The Indiana Mandatory Seatbelt Use Law and Its Effect upon Automobile Tort Litigation

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I. INTRODUCTION

The Indiana General Assembly passed legislation in the 1985 session which answered some questions about the effect comparative fault would have upon the availability of the seatbelt defense. Although assertion of the seatbelt defense has enjoyed relatively little success, defense attorneys continue to assert it. Advocates of the defense were encouraged with the news that the Indiana legislature was considering the enactment of a statute requiring passengers and drivers in moving automobiles to wear body restraints. The optimism was based upon the knowledge that Indiana courts had refused to declare a duty to wear safety devices and had clearly revealed their intention to defer to the legislature for the creation of such a duty.[1] With the passage of chapter 9-8-14 of the Indiana Code, the General Assembly created the duty to wear the restraints, ending nearly eighteen years of anticipation by seatbelt defense advocates. Optimism about being able to rely upon the newly-created duty for support in defending automobile tort cases was also ended, however, because the statute very strictly limits the application of the duty. Instead legal minds are no doubt at work attempting to find a chink in the statute's language that will enable the defense to be raised despite the legislative limitations. This Article will examine the statute for its effect upon the civil law rather than the criminal law of which it is a part. The examination will be conducted from the standpoint of the law of torts, including a consideration of the connection between the statute and the common law of negligence and the statutory law of comparative fault.

Important precepts in the arguments by advocates of the seatbelt defense have been that employment of some type of body restraint promotes safer automobile use,[2] and that ordinary and prudent care would include the use of any available device which reduces the risk of injury.[3] Several courts which have considered the matter have been

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[1]*See* State v. Ingram, 427 N.E.2d 444 (Ind. 1981).

[2]*See* National Highway Traffic Safety Administration studies and summaries of testimony accompanying amendment to 49 C.F.R. § 571.208, 49 Fed. Reg. 28,962, 28,986-91 (1984).

[3]Truman v. Vargas, 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969); Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984); Spier v. Barker, 35 N.Y.2d

reluctant to accept those precepts as a matter of common law.[4] With legislative pronouncement of a duty to wear the devices, seatbelt defense advocates gain a powerful ally in the argument that a plaintiff who has failed to use one has failed to exercise ordinary and prudent care. A detailed look at the Indiana statute, however, readily demonstrates that the General Assembly did not fully embrace the assertion that body restraints contribute to motoring safety. Importantly, not all passengers of motor vehicles are required to employ the devices, but only

> [e]ach front seat occupant of a passenger motor vehicle that is equipped with a safety belt meeting the standards stated in the Federal Motor Vehicle Safety Standard Number 208 (49 C.F.R. 571.208) shall have a safety belt properly fastened about the occupant's body at all times when the vehicle is in forward motion.[5]

A complicated sentence which, by general reference, incorporates definitions contained in other chapters of the motor vehicle code, declares that the words "passenger motor vehicle" mean "[e]very motor vehicle designed for carrying passengers except a motorcycle, bus or school bus."[6] In another provision, however, "buses, school buses and private buses" are placed back in the definition, and "trucks, tractors,[7] and recreational vehicles" are specifically excluded.[8] Furthermore, section two of the statute declares that:

> This chapter does not apply to a front seat occupant who:
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> (1) for medical reasons should not wear seatbelts;
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> (2) is required to be restrained under the the child passenger restraint law (IC 9-8-13);

444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

[4]Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Fischer v. Moore, 183 Colo. 392, 517 P.2d 458 (1973); Kavanaugh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967); 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); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977). *See* Note, *Oklahoma and the Seat Belt Defense; Should* Fields *be Reconsidered*?, 10 OKLA. CITY U. L. REV. 153 (1985) for a discussion of these cases and citations to many others.

[5]IND. CODE § 9-8-14-1 (Supp. 1985).

[6]*Id.* § 9-1-1-2(x) (Supp. 1985).

[7]"Tractors," as defined in IND. CODE § 9-1-1-2(g), means "[e]very motor vehicle designed and used primarily for drawing or propelling trailers, semitrailers or vehicles of any kind, except a 'farm tractor,' 'farm tractor used in transportation' as defined herein, or a tractor which is used exclusively for drawing a passenger-carrying semitrailer." Thus, drivers and passengers of most commercial freight hauling vehicles are not covered by the statute.

[8]IND. CODE § 9-8-14-1 (Supp. 1985).

(3) is traveling in a commercial or United States Postal Service vehicle that makes frequent stops for the purpose of pickup or delivery of goods or services;

(4) is a rural carrier of the United States Postal Service and is operating a vehicle while serving a rural postal route; or

(5) is a newspaper motor route carrier or newspaper bundle hauler who stops to make deliveries from his vehicle.[9]

Before starting a detailed analysis of the limitations of the statute, it may be helpful to examine its relationship to the common law of negligence. In so doing, a background of interconnected legal principles and patterns should be established which will enable a more precise evaluation of the ultimate effect of the statute upon existing law.

