Mercer Law Review

Volume 65
Number 1 *Annual Survey of Georgia Law*

Article 4

12-2013

The Seat-Belt Defense in Georgia

Jacob E. Daly

Special Contribution

The Seat-Belt Defense in Georgia

by Jacob E. Daly*

I. INTRODUCTION

For a doctrine of common-law origin, the seat-belt defense is a relatively youthful fifty years old. Credit for the first use of this defense has been attributed to the defendant in *Stockinger v. Dunisch*,[1] a 1964 case in Sheboygan County, Wisconsin, in which the plaintiff's damages were reduced by 10% based on the jury's finding that she was negligent for failing to use a seat belt.[2] Despite this initial success, most states have rejected the defense, some legislatively and others judicially, and therefore exclude evidence of a plaintiff's failure to use an available seat belt. The Georgia Court of Appeals first recognized the defense in 1970

---

* Of Counsel in the firm of Freeman Mathis & Gary, LLP, Atlanta, Georgia. University of Virginia (B.A., 1993); Mercer University, Walter F. George School of Law (J.D., cum laude, 2000). Member, State Bar of Georgia.

1. Cir. Ct. Sheboygan Cnty., Wis. (1964).

2. John J. Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172, 172 n.1 (1970); Michael B. Rick, *Failure to Wear Seat Belts as Contributory Negligence: The Development of the Wisconsin Rule*, 50 MARQ. L. REV. 662, 664 (1967).

and explicitly adopted it in 1987, but the Georgia General Assembly paradoxically abolished the defense in 1988 while at the same time mandating the use of seat belts by front-seat occupants of passenger vehicles. Since then, evidence of a plaintiff's failure to use an available seat belt has not been admissible in tort lawsuits for any purpose. This Article argues that the reasons typically given for excluding such evidence are no longer valid, and so the General Assembly should reinstate the seat-belt defense. Ultimately, the seat-belt defense is a matter of fairness because a defendant should not be liable for damages that the plaintiff could have avoided easily by the simple act of buckling up.

II. EVOLUTION OF THE SEAT-BELT DEFENSE

A difficult problem for the common law was how to handle a situation where "the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages."[3] A plaintiff's failure to use an available seat belt has been described as "the paradigm modern example" of this problem.[4] Five decades of litigation have not led to a universal solution. More than twenty-four years ago, one judge wrote, "Enough has been written about the 'seat-belt defense' to show the body of law related to it is split, fragmented and changing. It varies in time, place, rationale, effect and implementation."[5] These words are equally true today.

Congress had just enacted the National Traffic and Motor Vehicle Safety Act of 1966 (the Act)[6] when cases involving the seat-belt defense began to reach state appellate courts in the late 1960s.[7] Regulations promulgated pursuant to the Act required automobile manufacturers to

---

3. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 65, at 459 (5th ed. 1984).

4. *Id.* § 65, at 459 n.76.

5. LaHue v. Gen. Motors Corp., 716 F. Supp. 407, 410 (W.D. Mo. 1989).

6. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966).

7. *See, e.g.*, Hansen v. Howard O. Miller, Inc., 460 P.2d 739 (Idaho 1969) (examining as a matter of first impression whether failure to wear a seat belt is admissible as evidence of contributory negligence); Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966) (holding that contributory negligence as a matter of law was not established by evidence that the passenger in a collision failed to use a seat belt); Lawrence v. Westchester Fire Ins. Co., 213 So. 2d 784 (La. Ct. App. 1968) (holding that passenger who was ejected from a vehicle in a collision was not contributorily negligent for failing to wear a seat belt); Gierpisz v. Singleton, 230 A.2d 629 (Md. 1967) (holding that the lower court properly refused to submit the question of a passenger's contributory negligence due to her failure to use a seat belt); Bertsch v. Spears, 252 N.E.2d 194 (Ohio Ct. App. 1969) (holding that passenger in a collision was not negligent per se for failing to wear a seat belt).

install seat belts in all newly manufactured passenger vehicles by the late 1960s, but neither the Act nor the regulations required the use of seat belts.[8] Nor did any state require the use of seat belts.[9] Because seat belts were relatively new, many people disputed their effectiveness, and some people feared that seat belts would cause more injuries than they would prevent, such as trapping occupants inside a burning or sinking vehicle.[10] Not surprisingly, therefore, very few people used seat belts.[11] According to the National Highway Traffic Safety Administration (NHTSA), only about 10% of vehicle occupants used seat belts in the late 1960s and early 1970s.[12]

This factual context was critical to the reasoning employed by the state appellate courts that rejected the seat-belt defense in the early years. Simply put, those courts were not willing to penalize plaintiffs for not using a safety device that was not required to be used, that was not standard equipment in all passenger vehicles, that most people did not use, and that many people believed to be more dangerous to use than not.[13] Also important was the legal climate at that time. When the seat-belt defense began to rise in popularity in the late 1960s, contributory negligence was still the majority rule; comparative negligence had

---

8. 1 JOHN W. CHANDLER, HANDLING MOTOR VEHICLE ACCIDENT CASES §§ 1A:3, 1A:4 (2d ed. 2010).

9. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PUB. NO. DOT HS 811 413, STRATEGIES TO INCREASE SEAT BELT USE: AN ANALYSIS OF LEVELS OF FINES AND THE TYPE OF LAW 8 (2010) [hereinafter STRATEGIES TO INCREASE SEAT BELT USE] (noting that New York enacted the first statewide mandatory-use law in 1984).

10. Kircher, *supra* note 2, at 182-84.

11. *Id.* at 182.

12. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PUB. NO. DOT HS 811 444, COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURE GUIDE FOR STATE HIGHWAY SAFETY OFFICES 2-4 (6th ed. 2011). This statistic was not included in the seventh edition of this work. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PUB. NO. DOT HS 811 727, COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURE GUIDE FOR STATE HIGHWAY SAFETY OFFICES 2-1 to -2 (7th ed. 2013) [hereinafter COUNTERMEASURES THAT WORK].

