Seat Belts and Contributory Negligence

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I. Introduction

There are now thirty-six cases mentioned in the Canadian and English reports where it has been argued that the failure to wear a seat belt amounts to contributory negligence.\(^1\) The defence was successfully made out in only ten of these cases, with damages being reduced by five per cent to thirty-three and a third per cent under the applicable contributory negligence statutes.\(^2\) This volume of litigation would not provoke comment were it not for the division of judicial opinion and the confusion of judicial thinking to be found in these conflicting decisions. Even in England where it was thought that the seat belt defence was well-established, some uncertainty recently arose over the availability of the defence.\(^3\) This doubt has now been removed by the Court of Appeal,\(^4\) but this decision has yet to have an impact on the Canadian scene, where the position remains unsettled.\(^5\) The present uncertain state of the law makes it useful to attempt to lay down a theoretical framework within which the issue can be discussed. The seat belt cases are also of interest and worthy of discussion for a number of other reasons. First of all


\(^{3}\) See K. Williams, Comment (1975), 53 Can. B. Rev. 113 at 116; K. Williams, Correspondence (1976), 54 Can. B. Rev. 497


\(^{5}\) *Infra*, notes 124-131
they are important in that the reasoning in them is applicable by analogy to any case in which the failure to use safety equipment is an issue. Secondly, they represent an interesting application of the principles of contributory negligence, in that it is not argued that the plaintiff contributed to the accident, but rather that he contributed to the damage. Finally, the topic deserves attention because of recent legislative activity in the area.

The defence of contributory negligence in relation to the non-use of a safety device involves the proof of four factors. Initially it must be shown that the plaintiff was exposed to some unreasonable risk against which a reasonable person would take precautions. Then it must be shown that the safety device in question is generally effective either in reducing the risk of an accident, or alternatively in reducing the damage that would normally result if that risk materialized. Thirdly, it must be shown that the device was available to the plaintiff, but that the plaintiff did not make use of it. Finally, it must be shown that the plaintiff’s neglect in failing to use the device in fact caused the plaintiff’s injury to be worse or, put another way, that the device if used would actually have prevented some of the resulting damage. The application of each of these requirements to the use of seat belts will be discussed in turn, after which the apportionment procedure and the legislative activity in the field will be examined.

II. The Unreasonable Risk

In order to find the plaintiff contributorily negligent it is necessary to show that he failed to take reasonable care to ensure his own safety.6 In the seat belt cases this translates into showing that the plaintiff’s failure to wear the seat belt was unreasonable conduct on his part. This in turn requires that the defendant show that there was present some danger or risk of such magnitude that it was unreasonable for the plaintiff not to take steps to ensure his own safety. It is on this point, the risk involved in being a driver or passenger in a motor vehicle, that a good deal of the difference in judicial opinion rests.7 Is the chance of being involved in an accident and suffering injury while on Canadian highways an “unreasonable” risk?

It would seem clear that the reasonable person is aware that there are accidents on the highways, and that damage results from many of these accidents. Indeed he may even have seen such an occurrence from his seat on the Clapham omnibus. But this is not enough, for the reasonable person does not take precautions to prevent every risk that is foreseeable. It is necessary that the risk be such that the reasonable person would think it improper not to take some precaution. The reasonable person would, however, take account of even a relatively small risk. It should be noted that it is not necessary for the plaintiff to actually foresee the exact risk that arises, as was suggested in one case where the seat belt defence was not recognized. It is only necessary that the general risk be foreseeable by a reasonable person.

In addition to it being clear that there are a great number of accidents on Canadian highways, it is also notorious that death is not an uncommon result of these accidents. This is significant because in determining what risks the reasonable person would guard against "not only the greater risk of injury, but the risk of greater injury is a relevant factor."

Another factor that is relevant is the cost involved in abating or not running the risk, as compared to the benefits to be derived from the activity in question. The greater the relative cost, the more the reasonable person may be inclined to take the risk without the necessary precautions. In Bolton v. Stone, Lord Reid suggested that this was not a factor to be considered, but there is a considerable body of opinion to the contrary. That the cost should be considered is only reasonable, for no one would argue that everyone should give up driving, or drive constantly at five miles per hour,

13. [1951] A.C. 850 at 867; [1951] 1 All E.R. 1078 at 1086
because this is sure to end all accidents. The social cost would be too high, and each person must bear some risks for the general benefit of all persons. In the seat belt cases this factor must weigh against the plaintiff. In a car equipped with seat belts the cost to the plaintiff of using them is but a few seconds of the passenger’s time. The belts are “easily and quickly put on and worn” and the fact that they might be somewhat uncomfortable for some people, or that they may “spoil a special evening dress” would hardly seem a good reason to run the risks attached to not using them.

