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## Torts – Seat Belts and Contributory Negligence

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TORTS—SEAT BELTS AND CONTRIBUTORY NEGLIGENCE.—Four Canadian trial judges have now been called upon to grapple with the problem of seat belts and contributory negligence. One chose to apply the seat belt defence,<sup>1</sup> whereas three refused to do so.<sup>2</sup> Because this defence can affect thousands of motor vehicle collision cases, the conflict must be resolved. The aim of this comment is to cast some light on the problems posed by the seat belt defence and to offer some suggestions toward their rational resolution.<sup>3</sup>

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<sup>22</sup> *Supra*, footnote 15.

<sup>23</sup> *Supra*, footnote 16.

<sup>24</sup> *Supra*, footnote 14, at p. 730.

<sup>25</sup> *Ibid.*, aff'd [1971] 3 W.W.R. 359 (C.A.).

<sup>1</sup> *Yuan et al. v. Farstad et al.* (1967), 66 D.L.R. (2d) 295. (B.C.), noted (1968), 14 McGill L.J. 332.

<sup>2</sup> *McDonnell v. Kaiser* (1968), 68 D.L.R. (2d) 104 (N.S.); *Dame Lynch v. Grant*, [1966] Qué. C.S. 479; *Anders et al. v. Sim* (1970), 11 D.L.R. (3d) 366 (Alta).

<sup>3</sup> The American case law is also divided. Much of the difficulty stems from the fact that in most states contributory negligence is still a complete bar to recovery. The reluctance to invoke the seat belt defence is less marked in comparative negligence states. A complete list of the three dozen cases appears at (1970), 53 Marquette L. Rev. 226. See especially *Bentzler v. Braun* (1967), 149 N.W. 2d 626, 34 Wis. 2d 362 where a dictum indicates a willingness to invoke the defence in a comparative negligence state. Compare with *Miller v. Miller* (1968), 160 S.E. 2d 65 (N.C.) refusing to invoke it. Five state legislatures have forbidden their courts to rely on the seat belt defence. See Kircher, *The Seat Belt Defense—State of the Law* (1970), 53 Marquette L. Rev. 172, at p. 176. The periodical literature in the United States has mushroomed. See especially Roethe, *Seat*

A seat belt is a restraint mechanism which limits passenger movement after a crash.<sup>4</sup> Its purpose is to minimize the effect of the "second collision", which occurs when the car stops on impact and the occupant hurtles forward either to be ejected from the vehicle or to collide with part of the interior. The most common type of seat belt is the lap belt, which consists of a simple strap that extends from mounts on the frame of the automobile across the hips of the occupant and is secured by a metal clasp. Another kind of belt is the diagonal belt, which stretches from one hip across the body to the opposite shoulder, restraining the upper torso. A third variety, the three-point belt, combines these two systems. It is made up of a lap belt and a diagonal belt joined with a common buckle. The fourth type of belt consists of a lap belt and two diagonal belts extending over both shoulders.

Most auto crash injuries result from passenger impact with the steering column, doors, windshield, instrument panel or from ejection.<sup>5</sup> Seat belts, if worn properly, have been proven effective in minimizing these tragic occurrences. Hodson-Walker, in a recent study published in the *Canadian Medical Association Journal*<sup>6</sup> concluded that "lap seat belts reduce the risk of major or fatal injury by 60%". The author explains that belts may cause some abdominal injuries, but they "have never been shown to worsen injury, and while themselves producing injuries, they have prevented more serious ones"<sup>7</sup>. The following table depicts the findings of eight major studies on the reduction of fatal injuries:

*Reduction in Major and Fatal  
Injuries by the Use of Seat Belts*

<u>Authors</u>	<u>No. of Injuries Studied</u>	<u>Percentage Reduction</u>
Tourin and Garrett	9717	35
Backstrom	712	50
Moreland	121	55
Lister and Milson	893	67
Lindgren and Warg	382	69
Herbert	not stated	80
Gikas and Huelke	79	45
Kihlberg and Robinson	1302	59

Belt Negligence in Automobile Accidents, [1967] Wis. L. Rev. 288; Levy, The Seat Belt Defense—The Sophist's Escape (1967), 41 Temple L.Q. 126; West, Should Failure to Wear Seat Belts Constitute a Defense (1968), 10 Ariz. L. Rev. 523; The Seat Belt Defense: A New Approach (1969-70), 38 Fordham L. Rev. 94. See also fine bibliography in (1970), 53 Marquette L. Rev. 227.