13. *See, e.g.*, Britton v. Doehring, 242 So. 2d 666 (Ala. 1970); Nash v. Kamrath, 521 P.2d 161 (Ariz. Ct. App. 1974), *disapproved by* Law v. Superior Court, 755 P.2d 1135 (Ariz. 1988); Fischer v. Moore, 517 P.2d 458 (Colo. 1973); Miller v. Miller, 160 S.E.2d 65 (N.C. 1968); Robinson v. Lewis, 457 P.2d 483 (Or. 1969), *disapproved by* Dahl v. Bayerische Motoren Werke, 748 P.2d 77 (Or. 1987); *see also* David A. Westenberg, *Buckle Up or Pay: The Emerging Safety Belt Defense*, 20 SUFFOLK U. L. REV. 867, 870-75 (1986) (tracing the development of the seat belt defense from 1966 through 1975. However, there were a few courts that adopted the seat-belt defense in the early years. *See, e.g.*, Truman v. Vargas, 80 Cal. Rptr. 373 (Cal. Ct. App. 1969); Mount v. McClellan, 234 N.E.2d 329 (Ill. App. Ct. 1968), *overruled*, Clarkson v. Wright, 483 N.E.2d 268 (Ill. 1985); Spier v. Barker, 323 N.E.2d 164 (N.Y. 1974); Sams v. Sams, 148 S.E.2d 154 (S.C. 1966); Bentzler v. Braun, 149 N.W.2d 626 (Wis. 1967).

been adopted in only a few states.[14] In a contributory-negligence state, any negligence by the plaintiff was a complete bar to his recovery, and many state appellate courts refused to apply this harsh rule to a plaintiff whose allegedly negligent failure to use an available seat belt did not cause the accident.[15] Barring all recovery by an otherwise innocent plaintiff was seen by those courts as a windfall for the negligent defendant.[16] Moreover, those courts refused to characterize a plaintiff's failure to use an available seat belt as contributory negligence because there was no statutory or common-law duty to use a seat belt,[17] which also meant that the failure to use an available seat belt was not contributory negligence per se.[18] Attempts to reduce a plaintiff's recovery based on a failure to mitigate damages were similarly unsuccessful, primarily because the duty to mitigate damages typically arises with respect to the plaintiff's post-accident conduct, not his pre-accident conduct.[19] Other reasons given for rejecting the seat-belt defense were that a plaintiff is not required to anticipate the negligence of others,[20] and that "the complicated task of damage apportionment would 'invite verdicts on prejudice and sympathy contrary to the law,' create 'unnecessary conflicts in result,' and 'degrade the law by reducing it to a game of chance.'"[21]

The arguments against the seat-belt defense are no longer valid. Seat belts have been required in all newly manufactured passenger vehicles since the late 1960s,[22] and so the passage of almost fifty years means that most passenger vehicles on the roads today have them. Since 1984, the legislatures in forty-nine of the fifty states, including Georgia, have enacted mandatory-use laws, at least with respect to front-seat adult occupants of certain vehicles.[23] As a result, there has been a dramatic increase in the number of people who use seat belts. According to NHTSA, the national usage rate increased from less than 15% in 1984

---

14. VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.01, at 2-3 (5th ed. 2010).

15. 1 CHANDLER, *supra* note 8, § 1A:6; 1 COMPARATIVE NEGLIGENCE MANUAL §§ 4:4, 4:9 (3d ed. 2009); DAN B. DOBBS ET AL., THE LAW OF TORTS § 231, at 827, 831 (2d ed. 2011); SCHWARTZ, *supra* note 14, § 1.02[d][1], at 9.

16. 1 COMPARATIVE NEGLIGENCE MANUAL, *supra* note 15, § 4:5; DOBBS ET AL., *supra* note 15, § 231, at 831.

17. 1 CHANDLER, *supra* note 8, § 1A:6; DOBBS ET AL., *supra* note 15, § 231, at 831.

18. 1 COMPARATIVE NEGLIGENCE MANUAL, *supra* note 15, § 4:8.

19. 1 CHANDLER, *supra* note 8, § 1A:6; DOBBS ET AL., *supra* note 15, § 231, at 831.

20. 1 CHANDLER, *supra* note 8, § 1A:6; DOBBS ET AL., *supra* note 15, § 231, at 831.

21. *Miller*, 160 S.E.2d at 74 (quoting Lipscomb v. Diamiani, 226 A.2d 914, 917 (Del. Super. Ct. 1967)).

22. 1 CHANDLER, *supra* note 8, § 1A:4.

23. *Id.*

to 86% in 2012.[24] Undoubtedly, part of the explanation for the increase in the usage rate is the effectiveness of seat belts at saving lives and preventing injuries. Indeed, NHTSA considers the proper use of a seat belt to be "the single most effective way to save lives and reduce injuries in crashes."[25] For front-seat occupants of passenger cars, properly using a seat belt reduces the risk of a fatal injury by 45% and the risk of a moderate-to-critical injury by 50%.[26] For occupants of light trucks, properly using a seat belt reduces the risk of a fatal injury by 60% and the risk of a moderate-to-critical injury by 65%.[27] Fatal injuries often happen when an occupant is ejected from the vehicle, and seat belts are extremely effective at preventing total ejections. For fatality accidents involving passenger vehicles (cars, light trucks, vans, and sport-utility vehicles) that occurred in 2011, only 1% of belted occupants were totally ejected, compared to 31% of unbelted occupants.[28] Of those who were totally ejected, 77% were killed.[29]

Translating these percentages into real-life numbers shows the catastrophic effect of failing to use a seat belt. Nationwide statistics compiled by NHTSA for accidents involving passenger vehicles in 2011 show that 21,253 occupants were killed and that an estimated 1,968,000 occupants were otherwise injured.[30] Of those who were killed, at least 10,180 (47.9%) did not use a seat belt.[31] Of those who were otherwise injured, only about 113,000 (5.8%) did not use a seat belt.[32] Georgia suffered 877 of these fatalities, which was the fourth highest in the country, and at least 421 of these people did not use a seat belt.[33] In

---

24. COUNTERMEASURES THAT WORK, *supra* note 12, at 2-1 to -2.

25. *Id.* at 2-1.

26. *Id.*

27. *Id.*

28. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PUB. NO. DOT HS 811 729, TRAFFIC SAFETY FACTS, 2011 DATA: OCCUPANT PROTECTION 4 (2013).

29. *Id.*

30. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PUB. NO. DOT HS 811 754, TRAFFIC SAFETY FACTS 2011: A COMPILATION OF MOTOR VEHICLE CRASH DATA FROM THE FATALITY ANALYSIS REPORTING SYSTEM AND THE GENERAL ESTIMATES SYSTEM 42 (2013) [hereinafter TRAFFIC SAFETY FACTS 2011: CRASH DATA].

31. *Id.* at 42, 121. Seat belt use was unknown for 1,634 (7.7%) of those who were killed, *id.*, so the number of unbelted occupants who were killed is likely to be greater than 10,180.

32. *Id.* Seat belt use was unknown for an estimated 175,000 (8.9%) of those who were otherwise injured, *id.*, so the number of unbelted occupants who were otherwise injured is likely to be greater than 113,000.

33. *Id.* at 158, 160-61. Seat belt use was unknown for 67 (7.6%) of those who were killed, *id.* at 160, so the number of unbelted occupants who were killed is likely to be greater than 421.

light of the fact that unbelted occupants have a much greater likelihood of being killed or seriously injured in an accident, the United States Supreme Court long ago recognized "the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries."[34] In fact, NHTSA estimates that seat belts saved 292,471 lives between 1975 and 2011, including 11,949 lives in 2011, and that seat belts would have saved an additional 370,301 lives between 1975 and 2011 if the seat belt usage rate had been 100%.[35] Knowing all of this, one could easily argue that it is unreasonable or negligent for an occupant of a passenger vehicle not to use an available seat belt.

