] the rule was abolished in federal courts when the Federal Rules of Evidence were adopted.[69] Four reasons have been suggested as to why the ultimate issue rule did not work: (1) it was often impossible to distinguish between an ultimate and non-ultimate fact; (2) it was often impossible for a witness to couch his testimony in anything but an ultimate fact; (3) the testimony cannot invade the province of the jury when the jurors are free to draw their own conclusions; and (4) in those courts which allowed testimony on ultimate facts but not on issues of law, it was often impossible to separate one from another.[70]

Hollingsworth is important to Mississippi jurisprudence in two respects. First, the court has properly joined the significant majority of states that recognize the development of accident reconstruction as a science and the benefit to be gained from this type of evidence.[71] Second, *Hollingsworth* opens the door for a complete analysis on the merits of the seat belt defense in Mississippi.

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64. 465 So. 2d 311 (Miss. 1985).

65. *Id.* at 313.

66. *Id.*

67. *Id.*

68. *See, e.g.*, Early-Gary Inc. v. Walters, 294 So. 2d 181 (Miss. 1974) (testimony by expert in ceramic engineering that an injury was caused by a defect in a ketchup bottle held not to invade the province of the jury).

69. FED. R. EVID. 704 reads as follows: "Testimony in the form of an opinion or inference otherwise inadmissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Additionally, the Mississippi Rules of Evidence, modeled on the Federal Rules of Evidence, were adopted by order of the Mississippi Supreme Court on September 24, 1985, effective January 1, 1986.

70. J. WEINSTEIN, 3 WEINSTEIN'S EVIDENCE § 704[01] at 704-4, 5 (1982).

71. *See* note 61 *supra* and accompanying text. *See also* Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 148 So. 2d 693 (1963) (Jones, J., dissenting). Dissenting in *Hagan*, Justice Jones had the following to say: "If trial by jury in automobile accident cases is to accomplish its objectives, the law must take a more enlightened outlook on the problem of admissibility of expert opinions and other scientific, objective data relating to the laws of motion." *Id.* at 496, 148 So. 2d at 696.

MANDATORY SEAT BELT USAGE LEGISLATION

Under the authority of the National Traffic and Motor Vehicle Safety Act of 1966,[72] the Secretary of Transportation is authorized to issue motor vehicle safety standards. Pursuant to this authority, an administrative ruling from the Secretary of Transportation will require automobile manufacturers to install airbags or automatic seat belts in all new automobiles if the Secretary determines by not later than April 1, 1989, that two-thirds of the population of the states are not subject to mandatory seat belt use laws.[73] The response to the federal mandate has generated more uncertainty in an already unsettled area of tort law.

At the time of this writing fourteen states had enacted mandatory seat belt use laws.[74] All of the laws require seat belts to be worn by all front seat passengers. Excluded from this requirement are vehicles that make frequent stops such as postal carriers. However, the statutes do not apply to those children who by law are required to utilize child restraint devices.[75] In addition,

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72. 15 U.S.C. §§ 1381 *et seq.* (1976 and Supp. IV 1980).

73. The minimum criteria for state mandatory safety belt usage laws are:

(a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.

(b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

(1) A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the seat belt usage requirement.

(2) A provision specifying that the violation of the seat 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 resulting from the accident. This requirement is satisfied if there is a rule of law in the state permitting such mitigation.

(3) A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989.

Id.

74. 1985 Conn. Acts 85-429 (Reg. Sess.) (effective January 1, 1986); HAWAII REV. STAT. § 291 (1985) (effective December 16, 1985); ILL. REV. STAT. ch. 95.5 § 12-603.1 (1985) (effective July 1, 1985); 1985 Mo. Legis. Serv. S. Bill No. 43 (effective July 1, 1985); NEB. REV. STAT. § 39-669.26 (1985) (effective September 6, 1985); N.J. STAT. ANN. § 39:3-76.2e *et seq.* (West 1985) (effective March 1, 1985); 1985 N.M. Laws 131 (effective July 1, 1986); N.Y. VEH. & TRAF. LAW § 383 (McKinney 1985) (effective January 1, 1985); 1985 N.C. Adv. Legis. Serv. 20-135.2A (effective October 1, 1985); OKLA. STAT. tit. 47, § 12-417 (1985) (effective February 1, 1987); TEX. REV. CIV. STAT. ANN. art 67 (old) § 107c (1985) (effective September 1, 1985). *See also*, NEV. REV. STAT. § 484.641 (1985) and 1985 Or. Laws Adv. Sh. No. 619 (1985). Neither of these statutes are true seat belt laws under the 208 ruling. The Nevada law is tied to an increase in the speed limit to 70 miles per hour. If the federal government does not penalize Nevada in the form of reduced highway funds the safety belt law will apply. The Oregon law only applies to front seat occupants aged sixteen and under.