<sup>4</sup>See Arthur D. Little Inc., The State of the Art of Traffic Safety (1966), p. 211.

<sup>5</sup>Schwimmer & Wolf, Leading Causes of Injury in Automobile Accidents (1962), p. 5 (A.C.I.R. Cornell U.); Gikas & Huelke, Causes of Deaths in Automobile Accidents—Can Seat Belts Really Save Lives? (1964), 63 J. of Mich. State Med. Soc. 351.

<sup>6</sup>The Value of Safety Belts: A Review (1970), 102 Can. Med. Assoc. J. 391 citing the major medical studies in the field. <sup>7</sup>*Ibid.*, at p. 393.

Paradoxically, despite this overwhelming statistical support for the efficacy of seat belts, Canadian courts are still undecided about an appropriate response to the seat belt defence. And, what is worse, Canadian legislatures have ignored the problem completely.

The leading Canadian decision on the seat belt defence is *Yuan et al. v. Farstad et al.*<sup>8</sup> Mr. Justice Munroe of the British Columbia Supreme Court found that the defendant motorist was entirely to blame for causing the auto accident, which injured the plaintiff, Mrs. Yuan, and killed her husband, Dr. Yuan. Because Dr. Yuan, the driver of the blameless automobile, was not wearing an available seat belt at the time of the collision, he was ejected and fatally injured. Mrs. Yuan, who was a passenger in her husband's car, was also unbuckled, because there was no seat belt available to her. She was seated between her husband, the driver, and another passenger at the time and the vehicle was fitted with only two belts, one on each side of the front seat. Mrs. Yuan was allowed 100 per cent of her damages for her personal injuries, but the award for the loss of her husband was reduced twenty-five per cent, because of his contributory negligence in failing to buckle up.

The defendant introduced expert evidence<sup>9</sup> through a retired police force captain and a doctor to prove that Mr. Yuan's failure to wear the seat belt permitted him to be ejected, which caused his death. The police captain testified that seat belts "lessen the severity of the injuries in most automobile accidents". The doctor stated that seat belts "prevent ejection from a vehicle and lessen the severity of any steering wheel injury because it prevents body displacement". He admitted that belts cause abdominal injuries on occasion, but this was "so rare as to be improbable and, in any case, is correctible by surgery". The doctor concluded that the "fatal injuries would not have happened if the deceased had been wearing a seat belt at the time of the collision". This expert evidence was uncontroverted. Mr. Justice Munroe, basing his decision on this evidence and "upon the general knowledge of mankind", found that "lap seat belts are effective in reducing fatalities and minimizing injuries . . .". He adopted the view of Mr. Justice Frankfurter who once said "there comes a point where this court should not be ignorant as judges of what we know as men".<sup>10</sup> If the deceased had been wearing a seat belt, according to the judge, he would have suffered injury to his chest, but he would not have been ejected nor killed.

Mr. Justice Munroe<sup>11</sup> asserted that an automobile collision is reasonably foreseeable to one driving a car in the city and, there-

<sup>8</sup> *Supra*, footnote 1.

<sup>9</sup> *Ibid.*, at p. 301.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at p. 302.

fore, "a person must use reasonable care and take proper precautions for his own safety, and such precautions include the use of an available seat belt". He admitted that he was proceeding in this way, "despite the apparent absence of any Canadian precedents upon the matter". Acknowledging that the deceased "was committing neither a crime nor a breach of a statute" in driving without his seat belt done up, His Lordship stated that this was not determinative of the issue. The defendants, he contended, were entitled to be relieved of some degree of responsibility for the resulting injuries. His Lordship concluded by stating that "where a motorist fails to use an available seat belt and where it is shown that the injuries sustained by him would probably have been avoided or of less severity had he been wearing a seat belt, then the provisions of s. 2 of the Contributory Negligence Act are applicable". Section 2 reads in part:<sup>12</sup> "Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault. . . ."

