Torts: Negligence in Failure to Use Seat Belts

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the slowly developing expansion of deceit liability, whether at common law or under the securities Acts. As the professional accountant assumes increased importance in the business world, he must expect to be required to conform to proportionately increased standards.\(^5\)

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Plaintiff, an automobile passenger injured in a rear-end collision, sought recovery from her host, who was driving the following vehicle, the driver of the preceding vehicle, and a stranded motorist who had allowed his headlights to shine across the highway in such a manner as to blind oncoming drivers. The trial court rendered judgment apportioning liability among the three drivers.\(^1\) On appeal,\(^2\) defendants assigned as error, \textit{inter alia}, the refusal of the trial judge to submit to the jury the question of whether plaintiff was negligent in failing to use an available seat belt. The Wisconsin Supreme Court held that failure to use an available seat belt was a breach of the common law duty of due care and the question of whether such breach was a substantial factor in producing the injury was for the jury.\(^3\) However, the court stated that failure to instruct on that issue was not error where no evidence had been introduced to establish a causal relationship\(^4\) between the passenger's injuries and the failure to use seat belts. \textit{Bentzler v. Braun}, 149 N.W.2d 626 (Wis. 1967).

Thirty-two states and the District of Columbia now require some form of seat belt installation in passenger cars.\(^5\) However,

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\(^{1}\) Plaintiff was awarded damages in the amount of $37,855.90. This amount was apportioned as follows: 27.5% from the driver of the preceding vehicle, 45% from plaintiff's host, and 27.5% from the stranded motorist.

\(^{2}\) Plaintiff's host did not appeal.

\(^{3}\) Strictly speaking, this ruling may not constitute the holding since it does not follow directly from the verdict. However, for purposes of precedent, this is the important holding of the case. \textit{See Cierpisz v. Singleton}, 230 A.2d 629, 633 (Md. 1967).

\(^{4}\) The court determined that proof of a failure to "buckle-up" was not sufficient to prove causation of plaintiff's injuries. 149 N.W.2d at 640-41.

\(^{5}\) \textit{2 Trial} 36 (1966). All of the statutes are recent, none having been enacted prior to 1960. For a comparative analysis of seat belt legislation, see \textit{Motor Vehicles—A Comparative Analysis of Seat Belt Legislation}, 14 DePaul L. Rev. 152 (1964). \textit{See also 32 Fed. Reg. 2408
no state requires that they be used after installation.6 Indeed, in two states, Tennessee and Virginia, the statutes specifically provide that failure to use or wear seat belts should not be considered negligence;7 and Iowa, Minnesota, and Maine provide by statute that evidence of the use, or lack of use, of seat belts shall not be admissible at trial.8 No previously reported decision has found any common law duty to use available seat belts9 and

6. See Walker & Buck, Seat Belts and the Second Accident, 34 Ins. Counsel J. 349 (1967); Note, Torts—Failure To Fasten Seat Belts Not Contributory Negligence, 69 W. Va. L. Rev. 387 (1967). The closest to such a requirement is a Rhode Island statute requiring that every jitney, bus, private bus, school bus, trackless trolley coach, and authorized emergency vehicle, when operated upon a highway, shall be equipped with a driver's seat safety belt device. . . . Every person when driving any such vehicle shall use and have his body anchored by such seat safety belt. R.I. Gen. Laws Ann. § 31-23-41 (Supp. 1966). This enactment, however, has no application to the drivers of passenger cars.


9. See The Seat Belt Defense, Defense Research Institute, (September 1967). Only four reported decisions preceded the Bentzler case. In Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966), the court indicated that defendant should be allowed to prove that the failure of plaintiff to use a seat belt constituted contributory negligence.

In Brown v. Kendrick, 192 So. 2d 49 (Fla. 1966), and Lipscomb v. Diamiani, 226 A.2d 914 (Del. 1967), the respective courts stated that the question of whether failure to use available seat belts constitutes negligence is better left to the legislature. See 16 DePaul L. Rev. 521 (1967); 18 Mercer L. Rev. 511 (1967); 69 W. Va. L. Rev. 387 (1967).

In Kavangh v. Butorac, 221 N.E.2d 824 (Ind. App. 1966), the court held that it was not negligence, as matter of law, for one to fail to fasten seat belts; Hustad v. Refuse Removal Serv., 227 A.2d 433 (Conn. Super. 1967), dealt with the question of whether the seat belt defense is a question of law.