II. The Seatbelt Defense in Indiana

A. The Statute and the Standard of Care

Under certain circumstances, violation of a criminal statute may have critical bearing on the actor's civil liability. If the statute is designed to promote safety, requires a particular course of conduct of an actor, and the injury addressed is of the same type as that which is the subject of the controversy between tort litigants, the statute may be applied in lieu of the common law standard of care. The precise final effect of the application varies according to jurisdictional approaches and type of statute. The approaches range from consideration as mere evidence of the actor's negligence to a position where the violation will raise a conclusive presumption of negligence.[10] Between the polar ends of the spectrum is a middle position which considers proof of a violation "prima facie" establishment of negligence. In all approaches, the utility of the statute is to permit the triers of law and fact to look to the legislature rather than the common law as the source and specification of the standard of care to be exercised in the circumstances. The abstract standard of the reasonably prudent person is replaced by a more precise prescription or proscription of conduct against which the actor's conduct may be compared. As in an ordinary negligence case, the breach of the standard of care (here either proved or suggested by proof of a failure to buckle up) must be shown to have been a producing cause of the

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[9] *Id.* § 9-8-14-2 (Supp. 1985).

[10] *See generally* Prosser and Keeton, The Law of Torts 220 (5th ed. 1984); Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 Santa Clara L. Rev. 427 (1983), and authorities cited therein. It is not clear which position the Indiana courts are committed to. *See* Zimmerman v. Moore, 441 N.E.2d 690, 696 (1982).

injury. The statute may be used to set the standard of care for establishing the plaintiff's contributory fault as well as the defendant's primary fault.[11]

On this plane of analysis, as far as it goes, the Indiana seatbelt statute would seem to satisfy the general requirements for the application of the legislative standard to complaints arising from automobile accidents in which the plaintiff failed to wear the required body restraints. That the statute is designed for safety is abundantly evidenced by the reference to passenger restraints as "*safety* belts" and the later provision that:

> [t]he bureau of motor vehicles, in cooperation with the department of highways, division of traffic safety, shall develop and administer educational programs for the purpose of informing the general public of the benefits that will inure to passengers using safety belts.[12]

The enactment does more than express a general legislative concern for safety, but actually requires persons subject to it to wear the restraints, thereby imposing a particular course of conduct upon certain users of motor vehicles. A defendant in an automobile tort case may face difficulties in establishing the requisite causal connection between the failure to buckle up and the injuries incurred by the plaintiff, about which more will be said later, but on its face, an argument that plaintiff would not be before the court with the injuries alleged had a body restraint been worn has logical appeal.

B. Restrictions on Use of the Seatbelt Defense

Had the seatbelt law contained no more, persons injured in automobile accidents who had failed to buckle up would have difficulty obtaining full recovery for those injuries. Indiana case law had long established that the seatbelt defense was conceptually related to principles of comparative fault and that until the legislature enacted comparative fault and a duty to buckle up, the defense would not be recognized.[13] With

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[11]*See* New York Central Railroad Co. v. Glad, 242 Ind. 450, 179 N.E.2d 571 (1962); Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E.2d 896 (1951); Gasich v. Chesapeake & Ohio R. Co., 453 N.E.2d 371 (Ind. App. 1983); Anderson v. Pre-Fab Transit Co., Inc., 409 N.E.2d 1157 (Ind. App. 1980); Anderson v. Baker, 166 Ind. App. 324, 335 N.E.2d 831 (1975); Rosenbalm v. Winski, 165 Ind. App. 378, 332 N.E.2d 249 (1975); Bixenman v. Hall, 141 Ind. App. 628, 231 N.E.2d 530 (1968).

[12]IND. CODE § 9-8-14-4 (Supp. 1985).

[13]State v. Ingram, 427 N.E.2d 444 (Ind. 1981); Volkswagenwerk v. Watson, 181 Ind. App. 155, 390 N.E.2d 1082 (1979); Rhinebarger v. Mummert, 173 Ind. App. 34, 362 N.E.2d 184 (1977); Gibson v. Henninger, 170 Ind. App. 55, 350 N.E.2d 631 (1976); Birdsong v. ITT Continental Baking Co., 160 Ind. App. 411, 312 N.E.2d 104 (1974); Kavanaugh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1967). *But cf.* Mays v. Dealer Transit, Inc., 441 F.2d 1344 (7th Cir. 1971) (court found that the *Kavanaugh* decision, then the only reported opinion on the topic in Indiana, was not dispositive of the issue

the legislature having embraced both comparative fault and a duty to use body restraints, the way was opened for the defense to defeat or reduce recovery in proper cases when the statute goes into effect on July 1, 1987.[14]

The General Assembly was unwilling to extend the scope of the seatbelt statute so far, however. The statute is not just a simple declaration of new criminal law.[15] The statute specifically addresses the occasion when a party to a civil action seeks to admit violation of the statute into the case. Section five of the enactment severely limits the applicability of the law in automobile accident litigation. In effect, the legislature has curtailed the development of the seatbelt defense before it could truly be born in Indiana.

Section five's limitations are that "[f]ailure to comply with this chapter does not constitute fault under IC 34-4-33 and does not limit the liability of an insurer. Evidence of the failure to comply with this chapter may not be admitted in any civil action to mitigate damages."[16] Compliance with this language means that a person who would seek an apportionment of damages under comparative fault cannot do so with evidence of the other party's failure to wear body restraints. Because of the peculiar way in which the legislature has stated the limitations, however, the seatbelt defense may yet be asserted and recognized in Indiana courts. The remainder of this article will consider some ways that might be done.