Mr. Justice Munroe was somewhat influenced by the existence of legislation in British Columbia<sup>13</sup> that required the installation of two seat belts in the front seat of each vehicle. Although such an enactment, he stated, did not make the use of belts mandatory, it does "give some legislative sanction to the wearing of same". His Lordship also relied upon two American decisions,<sup>14</sup> that reached the same conclusion, the latter one in the total absence of any seat belt legislation.

The court apportioned twenty-five per cent of the blame to Dr. Yuan and seventy-five per cent to the defendant driver, because the deceased would be "uninjured and alive were it not for the negligence of the defendant driver in causing the collision".<sup>15</sup> No contributory negligence was found against Mrs. Yuan for two reasons. First, there was no evidence of causal relation between her injury and her failure to wear seat belts. Second, no belt was available to Mrs. Yuan where she was seated in the front seat, making it "impractical if not impossible" for her to use a seat belt.

There are three reported Canadian decisions that have refused to invoke the seat belt defence in mitigation of damages. In *McDonnell v. Kaiser*,<sup>16</sup> Mr. Justice Dubinsky of the Nova Scotia Supreme Court quoted at length both from *Yuan v. Farstad* and from an unreported case which refused to follow *Yuan*. His Lordship concluded that he would not adopt the seat belt defence

<sup>12</sup> R.S.B.C., 1960, c. 74.

<sup>13</sup> Motor-vehicle Act, R.S.B.C., 1960, c. 253, s. 206, as am. by S.B.C., 1966, c. 30, s. 34.

<sup>14</sup> *Bentzler v. Braun*, *supra*, footnote 3; *Mortenson v. Southern Pacific Co.* (1966), 53 Cal. Repr. 851.

<sup>15</sup> *Supra*, footnote 1, at p. 303.

<sup>16</sup> *Supra*, footnote 2.

(1) because it was not pleaded and (2) because he had doubts about the evidence concerning the effectiveness of seat belts. Although Mr. Justice Dubinsky's comments on the latter point are purely *obiter*, His Lordship referred to a rather undistinguished and incomplete article<sup>17</sup> by a plaintiff's negligence lawyer and concluded that "the effectiveness of seat belts is still in the realm of speculation and controversy". He did not foreclose "revised thinking" in the light of future expert testimony, but for the time being "there is too much indecision about the matter even among experts". Mr. Justice Dubinsky<sup>18</sup> rightly rejected the argument that the failure to wear a seat belt constitutes negligence *per se*. This could not be the case without the violation of a statute requiring seat belt use. His Lordship refused to hold that "a motorist who drives carefully and lawfully should be stamped with the mark of carelessness, that he has not discharged his duty as a reasonable man, simply because he has not fastened to his person a seat belt. Most people know the true reasons for the slaughter on the highways",<sup>19</sup> Mr. Justice Dubinsky seemed to be concerned that a logical extension of the seat belt defence would lead to motorists being made to wear shoulder harness, crash helmets and, perhaps, drive armoured cars. The court concluded by expressing its concern about judicial creativity in areas where the legislatures have not spoken.

A second case involving the seat belt defence was the Quebec decision of *Dame Lynch v. Grant*.<sup>20</sup> Mr. Justice Challies was able to dispose of the matter on the ground of absence of causation; in other words, there was no evidence to indicate that the plaintiff's injuries would have been any less serious had she been wearing seat belts at the time of the accident. Mr. Justice Challies declared<sup>21</sup> that "il n'y a aucune preuve, par expertise ou autrement, que les dommages subis par la demanderesse auraient été moindres si elle avait porté une ceinture de sécurité lors de l'accident".

The third decision rejecting the seat belt defence is *Anders et al. v. Sim*.<sup>22</sup> Mr. Justice Riley, of the Alberta Supreme Court, concluded that the "failure to wear a seat belt does not *per se* constitute contributory negligence".<sup>23</sup> His Lordship disagreed with *Yuan* and quoted at length from *McDonnell et al. v. Kaiser* with approval. His comment about the quality of the evidence offered by the defence, however, probably offers a more solid basis for refusing to apply the seat belt defence: "[The evidence of the wit-

<sup>17</sup> Kleist, *Seat Belt Defense—An Exercise in Sophistry* (1967), 18 *Hastings L.J.* 613.

