

# NORTH DAKOTA'S SEAT BELT DEFENSE: IT'S TIME FOR NORTH DAKOTA TO STATUTORILY ADOPT THE DOCTRINE OF AVOIDABLE CONSEQUENCES

## ABSTRACT

In the context of tort law, the seat belt defense is in its infancy. The purpose of the defense is to allow a defendant in a personal injury claim to admit evidence of the plaintiff's failure to wear a seat belt. If the defendant can adequately prove a causal relationship between the plaintiff's failure to wear a seat belt and the injuries alleged, the seat belt defense can be an effective tool to reduce or wholly defeat a plaintiff's recovery for damages. This article argues the need for North Dakota to adopt the doctrine of avoidable consequences with regard to the seat belt defense. The adoption of this approach is the most equitable alternative to the seat belt defense. Part II discusses an overview of comparative negligence theories and its relationship to the seat belt defense's origins. The three basic approaches to the admissibility of the seat belt defense are discussed in Part III: inadmissible, admissible only to mitigate damages (doctrine of avoidable consequences), or admissible to prove comparative negligence. Part IV of the article outlines the arguments for and against the adoption of the doctrine of avoidable consequences and provides a proposal for North Dakota to statutorily adopt the doctrine of avoidable consequences as it pertains to the seat belt defense. Lastly, Part V restates the need for a change in North Dakota's current approach to the seat belt defense.

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## I. INTRODUCTION

Rosemary Karczmit was fatally injured after her car hit a patch of ice, left the roadway, and collided with a telephone post.<sup>1</sup> Her husband brought a wrongful death action against the State of New York, alleging the State's failure to maintain proper drains and guide rails were the proximate causes of Rosemary's death.<sup>2</sup> In response, the State asserted Rosemary's injuries, which resulted in her death, would not have been caused but-for her failure to wear a seat belt at the time of the accident.<sup>3</sup> The court rendered a judgment in favor of Karczmit, but held Rosemary fifty percent at fault for causing the accident.<sup>4</sup> The court additionally held Rosemary failed to mitigate her damages by failing to wear a seat belt.<sup>5</sup> Therefore, Karczmit's judgment was reduced by an additional twenty-five percent.<sup>6</sup>

Under North Dakota's current law, Karczmit's recovery would have been substantially different.<sup>7</sup> Because Rosemary was fifty percent at fault for causing the accident and her failure to wear a seat belt accounted for an additional twenty-five percent of her damages, under North Dakota law, she would have been deemed seventy-five percent at fault.<sup>8</sup> Consequently, Karczmit's claim would have been completely barred under comparative negligence, and he would have recovered nothing in the wrongful death claim.<sup>9</sup>

The outcome of *Karczmit* was wholly dependent on how New York admitted evidence of seat belt nonuse in personal injury claims.<sup>10</sup> The admissibility of such evidence is known as the seat belt defense.<sup>11</sup> In the context of tort law, the seat belt defense is in its infancy.<sup>12</sup> Rooted in the adoption of comparative negligence, the seat belt defense predominantly

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1. *Karczmit v. State*, 588 N.Y.S.2d 963, 964 (N.Y. Ct. Cl. 1992).

2. *Id.* Karczmit alleged the patch of ice was caused by a defective drainage system and the car failed to stay on the road because of an inadequate guardrail system. *Id.*

3. *Id.*

4. *Id.* at 972.

5. *Id.*

6. *Id.*

7. See discussion *infra* Part III.C (explaining North Dakota recognizes accident-causing fault and injury-causing fault as the same thing).

8. See generally N.D. CENT. CODE § 32-03.2-02 (2010) (combining accident-causing and injury-causing fault).

9. See generally *id.* (barring claims where the plaintiff's fault is as great as, or is greater than, the defendant's fault).

10. N.Y. VEH. & TRAF. LAW § 1229-c(8) (Consol. 1992) (failing to wear a seat belt is admissible to mitigate a plaintiff's damages).

11. Dean Joseph Miller, Comment, *The Seat Belt Defense Under Comparative Negligence*, 12 IDAHO L. REV. 59, 59 n.1 (1975).

