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The Unbuckled Seat Belt - A Protection for the Negligent Defendant

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THE UNBUCKLED SEAT BELT— A PROTECTION FOR THE NEGLIGENT DEFENDANT

The enactment of seat belt legislation on the state[1] and federal[2] level is a fairly recent development. It has produced new and complex issues in many of the previously simple automobile accident cases. With the enactment of this legislation, defense attorneys were quick to realize the new issues presented. They sought to introduce the failure to wear seat belts as a defense to plaintiff's cause of action or in mitigation of the damages. This defense, if accepted, would permit the negligent defendant to evade responsibility or to reduce his liability for the injuries caused by the plaintiff's failure to utilize an available seat belt.

A California District Court of Appeal, in the case of *Truman v. Vargas*,[3] considered the question and gave recognition to the seat belt defense. By this decision, California has recorded its willingness to admit evidence relevant to such a defense.

In contrast, decisions in other jurisdictions have held as a matter of law that failure to wear an available seat belt does not give rise to an inference of negligence and have refused to admit evidence on that issue.[4] Many decisions have also held that such a policy determination should be left to the legislature.[5]

A small number of courts have allowed evidence of seat belt use in considering plaintiff's duty of due care to provide for his own safety.[6] However, most courts have held there is no common

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1 *See* Walker & Beck, *Seat Belts and the Second Accident*, 34 INS. COUNSEL J. 349 (1967).

2 *See* 32 Fed. Reg. 2408 (1967).

3 275 A.C.A. 1105, 80 Cal. Rptr. 373 (1969).

4 Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966). The trial court struck the defense that plaintiff was guilty of contributory negligence for failing to make use of an available seat belt. The district court of appeals held that the trial court did not err in refusing to allow evidence of the plaintiff's failure to use his seat belt. *Id.* at 51. *See also* Robinson v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (1968); Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. 1967). *Contra*, Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966).

5 Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. 1967). The court concluded that the effectiveness of seat belts was still in doubt and left to the legislature the determination of whether a person should be required to wear seat belts. *Id.* at 918. A Florida court held that since no law required the use of seat belts "[I]t is not within the province of this court to legislate on the subject, regardless of what might be the thinking of the individual members of this court." Brown v. Kendrick, 192 So. 2d 49, 51 (Fla. App. 1966).

6 Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). The court held that there is a duty, based on common law standards of ordinary care, to use an available seat belt. However, it was not error to refuse an instruction on that issue

law duty to use an available seat belt[7] and that the reasonably prudent person would not be expected to make use of such a device[8] under normal driving conditions.[9]

Many courts have been unwilling to accept the seat belt defense because of the inability to reasonably prove a causal relationship between the injuries received and the failure to wear a seat belt.[10] The *Truman* court, recognizing this problem, required expert testimony in situations that were beyond the general knowledge of laymen.[11] However, courts have still found most situations too speculative.[12] Even expert testimony does not solve the problem.[13]

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where there was no evidence of a causal relationship between plaintiff's injuries and his failure to wear a seat belt. A comparative negligence rule is applicable in this jurisdiction. *Id.* at 639. *See also* Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968).

[7] Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969). The court of appeals, after reviewing the seat belt cases in other jurisdictions, held that the plaintiff was under no common law duty to wear an available seat belt and failure to do so could not be deemed contributory negligence, nor would it be appropriate as a damage mitigating factor. *Id.* at 610-11. *Accord,* Robinson v. Bone, 285 F. Supp. 423 (D. Ore. 1968); Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967).

[8] The Supreme Court of North Carolina held that "[D]ue care is measured by the customary conduct of the reasonably prudent man. The scant use which the average motorist makes of his seat belt, plus the fact that there is no standard for deciding when it is negligent not to use an available seat belt, indicates that the court should not impose a duty upon a motorist to use them routinely whenever he travels upon the highway. If this is to be done, it should be done by the legislature." Miller v. Miller, 273 N.C. 288, —, 160 S.E.2d 65, 73 (1968).

[9] Robinson v. Lewis, 457 P.2d 483 (Ore. 1969) (no common law duty to wear seat belts in ordinary vehicle travel); *accord,* Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (1969); Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969).