<sup>18</sup> *Supra*, footnote 2, at p. 107.

<sup>19</sup> *Ibid.*, at p. 108.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, at p. 480.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, at p. 368.

ness] produced as an expert (if he be one), is so inaccurate and so incomplete and really so unreliable that I find that the defendant was wholly and solely to blame for the accident in question." Thus, considerable confusion reigns in Canada, much of which is completely unnecessary.

There are administrative roadblocks in the way of the seat belt defence. One is the problem of proof. To exploit this defence successfully, the defendant must first satisfy the court that, if the plaintiff had been buckled up, he would have suffered either no injury or a less severe one. This is a formidable and an expensive task, that can be accomplished only with convincing expert testimony.<sup>24</sup> The court must be satisfied that seat belts are generally effective, something some courts are not yet willing to accept. In addition to this, the court must be convinced that a seat belt would have helped *this* plaintiff in *this particular accident*. If it is satisfied on these two points, the court must then try to determine what injury would have been suffered if the belt had been worn and place a monetary value upon it. Lastly, the injury in fact suffered must be evaluated. Many a brave defendant has faltered over this proof barrier, but it can be overcome with effective preparation.

A second administrative hurdle is the complexity of the apportionment. The language of our legislation<sup>25</sup> permits apportionment where contributory negligence causes or contributes to *loss* or *damage*. Failure to buckle up, therefore, may be treated as an instance of contributory negligence, whereas it may not be in those jurisdictions that require a plaintiff's negligence to contribute to the *accident*.<sup>26</sup> The omission to strap in does not cause accidents, but it may contribute to some loss or damage.

Certain losses, however, are not affected in the least by belts. For example, the portion of the loss consisting of damage to the vehicle must be borne completely by a negligent defendant and not at all by an unbuckled plaintiff.<sup>27</sup> Further, let us suppose that a vehicle passenger suffers a broken leg with damages evaluated at \$3,000.00. Evidence is introduced that, if he had been strapped in, he would have suffered only some serious bruising, that would by itself lead to a damage assessment of \$1,000.00. The failure to wear the belt should not reduce the recovery for the first \$1,000.00 loss, which would have occurred in any event.

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<sup>24</sup> For some helpful ideas, see Bowman, Practical Defense Problems—The Trial Lawyer's View (1970), 53 Marquette L. Rev. 191; Huelke, Practical Defense Problems—The Expert's View (1970), 53 Marquette L. Rev. 203.

<sup>25</sup> Most of the provinces use the language "loss or damage", see for example, Contributory Negligence Act, *supra*, footnote 12, s. 2; The Negligence Act, R.S.O., 1960, c. 261, s. 4, employs the word "damages".

<sup>26</sup> See discussion in Levy, *op. cit.*, footnote 3, at p. 131. See also (1968), 10 Ariz. L. Rev. 523, at p. 527.

<sup>27</sup> See (1968), 10 Ariz. L. Rev. 523, at p. 528.