As mandatory-use laws and the public's acceptance of them have become the norm, the law has evolved during the past forty to fifty years to create a more hospitable environment for the seat-belt defense.[36] Most importantly, all but a handful of states have abandoned contributory negligence in favor of comparative negligence.[37] Comparative negligence is much more forgiving to plaintiffs than contributory negligence because it apportions fault according to each party's proportionate responsibility for the injuries sustained by the plaintiff,[38] and so it is a better fit for the seat-belt defense than contributory negligence. Thus, under comparative negligence the plaintiff would be barred from recovering for injuries that were caused or enhanced by his failure to use an available seat belt, assuming that a jury found such failure to be unreasonable or negligent under the circumstances, while the defendant still would be liable for other injuries.[39] As state legislatures began enacting mandatory-use laws in the mid-1980s, some courts rejected the reasoning of the early cases and held that evidence of a plaintiff's failure to use an available seat belt could be admitted to show comparative negligence or a failure to mitigate damages.[40] However, many state legislatures abolished the seat-belt defense at the same time they enacted their mandatory-use laws,[41] even though the exclusion of evidence of a plaintiff's failure to use an available seat belt

---

34. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).

35. TRAFFIC SAFETY FACTS 2011: CRASH DATA, *supra* note 30, at 217.

36. SCHWARTZ, *supra* note 14, § 1.01, at 2-5.

37. *Id.*

38. O.C.G.A. § 51-12-33(a) (Supp. 2013); KEETON ET AL., *supra* note 3, § 67, at 468-79.

39. DOBBS ET AL., *supra* note 15, § 231, at 827-29.

40. *See, e.g.*, Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986); Law v. Superior Court, 755 P.2d 1135 (Ariz. 1988); Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987); Dahl v. Bayerische Motoren Werke, 748 P.2d 77 (Or. 1987).

41. 1 CHANDLER, *supra* note 8, § 1A:8.

is inconsistent with and undermines the objective of mandatory-use laws. One commentator has attributed this anomaly to a "political compromise" between two unlikely allies: "the automobile industry (which want[ed] mandatory seat belt laws enacted in order to avoid [a regulation by the United States Department of Transportation] and the plaintiffs' trial bar (which [was] willing to tolerate such laws so long as they [did] not have the effect of limiting recovery in tort)."[42]

Regardless of the reason for these paradoxical laws, the fact remains that most states today have statutorily abolished the seat-belt defense.[43] Only about a dozen states have a statute that allows evidence of a plaintiff's failure to use an available seat belt to show comparative negligence or a failure to mitigate damages, but some of these statutes arbitrarily limit the defense by restricting its applicability to certain types of damages or by capping the amount by which the plaintiff's damages may be reduced.[44] Despite the rejection of the seat-belt defense by most state legislatures, distinguished commentators in the field of tort law, as well as the American Law Institute, support it.[45]

III. THE GEORGIA EXPERIENCE

The first discussion of the seat-belt defense in a reported opinion of the Georgia appellate courts appears to have been in 1970. In *Crowe v. Harrell*,[46] which involved the plaintiff's failure to fasten a seat belt around her eight-year-old daughter, the court of appeals held that even though the Superior Court of DeKalb County erred in striking the seat-belt defense, the error was harmless because the trial court subsequently instructed the jury in a manner that incorporated the seat-belt defense.[47] While this conclusion was questionable based on the language of the instruction, the court's decision implicitly accepted the

---

42. Robert M. Ackerman, *The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 229 n.50 (1986).

43. 1 CHANDLER, *supra* note 8, § 1A:8; DOBBS ET AL., *supra* note 15, § 231, at 829.

44. 1 CHANDLER, *supra* note 8, § 1A:9; DOBBS ET AL., *supra* note 15, § 231, at 828-29.

45. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 illus. 3 (2000); DOBBS ET AL., *supra* note 15, § 231, at 827; SCHWARTZ, *supra* note 14, § 4.06[b], at 118; *see also* RESTATEMENT (SECOND) OF TORTS § 465 cmt. c (1965) ("Such apportionment [between the plaintiff and the defendant] may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm that ensues."); KEETON ET AL., *supra* note 3, § 65, at 459 (noting that "the better view" may be to reduce a plaintiff's recovery to the extent that his injuries were aggravated by his own antecedent negligence).

46. 122 Ga. App. 7, 176 S.E.2d 190 (1970) (physical precedent).

47. *Id.* at 8, 176 S.E.2d at 191.

validity of the defense.[48] In a specially concurring opinion, Judge Pannell argued that the defense should not apply for some of the same reasons given by other state appellate courts:

> Failure to use seat belts does not alone cause collisions between automobiles or between automobiles and other objects, and one whose negligence causes such a collision cannot insulate himself against such negligence resulting in injury to a child, on the basis that the negligence of the mother of the child in failing to fasten seat belts was the sole proximate cause of the injuries received by the child.[49]

Crowe has limited value not only because its discussion of the seat-belt defense was so limited, but also because it is a physical precedent.[50] The limited discussion of the defense garnered the support of only Judge Jordan, the author of the court's opinion.[51] Judge Pannell specifically disagreed with that part of the court's opinion, and Judge Eberhardt concurred in the judgment only without writing an opinion.[52] *Crowe*, therefore, was an inauspicious first venture into the thicket of the seat-belt defense.

After *Crowe*, the Georgia appellate courts did not address the seat-belt defense until 1986, by which time many states (but not Georgia) had enacted mandatory-use laws.[53] In *Wendlandt v. Shepherd Construction Co.*,[54] the court of appeals was asked to decide whether the plaintiff's failure to use an available seat belt was contributory or comparative negligence.[55] Characterizing this issue as a matter of first impression in Georgia (the court did not cite *Crowe*), the court noted with approval the view that "the failure to use an available seatbelt, in view of its potential to reduce serious injuries, could be considered by a jury as a matter of negligence by the injured party and as affecting the amount of damages to be recovered."[56] However, the court did not have to decide this issue because it was moot in light of the jury's verdict for the defendant.[57]

---

48. *Id.*

49. *Id.* at 10, 176 S.E.2d at 193 (Pannell, J., concurring specially).

50. GA. CT. APP. R. 33(a) (providing that an opinion is not binding precedent, but rather is physical precedent only, when less than all of the judges of a three-judge panel fully concur in the opinion or when less than a majority of a seven-judge court fully concurs in the opinion).

51. *Crowe*, 122 Ga. App. at 7, 176 S.E.2d at 190.

52. *Id.* at 7, 9-11, 176 S.E.2d at 190, 192-93.

53. STRATEGIES TO INCREASE SEAT BELT USE, *supra* note 9, at 8.

54. 178 Ga. App. 153, 342 S.E.2d 352 (physical precedent).

55. *Id.* at 154, 342 S.E.2d at 353-54.

56. *Id.* at 155, 342 S.E.2d at 354.

