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COMMENTS

THE SEAT BELT DEFENSE IN TEXAS

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I. INTRODUCTION

There were over six million traffic accidents in the United States during 2002.[1] These accidents resulted in close to three million injuries and fatalities,[2] a number which could have been reduced substantially if passen-

1. National Highway Traffic Safety Administration (NHTSA), *at* http://www.nrd.nhtsa.dot.gov/2002annual_assessment/long_term_trends.htm (last visited Feb. 24, 2004) (on file with the *St. Mary's Law Journal*).
2. *Id.*

gers had simply worn their seat belts.[3] Despite these sobering statistics, seat belt usage has actually risen since 1994, steadily increasing to seventy-five percent in 2002, with an increase of two percent in the last year alone.[4] It has become standard procedure for Americans riding in motor vehicles to "buckle up."

Notwithstanding the steady increase in seat belt usage, many American jurisdictions still refuse to allow evidence of seat belt use or nonuse to be considered in civil suits.[5] Typically, evidence of nonuse would be intro-

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3. *See* National Highway Traffic Safety Administration (NHTSA), *Seat Belt Use by Drivers, Passengers Reaches 75 Percent, NHTSA Reports* (Sept. 9, 2002) (estimating that a relatively small increase in seat belt usage, such as two percent, could reduce the number of annual fatalities by five hundred), *at* http://www.nhtsa.dot.gov/nhtsa/announce/press/pressdisplay.cfm?year=2002&filename=pr58-02.html (on file with the *St. Mary's Law Journal*). Five hundred less fatalities per year may not seem substantial, but that number appears more significant after considering that there were 42,815 fatalities resulting from automobile accidents in 2002. National Highway Traffic Safety Administration (NHTSA), *Long Term Trends and Comparison of 2002 Data to 2001 Data*, *at* http://www-nrd.nhtsa.dot.gov/2002annual_assessment/long_term_trends.htm (last visited Feb. 24, 2004) (on file with the *St. Mary's Law Journal*).

4. *See* National Highway Traffic Safety Administration (NHTSA), *Seat Belt Use by Drivers, Passengers Reaches 75 Percent, NHTSA Reports* (Sept. 9, 2002) (reporting that these percentages are nationwide estimates), *at* http://www.nhtsa.dot.gov/nhtsa/announce/press/pressdisplay.cfm?year=2002&filename=pr58-02.html (on file with the *St. Mary's Law Journal*).

5. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 416 & n.121 (2002). There are many states that have not allowed, either through statute, judicial decision, or both, seat belt evidence to be admitted. *See generally* ALA. CODE § 32-5B-7 (2000) (stating that "[f]ailure to wear a safety belt in violation of [the mandatory seat belt usage statute] shall not be considered evidence of contributory negligence and shall not limit the liability of an insurer"); CONN. GEN. STAT. ANN. § 14-100a(c)(3) (West Supp. 2003) (providing that "[f]ailure to wear a seat safety belt shall not be considered as contributory negligence nor shall such failure be admissible evidence in any civil action"); DEL. CODE ANN. tit. 21, § 4802(i) (1996) (establishing that "[f]ailure to wear an occupant protection system shall not be considered as evidence of either comparative or contributory negligence in any civil suit . . . nor shall failure to wear an occupant protection system be admissible as evidence in the trial of any civil action"); D.C. CODE ANN. § 50-1807 (2001) (stating that "[n]either a violation of [the mandatory seat belt usage law] nor compliance with its terms shall constitute evidence of negligence, evidence of contributory negligence, or a basis for a civil action for damages"); GA. CODE ANN. § 40-8-76.1(d) (2001) (providing that "[t]he failure of an occupant of a motor vehicle to wear a seat safety belt . . . shall not be considered evidence of negligence or causation, shall not otherwise be considered . . . on any question of liability of any person . . . and shall not be evidence used to diminish any recovery for damages"); 625 ILL. COMP. STAT. ANN. 5/12-603.1(c) (West 2002) (stating that "[f]ailure to wear a seat safety belt . . . shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle"); KAN. STAT. ANN. § 8-2504(c) (2002) (stressing that "[e]vidence of failure of any person to use a safety belt shall not be admissible in any action for the

purpose of determining any aspect of comparative negligence or mitigation of damages"); LA. REV. STAT. ANN. § 32:295.1(E) (West 2002) (expressing that "[i]n any action to recover damages arising out of the . . . operation of a motor vehicle, failure to wear a safety belt . . . shall not be considered evidence of comparative negligence [and] . . . shall not be admitted to mitigate damages"); MD. CODE ANN., TRANSP. § 22-412.3(h) (2002) (providing, in part, that "[f]ailure of an individual to use a seat belt in violation of this section may not: [b]e considered evidence of negligence" nor "contributory negligence" nor may it be used to "[d]iminish recovery for damages arising out of the . . . operation of a motor vehicle"); MINN. STAT. ANN. § 169.685(4)(a) (West 2001) (stating, in part, "proof of the use or failure to use seat belts . . . shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle"); MISS. CODE ANN. § 63-2-3 (1999) (providing, in part, that "[f]ailure to provide and use a seat belt restraint device or system shall not be considered contributory or comparative negligence"); MONT. CODE ANN. § 61-13-106 (2003) (emphasizing that "[e]vidence of compliance or failure to comply with [the mandatory seat belt usage statute] is not admissible in any civil action for personal injury . . . resulting from the use or operation of a motor vehicle, and failure to comply . . . does not constitute negligence"); NEV. REV. STAT. 484.641(4)(b) (2001) (mandating, in part, that "[a] violation of [the seat belt use statute] . . . [m]ay not be considered as negligence or as causation in any civil action"); N.H. REV. STAT. ANN. § 265:107-a(IV) (1993 & Supp. 2003) (stating that "[a] violation of [the mandatory seat belt usage law] shall not be used as evidence of contributory negligence in any civil action"); N.M. STAT. ANN. § 66-7-373(A) (Michie Supp. 2003) (establishing that a "[f]ailure to be secured by a child passenger restraint device or by a safety belt as required by the Safety Belt Use Act . . . shall not in any instance constitute fault or negligence and shall not limit or apportion damages"); N.C. GEN. STAT. § 20-135.2A(d) (2002) (providing that "[e]vidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding"); OKLA. STAT. ANN. tit. 47, § 12-420 (West 2000) (providing, in part, that "the use or nonuse of seat belts shall not be submitted into evidence in any civil suit"); PA. STAT. ANN. tit. 75, § 4581(e) (West 1996 & Supp. 2003) (stating, in part, that "[i]n no event shall . . . failure to use a . . . safety seat belt system be considered as contributory negligence nor shall failure to use such a system be admissible as evidence in the trial of any civil action"); S.D. CODIFIED LAWS § 32-38-4 (Michie 2002) (mandating that a "[f]ailure to comply with the provisions of [the mandatory seat belt usage law] does not constitute contributory negligence, comparative negligence or assumption of the risk [and] . . . may not be introduced as evidence in any . . . civil litigation on the issue of injuries or on the issue of mitigation of damages"); UTAH CODE ANN. § 41-6-186 (Supp. 2003) (providing that "[t]he failure to . . . wear a safety belt does not constitute contributory or comparative negligence on the part of a person seeking recovery for injuries, and may not be introduced as evidence in any civil litigation on the issue of negligence, injuries, or the mitigation of damages"); VA. CODE ANN. § 46.2-1094(D) (Michie 2002) (stating that "[a] violation of [the mandatory seat belt usage law] shall not constitute negligence, be considered in mitigation of damages of whatever nature [or] be admissible in evidence . . . in any action for the recovery of damages arising out of the operation . . . of a motor vehicle"); WASH. REV. CODE ANN. § 46.61.688(6) (West 2001 & Supp. 2004) (mandating that a "[f]ailure to comply with the requirements of [the mandatory seat belt statute] does not constitute negligence, nor may failure to wear a safety belt assembly be admissible as evidence of negligence in any civil action"); WYO. STAT. ANN. § 31-5-1402(f) (Michie 2003) (providing that "[e]vidence of a person's failure to wear a safety belt as required by [the safety belt usage statute] shall not be admissible in any civil action"); Dillinger v. Caterpillar, Inc., 959 F.2d 430 (3d Cir. 1992) (applying Pennsylvania law and

holding that evidence of the driver's nonuse of a safety belt was inadmissible); Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977) (applying Pennsylvania law and finding that evidence of a driver's failure to use his seat belt was inadmissible under the rule of avoidable consequences); Morton v. Brockman, 184 F.R.D. 211 (D. Me. 1999) (applying the Maine statute that excludes evidence of seat belt nonuse); Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473 (D. Mont. 1995) (applying Montana law and finding that evidence of the plaintiff's nonuse of a seat belt was inadmissible and that the preclusion of the defense was proper); Forsberg v. Volkswagen of Am., Inc., 769 F. Supp. 33 (D. N.H. 1990) (finding that evidence of the decedent's failure to use a safety belt was inadmissible for the purpose of showing comparative fault); Pasternak v. Achorn, 680 F. Supp. 447 (D. Me. 1988) (holding that Maine's exclusionary rule excludes evidence of a plaintiff's nonuse of a seat belt and that it will not be considered under comparative negligence or for mitigation of damages); Britton v. Doehring, 242 So. 2d 666 (Ala. 1970) (holding that the evidence of a plaintiff's nonuse of a seat belt was inadmissible for the purpose of negating damages awarded for injuries that resulted from wanton misconduct); Wassell v. Hamblin, 493 A.2d 870 (Conn. 1985) (reversing a lower court's ruling that allowed evidence of seat belt nonuse to be considered as a failure to mitigate damages because there was a lack of evidence that the nonuse proximately caused the injuries); Melesko v. Riley, 339 A.2d 479 (Conn. Super. Ct. 1975) (concluding that the failure of the plaintiff to use a safety belt could not have caused the car accident and, therefore, the nonuse was not a defense); Remington v. Arndt, 259 A.2d 145 (Conn. Super. Ct. 1969) (stating that proof of the driver's accusation that the passenger did not wear his safety belt did not establish negligence); Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967) (holding that the evidence of an automobile occupant's failure to wear a seat belt was inadmissible); McCord v. Green, 362 A.2d 720 (D.C. 1976) (refusing to consider evidence of a passenger's failure to use a seat belt as contributory negligence or as mitigation of damages); C.W. Matthews Contracting Co. v. Gover, 428 S.E.2d 796 (Ga. 1993) (finding a statute rejecting admission of seat belt nonuse evidence constitutional); Reid v. Odom, 404 S.E.2d 323 (Ga. Ct. App. 1991) (holding that the defense attorney's closing argument, encouraging the jury to consider the plaintiff's failure to wear a seat belt as a reason for reducing his recovery, was improper because it was not based on the evidence); Boatwright v. Czerepinski, 391 S.E.2d 685 (Ga. Ct. App. 1990) (reversing the jury verdict and stating that without evidence showing that the use of a seat belt would have reduced the injuries to the motorist, it was erroneous to submit the issue to the jury); Katz v. White, 379 S.E.2d 186 (Ga. Ct. App. 1989) (granting a new trial after a confusing instruction may have caused the jury to consider the victim's failure to wear a seat belt on the issue of liability); Clarkson v. Wright, 483 N.E.2d 268 (Ill. 1985) (holding that evidence of a failure to use a seat belt was inadmissible for the purposes of determining either liability or damages); State v. Ingram, 427 N.E.2d 444 (Ind. 1981) (affirming trial court's refusal to give an instruction on the seat belt defense because the defense was not allowed, under a mitigation of damages theory, to limit the recovery of an injured driver and an occupant of the automobile); Fudge v. Kansas City, 720 P.2d 1093 (Kan. 1986) (finding that there was no duty to wear a seat belt); Rollins v. Dep't of Transp., 711 P.2d 1330 (Kan. 1985) (holding that the trial court erred in allowing testimony regarding the effect of a driver's failure to wear a seat belt); Hampton v. State Highway Comm'n, 498 P.2d 236 (Kan. 1972) (finding that a driver does not have a duty to use a safety belt, and finding evidence of nonuse to be inadmissible to show contributory negligence or failure to mitigate damages); Taplin v. Clark, 626 P.2d 1198 (Kan. Ct. App. 1981) (stating that a passenger did not have a duty to wear a seat belt in an attempt to anticipate the driver's negligence, and therefore, the failure to do so was not negligence reducing the driver's liability); Miller v. Coastal Corp., 635 So. 2d 607 (La. Ct. App. 1994) (declaring that a

