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Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984)

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CASENOTE

Torts/Evidence—Seat Belt Defense—Whether They Know It or Not, Florida Motorists Must “Buckle Up” or Risk Loss of Full Recovery—Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984)

I. Introduction

In Insurance Co. of North America v. Pasakarnis,1 the Florida Supreme Court reversed the Fourth District Court of Appeal2 and held that evidence of nonuse of an available seat belt may be considered by the jury in assessing damages when it is shown that failure to use the seat belt contributed substantially to at least a portion of the plaintiff’s injuries.3 In accepting the “seat belt defense,”4 the supreme court departed from prior Florida law5 and joined the minority of jurisdictions which recognize the doctrine.6 Because of the vast number of motorists that travel Florida highways, the ramifications of this decision are broad. The Florida driver now has a duty imposed by judicial fiat that requires him to predict and decide whether “buckling up” will increase or mitigate damages resulting from an automobile accident.7

The purposes of this note are threefold. First, it will examine the origin of the seat belt defense and highlight the theories which have been advanced in favor of the defense. The judicial responses to these theories will be explored in an effort to outline the general principles of the doctrine, and case law prior to Pasakarnis will be discussed to expose the quandary which has engrossed this area of

1. 451 So. 2d 447 (Fla. 1984).
2. Insurance Co. of N. America v. Pasakarnis, 425 So. 2d 1141 (Fla. 4th DCA 1982).
3. Pasakarnis, 451 So. 2d at 449.
4. Some commentators have used the phrase “seat belt rule” as distinguished from “seat belt defense.” Although the term “defense” has the connotation of a total bar to recovery, the author will use the term “seat belt defense” for the sake of uniformity. See Hoglund & Parsons, Caveat Viator: The Duty To Wear Seat Belts Under Comparative Negligence Law, 50 Wash. L. Rev. 1, 8 n.25 (1974).
5. Brown v. Kendrick, 192 So. 2d 49 (Fla. 1st DCA 1966) (court refused to permit defendant automobile owner to offer evidence of plaintiff’s failure to use seat belt).
6. See cases cited infra note 37.
7. Pasakarnis, 451 So. 2d at 454. The choice still rests with the motorist, because the supreme court did not impose an absolute duty to wear seat belts. The court held: “Nonuse of the seat belt may or may not amount to a failure to use reasonable care on the part of the plaintiff. Whether it does depends on the particular circumstances of the case.” Id.
the law. Second, the development of *Pasakarnis* and *Allstate Insurance Co. v. Lafferty,* a companion case, will be traced from the trial court level to the Florida Supreme Court. Finally, the supreme court's decision to adopt the seat belt defense will be questioned, with a suggestion for the possible contours of a legislative response.

II. THEORIES BEHIND THE SEAT BELT DEFENSE

In the mid-1950's, the Ford Motor Company launched a national safety campaign that included the promotion of vehicular safety through the installation of lap belts. Shortly thereafter, state legislatures in the early 1960's began to require the installation of front seat lap belts in all new automobiles. The federal government mandated the installation of front seat shoulder harnesses in cars manufactured after January 1, 1968.

Promotion of the installation of seat belts spawned the emergence of the "seat belt defense." Defense counsel have advanced three theories to justify adoption of the doctrine by the courts:

1. A plaintiff's failure to wear an available seat belt, coupled with state and federal installation requirements, constitutes negligence per se completely barring the plaintiff's recovery.
2. A plaintiff's failure to make use of an available seat belt is a breach of his duty to act reasonably under the circumstances and therefore constitutes contributory negligence.
3. If a plaintiff fails to fasten his seat belt, he may be found to have acted unreasonably and in disregard of his own best interest, and should not be allowed to recover damages for injuries which he could have avoided.

The third theory, known as the mitigation of damages theory, was accepted by the Florida Supreme Court in *Pasakarnis* as a viable means to adopt the seat belt defense.
A. Negligence Per Se

Negligence per se is defined as conduct which is considered negligent regardless of the circumstances, "either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it." Courts, however, are reluctant to find negligence per se absent a clear violation of statute or ordinance. Because nonuse of a seat belt is not a direct violation of state or federal seat belt laws, the negligence per se theory has been uniformly rejected by the courts. Although state and federal statutes have required the installation of seat belts, use of seat belts has generally not been mandated.

The consensus of the courts has been that "the seat belt enactments are not absolute safety measures and . . . no statutory duty to use the belts can be implied from them." The Wisconsin Supreme Court asserted that a statute "which does not require by its terms the use of seat belts, cannot be considered a safety statute in a sense that it is negligence per se for an occupant of an automobile to fail to use available seat belts." New York recently passed a law requiring the use of seat belts. The statute provides that evidence of seat belt nonuse can be introduced to reduce damages as determined by the jury, but may not be considered in regard to the issue of liability. This would appear to preclude the possibility that nonuse of a seat belt in New York will constitute negligence per se.

Some early cases in the trial courts of several states seemed to indicate that the negligence per se theory might be accepted as a basis for the seat belt defense. For example, in Stockinger v. Dunisch, a Wisconsin trial judge interpreted a state statute re-

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16. Pasakarnis, 451 So. 2d at 453. But see infra notes 199-205 and accompanying text.
20. Id. § 1, 1984 N.Y. Sess. Law News at 689-90 (evidence of nonuse of seat belts inadmissible on issue of liability but may be admissible on issue of mitigation of damages).
quiring installation of seat belts to implicitly require occupants to use them. Although the court did not rule that failure to use a seat belt was negligence per se, it did hold there was an implied duty to use the seat belt.\textsuperscript{22} Despite initial successes at the trial level, however, the majority of appellate courts have refused to admit evidence of seat belt nonuse under the negligence per se or any other theory.\textsuperscript{23}

B. Contributory Negligence or Comparative Negligence

Under the second theory defendants seek to admit evidence of seat belt nonuse to show that the plaintiff was contributorily negligent because he failed to exercise the common law duty of ordinary care. The majority of courts have rejected this argument, reasoning that contributory negligence is applicable only when the plaintiff's failure to use due care has caused the accident in whole or in part, not when it has merely exacerbated the injuries.\textsuperscript{24} Commentators have speculated that the courts made this distinction between accident and injury to avoid a total bar to the plaintiff's recovery, a characteristic of the doctrine of contributory negligence.\textsuperscript{25}

In jurisdictions governed by the doctrine of comparative negligence, the courts have sharply disagreed as to the propriety of the seat belt defense.\textsuperscript{26} Because comparative negligence is geared toward apportioning damages between parties based on their degree of fault,\textsuperscript{27} some courts have placed less emphasis on the distinction

\begin{itemize}


\item 27. Comparative negligence jurisdictions fall into one of three basic categories: pure, modified, or slight-gross. Under pure comparative negligence the plaintiff's damages are reduced in proportion to the amount of his contributing negligence. The modified form has two variations: "equal to or greater than" and "not greater than." Under the "equal to or greater than" variation, the plaintiff cannot recover damages if his negligence equaled or...
between the cause of the injury and the cause of the accident.\textsuperscript{28} It is speculated that the courts no longer have to make this distinction to avoid a complete bar to recovery.\textsuperscript{29}

Addressing the issue of negligence, the Wisconsin Supreme Court held "that there is a duty, based on a common law standard of ordinary care, to use available seat belts independent of any statutory mandate."\textsuperscript{30} The North Carolina Supreme Court voiced a different opinion, asserting that "[t]he social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence."\textsuperscript{31} Otherwise, the court would be imposing a standard of conduct rather than applying a standard already accepted by society.\textsuperscript{32}

In \textit{Amend v. Bell},\textsuperscript{33} the defendant argued that the doctrine of comparative negligence dictated that evidence revealing the plaintiff's failure to use his seat belt be allowed. The Washington Supreme Court, however, saw little significance in the adoption of the doctrine of comparative negligence regarding the seat belt defense. The court reasoned: "While the result of contributory negligence and comparative negligence is much different, both are premised upon negligence. In the one case we bar recovery, in the other we surpassed that of the defendant. Under the "not greater than" formula the plaintiff can recover damages if the plaintiff's negligence was less than or equal to that of the defendant. Under either variation, the damages are reduced in proportion to the plaintiff's fault. The slight-gross approach allows the plaintiff to recover only if the plaintiff's negligence is slight and the defendant's is gross comparatively; otherwise the plaintiff's contributory negligence bars his recovery. As noted earlier, Florida has adopted pure comparative negligence. See \textit{generally W. Prosser & W. Keeton, The Law of Torts \S 67, at 471-74 (5th ed. 1984).}


\textsuperscript{29} \textit{Hoglund & Parsons, supra} note 4, at 14.