III. Other Avenues for Asserting the Seatbelt Defense

A. Statutory Interpretation and the Definition of "Fault"

One approach would be to assert that the legislature's limitation pertaining to "fault" does not prevent the defense from being raised in cases where the comparative fault act's definition is not controlling. In order for a party to a tort action based upon fault to obtain an apportionment of damages, the proponent of apportionment must show that the opponent has engaged in conduct which satisfies the statutory

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and that Indiana law did not preclude the trier of fact from considering whether failure to use safety belts was a breach of due care and whether the failure was a "causative factor in the production of injury.") 441 F.2d at 1353-54.

[14]For a discussion of the applicability of a seatbelt defense and other failures to employ available safety devices under the comparative fault act *without* a legislative pronouncement of a duty to use the devices, see Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 Ind. L. Rev. 687, 795-800 (1984).

[15]The statute makes it a Class D infraction to be found guilty of not wearing a seatbelt. A Class D infraction, newly created in the seatbelt law, permits a fine of up to twenty-five dollars. Ind. Code §§ 9-8-14-6(a) and 34-4-32-4(d) (1982 & Supp. 1985).

[16]Ind. Code § 9-8-14-5 (Supp. 1985).

definition of "fault."[17] "Fault" has meaning under the comparative fault act far different from its common law meaning. It is not simply substandard conduct which is not condoned by society, but it

> includes any act or omission that is negligent, willful, wanton, or reckless toward the person or property of the actor or others, but does not include an intentional act. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.[18]

Several elements of the definition would seem to apply to the decision not to buckle up. As propounded by advocates of the seatbelt defense, the failure to use safety devices amounts to contributory negligence, assumption of risk, recklessness, and failure to avoid future injury.[19] The seatbelt law's pronouncement that the decision not to use the devices shall not constitute "fault" thus covers a broad spectrum of characterizations which otherwise might have given the seatbelt defense life. If the statute had said merely that failure to fasten one's seatbelt was not to be considered negligence, for example, all of the other aspects of statutory "fault" would be left open as receptacles for arguing that the conduct of the plaintiff is adequate basis for apportionment of damages.

Most avenues seem to be closed for characterizing the conduct in a way which circumvents the definition. Because the failure to use seatbelts has been declared not to be "fault," and because apportionment is dependent upon a finding of "fault," the legislature has removed the possibility of the defense satisfying the necessary antecedent for apportionment of damages.

As if anticipating efforts to find ways around the exclusion from "fault," the General Assembly inserted the sentence that evidence of failure to comply is not admissible to mitigate damages.[20]. The two sentences are extremely strong indicators that the legislators did not wish the defense to arise in comparative fault litigation.

Comparative fault litigation is not coextensive with the universe of automobile litigation, however. The legislature did not declare the defense

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[17]Attorneys accustomed to litigating tort cases at common law should quickly become accustomed to referring to the statute frequently and carefully to determine the precise shape of the new law of comparative fault. The statute is not simply a declaration of common law principles incorporated into a comparative system, and it is better to check and state precisely the portion of the act bearing upon the matter at hand than to guess, extrapolate, or pharapharse.

[18]IND. CODE § 34-4-33-2 (Supp. 1985).

[19]"Mitigation of damages" includes the latter concept, but "mitigation" is not limited to failure to avoid future injury. *See infra* notes 27-29 and accompanying text.

[20]IND. CODE § 9-8-14-5 (Supp. 1985).

itself to be improper, but only attempted to limit its use. In effect, the areas of "fault" and "mitigation of damages" are declared off-limits for the defense. It quite conceivably can exist and be properly applied in circumstances where the comparative fault act is not applicable or where the purpose for raising the defense is neither to establish "fault" nor to "mitigate damages."

One area where the issue is certain to arise is in claims against a government entity. Where a government employee's tortious operation of a motor vehicle has subjected the entity to liability and the injured party has failed to employ body restraints, the seatbelt defense will be appropriately raised. The comparative fault act is expressly inapplicable to such cases.[21] That act does not purport to change common law principles of fault, only to group several different concepts of fault and non-fault under the statute's definition of the term. Where the comparative fault act does not apply, courts are free to employ common law principles, which include violation of a safety statute. With the declaration of the seatbelt statute, the obstacles to recognition of the defense which prevented the Indiana courts from applying it in *Kavanaugh v. Butorac*[22] and other cases were removed. In place of legislative silence on the matter is a clear statutory mandate to buckle up, backed by penal sanctions and declarations of public safety objectives. In a nutshell, at this level of analysis, the defense may enter the case because it will be asserted as common law fault, not as statutory "fault."

The strategy need not be limited to cases where the common law of torts is controlling. The comparative fault act and its special treatment of "fault" is also inapplicable to strict product liability actions.[23] The product liability statute governing such actions controls defenses to claims made on the theory of strict tort liability, and no exclusion of the seatbelt defense is facially apparent:

> (1) It is a defense that the user or consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.
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> (2) It is a defense that a cause of the physical harm is a nonforeseeable misuse of the product by the claimant or any other person. Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other than the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for

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[21] *Id.* § 34-4-33-8.