If the relative cost test was used alone, it would seem that the reasonable motorist would be required to wear his seat belt. There are, however, a number of arguments presented in support of the opposite view. First, it has been submitted that a plaintiff should not be held to be negligent for not wearing a seat belt, as this would lead to ridiculous results. It is said that such a decision would force the courts to find negligence in a driver who did not wear a helmet, did not wear a shoulder harness, did not drive an armoured car, did not avoid smaller cars that are more susceptible to damage, or did not carry a fire extinguisher. The answer to this argument is found in another argument that is used against the seat belt defence, which is that it is not every prudent act that gives rise to a duty at law. This latter statement is correct, and if one takes the view that accidents are so rare, and preventable damage so slight that the reasonable person would not take them into account, then it is not negligent to fail to use a seat belt. It does not, however, logically follow that if seat belts must be used, all these other precautions must also be used. The cost of each precaution must be measured against the likelihood of the occurrence of, and the probable extent of preventable damage arising out of the risk they are each designated to counteract, in accordance with the principles stated

above. If it appears that head injuries and fires are very rare in automobile accidents then helmets and fire extinguishers are not needed. Further, the cost of large or armoured cars may speak against their general use. Likewise the seat belt issue must be decided on its own merits. Recognizing the seat belt defence will not open the floodgates of safety.

Secondly, in discussing the question of the risk involved in driving, it is sometimes argued that the plaintiff should be entitled to assume that other persons will not act negligently, and there is authority for this view. This assumption should only be allowed, however, in situations where other persons are not so habitually negligent that the reasonable person would begin to make allowance for them. The argument therefore begs the question, for in deciding if the risk of the road is such that the plaintiff must take reasonable care for his own safety, one must ask how many negligent drivers are about. If they are numerous, then the plaintiff may not assume that others will drive carefully, for the risk that they represent is an unreasonable one. If they are few, then he is entitled to make this assumption for the reasonable person would ignore the risk they create. However, even if one is prepared on grounds of public policy to allow the plaintiff to make this assumption, that is not the end of the matter. Not only bad drivers, but bad weather, bad roads and bad equipment contribute to accidents, and there is no suggestion that the plaintiff may assume these factors away. It is the cumulative danger of the road that calls for the wearing of the seat belt. A rule ignoring the negligent driver will only reduce, not eliminate, the danger facing the potential victim.

Finally, there has been some support for the view that it is an interference with individual freedom of choice to force a person to wear a belt where, for whatever personal reasons, he does not wish to. There are two answers to this argument. First, the standard of

care in negligence has always been an objective one. Thus it should not matter that the plaintiff held an honest belief that seat belts are dangerous,\textsuperscript{27} that the plaintiff had never seen a seat belt,\textsuperscript{28} or that the plaintiff never gave any thought to wearing a belt.\textsuperscript{29} What the plaintiff's subjective view of the situation is, or what he thinks or believes is good for himself at the time, cannot have any effect on the reasonable person standard against which his conduct must be measured.\textsuperscript{30} The second answer is that if the plaintiff insists on the freedom to act according to his personal views or comfort, he cannot then expect the defendant to bear the loss that results when his decision turns out to be the wrong one. "Any person who conscientiously objects to the wearing of a seat belt must recognize that he dispenses with the use of an accepted safety device at his peril".\textsuperscript{31}

In 1974, there were 610,836 reported accidents in Canada, resulting in 6,373 deaths and 204,587 injuries.\textsuperscript{32} These figures represent 5.9 accidents for every one million vehicle miles driven in Canada.\textsuperscript{33} One out of every ten cars is involved in an accident each year.\textsuperscript{34} It is estimated that over the next forty years, thirty-two per cent of the current population of Ontario will be killed or injured in automobile accidents.\textsuperscript{35} Whether these facts amount to such a risk as to cause a reasonable person to act for his own safety is of course a matter of opinion. One suspects that some of those who say it is not do so because they are offended at the thought that a negligent defendant who has caused an accident will be able to throw some responsibility on the plaintiff, who has at most worsened his own injuries.\textsuperscript{36} The feeling is that the "motorist who drives carefully and