\textsuperscript{30} \textit{Bentzler}, 149 N.W.2d at 639. Despite the court's finding that the plaintiff had a duty to wear a seat belt, the plaintiff's recovery was not reduced because there was insufficient proof; no expert testimony was presented on the probable effect of wearing the seat belt, and the driver, who had also failed to wear his seat belt, suffered only minor injuries. The court nevertheless concluded 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, it is proper and necessary to instruct the jury in that regard." \textit{Id.} at 640.


\textsuperscript{32} \textit{Note, supra} note 31, at 297.

\textsuperscript{33} \textit{570 P.2d} 138 (Wash. 1977).
compare negligence and potentially reduce damages. However, in either case, we look to the negligence of the plaintiff.'

Consequently, the court determined that evidence of seat belt nonuse was inadmissible.

C. Mitigation of Damages or Avoidable Consequences

The third argument advanced by the defendants to admit evidence of seat belt nonuse focuses on the doctrines of avoidable consequences and mitigation of damages. These theories have met with greater success than the negligence per se or contributory/comparative negligence theories. Both doctrines are considered similar and are directed toward the issue of damages rather than the issue of liability. Furthermore, both doctrines are based on the notion that recovery should be denied for those damages that could have been avoided by reasonable conduct of the plaintiff.

Traditionally, these doctrines have been used only with reference to post-accident conduct; it has been argued that to impose a preaccident duty forces the plaintiff to anticipate the negligence of others. A counterargument is that the availability of seat belts is a unique situation which allows the plaintiff to minimize his damages prior to an accident. This contention, however, has had limited success. In Britton v. Doehring, the Alabama Supreme

34. Id. at 143.
35. The doctrine of avoidable consequences is a rule which precludes recovery by the plaintiff for any damages which could have been avoided by reasonable conduct. W. Prosser & W. Keeton, supra note 27, § 65, at 458.
36. BLACK'S LAW DICTIONARY 904 (5th ed. 1979) defines mitigation of damages as the imposition of a duty on an injured party to exercise reasonable diligence and ordinary care in attempting to minimize his damages after injury has been inflicted. Both mitigation of damages and avoidable consequences are affirmative defenses.
38. See Spier, 323 N.E.2d at 168.
41. Kleist, supra note 21, at 615-16.
42. Spier, 323 N.E.2d at 168.
43. 242 So. 2d 666, 671 (Ala. 1970).
Court rejected the doctrine of avoidable consequences in the context of seat belt nonuse. The court noted that Alabama was a contributory negligence jurisdiction and reasoned that to allow the seat belt defense to mitigate the damages would permit the jury to apportion the damages and effectively adopt comparative negligence.\(^4\) The court further determined that the jury members would have to enter a "realm of speculation and conjecture" which is inappropriate for their consideration.\(^4\) Moreover, the court concluded that if a duty were to be imposed on the motorist to wear seat belts, it should be done by the state legislature.\(^4\)

Some courts have been more receptive to the avoidable consequences argument. In *Spier v. Barker*\(^7\) the New York Court of Appeals affirmed the trial court's ruling allowing use of the seat belt defense on the premise that one has a duty to take precaution against foreseeable injury.\(^4\) The plaintiff in *Spier* was injured when her car was hit by defendant's truck,\(^9\) causing the plaintiff to be ejected from her automobile and sustain serious injuries.\(^5\) An expert in accident reconstruction testified at trial that had the plaintiff been wearing her seat belt, she would have sustained only minor injuries.\(^5\) The judge instructed the jury members that if they found that a reasonably prudent driver would have used a seat belt, and that the plaintiff would not have received some or all of her injuries if she had used it, then they could only award damages for those injuries that could not have been prevented by using the belt.\(^5\) At that time, New York adhered to the doctrine of contributory negligence, but the court avoided totally barring recovery through utilizing the doctrine of avoidable consequences.

The majority of jurisdictions have not accepted the rationale set out in *Spier*.\(^5\) In rejecting the seat belt defense, the courts have

\(^4\) Id. at 675.
\(^5\) Id.
\(^6\) Id.
\(^7\) 323 N.E.2d 164 (N.Y. 1974).
\(^8\) Id. at 168.
\(^9\) Id. at 165.
\(^10\) Id. at 169.
\(^11\) Id.
\(^12\) Id. at 168.

grappled with a number of concerns. When determining unreasonable conduct, courts have considered that only approximately fourteen percent of the population uses seat belts. Although a customary standard of conduct is not necessarily always a reasonable standard, the low percentage of users may indicate that the effectiveness of seat belts is not yet established in the minds of motorists.

Proponents of the seat belt defense advance the following test to determine the reasonableness of a plaintiff's conduct:

1. the unreasonableness of the risk to which plaintiff has exposed himself, as determined by
2. weighing the importance of the interest to be protected against
3. the probable gravity of anticipated harm to himself.

Similarly, the test set out by Judge Learned Hand in *United States v. Carroll Towing Co.* has been suggested by proponents of the seat belt defense to determine unreasonable behavior. In *Carroll Towing*, the formula for liability was whether the burden of adequate precautions against harm was less than the probability of harm multiplied by the gravity of the resulting injury.

Although the number of accidents that occur are substantial, that number is relatively small in relation to the amount of vehicles travelling the highways. Most individuals reach their destination without an accident. Moreover, the average motorist does not anticipate harm to himself when he enters his automobile in-


55. See, e.g., The T.J. Hooper, 60 F.2d 737 (2d Cir.) (opinion of L. Hand, J.) (emphasizing that some safety precautions are so imperative that even their universal disregard will not excuse their omission), cert. denied, 287 U.S. 662 (1932).

56. *Pasakarnis*, 451 So. 2d at 455 n.3 (Shaw, J., dissenting).


58. 159 F.2d 169 (2d Cir. 1947).

59. *Id.* at 173.

60. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, TRAFFIC ACCIDENT FACTS 31 (1981).
tending to drive lawfully. The court in *Miller v. Miller* found merit in this contention and asserted: “In spite of the well known hazards of highway travel, . . . most motorists do arrive safely at their destinations. . . . [The average person] believes that the chance of being involved in an injury-producing accident is relatively low.” Accordingly, courts have expressed doubt as to whether the plaintiff has exposed himself to an unreasonable risk by not fastening his seat belt.

Although the burden of buckling one's seat belt appears to be slight, the burden becomes greater due to the frequency with which it must be done. Questions remain as to whether fastening the seat belt is at such a level of consciousness in most people as to label the burden as slight.

Additionally, the possibility of enhanced injuries as a result of the motorist fastening the seat belt cannot be ignored when determining reasonable behavior. Although there has been a plethora of literature advocating the effectiveness of the seat belt in reducing injuries, there has also been some evidence to the contrary and instances where wearing seat belts may actually have exacerbated the injuries. Consequently, it would be difficult to calculate in advance the probable gravity of harm when the motorist does not use his seat belt since the outcome is pure speculation.

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62. *Id.* at 68 (citation omitted).
63. Courts have hinted that if a situation were to arise that would call the seat belt to an occupant's attention, then evidence of seat belt nonuse should be allowed. The court in *Miller* stated in dicta:

Conceivably a situation could arise in which a plaintiff's failure to have his seat belt buckled at the time he was injured would constitute negligence. It would, however, have to be a situation in which the plaintiff, with prior knowledge of a specific hazard—one not generally associated with highway travel and one from which a seat belt would have protected him—had failed or refused to fasten his seat belt.

*Id.* at 70.

Similarly, in *Remington v. Arndt*, 259 A.2d 145 (Conn. 1969), the court noted that a situation may arise in which the circumstances are such as to require a passenger to anticipate a collision or other mishap and fasten his seat belt. *Id.* at 146. These situations have been characterized as the “exceptional circumstances” theory. *See Note, supra* note 15, at 278-79.