[22] 140 Ind. App. 139, 221 N.E.2d 824 (1967).

[23] IND. CODE § 34-4-33-13 (Supp. 1985).

the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

(3) It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of the physical harm.

(4) Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.[24]

With the enactment of the seatbelt statute, the legislature has arguably declared the nonuse of available body restraints unreasonable[25] as a

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[24]*Id.* § 33-1-1.5-4 (1982 & Supp. 1985).

[25]To suggest that the legislature's restrictions on the use of evidence of violation of the statute means that it does *not* consider nonuse to be unreasonable, places one in a position of having uttered a paradox: "The legislature has 'declared' a course of conduct 'reasonable' which it punishes through penal sanctions as 'unsafe.' "

The paradox can be avoided in three ways. First, it can be denied that the seatbelt statute's limitation is a declaration of the reasonableness of nonuse, but is merely a statement of public policy that nonuse should only be sanctioned by the imposition of criminal, not civil liability. Second, it might be said that the restrictions on use of evidence of noncompliance read in connection with the exclusions and exceptions from the duty imposed, the narrow range of circumstances under which the statute may be enforced (no violation unless the vehicle is moving, enforcement officers may not stop, inspect, or detain solely to determine compliance), and the very light penalty imposed in the rare case where an enforcement action succeeds (a Class D infraction carries a maximum fine of $25, and costs may not be imposed against one found guilty of a Class D infraction) demonstrate that the legislature did not consider the statute to be aimed at eliminating *unsafe* practices by motorists, but only as an incentive to practice *safer* motoring.

The third approach would be to say that the legislature was not responding to a perceived need for safety legislation at all, but enacted the statute for other purposes, the language being couched in terms of safety only because it is semantically difficult to pass a statute relating to safety belts without carrying the connotation that safety is the main aim.

Good evidence can be cited in support of the third argument to remove it from the realm of pure cynicism. In July of 1984, the United States Department of Transportation promulgated an amendment to Federal Motor Vehicle Safety Standard No. 208 (49 C.F.R. § 571.208) pertaining to automatic passenger restraint systems. That directive requires automobile manufacturers, in a phased-in schedule, to install restraint systems not requiring user activation on all new cars manufactured after September 1, 1989. The regulation reversed administration policy opposed to automatic restraint systems and directly responded to the United States Supreme Court's decision in Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983). That case struck

matter of public policy. In a case where the claim of the plaintiff against an automobile manufacturer maintained that the automobile's manufacture or design presented a defect making it unreasonably dangerous

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down the National Highway Traffic Safety Administration's rescission of Standard No. 208 on the grounds that the agency had acted arbitrarily and capriciously. The Court ordered the agency either to consider the matter further, adhere to the standard, or amend it in accordance with the opinion. 463 U.S. at 57. As part of its reconsideration, the agency included a provision in the amendment rescinding the standard if state mandatory seatbelt use laws meeting stated minimums are applicable to two-thirds of the total U.S. population by April 1, 1989. While the standard does not require any particular type of restraint system, technology currently under study includes airbag systems, a controversial concept generally opposed by the automobile manufacturing industry. As part of efforts to resist the ultimate requirement of manufacturing all automobiles with airbags, the industry has actively sought the passage of mandatory use laws. *See* "Buckle-up Laws Are Beginning to Spread," The Christian Science Monitor, Mar. 12, 1985, at 6; "States Debate Requiring Use of Belts," N.Y. Times, Feb. 28, 1985, at B5, col. 4. The efforts are getting results: in July of 1984, only one state had passed such legislation (New York N.Y. Veh. & Traf. § 1229-C (McKinney 1970 & Supp. 1984-85). By the end of the year, New Jersey and Illinois had mandatory use laws on the books. At the date of this writing, thirteen states have enacted seatbelt laws, and legislation is pending in at least four other states.

One explanation for the sudden popularity of the mandatory use laws has been offered by Senator John C. Danforth of Missouri. He asserts that General Motors has exerted pressure on state legislators to pass seatbelt legislation by indicating that states who refuse to do so would fall from consideration by that company for its proposed Saturn plant, an economic prospect of many billions of dollars. (Remarks of Senator John C. Danforth, Chairman of the United States Senate Commerce Committee, before the Committee on February 21, 1985, at hearings on the National Highway Traffic Safety Administration's 1984 amendment to Standard No. 208. *See* "Buckle-Up Laws Are Beginning to Spread," The Christian Science Monitor, Mar. 12, 1985, at 6; "State Mandatory Seat Belt Laws 'Tepid, Innocuous,' Danforth Charges," Daily Report for Executives (BNA) No. 36, (Feb. 22, 1985) at A-21.