failure to wear a seat belt was not admissible for comparative negligence purposes or to prove a plaintiff's failure to mitigate damages); Shahzade v. C.J. Mabardy, Inc., 586 N.E.2d 3 (Mass. 1992) (finding that evidence of the plaintiff's nonuse of her seat belt at the time she was in an automobile collision could not be considered as comparative negligence); Anker v. Little, 541 N.W.2d 333 (Minn. Ct. App. 1995) (stating it is not necessary to look beyond the plain meaning of the unambiguous "statutory gag rule" which excludes evidence of seat belt use or nonuse in personal injury litigation resulting from the operation of a motor vehicle); Cressy v. Grassmann, 536 N.W.2d 39 (Minn. Ct. App. 1995) (upholding the constitutionality of a "statutory gag rule" and finding the statute was not repealed by the enactment of the mandatory seat belt usage statute and the comparative fault statute); Estate of Hunter v. Gen. Motors Corp., 729 So. 2d 1264 (Miss. 1999) (reversing the lower court because the jury instruction—that evidence of seat belt nonuse constituted negligence—was reversible error); Jones v. Panola County, 725 So. 2d 774 (Miss. 1998) (reversing judgment of the trial court because it admitted evidence of seat belt nonuse); Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo. 1998) (interpreting a state statute as precluding the finding of contributory negligence of a motorist for failure to use a seat belt in a products liability claim against a manufacturer); Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970) (holding that evidence of a failure to wear a seat belt was not admissible to establish a driver's lack of due care); Kopischke v. First Cont'l Corp., 610 P.2d 668 (Mont. 1980) (prohibiting a used car dealer from asserting the seat belt defense); Jeep Corp. v. Murray, 708 P.2d 297 (Nev. 1985) (upholding the trial court's exclusion of evidence concerning the use of seat belts); Thibeault v. Campbell, 622 A.2d 212 (N.H. 1993) (concluding that evidence of lack of seat belt use was inadmissible in order to show comparative negligence); Thomas v. Henson, 695 P.2d 476 (N.M. 1985) (reversing the lower court's recognition of a seat belt defense by holding that such recognition was within the purview of the legislature, rather than the judiciary); Miller v. Miller, 160 S.E.2d 65 (N.C. 1968) (concluding that no duty should be imposed on motorists to wear seat belts because duty is measured by the customs of a reasonable person, and few people wear seat belts; if such a duty is to be recognized, it is up to the legislature, not the judiciary); Hagwood v. Odom, 364 S.E.2d 190 (N.C. Ct. App. 1988) (holding that evidence of the plaintiff's failure to wear a seat belt at the time of the collision was neither contributory negligence nor evidence of a failure to mitigate damages); Craig v. Woodruff, 748 N.E.2d 592 (Ohio Ct. App. 2000) (finding that evidence of a passenger's nonuse of a seat belt was not admissible for the purpose of showing comparative negligence because nonuse did not proximately cause the injuries); Comer v. Preferred Risk Mut. Ins. Co., 991 P.2d 1006 (Okla. 1999) (concluding that the Oklahoma Mandatory Seat Belt Use Act does not require the operator of a vehicle to make a back seat passenger wear a seat belt if the passenger is a minor, and even if there was such a duty, the Act excludes admission of evidence of seat belt nonuse in civil actions); Fields v. Volkswagen of Am., Inc., 555 P.2d 48 (Okla. 1976) (finding that evidence of a failure to use a seat belt was neither admissible to show contributory negligence nor to show a failure to mitigate damages); Grim v. Betz, 539 A.2d 1365 (Pa. Super. Ct. 1988) (preventing the defendants from amending their answer to raise the seat belt defense); Swajian v. Gen. Motors Corp., 559 A.2d 1041 (R.I. 1989) (prohibiting all evidence of seat belt use or nonuse from being used to prove comparative fault or proximate cause, and stating that such evidence is irrelevant in actions against automobile manufacturers involving products liability); Keaton v. Pearson, 358 S.E.2d 141 (S.C. 1987) (holding that, in the absence of a statutory duty, the jury shall not consider evidence of the plaintiff's failure to wear a seat belt because such evidence does not constitute a failure to mitigate damages and it does not establish contributory negligence); Davis v. Knippling, 576 N.W.2d 525 (S.D. 1998) (criticizing the trial court for having instructed the jury that evidence of a

duced by a defendant for the purpose of reducing liability for harm suffered by a plaintiff,[6] either under principles of comparative negligence,[7] comparative responsibility,[8] or as evidence of failure to mitigate damages.[9] By attempting to have such evidence admitted, the defendant seeks to raise what is sometimes known as the "seat belt defense."[10]

It is hard to understand why the seat belt defense has had such difficulty gaining recognition throughout the country, since public policy ap-

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failure to use a seat belt could be considered when determining whether a plaintiff mitigated damages); Whitehead v. Am. Motors Sales Corp., 801 P.2d 920 (Utah 1990) (upholding a lower court decision to exclude evidence of a failure to wear seat belts because such evidence did not constitute contributory negligence or establish a failure to mitigate damages); Amend v. Bell, 570 P.2d 138 (Wash. 1977) (concluding that evidence of the plaintiff's nonuse of a seat belt should be excluded); Grobe v. Valley Garbage Serv., 551 P.2d 748 (Wash. 1976) (upholding the trial court's decision to refuse to allow the defendants to prove that the plaintiff was not using a safety belt at the time of the collision); Derheim v. N. Fiorito Co., 492 P.2d 1030 (Wash. 1972) (holding that the plaintiff's failure to use a safety belt was not a total bar to recovery under contributory negligence, and upholding the trial court's refusal to admit evidence of seat belt nonuse to prevent the defendant from raising the seat belt defense); Wright v. Hanley, 387 S.E.2d 801 (W. Va. 1989) (finding that evidence of a failure to wear a seat belt did not show unreasonable conduct and could not limit the driver's recovery).

6. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 406 (2002) (stating that evidence of nonuse should be admitted to reduce the damages awarded to plaintiff).

7. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 reporters' note, cmt. a (2000) (noting that "[e]arly versions of comparative responsibility involved negligence and were called 'comparative negligence' systems").

8. *See id.* § 1 cmt. a (stating that "[s]ometimes comparative responsibility . . . determines the *effect* of a plaintiff's negligence on his or her recovery"); *id.* § 3 reporters' note, cmt. b (commenting that "[t]he underlying premise of comparative responsibility is that a plaintiff's negligence should reduce . . . the plaintiff's recovery for any damages caused both by that conduct and by the defendant's conduct").

9. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 184-85 (2d ed. 1999) (determining that if seat belt nonuse is treated "as [a] failure to 'mitigate damages' in *advance* of the accident . . . [it would] limit the plaintiff's recovery to the damages that would have been sustained had a seatbelt been worn"); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 reporters' note, cmt. b (2000) (noting that "[u]nder comparative responsibility, a plaintiff's negligent failure to mitigate damages is a factor to consider when assigning percentages of responsibility"); *id.* § 7 reporters' note, cmt. k (adding that "[u]nder comparative responsibility, most courts *merge* several defenses into plaintiff's negligence, such as implied assumption of risk, avoidable consequences, and *mitigation of damages*") (emphasis added).

10. *See* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 218 (1998) (defining the seat belt defense as a defense that "precludes an automobile accident victim from recovering for injuries that would have been prevented had he worn his seat belt"); *see also* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 406 (2002) (providing a practical definition for the seat belt defense).

pears to favor wearing seat belts.[11] Moreover, non-recognition of a seat belt defense is inconsistent with the doctrine of negligence, the baseline regime[12] for determining liability in American tort law.[13]

The negligence doctrine is based upon reasonableness,[14] which is determined objectively,[15] and a defense based on a plaintiff's conduct in a negligence action is analyzed by the same objective standard.[16] Objective

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11. *See* DAN B. DOBBS, THE LAW OF TORTS § 205, at 517 (2001) (recognizing that "the reasons for refusing to permit a jury to reduce the plaintiff's damages for seatbelt negligence are not necessarily appealing when the plaintiff is in fact arguably at fault in failing to take pre-injury precautions"); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 406 (2002) (asserting that "[t]he courts' reluctance to allow the defense was understandable decades ago . . . [but t]oday . . . such reluctance is foolish . . . [especially i]n light of public policy favoring the use of seatbelts").

12. *See* Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (recognizing that "[t]he baseline common law regime of tort liability is negligence").

13. *See* Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. L. REV. 237, 241 (2000) (stating that "[t]oday, at the beginning of the 21st century, the general rule in American tort law is that all persons are obliged to exercise reasonable care to avoid foreseeable harm to others").

14. *See* DAN B. DOBBS, THE LAW OF TORTS § 117, at 277 (2001) (stating that the standard for determining negligence is reasonable care); *see also* BLACK'S LAW DICTIONARY 1056 (7th ed. 1999) (defining negligence as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation").

15. *See* DAN B. DOBBS, THE LAW OF TORTS § 118, at 280 (2001) (explaining that the reasonable person standard is, for the most part, objective).

16. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 (2000) (stating that a "[p]laintiff's negligence is defined by the applicable standard for a defendant's negligence"); DAN B. DOBBS, THE LAW OF TORTS § 199, at 495 (2001) (writing that the reasonable person standard that applies to negligence also applies to contributory negligence). Texas uses the "greater-than" version of modified comparative responsibility. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (Vernon 1997 & Supp. 2004) (providing in part that "the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility"); *see also id.* § 33.001 (Vernon 1997) (limiting Section 33.012(a) by stating that "a claimant may not recover damages if his percentage of responsibility is greater than 50 percent"). *See generally* 53 TEX. JUR. 3D *Negligence* § 71 (1997) (expanding upon the statute and listing all of its applications). Modified comparative responsibility reduces the amount of damages awarded to a plaintiff by reducing the award in proportion to the plaintiff's overall fault, but if the plaintiff's fault is greater than fifty percent, then the plaintiff is completely barred from recovery. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. n (2000) (explaining that "[u]nder modified comparative responsibility, a plaintiff is barred from recovery only if the factfinder assigns the plaintiff a percentage of responsibility greater than (51% bar) . . . that of all of the defendants and other relevant persons to whom a percentage of responsibility is assigned"); DAN B. DOBBS, THE LAW OF TORTS § 201, at 505 (2001) (describing the "greater-than" version of the modified system of comparative fault). Comparative fault also allows the plaintiff's negligence to be used as a defense in both strict liability and

reasonableness is determined by reference to what a reasonable person would do in the same or similar situation.[17]

Today, an overwhelming majority of people use seat belts due in part to the fact that lawmakers have passed legislation in many states requiring seat belt usage.[18] Thus, it would not be surprising for a court or jury to determine that a reasonable person will both follow the law and adhere to the custom broadly embraced by the majority of the population by using a seat belt.[19] Some courts have held that nonuse of a seat belt is unreasonable,[20] and commentators have argued that the widespread refusal to recognize the seat belt defense is contrary to common sense.[21] Seat belt nonuse should be considered in civil tort actions because reasonableness is the cardinal issue in a negligence case.[22]

For many years, Texas refused to recognize the seat belt defense, both statutorily[23] and through case law.[24] However, as part of an omnibus

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reckless conduct actions. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 760 (2d ed. 1999).

17. *See* DAN B. DOBBS, THE LAW OF TORTS § 117, at 277 (2001) (defining the objective reasonable person standard as "the standard of care . . . that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm").

18. *See* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1378 (1999) (noting that seat belt usage has risen nationwide).

19. *See* Dunn v. Durso, 530 A.2d 387, 392 (N.J. Super. Ct. Law Div. 1986) (expounding that "as a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts" (quoting Bentzler v. Braun, 49 N.W.2d 626, 640 (Wis. 1967))); Foley v. City of West Allis, 335 N.W.2d 824, 828 (Wis. 1983) (stating that the recognition of the seat belt defense was necessitated by the public knowledge that drivers and passengers should buckle up to prevent the extensive injuries caused by automobile accidents). The *Dunn* court added, "A person riding in a vehicle driven by another is under the duty of exercising such care as an ordinarily prudent person would exercise under similar circumstances to avoid injury to himself." *See Dunn*, 530 A.2d at 392 (quoting *Bentzler*, 149 N.W.2d at 640).

20. *See* Law v. Superior Court, 755 P.2d 1135, 1140 (Ariz. 1988) (concluding that public policy dictates that everyone must guard themselves against the dangers of automobile accidents by following *reasonable* procedures, such as wearing a safety belt).

21. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 406 (2002) (noting that courts' reluctance to allow the seat belt defense is contrary to common sense).

22. *See* DAN B. DOBBS, THE LAW OF TORTS § 117, at 277 (2001) (indicating that the reasonable person standard purports to apply to all cases).

23. Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1643-44, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863.

24. *See generally* Carnation Co. v. Wong, 516 S.W.2d 116 (Tex. 1974) (rejecting the use of the seat belt defense in civil litigation).

tort-reform bill,[25] the Texas Legislature deleted the statutory language that previously made evidence of seat belt use or nonuse inadmissible in tort suits.[26] This legislative deletion of key language relating to evidence of seat belt nonuse opens the door for judicial recognition of a seat belt defense. If such a defense is to be recognized, there are important unanswered questions concerning the contours of the defense, including whether it should be recognized as a form of comparative responsibility or whether it should only be used to show a failure on the part of the plaintiff to mitigate damages.

This Comment explores the various ways the seat belt defense has been recognized in other states and examines the possible justifications for recognition of such a defense in Texas. Part II offers both a general background of the defense and a particular one that focuses on Texas. Part III of this Comment discusses the recent legislative changes that have taken place in Texas. These changes have created an opportunity for the Texas judiciary to recognize the seat belt defense. Additionally, Part III offers support for the proposition that the defense should be recognized in Texas as a form of comparative responsibility. Part III also addresses the various arguments advanced against recognition of the seat belt defense. Part IV of this Comment concludes by calling upon the courts of Texas to follow the principles of comparative responsibility by recognizing the seat belt defense in Texas.

II. USE OF THE SEAT BELT DEFENSE IN NEGLIGENCE CASES

A. *Seat Belt Usage*

In recent years, there have been many debates in courts throughout the country regarding the legitimacy of the seat belt defense.[27] Widespread availability and common use of seat belts are the reasons that the defense is an issue,[28] but this has not always been the case.[29] The seat belt de-

25. *See* Scott Rothenberg, *House Bill 4: A User-Friendly Guide*, 66 TEX. B.J. 702, 702 (2003) (noting that the legislation spans "62 pages in text format and more than 160 pages in Adobe® PDF format" and "a comprehensive analysis of [the legislation] . . . would likely fill two entire issues of the Texas Bar Journal").

26. *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863 (providing that "Sections 545.412(d) and 545.413(g), Transportation Code, are repealed").

27. *See* Hopper v. Carey, 716 N.E.2d 566, 570 (Ind. Ct. App. 1999) (commenting that "[t]he validity of the seatbelt defense has been hotly contested in courts across the country").

28. Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 218 (1998) (acknowledging that as seat belts have become standard equipment in automobiles, defendants have increasingly attempted to use the seat belt defense).

fense, when compared to other legal doctrines, is relatively new[30]—seat belts did not become available until the 1950s.[31] At that time, both Chrysler and Ford began to offer seat belts in their automobiles.[32] By the late 1960s, most automobile manufacturers had made seat belts part of the standard equipment in all cars.[33] Despite the prevalence of safety belts in automobiles, very few people actually used them at first.[34] However, evidence began to show that wearing a seat belt could help prevent both injuries and deaths resulting from car accidents.[35]

Recognizing the need to increase automobile safety by encouraging people to wear seat belts,[36] Congress enacted the National Traffic and Motor Safety Act of 1966,[37] thereby creating the National Highway Traf-

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29. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 406 (2002) (reporting that the defense has only existed for several decades).

30. *See id.* at 407 (describing the defense as being "in its infancy" when "[c]ompared to other Anglo-American legal doctrines").

31. *See* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1377 (1999) (identifying the 1950s as the time when seat belts first became available in cars).

32. *See* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 217 (1998) (stating that seat belts in automobiles were first offered as optional equipment).

33. Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1377 (1999) (noting that "lap seat belts [were] standard equipment in all vehicles by 1966").

34. *See* Cheryl Lynn Daniels, Note, *The Seat Belt Defense and North Carolina's New Mandatory Usage Law*, 64 N.C. L. REV. 1127, 1132 (1986) (claiming that only approximately thirteen percent of Americans wore safety belts in the 1980s, despite public knowledge of seat belt effectiveness); Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1377 (1999) (discussing the lack of seat belt usage).

35. *See* Donald F. Huelke et al., *The Effectiveness of Belt Systems in Frontal and Rollover Crashes*, *in* LITIGATING THE COMPLEX MOTOR VEHICLE CASE: ACCIDENT RECONSTRUCTION AND THE SEAT BELT DEFENSE 1987, at 300 (PLI Litigation & Administrative Practice Course, Handbook Series No. H4-5012, 1987), *available at* WESTLAW 323 PLI/LITIG 295 (asserting that seat belts can reduce the occurrence of severe injuries and fatalities); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 217-18 (1998) (linking the requirements for seat belt installation with the new evidence that supported seat belts).

36. *See* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1377 (1999) (offering the reason Congress enacted the National Traffic and Motor Safety Act of 1966).

37. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1967), *repealed by* Pub. L. 103-272, 108 Stat. 1379 (1994); *see also* R. Ben Hogan III, *The Crashworthiness Doctrine*, 18 AM. J. TRIAL ADVOC. 37, 39 (1994) (recognizing that the National Traffic and Motor Vehicle Safety Act of 1966 was a result of congressional hearings investigating highway fatalities that occurred in the 1960s).

fic Safety Administration (NHTSA).[38] Two years later, in a further effort to promote safety, the NHTSA adopted the Federal Motor Vehicle Safety Standard Number 208 (Standard 208).[39] Standard 208 required all car manufacturers to install seat belts in all automobiles manufactured after January 1968.[40] Furthermore, states began to require seat belt installation as well.[41] Years later, the NHTSA enacted a revised version of Standard 208, which required that cars manufactured after 1989 have automatic restraints (for example, airbags), unless prior to September 1, 1989, a minimum of two-thirds of the states enacted mandatory safety belt usage laws.[42] Accordingly, many states passed laws requiring seat belt usage.[43]

B. *A Refusal to Recognize*

Despite the widespread adoption of mandatory seat belt usage laws,[44] the recognition of the seat belt defense has not had the same fortunate

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38. R. Ben Hogan III, *The Crashworthiness Doctrine*, 18 AM. J. TRIAL ADVOC. 37, 39 (1994).

39. Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 217 (1998).

40. *Id.* The current form of this regulation is in 49 C.F.R. § 571.208 (2003).

41. *Id.* at 218.

42. *See* Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28,962, 28,962-63 (July 17, 1984) (codified at 49 C.F.R. § 571.208 (2003)); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 221 (1998) (noting that the amended Standard 208 was enacted in 1984); Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1377-78 (1999) (recognizing that revised Standard 208 was enacted to push state legislatures into promulgating laws mandating seat belt usage).

43. *See* Robert M. Ackerman, *The Seatbelt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 221 n.1 (1986) (stating that fifteen states enacted mandatory seat belt laws by late 1985); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 222 (1998) (explaining that the amended Federal Motor Vehicle Safety Standard Number 208 caused the majority of states to adopt legislation that required front seat vehicle occupants to wear safety belts).

44. Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 222 & n.34 (1998); *see, e.g.*, ALA. CODE § 32-5B-4(a) (2000) (mandating that "[e]ach front seat occupant of a passenger car manufactured with safety belts in compliance with Federal Motor Vehicle Safety Standard No. 208 shall have a safety belt properly fastened about his body at all times when the vehicle is in motion"); ARIZ. REV. STAT. ANN. § 28-909(A) (West 1998 & Supp. 2003) (providing that "[e]ach front seat occupant of a motor vehicle . . . shall . . . [h]ave the lap and shoulder belt properly adjusted and fastened while the vehicle is in motion"); GA. CODE ANN. § 40-8-76.1(b) (2001) (stating that "[e]ach occupant of the front seat of a passenger vehicle shall, while such passenger vehicle is being operated on a public road, street, or highway of this state, be restrained by a seat safety belt approved under Federal Motor Vehicle Safety Standard 208"); HAW. REV. STAT. ANN. § 291-11.6(a)(1) (Michie 2002) (establishing that "no person . . . [s]hall operate a motor vehicle upon any public highway unless the person is restrained by a seat

belt assembly and any passengers in the front or back seat of the motor vehicle are restrained by a seat belt assembly if between the ages of four and fourteen"); IDAHO CODE § 49-673(1) (Michie Supp. 2003) (providing that "each occupant of a motor vehicle . . . which was manufactured with safety restraints in compliance with federal motor vehicle safety standard no. 208, shall have a safety restraint properly fastened about his body at all times when the vehicle is in motion"); IND. CODE ANN. § 9-19-10-2 (Michie 1997) (proclaiming that "[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 . . . shall have a safety belt properly fastened about the occupant's body at all times"); IOWA CODE ANN. § 321.445(2) (West 1997) (establishing that "[t]he driver and front seat occupants of a . . . motor vehicle . . . shall each wear a properly adjusted and fastened safety belt or safety harness any time the vehicle is in forward motion on a street or highway in this state"); KAN. STAT. ANN. § 8-2503(a) (2002) (stating that "each front seat occupant of a passenger car manufactured with safety belts in compliance with federal motor vehicle safety standard no. 208 shall have a safety belt properly fastened about such person's body at all times when the vehicle is in motion"); KY. REV. STAT. ANN. § 189.125(6) (Michie 1997) (mandating that "[n]o person shall operate a motor vehicle manufactured after 1965 on the public roadways of this state unless the driver and all passengers are wearing a properly adjusted and fastened seat belt"); MINN. STAT. ANN. § 169.686(1)(a) (West 2001) (providing that "[a] properly adjusted and fastened seat belt . . . shall be worn by . . . the driver [and passenger riding in the front seat] of a passenger vehicle or commercial motor vehicle [and] . . . a passenger [between the age of four and ten] riding in any seat of a passenger vehicle"); MO. ANN. STAT. § 307.178(2) (West Supp. 2004) (establishing that "[e]ach driver . . . and front seat passenger of a passenger car . . . operated on a street or highway in this state, and persons less than eighteen years of age operating or riding in a truck, . . . shall wear a properly adjusted and fastened safety belt"); MONT. CODE ANN. § 61-13-103(1) (2003) (stating that "[a] driver may not operate a motor vehicle upon a highway of the state of Montana unless each occupant of a designated seating position is wearing a properly adjusted and fastened seatbelt or, . . . is properly restrained in a child safety restraint"); NEB. REV. STAT. § 60-6,270(1) (1999) (mandating that "no driver shall operate a motor vehicle upon a highway or street in this state unless the driver and each front-seat occupant in the vehicle are wearing occupant protection systems and all occupant protection systems worn are properly adjusted and fastened"); N.M. STAT. ANN. § 66-7-372(A) (Michie 2003) (stating that "each occupant of a motor vehicle having . . . safety belts in compliance with federal motor vehicle safety standard number 208 shall have a safety belt properly fastened about his body at all times when the vehicle is in motion on any street or highway"); N.C. GEN. STAT. § 20-135.2A(a) (2002) (establishing that "[e]ach front seat occupant who is 16 years of age or older and each driver of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in . . . motion"); S.C. CODE ANN. § 56-5-6520 (Law. Co-op. Supp. 2004) (declaring "[t]he driver and every occupant of a motor vehicle, when it is being operated on the public streets and highways of this State, must wear a fastened safety belt which complies with all provisions of federal law for its use"); S.D. CODIFIED LAWS § 32-38-1 (Michie 2002) (providing that "every operator and front seat passenger of a passenger vehicle operated on a public highway in this state shall wear a properly adjusted and fastened safety seat belt system"); UTAH CODE ANN. § 41-6-182(2) (Supp. 2003) (stating that "[a] passenger who is 16 years of age or older of a motor vehicle operated on a highway shall wear a properly adjusted and fastened safety belt"); WASH. REV. CODE ANN. § 46.61.688(3) (West 2001 & Supp. 2004) (declaring that "[e]very person sixteen years of age or older operating or riding in a motor vehicle

history.[45] At first, unsuccessful attempts were made to use the defense as a form of contributory negligence on the part of the plaintiff for not wearing a safety belt.[46] Not surprisingly, these efforts failed to gain much sup-

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shall wear the safety belt assembly in a properly adjusted and securely fastened manner"); WIS. STAT. ANN. § 347.48(2m)(b) (West 1999) (providing that "[i]f a motor vehicle is required to be equipped with safety belts in this state, no person may operate that motor vehicle unless the person is properly restrained in a safety belt"); WYO. STAT. ANN. § 31-5-1402(a) (Michie 2003) (mandating that "[e]ach driver and passenger [including passengers under twelve years of age] of a motor vehicle operated in this state shall wear, . . . a properly adjusted and fastened safety belt when the motor vehicle is in motion on public streets and highways"); Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1378 (1999) (noting that every state, with the exception of New Hampshire, has laws mandating seat belt usage). New Hampshire only mandates seat belt usage for persons under eighteen years of age. N.H. REV. STAT. ANN. § 265:107-a(I) (Supp. 2003). The New Hampshire statute provides:

> I. No person shall drive a motor vehicle on any way while carrying as a passenger a person less than 18 years of age unless such person is wearing a seat or safety belt which is properly adjusted and fastened. If the passenger is less than 6 years of age and is less than 55 inches in height, the passenger shall be properly fastened and secured by a child passenger restraint which is in accordance with the safety standards approved by the United States Department of Transportation in 49 C.F.R. section 571.213. . . . no person shall drive a motor vehicle on any way while carrying as a passenger a person less than 18 years of age unless the motor vehicle was designed for and equipped with the passenger restraints specified above.
>
> I-a. No person who is less than 18 years of age shall drive a motor vehicle on any way unless such person is wearing a seat or safety belt which is properly adjusted and fastened.

Id. § 265:107a.

45. *See, e.g.*, 625 ILL. COMP. STAT. ANN. 5/12-603.1(c) (West 2002) (providing that "[f]ailure to wear a seat safety belt . . . shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle"); MINN. STAT. ANN. § 169.685(4)(a) (West 2001) (stating that "[e]xcept [in crashworthiness cases], proof of the use or failure to use seat belts or a child passenger restraint system . . . shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle"); VA. CODE ANN. § 46.2-1094(D) (Michie 2002) (declaring that "[a] violation of [the mandatory seat belt usage law] shall not constitute negligence, be considered in mitigation of damages of whatever nature, [or] be admissible . . . in any action for the recovery of damages arising out of the operation . . . of a motor vehicle"). *See generally* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215 (1998) (describing many of the states that do not recognize the defense).

46. *See* Fischer v. Moore, 517 P.2d 458, 459 (Colo. 1973) (concluding "that the failure of the driver or passenger . . . to use a seat belt does not constitute contributory negligence and may not be pleaded as a bar to recovery of damages in an action against a tort-feasor whose negligence . . . is a proximate cause of an injury"); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 218-19 (1998) (explaining that the reason for the lack of success was because courts tended to focus on

port because contributory negligence was a total bar to recovery.[47] Entirely denying compensation to an auto accident victim because he or she failed to use a seat belt was simply too harsh.[48] Proponents of the defense also argued that seat belt nonuse could be analogized to a failure by the plaintiff to mitigate damages,[49] and therefore treated as only a partial bar to recovery.[50] However, this route was rejected by some courts because they reasoned that the defense could not be reconciled with the avoidable consequences rule.[51] Treating seat belt nonuse as a failure to mitigate damages would imply that there was a pre-accident obligation on the part of the plaintiff to anticipate the defendant's negligence.[52] This would require the plaintiff to attempt to reduce the likely damages before these damages actually occur.[53] Courts addressing these issues at a time when seat belt use was uncommon were sometimes unwilling to embrace this logic. They occasionally stated that a plaintiff is not under a duty to expect and guard against the negligence of others.[54]

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liability and concluded that evidence of nonuse should not totally bar the plaintiff's recovery because failing to wear a safety belt was not one of the causes of the collision).

47. Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 218-19 (1998).

48. *Id.*

49. DAN B. DOBBS, THE LAW OF TORTS § 203, at 510 (2001).

50. *Id.*

51. The avoidable consequences rule holds that a plaintiff will be denied recovery for damages that were negligently inflicted if the plaintiff could have minimized or avoided such damages through the exercise of reasonable care. *See* DAN B. DOBBS, THE LAW OF TORTS § 203, at 510 (2001) (illustrating the rule through an example by explaining that "the plaintiff who unreasonably delays in obtaining medical attention for her injury, or who unreasonably refuses to follow medical advice, cannot recover for exacerbation of the injury resulting from her own delay or refusal"). The effect of the rule is to reduce recovery by the plaintiff, but not to completely bar it. *Id.*

52. *See, e.g.*, Amend v. Bell, 570 P.2d 138, 143 (Wash. 1977) (holding that "[t]he defendant should not diminish the consequences of his negligence by the failure of the plaintiff to anticipate the defendant's negligence" because "[o]nly if plaintiff should have so anticipated the accident can it be said that plaintiff had a duty to fasten the seat belt"); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 219-20 (1998) (echoing that the reason some courts have refused this application of the avoidable consequences rule is because it would deny a plaintiff the right to expect due care from others).

53. *See* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 219-20 (1998) (discussing the pre-accident obligation that could be created if courts applied the avoidable consequences rule to seat belt usage).

54. *See, e.g.*, Britton v. Doehring, 242 So. 2d 666, 675 (Ala. 1970) (finding that "[r]equiring one to use available seat belts results in one who is lawfully using the highways having to *anticipate that another driver may be negligent*"); *Amend*, 570 P.2d at 143 (emphasizing that "[o]nly if plaintiff should have so anticipated the accident can it be said that plaintiff had a duty to fasten the seat belt prior to the accident"); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 220 (1998)

However, other jurisdictions have reasoned that plaintiffs are responsible for pre-accident precautionary measures, such as wearing a safety belt.[55]

More recently, courts have addressed the issue of whether the seat belt defense should be available in terms of comparative responsibility.[56] Courts that have refused to recognize the defense in this regard have sometimes reasoned that the nonuse of a seat belt is inadmissible because it is not the factual cause of the accident.[57] Yet other jurisdictions have adopted the defense as a form of comparative responsibility, deducing that nonuse could contribute to the injuries, thereby allowing damages to be apportioned.[58] In most jurisdictions that have adopted comparative

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(indicating that some courts refuse to recognize the defense because the plaintiff does not have to anticipate other people's negligence). *But see* Dahl v. BMW, 748 P.2d 77, 81 (Or. 1987) (determining that "[a]utomobile collisions are a foreseeable general type of risk resulting in injuries in most highway situations; therefore, whether the plaintiff's actions in not buckling up were reasonable in light of the foreseeability of an accident is . . . a question for the trier of fact to determine").

55. *See* Mount v. McClellan, 234 N.E.2d 329, 331 (Ill. App. Ct. 1968) (establishing that a plaintiff's seat belt use is a factor that the trier of fact may consider when deciding whether the plaintiff exercised due care by attempting to both avoid injury to himself and to mitigate any injuries that would likely be sustained); Spier v. Barker, 323 N.E.2d 164, 167 (N.Y. 1974) (holding that "nonuse of an available seat belt . . . is a factor which the jury may consider . . . in arriving at its determination as to whether the plaintiff has exercised due care, not only to avoid injury to himself, but to mitigate any injury he would likely sustain"); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 220 (1998) (adding that the mitigation approach requires the defendant to show a causal connection between nonuse of the seat belt and the damages that occurred in the collision).