[10] *See* Turner v. Pfluger, 407 F.2d 648 (7th Cir. 1969). In an action to recover for injuries sustained in a collision when plaintiff was thrown through the windshield, the United States Court of Appeals, applying Oklahoma law, held that the defendant had not established that plaintiff's injuries were due, in any part, to his failure to fasten his seat belt. *Id.* at 650. In a wrongful death action where deceased was not wearing her seat belt and was thrown from the automobile, the court rejected the view that the failure to use a seat belt was either negligence or a failure to minimize damages. Jones v. Dague, 166 S.E.2d 99, 107 (S.C. 1969).

[11] Truman v. Vargas, 275 A.C.A. 1105, 1111, 80 Cal. Rptr. 373, 376 (1969).

[12] *See* North v. Scheurer, 285 F. Supp. 81, 85 (E.D. N.Y. 1968). The court held that there is no duty upon an occupant of an automobile to wear an available seat belt. It also stated that the question of whether utilization of seat belts might have prevented decedent's death is a "highly speculative question which if considered, would be a question for the jury, imposing a heavy burden of proof upon the defendant." *Id.* at 83. *See also* Jones v. Dague, 166 S.E.2d 99 (S.C. 1969); Bertsch v. Spears, 252 N.E.2d 194 (Ohio App. 1969).

[13] *See* Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966). Plaintiff was injured when he struck the rear view mirror during an automobile accident. Defendant produced expert testimony stating that plaintiff could not have hit the mirror had he been wearing his seat belt. On appeal the court held that contributory negligence was not established by the mere evidence that the plaintiff did not fasten his seat belt. Although expert testimony was produced, the court noted the speculative nature of such a determination; only a few inches separated the plaintiff from the mirror. *Id.* at 833.

TRUMAN v. VARGAS

A. *The Case*

This was an action for personal injuries resulting from an automobile collision. Plaintiff was riding as a passenger in the front seat of an automobile which collided with a car driven by defendant. The plaintiff was aware that the car was equipped with seat belts, but at the time of the collision his seat belt was not buckled. He brought an action for damages against the negligent defendant. In answer, the defendant pleaded the contributory negligence of plaintiff in two particulars: First, that plaintiff diverted the attention of the driver of his car, and second, that plaintiff's failure to use his seat belt was a proximate cause of his injuries. The trial judge instructed the jury that the consequences of the failure to use a seat belt could be determined only by the testimony of expert witnesses and since the defendant had not produced any, this defense could not be considered. The verdict was for defendant and the trial court granted plaintiff's motion for judgment notwithstanding the verdict and for a new trial.

On appeal, the district court held that a new trial was properly granted for the reason that plaintiff was not guilty of negligence for diverting the driver's attention.[14] The court held, however, that it was error to limit the issues upon retrial to the question of damages and that defendant's refusal to make use of expert testimony in the first trial does not justify exclusion of such testimony in a new trial.[15] The court formulated the test to be applied by the trier of fact in determining whether plaintiff's conduct was negligence, stating that:

> [I]t was a question of fact whether in the exercise of ordinary care Truman should have used the seat belt and that this question should be answered from a consideration of all the circumstances in evidence and any expert testimony as to the efficacy of seat belts, in so far as the same was known, or in the exercise of ordinary care would have been known to Truman.[16]

The court also adopted the trial court's reasoning that while plaintiff's failure to wear seat belts may have amounted to negligent conduct, such conduct is immaterial unless it was the proximate or aggravating cause of the injury.[17] To establish plaintiff's negligence

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14 Truman v. Vargas, 275 A.C.A. 1105, 1109, 80 Cal. Rptr. 373, 375 (1969).
15 *Id.* at 1112, 80 Cal. Rptr. at 377.
16 *Id.* at 1111, 80 Cal. Rptr. at 377.
17 *Id.* at 1109, 80 Cal. Rptr. at 376.

as the proximate or aggravating cause, the court required expert testimony because the evidence was beyond the general knowledge of laymen.[18]

The *Truman* decision creates new law in California. But it is in direct conflict with the current decisions in other jurisdictions which hold that no common law duty exists requiring the use of seat belts.[19] One can only speculate as to why the *Truman* court took this position. The only authority cited in *Truman* is *Mortensen v. Southern Pacific Co.*,[20] and it was cited only to support the necessity of expert testimony. A closer look at the *Mortensen* case shows that it was an action under the Federal Employers' Liability Act to recover for the death of an employee of defendant railroad company. The deceased was killed when thrown from defendant's truck which was not equipped with seat belts. The district court of appeal held that it was a question for a jury to decide whether the defendant's failure to provide seat belts amounted to negligence.[21]

Mortensen is not direct precedent for *Truman* since the former was governed by the Federal Employers' Liability Act, which requires that an employer provide safe working conditions for its employees. While the *Truman* court may have taken notice of the testimony in that case concerning the effectiveness of seat belts,[22] *Mortensen* was certainly not controlling on whether an occupant of a vehicle is negligent in failing to use an available seat belt.