Now that General Motors has announced the location of that plant ("It's Official; Saturn to Tennessee," The Indianapolis Star, July 30, 1985, at 21, col. 2.), it may be interesting to watch for any change in the rate of passage of seatbelt legislation. In Tennessee, the senate approved seatbelt legislation, but on May 15, 1985, the house of representatives failed to pass the bill by the necessary majority. Whether or not Danforth's charges are true, it is clear that the Saturn plant was on the minds of Indiana legislators and administrators during the session in which the seatbelt statute was enacted ("Senator Reconsiders Seat-belt Bill," The Indianapolis Star, March 19, 1985, at 1, col. 1.), and it may well be that the statute was considered as "Saturn-bait" without pressure from General Motors. In addition, the city of Richmond, Indiana, is reportedly under consideration by Chrysler Motors as a site for its joint venture with Mitsubishi. ("Mitsubishi Considering Lafayette, Richmond," The Indianapolis Star, June 19, 1985, at 24, col. 5). Chrysler chairman Lee Iacocca, an outspoken opponent of airbag legislation, reportedly urged the passage of seatbelt legislation in Illinois as a measure to "forestall the mandatory use of air bags." *See* N.Y. Times, *supra*, quoting Governor James Thompson of Illinois concerning his conversation with Mr. Iacocca and the Governor's assessment of the purpose of the conversation.

The statute does not even satisfy the minimum criteria of the National Traffic Highway Safety Administration rule. Those criteria are specifically stated in 49 C.F.R. § 571.028, and provide, in pertinent part:

in collisions, for example, the manufacturer might well invoke subsection one above to argue that driving or riding in the vehicle while refusing to use body restraints was an unreasonable use if it can otherwise establish that the plaintiff "discovered the defect and was aware of the danger." Even where the "discovery and awareness" clause presents a difficulty, the manufacturer might argue that subsection two bars recovery because the nonuse of the restraints was an unforeseeable misuse of the product regardless of the plaintiff's ignorance of the dangerous defect. Given the statutory mandate to wear the safety devices, backed up by criminal sanctions, the manufacturer could well maintain that it was not bound to foresee that reasonably prudent people would ignore both the provided safety measure and the command to wear them. The legislature has spelled out the exceptions to required use, and if those exceptions are taken to be the only areas of reasonable nonuse, the seatbelt defense may well be applicable in such a lawsuit. Subsection three might be raised in defense if the plaintiff had "modified or altered" the vehicle by removing, changing, or otherwise rendering the seatbelts inoperable.[26]

B. The Seatbelt Defense and Damages

Whatever the precise form the defense may take, however, if it was raised for the purpose of *reducing* the plaintiff's recovery rather than barring it altogether, the seatbelt law's limitations will not have been escaped. Recall that the enactment provides that "[e]vidence of the failure to comply with this chapter may not be admitted in *any* civil

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§ 4.1.5.2 The minimum criteria for state mandatory safety belt usage laws are:

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(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 belt usage requirement.

(2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

Issues of federal administrative rules dictating state law aside, with such blatant nonadherence to the rule's criteria, the sincerity of the General Assembly in passing a true safety statute is validly called into question. The statute is virtually unenforceable, and even if it should come to pass that some unfortunate soul is found to be in violation of the narrow prescriptive duty, the penalty applicable is less than for jaywalking and failure to signal a turn. (Jaywalking and failure to signal are Class C infractions which carry a penalty of up to $500.00. IND. CODE §§ 9-4-1-86, 9-4-1-88, 9-4-1-79, 9-4-1-127.1(b) (1982)).

[26]In the early days of federal legislation pertinent to seatbelts during which the seatbelts were coupled with an audible warning device and ignition systems, some users would buckle the belts across or under the seats to prevent the noise and allow the auto to be started. Such a practice, if it were the case, might be considered "modification or alteration" under subsection (3) above.

action to *mitigate* damages."[27] Here the difference between a negligence action at common law and a proceeding subject to the comparative fault act becomes crucial. The comparative fault act replaces the total bar of contributory negligence with a principle of apportionment of damages only in cases where it is properly invoked. It did not totally replace or abolish the common law of negligence in any respect. In ordinary negligence actions, the defense will have been admitted for the purpose of completely barring recovery rather than merely reducing it.

Even where the comparative fault act does apply, sufficient room exists in the seatbelt statute's limiting language for admitting the defense. Fault and injury are not the sum total of a plaintiff's prima facie case in negligence, and if the defendant attacks that prima facie case on some other element, the limitations are not called into play. Careful adherence to the concept of "mitigation" is important here. So long as the defensive theory is that the plaintiff's injuries would not have occurred at all had body restraints been worn, the defense is a denial of liability, not an attempt to reduce damages. But if the defensive theory is that the injuries would not have been *as severe* as alleged had the safety devices been used, the theory will have been injected into the case for the purpose of reducing the defendant's accountability. The legislature has implied that the defense is an all or nothing proposition, and if the nonuse of restraints can only account for a portion of the plaintiff's harm, the defense would be inadmissible under section five of the seatbelt law.