It can also be argued that the defendant was not the "cause" of the additional \$2,000.00 loss, that the conduct of the plaintiff in failing to use the belt was *the sole cause* of this loss, and, therefore, the defendant should pay only \$1,000.00. It is sometimes said that these are "avoidable consequences" or that the plaintiff "failed to mitigate damages".<sup>28</sup> This approach has been advocated in the United States as a preferable compromise alternative to contributory negligence, which in most states robs the plaintiff of all recovery, and the total rejection of the seat belt defence which does nothing to encourage their use. Canadians need not fall into this trap. The first \$1,000.00 should be borne totally by the negligent defendant. The \$2,000.00 additional loss should be apportioned "in proportion to the degree of negligence found against the [parties]". This is no easy task. It becomes more difficult if the plaintiff is partially to blame for the accident itself. For example, let us say that the plaintiff was fifty per cent at fault for the accident, and twenty-five per cent to blame for the additional injury. He will, therefore, collect one-half of \$1,000.00 = \$500.00 plus one-half of three-quarter of \$2,000.00 = \$750.00, that is a total of \$1,250.00. These problems seem to have escaped Mr. Justice Munroe completely in *Yuan*, who merely divided the *total* damages seventy-five—twenty-five, without deducting anything for the loss that would have occurred had the deceased worn the belt. Although complicated, these problems are not completely insurmountable. One possible device to minimize the complexity is a statutory presumption to the effect that the failure to buckle up is the cause of twenty-five per cent of the *total* damages whatever they are. If a defendant believes that he can prove a larger contribution by the plaintiff's omission, he should be free to attempt to do so. Similarly, if a plaintiff thinks that his being unstrapped contributed in no way to his loss, he too should be entitled to introduce evidence to this effect. This would recognize the value of seat belts and encourage their use, without increasing the cost of litigation unduly. Even without such a presumption the problem, though awkward, is manageable.

The heart of the matter is the determination of the standard of care to be expected of a motorist in connection with his own safety. In general, tort law demands that everyone—both plaintiffs and defendants—live up to the standard of the reasonable man, not the perfect man. In order to decide whether a reasonable man wears a seat belt in 1971, the court or the jury must balance the danger created by his conduct and the cost of avoiding it.<sup>29</sup> If the risk created is an "unreasonable" one in the circumstances, liability

<sup>28</sup> Prosser, *Handbook of The Law of Torts* (3d ed., 1964), p. 433. See Levy, *op. cit.*, footnote 3, at p. 99. See also Harvey, comment (1970), 48 *Can. Bar Rev.* 733.

<sup>29</sup> Prosser, *op. cit.*, p. 148.

will be imposed. It is a rather vague standard, but custom and legislative standards may offer some succour to the beleaguered tribunal. In assessing the risk side of the equation both the chance of an accident occurring and the potential severity of the injury must be examined. The wearing of seat belts does not affect the frequency of collisions, but the empirical evidence clearly establishes that the severity of the injuries suffered will be greatly minimized.<sup>30</sup> The arguments against buckling up are weak. Some express the fear that the belted passengers will be trapped in a burning, submerged or overturned car, but such accidents are exceedingly rare.<sup>31</sup> If they do occur a belted occupant may well be better off because the belt may keep him conscious and thus facilitate his escape. Others worry about the injuries caused by the belts.<sup>32</sup> However, pregnant women and their unborn babies are better off, not worse, if they wear belts in a collision. Where injury does occur, it is usually less severe than the one that would have occurred without the belt. Moreover, some of these injuries occur because of the improper use of the belt. In any event, most of these injuries are correctible. It is sometimes said that seat belts are inconvenient, uncomfortable, and they crease clothing. This is doubtful, but even if it were so, this is a small price to pay for the enormous benefits to be gained by seat belt use.

The financial cost and trouble of installing belts might well have inhibited a judicial finding of contributory negligence years ago, but there is no reason for this to-day. When legislation in the United States mandated seat belts in all new vehicles,<sup>33</sup> every new American car sold in Canada was also fitted with belts. An investigation done in the United States<sup>34</sup> in 1967 indicated that sixty-five per cent of the vehicles studied contained seat belts at that time. Canada was lagging behind, according to a 1969 study<sup>35</sup> that showed fifty per cent of the vehicles involved in accidents in Toronto were equipped with belts. As new vehicles replace the old, this figure steadily improves.

Installation of seat belts is vital, but unless they are buckled

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<sup>30</sup> See Hodson-Walker, *op. cit.*, footnote 6.

<sup>31</sup> See Roethe, *op. cit.*, footnote 3, at p. 292. Fire occurs in two-tenths of one per cent of injury producing accidents, and submersion in three-tenths of one per cent. Rollover occurred in twenty per cent of injury producing accidents in 1961, but it is less frequent today, see Snyder, *The Seat Belt as a Cause of Injury* (1970), 53 *Marquette L. Rev.* 211, at p. 223.

<sup>32</sup> See Snyder, *op. cit.*, *ibid.*, for a survey of the extensive literature on this topic.