65. *See, e.g., McLeod v. American Motors Corp.*, 723 F.2d 830 (11th Cir. 1984) (testimony of expert witness that plaintiff's injuries would have been more serious had she been wearing a seat belt); 2 *FORENSIC MEDICINE: A STUDY IN TRAUMA AND ENVIRONMENTAL HAZARDS* 856-57 (C. Tedeschi, W. Eckert & L. Tedeschi ed. 1977) (discussion and graphic illustration of situations in which serious or fatal injury may be received from wearing a seat belt).
Another basis for rejection of the seat belt defense has been the notion that "the defendant takes the plaintiff as he finds him." 66 One commentator has noted that if the courts ignore this principle, it will be difficult to determine how far a motorist must go to mitigate his damages.67 For example, the commentator compared the use of door locks with the use of seat belts. Both are standard safety equipment in automobiles. The commentator relied on evidence indicating use of door locks may reduce personal injuries in accidents and questioned why door lock use was not also relevant and admissible to mitigate a plaintiff’s damages.68

Another concern expressed by the courts is whether acceptance of the seat belt defense will actually encourage seat belt use.69 It is highly questionable that a change in common law liability rules will have a substantial effect on the conduct of the populace, as the average motorist is either unaware or inadequately informed of current case law.70 Consequently, only those individuals who have been involved in auto accident litigation will be likely to adjust their behavior. Moreover, if motorists are reluctant to buckle up for their safety, it is unlikely that they will buckle up for recovery in a possible lawsuit.

The North Carolina Supreme Court in Miller v. Miller71 was not convinced that the seat belt defense would modify public behavior. The court quoted a Colorado law review article which asserted: "'[I]mposing an affirmative legal duty of wearing seat belts will have virtually no effect on the actual seat-belt wearing habits of automobile occupants. Its only effect would be to give an admitted wrongdoer a chance to dodge a substantial portion of his liability.'"72

The common thread in many of the cases rejecting the seat belt

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67. See Comment, supra note 12, at 136.
68. Id. at 137. "Unfortunately, most people do not lock their car doors from the inside—a simple procedure that would help prevent the doors from being unlatched in rollover or side-impact accidents—and so fail to take full advantage of improvements on doors and related components." Id. The author noted that "there is apparently no duty imposed on a vehicle occupant to lock his door from the inside. It is submitted that the failure to use this safety device, which is readily available to the motorist, constitutes an omission analogous to the failure to fasten one's seat belt." Id.
69. Miller, 160 S.E.2d at 73.
70. See Note, supra note 57, at 117 (author thought it was unduly optimistic to believe the traditional fault system would have a general deterrent effect on the populace as a whole).
71. 160 S.E.2d 65 (N.C. 1968).
72. Id. at 73 (quoting 39 U. Colo. L. Rev. 605, 608 (1967)).
defense is the notion that the matter should be left to the legislature. Several reasons have been offered in support of judicial restraint. First, because the legislature has required that seat belts be installed, the legislature should also be the entity to mandate their use. Second, inasmuch as the legislature omitted language requiring their use, it could be argued that the legislature knowingly declined to make seat belt use mandatory. It is argued that this omission should serve as a signal for the exercise of judicial restraint. The majority of courts considering the seat belt defense have opined that the legislature, rather than the judiciary or the jury, is the better forum to resolve this complex and conflicting issue.

**III. FLORIDA DISTRICT COURT REACTION TO THE SEAT BELT DEFENSE**

Prior to Pasakarnis, the leading case in Florida addressing the seat belt defense was Brown v. Kendrick. In Brown, the First District Court of Appeal subscribed to the notion that the adoption of the seat belt defense was a matter best left to the legislature. Judge Johnson, writing for the court, hinted that some of the members of the court were convinced that seat belts were effective safety devices but nevertheless recognized the propriety of judicial restraint.

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76. The Fourth District Court of Appeal in Lafferty v. Allstate Ins. Co., 425 So. 2d 1147 (Fla. 4th DCA 1982), rev'd, 451 So. 2d 446 (Fla. 1984), took this position. The court asserted: "Florida's Legislature has had two decades in which to enact a statute similar to that enacted in 1971 requiring motorcycle riders to wear helmets." The court reasoned that this silence on the issue "may be taken as a declaration that the defense is not recognized." Lafferty, 425 So. 2d at 1149.
77. Robinson, 457 P.2d at 485.
78. 192 So. 2d 49 (Fla. 1st DCA 1966). Brown was an action by a minor guest passenger and her father against the owner of the automobile and the owner's son, who was the driver. The First District Court of Appeal held that the trial court had not erred in refusing to admit into evidence the plaintiff's failure to wear an available seat belt. The court noted that the plaintiff's failure to wear a seat belt did not cause the accident and that fastening her belt would not have prevented it. Id. at 50-51.
79. Id. at 51.
80. The court stated: "This is not the law today and it is not within the province of this court to legislate on the subject, regardless of what might be the thinking of the individual members of this court." Id.
The court in *Brown* was reluctant to get into a debatable side issue of questionable propriety. "So, in this state of quandary, the plaintiff and defendant could each have argued on the merits of the use of seat belts, but each argument would necessarily have been conjectural and of doubtful propriety."\(^{81}\)

In the cases of *Insurance Co. of North America v. Pasakarnis*\(^{82}\) and *Lafferty v. Allstate Insurance Co.*,\(^{83}\) the Fourth District Court of Appeal adhered to the rationale of *Brown* and rejected the use of the seat belt defense.

A. Lafferty v. Allstate Insurance Co.

In *Lafferty*, the plaintiff sustained facial and knee injuries in an automobile accident.\(^{84}\) The trial court allowed into evidence expert testimony that established that Lafferty would not have received her injuries had she buckled her available seat belt.\(^{85}\) Additionally, the court instructed the jury that it could consider the testimony of the expert regarding seat belt nonuse. The jury awarded Lafferty $3,700. The court increased the award by $2,500 on post-trial motion.\(^{86}\)

On appeal, the Fourth District Court of Appeal offered several reasons for reversing the trial court’s decision to permit the instruction of the seat belt defense. At the outset, Judge Beranek, writing for the majority, noted that the legal issue surrounding seat belt nonuse "is widely debated and inconsistently applied by courts in current auto accident personal injury litigation."\(^{87}\) The court also noted that although the sixteen years since *Brown v. Kendrick* had seen changes in Florida law,\(^{88}\) the wisdom of *Brown*...
was still impressive. The court found particularly persuasive the argument that the court should let the matter be resolved by the legislature. In support of its position, the court analogized this situation to the statute requiring use of motorcycle helmets, noting that this was a similar safety measure which the legislature chose to address. "[A] jury should not find the existence or nonexistence of a legal duty to use a [seat] belt based upon such traditionally legislative materials. Florida's Legislature has had two decades in which to enact a statute similar to that enacted in 1971 requiring motorcycle riders to wear helmets." Hence, the court interpreted the legislature's silence on the seat belt issue as a declaration that the seat belt defense is not recognized in Florida.

Focusing its attention on the issue of mitigation of damages, the court in Lafferty realized that because no Florida case had ruled on this issue, the court would have to look to other jurisdictions for guidance. Moreover, the court recognized the difficulty in resolving the issue, noting that "[c]ase law from other jurisdictions is split and respectable judicial reasoning and authority exists on both sides of the issue."

Apparently indicating approval, the court in Lafferty enumerated the reasons for disallowing evidence of seat belt nonuse set forth in a Washington case, Amend v. Bell:

(1) [P]laintiff need not predict the defendant's negligence or anticipate an accident; (2) seat belts are not required in all vehicles, and defendant shouldn't be permitted to take advantage of the fact that they were installed in plaintiff's vehicle; (3) most people don't use seat belts, so a jury shouldn't be permitted to find that they should; and (4) allowing a seat belt defense will produce a "veritable battle of experts" on the causation question, and spec-

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a plaintiff from recovering more than an amount equal to the percentage of damages for which the defendant was responsible. Id.

89. Lafferty, 425 So. 2d at 1148.

90. The court cited Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970), and the reasons set forth in that opinion for exercising judicial restraint. The court in Peterson noted there was no consensus as to the utility of seat belts and felt that their usefulness should be established in the mind of the public before the courts could hold occupants negligent for not wearing one. Lafferty, 425 So. 2d at 1148-49.