The legal meaning of mitigation of damages is the key to understanding the different treatment of the two defensive strategies. When the defendant seeks mitigation of damages, the issue of liability technically is no longer contested. Instead, the defensive tactic focuses upon aspects of the case which will cause the jury literally to "soften"[28] imposition of a damages award on the defendant. The trier of fact is presented with evidence which the defendant hopes will prove one or more of three things: (1) the plaintiff's act or omission actually caused the injury to worsen, and a reasonably prudent person would have taken measures to prevent the aggravation; (2) the defendant's act or omission conferred a benefit upon the plaintiff as well as injury, and that benefit should be taken into account in the assessment of damages; (3) the defendant's act or omission was not as blameworthy as the plaintiff's case presents it.[29] In each, the plaintiff is assumed to have established some right of

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[27]IND. CODE § 9-8-14-5 (Supp. 1985) (emphasis supplied).

[28]The Latin derivation of "mitigate" is *mitigatus*, to soften. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1447 (1961); FUNK AND WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1590 (1963); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 918 (1971).

[29]BALLENTINE'S LAW DICTIONARY 808 (3d ed. 1969).

recovery. But also in each, the tortfeasor hopes to soften the jury's verdict by presenting evidence that would tend to prove that the plaintiff should not receive as much as the facts would justify without the mitigating circumstances.[30] The mitigation defense is in the nature of confession and avoidance; liability is uncontested, but the accountability for that liability becomes the main issue.

In contrast, the defensive tactic which sets up the failure to use available safety devices as the entire cause of the injury is in the nature of a denial defense. Liability is the central issue and the defense contests it by attacking an essential element in the plaintiff's prima facie case. The defendant is not attempting to soften an inevitable plaintiff's verdict; he is attempting to win a verdict of no liability for himself.

In this light, it can be seen that a defendant who attempts to show that nonuse entirely caused the plaintiff's injuries may argue that the seatbelt law does not bar the defense regardless of the plaintiff's theory or the status of the parties. Causation, after all, is not equivalent to fault, and has been kept conceptually separate from the comparative fault act's treatment of "fault" despite the necessary close interrelatedness of the two terms.[31] If a defendant seeks to defeat liability on the theory that his own conduct was not the cause of the plaintiff's injury, it does not matter whether that other conduct is faulty or innocent.[32] The comparative fault act's modification of the common law of negligence is for the purpose of apportioning damages commensurate to the degrees of "fault" attributable to the various actors involved. It does not purport to modify the common law of causation. A defendant employing the theory here contemplated would not be seeking apportionment of damages by trying to establish the plaintiff's contribution of "fault" but would rather be addressing the defense to plaintiff's prima facie case. If the theory is valid, it means that neither the comparative fault act nor the seatbelt statute affects the defense as it is here posed.

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[30]BLACK'S LAW DICTIONARY 904 (5th ed. 1979).

[31]The definition of "fault" does not include an element of causation. IND. CODE § 34-4-33-2 (Supp. 1985). The "legal requirements of causal relation" are to be applied to "fault" by virtue of a separate section of the act. *Id.* § 34-4-33-1. And, if that "fault contribut[es] to cause the claimant's loss," *id.* § 34-4-33-5(a), (b), or if the claimant's "fault" combines with defendant's to "cause the claimant's death, injury or property damage," *id.*, the jury may apportion damages accordingly.

[32]This assertion is valid only as a special proposition. It is not pertinent to situations where the defendant seeks to avoid liability by proving that multiple factors caused the injury. Where the defendant's acts can fairly be taken as a producing cause of the injury, courts do not generally permit plaintiff's cause of action to be defeated simply upon proof that other forces combined with the defendant's conduct to produce the harm. *See, e.g.*, Kingston v. Chicago & N.W. Ry., 191 Wis. 610, 211 N.W. 913 (1927) (a favorite of torts teachers and textbook writers). RESTATEMENT (SECOND) OF TORTS § 432 (1965); Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941 (1935). In joint tort situations, defendants do not escape liability by pointing accusing fingers at each other. RESTATEMENT

Two difficulties with this approach to the seatbelt defense exist. First, it is effective only in *some* circumstances where *all* of the plaintiff's injuries have been caused by the failure to wear safety belts, and second, even if admitted upon the grounds that it explains all of the plaintiff's injuries, unless the jury is carefully instructed about its applicability and the jury adheres to the instruction, it may be given effect contrary to the statute's limitations.

It is important to recall and emphasize the statutory limitations upon the defense at this stage of analysis. The statute prevents the introduction of evidence of failure to employ safety belts for the purposes of establishing "fault" or to "mitigate damages."[33] This means that if the defendant proffers the evidence upon the strategy that it was plaintiff's "fault" and not the defendant's that caused the injury, the evidence is technically inadmissible under the statute. Likewise, the prohibition against admission for purposes of mitigation prevents the defendant from asserting directly or indirectly that the failure to wear safety belts should reduce the plaintiff's recovery, regardless of whether the omission technically satisfies the statutory definition of "fault." The latter prohibition presents some interesting issues concerning the propriety of jury conduct which will be discussed in greater detail later,[34] but for now the problem can be stated as a lack of direct control over jury treatment of evidence of violation of the seatbelt statute.