12. *Id.* at 59.

came to the forefront of tort issues within the last four decades.<sup>13</sup> Although most states have statutory enactments or judicial fiats concerning the admissibility of seat belt evidence, North Dakota has an unsettled history with regard to the seat belt defense's admissibility.<sup>14</sup>

The purpose of this article is to demonstrate the need for North Dakota to statutorily adopt the doctrine of avoidable consequences as it pertains to the seat belt defense. Part II discusses an overview of comparative negligence and its relationship to the seat belt defense's origins.<sup>15</sup> The three basic approaches to the admissibility of the seat belt defense are discussed in Part III: inadmissible, admissible only to mitigate damages (doctrine of avoidable consequences), or admissible to prove comparative negligence.<sup>16</sup> Part IV of the article outlines the arguments for and against the adoption of the doctrine of avoidable consequences and provides a proposal for North Dakota to statutorily adopt the doctrine for the seat belt defense.<sup>17</sup> Lastly, Part V restates the need for a change in North Dakota's current approach to the seat belt defense.<sup>18</sup>

## II. AN OVERVIEW OF NEGLIGENCE THEORIES AND THEIR RELATIONSHIP TO THE SEAT BELT DEFENSE

The theory that contributory negligence completely bars a plaintiff's recovery in negligence actions arose in England in the early nineteenth century.<sup>19</sup> The United States first adjudicated the theory in 1824.<sup>20</sup> Contributory negligence remained in effect for over a century but was slowly phased out in favor of comparative fault.<sup>21</sup> During the transition, the issue of the seat belt defense came to the forefront of tort law.<sup>22</sup> This section will first discuss the United States' shift from contributory

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13. *Id.*

14. See discussion *infra* Parts III.A-D (discussing the three variations of admitting seat belt evidence and North Dakota's approach to the defense).

15. See discussion *infra* Part II.

16. See discussion *infra* Part III.

17. See discussion *infra* Part IV.

18. See discussion *infra* Part V.

19. David C. Sobelsohn, *Comparing Fault*, 60 IND. L.J. 413, 413 (1985).

20. *Smith v. Smith*, 19 Mass. (2 Pick.) 621, 624 (1824) (holding a plaintiff's failure to exercise ordinary care should preclude the plaintiff from recovering damages); Sobelsohn, *supra* note 19, at 413.

21. Sobelsohn, *supra* note 19, at 414. "Contributory negligence is conduct on the part of the plaintiff . . . which is a legally contributing cause . . . [to] the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS § 463 (1965). Comparative fault requires the fact finder to compare each party's negligence and reduce the plaintiff's damages based on the comparison. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 171 (2003).

22. David A. Westenberg, *Buckle Up or Pay: The Emerging Safety Belt Defense*, 20 SUFFOLK U. L. REV. 867, 870 (1986).

negligence to comparative negligence and its impact on personal injury litigation.<sup>23</sup> Then, this section will discuss the origins of the seat belt defense in light of the negligence doctrines.<sup>24</sup> Lastly, the relationship between the negligence theories and the seat belt defense will be analyzed.<sup>25</sup>

#### A. SHIFT FROM CONTRIBUTORY NEGLIGENCE TO COMPARATIVE NEGLIGENCE

Comparative negligence is a relatively new concept in American tort law.<sup>26</sup> It was not until the 1970s when states began to steer away from contributory negligence to the more lenient theory of comparative negligence.<sup>27</sup> The shift was in response to the apparent lack of justification for contributory negligence and the harshness of completely barring recovery for the plaintiff, no matter how slight the plaintiff's "lack of ordinary care" may be.<sup>28</sup>

There are three general forms of comparative negligence: "pure" comparative negligence and two forms of "modified" comparative negligence.<sup>29</sup> "Pure" comparative negligence is the simplest form of comparative negligence, which compensates a plaintiff for all harm attributable to the tortfeasor, but reduces the plaintiff's damages in proportion to his/her own negligence.<sup>30</sup> "Pure" comparative negligence will not bar recovery unless the proximate cause of the plaintiff's damages is wholly attributable to the plaintiff.<sup>31</sup> Congress adopted the "pure" form of comparative negligence with the enactment of the Federal Employers Liability Act in 1908.<sup>32</sup> Two years later, Mississippi became the first state to statutorily adopt the theory of pure comparative negligence for all negligence cases.<sup>33</sup> Now, thirteen states throughout the United States have statutorily or judicially adopted the "pure" form of comparative negligence.<sup>34</sup>

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23. See discussion *infra* Part II.A.

24. See discussion *infra* Part II.B.

25. See discussion *infra* Part II.C.

26. Miller, *supra* note 11, at 62.

27. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 471 (5th ed. 1984).