\textsuperscript{27} Id. at 294E; [1975] 3 All E.R. at 526
\textsuperscript{28} Geier v. Kujawa, [1970] I Lloyd's Rep. 364
\textsuperscript{31} Drage v. Smith, [1975] R.T.R. 1 at 5H; see also Froom v. Butcher, id. at 293D, 296E; [1975] 3 All E.R. at 525, 528
\textsuperscript{32} Statistics Canada, Canada Yearbook 1974(Ottawa: Information Canada, 1974) at 48
\textsuperscript{33} Statistics Canada, Motor Vehicle Traffic Accidents (Ottawa: Information Canada, 1974) at 12
\textsuperscript{34} Insurance Bureau of Canada, You and Your Car Insurance (Pamphlet)
\textsuperscript{35} Ont. Leg. Debates (December 2, 1975) at 1185
lawfully”, the “innocent injured victim” should not be penalized, especially where the defendant has been grossly negligent or where the loss will really fall on an insurance company. Here the conclusion precedes the reasoning, for the whole purpose of the judicial inquiry is to decide if the injured victim is in fact innocent. Whatever the motivation behind the decisions, there are two possible answers that can be given. First, it could be decided that the risk of driving is always unreasonable, and that it is always negligent not to wear a seat belt. This seems to be the position in England since the Court of Appeal decision in *Froom v. Butcher*. The second approach would be to argue that while it is not always negligent not to wear a seat belt, it may be in some individual cases. The condition of the road, the hour of the day, the condition of the car and the length of the journey would have to be looked at in each case. Thus one might suspect that even if it is not always negligence to not wear a seat belt, it would be so where the roads are “very icy and dangerous to travel”, where the express purpose of the trip was to test the performance of a particularly high powered car, or where the plaintiff had had occasion to tell the driver to be more careful. This second approach appears to have been taken in some cases.

The New Brunswick Court of Appeal has said that failure to wear a seat belt is not *per se* negligence. It is not clear whether the

38. *Smith v. Blackburn*, [1974] R.T.R. 533 at 536C; [1974] 2 Lloyd’s Rep. 229 at 235. It is generally thought that the courts may not take the insurance position into account, even though, as will be seen later (infra, note 112), the legislature may have. See Williams, *supra*, note 3 at 116
Court simply means that the defence must also prove causation, as Stevenson J. interpreted these words, or if they are saying that negligence must be proven in each particular factual situation. Even if one does not accept the first position, it would not seem to be open to rule as a matter of law (in the absence of a statutory provision) that the defence can never prove that the failure to wear a seat belt was negligence. The second argument must always be available in factual situations where an extreme risk of damage was present.

In summary, there are two clear views on whether the roads represent such an unreasonable risk that the motorist is under a legal duty to wear his seat belt. Shaw J., who is representative of one side, has expressed the opinion that an accident is a "vague and distant contingency", and concluded

The regular toll of death and injury on the highways is tragic indeed; but one hopes that travelling in a motor car does not yet, and never will, involve the incidence of imminent risk to life and limb. A principle of law based on the assumption that it does, has a morbid tinge and is not salutary or necessary in the public interest.

On the other hand there are those who feel that the risks of the road have reached the point where the reasonable person must take care. The risk is thought to be such that, on the application of the legal principles stated above, it is unreasonable conduct not to wear a seat belt. Whether the optimists or the pessimists will prevail in Canada remains to be seen. It is submitted, however, that most of the arguments presented against the recognition of the seat belt defence will not stand up under close examination. The ease with which the belts can be used combined with what danger can clearly be shown to exist in using the highways is sufficient to establish a risk against which the reasonable person would take precautions.

III. The General Effectiveness of the Device

In order to find contributory negligence in the plaintiff for failure to

use a safety device, it is not sufficient to show that there was an unreasonable risk present. One must also demonstrate either that the safety device is of value in preventing the type of accident that is foreseeable, or that should that risk materialize the safety device will usually reduce the resulting damage. Clearly there can be no negligence if the device is in general ineffective, even if in the one particular case it might have been effective. Again, the trouble involved in taking the protective step must be looked at. As has been mentioned the inconvenience in using a seat belt is very slight, and so the reasonable person would use it in the face of an unreasonable risk even if it only offered a small amount of protection.

Many of the early cases seem to have been decided against the defendant as much because of a failure to prove the effectiveness of seat belts as for any other reason. So Dubinsky J. said in 1968 that "the effectiveness of seat belts is still in the realm of speculation and controversy". There are two lines of attack used. Either it is suggested that seat belts do not reduce damage, or it is suggested that they actually increase damage. In a variation on the first approach it is sometimes said that injuries with a seat belt will not be less severe, just different; that the plaintiff is just trading one type of injury for another. There is in fact some evidence that a seat belt can cause injury, especially when improperly used, but in the vast majority of cases these injuries will be less severe than those that would otherwise have resulted.