Because the statute's prohibitions are specifically stated and prevent admission for "mitigation" and treatment as "fault," the prohibitions carry the implications that evidence of the violation may be *admitted* for purposes *other* than mitigation and *may* be treated as *other* than

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(SECOND) OF TORTS §§ 875-876 (1979). Some successive or concurrent tort situations are treated as if they were joint torts and to the same effect. *See* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); *Kingston*, 191 Wis. 610, 211 N.W. 913 (1927); RESTATEMENT (SECOND) OF TORTS § 879 (1979). Intervening and superseding cause doctrine requires the defendant to prove that the responsible cause was not within the scope of duty, and in some instance the culpability of the other causal agent may have an important bearing upon the issue. *E.g.*, Watson v. Kentucky & Indiana Bridge & Ry. Co., 137 Ky. 619, 126 S.W. 146 (1910); RESTATEMENT (SECOND) OF TORTS § 442 (1965). In contributory negligence situations, of course, the faultiness of the plaintiff's conduct is of crucial importance. RESTATEMENT (SECOND) OF TORTS §§ 463, 469 (1965). Against this background, the causation theory here being explored has utility only in the narrow range of circumstances where the defendant seeks to prove that no injury at all would have occurred without the plaintiff's act. Pragmatically, this means that the theory is arguable only in cases where the defendant can establish that the failure to wear seatbelts was *the* factual cause of the accident which ultimately produced the injury, because it will be exceedingly rare where the defendant's conduct did not produce some minimal kind of harm. Once the threshold of "some harm" is breached, the defendant becomes subject to the prohibition upon mitigation in the statute and the general common law proposition that defendants take their plaintiffs as they find them. RESTATEMENT (SECOND) OF TORTS § 435 (1965).

[33]IND. CODE § 9-8-14-4 (Supp. 1985).

[34]*See infra* notes 35-39 and accompanying text.

"fault." Furthermore, the statute does not in any way directly affect the jury's power to decide the issue of damages, so a question exists whether the jury may mitigate damages for failure to buckle up when the evidence of that failure has otherwise been properly admitted.

IV. Evidentiary Problems and the Jury

The legislature's approach and the issues which lurk in the language of that approach spawn the need to consider proffers of evidence of omissions of the safety precaution with great care. The evidence should be allowed if, but only if, it is clear that safety belts were not used and the defendant proposes to show that his conduct did not produce the injury and that the conduct of the plaintiff did produce it. Furthermore, even where those preconditions are satisfied, the jury should be instructed that it is not to consider the evidence as proof of the plaintiff's "fault," or as reason to reduce damages, but only as proof that the defendant did not cause the injuries. In the abstract, a jury faced with such a defense is capable of producing one of three possible verdicts: (1) defendant alone caused the injury (thereby completely rejecting the defendant's evidence); (2) plaintiff alone caused the injury (thereby completely accepting defendant's evidence); or (3) defendant and plaintiff together produced the injury (thereby partially accepting and partially rejecting defendant's evidence). Upon verdicts (1) and (3), any reduction of damages, whether one or one hundred percent, would technically amount to "mitigation" and would therefore pose the issue of whether such mitigation is proper under the statute. Arguments in support of mitigation would take the form that the statutory prohibition is upon admissibility for purposes of mitigation only; evidentiary principles permit its admission for other purposes; and the jury's power to mitigate damages is undiminished by the prohibition. Opposition arguments would take the form that clear public policy has been stated that a motorist's failure to use a seatbelt is not to be considered a basis for impairing an injured party's right of recovery; that even though the jury's power to mitigate has not been directly impaired by the statute, it may do so only upon competent evidence; and the competency of seatbelt nonuse evidence for purposes of mitigation has been abrogated.[35]

Principles of *proximate* cause may blur the conceptual picture here somewhat, because a jury may well find that although the defendant and the plaintiff both contributed to the injury, only one or the other

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[35]*See generally* McCormick on Evidence 151 (3d ed. 1984), citing 1 Wigmore, Evidence § 13 at 693 (Tiller rev. 1983). Commentary in Wigmore's treatise seems to support the latter argument, but at the same time it expresses the view that the main line of protection against jury misuse is the limited form of admonition in the instructions. *Id.*

was the proximate cause. The scope of this comment does not permit a full exposition of proximate cause theory, but it may help to think of proximate cause as "legal cause." Against a background of cause and effect relationship between both parties' conduct and the injury, with a finding that the plaintiff (or the defendant) is the "legal cause" of the injury, the jury has declared that even though a connection can be established within the laws of physics between the act of the opposite party and the event of injury, the connection may not be made within the law of torts. Conceptually then, the finding fits either verdict (1) or verdict (2) above. If it fits verdict (2), the defendant has defeated the plaintiff's prima facie case, and the "faultiness" of the plaintiff's causal act is logically unrelated to the determination of the controversy. It is not one hundred percent "mitigation" because it does not simply amount to a reduction of damages that the plaintiff would otherwise be entitled to recover.[36]

Assuming proper admission of evidence of the plaintiff's failure to wear a safety belt and jury instructions which explain the proper effect of its findings in regard to that evidence, the possibility remains that through misunderstanding or misconduct, the jury will reduce the plaintiff's award. In the three ways in which such a result can be reached, one is easily detectable and corrected; the other two are not.