<sup>33</sup> The U.S. Motor Vehicle Safety Standards became effective on Jan. 1st, 1968, see (1967), 32 *Fed. Reg.* 2408. The government of Canada has finally acted. See *Motor Vehicles Safety Regulations*. S.O.R. 170-487, pursuant to the Motor Vehicle Safety Act, S.C., 1969-70, c. 30.

<sup>34</sup> Auto Industries Highway Safety Committee, *National Survey of Seat Belt Installation and Use* (1967).

<sup>35</sup> Metro. Toronto Police Department, *Traffic Accident Statistical Report* (1969).

they are worthless. Too few motorists wear them consistently. One American study<sup>36</sup> in 1967 indicated that on local trips only thirty-eight per cent of the motorists surveyed used their belts always, another thirty-nine per cent used them sometimes and twenty-three per cent said they never used them. On long trips, the figures jumped to fifty-five per cent, twenty-eight per cent and seventeen per cent. The Metropolitan Toronto Police *Report*<sup>37</sup> that the employment of seat belts in actual accidents investigated by them in 1969 was only six point one per cent, a much lower figure. Volvo company research into seat belt use in their own automobiles indicated that twenty-five per cent of the drivers and thirty per cent of the passengers involved in accidents wore seat belts at the time.<sup>38</sup> Seat belts, therefore, are not yet being universally or even normally worn. If there were such a custom, the courts could easily adopt it as the appropriate standard of care and force it upon deviating motorists. Without proof of a general practice, they are more reluctant to do so, although they may.<sup>39</sup>

The Australian State of Victoria has become the first to order all its motor vehicle passengers to wear seat belts.<sup>40</sup> California has mandated them only in driver training vehicles<sup>41</sup> and Rhode Island requires their use in public service vehicles,<sup>42</sup> but most jurisdictions have merely attempted to make the belts available and to encourage their use. In Canada no jurisdiction has had the courage to penalize the failure to strap in. Some American states post signs along their highways that ask: "Are Your Seat Belts Fastened?", or that urge passengers to "Buckle Your Seat Belt". The Province of Ontario has held a conference on seat belts, has prepared educational material and has urged voluntary groups to run seminars encouraging their use. It does not seem to have had any major impact. Advertisements sponsored by governments and safety organizations occasionally appear on television and billboards aimed at the unbuckled passenger. Some insurance companies exhort their insureds to use their belts and at least one provides a financial incentive to those who do. This is not sufficient. We need federal legislation that provides for the mandatory use of belts by

<sup>36</sup> *Op. cit.*, footnote 34.

<sup>37</sup> *Op. cit.*, footnote 35.

<sup>38</sup> Volvo Press Release, Oct. 13th, 1967.

<sup>39</sup> See generally Linden, Custom in Negligence Law (1968), 11 Can. Bar J. 151; Morris, Custom and Negligence (1942), 42 Col. L. Rev. 1147.

<sup>40</sup> Victoria Motor Car Act, 1958, No. 6325, reprinted to No. 7777 as amended by the Motor Car (Safety) Act, 1970, No. 8074, s. 31 B. (1) "A person shall not be seated in a motor car, that is in motion, in a seat for which a safety belt is provided unless he is wearing the safety belt and it is properly adjusted and securely fastened. Penalty \$20."

<sup>41</sup> Cal. Vehicle Code, § 27304 (Supp. 1970).

<sup>42</sup> R.I. General Laws Am., § 31-33-41 (1968). In 1966 the City of Brooklyn, Ohio enacted an ordinance requiring all persons riding in motor vehicles operated in the city to use available seat belts. See (1969), 10 For the Defence 27.

all vehicle occupants, which should be launched by a massive education campaign. With such leadership we might achieve almost universal seat belt use in Canada, and save many lives thereby.