91. Lafferty, 425 So. 2d at 1149.

92. Id. The court looked to cases from Alabama, Colorado, New Mexico, New York, Pennsylvania, and Washington.

93. Id. (citing Annot., 80 A.L.R.3d 1033 (1977)).

94. 570 P.2d 138 (Wash. 1977). The court noted that the Amend case was also relied on by the First District Court of Appeal in Selfe v. Smith, 397 So. 2d 348 (Fla. 1st DCA 1981).
ulative verdicts.\textsuperscript{95}

The court also noted that because the effectiveness of seat belts is questionable, a nonuser should not be deemed to have acted unreasonably.\textsuperscript{96}

The court considered the most compelling reason for disallowing evidence of seat belt nonuse to be the argument based on the difference between fault and damages or loss.\textsuperscript{97} The court was convinced there was no way to clearly and fairly arrive at a figure determining damages.\textsuperscript{98} Consequently, the court was troubled by the possibility that a plaintiff might be limited to recovering only a fraction of the damages he sustained in an accident which was not due to any fault on his part. This would result in a windfall for the negligent tortfeasor.\textsuperscript{99} The court envisioned a situation where an intoxicated driver could escape liability after colliding with an unbelted motorist who was stopped at a traffic light.\textsuperscript{100} If expert testimony revealed that the motorist would have received no injuries had he been wearing a seat belt, the jury would have to preclude any recovery. This would be an unfortunate and unfair result, because the rule has always been that the lawful driving of a car is not negligent.\textsuperscript{101}

The most compelling argument advanced by the court was based upon the simple tort concept that a "tortfeasor takes his plaintiff as he finds him."\textsuperscript{102} Indeed, the court recognized that admitting evidence of preaccident conduct would open a Pandora's box.\textsuperscript{103}

\begin{enumerate}
\item \textsuperscript{95} Lafferty, 425 So. 2d at 1149-50 (quoting Selfe, 397 So. 2d at 351 n.8).
\item \textsuperscript{96} Lafferty, 425 So. 2d at 1150. The court cited Britton v. Doehring, 242 So. 2d 666 (Ala. 1970), for the proposition that further research needs to be done before it can be concluded that seat belts are in fact an effective means to prevent injury and death.
\item \textsuperscript{97} Lafferty, 425 So. 2d at 1150. The court apparently believed that fault and damages were distinguishable, but could envision no rational way to assess how much weight to put on either in calculating plaintiff's recovery. "Should we simply let the jury blend all of the factors together without being able to even verbalize the logical steps by which they should arrive at a conclusion?" The court predicted situations in which a plaintiff who was only 20\% negligent would receive only 10\% of his damages. \textit{Id}.
\item \textsuperscript{98} The court also expressed its concern for the unfairness that might result if the jury placed too much emphasis on the single fact of seat belt nonuse. \textit{Id}.
\item \textsuperscript{99} \textit{Id}.
\item \textsuperscript{100} \textit{Id}. at 1151.
\item \textsuperscript{101} Again, the court offered a persuasive illustration: "People lawfully driving a car on New Year's Eve probably know there will be drunks on the road but the innocent driver is not held negligent because he would have been safer at home." \textit{Id}.
\item \textsuperscript{102} \textit{Id}. at 1150. The court also pointed out that "[m]itigation of damages concerns a plaintiff's conduct after an accident, not before." \textit{Id}.
\item \textsuperscript{103} \textit{Id}. at 1150-51.
\end{enumerate}
The court offered illustrations of potential "evils" which could result from such a holding:

For example, numerous studies have shown that standard-size cars are safer than compact or sub-compact cars. Should a plaintiff be penalized for not taking this safety factor into consideration when purchasing a car? Further, hard tops are safer than convertible tops. Is this [fact] for jury consideration and for [the] court to instruct on? What about evidence demonstrating that had the convertible top been up rather than down, plaintiff would not have sustained any injuries? 104

The examples are analogous to the question of seat belt nonuse. All have a bearing on the injuries received in an auto accident, but none have been considered when determining damages.

Finally, the court opined that the admission of evidence of seat belt nonuse would place undue emphasis on one evidentiary fact, which would distract the jury from the main issue of fault for the accident. 105

Judge Hurley dissented, stating that he would have affirmed the judgment of the trial court. 106 Notwithstanding what he considered to be an attractive argument, he was persuaded by the dissent in Pasakarnis 107 and the rationale in Spier v. Barker, 108 which allowed evidence of seat belt nonuse. Because different theories were proposed by those two opinions, 109 it is unclear which theory Judge Hurley believed should have been adopted.

B. Insurance Co. of North America v. Pasakarnis

The majority of the court in Pasakarnis, unlike Judge Hurley, found the rationale of Lafferty not only attractive, but persuasive

104. Id. at 1151. The court again emphasized that prior conduct is regulated by the legislature (e.g., driving under the influence laws).
105. Id.
106. Id. (Hurley, J., dissenting).
107. Pasakarnis, 425 So. 2d at 1142 (Schwartz, J., dissenting).
109. In Spier, the New York Court of Appeals adopted a theory based on the mitigation of damages. In his dissenting opinion in Pasakarnis, Judge Schwartz initially advocated that buckling the seat belt takes minimal effort. Pasakarnis, 425 So. 2d at 1143 (Schwartz, J., dissenting). He used Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), and the adoption of comparative negligence as the basis for allowing the seat belt defense. Pasakarnis, 425 So. 2d at 1143-44 (Schwartz, J., dissenting). Later in his opinion he apparently rejected the application of the seat belt defense as negligence per se, stating, "I could not in good conscience hold that it is necessarily negligent to fail to fasten one's seat belt." Id. at 1146.
as well.\textsuperscript{110} Indicative of the patent uncertainty that surrounds the seat belt defense, the court had originally formed a majority in favor of the seat belt defense but subsequently joined the ruling of their colleagues on the \textit{Lafferty} court, leaving Judge Schwartz in "lonely dissent."\textsuperscript{111}

In \textit{Pasakarnis}, the litigation stemmed from an accident which occurred at an intersection when the defendant ran a stop sign.\textsuperscript{112} Upon collision, the plaintiff, Pasakarnis, was hurled from his jeep, resulting in a compression type injury of his lower back. Pasakarnis acknowledged that the jeep was unstable, but deliberately chose not to fasten his seat belt.\textsuperscript{113} An expert accident analyst testified at a deposition that if the plaintiff had buckled his seat belt, he would not have been thrown from the jeep and would have received either minor or no injuries.\textsuperscript{114} The trial court, however, ruled that failure to use the seat belt did not establish a legal basis to reduce the damage award and refused to submit the expert's testimony to the jury.\textsuperscript{115} Consequently, the jury found the defendant 100\% at fault and found for Pasakarnis in the amount of $100,000.\textsuperscript{116}

Judge Schwartz pointed out in his dissent that adoption of the comparative negligence doctrine eliminated the harshness of a complete bar to recovery typical in contributory negligence jurisdictions.\textsuperscript{117} Additionally, the comparative negligence formulation established by \textit{Hoffman v. Jones} relates to whether any negligence

\begin{itemize}
  \item \textsuperscript{110} Insurance Co. of N. America v. Pasakarnis, 425 So. 2d 1141, 1141 (Fla. 4th DCA 1982), rev'd, 451 So. 2d 447 (Fla. 1984).
  \item \textsuperscript{111} \textit{Pasakarnis}, 425 So. 2d at 1142 n.1 (Schwartz, J., dissenting). Judge Schwartz set the tone early when he stated:

  \begin{quote}
  [I]t seems clear to me that the failure to expend the minimal effort required to fasten an available safety device which has been put there specifically in order to reduce or avoid injuries from a subsequent accident is, on the very face of the matter, obviously pertinent and thus should be deemed admissible in an action for damages, part of which would not have been sustained if the seat belt had been used.
  \end{quote}

  \textit{Id.} at 1143.
  \item \textsuperscript{112} \textit{Id.} at 1142.
  \item \textsuperscript{113} \textit{Id.} The supreme court conceivably could have avoided adopting the seat belt defense and ruled that evidence of seat belt nonuse was admissible in this case as an "exceptional circumstance." \textit{See supra} note 63. The fact that the jeep was known to be unstable may have required the occupant to use his seat belt in order to avoid a comparative negligence counterclaim.
  \item \textsuperscript{114} \textit{Pasakarnis}, 425 So. 2d at 1142 (Schwartz, J., dissenting).
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at 1143.
\end{itemize}
of the plaintiff was a legal cause of his "damages," "loss," or "injury," not of the accident.\textsuperscript{118} Rejecting the argument calling for judicial restraint, Judge Schwartz interpreted the legislature's silence as inconclusive.\textsuperscript{119} Further, he cautioned that judicial inaction, coupled with the absence of a statute, will be interpreted to mean that an available seat belt did not have to be fastened.\textsuperscript{120}