The argument that seat belts in fact cause more injury revolves around certain stock situations. First of all, it is said that in accidents causing fire or submersion the seat belt would trap the victim in the car thereby causing greater injury. In fact these two situations occur in less than one per cent of all collisions.

51. Williams, supra, note 3 at 120; Burtt v. Davis (1976), 14 N.B.R. (2d) 541 at 543; 15 A.P.R. 541 at 543, and see Donn v. Schacter, [1975] R.T.R. 238, where a passenger tripped on a belt while leaving a car and was injured.
53. Nova Scotia Registry of Motor Vehicles, Drivers' Handbook at 51
Seat Belts and Contributory Negligence

Needless to say the reasonable person does not ignore ninety-nine per cent of the risk in order to protect against one per cent of it. Actually the real answer to this argument is that even in these rare situations the seat belt is valuable. Without it the passenger is liable to be knocked unconscious, and thus will be unable to make efforts to free himself. The second argument made is that it is safer to be thrown clear of the car in an accident. In fact the opposite is true; the risk of death is increased five times if a person is thrown from a vehicle. The third situation mentioned is that of very large persons, or pregnant women, and Lord Denning M.R. has said that an exception should be made for these persons. There can be no objection to this if these groups really are exposed to greater danger when wearing a seat belt, but one must wonder what happens to mother and unborn child when they are thrown from an automobile. It is also possible to argue that the defendant should not be expected to bear the responsibility for their unusual conditions, but the thin skull doctrine would appear to cover the point.

On the other side of the argument is the opinion of every insurance company, safety council and motor association, all of whom have spent a great deal of time and money promoting the use of belts. Lord Denning M.R. summed up their conclusions in these words:

Much material has been put before us about the value of wearing a seat belt. It shows that everyone in the front seats of a car should wear a seat belt. Not only on long trips, but also on short ones. Not only in the town, but also in the country. Not only where there is fog, but also when it is clear. Not only by fast drivers, but also by slow ones. Not only on motorways, but also on side roads.

Expert evidence has played an important part in many of the seat belt cases, most of it directed toward showing the effectiveness of the belts. Included in the parade of persons promoting their use have been police officers, doctors, safety council representa-

56. Id. at 293 E; [1975] 3 All E.R. at 525-26
tives,\textsuperscript{59} motor association representatives,\textsuperscript{60} mechanical engineers,\textsuperscript{61} statisticians,\textsuperscript{62} and automotive engineers.\textsuperscript{63} In at least one case it was held that the issue could be decided without scientific evidence,\textsuperscript{64} but in others the failure to produce such evidence has been fatal.\textsuperscript{65} The doctors generally gave evidence concerning not only the general effectiveness of the seat belts, but also the effect they would have had in reducing the damage in the particular case. Hopefully, the effectiveness of seat belts will soon become settled as a question of law, so that litigants will not be put to the expense of producing expert testimony, the effect of which is already to be found in the reports and in numerous documents and studies.\textsuperscript{66}

IV. Availability and Use

The plaintiff cannot, naturally enough, be held to be negligent unless it is shown that he did the negligent act; it must be proven that he did not wear the seat belt.\textsuperscript{67} If the safety device was not available to him, he would also be relieved of liability, unless of course such availability was due to his own default. It must therefore also be shown that the car was equipped with seat belts,\textsuperscript{68} and that they were in good condition and usable.\textsuperscript{69} Where there is


66. Linden, \textit{supra}, note 39; Williams, \textit{supra}, note 3


Seat Belts and Contributory Negligence

no belt in the car one must enquire whether the cost and inconvenience of refusing to ride in such a vehicle are great enough to justify the plaintiff running the risk of riding unprotected. Indeed, where there is no seat belt the shoe may be on the other foot. It could then be argued that the driver or owner was negligent in failing to provide an accepted safety device.

There has been some suggestion that the driver may not use this defence if he has not told the passengers of the existence of the belt, asked them to use it, or shown them how it works. Lord Denning M.R. has, however, said that an adult passenger need not be told what to do for his own safety. The situation may be different where the defendant actually discourages the use of the seat belt. There have also been suggestions that when the driver himself was not wearing his seat belt, it is not open to him to say that the passenger was negligent for so acting. How the driver’s negligence can affect the fact that the passenger was also negligent, or how in such a case the driver’s negligence in not wearing a seat belt can be a cause of the plaintiff’s injuries is not explained.