One way a jury may err in this respect is to ignore or misconstrue judicial admonitions not to consider the failure to wear the device as "fault." So doing, the jury may decide that plaintiff's failure constituted "fault" of a certain percentage and reduce damages in proportion to that "fault." Because the jury is required to render verdicts pursuant to the comparative fault act's specifications of form, that error will show up in the jury's answers to the questions put to it concerning the amount of damages prior to reduction for "fault" and the percentages of "fault" assigned to each party.[37] Although the comparative fault act does not specifically address the corrective action to be taken when the verdict form indicates an inconsistency with the seatbelt statute's limi-

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[36]A hypothetical case may serve to illustrate the idea being presented here. The defendant (D), through its agents, was operating its train at a speed in excess of the posted limit as the train approached the intersection with the highway upon which the plaintiff (P) was travelling. P swerved his automobile upon seeing the train appear suddenly in his path. His maneuver caused him to collide with the crossing warning device and his car flipped over. P was not wearing a seatbelt at the time and was thrown from the vehicle as it flipped over. He was thrown under the wheels of the moving train and seriously injured. In the realm of cause and effect, D's conduct was related to P's, and is properly considered as combining with P's to produce the injury. In the realm of "legal cause," however, the liability of D will depend upon whether its conduct was within the scope of its duty to proceed at the posted speed. A jury could properly decide that D's speeding was not the legally responsible cause of P's injury.

[37]IND. CODE § 34-4-33-6 (Supp. 1985) requires the court to "furnish to the jury forms

tations,[38] such an error would clearly invoke the basis for a motion to correct error pursuant to Indiana Trial Rule 59(A)(8). If no other evidence was presented in the case pertinent to the plaintiff's "fault," a declaration by the jury that plaintiff contributed a certain percentage of "fault" would be incontrovertible evidence of jury error. It would be a relatively simple matter to establish "[t]he verdict or decision being contrary to law specifically pointing out the insufficiency or defect."[39]

If the defendant has attempted to show that the plaintiff was at "fault" for reasons other than the failure to wear the safety belt, a jury error of the sort just described is far more difficult to detect and correct. Given the wide discretion afforded to juries by tort law generally and the comparative fault act in particular, considerable room exists for the jury to employ loosely the definition of "fault." Add to that the absence of any real standard by which to determine *percentages* of "fault" objectively or to test jury declarations of the percentages, and an attribution of "fault" to the plaintiff might well easily conceal a jury's decision to count the failure to use seatbelts as culpable conduct.

Another way the error might occur would be when a jury, although it adheres to the instructions concerning the relationship of the defense to issues of "fault," simply awards less than full damages in the belief that the plaintiff does not "deserve" to recover fully. Such a verdict would contravene the seatbelt statute, not so much because it mitigates damages, but because the jury will have treated the plaintiff's omission tantamount to "fault." The error will be especially difficult to detect because the jury is not bound to value the injury in the same manner or amount as the plaintiff, and plaintiffs often consider their damages to be much higher than the ultimate award. Unless the jury's reduction is of sufficient magnitude to induce counsel and court to apply trial rule 59 to correct the verdict on the ground of "inadequate damages," the error may defy correction.

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of verdicts that require the disclosure of: (1) the percentage of fault charged against each party; (2) the calculations made by the jury to arrive at their final verdict."

[38] IND. CODE § 34-4-33-9 (Supp. 1985) provides:

> In actions brought under this chapter, whenever a jury returns verdicts in which the ultimate amounts awarded are inconsistent with its determinations of total damages and percentages of fault, the trial court shall:
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> (1) inform the jury of such inconsistencies;
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> (2) order them to resume deliberations to correct the inconsistencies; and
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> (3) instruct them that they are at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

In the case here contemplated, the verdict's "ultimate amounts awarded" and the "determinations of total damage and percentages of fault" would not be "inconsistent." However, such a verdict would be applying the comparative fault act under circumstances which would not warrant a finding of "fault" and in a way that the legislature clearly declared improper.

[39] IND. R. TR. P. 59(A)(8).

V. Conclusion

Because the legislature has spoken with such specificity in limiting the use of evidence of violation of the seatbelt statute in automobile accident cases, leeway remains in the margin of cases where those specific limitations are not invoked to hold plaintiffs accountable for their failure to use the safety devices. It is important to observe in closing that the common law of Indiana has yet to recognize the seatbelt defense. This Article has identified some situations where the defense may be raised in light of the language chosen by the General Assembly and has discussed the issues that will arise when the defense is proposed. One important justification for rejecting the defense articulated by some courts has been that the added delay and expense accompanying proof of the omission to wear body restraints and the contribution to the plaintiff's injury do not warrant its introduction into the case.[40] To those direct costs must now be added the indirect costs of complication and potential for error which reside in the type of case which falls outside the legislative limitations on the defense. With that observation, prognostication about the ultimate recognition of the seatbelt defense at common law in Indiana should be cautious. Given that the seatbelt statute does not take effect until July of 1987, and that some developments will have occurred in other jurisdictions which may be of interest to the Indiana General Assembly as well as Indiana courts, caution demands that this Article close by saying simply: it's too early to tell.

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[40] *E.g.*, Franklin v. Gibson, 138 Cal. App. 3d 340, 188 Cal. Rptr. 23 (1982); Halvorson v. Voeller, 336 N.W.2d 118 (N.D. 1983); Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972).