Two Wisconsin Circuit Court juries, Busick v. Budner, Cir. Ct. Milwaukee Co., Civil No. 381-602 (Wis. Dec. 1965); Stockinger v. Dunish, Cir. Ct. Sheboygan Co. (Wis. 1964), apparently did find the plaintiff negligent for failing to use an available seat belt, but these findings were based on a statutory construction, not on the common law. In Stockinger, noting that the Wisconsin statutes required seat belts be "installed for use," the trial judge instructed: "It . . . must follow that the legislature intended that these seat belts be used in certain circumstances." The Defense Forum: Seat Belts, 5 For the Defense 78 (1964).

The Bentzler Court repudiated this approach when it stated:

It seems apparent that the Wisconsin legislation, which does not require by its terms the use of seat belts, cannot be considered a safety statute in the sense that it is negligence per se for an occupant of an automobile to fail to use available seat belts.

149 N.W.2d at 639.
the Wisconsin Supreme Court, in Bentzler, apparently became the nation's first appellate court to find either a statutory or a common law duty to use them.\textsuperscript{10}

The Bentzler court conceded that the statute requiring installation of seat belts did not require their use.\textsuperscript{11} Nonetheless, it identified a common law duty to use available seat belts grounded on two basic premises: first, the duty of a passenger in an automobile to care for his own safety and, second, the common knowledge\textsuperscript{12} that seat belts provide an additional safety factor for the passenger. Inherent in both premises was the assumption that a reasonable, prudent man in plaintiff's circumstances is cognizant of the merit of using a seat belt and will do so as a matter of ordinary care. However, despite a heavy reliance upon statistics purporting to show the general merit of seat belts, the court expressed the caveat that such statistics cannot be used to predict the effect seat belts would have in a particular accident situation.\textsuperscript{13} Therefore, the question Bentzler would leave to the jury is whether the plaintiff's failure to use the seat belt was a substantial factor in causing the injury.\textsuperscript{14}

Bentzler, however, would not leave the jury completely free to speculate on this issue, for part of the defendant's burden of proof would be to show that plaintiff's injuries would in fact have been reduced by use of the seat belt. Absent such proof, the Bentzler court would refuse to give the question of plaintiff's negligence to the jury.

The proposition that an automobile passenger has a duty to care for his own safety has been generally accepted.\textsuperscript{15} However, the court's second premise, that it is common knowledge that

\textsuperscript{10} With regard to harnesses, in Vernon v. Droeste, Cause No. 17,205, Dist. Ct. of Brazos County, Tex. (June 9, 1966), a Texas jury found that plaintiff's failure to wear a safety harness with which the car was equipped was contributory negligence. \textit{Seat Belt Liability: Texas}, 7 FOR THE DEFENSE 49 (1966). The case has apparently not been appealed.

\textsuperscript{11} 149 N.W.2d at 639. \textit{See Wis. Stat. §§ 347.48 (1965).}

\textsuperscript{12} As an appendix to the decision there is a two page excerpt from the \textit{Wisconsin Law Review} statistically supporting the conclusion that seat belts are, on the whole, safety devices. \textit{See Roethe, Seat Belt Negligence in Automobile Accidents, 1967 Wis. L. Rev. 288.}

\textsuperscript{13} 149 N.W.2d at 640.

\textsuperscript{14} \textit{Id.}

seat belts provide an additional safety factor for the passenger, is not free from doubt. The question of whether seat belts do, in fact, add to passenger safety is not entirely settled. Another court, facing the question only months before Bentzler, found this question in a “state of quandary.” Legal writers have challenged the propriety, in light of the limited state of present knowledge, of taking judicial notice of the fact that seat belts are safety devices. Articles in medical journals have pointed to the fact that positive injury can be caused by the use of seat belts, and some independent researchers have concluded that seat belts can cause more rather than fewer injuries in many crash situations. Insofar as the opinion in the instant case ignored such factors, its analysis is open to question.

Moreover, even if the court could be sure that a fastened seat belt is more frequently a positive safety device, it might still be difficult to find a duty to use the seat belt. The court in Bentzler pointed out that the test of a passenger’s negligence is whether he acted as a reasonable man would have acted under the circumstances. The court went into a detailed analysis of whether, on the average, seat belts are safety devices, but it referred to none of the available studies on the frequency with which people customarily use seat belts although custom is one material factor in creating a reasonable standard of conduct.