To Judge Schwartz, the issue of seat belt nonuse would be a factual matter to be determined by the jury.\textsuperscript{121} He analogized the jury to a mini-legislature, in which the members would determine whether a reasonable person should have fastened his seat belt.\textsuperscript{122} Judge Schwartz reemphasized that the seat belt defense would reach the jury only when there was competent evidence indicating that the plaintiff's nonuse of a seat belt had caused the plaintiff's injuries.\textsuperscript{123}

IV. \textit{Insurance Co. of North America v. Pasakarnis—The "Seat Belt Defense" in the Florida Supreme Court}

The Florida Supreme Court reviewed this matter of great public importance in an effort to resolve the legal quagmire. \textit{Pasakarnis} and \textit{Lafferty} provided the vehicles by which the supreme court could determine whether Florida courts should "consider seat belt evidence as bearing on comparative negligence or mitigation of damages."\textsuperscript{124}

Although the rationale of the majority in \textit{Lafferty} convinced their colleagues at the Fourth District Court of Appeal, the Florida Supreme Court was not persuaded. In reversing the Fourth District Court of Appeal, the supreme court adopted the minority

\begin{itemize}
  \item \textsuperscript{118} \textit{See supra} note 27 and accompanying text.
  \item \textsuperscript{119} \textit{Pasakarnis}, 425 So. 2d at 1144-45 (Schwartz, J., dissenting). Judge Schwartz pointed out that no statute has been enacted which specifically prohibits nonuse of seat belts from being considered evidence in the mitigation of damages. He opined, "Florida's silence on the issue may therefore be taken, not as a declaration that the defense may not be recognized, but rather as one that the issue should be determined within judicial process." \textit{Id.} at 1145.
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{Id.} at 1146.
  \item \textsuperscript{122} \textit{Id.} This idea is troublesome. The jury does not have the benefit of time to decide by way of technical evidence in the form of expert testimony and literature to make a fair decision. \textit{See Lafferty}, 425 So. 2d at 1149 (court asserted that "[a] jury should not find the existence or nonexistence of a legal duty to use a belt based upon such traditionally legislative materials").
  \item \textsuperscript{123} \textit{Pasakarnis}, 425 So. 2d at 1147 (Schwartz, J., dissenting). This view of the need for competent evidence is generally shared by those in favor of the seat belt defense.
  \item \textsuperscript{124} \textit{Id.; Lafferty}, 425 So. 2d at 1151 (Hurley, J., dissenting).
\end{itemize}
view and held that evidence of seat belt nonuse is admissible to show enhanced injuries.\textsuperscript{125}

\textbf{A. The Majority Opinion}

Justice Alderman, writing for the majority, noted early in his opinion that although the seat belt issue had been raised in several district courts of appeal, these courts had not considered the defense under any of the possible theories because the evidence had not established that the injuries would have been prevented or lessened by the use of a seat belt.\textsuperscript{126} He then proceeded through a brief summation of Brown \textit{v. Kendrick}\textsuperscript{127} and its progeny\textsuperscript{128} to illustrate that those cases, unlike the Pasakarnis case, did not provide sufficient evidence to establish that the nonuse of seat belts increased the injuries.\textsuperscript{129}

The supreme court rejected the argument that the courts are law interpreting and not lawmaking\textsuperscript{130} and, therefore, should exercise judicial restraint when called upon to adopt the seat belt defense.\textsuperscript{131} The court cited \textit{Hoffman v. Jones} for the proposition that the court should not abdicate to the legislature its responsibility to ensure that the law remain “fair and realistic as society and technology change.”\textsuperscript{132}

Additionally, the majority in \textit{Pasakarnis} cited \textit{Auburn Machine

\begin{itemize}
  \item \textsuperscript{125} Insurance Co. of N. America \textit{v. Pasakarnis}, 451 So. 2d 447 (Fla. 1984); see Note, supra note 57, at 117.
  \item \textsuperscript{126} \textit{Pasakarnis}, 451 So. 2d at 450.
  \item \textsuperscript{127} 192 So. 2d 49 (Fla. 1st DCA 1966).
  \item \textsuperscript{128} Selfe \textit{v. Smith}, 397 So. 2d 348 (Fla. 1st DCA 1981) (court held that no duty existed requiring parents to install child restraint devices in their vehicles; therefore, a jury could not impose contribution or liability on parents) (recently the legislature passed FLA. STAT. § 316.613 (1983), requiring child restraints but including a section prohibiting nonuse of child restraints from being admitted into evidence in a civil action); Quinn \textit{v. Millard}, 358 So. 2d 1378, 1384-85 (Fla. 3d DCA 1978) (court refused to rule on the seat belt issue because the evidence did not support the contention that the plaintiff intentionally exposed himself to known risks, nor did the defendant provide any evidence that fewer injuries would have resulted had the seat belt been worn); Chandler Leasing Corp. \textit{v. Gibson}, 227 So. 2d 889, 890 (Fla. 3d DCA 1969) (court found that the defendant did not plead contributory negligence and therefore the evidence was correctly precluded from the jury; court in dictum stated that even if defendants had properly attempted to raise the issue of contributory negligence, they still would have had to face Brown).
  \item \textsuperscript{129} \textit{Pasakarnis}, 451 So. 2d at 450.
  \item \textsuperscript{130} Id. at 451. \textit{But see infra} note 150 and accompanying text.
  \item \textsuperscript{131} \textit{Pasakarnis}, 451 So. 2d at 451.
  \item \textsuperscript{132} \textit{Hoffman v. Jones}, 280 So. 2d 431, 436 (Fla. 1973). In \textit{Hoffman}, the court decided that a complete bar to the plaintiff's recovery because of his contributory negligence was inequitable and therefore judicially adopted comparative negligence.
\end{itemize}
Works v. Jones, in which the supreme court held that the obviousness of the hazard was not an exception to the manufacturer's liability but rather a defense whereby the manufacturer could show that the plaintiff had not used the reasonable degree of care required under the circumstances.

Moving closer to the issue of automobile usage, the supreme court drew further support from their past holding in Ford Motor Co. v. Evancho "that there was a duty of care resting on common law negligence that the manufacturer of an article must use reasonable care in design and manufacture of its product to eliminate the risk of foreseeable injury." The supreme court held that the foreseeability issue as construed in Evancho was relevant to the Pasakarnis case. The court came to what it considered the logical conclusion—that if accident injuries are foreseeable to manufacturers, then they are also foreseeable to the motorist.

The court relied on the fact that "[t]he seat belt has been proven to afford the occupant of an automobile a means whereby he or she may minimize his or her personal damages prior to the occurrence of the accident." In support, the court offered a 1982 study which concluded that the effectiveness of seat belts in reducing injury and death is "substantial and unequivocal." From this determination, the court concluded that failure to wear the safety belt may, under certain circumstances, be a factor for the jury to consider in deciding whether the plaintiff exercised due care for his own safety.

The supreme court adopted the approach set out in Spier v.

133. 366 So. 2d 1167, 1171 (Fla. 1979).
134. 327 So. 2d 201 (Fla. 1976).
135. Pasakarnis, 451 So. 2d at 452 (citing Evancho, 327 So. 2d at 204).
136. Pasakarnis, 451 So. 2d at 452. Quoting Evancho, 327 So. 2d at 204, the court asserted:

Automobiles are made for use on the roads and highways in transporting persons and cargo to and from various points. This intended use cannot be carried out without encountering in varying degrees the statistically proved hazard of injury-producing impacts of various types . . . .

. . . While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts.

137. Pasakarnis, 451 So. 2d at 453.
138. Id. (citing Spier v. Barker, 323 N.E.2d 164 (N.Y. 1974)).
139. Pasakarnis, 451 So. 2d at 451 (citing NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., EFFECTIVENESS AND EFFICIENCY OF SAFETY BELT AND CHILD RESTRAINT USAGE (1982)).
140. Pasakarnis, 451 So. 2d at 451.
Nonuse of the seat belt may or may not amount to a failure to use reasonable care on the part of the plaintiff. Whether it does depends on the particular circumstances of the case. Defendant has the burden of pleading and proving that the plaintiff did not use an available and operational seat belt, that the plaintiff’s failure to use the seat belt was unreasonable under the circumstances, and that there was a causal relationship between the injuries sustained by the plaintiff and plaintiff’s failure to buckle up. Moreover, if there is competent evidence establishing these factors, the jury will be permitted to consider those factors in deciding whether the damages to the plaintiff should be reduced.