57. *Id.*

The court of appeals finally decided this issue in late 1987.[58] In *Cannon v. Lardner*,[59] the plaintiff appealed the State Court of Gwinnett County's admission of evidence of her failure to use an available seat belt.[60] Although the court agreed with the plaintiff that there was no statutory duty for her to use an available seat belt, it determined that

> [T]he common law duty to exercise ordinary care for one's own safety could authorize a jury to conclude that the standard has been violated by one who fails to use this universally available preventive device when undertaking to drive upon the highways and thereby subject[s] oneself to injury in a potential collision. . . . This evidence was relevant in regard to comparative negligence, rather than contributory negligence, in determining the amount of damages to award as opposed to proximate cause of the collision itself. That is, it was arguably related to the proximate cause of the nature and degree of the injuries.[61]

Noting that "it would be necessary [for the defendant] to show that the actual injuries sustained could have been reduced . . . by the use of an available seatbelt," the court of appeals held that the trial court correctly admitted evidence of the plaintiff's failure to use an available seat belt on the issue of comparative negligence.[62] Judge McMurray dissented on the ground that there was no duty to use a seat belt or to anticipate another driver's negligence.[63] Even if the seat-belt defense were to be valid, Judge McMurray dissented because the majority improperly presumed that the plaintiff's failure to use a seat belt contributed to her injuries; he contended that "[i]n the absence of expert opinion concerning [the consequences of not using a seat belt], evidence of seat belt use or non-use should be deemed inadmissible."[64]

Three months after the court of appeals decided *Cannon*, the Georgia General Assembly enacted section 40-8-76.1 of the Official Code of

---

58. In a few cases decided after *Wendlandt*, the court of appeals apparently assumed the validity of the seat-belt defense without discussing the merits of it. Martini v. Nixon, 185 Ga. App. 328, 329-30, 364 S.E.2d 49, 51-52 (1987); Sapp v. Johnson, 184 Ga. App. 603, 605-06, 362 S.E.2d 82, 85 (1987); Cullen v. Timm, 184 Ga. App. 80, 83, 360 S.E.2d 745, 748-49 (1987); F.A.F. Motor Cars, Inc. v. Childers, 181 Ga. App. 821, 822, 354 S.E.2d 6, 8 (1987).

59. 185 Ga. App. 194, 363 S.E.2d 574 (1987) (en banc). Because only three of the seven judges fully concurred in the portion of the opinion dealing with the seat-belt defense, that portion of the opinion is physical precedent. *See supra* note 50.

60. *Cannon*, 185 Ga. App. at 194, 363 S.E.2d at 575.

61. *Id.* at 195, 363 S.E.2d at 576.

62. *Id.* at 195-96, 363 S.E.2d at 576-77 (ellipsis in original)

63. *Id.* at 199, 363 S.E.2d at 579 (McMurray, P.J., dissenting).

64. *Id.* at 199, 363 S.E.2d at 579-80.

Georgia Annotated (O.C.G.A.),[65] which simultaneously required front-seat occupants of passenger vehicles to use a seat belt and abolished the seat-belt defense for all cases arising on or after September 1, 1988.[66] As originally enacted in 1988, the section of the statute abolishing the seat-belt defense provided as follows:

> Failure to wear a seat safety belt in violation of this Code section shall not be considered evidence of negligence, shall not be considered by the court on any question of liability of any person, corporation, or insurer, . . . and shall not diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a passenger vehicle.[67]

Because the phrase "in violation of this Code section" referred to the fact that only front-seat occupants of passenger vehicles were required to use a seat belt, evidence of the failure of a rear-seat occupant of a passenger vehicle to use a seat belt was admissible under the original version of the statute.[68] The General Assembly closed this loophole in 1993 when

---

65. O.C.G.A. § 40-8-76.1 (2011).

66. Ga. H.R. Bill 751, 1988 Ga. Laws 31 (codified as amended at O.C.G.A. § 40-8-76.1). Because the statute applied prospectively only, the former rule continued to apply for several years in cases involving injuries that occurred prior to September 1, 1988. *Id.* § 2. Although the court of appeals held in *Cannon* that seat-belt evidence was relevant to determining the amount of damages, it also held that such evidence was relevant to determining whether the plaintiff was comparatively negligent for failing to use an available seat belt. *Cannon*, 185 Ga. App. at 195, 363 S.E.2d at 576. It is true that comparative negligence focuses on apportioning damages between the plaintiff and the defendant, and so in that sense seat-belt evidence relates to damages, but it is also true that comparative negligence relates to liability insofar as a plaintiff who is 50% or more at fault is completely barred from recovering. O.C.G.A. § 51-12-33(a), (g) (Supp. 2013). Thus, the precise scope of the admissibility of seat-belt evidence was not clear based on *Cannon*, but subsequent opinions of the court of appeals clarified that evidence of the plaintiff's failure to wear a seat belt was admissible only on the issue of damages and only if the defendant presented evidence showing that the plaintiff's injuries could have been reduced by the use of a seat belt. *See, e.g.*, Scott v. Chapman, 203 Ga. App. 58, 59, 416 S.E.2d 111, 112 (1992); Reid v. Odom, 199 Ga. App. 146, 147, 404 S.E.2d 323, 324 (1991); Payne v. Joyner, 197 Ga. App. 527, 528, 399 S.E.2d 83, 84 (1990); Bales v. Shelton, 197 Ga. App. 522, 524-25, 399 S.E.2d 78, 81-82 (1990); Menendez v. Jewett, 196 Ga. App. 565, 567, 396 S.E.2d 294, 296 (1990) (physical precedent); Boatwright v. Czerepinski, 194 Ga. App. 697, 698, 391 S.E.2d 685, 686 (1990); Jones v. Scarborough, 194 Ga. App. 468, 469, 390 S.E.2d 674, 675-76 (1990); Katz v. White, 190 Ga. App. 458, 458, 379 S.E.2d 186, 187 (1989); City of Fairburn v. Cook, 188 Ga. App. 58, 67-69, 372 S.E.2d 245, 253-54 (1988).

67. Ga. H.R. Bill 751.

68. Purvis v. Virgil Barber Contractor, Inc., 205 Ga. App. 13, 15, 421 S.E.2d 303, 305 (1992). The phrase "in violation of this Code section" also could have been used to argue that evidence of a plaintiff's failure to use an available seat belt was admissible if such failure was in violation of a common-law duty. *Bentzler*, 149 N.W.2d at 639 (holding that

it deleted that phrase, thereby making the statute apply to all occupants.[69] A 1996 amendment confirmed the broad applicability of the statute to all occupants by replacing the phrase "Failure to wear a seat safety belt" with the phrase "The failure of an occupant of a passenger vehicle to wear a seat safety belt in any seat of a passenger vehicle which has a seat safety belt."[70] In 1999, the General Assembly again broadened the applicability of the statute by making three significant changes: (1) it substituted the word "motor" for the word "passenger" in three places,[71] which meant that the statute applied to occupants of "motor vehicles" (defined broadly by the Motor Vehicle Code[72]) rather than just to occupants of "passenger vehicles" (defined narrowly by the statute);[73] (2) it added causation to the list of prohibited purposes;[74] and (3) it substituted the phrase "finder of fact" for the word "court."[75] As a result of these amendments, the exclusionary provision in the statute now provides as follows:

> The failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation, or insurer, . . . and shall not be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle.[76]

The original language of the statute mostly accomplished the General Assembly's purpose of excluding evidence of a person's failure to use an available seat belt from all civil actions, at least with respect to vehicles that were included within the scope of the statute.[77] As explained by the court of appeals, "unlike general rules of evidence which permit

---

"there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate").