With this lack of authority to support the *Truman* decision, one can only look to other considerations the court may have had. Perhaps the court felt that this decision would provide an incentive, in the form of a penalty, to encourage motorists to use their seat belts. The court may also have thought it would be unfair to require the defendant, even though negligent, to pay for injuries that plaintiff may have prevented by using his seat belt.

Whatever the reasons or considerations for the *Truman* decision, it certainly will have an effect on most motorists in California and will present many new and complex problems in the litigation of automobile accidents.

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18 *Id.*

19 *See* Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Robinson v. Lewis, 457 P.2d 483 (Ore. 1969); Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (1969); Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969).

20 245 Cal. App. 2d 241, 53 Cal. Rptr. 851 (1966).

21 *Id.* at 244, 53 Cal. Rptr. at 853.

22 *Id.*

B. *Effects*

On its face, the first and paramount effect of *Truman* is that now occupants can be held negligent for failing to "buckle-up." In so holding, the court has set a new standard to which one must conform for his own safety. If plaintiff fails to meet the standard, in certain situations, he may be denied any recovery. In others, there may be a diminution of damages. A policy that allows a negligent defendant to abscond with impunity is certainly not new in our law but is one which contradicts current California policy for providing compensation to accident victims through an expansion of liability and a limitation of traditional defenses.[23]

Truman may also prove to be a deterrent to the expanded installation of seat belts. There is still a large number of car owners who do not have seat belts installed in their automobiles.[24] They may now feel that whatever value seat belts may have, it is outweighed by the risk of being denied recovery for their damages if seat belts were available, but not buckled, at the time of an accident. Why should a person accept the burden of being held to a higher standard of conduct by having seat belts installed in his automobile? On the one hand, plaintiffs run the risk of being denied full recovery by their mere failure to buckle their belt, while on the other hand, they would be permitted full recovery for damages if their vehicle were not equipped with seat belts.[25] Seat belts may prove to be more of a liability than an asset. Inasmuch as a large part of the motoring public frequently fails to use available seat belts,[26] seat belts may supply greater protection to the negligent driver than to the innocent victim.

PROBLEMS

A. *Determining Negligence*

Ordinary care is defined as the care a reasonably prudent person would exercise under the same or similar circumstances.[27] If

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23 *See* Hayton, *Present and Prospective Changes in California Automobile Negligence Law*, 2 CAL. WEST. L. REV. 201 (1969).

24 " 'Seat belts are now available to more than half of all passenger car occupants, but the belts are being used less than half the time, on the average. As a consequence, the net usage figure—the per cent of all exposure hours during which passenger car occupants are using belts—is estimated to be only 20 to 25 per cent.' National Safety Council, Accident Facts 53 (1967)." Miller v. Miller, 273 N.C. 288, —, 160 S.E.2d 65, 69 (1968).

25 "It would be a strange common law rule which would bar recovery to a guest riding in a post-October belt equipped vehicle, while, on the same state of facts, permitting recovery to a guest riding in a pre-November vehicle, i.e. one not equipped with seat belts." Robinson v. Bone, 285 F. Supp. 423, 424 (D. Ore. 1968).

26 See note 24 *supra*.

27 Rangel v. Badolayo, 133 Cal. App. 2d 254, 259, 284 P.2d 138, 142 (1955).

one's conduct falls below this standard, he is usually considered negligent or contributorily negligent.[28] The question is whether the wearing of an available seat belt is the standard of conduct to which an occupant of an automobile must conform. The standard of conduct may be established by a consideration of three sources: Legislative standards, judicial standards, and the reasonable man standard.[29]

Legislative standards can provide the first source from which a standard of conduct may be established. There are at least thirty-two states which presently require the installation of seat belts.[30] Federal legislation also requires seat belt installation.[31] It is significant to note that no state or federal statute requires the use of seat belts for ordinary vehicle travel. There are two states that have statutory requirements for the use of seat belts in certain vehicles.[32] On the other hand, five states provide either that evidence of failure to use a seat belt is inadmissible or that failure to use a seat belt is not to be considered contributory negligence, nor is such failure to be considered in mitigation of damages.[33]

California, in particular, has enacted extensive seat belt legislation.[34] The California Legislature amended previous code sections in 1967 to make it illegal for a dealer to sell or offer for sale any used passenger vehicle manufactured on or after January 1, 1962, unless it is equipped with at least two seat belts which are installed in the front seat of the vehicle.[35] A dealer is subject to further sanction if he sells or offers for sale any used passenger vehicle manufactured on or after January 1, 1968, unless it is equipped

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[28] RESTATEMENT (SECOND) OF TORTS § 463 (1965): "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about plaintiff's harm."