56. *Compare* Law v. Superior Court, 755 P.2d 1135, 1145 (Ariz. 1988) (stating that a jury may consider evidence of seat belt nonuse when reducing damages), *with* Melesko v. Riley, 339 A.2d 479, 480 (Conn. Super. Ct. 1975) (holding that "[i]n this instance, it is felt that the failure to use the seat belt could not, as a matter of law, contribute to the happening of the accident and is not therefore a valid ground of special defense").

57. *See Melesko*, 339 A.2d at 480 (stating that the failure to wear a seat belt does not cause the accident); *Amend*, 570 P.2d at 143 (explaining that a failure by the plaintiff to wear a seat belt does not diminish the fact that the defendant actually caused the accident itself); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 220 (1998) (summarizing why certain jurisdictions are against using the evidence of nonuse as a basis for comparative fault).

58. *See Law*, 755 P.2d at 1145 (recognizing that the seat belt defense is "a matter which the jury may consider in apportioning damages due to the 'fault' of the plaintiff"); Bentzler v. Braun, 149 N.W.2d 626, 640 (Wis. 1967) (concluding that "in those cases where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, . . . [a] jury in such case could conclude that an occupant . . . [was] negligent in failing to use seat belts"); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 220-21 (1998) (recognizing that the courts that allowed evidence of nonuse to be considered in regard to comparative fault analyzed the seat belt defense issue by addressing

responsibility, a failure to mitigate damages is normally just one factor to consider when apportioning responsibility.[59]

C. *Forms of Recognition Among the Minority*

Although a majority of states still reject a general admission of seat belt evidence,[60] a growing number of jurisdictions allow the defense, but the foundation for it varies from one jurisdiction to another.[61] Some

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the relationship between the nonuse and the injuries sustained, rather than addressing whether nonuse bore any sort of relationship to the actual cause of the accident).

59. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 reporters' note, cmt. b (2000).

60. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 416 & n.121 (2002). *See generally supra* note 5 (listing statutes and case law that reject the seat belt defense).

61. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 420-21 & n.156 (2002). *See generally* IOWA CODE ANN. § 321.445(4)(b) (West 1997 & Supp. 2003) (providing that evidence of seat belt nonuse could only be used to mitigate damages, but a plaintiff's recovery could not be reduced more than five percent); MO. ANN. STAT. § 307.178(4) (West Supp. 2004) (stating that the percentage cap for a plaintiff's reduction in damages is one percent); OR. REV. STAT. § 18.590(1) (2002) (capping the reduction percentage at five percent); Ins. Co. of N. Am. v. Pasakarnis, 451 So. 2d 447 (Fla. 1984) (finding that evidence of a failure to wear a seat belt could be considered by the jury after the "seat belt defense" was raised and evidence showed that the failure to use a safety belt contributed to producing the damages); Smith v. Butterick, 769 So. 2d 1056 (Fla. Dist. Ct. App. 2000) (holding that the evidence was satisfactory to raise the safety belt defense); Zurline v. Levesque, 642 So. 2d 1169 (Fla. Dist. Ct. App. 1994) (allowing evidence of nonuse to be admitted, but determining that the evidence was insufficient to reduce recovery); Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987) (holding that, depending on the facts of the case, evidence may be admitted); Fedele v. Tujague, 717 So. 2d 244 (La. Ct. App. 1997) (concluding that the statutory prohibition against admission of evidence regarding lack of safety belt use did not apply in the realm of products liability); Klinke v. Mitsubishi Motors Corp., 581 N.W.2d 272 (Mich. 1998) (holding that the seat belt statute's cap on the damages reduction did not apply in an action involving products liability); Lowe v. Estate Motors Ltd., 410 N.W.2d 706 (Mich. 1987) (stating that evidence of a passenger's failure to wear a safety belt was admissible for the purpose of establishing comparative negligence); Waterson v. Gen. Motors Corp., 544 A.2d 357 (N.J. 1988) (holding that evidence of seat belt nonuse could be admitted for the purpose of reducing a motorist's recovery, but limiting the admission to being considered only for those damages that could have been avoided by the use of a seat belt); Shpritzman v. Strong, 670 N.Y.S.2d 50 (N.Y. App. Div. 1998) (deciding that the defendant could use evidence of the plaintiff's failure to wear a seat belt, but only for showing a failure to mitigate damages); Bishop v. Takata Corp., 12 P.3d 459 (Okla. 2000) (stating that the Mandatory Seat Belt Use Act prevents automobile occupants from being penalized for deciding not to use seat belts, but it does not prevent the introduction of such evidence in a manufacturers' liability action); Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992) (announcing that parents have a duty to fasten the safety belts of minor passengers, and the evidence of safety belt nonuse could be used to establish a nexus between the nonuse and the injuries sustained by the occupant).

states, such as Arizona and New Jersey, have recognized the seat belt defense through judicial decision.[62] Other states, such as California and Ohio, have adopted the defense statutorily, without any apparent limit on its application.[63] New York limits the availability of the defense by allowing it only for the purpose of establishing a failure to mitigate damages.[64] Conversely, Florida recognizes the defense for comparative negligence purposes but rejects its use for mitigation of damages.[65] Still another state allows evidence of nonuse to be considered, but narrows the recognition so that admission is only allowed when reducing the pain and suffering damages awarded to the plaintiff.[66] States such as Arkansas and Tennessee have further narrowed the application of the defense by only allowing it in products liability actions.[67]

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62. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 421 (2002); *see, e.g.,* Law v. Superior Court, 755 P.2d 1135, 1145 (Ariz. 1988) (recognizing the seat belt defense in Arizona); *Waterson*, 544 A.2d at 373 (allowing the seat belt defense to be raised in New Jersey to reduce the recovery for injuries caused by the second collision).

63. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 421 & n.158 (2002); *see also* CAL. VEH. CODE § 27315(i) (Deering Supp. 2004) (providing that "in a civil action, a violation of [the seat belt usage law] . . . does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation").

64. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 421 & n.161 (2002); *see also* N.Y. VEH. & TRAF. LAW § 1229-c(8) (McKinney 1997 & Supp. 2004) (stating that "[n]on-compliance with the [mandatory seat belt statute] shall not be admissible as evidence in any civil action . . . in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded . . . non-compliance as an affirmative defense").

65. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 421 & n.162 (2002); *see also* FLA. STAT. ANN. § 316.614(9) (West 2001) (stating "[a] violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action").

66. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 421 & n.163 (2002) (identifying Colorado as the state that restricts the admission of nonuse evidence to being considered only when reducing the plaintiff's damages for pain and suffering). The Colorado statute provides that "[e]vidence of failure to [follow the seat belt statute] shall be admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks . . . to recover damages for . . . pain and suffering and shall not be used for limiting recovery of economic loss." COLO. REV. STAT. § 42-4-237(7) (2003).

67. ARK. CODE ANN. § 27-37-703 (Michie Supp. 2003); TENN. CODE ANN. § 55-9-604 (1998); *see also* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 421-22 & n.166 (2002) (criticizing this approach as being too confusing).

Some of the jurisdictions that recognize the seat belt defense hold that although the defense can be raised, there is a percentage cap placed on the amount that the defense can reduce the plaintiff's recovery.[68] The percentage cap varies depending on the state.[69] Wisconsin is the most generous to defendants, placing the limit at fifteen percent,[70] while Missouri allows only one percent of the plaintiff's recovery to be reduced.[71] Other states limit the cap to five percent.[72]

The placement of such caps has been met with criticism.[73] Opponents argue that by enacting them, legislatures have severely handicapped the seat belt defense.[74] One commentator asserted that such caps tend to create windfalls for plaintiffs who refuse to wear their safety belts.[75]

D. *A History of Rejection in Texas*

1. The Preliminary Cases

The first case in Texas to address the issue of a seat belt defense, *Tom Brown Drilling Co. v. Nieman*,[76] held there was insufficient evidence to show that the decedents, whose deaths resulted from a motor vehicle col-

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68. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 422 (2002).

69. *Compare* MO. ANN. STAT. § 307.178(4)(2) (West Supp. 2004) (placing the cap at one percent), *with* NEB. REV. STAT. § 60-6,273 (1999) (placing the limit at five percent).

70. WIS. STAT. ANN. § 347.48(g) (West 1999); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 422 (2002). The Wisconsin statute states that "[e]vidence of compliance or failure to comply with [the required seat belt usage statute] is admissible . . . for personal injuries or property damage resulting from the use or operation of a motor vehicle. . . . [S]uch a failure shall not reduce the recovery . . . by more than 15%." WIS. STAT. ANN. § 347.48(g) (West 1999).

71. MO. ANN. STAT. § 307.178(4)(2) (West Supp. 2004); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 423 (2002). The Missouri statute provides that "the trier of fact may find that the plaintiff's failure to wear a safety belt in violation of [the seat belt statute] contributed to the plaintiff's claimed injuries, and may reduce the amount of the plaintiff's recovery by an amount not to exceed one percent of the damages awarded." MO. ANN. STAT. § 307.178(4)(2) (West Supp. 2004).

72. IOWA CODE ANN. § 321.445(4)(b)(2) (West 1997); MICH. COMP. LAWS § 257.710e(6) (2001); NEB. REV. STAT. § 60-6,273 (1999); OR. REV. STAT. § 18.590 (2002); W. VA. CODE ANN. § 17C-15-49(d) (Michie 2000).

73. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 422-23 (2002) (criticizing the percentage cap statutes for being worrisome and making no sense).

74. *See id.* at 423-24 (asserting that the statutes handicap the defense because they only recognize the defense's validity to the extent allowed by the percentage limits).

75. *Id.* at 424.

76. 418 S.W.2d 337 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

lision, would have lived had they worn their seat belts.[77] After noting that there was neither a mandatory seat belt usage statute in Texas nor authority to determine whether a plaintiff had a duty to wear a seat belt, the court discussed the split in other jurisdictions in regard to recognizing the seat belt defense.[78] The court then sidestepped the issue of whether the plaintiff had a responsibility to buckle up by leaving undecided which view it would accept.[79]

In *Sonnier v. Ramsey*,[80] the court once again refused to decide whether the plaintiff had a duty to wear a seat belt,[81] but suggested that the seat belt defense should be considered in subsequent cases. However, the court stated that the defense should be used when addressing damages, rather than when determining liability.[82] Although *Sonnier* seemed to indicate there was a possibility the defense could be recognized in some fashion,[83] *Quinius v. Estrada*,[84] decided one year later, held that the answer to the question of whether an automobile occupant had a duty to wear a seat belt was a resounding no.[85]

Four years later, the Texas Supreme Court decided the case of *Kerby v. Abilene Christian College*.[86] This case involved a car collision between a van, driven by Kerby, and a school bus, driven by an employee of Abilene Christian College.[87] The employee drove the bus into Kerby's van

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77. Tom Brown Drilling Co. v. Nieman, 418 S.W.2d 337, 341 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

78. *Id.* at 340-41.

79. *See id.* (explaining it was unnecessary to decide the issue because there was a lack of evidence to support the issue); *see also* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1381 (1999) (noting that the court found that the defendant failed to offer evidence on the issue, and refused to submit it to jurors); Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 195 (1990) (observing that the court refrained from determining which line of authority controlled the issue).

80. 424 S.W.2d 684 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.).