69. Ga. H.R. Bill 4 § 1, Reg. Sess., 1993 Ga. Laws 516 (codified in relevant part as amended at O.C.G.A. § 40-8-76.1).

70. Ga. H.R. Bill 606 § 3, Reg. Sess., 1996 Ga. Laws 469 (codified in relevant part as amended at O.C.G.A. § 40-8-76.1).

71. Ga. H.R. Bill 727 § 1, Reg. Sess., 1999 Ga. Laws 276 (codified in relevant part as amended at O.C.G.A. § 40-8-76.1).

72. O.C.G.A. tit. 40 (2011 & Supp. 2013).

73. *Compare* O.C.G.A. § 40-1-1(33) (Supp. 2013), *with* O.C.G.A. § 40-8-76.1(a).

74. *Compare* Ga. H.R. Bill 606 § 3, *with* Ga. H.R. Bill 727 § 1.

75. *Compare* Ga. H.R. Bill 606 § 3, *with* Ga. H.R. Bill 727 § 1.

76. O.C.G.A. § 40-8-76.1(d).

77. Ga. H.R. Bill 751 § 1 (stating that one purpose of the statute was "to provide that a failure to use seat safety belts may not be introduced in evidence in any civil action and may not be used to diminish recovery of damages").

admission of evidence for one purpose although not for other purposes, the legislative intent of the statute was to prohibit the admission of evidence that no seat belt was worn for *all* purposes."[78] The General Assembly confirmed its intent in the subsequent amendments to the statute, while at the same time expanding and strengthening the exclusionary provision.[79] Nevertheless, creative lawyers have sought ways around the statute, and some have succeeded. Although later reversed, one federal district court agreed with the plaintiff's argument that although the plain language of the statute excludes evidence of a person's failure to use an available seat belt, it does not exclude evidence showing that a person used an available seat belt or evidence showing that the vehicle was equipped with seat belts.[80] By itself, admitting evidence of seat-belt use is not a way around the statute, but when jurors hear evidence that one occupant was belted and sustained only minor injuries, that the other occupant was ejected and killed, and that there were seat belts in the vehicle, they may assume that the other occupant was unbelted even though there was no such direct evidence.

In another case, the Georgia Court of Appeals held that questions about how the impact of the collision caused the plaintiff's body to move inside her vehicle did not violate the statute because they "merely dealt with the relevant issue of force of the impact and how that force, or lack thereof, caused [the plaintiff's] body to react."[81] Again, the jurors may assume that the plaintiff was unbelted depending on her description of how her body moved inside her vehicle. However, other efforts to avoid the consequences of the statute have been unsuccessful. Defendants in product liability cases have argued that the statute does not apply to strict liability claims, but both state and federal courts have rejected this argument.[82] Both state and federal courts have also held that the jury must be instructed not to consider evidence of the plaintiff's failure to use an available seat belt, even if the plaintiff does not object to the evidence at the time it is offered.[83]

---

78. Crosby v. Cooper Tire & Rubber Co., 240 Ga. App. 857, 866, 524 S.E.2d 313, 322 (1999), *rev'd on other grounds*, 273 Ga. 454, 543 S.E.2d 21 (2001).

79. *Id.* ("Through each successive amendment to this Act, the General Assembly repeatedly expressed its overriding intent not to allow admission of the failure to wear safety belts.").

80. Hockensmith v. Ford Motor Co., 2003 U.S. Dist. LEXIS 27528, at *12 (N.D. Ga. Apr. 17, 2003), *rev'd*, 116 F. App'x 244 (11th Cir. 2004).

81. Fulton-Fritchlee v. Douglas, 240 Ga. App. 413, 415, 523 S.E.2d 349, 352 (1999).

82. McCurdy v. Ford Motor Co., 2007 U.S. Dist. LEXIS 2109, at *8-10 (M.D. Ga. Jan. 11, 2007); *Crosby*, 240 Ga. App. at 866, 524 S.E.2d at 322.

83. Denton v. Daimler Chrysler Corp., 645 F. Supp. 2d 1215, 1221 (N.D. Ga. 2009); King v. Davis, 287 Ga. App. 715, 715-16, 652 S.E.2d 585, 585-86 (2007).

For years, the Georgia Chamber of Commerce and several members of the General Assembly have advocated for the reinstatement of the seat-belt defense.[84] In 2009, separate bills were introduced in the Senate and in the House of Representatives to reinstate the defense.[85] The Senate passed a bill that would have simply deleted the exclusionary language from the statute, but the House did not vote on this bill.[86] The House Bill, as amended, was more complex and would have allowed seat-belt evidence only in mitigation of the plaintiff's damages if certain requirements were satisfied, but it suffered a resounding defeat by a vote of 148-15.[87]

In 2013, several members of the House decided to try again.[88] According to Representative Mike Jacobs, who introduced House Bill 532[89] in March 2013, "The current Georgia rule is very antiquated. . . . When the current law hits the ear, there is a part of common sense that says the rule really shouldn't be the way it is."[90] House Bill 532, which is nearly identical to the 2009 House Bill, would allow the defendant to introduce evidence of the failure of a front-seat occupant of a passenger vehicle to use an available seat belt in mitigation of damages if: (1) the defendant has pleaded such failure as a defense before the court enters a pre-trial order; (2) the occupant who was not using a seat belt was at least fourteen years old at the time of the accident; and (3) the defendant presents expert testimony proving that the occupant's failure to use a seat belt contributed to the alleged injuries.[91] House Bill 532 also provides that if these same three conditions are satisfied, the jury may find that the plaintiff's failure to use a seat belt contributed to the alleged injuries and may reduce the plaintiff's recovery accordingly,

---

84. Kathleen Baydala Joyner, *A Bill to Blame the Unbuckled Waits for Next Year*, FULTON COUNTY DAILY REP., Mar. 22, 2013, at 1; Kathleen Baydala Joyner, *Chamber Outlines Tort Reform Wish List*, FULTON COUNTY DAILY REP., Aug. 21, 2012, at 1; Andy Peters, *GOP Legal Issues are Losing Steam*, FULTON COUNTY DAILY REP., Mar. 6, 2009, at 1; Andy Peters, *Bill Lets Jurors Know if Plaintiff Buckled Up*, FULTON COUNTY DAILY REP., Feb. 9, 2009, at 1.

85. Ga. H.R. Bill 200, Reg. Sess. (2009) (unenacted); Ga. S. Bill 23, Reg. Sess. (2009) (unenacted).

86. 1 Journal of the Senate of the State of Georgia, 150th Gen. Assem., Reg. Sess., at 440-43 (Ga. 2009).