It has also been suggested that the plaintiff must have actual knowledge of the existence of the belts. This would seem to impose a subjective rather than an objective test. Surely the reasonable person is aware that most cars are now required by law to be equipped with seat belts? One can hardly fail to notice their existence in most cars, and in any case it would only take a second’s

77. Id. at 14G. See also Reineke v. Weisgerber (1974), 46 D.L.R. (3d) 239 at 243; [1974] 3 W.W.R. 97 at 113
time to ascertain if they are fitted. The better view would seem to be that availability does not require actual knowledge or conscious awareness of the belts.  

V. Causation

The final step in proving contributory negligence on the part of the plaintiff is to prove causation. There is no negligence without damage, and the plaintiff’s failure to wear a seat belt is of no consequence unless it can be shown that the injuries suffered would in fact have been less if the belt had been used. Probably more cases have failed on this point than on any other.  

This may be one reason why few of the cases where the defence was not recognized were appealed, for there was often a concurrent finding that causation was not proven. While an Appeal Court might be willing to reverse on the question of law as to the standard of care, they would not be inclined to overturn the factual ruling that causation was not shown.

It may well be that judges who are reluctant to throw part of the loss onto the plaintiff’s shoulders use this factor to defeat the defence. There have been some exacting standards of proof set. In Rigler v. Miller, McIntryre J. was not willing to assume that an injury to the nose, probably caused by hitting the dashboard, would have been prevented by a seat belt. In Lertora v. Finzi, Fay J. would not hold that facial injuries caused by glass, where the windshield was smashed, would have been prevented. In some cases where several persons were not wearing seat belts causation of the damage was proven for one passenger but not for another. As was mentioned, medical doctors have been used effectively to

84. Supra, note 58
prove that the plaintiff's injuries would have been reduced if a seat belt had been worn, and a question to this effect should be put to them while they are testifying. Where another passenger who was wearing a belt suffers no injury, the courts will probably be more willing to find causation. One would think that in some instances the courts should be willing to conclude from the very nature of the injuries that they would have been prevented.

The seat belt cases are an interesting example of the application of apportionment statutes, for in them it is not alleged that the plaintiff's negligence caused the accident but rather that it caused the damage. This aspect of the defence has been noted in a number of cases, but it has never been seriously contested that this is a bar to the defendant's claim, although the question was reserved in one case. The issue was settled in England in O'Connell v. Jackson, a case involving the non-use of a helmet while riding a motor cycle, where it was decided that contribution to the damage is sufficient. In Canada most of the apportionment statutes speak of fault causing "damage or loss", and these words appear to be wide enough to encompass the situation.

VI. Procedure

Once the four elements of the defence have been proven it is necessary to apportion the damages. The only damages that are subject to apportionment are the extra damages, those that would have been prevented by wearing the seat belt, and even here the defendant who has negligently caused the accident must bear the major part of the loss. It has been argued that the plaintiff's

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90. For example, Contributory Negligence Act, R.S.N.S. 1967, c. 54, s. 1(1), and see Spike v. Roche, [1955] 5 D.L.R. 385 at 392-93; 37 M.P.R. 57 at 66-67 (Nfld. S.C.)
91. Linden, supra, note 39 at 480
negligence, in terms of the chain of causation, is completely responsible for all this extra damage, and so he should recover nothing for it, but this argument has yet to be accepted in England or Canada. 93

The apportionment procedure is best illustrated by an example. Assume that the defendant is one hundred per cent at fault for an accident in which the plaintiff suffered $2500 in damages. Assume further that if a seat belt had been worn the damages would only have been $1000. Remember that in Canada apportionment is on the basis of fault or negligence. 94 Since the defendant was entirely at fault for the accident he must bear all the initial $1000 of loss. For the remaining $1500 it is necessary to determine the relative fault of the plaintiff and the defendant. This requires a comparison of the relative extent to which each party departed from the standards of the reasonable man. The plaintiff’s amount of fault will depend on the circumstances in which the belt was not worn, and on whether or not a conscious decision was made not to wear it. 95 The defendant may be slightly or grossly negligent. Assume that in the particular case the ratio of the defendant’s fault to the plaintiff’s fault was eighty to twenty. The plaintiff will then receive only eighty per cent of the additional $1500 damages or $1200.