81. *See* Sonnier v. Ramsey, 424 S.W.2d 684, 689 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) (concluding that the decision as to whether "there is a duty to use a seat belt . . . is reserved for a future case").

82. *See id.* at 689 (writing that "[t]he failure to use a seat belt may contribute to the cause of the injury, but almost never to the cause of the accident").

83. *Id.*; *see also* Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 196 (1990) (commenting that "the court hinted at an openness to possible expansion of traditional tort doctrine to allow the defense").

84. 448 S.W.2d 552 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

85. *See* Quinius v. Estrada, 448 S.W.2d 552, 554 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (deciding that the plaintiff was under no duty to fasten the seat belt, and because of this, failing to fasten the seat belt was not negligent).

86. 503 S.W.2d 526 (Tex. 1973).

87. Kerby v. Abilene Christian Coll., 503 S.W.2d 526, 527 (Tex. 1973).

after running a red light.[88] The door to Kerby's van was open, causing Kerby to be ejected and crushed by the van.[89] In reversing the trial court[90] and the court of civil appeals,[91] the supreme court related driving with a door open to driving without wearing a seat belt.[92] Both, the court noted, were not actionable negligence, but instead were "negligence contributing to the damages sustained."[93] This determination was important because the court distinguished between negligence that adds to the accident and negligence that worsens the injuries sustained.[94] The court did not state that evidence of seat belt nonuse was irrelevant.[95] Rather, the court was critical of the suitability of such evidence, and the distinction the court made between the two types of negligence exposed the inadequacies of negligence theory, at that time, to address the significance of the seat belt defense.[96]

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88. *Id.*

89. *Id.*

90. *See id.* (noting the trial court found in favor of Kerby, but held he was thirty-five percent responsible for his injuries because of his conduct of driving while the door to the van was open).

91. *See id.* (explaining how the court of civil appeals reversed the trial court and found for the defendant because it held that the plaintiff's conduct constituted contributory negligence).

92. *Kerby*, 503 S.W.2d at 528.

93. *Id.* In recognizing a distinction between negligence that causes the accident and negligence that adds to the injuries sustained, the court addressed the inadequacy of the negligence framework, at that time, to sufficiently recognize the significance of the seat belt defense. *See* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1384 (1999) (finding this was the first time a Texas court recognized a difference between negligence contributing to the cause of the accident and that which contributes to the injuries). One commentator has suggested that the court doubted both the jury's ability to determine whether the failure to use a seat belt added to the injuries and its competence to decide the appropriate percentage of damages. Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 197 (1990).

94. *See Kerby*, 503 S.W.2d at 528 (holding that "[c]ontributory negligence must have the causal connection with the accident that but for the conduct the accident would not have happened. Negligence that merely increases or adds to the extent of the loss or injury occasioned by another's negligence is not such contributory negligence as will defeat recovery."). The court also noted that "driving without use of available seat belts has been held not to be contributory negligence such that would bar recovery." *Id.*

95. Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1384 (1999).

96. *Id.* Although the court refused to admit the evidence, one commentator has expounded that "*Kerby* sheds light on the inflexibility of then existing tort law and the resulting attempts by defendants to analytically shoehorn relevant seat belt evidence into negligence causes of action." *Id.* One reason the seat belt defense could not be properly addressed at the time the judgment in *Kerby* was rendered is because Texas did not even have a mandatory seat belt usage law until 1985. *Id.* at 1381 & n.62.

2. *Carnation Co. v. Wong*

One year after *Kerby* was decided, the Texas Supreme Court, in a per curiam opinion, denied writ of error in *Carnation Co. v. Wong*.[97] *Carnation* involved injuries sustained by plaintiffs Bobbie Joan Wong and King Son Wong after their automobile was negligently struck by a truck that was owned by Carnation Company.[98] The trial court admitted evidence of seat belt use and found that the plaintiffs' failure to buckle their seat belts constituted negligence and was a proximate cause of the injuries they sustained.[99] The jury found that King Son Wong's failure accounted for fifty percent of his injuries and Bobbie Joan Wong's failure accounted for seventy percent of her injuries.[100] The appellate court reversed, holding that *Kerby* stated there exists no duty to wear a seat belt in order to mitigate damages.[101] The Texas Supreme Court affirmed by first rejecting all cases from those jurisdictions that allowed the seat belt defense to completely bar the plaintiff's recovery through contributory negligence.[102] Next, the court dismissed the mitigation of damages approach, stating that "there was no evidence to prove that had plaintiff been wearing seat belts [sic], the injuries suffered would have been less than those actually sustained."[103]

3. Past Statutory Refusal to Recognize the Defense

In 1985, the Texas Legislature enacted the mandatory seat belt statute.[104] Besides making nonuse of a seat belt an offense, Section 107C(j)

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97. 516 S.W.2d 116 (Tex. 1974) (per curiam).

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

99. *Id.*

100. *Id.*

101. *Id.* at 117.

102. *Id.* at 116. The court also reiterated the holding in *Quinius* by stating that "[Texas] courts have held that driving without using available seat belts is not actionable negligence." *Id.* at 116-17 (citing Quinius v. Estrada, 448 S.W.2d 552 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.)).

103. *Carnation Co.*, 516 S.W.2d at 117. The court addressed other jurisdictions' approaches in regard to allowing the defense to be considered when mitigating damages, but summarily rejected those approaches by concluding that many "cases have been decided in other jurisdictions where the question of failure to wear available seat belts has been considered under a theory of mitigation of damages," but "we can find no reported appellate decision where a court has actually relied upon [this theory] to uphold . . . reduction of plaintiff's recovery." *Id.*

104. Act of June 15, 1985, 69th Leg., R.S., ch. 804, § 1, 1985 Tex. Gen. Laws 2846, 2846-47, *amended by* Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1643, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863; *see also* Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 198 (1990) (noting that the statute, at that time,

of the statute provided that "[u]se or nonuse of a safety belt is not admissible evidence in a civil trial."[105]

Then, in 1994, the Texas Supreme Court limited the statute's application in its holding in *Bridgestone/Firestone, Inc. v. Glyn-Jones*.[106] In *Bridgestone/Firestone*, the plaintiff, Glyn-Jones, in addition to suing the driver of a car that collided with her car, sued Bridgestone/Firestone, Inc., Ford Motor Company, and Champion Motor Sales.[107] The plaintiff asserted products liability and breach of warranty claims, alleging that the seat belt was defective and failed to protect her, which resulted in her being thrown around inside her vehicle, thereby causing further injury.[108] Bridgestone/Firestone argued that Glyn-Jones was barred by Section 107C(j) from admitting evidence that established she was wearing a seat belt and therefore she was unable to prove the element of causation.[109] The court refused to interpret Section 107C(j) as precluding the plaintiff from admitting evidence that proved she had used her seat belt.[110] Essentially, the court held that the purpose of the statute was "to make clear that the sole legal sanction for the failure to wear a seat belt is the criminal penalty provided by the statute and that the failure could not be used against the injured person in a civil trial."[111] In other words, the statute did not bar a plaintiff from introducing evidence of seat belt use when the claim revolved around the issue of a seat belt defect.[112]

Nevertheless, as a result of the 1985 codification of *Carnation Co.*, there was no possibility for a tort litigant to raise a seat belt defense in Texas because for nearly two decades the statute continued to prevent admission of seat belt nonuse evidence when it was being offered in an attempt to reduce a defendant's liability.[113]

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disallowed seat belt nonuse evidence from being admitted, and this ended judicial opinion on the matter).

105. Act of June 15, 1985, 69th Leg., R.S., ch. 804, § 1, 1985 Tex. Gen. Laws 2846, 2846-47 (amended 1995) (repealed 2003).

106. 878 S.W.2d 132 (Tex. 1994).

107. Bridgestone/Firestone, Inc. v. Glyn-Jones, 878 S.W.2d 132, 133 (Tex. 1994).

108. *Id.*

109. *Id.*

110. *See id.* (stating that it was not the intent of the legislature to bar the use of such evidence).

111. *Id.* at 134.

112. *See Bridgestone/Firestone, Inc.*, 878 S.W.2d at 134 (finding that "[t]he legislature did not . . . seek to preclude plaintiffs from bringing claims against seat belt manufacturers for injuries caused by defective seat belts").

113. *See* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1403 (1999) (providing that *Bridgestone/Firestone, Inc.* never discussed using seat belt nonuse evidence to reduce the defendant's liability). *See generally Bridgestone/Firestone, Inc.*, 878 S.W.2d at 132 (limiting the holding to products liability claims involving seat belt manufacturers).

III. Whether a Seat Belt Defense Should Be Recognized in Texas in Light of Recent Legislative Changes

On June 11, 2003, Texas Governor Rick Perry signed into law House Bill 4.[114] "HB 4 is a monumental piece of legislation," both in size and in effect.[115] In the words of one commentator, "this . . . legislation changes the face of civil litigation in the State of Texas perhaps more comprehensively than every other piece of legislation combined since the Reconstruction Era."[116]

One such area that House Bill 4 has affected is litigation involving motor vehicle collisions.[117] In automobile collision litigation, House Bill 4 appears to authorize the admission of evidence regarding seat belt usage.[118] The old legislative language making seat belt evidence inadmissible has been deleted,[119] which strongly implies that defendants in civil suits can now attempt to successfully raise the seat belt defense. Despite this implication, the defense has yet to be recognized in Texas.

A. *A Policy Argument in Favor of Recognition*

Recognition of the seat belt defense would be consistent with the policies of deterrence of harmful conduct and promotion of individual responsibility. A guiding principle of tort law policy is that liability should be imposed to deter certain types of undesirable conduct.[120] If Texas rec-

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114. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847.

115. Scott Rothenberg, *House Bill 4: A User-Friendly Guide*, 66 Tex. B.J. 702, 702 (2003) (noting that the legislation contains sixty-two pages of text).

116. *See id.* (commenting that "virtually every provision of HB 4 is designed to make it more difficult or more costly for plaintiffs in civil litigation to obtain monetary damages and other civil remedies in lawsuits tried under Texas law").

117. *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863 (deleting the language of Section 545.413(g), Transportation Code, which had previously disallowed using seat belt nonuse evidence in civil litigation involving automobile collisions); Scott Rothenberg, *House Bill 4: A User-Friendly Guide*, 66 Tex. B.J. 702, 703 (2003) (stating that Article 8 of HB 4 addresses the issue of the seat belt defense).

118. *See* Scott Rothenberg, *House Bill 4: A User-Friendly Guide*, 66 Tex. B.J. 702, 706 (2003) (asserting that "[a]rticle 8 of HB 4 authorizes use of the 'seat belt' defense in motor vehicle collision litigation").

119. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863.

120. *See* Dan B. Dobbs, The Law of Torts § 11, at 19 (2001) (noting that an "aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm").