[29] *Id.* § 475.

[30] Walker & Beck, *Seat Belts and the Second Accident*, 34 INS. COUNSEL J. 349 (1967).

[31] 32 Fed. Reg. at 2415, Standard No. 208, § 3.1 (1967).

[32] CAL. VEH. CODE § 27304 (West Supp. 1970) (requires both drivers and passengers in driver-training vehicles to wear seat belts). R.I. GEN. LAWS ANN. § 31-23-40 (1969) (requires the drivers of buses and emergency vehicles to wear seat belts).

[33] IOWA CODE ANN. § 321.445 (1966); ME. REV. STATS. ANN. tit. 29, § 1368-A (Supp. 1970); MINN. STATS. ANN. § 169.685(4) (Supp. 1970); TENN. CODE ANN. tit. 59, § 930 (1968); CODE OF VA. tit. 46.1, § 309.1(b) (Supp. 1968).

[34] In California it became unlawful after January 1, 1962, to sell a new passenger vehicle which was not equipped with seat belt anchorage for two passengers in the front seat. Cal. Stats. 1961, ch. 1710, § 1 (repealed 1968). After January 1, 1964, no new passenger vehicle could be sold which was not equipped with at least two safety belts or safety harness combinations for at least two passengers in the front seat. Cal. Stats. 1963, ch. 997, § 1 (repealed 1968).

[35] CAL. VEH. CODE § 27314(a) (West Supp. 1970).

with seat belts for each seating position.[36] Along with this a comprehensive traffic safety program was established.[37]

Inasmuch as the question of automobile safety is comprehensively considered in California by statutory law, if the legislature had intended that the use of seat belts should be required, it would have so stated. The California Legislature, by requiring the use of seat belts in certain vehicles,[38] has shown that it is willing to act when the social utility of such a requirement is appropriate. As was stated in *Pacific Coast Joint Stock Land Bank v. Roberts*,[39] "[I]t is the function of the courts to construe and apply the law as it is enacted and not to add thereto or detract therefrom."[40] The creation of a seat belt defense would, in effect, amount to judicial legislation.

Judicial standards provide the second source from which a standard of conduct may be established. The courts that have considered the question have all held that this determination should be made by the legislature.[41] The court in *Robinson v. Lewis*,[42] stated that "[T]he task of investigating and testing the utility of safety devices and determining when their use should be made mandatory can best be performed by the legislature."[43] In light of this authority, the soundness of the *Truman* decision could be challenged.

The third source by which a standard of conduct may be established is through reference to the reasonably prudent man. The question is whether the reasonably prudent man, considering the probability of being involved in an automobile accident, would make use of an available seat belt for his own protection. According

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36 *Id.* § 27314(b).

37 CAL. VEH. CODE § 2900 (West Supp. 1970).

38 CAL. VEH. CODE § 27304 (West Supp. 1970) requires both drivers and passengers in driver-training vehicles to wear seat belts.

39 16 Cal. 2d 800, 108 P.2d 439 (1940).

40 *Id.* at 805, 108 P.2d at 442.

41 "[I]t is for the legislature, which in its wisdom has prescribed seat belts, to prescribe any required use thereof if it chooses." Romankewiz v. Black, 16 Mich. App. 119, —, 167 N.W.2d 606, 611 (1969); *accord*, Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (1968); Miller v. Miller, 273 N.C. 288, 160 S.E.2d 65 (1968); Robinson v. Lewis, 457 P.2d 483 (Ore. 1969). *See also* Lipscomb v. Diamiani, 226 A.2d 914, 916 (Del. Super. 1967), where the court stated that it had in the past acted when confronted with persistent failure of the legislative action, but such cases usually involved broad concepts of personal liberty and the Constitution.

42 457 P.2d 483 (Ore. 1969).