In an attempt to eliminate jury confusion, the court authorized the addition of three new interrogatories to the standard verdict form. The first inquiry is whether the plaintiff acted reasonably by not wearing a seat belt. Second, the jury is to determine whether there was sufficient proof that the failure to use the belt contributed to the injuries. The third question requires the jury to determine the percentage of injuries resulting from seat belt nonuse.

B. Analysis of the Majority Opinion

The rationale of the majority in Pasakarnis is suspect for several reasons. As previously noted, the Florida Supreme Court cited Hoffman v. Jones for the proposition that the court can alter existing law absent legislation. Moreover, the court held that the

141. 323 N.E.2d 164 (N.Y. 1974).
142. Pasakarnis, 425 So. 2d at 1142 (Schwartz, J., dissenting).
143. Pasakarnis, 451 So. 2d at 454.
144. Id.
145. Id.
146. "(a) Did defendant prove that the plaintiff failed to use reasonable care under the circumstances by failing to use an available and fully operational seat belt?" Id. Instructions provide that if the answer is no, the jury should not proceed to the next question.
147. "(b) Did defendant prove that plaintiff's failure to use an available and fully operational seat belt produced or contributed substantially to producing at least a portion of the plaintiff's damages?" Id. Some instructions are provided.
148. "(c) What percentage of plaintiff's total damages were caused by his (or her) failure to use an available and fully operational seat belt?" Id.
149. 280 So. 2d 431 (Fla. 1973).
150. Pasakarnis, 451 So. 2d at 451. But see Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978), where the Florida Supreme Court held:

Accordingly, until the provisions of Article II, Section 3, of the Florida Constitu-
seat belt defense was consistent with the doctrine of comparative negligence as adopted in Hoffman. 151

A careful look reveals that the court's reliance on the Hoffman decision is misplaced in the context of the seat belt defense. Prior to Hoffman, the plaintiff was totally barred from recovery in a wrongful death action due to his limited negligence in causing the accident. 152 The court rebutted the judicial restraint argument with the notion that the court "may change the rule where great social upheaval dictates." 153 The Hoffman court recognized that it was almost universally considered unjust and inequitable to vest an entire accidental loss on one of the parties whose negligence when combined with the negligence of the other party produced the loss. 154 Additionally, the court in Hoffman noted that if fault were to be the test of liability, the doctrine of comparative negligence, which involves apportionment of loss among those whose fault contributed to the occurrence, would be more consistent with liability based on fault. 155

In contrast, in Pasakarnis there was no indication of any great social upheaval. Quite to the contrary, a low percentage of motorists use seat belts. 156 Unlike the doctrine of comparative negligence, the seat belt defense is the minority view. 157 Since there is so much controversy concerning the effectiveness of the seat belt and a great deal of judicial agonizing over the inequities of both positions, judicial restraint could hardly be considered as unjust or inequitable.

Equally troubling is the supreme court's use of Hoffman v. Jones
as a springboard to invade areas of tort law.\textsuperscript{158} There are some areas where judicial intervention is inappropriate. Unlike Hoffman, the court in Pasakarnis was required to evaluate volumes of studies and surveys of automobile safety to make its decision.\textsuperscript{159} Due to the court's limited resources, this has traditionally been a legislative task. Consequently, the court in Pasakarnis effectively erased the line that has separated the judiciary from the legislative branch.

It is unclear why the court felt compelled to emphasize the doctrine of comparative negligence as a basis for its decision. The supreme court noted that the seat belt defense was consistent with "the underlying philosophy of individual responsibility upon which the decisions of this Court succeeding Hoffman have been predicated."\textsuperscript{160} However, several factors reveal that Florida's switch to comparative negligence has little significance with respect to the seat belt defense. First, the court in Pasakarnis adopted the rationale of the New York case, Spier v. Barker.\textsuperscript{161} At the time Spier was decided, New York was a contributory negligence jurisdiction. Thus, if Florida was still a contributory negligence state, the same result could have been reached. Contrary to the position of the petitioner, there was no indication in Brown v. Kendrick\textsuperscript{162} that the court considered the harshness of contributory negligence. Second, the Brown court could have applied the concept of remote contributory negligence, which has been defined as "that negligence which is too far removed as to time or place, or causative force, to be a direct or proximate cause of the accident."\textsuperscript{163} If the plaintiff's negligence was remote, it would be considered in mitigation of damages, rather than as a bar to his recovery.\textsuperscript{164} Third, the

\textsuperscript{158} Pasakarnis, 451 So. 2d at 451. The supreme court asserted, "[T]he law of torts in Florida has been modernized, for the most part, through the courts."

\textsuperscript{159} In addition to the studies cited in the majority and dissenting opinions in Pasakarnis, amicus curiae briefs submitted by the Florida Safety Councils and the Motor Vehicle Manufacturers Association of the United States, Inc., included appendices which contained detailed traffic accident statistics and automobile safety data.

\textsuperscript{160} Pasakarnis, 451 So. 2d at 451.

\textsuperscript{161} 323 N.E.2d 164 (N.Y. 1974). In Spier, evidence of seat belt nonuse went to the mitigation of damages under the theory of avoidable consequences, not to the issue of comparative or contributory negligence.

\textsuperscript{162} Petitioner's Brief on the Merits at 4, Insurance Co. of N. America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984).

\textsuperscript{163} 192 So. 2d 49 (Fla. 1st DCA 1966).

\textsuperscript{164} Street v. Calvert, 541 S.W.2d 576, 585 (Tenn. 1976).

\textsuperscript{165} See Perry v. Gulf, Mobile & Ohio R.R., 502 F.2d 1144, 1145 (6th Cir. 1974); Frankenberg v. Southern Ry., 424 F.2d 507, 508 (6th Cir. 1970); Atlantic Coastline R.R. v. Smith, 264 F.2d 428, 432 (6th Cir. 1959); Street v. Calvert, 541 S.W.2d 576, 585 (Tenn. 1976).
Florida Supreme Court soundly rejected the theory premised on negligence, reasoning that this theory would be applicable only if a plaintiff's failure to use due care contributed to the accident rather than to the injuries.  

The court cited Auburn Machine Works Co. v. Jones to illustrate how the doctrine of comparative negligence can affect common law tort concepts. In Auburn, the court prevented the manufacturer from escaping liability by rejecting the "patent danger" doctrine. The court in Pasakarnis also cited Ford Motor Co. v. Evancho for the proposition that automobile manufacturers may be held liable for a design or manufacturing defect that enhances injuries during a car accident. Furthermore, the court held that automobile accidents and resulting injuries were foreseeable, a point the court found particularly relevant to the present case.

Several reasons not expressed by the supreme court, however, distinguish these previous manufacturer cases from the present case and therefore makes reliance on these cases inappropriate. Unlike Pasakarnis, which dealt with an individual tortfeasor, the manufacturer cases relied on by the court in support of the foreseeability of the injuries dealt with great numbers of items generally associated with mass production. When dealing in the volume of cars manufactured by Ford, an auto accident is not only foreseeable, but there is a probable certainty that a given number of automobiles will be involved in accidents. The substantial number of cars manufactured increases the risk of injuries proportionately. Courts have long recognized a higher standard of care for manufacturers in products liability cases inasmuch as they place the chattel in the stream of commerce with the intent of profiting from the consumer. Applying Judge Learned Hand's formula for determining liability and taking into account the profit margin

166. Pasakarnis, 451 So. 2d at 453-54.
167. 366 So. 2d 1167 (Fla. 1979).
168. The doctrine was considered to be an exception to the manufacturer's liability due to the obviousness of the hazard. Pasakarnis, 451 So. 2d at 452. The court rejected the doctrine as an exception to liability but allowed the doctrine as a defense where the manufacturer could show unreasonable care. Auburn Machine Works, 366 So. 2d at 1172.
169. 327 So. 2d 201 (Fla. 1976).
170. The court recognized that the automobile manufacturer has a greater ability than the driver to safeguard against injuries resulting from automobile collisions. Pasakarnis, 451 So. 2d at 452.
171. Id.
172. See Evancho, 327 So. 2d at 203.
174. See supra text accompanying note 59.
due to sales, the burden to design and manufacture a safe automo-
ble is slight compared to the probable certainty of the accident.175
In contrast, a motorist who complies with highway speed limits
and traffic rules has only a relatively small chance of being in-
volved in an accident.176 To some motorists, the burden of con-
sciously buckling a seat belt every time the motorist enters a car
may seem great compared to the probability of an accident.177