87. 1 Journal of the House of Representatives of the State of Georgia, 150th Gen. Assem., Reg. Sess., at 1193-96 (Ga. 2009).

88. Ga. H.R. Bill 532, Reg. Sess. (2013) (unenacted); Ga. H.R. Bill 504, Reg. Sess. (2013) (unenacted).

89. Ga. H.R. Bill 532.

90. Joyner, *A Bill to Blame the Unbuckled Waits for Next Year*, *supra* note 84, at 1.

91. Ga. H.R. Bill 532 § 1; *see also* Ga. H.R. Bill 200 § 1.

provided that the plaintiff is not precluded from recovering for the damages attributable to the defendant's negligence.[92]

Representative B.J. Pak introduced a similar bill, House Bill 504,[93] that also would allow the defendant to introduce evidence of the failure of a front-seat occupant of a passenger vehicle to use an available seat belt in mitigation of damages, though the conditions for the admission of such evidence are slightly different in House Bill 504.[94] As under House Bill 532, House Bill 504 would allow the admission of such evidence only if the defendant has pleaded the plaintiff's failure as a defense before the court enters a pre-trial order and if the occupant who was not using a seat belt was at least fourteen years old at the time of the accident.[95] Unlike House Bill 532, however, House Bill 504 would not require expert testimony.[96] House Bill 504 would require only that the defendant present evidence demonstrating that the occupant's failure to use a seat belt contributed to the alleged injuries.[97] If these three conditions are satisfied, House Bill 504 would allow the jury to consider the plaintiff's failure to use a seat belt.[98] If the jury were to find that the plaintiff's failure to use a seat belt contributed to the alleged injuries, it must reduce the plaintiff's recovery to the extent that the alleged injuries were caused by the non-use.[99] House Bill 504 specifically provides that the failure to use an available seat belt cannot be used against an occupant of a motor vehicle other than a passenger vehicle, as defined by the statute, or an occupant of a passenger vehicle who was sitting anywhere other than a front seat.[100]

House Bill 532 and House Bill 504 are assigned to the House Judiciary Committee.[101] The Committee did not vote on either bill in 2013,[102] but presumably will do so in 2014, though the bills may be merged into a single bill before a final vote is taken.

---

92. Ga. H.R. Bill 532 § 1.
93. Ga. H.R. Bill 504.
94. Ga. H.R. Bill 504 § 1.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. 1 Journal of the House of Representatives of the State of Georgia, 152d Gen. Assem., Reg. Sess., at 1293, 1842-43 (Ga. 2013).
102. *Id.* at 1603, 2206.

IV. THE WHOLE TRUTH?

When witnesses testify at trial, they are sworn to tell "the truth, the whole truth, and nothing but the truth," but in many instances they are not permitted to comply with their oath because of a substantive rule of law that arbitrarily withholds relevant and useful information from the jury's consideration.[103] Statutes like O.C.G.A. § 40-8-76.1(d) are an example of one such rule.[104] In light of the fact that so many people use seat belts and the benefits of using seat belts are so well understood by the motoring public, it is not surprising that "one of the first questions people ask after hearing about a car accident is, 'were they wearing their seatbelts?' Certainly, this question also comes to the minds of jurors deliberating an automobile accident case."[105] Yet, in Georgia and in most other states, jurors are not permitted to know the answer to this question.[106] The failure to use an available seat belt is undeniably relevant if using it would have prevented or lessened the plaintiff's injuries, and so there is no legitimate reason for withholding such evidence from the jury. "Not allowing a jury to consider such an important fact in assessing damages, even when wearing a seatbelt might have saved a driver's or passenger's life, is surely not 'the whole truth' that juries expect from the witnesses who testify before them."[107] This is why a rule that excludes evidence of a plaintiff's failure to use an available seat belt is inherently unfair. Without the seat-belt defense, jurors have incomplete information, which prevents them from making fully informed decisions.[108] This, in turn, inevitably leads to unfair verdicts, such as requiring a defendant to pay the plaintiff's full damages even though the plaintiff was responsible for a significant percentage of them due to his failure to buckle up. A windfall for the plaintiff is no less unfair than a windfall for the defendant.

The unfairness of O.C.G.A. § 40-8-76.1(d) is more apparent when similar evidentiary issues are considered.[109] For example, Georgia law requires motorcycle operators and passengers to wear a helmet,[110] and the court of appeals has held that evidence of the failure to do so is

---

103. Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21, 23-24 (2005).

104. O.C.G.A. § 40-8-76.1(d).

105. Hantler et al., *supra* note 103, at 32.

106. *See* discussion *supra* Sections II, III.

107. Hantler et al., *supra* note 103, at 51.

108. *Id.* at 50.

109. *See infra* notes 110-14 and accompanying text.

110. O.C.G.A. § 40-6-315(a) (2011).

admissible if such failure proximately caused the person's injuries, even though not wearing a helmet had nothing to do with causing the collision.[111] Georgia law also requires drivers of certain vehicles to use a child-passenger restraining system for children under eight years of age,[112] but evidence of a failure to do so is prohibited only for the purpose of showing negligence per se or contributory negligence per se.[113] Presumably, the limited scope of the exclusionary provision in this statute means that such evidence would be admissible for the purpose of showing comparative negligence or a failure to mitigate damages. There is no logical reason for excluding evidence of the failure to use an available seat belt when evidence of the failure to use other safety devices is admissible.[114]

Just as the typical arguments against the seat-belt defense are no longer valid on a general level, they are not valid specifically in Georgia either. Georgia first adopted a hybrid judicial-statutory scheme of comparative negligence in the mid-19th century,[115] and the Georgia General Assembly enacted the current comparative-negligence statute in 1987,[116] so the harshness of contributory negligence is not a concern in Georgia. Since January 1, 1964, all new passenger vehicles manufactured for sale in Georgia have been required to be equipped with seat belts for front-seat occupants,[117] which means that few passenger vehicles on the roads today do not have seat belts, and since 1988 there has been a statutory duty for those seat belts to be used.[118] After more than twenty-five years of mandatory use, most people traveling on Georgia roads comply with this duty, as shown by Georgia's usage rate of 92% in 2012.[119] And, once again, the effectiveness of seat belts at saving lives and preventing injuries is beyond dispute.[120]

---

111. Green v. Gaydon, 174 Ga. App. 796, 798, 331 S.E.2d 106, 108 (1985) (physical precedent).

112. O.C.G.A. § 40-8-76(b)(1) (2011).

113. O.C.G.A. § 40-8-76(c) (2011).

114. DOBBS ET AL., *supra* note 15, § 231, at 830 (noting that "pre-injury precautions are a regular feature of reasonable care, ranging from protective clothing for cold weather to canteens of water for desert hikers").

115. SCHWARTZ, *supra* note 14, § 1.05[a][2], at 19-20; Ernest A. Turk, *Comparative Negligence on the March: Part II*, 28 CHI.-KENT L. REV. 304, 326-33 (1950).