In the meantime, (as well as afterwards) tort law can help to achieve this goal. One approach would be to let each case go to the jury to decide whether *in the circumstances of this case* the neglect to wear a seat belt amounted to contributory negligence. Thus, if there were heavy traffic, an icy road, a poorly maintained vehicle, or an impaired driver, the jury might find the defendant partially at fault for not buckling up. On the other hand it might refuse to do so, if there was no traffic, if the highway was in good condition, if the vehicle was new, or if the driver was sober. This would be less than satisfactory because of the confusion it would create. Drivers would be tempted to delude themselves into thinking that the conditions are safe and belts are unnecessary, very much like drinking drivers tend to think that *they* are all right. But, even such a measure would be better than ignoring the defence altogether. At least non-wearers of belts would know that they *might* be held contributorily negligent.

Alternatively, tort law might choose to treat the failure to wear seat belts as negligence *per se* or *prima facie* negligence. This would provide a more uniform standard, but it would be difficult for courts to fashion such a rule without the aid of legislation mandating seat belt use. Some support might be garnered from legislation requiring seat belt installation, on the ground that such a statute evinces a legislative policy in favour of seat belt use, as well as that of making belts *available* for those who wish to use them.<sup>43</sup> Although some contend that tort law has no business establishing new standards of care without legislative initiative, this has always been the case. For example, tort law insisted on reasonable speed on the highway long before statutory speed limits were set.<sup>44</sup> Under the umbrella of the reasonable man test, tort law has fostered safety by taxi companies,<sup>45</sup> public transit systems<sup>46</sup> and even the medical profession.<sup>47</sup> The courts have also held as contributory negligence the failure to utilize safety devices such as a safety rope<sup>48</sup> and safety goggles.<sup>49</sup> There is one English case, *Hilder v. Associated Portland Cement Mfrs., Ltd.*,<sup>50</sup> where Mr. Justice

<sup>43</sup> As suggested in *Yuan et al. v. Farstad et al.*, *supra*, footnote 1, as will now be the case, see footnote 33, *supra*.

<sup>44</sup> See Linden, *Speeding as Negligence* (1967), 10 Can. Bar J. 94.

<sup>45</sup> *Wares Taxi v. Gilihan*, [1949] S.C.R. 637.

<sup>46</sup> *Harris v. T.T.C.*, [1967] S.C.R. 460.

<sup>47</sup> *Chasney v. Anderson*, [1950] 4 D.L.R. 223 (S.C.C.).

<sup>48</sup> *Carter v. Christ* (1933), 148 So. 714 (La.).

<sup>49</sup> *Nashville C. & St. L. Ry. v. Coleman* (1924), 151 Tenn. 443, 269 S.W. 919. In Wisconsin under the workmen's compensation legislation workers who fail to use safety devices have their awards cut by fifteen per cent, see Roethe, *op. cit.*, footnote 3, at p. 297.

<sup>50</sup> [1961] 3 All E.R. 701.

Ashworth of the Queen's Bench Division refused to hold that a motorcyclist's failure to wear a crash helmet constituted contributory negligence. His Lordship chose to follow an unreported decision to this effect. At the time of the accident, however, there was no suggestion in the Highway Code that helmets be used, although it had been amended to this effect at the time of the trial. Nor was there any legislation in England mandating the use of helmets, as in some Canadian provinces,<sup>51</sup> a fact that should make a considerable difference in the treatment of this evidence. His Lordship also stated that he was not satisfied that the wearing of a helmet would have prevented the death, so that proof of causation, a vital link, was absent.

Tort law should do what it can to encourage the use of seat belts. It has at its command the machinery for this purpose. If it were held that the failure to wear belts amounted to contributory negligence, it might help to educate the public to their undoubted effectiveness. Although the deterrent role of tort law has diminished in importance since the rise of liability insurance, the threat of a finding of contributory negligence may still have some force. The unbuckled plaintiff cannot merely shrug his shoulders and say his insurance company will pay for his negligence; it is money out of his own pocket if he neglects to strap himself in. Moreover, by adopting the seat belt defence, our courts may act as a catalyst to our sluggish legislatures. By moving into this field, perhaps tort law can stimulate more comprehensive legislative treatment, something that would be preferable to the piece-meal approach of the common law.

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<sup>51</sup> Highway Traffic Act, R.S.O., 1960, c. 172, s. 51a, as am. by S.O. 1968, c. 50, s. 12.

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