19. One researcher, after conducting intensive auto safety studies, summed up the value of seat belts as follows: “If one can select the type of accident to become involved in, wear a seat belt. If not, a seat belt can be the primary cause of injury or death.” A.J. White, Passenger Car Dynamics 383 (1965).
20. 149 N.W.2d at 640.
21. Although the standard of the reasonable man is not solely de-
If the court had faced this question, it would have found that only the most recent and optimistic studies report that as many as fifty per cent\(^2\) of those who have seat belts regularly use them.\(^3\) Indeed, the chief article from which the Bentzler court gathered its statistical information asserted that the public has not yet accepted the seat belt as a useful safety device.\(^4\)

Thus, not only did the instant court create a common law duty on the strength of a questionable fact finding, but it failed to analyze the important question of whether the ordinary and prudent man was aware of this fact and would premise his conduct upon it. In short, instead of applying an accepted standard, the Bentzler court has imposed a new standard of dependent on custom, it is relevant as an indication of community judgments and expectations. See 2 F. Harper & F. James, The Law of Torts 1227, 1229 (1966); W. Prosser, The Law of Torts 153, 154 (3d ed. 1964); Morris, Custom and Negligence, 42 COLUM. L. REV. 1147 (1942).


Although a poll taken by the Auto Industries Highway Safety Committee, reported in Best's Weekly News Digest, October 26, 1965, indicated that 76% use seat belts on long trips, this figure is somewhat misleading since 3 out of 4 traffic deaths occur within 25 miles of the victim's home. Use Those Seat Belts in the City Too, 54 Sci. Digest 66 (1963).

23. The reported percentages of motorists who actually use seat belts do not include those motorists who own cars not equipped with seat belts. Therefore, the portion of the total population which actually uses them is apparently quite small. A study cited in the Seat Belt Defense, supra note 9, indicated that while 52% of the cars surveyed had seat belts only 37.3% of the owners with seat belts always used them. On the basis of this survey then, less than 20% of the car owners regularly wear seat belts. The report of the above study does claim a high percentage of "sometime" use, but makes no attempt to show how regular or prolonged is this "sometime" use. A 1966 report of the National Safety Council, cited in Cainazzo & Flynn, The Failure to Use Seat Belts as a Basis for Establishing Contributory Negligence, Barring Recovery for Personal Injuries, 1 U. San Fran. L. Rev. 277 (1967), shows that only 16% of all passenger car occupants use seat belts.

24. Roethe, supra note 12, at 296. Two months after Bentzler, the Maryland Supreme Court held that failure to fasten seat belts could in some cases constitute negligence. However, the court also stated: We do not adopt, at this time, the Wisconsin court's statement that "an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts." We are persuaded, for the present at least, that the statement in Roethe, Seat Belt Negligence in Automobile Accidents . . . is a more accurate appraisal of the status of seat belts in the "mind of the public. . . ."

Another question, more difficult than these factual questions ignored by the court, is the question of proof. The present state of medical knowledge renders it virtually impossible to determine, with any degree of certainty, the probable physical injuries that would have resulted even if the "negligent" plaintiff had been wearing a seat belt. In view of this general inability to accurately allocate the damages between those caused by the negligence of the defendant in precipitating the collision and those caused by the plaintiff in failing to use the seat belt, the courts are faced with a number of alternatives.

Following the Bentzler rationale, future courts may elect to place this burden of proof on the defendant. This procedure would bring a result consistent with the modern trend in tort law which allows recovery for injuries negligently caused. However, it would be inconsistent with the court's analysis respecting the source of plaintiff's duty to "buckle-up," rendering meaningless the proposition that failure to fasten the seat belt can be a bar to recovery. Conversely, the court could shift the burden of proof to the plaintiff. This approach, however, offends any sense of justice, since it would mean that a party injured entirely through the negligence of another could be denied recovery in toto because he failed to take a precaution that might, in some cases, either have reduced the level of his injury or caused a different type of injury.