43 *Id.* at 485. The court further stated: "We prefer at this time to leave this problem to the legislature which can hold hearings, consider expert opinion, analyze empirical data and exercise an informed legislative judgment." *Id.*

to the *Truman* decision, this standard must be considered in the light of the circumstances in evidence.[44]

A major problem is presented for the trier of fact in determining what the reasonable man would do under the particular circumstances of each case. A jury would have to be careful, for in some accidents an after-the-fact appraisal could reveal that one's injuries might have been minimized had he been wearing a seat belt. But whether a motorist was negligent in failing to buckle his seat belt must be determined in view of his knowledge of conditions prior to the accident and not in the light of hindsight.[45] Since one will not have time to fasten his seat belt when the danger of an accident becomes apparent, the duty to "buckle-up," if any, must exist before a motorist begins his journey.[46] However, since conditions preceding any given trip will vary, so will conduct constituting due care.

There are no objective standards for a jury to use in determining that the use of seat belts is required for one trip and not for another.[47] It would be extremely difficult to analyze the variables presented in failing to use a seat belt before embarking on a normal everyday drive.[48] Such factors as the prevailing weather conditions, the time of day, the types of roads, the distance to be traveled, the size of the automobile, the person who is driving, the terrain, the traffic congestion, the frequency of collisions in a particular area, and the knowledge of any mechanical problems are some of the variables that would have to be considered in making a determination whether one was under a duty to wear a seat belt on a particular occasion.

In addition, the *Truman* decision would also require the jury to consider the effectiveness of seat belts in reducing injuries under these varying conditions.[49] It would seem a difficult task for a motorist to consider even a few of these factors before beginning his journey. It would probably be impossible for him to validly analyze even a small portion of these variables before venturing

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[44] 275 A.C.A. at 1111, 80 Cal. Rptr. at 377.

[45] Miller v. Miller, 273 N.C. 288, —, 160 S.E.2d 65, 70 (1968).

[46] *Id.*

[47] "Without a meaningful standard for judgment, the triers of fact cannot find the failure to fasten a seat belt to be negligence." Miller v. Miller, 273 N.C. 288, —, 160 S.E.2d 65, 71 (1968).

[48] "To ask the jury to do so is to invite verdicts on prejudice and sympathy contrary to the law. It is an open invitation to unnecessary conflicts in result and tends to degrade the law by reducing it to a game of chance." Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. Super. 1967).

[49] Truman v. Vargas, 275 A.C.A. 1105, 1111, 80 Cal. Rptr. 373, 377 (1969).

onto the highway or driving to the neighborhood store. For one thing, a motorist may not know what conditions he will encounter during his drive. The longer one's trip the more likely it is that a motorist will come upon a variety of driving conditions or that conditions will quickly change. An even greater problem is posed for the jury in determining what the reasonably prudent man would do under similar circumstances. The large number of variables plus the many unknown or changing conditions make such a determination speculative at best.[50]

Possibly the question of the use of seat belts is best resolved by a fixed standard. "An occupant of a car involved in normal everyday driving should either be required to wear a belt or he should not."[51] The *Truman* decision, nevertheless, leaves such a determination to the trier of fact. Therefore, consideration will be given to whether the reasonable man, considering the probability of being involved in an automobile accident, would normally make use of an available seat belt.

The utilization of seat belts and the general acceptance of their effectiveness are indications of what the reasonable man would do.[52] Since the majority of motorists fail to use available seat belts,[53] the argument can be made that such a failure is not a breach of the duty of ordinary care based upon conduct of the reasonably prudent man.[54] Although public apathy toward the use of seat belts is certainly not controlling,[55] the social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence.[56] "Otherwise the court would be imposing a standard of conduct rather than applying a standard accepted by society."[57]

Actually the probability of being involved in an automobile accident is relatively low. In spite of the well-known hazards of highway travel, most motorists arrive safely at their destination.[58]

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50 Miller v. Miller, 273 N.C. 288, —, 160 S.E.2d 65, 70 (1968).

51 Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. Super. 1967) (determination should be left to the legislature).

52 Kavanagh v. Butorac, 140 Ind. App. 139, —, 221 N.E.2d 824, 832 (1966).

53 See note 24 *supra*.

54 Annot., 15 A.L.R.3d 1428, 1430 (1967).

55 *See* W. PROSSER, LAW OF TORTS § 33, at 168 (3d ed. 1964).