75. In Mississippi the child restraint law is codified in MISS. CODE ANN. § 63-7-301 (Supp. 1985) which provides:

Every person transporting a child under the age of two (2) years in a motor vehicle required to be registered . . . and operated on the roadways, streets or highways of this state shall provide for the protection of the child by properly using a child passenger restraint device or system meeting applica-

exceptions are generally allowed for medical reasons. But, the similarity of the statutes ends when the issue of noncompliance arises.

Five general approaches have been adopted for treating noncompliance. Illinois specifically prohibits the seat belt defense as evidence of negligence or as a factor in mitigation of damages.[76] In Michigan a violation can be considered evidence of negligence and mitigation of damages is allowed, but only to the extent that damages are not reduced by greater than five percent of the recovery.[77] Missouri treats the issue as Michigan does; however, mitigation is only allowed to reduce the damages award by a maximum of one percent.[78] The New Jersey statute does not change existing rules or laws as they pertain to civil damages.[79] New York, the state with the most liberal statute, prohibits the defense as it applies to liability but allows the defense for mitigation of damages without imposing a ceiling on the amount that can be mitigated.[80]

In light of the existing case law, the provisions on noncompliance have a bizarre effect on the seat belt defense. As the defense evolved courts uniformly held that since there were no statutes requiring the use of available seat belts the failure to wear one could not be negligence per se.[81] Now that fourteen states have adopted mandatory usage laws there is an express duty to wear an available belt, and a violation of the statute is conclusive evidence of unreasonable conduct.

Illinois, a state traditionally allowing the defense,[82] now prohibits the defense[83] despite the fact that a violation would be unreasonable conduct in an ordinary violation of statute. Although no legislative history was found, it appears the plaintiffs' bar effectively lobbied for the provision and gained a favorable position by the passage of the statute.

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ble federal motor vehicle safety standards. Failure to provide and use a child passenger restraint device or system shall not be considered contributory or comparative negligence.

76. ILL. REV. STAT. ch. 95.5 § 12-603.1(9)(c) (1985). *See also* 1985 Conn. Acts 85-429 § 4 (Reg. Sess.); IND. CODE § 9-8-14-5 (1985); 1985 N.C. Adv. Legis. Serv. 20-135.2A(d); OKLA. STAT. tit. 47, § 12-417(5) (1985); and TEX. REV. CIV. STAT. ANN. art. 67 (old) § 107c(j) (1985).

77. Mich. S. Bill No. 6 (5) (1985). *See also* NEB. REV. STAT. § 39-669.26(7) (1985).

78. 1985 Mo. Legis. Serv. S. Bill No. 43 § 3(2). *See also* 1985 La. Acts 377 § 295.1E (allowing maximum of two per cent mitigation).

79. N.J. STAT. ANN. § 39:3-76.2e(4) (West 1985). *See also* HAWAII REV. STAT. § 291 (1985) and 1985 N.M. Laws 131 (Neither statute addressed the issue of mitigation of damages).

80. N.Y. VEH. & TRAF. LAW § 383(8) (McKinney 1985).

81. *See, e.g., Insurance Co., supra* note 46.

82. *See generally* Wagner v. Zboncak, 111 Ill. App. 3d 268, 443 N.E.2d 1085 (1982) (holding evidence of the use or nonuse of seat belts is limited only as to the issue of damages; it does not reach the issue of contributory negligence or the defendant's negligence); Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968).

83. *See supra* note 74 and accompanying text.

To the contrary, Michigan and Missouri now treat the failure to wear an available seat belt as negligence per se and allow mitigation of damages.[84] This is definitely a reversal of the prior Michigan position[85] and also appears to be a departure from prior Missouri law as well.[86] New Jersey law was initially unsettled;[87] therefore, it is unclear what effect the new law will have in that state. New York's statute is consistent with prior case law. Not only is the defense admissible for mitigation of damages, it also is not subject to a limitation on the amount by which damages can be reduced.[88]

Fortunately, the balance of the statutes are basically consistent, or at least do not conflict with prior case law. No cases on point were found in Hawaii or Nebraska. The Connecticut Supreme Court has recently held that the general state of the defense is unsettled in Connecticut.[89] Indiana's seat belt law follows its judicial precedent by holding evidence of nonuse inadmissible.[90] Louisiana law is unsettled; however, two opinions appear to favor admissibility of the defense on the issue of mitigation.[91] Thus, a five percent maximum for mitigation under the Louisiana statute would not seem inconsistent. Although New Mexico does not address mitigation in its statute, the defense has not been allowed in that state.[92] Similarly, despite admissibility under exceptional circumstances, the defense in North Carolina is generally inadmissible.[93] Oklahoma[94] and Texas[95] also deny the defense as a factor in mitigation of damages.