In fact the courts have not followed this theoretically correct approach. In many cases it is impossible to tell exactly what injuries would have been suffered if the belt had been worn. 96 Some judges have used this problem of proof to deny recovery, as was mentioned above, but others have attempted to do rough justice by reducing the whole damage award by some percentage, taking into account the relative fault and causation factor at the same time. 97 Of course

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94. Supra, note 90. In England it is on the basis of what is “just and equitable having regard to the claimant’s share in responsibility for the damage”. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, s. 1(1) (U.K.)
where the seat belt would have prevented all the injury this approach is theoretically correct too. In some cases the plaintiff may be partly responsible for causing the accident, as well as being negligent in not wearing a seat belt. Thus, in *Earl v. Bourdon*, the plaintiff's damages were reduced by seventy-five per cent to allow for his total responsibility in causing the damage, without any attempt being made to determine what part of the damage could have been prevented by a seat belt. It is submitted that the more general approach to the apportionment of damages does better justice between the parties, and requires nothing more than a looser interpretation of the statutory requirement that damages are to be apportioned according to fault. That is, there would appear to be no reason why causation and fault cannot be measured at the same time.

VII. Legislative Activity

The seat belt cases provide an interesting example of the way the courts use legislative activity to develop new common law duties. Initially there was just the opinion of researchers and safety experts as to whether or not the belts should be used. As was noted above some judges were willing to accept this as sufficient to create a duty to use the belts while others were not. In England, the first piece of legislative action was the inclusion in the *Highway Code* of a provision to the effect that seat belts should be installed and worn. This code is published by the British government for the general interest of motorists, and contains suggested procedures on all aspects of use of the highways. A breach of the *Highway Code* involves no liability of itself, but under the Road Traffic Act, 1972 its provisions are evidence in civil actions of what is reasonable conduct on the road. The *Highway Code* does not create a presumption of negligence, and in many of the English cases the judges had no difficulty in holding that the failure to wear a seat belt was not negligence, despite the recommendation that this is good practice. In the end, however, its influence was felt, the

100. (1972), c. 20, s. 37(5) (U.K.)
Court of Appeal using the advice that it contains as one reason why the non-use of a seat belt should be classed as an unreasonable act.\textsuperscript{103}

There is no equivalent to the \textit{Highway Code} in Canada, and here the first legislative step taken was to require the installation of seat belts in all new cars, without making their use compulsory.\textsuperscript{104} This type of provision has been noted by the courts,\textsuperscript{105} but has not been found to be sufficient on its own to create a legal duty to wear a seat belt. Such a requirement should, however, have an impact on the argument over the general effectiveness of seat belts. As was noted above, this is one of the four factors that must be proved to make out the defence, and a statute making it mandatory to provide a certain safety device should be almost conclusive evidence that that device is generally of some value in reducing injuries.

After providing the motorist with seat belts in the hope that injuries suffered on the highways would thereby be reduced, many legislatures were dismayed to find that people seldom used them.\textsuperscript{106} The dismay increased when the legislators realized that publicly funded health plans were bearing a large proportion of the costs incurred in treating injuries that result from road accidents.\textsuperscript{107} The safety experts started advocating the enactment of legislation that would make the wearing of the belts compulsory. This may have been the wise course to take, but it certainly was not the best political course to take. The initial Ontario response, which is representative of other jurisdictions, was “an educational endeavor”, an advertising campaign to promote the use of the belts.\textsuperscript{108} A similar programme was mounted in England, and Lord Denning M.R. made note of that fact when deciding that there was a duty at law to wear a seat belt.\textsuperscript{109} Despite the large sums invested in these programmes (which must be taken to be an indication of legislative opinion as to the desirability of using the belts), the

\textsuperscript{103} Froom v. Butcher, [1976] Q.B. 286 at 293H; [1975] 3 All E.R. 520 at 526
\textsuperscript{104} Motor Vehicle Safety Regulations, S.O.R. 70-487, R. 9(1) made under the Motor Vehicle Safety Act, R.S.C. 1970 (1st Supp.), c. 26, s.7
\textsuperscript{106} Linden, supra, note 39 at 483; Williams, supra, note 3 at 119
\textsuperscript{107} Supra, note 35 (estimated at $90 million per year in Ontario)
\textsuperscript{108} Ont. Leg. Debates, (June 9, 1975) at 2704
government propaganda has not had much visible impact on the Canadian decisions.