56 "The issue of the social utility of the use of seat belts is definitely not clarified in the minds of the public and the courts. Doubts remain as to whether seat belts cause injury, and the real usefulness of the seat belt in preventing injuries has not become public knowledge." Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288, 296.

57 *Id.* at 297.

58 Cierpisz v. Singleton, 247 Md. 215, —, 230 A.2d 629, 635 (1967). In 1966 there were 4.6 deaths in Maryland caused by automobile accidents for every 100

It is questionable whether the probability of suffering injury from an automobile accident on any given trip is great enough to cause a reasonably prudent man to wear a seat belt.

Even though accidents do occur, a motorist, in the absence of conduct to put him on notice to the contrary, has a right to assume others using the highways will perform their duty under the law.[59] He has a right to act upon this assumption and it is not negligence to fail to anticipate injury or to take precautions to avoid injuries that can occur only from violation of the law or as a result of another's negligence.[60] This proposition is so basic that it has been adopted in California as a uniform jury instruction.[61]

Absent special circumstances known to a motorist, which create hazards over and above the ordinary risks incident to highway travel, there is no common law duty to anticipate an accident or to take precautions against such a possibility.[62] If there is no duty to anticipate such an accident, it would be difficult to hold that a plaintiff failed to use ordinary care in not wearing his seat belt.

The *Truman* decision would now require the triers of fact, in the light of the foregoing, to take into consideration the efficacy of seat belts, insofar as this was known or should have been known to the plaintiff.[63]

While the use of seat belts does provide a certain safety factor, there is some evidence that wearing a seat belt may cause more, rather than less, injuries in certain situations.[64] One obvious example is that a driver, who is secured to his seat, will more surely be

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million miles of highway travel. *Id.* "One would have to drive over 17,000,000 miles to be sure of dying in a traffic accident." Campbell, *Seat Belt "Defense" Sustained*, 4 TRIAL, Je-Jl, 1968, at 57.

[59] *See* Hooker v. Oclaray, 191 Cal. App. 2d 94, 98, 12 Cal. Rptr. 308, 310 (1961); Weeks v. Raper, 139 Cal. App. 2d 737, 294 P.2d 178 (1956); Chapman v. Mason, 83 Cal. App. 2d 685, 189 P.2d 510 (1948).

[60] *See* Bechtold v. Bishop & Co., 16 Cal. 2d 285, 105 P.2d 984 (1940); Kaver v. Holzmark, 185 Cal. App. 2d 138, 145, 8 Cal. Rptr. 145, 148 (1960); Atlas Assur. Co. v. California, 102 Cal. App. 2d 789, 229 P.2d 13 (1951).

[61] 1 CAL. JURY INSTRUCTIONS, Civil No. 138 (1956).

[62] *See* Remington v. Arndt, 28 Conn. Supp. 289, 259 A.2d 145 (1969).

[63] Truman v. Vargas, 275 A.C.A. 1105, 1111, 80 Cal. Rptr. 373, 377 (1969).

[64] "A multitude of injuries are caused by the lap belt. 1) The small bowels are injured by direct violence and/or entrapment with subsequent perforation; 2) Bursting injuries to the colon; 3) Injuries to the duodenum and pancreas; 4) Splenic injuries; 5) Rupture gavid uterus; 6) Bladder rupture; and 7) Herniation—various types, the most common of which is hiatus hernia.

"Even the shoulder belt can and does cause injuries to the hepatic veins, kidneys, renal artery, spleen and liver." Beloud, *The Changing Seat Belt Laws*, 4 TRIAL, Je-Jl, 1968, at 60. *See also* National Dairy Products Corp. v. Durham, 115 Ga. 420, 154 S.E.2d 752 (1967) (injury from seat belt caused death).

hit by a steering shaft in a severe collision.[65] Also, a person secured to his seat may be in a more dangerous situation if involved in a side collision.

Although some studies may indicate otherwise, there is a strong belief and fear that seat belts increase the hazard in many accidents.[66] Additionally, fear of entrapment is a strong trait in human character and is a leading cause for their nonacceptance.[67] With expert opinion divided and public acceptance still questionable, it would seem unwise to hold a person negligent or in breach of his duty to exercise due care for failing to wear his seat belt.[68]

B. *Causation*

Even if it were determined that plaintiff did not conform to the standards of a reasonably prudent man in failing to wear his seat belt, the element of causation must still be established. A difficult problem is encountered in proving a causal relationship between the failure to wear seat belts and the injuries sustained.