116. Ga. H.R. Bill 1 § 8, Reg. Sess., 1987 Ga. Laws 915 (codified in relevant part as amended at O.C.G.A. § 51-12-33).

117. O.C.G.A. § 40-8-76(a).

118. O.C.G.A. § 40-8-76.1(b).

119. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PUB. NO. DOT HS 811 809, TRAFFIC SAFETY FACTS, CRASH-STATS: SEAT BELT USE IN 2012—USE RATES IN THE STATES AND TERRITORIES 1 (2013).

120. COUNTERMEASURES THAT WORK, *supra* note 12, at 2-1.

An argument frequently asserted by opponents of the seat-belt defense is that a plaintiff does not have a duty to anticipate the negligence of others.[121] Although there is some truth to this statement, it is much too broad to be useful.[122] The general rule is that a person has a right to assume that others will not drive negligently, but this rule does not apply when the person is also negligent. The failure to use an available seat belt is negligence per se, at least for occupants to whom the mandatory-use law applies, and is otherwise negligent for the reasons discussed herein.[123] Thus, a plaintiff is not entitled to assume that others will not drive negligently. Moreover, a plaintiff "is bound at all times to exercise ordinary care for his own safety, even before the negligence of another is or should be apparent."[124] In that regard, a reasonably prudent person would use a seat belt based on the foreseeability of motor vehicle accidents:

> Over a lifetime, . . . it is almost certain that a motor vehicle accident *will* injure the average motorist. The clear foreseeability of automobile accidents is the reason most courts now hold automobile manufacturers responsible to make vehicles capable of providing a reasonable level of protection to automobile occupants. . . . Given modern-day conditions, we conclude as a matter of public policy that the law must recognize the responsibility of every person to anticipate and take reasonable measures to guard against the danger of motor vehicle accidents that are not only foreseeable but virtually certain to occur sooner or later. Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others. There is nothing to anticipate; the negligence of motorists is omnipresent.[125]

Another favorite argument of opponents of the seat-belt defense is that it is too difficult for jurors to apportion fault for injuries caused by the

---

121. 1 CHANDLER, *supra* note 8, § 1A:6; DOBBS ET AL., *supra* note 15, § 231, at 831.

122. DOBBS ET AL., *supra* note 15, § 231, at 831 n.21 ("This is an old saying that simply is not true. At best it can be applied in some particular instances, not in an entire category of cases."); KEETON ET AL., *supra* note 3, § 33, at 197-99 (discussing the circumstances under which a person has a duty to take precautions against the possible negligence of others).

123. *See supra* discussion Section II.

124. Garrett v. NationsBank, N.A. (S.), 228 Ga. App. 114, 117, 491 S.E.2d 158, 163 (1997) (quoting Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 667, 88 S.E.2d 6, 9 (1955)).

125. *Law*, 755 P.2d at 1140 (footnote and citations omitted); *see also* Kircher, *supra* note 2, at 184-86 (discussing the probability of motor vehicle accidents and the severity of harm caused by them).

non-use of a seat belt,[126] but this argument is not persuasive in the age of comparative negligence.[127] "Juries perform this type of operation on a regular basis in many types of civil and criminal cases. The very idea of comparative negligence requires that juries apportion fault. The same is true when juries apportion fault between joint tortfeasors."[128] Dean Prosser observed that "[m]any civil law jurisdictions, and common law jurisdictions outside of the United States, have apportioned damages in accident cases for some time, and they do not appear to have experienced any insurmountable difficulties in administration."[129] Further, "results of scientific experiments . . . combined with expert engineering and medical testimony on the effects of the speed of the vehicles, the angle of impact, the weight of the occupants, etc., could tell the jury, within workable perimeters, how much the plaintiff actually contributed to his own injury."[130] Even if apportioning fault is not an exact science, attempting to do so is more accurate, and more equitable, than complete liability for the defendant or a complete denial of recovery for the plaintiff.[131]

The Georgia Supreme Court has held that the General Assembly was justified in abolishing the seat-belt defense to "ensure that those who cause vehicular collisions are not permitted to escape liability by raising the defense that the injured party was not wearing a seat belt."[132] However, the seat-belt defense would not necessarily constitute an absolute defense. Although it is conceivable that the defense could be an absolute bar to recovery if the evidence showed that the plaintiff would not have sustained any injuries at all had he been wearing a seat belt, or if the jury determined that he was 50% or more at fault for failing to use an available seat belt,[133] it is more likely that the defense would operate only to reduce his recovery. Further, the law should not allow a plaintiff to recover full damages when the simple act of buckling up

126. 1 COMPARATIVE NEGLIGENCE MANUAL, *supra* note 15, § 4:6.

127. SCHWARTZ, *supra* note 14, § 4.06[b], at 115 ("Theoretically, when a state has a general system of comparative negligence, apportioning damages should be much easier in the seat[-]belt cases because the courts are accustomed to dealing with damage apportionment between negligent plaintiffs and defendants.").

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

129. KEETON ET AL., *supra* note 3, § 67, at 470-71 (footnotes omitted).

130. Comment, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94, 101-02 (1969) (footnotes omitted).

131. *Id.* at 102; William L. Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 9 (1953).

132. C.W. Matthews Contracting Co. v. Gover, 263 Ga. 108, 110, 428 S.E.2d 796, 798-99 (1993).

133. O.C.G.A. § 51-12-33(a), (g).

would have prevented or reduced his injuries. There is no reason to treat a plaintiff's failure to use an available seat belt different than other evidence of comparative fault, especially in light of the fact that the benefits of seat belts are now common knowledge.

Recognizing that the seat-belt defense should be reinstated does not answer the question of how, or for what purpose, evidence of a plaintiff's failure to use an available seat belt should be admitted. Before the General Assembly abolished the defense, this evidence was admissible only to show that the plaintiff failed to mitigate his damages.[134] House Bill 532 and House Bill 504 would admit this evidence for the same purpose.[135] The problem with this approach is that the duty to mitigate damages typically applies to the plaintiff's post-accident conduct, the theory being that the plaintiff cannot mitigate that which has not yet happened.[136] Despite this conceptual obstacle, the court of appeals held in cases arising before the effective date of O.C.G.A. § 40-8-76.1(d) that a pre-accident failure to fasten a seat belt could support a mitigation defense.[137] Even though there is precedent for using evidence of a plaintiff's failure to use an available seat belt to support a mitigation defense,[138] it is more logical to use this evidence to support a comparative-negligence defense. Opponents of the defense have argued that this evidence cannot constitute contributory or comparative negligence because the failure to use an available seat belt is not a cause of the accident, but this argument has been criticized as "plac[ing] an artificial emphasis upon the moment of impact, and the pure mechanics of causation."[139] Because a tort is not complete until there is an injury caused by the defendant's breach of a duty of care, the "accident" "... should not be viewed as including merely the initial collision, but also as encompassing the events immediately subsequent thereto."[140] Under this view, "it is clear that the failure to fasten one's seat belt does, in fact, play a role in causing the accident, or, more importantly, the injury ultimately sustained."[141]

Moreover, the plain language of Georgia's comparative-negligence statute shows that the focus should be on fault for the plaintiff's

---

134. *See supra* note 66 and accompanying text.