> The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage. In some cases, this means nothing more than that liability should be imposed on those

ognizes the seat belt defense, automobile occupants are more likely to use available seat belts because they will know that their failure to do so could reduce their recovery for damages resulting from another person's negligence.[121] An increase in seat belt usage will tend to minimize damages resulting from automobile accidents.[122]

Another aspect of public policy that will be furthered through Texas's recognition of the seat belt defense is the promotion of individual responsibility.[123] If a plaintiff refuses to use a seat belt, the plaintiff should be held accountable for a portion of the damages that result from the nonuse.[124] Recognition of the defense achieves this desirable result. By rejecting the defense, courts not only fail to hold the plaintiff accountable for his contribution to the injuries sustained, but they reward the plaintiff for acting carelessly by allowing recovery for damages that could have been reduced if the plaintiff had worn a seat belt.[125]

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who deliberately inflict injury or cause harm by ignoring foreseeable risks. In other situations, such as those where a risk of harm is equally foreseeable to more than one person, the policy of deterrence favors placing the threat of liability on the party best situated to avoid the loss, or, as some might say, the cheapest cost avoider.

VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (2d ed. 1999).

121. *See* DAN B. DOBBS, THE LAW OF TORTS § 11, at 19 (2001) (commenting that "[t]he idea of deterrence is not so much that an individual, having been held liable for a tort, would thereafter conduct himself better[, but] . . . rather [it is] the idea that all persons, recognizing potential tort liability, would tend to avoid conduct that could lead to tort liability").

122. *See* National Highway Traffic Safety Administration (NHTSA) (noting that an increase in seat belt usage would decrease the number of injuries and fatalities resulting from car collisions), *at* http://www.nhtsa.dot.gov/nhtsa/announce/press/pressdisplay.cfm?year=2002&filename=pr58-02.html (last visited Feb. 24, 2004) (on file with the *St. Mary's Law Journal*).

123. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 8 (2d ed. 1999) (suggesting that "tort law should encourage individuals to employ available resources to protect their own interests, rather than depend upon others to save them from harm").

124. *See* Law v. Superior Court, 755 P.2d 1135, 1143 (Ariz. 1988) (recognizing that a person who decides not to wear a simple safety device, such as a seat belt, may be negligent).

125. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (commenting that "[w]hen the seatbelt defense is not allowed, plaintiffs recover for damages that would not have occurred but for their failure to buckle up").

B. *Recognition of the Seat Belt Defense Is Within the Purview of the Judiciary*

Texas's recognition of the seat belt defense was precluded by Section 545.413(g) of the Texas Transportation Code.[126] However, the language of that section has been deleted, and the changes wrought by House Bill 4 permit recognition of the defense, although no guidance has been provided on how the defense should be structured.[127]

An obvious implication that follows from the legislature's deletion of the language barring evidence of seat belt nonuse is that the legislature has no objection to courts addressing related issues. In addition, "court[s have] an obligation to participate in the evolution of tort law so that [the judiciary] may reflect societal and technological changes."[128] The refusal by many courts to recognize the defense was excusable in the past,[129] when contributory negligence was the rule and nonuse of seat belts was the norm.[130] Today, however, carelessness on the part of the plaintiff is often only a partial defense, and seat belt use is common and legally required in a wide range of circumstances. In light of these changes, courts should actively address whether prevailing comparative responsibility principles warrant recognition of a seat belt defense.[131]

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126. Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1643 (repealed 2003); *see also* Peter Scaff, Comment, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371, 1390 (1999) (writing that, because of Section 107C(j), which was codified in Section 545.413(g) of the Texas Transportation Code, evidence of nonuse of a safety belt was simply inadmissible); Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 198 (1990) (reiterating that the statute prohibited seat belt nonuse evidence from being admitted in a civil trial).

127. House Bill 4 has provided for recognition of the defense simply by deleting the previous non-recognition language. *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863 (deleting the language of Section 545.413(g), Transportation Code, which had previously disallowed using seat belt nonuse evidence in civil litigation involving automobile collisions).

128. *Id.* at 1144.

129. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 406 (2002).

130. *See* Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 189 (1990) (reiterating that "[s]eatbelt evidence did not fit easily within the doctrine of contributory negligence, which traditionally applied only where the plaintiff's failure to exercise due care caused the accident in whole or in part").

131. *See* Law v. Superior Court, 755 P.2d 1135, 1143 (Ariz. 1988) (analyzing the comparative fault statute in Arizona and concluding that it supports recognition of the seat belt defense).

C. *The Seat Belt Defense Should Be Recognized As a Form of Comparative Responsibility*

The courts of Texas should follow Arizona and recognize the defense as a form of comparative responsibility.[132] Arizona judicially adopted the defense because of the lack of statutory language addressing it.[133] Texas is in a similar situation because there is no statute addressing either recognition or non-recognition.[134]

Several years ago, Arizona was one of several states that had not enacted a mandatory seat belt statute.[135] Not until 1997 was such a statute promulgated in Arizona.[136] Although Arizona presently has a statute requiring safety belt usage,[137] the state recognized the seat belt defense as a form of comparative fault a decade before the statute came to fruition.[138]

Arizona's unique history of the seat belt defense is significant because in most jurisdictions, the absence of a mandatory seat belt statute would entirely eliminate the issue of the defense.[139] In Arizona, that was not the case.[140] In the words of the Arizona Supreme Court, "under the com-

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132. *See id.* at 1145 (recognizing in Arizona that "under the theory of comparative 'fault,' nonuse of a seat belt is a factor that the jury may consider and use to reduce damages").

133. *See id.* at 1143 (finding there was no statute in Arizona forbidding consideration of evidence that a motorist failed to wear a safety belt).

134. The only statute that addressed evidence of seat belt usage, Texas Transportation Code Section 545.413(g), was repealed. Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1643, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 8.01, 2003 Tex. Gen. Laws 847, 863.

135. *See* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 241 (1998) (finding there was no mandatory seat belt usage statute in Arizona when this note was written). Arizona recently enacted a mandatory seat belt statute. *See* ARIZ. REV. STAT. ANN. § 28-909(A) (West 1998 & Supp. 2003) (requiring shoulder and lap belts to be properly fastened while the car is in motion).

136. ARIZ. REV. STAT. ANN. § 28-909(A) (West 1998 & Supp. 2003).

137. *See id.* (requiring shoulder and lap belts to be properly fastened while the car is in motion).

138. *Compare id.* (mandating seat belt usage in Arizona), *with Law*, 755 P.2d at 1143 (recognizing the seat belt defense despite the lack of a statute requiring seat belt use).

139. Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 241 (1998); *see also* Britton v. Doehring, 242 So. 2d 666, 675 (Ala. 1970) (holding, in part, that because there was no statutory requirement mandating seat belt usage in Alabama, there was no reason to recognize the defense); Miller v. Haynes, 454 S.W.2d 293, 301 (Mo. Ct. App. 1970) (deciding that because "there [was] no duty to fasten a seat belt, such a failure [could not] be held to be a breach of the duty to minimize damages").

140. *See generally* Law v. Superior Court, 755 P.2d 1135 (Ariz. 1988) (recognizing the seat belt defense in Arizona, despite the lack of a mandatory seat belt usage statute). Instead, Arizona courts held that the issue of fault was not a matter of whether the plaintiff had a duty to wear a safety belt. *See id.* at 1143 (stating that "[o]ur examination of the

parative fault statute, each person is under an obligation to act reasonably to minimize foreseeable injuries and damages. Thus, if a person chooses not to use an available, simple safety device, that person may be at 'fault.'"[141] It follows that in some situations, damages may be reduced when evidence of safety belt nonuse is considered.[142] An example is a situation in which the nonuse causes injuries that would not have occurred if the seat belt had been used.[143]

Arizona's manner of recognizing the defense presents one obvious difference between Arizona and Texas—unlike Arizona when it recognized the seat belt defense,[144] Texas has a mandatory seat belt usage law.[145] But this difference supports the argument for recognition in Texas in that if Arizona could recognize the defense despite the lack of even having a statute mandating seat belt usage, Texas should be even more justified in recognizing the defense because Texas has a statute requiring automobile occupants to wear seat belts.[146] In Texas, if an automobile occupant is caught not wearing a seat belt, he or she will be ticketed for breaking the

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applicable caselaw and our analysis of the concept of 'duty' lead us to the conclusion that the seat belt defense is not a question of duty at all"); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 241 (1998) (explaining that in Arizona, the courts emphasized that fault was not determined by deciding whether a plaintiff had a certain duty to wear a safety belt).

141. *Law*, 755 P.2d at 1143; *see also* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 241 (1998) (quoting *Law*).

142. *See Law*, 755 P.2d at 1145 (delineating the conditions where evidence of nonuse could be a factor that juries consider); *see also* Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 241-42 (1998) (paraphrasing the circumstances where damages may be reduced).

143. *Law*, 755 P.2d at 1145. Other conditions where nonuse of a safety belt could be a factor considered by the jury are as follows: where the injury occurred after the comparative negligence statute went into effect; where the nonuse of the seat belt was unreasonable, considering all of the circumstances; where nonuse enhances the injuries that occurred; "where the injured party is of an age and discretion that his or her nonuse could be considered as 'fault'"; and where the evidence of nonuse proves with a reasonable likelihood the degree of enhancement. *Id.*

144. *See id.* at 1143 (recognizing the seat belt defense despite the lack of a statute requiring seat belt use).

145. *See* TEX. TRANSP. CODE ANN. § 545.413(a) (Vernon 2002 & Supp. 2004) (mandating seat belt usage). The Texas statute provides:

> (a) A person commits an offense if the person:
> (1) is at least 15 years of age;
> (2) is riding in the front seat of a passenger vehicle while the vehicle is being operated;
> (3) is occupying a seat that is equipped with a safety belt; and
> (4) is not secured by a safety belt.

Id.

146. *Id.*

law.[147] This violation of the law is punished, albeit minimally, in an attempt to compel automobile occupants to use available safety belts because using them could prevent or greatly reduce potential injuries.[148] The automobile occupant is no less at fault for not wearing a seat belt simply because a negligent defendant collides with the occupant's car. Rather, the automobile occupant is still at fault because a reasonable person in the occupant's position knows or should know that failing to buckle up is not only against the law, but that it is an act of refusal to do what would otherwise minimize foreseeable injuries.[149] Based upon the comparative responsibility statute in Texas, if that automobile occupant brings a negligence claim against the defendant who caused the collision, the defendant should now be able to submit evidence of the automobile occupant's nonuse.[150] The comparative responsibility statute in Texas provides: "[T]he court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility."[151] Texas defines "percentage of responsibility" as

> that percentage, stated in whole numbers, attributed by the trier of fact to each claimant, each defendant, each settling person, or each responsible third party with respect to causing or contributing to

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147. *See id.* § 545.413(d) (providing that "[a]n offense under [the mandatory seat belt usage statute] is a misdemeanor punishable by a fine of not less than $25 or more than $50").

148. *See* DAVID G. OWEN ET AL., 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 21:7 (3d ed. 2000) (asserting that "occupants of automotive vehicles who fail to use their seatbelts significantly increase the risk of being seriously injured or killed in accident situations"); National Highway Traffic Safety Administration (NHTSA), *Seat Belt Use by Drivers, Passengers Reaches 75 Percent, NHTSA Reports* (Sept. 9, 2002) (disclosing that a relatively small increase in seat belt usage could reduce the number of fatalities in the United States by five hundred), *at* http://www.nhtsa.dot.gov/nhtsa/announce/press/pressdisplay.cfm?year=2002&filename=pr8-02.html (on file with the *St. Mary's Law Journal*).