As a third alternative, a court faced with the injustice and impracticability of placing the burden on either the plaintiff or defendant and with the fact that proof is often impossible in this area might allow the jury to speculate as to which injuries were caused by the negligence of each of the parties. However,

25. See Roethe, supra note 12, at 297.
In Cierpisz v. Singleton, 230 A.2d 629 (Md. 1967), the court held that plaintiff who was thrown into the air, struck the rearview mirror with her forehead, and cut her face on the dashboard when she came back down was not guilty of contributory negligence since the defendant was unable to offer any positive proof that plaintiff would not have sustained the same injuries had the seat belt been fastened.
28. See authorities cited note 18 supra; cf. 2 F. Harper & F. James, supra note 21, § 22.10.
this approach, expressly rejected by the Bentzler court, is simply too foreign to our system of justice to be seriously considered.\(^29\)

Thus, none of the available methods of placing the burden of proof seems to bring a satisfactory result. Arguably the dilemma is not insolvable, but unless the courts find a satisfactory solution to this type of case, or unless medical technology becomes sophisticated enough to separate the injuries, the proposition that failure to fasten available seat belts can constitute negligence must remain either meaningless or unjust.

Beyond the problems of fact and proof involved in the instant court's decision, there are broader problems of basic public policy. By declaring that failure to fasten seat belts constitutes negligence, the court reached a decision contrary to the present trend in tort law. Generally, in order to further the social policy of compensating for loss, the courts have expanded the concept of negligence, while at the same time restricting the concept of contributory negligence.\(^30\) However, the Bentzler rationale would create a new defense, thereby expanding the concept of contributory negligence. Standing alone, this result does not form a ground for criticism, but it does suggest that the policy basis of the Bentzler decision warrants close scrutiny.

Theoretically, the Bentzler result might not work any great injustice in Wisconsin, or in the five other states which adhere to the doctrine of comparative negligence.\(^31\) Under Wisconsin's comparative negligence statute, the defendant is liable only to the extent he is judged to be at fault, and the plaintiff must bear responsibility to the extent of his own assessed fault.\(^32\) However, if the majority of states which still adhere to the doctrine of strict contributory negligence should adopt the reasoning in Bentzler, the result would be horrendous.\(^33\) A plaintiff who in no way contributed to the collision would be denied


\(^{30}\) 2 F. Harper & F. James, supra note 21, § 22.10; see note 27 supra.


\(^{32}\) W. Prosser, supra note 21, § 66.

\(^{33}\) See Kleist, supra note 17; Walker & Buck, supra note 6; Note, Seat Belts and Contributory Negligence, 12 S.D.L. Rev. 130 (1967).
recovery for any part of his injuries.\textsuperscript{34} Moreover, this result would fail to provide any additional incentive for due care on the part of the defendant.\textsuperscript{35} Recognition of these objections may explain why four states have legislatively determined that failure to fasten a seat belt shall not constitute contributory negligence, while no states have spoken for a contrary position.\textsuperscript{36}

It is suggested that there are existing legal rationales whereby a Bentzler-type common law duty to "buckle-up" could be established in states adhering to the doctrine of contributory negligence, without unfairly depriving plaintiffs of all recovery. One such rationale might be through an adaptation of the doctrine of avoidable consequences. Generally, this doctrine is based on the rationale that plaintiff has a duty to reasonably minimize whatever damages might be caused by the defendant.\textsuperscript{37} Since plaintiff's "negligence" in the seat belt cases relates only to his own injuries, it can be argued that the avoidable consequences doctrine, which likewise relates only to a self-imposed aggravation of plaintiff's injuries, should be applied to the seat belt cases to deny recovery for those specific damages which could have been avoided by the use of a seat belt.

However, the doctrine of avoidable consequences has generally been applied to plaintiff's actions taken after the accident,\textsuperscript{38} whereas a seat belt defense would require action by the plaintiff before he has any notice of defendant's negligence.\textsuperscript{39} In addition, even if the doctrine were stretched to apply to plaintiff's pre-accident conduct, the proof of causation is so dif-