The ultimate legislative step is, of course, to make the wearing of the belts compulsory. This step has now been taken in Ontario,\textsuperscript{110} Quebec,\textsuperscript{111} and Nova Scotia,\textsuperscript{112} although in the latter the legislation has never been proclaimed. The impact that these statutes will have on the seat belt defence varies. The Nova Scotian statute contains the following provision:

10(14) The use or non-use of restraint equipment by operators or passengers shall not be evidence of negligence in any civil action. This would appear to be an attempt to abolish the seat belt defence in civil actions. The section may, however, only mean that non-use by itself is not to be found to be negligence. This interpretation would not prevent evidence on non-use of a seat belt being introduced along with evidence of other unreasonable conduct on the part of the plaintiff to prove negligence. Thus, this section would have the effect of requiring that the defendant prove in each particular case that it was, on the facts of that case, negligent to fail to wear a seat belt; it could never automatically be negligent to fail to wear a seat belt.\textsuperscript{113} This section may not abolish the defence for another reason. Under the Nova Scotia Contributory Negligence Act it is not necessary to prove negligence to bring about apportionment of damages, it is only necessary to prove "fault".\textsuperscript{114} The breach of a penal statute may be sufficient fault for the purposes of apportionment where the statute is aimed at preventing the very danger that arose.\textsuperscript{115} A strict interpretation of the penal statute and the apportionment statute would therefore render meaningless at least one section of the former.

The Quebec statute contains a similar provision which reads:

56n. Failure to comply with section 56d, 56e, 56i, or 56j shall not be considered in determining the amount of damages in a civil case.

\textsuperscript{110} The Highway Traffic Amendment Act, 1975 (2nd sess.) (No. 2), S.O. 1975 (2nd sess.), c. 14, s. 1
\textsuperscript{111} An Act to Amend the Highway Code (1976), Quebec, 30th Legislature, 4th session, Bill 13, s. 14
\textsuperscript{112} An Act to Amend the Motor Vehicle Act, S.N.S. 1974, c. 42, s. 10
\textsuperscript{113} Supra, note 39
\textsuperscript{114} Supra, note 94
The obvious reaction to this wording is that the failure to comply could never affect the amount of damages in a civil suit. The damages must remain the same in quantum, the only question is how the damages are to be apportioned between the two parties. The section does not say that failure to comply with the listed sections shall not affect the apportionment of damages in a civil case.

Assuming that these actions were designed to abolish the seat belt defence in civil cases, one must ask why the legislatures thought this to be a desirable policy. It may have been thought that the seat belt defence did not exist in the jurisdictions in question, with these provisions being included so that the penal statute would not alter the civil law. This, however, would involve at least a tacit approval of the present state of the law. It is submitted that this must mean that the legislature is of the view either that the risk of using the highways is not unreasonable, or that the effectiveness of seat belts has not been proven. If this is so then it is difficult to see why the use of seat belts would be made compulsory. In summary, if these sections were enacted to maintain the existing civil law, it would appear as if the legislatures are acting on conflicting assumptions regarding the value of seat belts in different sections of the same statute.

The provisions abolishing the seat belt defence may have been included because of a belief that the defence only assists insurance companies in escaping from their contractual obligations. Where both parties have insurance the defence can, of course, only have the effect of shifting liability from one insurance company to another, without affecting the victim’s compensation. In some cases, however, one party may not have insurance, or access to insurance may be blocked by contract or statute. For example there may be contractual limitations on who may recover on a policy, on what type of damage is compensable, or on the quantum of damages recoverable under the insurance policy. The “guest passenger” legislation, which requires proof of gross negligence on the part of the driver before liability arises, may also block the passenger’s access to his driver’s insurance. In these cases, where the victim is unable to recover from the insurer of the car in which he was riding, the sections abolishing the seat belt defence in civil actions would have the effect of compensating the victim at the expense of the

116. Ont. Leg. Debates (November 25, 1975) at 943 and (December 2, 1975) at 1176
defendant’s insurer, who is presumably better able to spread the loss among the motoring public as a whole. However, if it is the defendant who is without access to insurance, these actions will cause all the loss to fall on the shoulders of one of two parties who have both been at fault. In such a case it is possible that it will be the plaintiff’s insurer who will escape liability.

In Ontario, the statute is silent as to the effect it is to have on civil proceedings. Before the first of these Acts was passed it was suggested in some of the cases that a compulsory use law would strengthen the case against the plaintiff.117 Shaw J. disagreed saying that while under such an act

Failure to use a seat belt may attract penalties to the offender, it is to be expected that the duty to use the belt will be regarded as having been imposed for the benefit of the potential victim of another’s negligence and not as a ground for diminishing the liability of a bad driver to pay compensation.118

Whether or not a penal statute raises a corresponding civil duty has always been a difficult question for the courts, sending them off in search of a non-existent legislative intention.119 There is a clear legislative policy here to protect the motorist, and the courts might justifiably attempt to promote compliance with the statute by super-imposing civil liability on the fine. There is also Sterling Trusts v. Postma in which the Supreme Court of Canada held that the breach of a statutory provision designed to promote highway safety was prima facie proof of negligence.120 The reasoning behind this decision was, however, based on a desire to compensate an injured party who suffered, partly at least, from the breach of statute. In the seat belt cases all that the lawbreaker has done is injure himself, and the same considerations may not apply. Allowing the defence would mean that the lawbreaker would be bearing the loss, as in the Postma case. Denying it would mean that the defendant would not be allowed to take advantage of the breach of statute that was not designed to protect him anyway, and through which he has not himself suffered damage. At the same time, though, this may mean that the plaintiff is being allowed to allege a