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84. *See supra* notes 75-76 and accompanying text.

85. *See* Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969) (inadmissible to mitigate damages).

86. In the only case found in Missouri, Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970), the Missouri Court of Appeals, applying Illinois law, held the defense inadmissible to mitigate damages; however, the court appeared to approve of the outcome.

87. In Barry v. Coca-Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1976), the court held a defense of contributory negligence was not sufficient to bar a recovery. Although the court denied the defense, it recognized that it was not addressing what the outcome would be if expert testimony had been available. *Id.* at 280. *See also* Polyard v. Terry, 148 N.J. Super. 202, 372 A.2d 378 (1977) (the court holding the defense had not been established in the state and the instant case was not the appropriate case to declare the rule).

88. *See supra* note 78 and accompanying text.

89. Delott v. Rosaback, 179 Conn. 406, 426 A.2d 791 (1980). *But see* Tempe v. Giacco, 186 Conn. Supp. 120, 442 A.2d 947 (1981) (allowing the defense in exceptional circumstances).

90. State v. Ingram, 427 N.E.2d 444 (Ind. 1981).

91. *See* Fontenot v. Fidelity and Casualty Co., 217 So. 2d 702 (La. Ct. App. 1969) and Becnel v. Ward, 286 So. 2d 731 (La. Ct. App. 1973). Both cases contain language favorable to the seat belt defense under a proper evidentiary record.

92. Selgado v. Commercial Warehouse Co., 88 N.M. 579, 544 P.2d 719 (N.M. Ct. App. 1975).

93. *See supra* note 33 and accompanying text.

94. No appellate court in Oklahoma has held the defense inadmissible in a personal injury case; however, two federal courts, construing Oklahoma law have ruled the defense inadmissible for contributory negligence. Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969); Henderson v. United States, 429 F.2d 588 (10th Cir. 1976).

95. Carnation Co. v. Wong, 516 S.W.2d 116 (Tex. 1974).

The limit on the amount by which damages can be reduced may prove to be a serious deterrent to the practical usefulness of the seat belt defense. Those jurisdictions that have accepted the seat belt defense have required a seat belt expert to establish the causal connection between the injury sustained and the nonuse of the seat belt.[96] Considering the expenses involved in securing the expert and the time involved for the attorney to prepare a seat belt argument for trial, it is questionable whether the effort would be cost effective when the maximum realization is a one or two percent reduction in damages. The result could be worth the effort under the right circumstances in Michigan or Nebraska where mitigation of five percent of the damages is allowed. However, in Louisiana, Michigan, Missouri, and Nebraska it would seem that the defense would only be worth pursuing in those cases which involve a potential million dollar liability.

In Mississippi, a mandatory seat belt bill, number HB807, introduced by Representative Margaret Tate of Picayune, was defeated by the House Transportation Committee on February 5, 1985. William J. McCoy, Vice Chairman of the House Transportation Committee suggested two reasons for the bill's defeat. First, the threat of the federal mandate concerned the committee. Second, committee members felt it would be beneficial to see how similar bills are treated by other states that adopt such legislation.[97] While both reasons are not without merit, the mandatory seat belt laws now existing in fourteen states provide the needed examples for our legislature to consider in order to adopt a safety belt law in the next session.

CONCLUSION

That the seat belt defense has been denied in Mississippi solely because of a lack of evidence as to the effectiveness and social utility of seat belts is apparent from the language used in the Mississippi cases dealing with the defense. Today it is common knowledge that the proper use of an available and fully operational seat belt plays a significant role in minimizing the effects of automobile collisions.[98]

The time is ripe for the defense to be adopted in Mississippi, preferably through legislative enactment. Legislation adopted at the end of 1984, and in the first eight months of 1985, has im-

96. *See supra* note 57 and accompanying text.
97. Jackson Daily News, Feb. 6, 1985 at col. 2.
98. *See supra* notes 1-4.

posed an express duty to wear seat belts in fourteen states. Surely more states will soon become a part of this trend. And, in order to comply with the federal mandate, as currently written, a mitigation of damages provision will be necessary.

Should the legislature fail to adopt a seat belt law in the next session, the judicial evolution of the seat belt defense provides a basis for admitting evidence of safety belt nonuse. With the abolition of the ultimate issue rule in Mississippi state courts, causal connection, long the missing element in seat belt defense cases, can be established. In any event, defendants should not be held liable for those injuries to a plaintiff that could have been prevented had a seat belt been in use. But more importantly, through increased usage of automobile safety belts, needless loss of life will be avoided in Mississippi.

Granville Tate, Jr.