The supreme court determined that the seat belt provided mo-
torists with a means to minimize his or her personal injuries prior
to an accident.178 In support, the court offered a 1982 study by the
United States Department of Transportation, which indicated that
evidence of the effectiveness of safety belts in reducing injury and
death is substantial and unequivocal.179 The court, however, did
not consider the possibility that the use of seat belts may actually
enhance injury or even prove fatal in a particular accident. In a
recent case, McLeod v. American Motors Corp.,180 an expert wit-
ness testified that had the plaintiff been wearing her seat belt, she
would have received greater injuries. This case suggests that, in
some instances, buckling one's seat belt may result in more serious
injuries. The majority's holding in Pasakarnis will force the motor-
ist to make predictions as to what might occur. To impose a less
than absolute duty to wear seat belts requires a motorist to predict
an outcome that may or may not be beneficial to his health.181 In
deciding Lafferty, the Fourth District Court of Appeal recognized

175. Pasakarnis, 451 So. 2d at 452. The court implied that the auto manufacturer has a
greater duty of care than the motorist "[b]ecause of the greater ability of the manufacturer
to safeguard against injuries in automobile collision cases ..." Id.
177. In Miller, 160 S.E.2d at 69, the court noted that most motorists reach their destina-
tion safely and that a typical automobile occupant believes that he "need not truss himself
up in every known safety apparatus before proceeding on the highway."
178. Pasakarnis, 451 So. 2d at 453.
179. Id. (citing NATIONAL HIGHWAY SAFETY ADMIN., U.S. DEPT. OF TRANSP., EFFECTIVE-
NESS AND EFFICIENCY OF SAFETY BELT AND CHILD RESTRAINT USAGE (1982)).
180. 723 F.2d 830, 836 (11th Cir. 1984).
181. The court in Lafferty was trapped by this halfway approach. Quoting Petersen v.
Klos, 426 F.2d 199, 204 (5th Cir. 1970), the court noted:
Yet another problem was recognized by the Supreme Court of North Carolina in
Miller v. Miller ... The court observed that, excluding the most bizarre circum-
stances, "there are no standards by which it can be said that the use of seat belts
is required for one trip and not for another," since a motorist ordinarily must
engage the seat belts before the imminent danger of an accident is apparent. If a
duty to use seat belts is recognized, it must then be an absolute duty, not depen-
don the circumstances of a particular accident.
Lafferty v. Allstate Ins. Co., 425 So. 2d 1147, 1149 (Fla. 4th DCA 1982) (citation omitted),
this dilemma, asserting that "[e]vidence of enhanced injuries from no seat belt is hindsight."182

Equally disturbing is the fact that the Florida Supreme Court did not respond to the concept raised in Lafferty "that a tortfeasor takes his plaintiff as he finds him."183 The holding in Pasakarnis may very well lead to subsequent litigation concerning other preaccident behavior of the plaintiff, whereas a usual mitigation of damages analysis would only consider post-accident behavior. For example, will the court now consider the increased risk of heart failure due to smoking to be a precipitating factor of a fatal heart attack following an accident? To date, no court has accepted this physical abuse as a viable defense.184 This is analogous to the seat belt defense. In both instances, it has been determined that the prior habits of the plaintiff could prove detrimental to the individual's health. The acceptance of the seat belt defense could generate many litigable questions as to what constitutes a breach of due care or a failure to mitigate damages in other contexts as well.

C. The Dissent

Justice Shaw, with whom Justice Adkins concurred, strenuously dissented from the majority's holding.185 He began his analysis by noting that the majority's opinion ignored the fact that the legislature had recently prohibited the theories of comparative negligence or mitigation of damages to be considered when a parent or legal guardian had not provided and used a child restraint.186 Although the use of a child restraint is now mandated by law, admission of evidence of nonuse of a child restraint is statutorily prohibited.187 Justice Shaw argued that the child restraint situation was analogous to the seat belt issue. "It seems to me that there would be a greater duty for a parent to protect a helpless child, especially when required by law, than to protect himself."188

The dissenters also noted that the majority of the motoring pub-

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182. Lafferty, 425 So. 2d at 1149.
183. Id. at 1150.
184. A similar situation occurred in Matthews v. Williford, 318 So. 2d 480 (Fla. 2d DCA 1975). The decedent had been advised by his doctor to quit smoking and lose weight. He subsequently suffered a heart attack and died. In response to the suit alleging improper medical care, the doctor unsuccessfully asserted that the decedent's prior conduct should be admissible to show contributory negligence.
185. Pasakarnis, 451 So. 2d at 455 (Shaw, J., dissenting).
186. Id. Justice Shaw was referring to Fla. Stat. § 316.613(1), (3) (1983).
188. Pasakarnis, 451 So. 2d at 455 (Shaw, J., dissenting).
lic do not use seat belts and that there is no common law or statutory duty requiring their use. Consequently, they advanced the notion that the legislature was the appropriate forum in which to settle this issue.189

Justice Shaw was also troubled by the majority's misuse of the doctrine of avoidable consequences. Since this doctrine is generally applied to post-accident conduct, the failure to buckle one's seat belt does not fall within the normal bounds of this principle. Justice Shaw asserted: "The majority's defense therefore not only smacks of judicial policy making, but also offends traditional notions of tort law."190

Additionally, Justice Shaw argued that the adoption of the seat belt defense would increase the cost, time, and complexity of litigation.191 First, he predicted difficulty for the jury having to evaluate conflicting testimony on such technical elements of crash behavior.192 As a result, Shaw thought the seat belt issue might become the focal point and completely overshadow the tortfeasor's conduct that caused the accident.193 Second, he recognized practical and technical difficulties that would result from the court's decision. For instance, when does the duty to wear a seat belt arise, and who must wear it?194 In conclusion, he considered the adoption of the seat belt defense "an unwarranted and inappropriate use of judicial power to impose by fiat a debatable public policy on an unwilling public."195

V. Suggested Legislative Action

The widespread use of automobiles, the number of accidents

189. Id. at 456.
190. Id.
191. He stated: "It is unclear in my mind when the defense is available and when the duty to wear seat belts arises. Is it available in an intentional tort action? What is the duty of a pregnant or handicapped person to wear the safety device?" Id.
192. He noted:
The jury will be called upon to evaluate conflicting expert testimony on such technical elements as the crash behavior of the vehicle, the trajectory of the plaintiff's body in the crash, the relationship of the vehicle crash event to occupant kinematics, the particular injury suffered, the trajectory which a restrained occupant would have taken, and the extent of lesser injuries which the restrained occupant would have sustained as a result of the impact.

Id.
193. Id.
194. Id.
195. Id. at 457.
that occur, and the conflicting views as to the effectiveness and use of the seat belt, make the seat belt defense a good candidate for legislative consideration. Moreover, the judiciary lacks both the resources and the time to adequately resolve this public policy issue.

The Florida legislature has two options. First, if the legislature determines through its committees that the seat belt is an effective device in most instances but that there is an element of risk in its use, it can draft a statute that precludes the use of evidence of seat belt nonuse in personal injury trials. This has already been established by other legislatures.

New York has blazed the legislative trail through their recent enactment of a statute requiring that seat belts be worn. The statute provides that all front seat passengers are to be restrained by seat belts while the motor vehicle is in operation and also requires that the operator of the motor vehicle be restrained by a safety belt. Violators may be fined up to fifty dollars. The statute does not apply to physically disabled individuals who are unable to wear a seat belt. The statute also provides that evidence of noncompliance can be used to mitigate damages if pled as an affirmative defense, although noncompliance is not admissible as evidence in regard to the issue of liability.

If a seat belt is to be required as a matter of public policy, legislative mandate is the more appropriate vehicle. New York motorists are likely to be more aware than Florida motorists of the duty ...

196. 47,400 people were killed in automobile accidents in the United States in 1980, while 1,400,000 others were severely injured. National Safety Council, Accident Facts 40 (1981).