\textsuperscript{34} For a discussion of the problem of the relative fairness of the comparative versus contributory negligence doctrines, see Body, Comparative Negligence: The View of the Trial Lawyer, 44 A.B.A.J. 346 (1958).
\textsuperscript{35} It is true that defendant cannot know, prior to the collision, whether his victim will be "buckled-up." Hence, there may be no primary impact upon the deterrence of defendant's negligence. However, a policy which immunizes an actor from any responsibility for his negligence cannot provide a positive incentive for careful and prudent conduct—an end which seems worthy of consideration. See W. Prosser, supra note 21, § 3, at 1091.
\textsuperscript{36} See notes 7 & 8 supra.
\textsuperscript{38} W. Prosser, supra note 21, § 64, at 433.
\textsuperscript{39} See Berz, Seat Belt Liability, 7 FOR THE DEFENSE No. 2 (1966); Seligson, Seat Belt Liability III, 8 FOR THE DEFENSE No. 3 (1967); Note, Automobile Seat Belts: Protection for Defendants as Well as For Motorists?, 38 S. Cal. L. Rev. 733 (1965).
ficult in this sort of case that much unfairness could result. Under the traditional analysis of the rule of avoidable consequences, if the injuries caused by the defendant and the self-imposed negligent aggravation by the plaintiff cannot be separated, the plaintiff's negligence will bar all recovery. This results notwithstanding the fact that defendant's negligence was the sole proximate cause of the accident. Moreover, any jurisdictions strongly committed to the defense of contributory negligence as a complete bar to recovery are unlikely to accept the avoidable consequences rationale in the seat belt cases. If contributory negligence was not to be a complete bar in the seat belt situation, it would logically follow that it should not be a complete bar in other negligence cases in which the plaintiff, by his own action, causes a part of his own injury.

Another legal rationale that might be applied to obtain a Bentzel result would be to contend that plaintiff, whenever he rides in an automobile without fastening his seat belt, assumes the risk of sustaining injuries over and above those he would have sustained had the seat belt been fastened. Under this approach, plaintiff would be barred from recovering those specific damages resulting from this voluntary assumption of risk. This approach might find some analogous support from the Mortensen case which recognized that a jury could find negligence in failure to equip a truck with seat belts because it was reasonably foreseeable that anyone entering upon the highways of California might be involved in an accident. However, this approach is repugnant to the established tort policy that plaintiff may rely on the supposition that other motorists will drive with ordinary care and that plaintiff need not guard against someone else negligently initiating an accident.

A third approach might be to recognize that, in fact, two accidents are involved in any seat belt litigation: the "first accident," the collision, and the "second accident," the impact of the plaintiff against some of the interior portions of the car or the plaintiff's being thrown out of the vehicle. After the cau-

40. W. Prosser, supra note 21, § 64.
41. Id.
43. See, e.g., Berkstresser v. Voight, 63 N.M. 470, 321 P.2d 1115 (1958); Miller v. Treat, 57 Wash. 2d 524, 358 P.2d 143 (1960); W. Prosser, supra note 21, § 67.
44. See generally R. Nadar, Unsafe at Any Speed (1965); Walker & Buck, supra note 6; Note, Seat Belts and Contributory Negligence, 12 S.D.L. Rev. 130 (1967).
sation of the first accident had been determined and damages assessed, the court could then proceed to the second accident. If the plaintiff's unfastened seat belt constituted contributory negligence in regard to the second accident, he would be denied recovery for damages caused by such accident. The present adoption of this approach would mean, in most cases, that plaintiff would be allowed recovery, if he were the owner of the car, for the property damage caused by defendant's negligence, and denied recovery for those personal injuries partially caused by his failure to fasten his seat belt. While this approach would not fully compensate plaintiffs who fail to "buckle-up" it at least would serve to mitigate the effects of a doctrine which, when strictly applied, would bar all recovery.45

Weighing against any general acceptance of the Bentzler result, even in such modified forms, is the equitable consideration that allowing the seat belt defense would put an undesirable burden on those who enter automobiles. The Bentzler court itself admits that the seat belt statistics cannot serve to predict the extent or gravity of a particular plaintiff's injuries.46 Given this, and the further fact that the passenger has no way of knowing whether in his case fastening the seat belt will increase or decrease his potential injuries,47 it seems unfair to require the passenger to "buckle-up" or risk losing all compensation for his injuries.

If, as some courts have suggested, the time arrives when failure to fasten a seat belt should be considered contributory negligence, that decision is probably better left to the legislatures.48 Because of their superior investigative facilities, they are arguably better equipped to make the inherently difficult factual determinations and are thus in a better position to define the standard of conduct most appropriate to the seat belt cases.

45. For arguments suggesting the unimportance of providing compensation for property damage, see R. Keeton & K. O'Connell, Basic Protection for the Traffic Victim 136, 276 (1965).
46. 149 N.W.2d at 640.
47. See text accompanying note 19 supra. One value of the fastened seat belt appears to be its effectiveness in reducing head injuries. However, while protecting the head, the seat belt can literally break the passenger's back. Supra note 18. Admittedly, a head injury may be potentially more serious. But the individual may, for reasons personal to him, prefer to take a chance on his head rather than on his back. In this situation it seems most unfair that he should be denied recovery for the head injury simply because he chose to protect his back.