149. *See Law*, 755 P.2d at 1143 (stating that "under the comparative fault statute, each person is under an obligation to act reasonably to minimize foreseeable injuries and damages"); Dunn v. Durso, 530 A.2d 387, 392-93 (N.J. Super. Ct. Law Div. 1986) (deciding that "it is 'obvious' and a 'matter of common knowledge' that wearing seat belts, on the average, serves to prevent or minimize injuries"); Foley v. City of West Allis, 335 N.W.2d 824, 828 (Wis. 1983) (holding that the seat belt defense should be recognized because it is "public knowledge that riders and drivers should 'buckle up for safety,'" and "those who fail to use available seat belts should be held responsible for the incremental harm caused by their failure to wear available seat belts").

150. *See* DAN B. DOBBS, THE LAW OF TORTS § 205, at 514 (2001) (explaining that a "failure to use [a] seatbelt does not normally cause injuries in the initial impact, only injury from a 'second collision' when the unbelted plaintiff is thrown out of the car or against an object in the car").

151. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (Vernon 2002 & Supp. 2004).

> cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.[152]

Based upon this definition of responsibility, the plaintiff (claimant) is responsible for a portion of the injuries suffered because the plaintiff contributed to the cause of the injuries through a negligent omission. The negligent omission is the failure to use the seat belt. Of course, it would be manifestly unfair to hold that because the plaintiff failed to buckle his safety belt, the plaintiff should be responsible for "causing or contributing to cause"[153] the initial collision[154] with the defendant.[155] Aside from other circumstances that could lead to the conclusion that the plaintiff was partly responsible for causing the initial collision (for example, running a red light at an intersection), failing to wear a seat belt could in no way be construed as "causing or contributing to cause"[156] the initial collision.[157] But in many automobile collisions, the initial collision leads to a second collision between the plaintiff passenger and the interior of the

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152. *Id.* § 33.011(4). The statute in Texas that decides how the percentage of responsibility is to be determined provides in pertinent part:

> The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
> (1) each claimant;
> (2) each defendant;
> (3) each settling person; and
> (4) each responsible third party who has been designated [as such].

Id. § 33.003.

153. *Id.* § 33.011(4).

154. *See* Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 322 n.20 (1986) (arguing that damages resulting from the initial collision are recoverable regardless of whether the plaintiff was wearing a safety belt because the damages would have happened anyway).

155. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 430 (2002) (claiming that only in the rarest of situations would the failure to use a seat belt be the actual cause of the accident).

156. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(4) (Vernon 2002 & Supp. 2004).

157. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 430 (2002).

automobile.[158] The damages resulting from this second collision could be prevented or greatly reduced if a seat belt is properly worn.[159] Therefore, by failing to wear a seat belt, the plaintiff could be found to have caused or contributed to the cause of the second collision, which is part of the "personal injury . . . or other harm for which recovery of damages is sought."[160]

Since the plaintiff will be bringing a claim against the defendant for the defendant's negligent act of colliding with the plaintiff's car, and since the plaintiff must prove damages resulting from the collision, the defendant should be allowed to admit evidence of the plaintiff's nonuse of a seat belt in an attempt to prove that such evidence shows the plaintiff caused or contributed to the cause of the plaintiff's own personal injuries.[161] If the defendant is successful, the plaintiff's damage award must be reduced in proportion to the plaintiff's percentage of responsibility.[162]

To determine the plaintiff's percentage of responsibility, it is necessary to first separate the two collisions and then to allow the trier of fact to perform a fault analysis on both collisions.[163] The fault determination in the first collision should proceed as it would in any normal negligence action—if the plaintiff is found not to have caused or contributed to causing the collision, the plaintiff should receive the full amount of damages

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158. *See* Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 322 n.21 (1986) (describing second collision injuries as enhanced injuries that would have been prevented had a safety belt been worn). Second collisions normally result in the automobile occupant making contact with the interior of the automobile. DAN B. DOBBS, THE LAW OF TORTS § 205, at 514 (2001); Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 322 n.21 (1986); *see also* Juli Spector, Comment, *The Continuing Controversy of the Seatbelt Defense*, 27 HOUS. L. REV. 179, 190 (1990) (explaining that "second collision" accidents are foreseeable).

159. *See* DAVID G. OWEN ET AL., 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 21:7 (3d ed. 2003) (emphasizing that nonuse of a safety belt significantly increases a person's risk of being injured).

160. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(4); Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 345 (1986).

161. *See* Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 345 (1986) (proposing that evidence of the plaintiff's nonuse be admitted because it is probative of comparative fault).

162. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (Vernon 2002 & Supp. 2004).

163. *See* Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 346 (1986) (encouraging separate fault comparisons to be performed on each collision).

awarded.[164] In the second collision, the jury should determine what percentage of responsibility to assign to the plaintiff with respect to the cause of the personal injury resulting from the nonuse of a seat belt.[165] The defendant should bear the burden of introducing expert testimony to bifurcate the injuries from the first collision with those resulting from the second collision.[166]

D. *Opposition to Recognition*

Opponents of the seat belt defense typically assert several different arguments against recognition of the defense.[167] The four primary arguments against recognition are: a plaintiff does not need to anticipate a defendant's negligence,[168] recognizing the defense would create a windfall for defendants,[169] failure to wear a safety belt does not cause the accident,[170] and recognizing the defense will create an undue complication of litigation.[171]

The first argument against recognition states that a plaintiff does not need to anticipate a defendant's negligence.[172] Opponents who make this argument contend that by recognizing the seat belt defense, the plaintiff is forced to anticipate a defendant's negligence by having to wear a safety belt.[173] This argument is correct in recognizing that the defense will require seat belt usage in an attempt to guard against the negligence of

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164. *Id.* at 347.

165. *See id.* (explaining the necessity of comparing the plaintiff's fault with that of the defendant in determining the damages of the second collision).

166. Law v. Superior Court, 755 P.2d 1135, 1144 (Ariz. 1988); Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 346 (1986).

167. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 428-29 (2002) (criticizing these arguments as being misleading).

168. *Law*, 755 P.2d at 1137; Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002).

169. *Law*, 755 P.2d at 1137; Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002).

170. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 430 (2002).

171. *Law*, 755 P.2d at 1144.

172. *Id.* at 1137; Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002).

173. *See Law*, 755 P.2d at 1137 (recognizing one of the plaintiffs' arguments); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (dispelling the argument that the negligence of others does not have to be anticipated).

others.[174] But the argument is incorrect when it asserts that a plaintiff should not have to meet this requirement.[175] During a person's lifetime, the probability that an automobile accident will cause an injury is near certainty.[176] Public policy dictates that all motorists should guard against accidents[177]—accidents that are not just foreseeable, but highly likely to occur.[178] In reality, "[t]here is nothing to anticipate; the negligence of motorists is omnipresent."[179]

Another argument that is made against recognizing the defense asserts that doing so would create a windfall for defendants.[180] Critics of the defense assert that defendants will unfairly and unnecessarily benefit from plaintiffs' recoveries being reduced as a result of the plaintiffs' failure to use safety belts.[181] This assertion lacks merit because it fails to recognize that a negligent defendant will still be held responsible for his percentage of fault in causing the personal injury of the plaintiff in both the first and second collisions.[182] In the opponents' alternative outcome—where the failure to wear a seat belt does not reduce the plaintiff's recovery—the plaintiff actually benefits from his contribution to his own injuries.[183] Therefore, by not recognizing the defense, plaintiffs re-

174. *Law*, 755 P.2d at 1140.

175. *See id.* (stating that everyone must take reasonable measures to protect themselves because of the commonality of automobile accidents); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (quoting *Law*, 755 P.2d at 1140).

176. *See Law*, 755 P.2d at 1140 (citing John A. Hoglund & A. Peter Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law*, 50 WASH. L. REV. 1, 3 (1974)); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (quoting *Law*, 755 P.2d at 1140).

177. *Law*, 755 P.2d at 1140; *see also* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (warning that every motorist should prepare against automobile accidents by latching a seat belt).

178. *See Law*, 755 P.2d at 1140 (discussing the virtual certainty of an accident occurring sooner or later).

179. *Id.*

180. *Law*, 755 P.2d at 1144; Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002).

181. *Law*, 755 P.2d at 1144; Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002).

182. *See* Law v. Superior Court, 755 P.2d 1135, 1144 (Ariz. 1988) (stating that "some tortfeasors may pay less than they otherwise *would*, [but] not . . . less than they *should*"); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (recognizing that plaintiffs will still recover damages resulting from the negligence of defendants).

183. *See* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (arguing that without the seat belt defense, the plaintiff will recover for damages that could have been prevented had a safety belt been used).

ceive the windfall by recovering those damages that are the direct result of their failure to use their seat belts.[184]

Opponents also argue that a failure to wear a safety belt does not cause the accident.[185] Opponents are correct in contending that a failure to buckle a seat belt does not cause the accident.[186] However, such opponents could only be referring to the initial cause of the first collision.[187] Beyond that, the contention is in conflict with the Texas definition of responsibility. In a second collision analysis, the plaintiff's failure to wear a safety belt is an omission that could be found to have caused the second collision between the plaintiff and the interior of the automobile.[188]

A final argument against recognizing the defense is that recognition will create an undue complication of litigation.[189] Because a defendant may use experts to help lay the foundation for the defense, some opponents argue that this will unduly complicate litigation, thereby confusing the jury.[190] Yet comparative responsibility requires juries to apportion fault based on the jury's consideration of all the evidence, including expert testimony.[191] The overall process may add some time to deliberation and create a new issue for the jury to work through, but this process is neither an excuse nor justification for not recognizing the seat belt defense.[192]

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184. *See Law*, 755 P.2d at 1144 (finding that "[i]f a victim unreasonably failed to use an available, simple prophylactic device, then he will not be able to recover for damages created or enhanced by the nonuse"); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 429 (2002) (asserting that refusing to recognize the seat belt defense will create windfalls for plaintiffs).

185. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 430 (2002).

186. *Id.*

187. *See id.* (commenting that "[i]n only the wildest of fact patterns could one imagine the failure to wear a seatbeat as the actual cause of an accident").

188. TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(4) (Vernon 2002 & Supp. 2004); *see also* Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 430 (2002) (indicating that the seat belt defense has nothing to do with determining how the initial collision happened, but rather it is used to show what caused the subsequent injuries suffered by the plaintiff).

189. *Law*, 755 P.2d at 1144.

190. *Id.*

191. *Id.*

192. *See id.* at 1145 (concluding that "[t]here is no doubt that the seat belt defense will complicate and lengthen litigation in some cases" which "does not militate in favor of its acceptance, [but] . . . the problem is no different in principle from that posed by any legal, technological or scientific advance").

IV. Conclusion

In light of recent legislative changes, it is time for the courts of Texas to dispose of past judicial decisions refusing to recognize the seat belt defense. The Texas judiciary has been presented with a tremendous opportunity. The exact manner for recognizing the defense has been placed in the hands of the courts of Texas. It is time for Texas to judicially join the growing number of American jurisdictions that accept the seat belt defense as a form of comparative responsibility, because "[r]ejection of the seat belt defense can no longer be based on the antediluvian doctrine"[193] that has been used to justify its non-recognition.

193. *Id.* at 1140.