197. Virginia has a statute that expressly precludes evidence of seat belt nonuse in civil actions. Va. Code § 46.1-309.1 (Supp. 1984). The pertinent part provides: "Failure to use such safety lap belts or a combination of lap belts and shoulder straps or harnesses after installation shall not be deemed to be negligence nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature."


200. Id. § 1, 1984 N.Y. Sess. Law News at 689-90.

201. Id.

202. Id.

203. Id.

204. Id.
imposed and the consequences for failure to comply.\textsuperscript{205}

Once making the determination that mandatory seat belt use is appropriate, the Florida legislature should follow the example of New York and impose a fine on motorists who fail to comply. Fines generally increase the probability of lawful compliance.\textsuperscript{206} Another section should address the applicability of the statute in accident litigation. The Florida law should contain an express proviso that negligence would not affect liability, but would be considered to mitigate damages. Failure to comply, therefore, would not be considered negligence per se.\textsuperscript{207}

It can be anticipated that a mandatory seat belt law will be constitutionally challenged in court. The arguments will probably be based on grounds of an unwarranted intrusion on privacy and restriction on individual freedom. Similar arguments were advanced when the laws requiring the use of motorcycle helmets went into effect.\textsuperscript{208} The courts faced with these arguments have stated: "[W]e believe that society has an interest in the preservation of the life of the individual for his own sake."\textsuperscript{209} The Florida Supreme Court held, in a motorcycle helmet case, that a minimal inconvenience could be imposed by the legislature to protect against a significant possibility of serious injury or death.\textsuperscript{210} The controversy that exists as to the effectiveness of the use of seat belt and its potential to increase injuries may distinguish it from the motorcycle helmet law. Notwithstanding this issue of debatable public welfare, if the legislature decides that the risk of enhanced injuries is very slight when compared with its ability to prevent injuries, the statute will

\begin{footnotesize}
\textsuperscript{205} The statute mandates educational programs by the Governor's Traffic Safety Committee as well as law enforcement assistance. \textit{Id. §§} 3-4, 1984 N.Y. Sess. Law News at 690.

\textsuperscript{206} See Note, \textit{supra} note 57, at 151 (citing G. \textsc{Calabresi}, \textsc{The Cost of Accidents: A Legal and Economic Analysis} (1970); P. Pellerin & K. Heine, Special Report: Seat Belt Use Abroad 1 (unpublished report prepared for the American Seat Belt Council, Jan. 1978)).

\textsuperscript{207} See Rex Util., Inc. v. Gaddy, 413 So. 2d 1232 (Fla. 3d DCA 1982). A similar argument arose in this case, where it was asserted that failure to wear a motorcycle helmet constituted negligence per se. The court rejected this notion by asserting: "It does not follow . . . that a violation of this type of statute by itself constitutes a case of actionable negligence." \textit{Id.} at 1234.

\textsuperscript{208} See Comment, \textsc{Constitutionality of Mandatory Motorcycle Helmet Legislation}, 73 \textsc{Dick. L. Rev.} 100 (1968); Note, \textsc{Motorcycle Helmets and the Constitutionality of Self-Protective Legislation}, 30 \textsc{Ohio St. L.J.} 355 (1969).

\textsuperscript{209} State v. Eitel, 227 So. 2d 489, 491 (Fla. 1969) (supreme court held that law mandating motorcycle headgear is constitutional).

\textsuperscript{210} \textit{Id.} \textit{Eitel} was reaffirmed in \textit{Hamm v. State}, 387 So. 2d 946, 947 (Fla. 1980). \textit{See also} Comment, \textit{supra} note 25, at 134 (discussion of constitutional challenges to motorcycle helmet statute in Tennessee).
\end{footnotesize}
more than likely pass constitutional muster.

Although commentators have indicated that the members of the public will probably not change their habits as a result of the law, an examination of countries abroad proves otherwise.\footnote{211} Australia in 1971 and France in 1973 enacted such laws and reported that use increased from 25% to an average of 75-80% with a concurrent decline in fatalities.\footnote{212} If an objective is ultimately set to encourage seat belt use, a legislative mandate will help insure Florida the same success. More importantly, to encourage the use of seat belts and to fairly apprise the Florida motorist of this new duty imposed by legislative action, a widespread and thorough educational program utilizing the mass media and law enforcement agencies should be launched to inform the public of the advantages of using seat belts and of the law that requires their use.

VI. Conclusion

The number of automobile accidents and resulting injuries and deaths each year makes the issue of seat belt usage quite important. Feeling compelled to assist in ending this carnage, the Florida Supreme Court in Insurance Co. of North America v. Pasakarnis took it upon itself to impose an unsure duty to wear seat belts. The court was obviously attempting to encourage the use of seat belts and aid in the equitable apportionment of damages. However, several factors suggest this decision was inappropriate and at the very least premature.

First, the issue of seat belt effectiveness and public acceptance is both complex and technical. Many questions remain in the minds of the motoring public and judges throughout the state as to the effectiveness of the seat belt and the inequities that may result if the seat belt defense is adopted. These substantial reservations concerning the effectiveness of seat belts and the scope of the seat belt defense should not be disregarded. Moreover, the small percentage of seat belt users lends support to the notion that the public is not yet consciously aware of the advantages of the use of the seat belt.

\footnote{211} See Note, supra note 57, at 103 n.84 (noting that 22 countries or regions currently mandate seat belt use; these include: Australia; Austria; Belgium; British Columbia, Ontario, Quebec, and Saskatchewan, Canada; Czechoslovakia; Denmark; Finland; France; Israel; Luxembourg; The Netherlands; New Zealand; Norway; Puerto Rico; Spain; Sweden; Switzerland; The Soviet Union; and West Germany).

\footnote{212} See Comment, supra note 25, at 133 (citing National Safety Council, Traffic Accident Facts 52 (1975)).
Second, the supreme court’s failure to respond to the concept that you “take your plaintiff as you find him” blurs the line that has been drawn regarding preaccident conduct. Furthermore, the supreme court’s use of the doctrine of avoidable consequences in reference to preaccident conduct, as opposed to the traditional post-accident applications, adds further confusion to an established tort doctrine.

Third, as a practical matter, the adoption of the seat belt defense as written leaves many questions unanswered regarding its application. Because there is no absolute duty to wear a seat belt, under what circumstances should the motorist wear them? Even more troubling, how will the jury know when the duty arises? The language of the opinion indicates that the seat belt must be “available and fully operational.” Does that imply a duty to keep the seat belts operational? How long can they be in disrepair? What if the motorist consciously removes them from the vehicle?

Another consideration is the practicality of hiring an expert to testify as to the causal connection between the failure to fasten the seat belt and the injuries. Even though the defendant may win the battle of the experts, there is little assurance that the jury will find that the plaintiff acted unreasonably. It is all too apparent that the court could not establish in its own mind the utility of the seat belt and therefore passed the decision on to the jury. Unfortunately, the jury is without the benefit of nonpartisan evidence to make its decision.

All factors considered, the adoption of the seat belt defense is inappropriate for judicial resolution. Until such time as the legislature determines that public policy demands the use of seat belts, the unwary motorist should not be denied recovery for those injuries that may have been prevented by use of seat belts. Since the

213. The Florida Supreme Court has recently attempted to clarify at least one of these issues. In Protective Cas. Ins. Co. v. Killane, 9 Fla. L.W. 490 (Fla. Nov. 29, 1984), the court stated that the seat belt defense must be “specifically pled” prior to trial; the court seemed to be concerned with the potential prejudice which could occur to the plaintiff if the defendant did not raise the defense until during or shortly before the trial.

214. Pasakarnis, 451 So. 2d at 454.

215. At the time that this note went to print, three bills that would require seat belt usage had been prefiled with the Florida House of Representatives for the 1985 legislative session. Fla. HB's 37, 47 & 70 (1985). Although the provisions and requirements of these bills differ somewhat, all of the bills provide that violation of the law would be a noncriminal traffic infraction punishable by a fine. House Bills 37 and 70 also provide for public education programs. However, none of the bills address the question of whether evidence of nonuse of a seat belt would be admissible in a civil trial on the issues of negligence and mitigation of damages.
decision will ultimately affect the Florida motorist, it follows that fairness dictates that the motorist be fully apprised. When and if the legislature determines that seat belts should be worn, and if the legislature determines that the nonuse of seat belts should be admissible on the issue of mitigation of damages, its determination must be accompanied by a widespread campaign urging the motorist to "buckle up" and informing him of the physical and financial consequences he may suffer if he fails to do so.

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