135. Ga. H.R. Bill 532 § 1; Ga. H.R. Bill. 504 § 1.

136. O.C.G.A. § 51-12-11 (2000); Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 66-67, 668 S.E.2d 518, 521 (2008).

137. *See supra* note 66.

138. *Id.*

139. KEETON ET AL., *supra* note 3, § 65, at 459.

140. Ackerman, *supra* note 42, at 223.

141. *Id.*

damages rather than whose negligence caused the initial collision.[142] There is no requirement in this statute that the plaintiff must have owed a duty of care to the defendant in order to be found comparatively negligent.[143] Instead, this statute asks whether "the plaintiff is to some degree responsible for the injury or damages claimed."[144] If so, the jury is to "determine the percentage of fault of the plaintiff," and the court will then "reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault."[145] The plaintiff may be at fault for his own injuries, such as by failing to use an available seat belt, even though he was not negligent insofar as he did not owe the defendant a duty to use the seat belt.[146] The term "fault," as used in O.C.G.A. § 51-12-33(a),[147] "means that the damages are reduced, where appropriate, based on the degree to which plaintiff's actions contributed to the damages."[148] Assuming that the defendant presents evidence showing that the plaintiff's injuries were caused to some extent by his failure to use an available seat belt, the plaintiff is at fault for those injuries within the meaning of O.C.G.A. § 51-12-33(a).

The General Assembly could reinstate the seat-belt defense by simply repealing O.C.G.A. § 40-8-76.1(d). The shortcoming of this option is that it would reinstate the seat-belt defense as it existed before the effective date of the statute, unless the supreme court or the full court of appeals were to modify that precedent. Because seat-belt evidence should be admissible to show comparative negligence, and not just a failure to mitigate damages, the General Assembly should amend O.C.G.A. § 40-8-76.1(d) rather than repeal it. House Bill 532 and House Bill 504 are

---

142. O.C.G.A. § 51-12-33(a). Because the comparative negligence statute is concerned with "fault," it is more accurate to say "comparative fault" than "comparative negligence." SCHWARTZ, *supra* note 14, § 2.01, at 32 ("An early analysis of comparative negligence suggested that it should be called 'damage apportionment' or 'comparative damages.' The suggestion has merit, but it has not been followed in common parlance." (footnotes omitted)); Prosser, *supra* note 131, at 1 n.2 ("'Comparative negligence' properly refers only to a comparison of the fault of the plaintiff with that of the defendant. . . . In the interest of clarity the term should be avoided, and the statutes here in question should be called 'damage apportionment' or 'comparative damages' acts. 'Comparative negligence' is, however, in much too general use to permit much hope of its elimination." (citations omitted)).

143. O.C.G.A. § 51-12-33(a).

144. *Id.*

145. *Id.*

146. Couch v. Red Roof Inns, Inc., 291 Ga. 359, 362, 729 S.E.2d 378, 381 (2012) (noting that "fault is not meant to be synonymous with negligence").

147. O.C.G.A. § 51-12-33(a).

148. *Couch*, 291 Ga. at 360, 729 S.E.2d at 380.

preferable to O.C.G.A. § 40-8-76.1(d), but there are a number of problems with each bill:

1. Most importantly, both bills would allow seat-belt evidence only on the issue of whether the plaintiff failed to mitigate his damages.[149] A better law would allow the plaintiff's failure to use an available seat belt as evidence of comparative negligence.

2. Both bills would apply only to the failure of front-seat occupants to use an available seat belt rather than all occupants.[150] While this is consistent with the fact that the mandatory-use law does not apply to rear-seat occupants,[151] it will lead to inconsistent results based on where the person was sitting. The original language of the statute created this same anomaly, which the General Assembly remedied in the 1993 amendment,[152] so it makes no sense to recreate a problem that was already fixed.

3. Both bills would apply only to occupants who were at least fourteen years old at the time of the accident.[153] Even if it is good public policy not to hold children under the age of fourteen responsible for failing to use an available seat belt, there is no legitimate reason for not holding the driver responsible for ensuring that these children buckle up, just as O.C.G.A. § 40-8-76(b)(1) requires the driver to ensure that a child under the age of eight is secured by a child-passenger restraining system.

4. House Bill 532 would require the defendant to present expert testimony proving that the occupant's failure to use a seat belt contributed to the alleged injuries.[154] Of course, the defendant must prove this,[155] but it should not be necessary to require such proof to be offered through an expert. Expert testimony may well be required

---

149. Ga. H.R. Bill 532 § 1; Ga. H.R. Bill 504 § 1. House Bill 532 could be construed as allowing evidence of a plaintiff's failure to use an available seat belt to be admitted for the purpose of showing comparative negligence, by providing that "notwithstanding [O.C.G.A. § 51-12-33(g)], . . . a person's failure to wear a seat safety belt shall not serve to deprive such person from recovering that portion of his or her damages attributable to the negligence of another." Ga. H.R. Bill 532 § 1. This suggests that this evidence could show comparative negligence but that the 50% rule (under which the plaintiff cannot recover if his fault is equal to or greater than the defendant's fault) would not apply. Otherwise, there would be no reason for House Bill 532 to refer to O.C.G.A. § 51-12-33(g) because that is the comparative negligence statute, not the mitigation of damages statute. *See* O.C.G.A. § 51-12-33(g). House Bill 504 does not include a similar provision. *See* Ga. H.R. Bill 504.

150. Ga. H.R. Bill 532 § 1; Ga. H.R. Bill 504 § 1.

151. O.C.G.A. § 40-8-76(b)(1).

152. *See supra* notes 68-69 and accompanying text.

153. Ga. H.R. Bill 532 § 1; Ga. H.R. Bill 504 § 1.

154. Ga. H.R. Bill 532 § 1.

155. *Id.*

under the circumstances of a given case, but it should not be required in all cases because some injuries could be connected to the occupant's failure to use a seat belt by lay testimony. The standard rules of evidence are sufficient for determining whether expert testimony is necessary, which is how House Bill 504 treats the issue.[156]

V. CONCLUSION

Excluding evidence of a plaintiff's failure to use an available seat belt may have been justified decades ago when seat belts were new, as many vehicles were not equipped with them, and their benefits were not understood. Today, however, there is no justification for this rule. This rule is unfair to defendants because it requires them to pay for damages caused by a plaintiff's negligent or unreasonable failure to use a seat belt that was available and designed to prevent or minimize the injuries that actually occurred. Conversely, it is not unfair to require a plaintiff to bear the responsibility for his own fault. That is the very essence of Georgia's comparative-negligence statute. This rule also undermines the intent of Georgia's mandatory-use law, and so reinstating the seat-belt defense would have the salutary effect of encouraging more people to buckle up. Admitting evidence of a plaintiff's failure to use an available seat belt as a matter of comparative negligence not only would be fair but also would promote this goal.

156. Ga. H.R. Bill 504 § 1.