Not every negligent act of the plaintiff immunizes the defendant from liability. The doctrine of contributory negligence usually requires that the plaintiff's conduct contribute to his injuries as a proximate cause, as opposed to a remote cause or a mere condition.[69] The *Truman* decision made a distinction between the failure to use seat belts as a cause of the accident and as a cause of the injuries.[70] The court determined that the failure to wear seat belts could be the proximate cause of the injuries without being the proximate cause of the accident.[71]

The problem is proving the causal relation between plaintiff's conduct and the harm resulting to him. Many factors come into

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65 Campbell, *Seat Belt "Defense" Sustained*, 4 TRIAL, Je-Jl, 1968, at 57.

66 Robinson v. Lewis, 457 P.2d 483, 484 (Ore. 1969).

67 16 AM. JUR. PROOF OF FACTS, *Seat Belt Accidents* § 3 (1965).

68 "In the comprehensive study conducted by Motor Vehicle Research, Inc., hundreds of controlled crashes at various speeds with dummies simulating the human body placed in various positions with and without seat belts were observed by specially located cameras, and it was concluded that standard waist type belts can cause more, rather than less, injuries in many crash conditions. Therefore, whether or not the use of waist type seat belts is desirable remains at best speculative." Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613, 614 (1967). "It would be absurd to deem the ordinarily prudent man negligent for failing to exercise proper care for his own safety by not using the belt when experts, far more familiar with the problem than he, cannot agree as to the belt's worth." Note, 42 ST. JOHN'S L. REV. 371, 389 (1968).

69 *See* RESTATEMENT (SECOND) OF TORTS § 463 (1965).

70 275 A.C.A. at 1109, 80 Cal. Rptr. at 375.

71 *Id.* at 1109, 80 Cal. Rptr. at 376.

play when an attempt is made to determine what would have happened to the plaintiff if he had been wearing his seat belt. In any analysis, consideration must be given to at least the following factors: Speed of the vehicles on impact; size of the vehicles; collapsible characteristics of the vehicles; human body variations, including height, weight and age of the plaintiff; position of plaintiff in the vehicle, including any defensive movement taken before the collision; proximity of fixed objects within the vehicle; and type of accident or angle of impact.

The *Truman* court recognized the difficulty involved in an analysis of this type and held that expert testimony would be required unless such a determination was within the general knowledge of laymen.[72] In most situations, such a determination would be beyond the comprehension of the layman. This would mean, almost without exception, that in every accident case involving the issue of seat belt use, expert witnesses would have to be obtained.

As the *Truman* court pointed out, even expert opinion may not be in agreement.[73] When a jury is confronted with conflicting testimony, on issues beyond their general knowledge, there seems to be a critical area of speculation remaining. Even the expert qualifies his testimony on the basis that the seat belt was "properly adjusted."[74] It would be safe to say that there are many interpretations of what would be considered "properly adjusted." Is the plaintiff to be held negligent if he is wearing a seat belt at the time of the accident but it was not "properly adjusted"?

This problem is not completely unique. The trier of fact deals with similar issues when considering other proximate cause questions.[75] However, in such cases the judgment deals with what did in fact happen or what is reasonably likely to happen. Here a reasonable judgment as to what would have happened cannot be applied. There are so many variables involved that even expert opinion cannot determine, in a given situation, what would have happened. Even if we accept the proposition that seat belts generally do provide an added safety factor, this does not supply the trier of fact with a causal relationship upon which to base its judgment. The proof of causation cannot rest on guess or speculation.[76]

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[72] *Id.* at 1111, 80 Cal. Rptr. at 376.

[73] *Id.* at 1112, 80 Cal. Rptr. at 377.

[74] Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824, 833 (1966).

[75] Lipscomb v. Diamiani, 226 A.2d 914, 918 (Del. Super. 1967).

[76] *See* Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. 1967).

C. *Damages*

In California, where the doctrine of comparative negligence is not applied, contributory negligence is a bar to all recovery.[77] This is so even though the plaintiff's negligence contributed to only a small part of his injuries. Such a rule would deny recovery to the plaintiff whose mere failure to wear his seat belt in no way contributed to the accident.

However, the *Truman* court recognized the fact that plaintiff's failure to wear his seat belt had no effect on causing the accident.[78] Therefore, plaintiff would still have a cause of action against defendant but may be denied recovery for those injuries which could have been avoided had a seat belt been used.