119. Linden, supra, note 14 at 85; Fleming, supra, note 12 at 122
breach of statute against the defendant (in relation to the cause of the accident), but that the defendant may not hold the plaintiff to the same standard. The equity of the situation may require applying the same standard to both parties. On the other hand it would also appear desirable to compensate the victim or his family when his bad judgement catches up with him, rather than saying 'I told you so.' It is difficult to predict whether or not the courts will balance these competing factors in such a way that the penal statute will give rise to a corresponding civil duty.

There may, however, be a shorter answer to the question of whether the statute creates a civil duty. As was mentioned above it may not be necessary to go so far as to show that the plaintiff is negligent. This would make it unnecessary to show that the penal provision of the act sets a standard applicable to civil actions. The various contributory negligence acts provide for apportionment where the 'fault' of a party causes damage. While this certainly includes negligence it is not necessarily confined to it. It has been suggested, in a case where the statutory provision in question was clearly aimed at the safety of the plaintiff, that a breach of statute is itself 'fault' within the meaning of the Acts. Should the courts be willing to apply this authority it will have the effect of making the motorist strictly liable for the non-use of a seat belt where a statute makes use compulsory.

The Ontario statute provides an exemption from penalties for persons who have written excuses from their doctors or who are engaged in driving that involves frequent stops. One could argue that this provides evidence that for these types of people it is reasonable not to wear a belt. The contrary view would be that when these persons avail themselves of the privilege of not wearing a seat belt they do so at their own risk, and cannot expect the defendant to pay for any resulting damage. Again the courts will most likely take the route that compensates the victim, given the legislative acquiescence to the non-use of the belts by these groups.

VIII. Conclusion

In closing it may be useful to summarize the present status of the seat belt defence in the various jurisdictions. In England it is firmly

121. *Supra*, note 90, except in Manitoba where 'negligence' is used: R.S.M. 1970, c. T90, s. 4(1)
122. *Supra*, note 115
established. In Quebec it has been abolished by statute, if it ever existed. A similar result may obtain in Nova Scotia if the legislation there is proclaimed, but at present the law is uncertain. The defence appears to be well established in New Brunswick, British Columbia, and Ontario. The statute in the latter province can only serve to strengthen the already accepted arguments. On the other hand it would seem that Prince Edward Island, Alberta, and Saskatchewan have rejected the defence, there being no case recognizing it reported from any of these provinces. Manitoba, Newfoundland, and the territories have no reported judgments.

The future of the defence in Canada must depend largely on whether there is more legislation making the use of seat belts compulsory, or alternatively, legislation abolishing the defence. It is submitted that if the common law is left to develop by itself the defence will come to be increasingly recognized by the courts. The arguments presented against the defence are generally weak, and the risks present in the use of the highways and the general effectiveness of the seat belt have now been sufficiently demonstrated to give the seat belt defence a firm claim to recognition by the law.

    *Beaver v. Crowe* (1974), 49 D.L.R. (3d) 114, and see *supra*, note 112
    (2d) 653; *Belanger v. Reid* (1974), 11 N.B.R. (2d) 94; 7 A.P.R. 94, aff'g 10
    N.B.R. (2d) 112; 4 A.P.R. 112 (S.C., Q.B.D.); *Best v. Young* (1976), 13 N.B.R.
    (2d) 596; 13 A.P.R. 596; *Burtt v. Davis* (1976), 14 N.B.R. (2d) 541; 15 A.P.R.
    541
    O.R. 729; 19 D.L.R. (3d) 53 and *supra*, note 110
    v. Tweel* (1975), 8 N. & P.E.I.R. 539; 8 A.P.R. 539; *Hood v. McKarney* (1976), 9
    N. & P.E.I.R. 16; 12 A.P.R. 16 (P.E.I.C.A.), aff'g on other grounds (1973), 37
    Schwanke*, [1972] 2 W.W.R. 541
Addendum: Since this article was written the following additional cases have been reported — *Jones v. Johnson* (1975), 18 N.S.R. (2d) 67 (N.S.S.C., T.D.); *Gagnon v. Beaulieu*, [1977] 1 W.W.R. 702 (B.C.S.C.).