Although the *Truman* court did not label the theory behind such a rule, it would seem to be applying the doctrine of avoidable consequences. However, an analysis of the avoidable consequence doctrine shows that such an application to the seat belt situation is not proper.

The doctrine of avoidable consequences is frequently expressed in terms of a duty, but it is more accurate to say that the wrongdoer is not required to compensate the injured party for damages which were avoidable by reasonable effort.[79] Such a doctrine is distinguished from contributory negligence in that the two occur at different times. Contributory negligence occurs either before or at the time of the wrongful act of the defendant.[80] On the other hand, the rule of avoidable consequences comes into play after the wrongful act of the defendant, but while some damage may still be averted, and bars recovery only for such damages.[81]

The seat belt defense does not fit this rule since plaintiff's failure to buckle his seat belt occurs before defendant's negligent act and before any injuries have occurred. Even if such a doctrine could be applied, it may also produce undesirable results. If it is found that the plaintiff's failure to use his seat belt did aggravate the injuries, but the injuries caused by the defendant and those caused by the plaintiff cannot be reasonably separated, the plaintiff's negligence will bar all recovery.[82] This overly harsh result occurs notwithstanding the fact that the defendant's negligence was the proximate cause of the accident.

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77 Summers v. Burdick, 191 Cal. App. 2d 464, 13 Cal. Rptr. 68 (1961).
78 275 A.C.A. at 1109, 80 Cal. Rptr. at 375.
79 Green v. Smith, 261 Cal. App. 2d 392, 67 Cal. Rptr. 796 (1968).
80 W. PROSSER, LAW OF TORTS § 64 at 433 (3d ed. 1964).
81 *Id.*
82 *Id.*

In other situations, plaintiff's negligence, although prior to that of defendant's, may be found to have caused only a separable part of the injury.[83] Under such a situation, damages may be apportioned if they are capable of logical division. However, cases will be infrequent in which the extent of aggravation can be determined with any reasonable degree of certainty, and the court may properly refuse to divide the damages upon the basis of mere speculation.[84] Therefore, when the issue as to causation is speculative, a court would be compelled to reject the doctrine of damage apportionment.

Also, such a doctrine would be in direct contradiction with the current public policy toward expansion of liability and limitation of defenses.[85] It would cause the injured plaintiff to bear the financial burden of the injuries caused by defendant's negligence. California's public policy has been toward an increased concern for providing compensation to the plaintiff who is injured in an automobile accident.[86]

If the seat belt defense is to be accepted, conceivably issues under the doctrine of last clear chance may also be involved.[87] For example, in the typical guest-driver case the *Truman* rationale would allow the defendant driver to raise contributory negligence as a defense. However, if the driver were aware of the plaintiff's failure to buckle up, he might have averted plaintiff's injuries. Under these circumstances the guest could apply the doctrine of last clear chance.

CONCLUSION

Seat belts are just the beginning. New and more effective safety devices are now available and will soon become standard equipment in all new vehicles. Shoulder harness installation is already required by federal statute.[88] However, medical opinion as to the efficacy of shoulder harnesses is even more divided than with seat belts.[89] If the logic of the *Truman* decision is accepted, there will probably be an effort made to establish a shoulder harness defense. Does the decision of the *Truman* court mean that with every new safety device that is offered, a motorist may be held contributorily negligent for failure to make use of such equipment? Possibly the *Truman* decision would apply only when installation is required by

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[83] *Id.*

[84] *Id.*

[85] *See* Hayton, *Present and Prospective Changes in California Automobile Negligence Law*, 2 CAL. WEST. L. REV. 201 (1969).

[86] *Id.*

[87] Annot., 15 A.L.R.3d 1428, 1431 (1967).

[88] 32 Fed. Reg. 2415, Standard No. 208, § 3.1.1 (1967).

[89] *See* Beloud, *The Changing Seat Belt Laws*, 4 TRIAL, Je-Jl, 1968, at 56.

statute. Consideration, however, should be given to whether or not a negligent defendant was intended to be protected by statutes requiring the use of seat belts or other safety devices.

A further result of the *Truman* decision could be an expanded and more costly trial. A very real problem would be presented in cases where only small claims are involved. The cost of obtaining expert witnesses may prove to be prohibitive. A policy that places such a financial burden on the parties would seem to produce an undesirable result.

The end result of the *Truman* decision is the establishment of an inequitable standard of conduct—one that would subject motorists with seat belts installed to a higher standard of care than motorists not possessing seat belts.

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