28. Miller, *supra* note 11, at 59. A plaintiff's claim was barred if he/she was found to be one percent or more at fault. *Id.*

29. KEETON ET AL., *supra* note 27, at 471.

30. *Id.* If the plaintiff is awarded a \$100,000.00 judgment but is eighty-five percent at fault, he can only recover \$15,000.00.

31. 21 AM. JUR. *Trials* § 3 (1974).

32. *Id.* § 4.

33. *Id.*

34. Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 17, app. (2007); see also ALASKA STAT. § 09.17.060

The second and third types of comparative negligence are considered “modified” forms of comparative negligence.<sup>35</sup> The first approach, or the “equal fault bar” approach, allows a plaintiff to recover as long as his/her negligence is less than that of the defendant.<sup>36</sup> Wisconsin and Arkansas were the first states to adopt this approach to comparative negligence.<sup>37</sup> The other “modified” form of comparative negligence is the “greater fault bar,” which allows the plaintiff to recover damages so long as his/her fault does not exceed that of the defendant.<sup>38</sup> In 1969, New Hampshire became the first state to adopt the “greater fault bar” form of modified comparative negligence.<sup>39</sup>

## B. THE ORIGINS OF THE SEAT BELT DEFENSE

As the American court systems shifted from contributory negligence to comparative negligence, some state legislatures implemented statutes mandating the installation of seat belts in all newly modeled automobiles.<sup>40</sup> In conjunction with the requirement to install seat belts, five states judicially adopted the seat belt defense in civil litigation cases.<sup>41</sup> In the 1966 *Sams v.*

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(2008); ARIZ. REV. STAT. § 12-2505 (LexisNexis 2010); CONN. GEN. STAT. ANN. § 52-572o (West 2005); FLA. STAT. ANN. § 768.81 (West 2010); KY. REV. STAT. ANN. § 411.182 (LexisNexis 2005); LA. CIV. CODE ANN. art. 2323 (2010); MICH. COMP. LAWS SERV. § 600.2957(1) (LexisNexis 2004); MISS. CODE ANN. § 11-7-15 (2004); MO. ANN. STAT. § 537.765 (West 2008); N.Y. C.P.L.R. 1411 (Consol. 2001); R.I. GEN. LAWS § 9-20-4 (1997); *Li v. Yellow Cab, Co.* 532 P.2d 1226, 1243 (Cal. 1975); *Scott v. Rizzo*, 634 P.2d 1234, 1242 (N.M. 1981).

35. Best, *supra* note 34, at 17.

36. *Id.* A plaintiff will recover if he/she is found to be forty-nine percent or less at fault for the damages. *Id.*

37. AM. JUR., *supra* note 31, § 3. Several other states followed Wisconsin and Arkansas thereafter. See DEL. CODE ANN. tit. 10, § 8132 (1999); HAW. REV. STAT. § 663-31 (1985); 735 ILL. COMP. STAT. ANN. 5/2-1116 (West 2003); IND. CODE ANN. § 34-51-2-6 (LexisNexis 2008); IOWA CODE ANN. § 668.3 (West 1998); MASS. ANN. LAWS ch. 231, § 85 (LexisNexis 2000); MINN. STAT. ANN. § 604.01 (West 2010); MONT. CODE ANN. § 27-1-702 (2009); NEV. REV. STAT. ANN. § 41.141 (LexisNexis 2006); N.H. REV. STAT. ANN. § 507:7-d (LexisNexis 2009); N.J. STAT. ANN. § 2A:15-5.1 (West 2000); OHIO REV. CODE ANN. § 2315.33 (LexisNexis 2010); OKLA. STAT. ANN. tit. 23, § 13 (West 2008); OR. REV. STAT. ANN. § 18.470 (2003); 42 PA. CONS. STAT. ANN. § 7102(a) (West 2007 & Supp. 2011); S.C. CODE ANN. § 15-38-15 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2008); VT. STAT. ANN. tit. 12, § 1036 (2002); WASH. REV. CODE ANN. § 4.22.005 (West 1988); WIS. STAT. ANN. § 895.045 (West 2006); WYO. STAT. ANN. § 1-1-109 (2011).

38. AM. JUR., *supra* note 31, § 3. The plaintiff will recover if he/she is fifty percent or less at fault than the defendant. *Id.*

39. See *id.* § 4. Several states followed New Hampshire’s example. See ARK. CODE ANN. § 16-64-122 (Supp. 2009); COLO. REV. STAT. § 13-21-111 (2009); GA. CODE ANN. § 51-11-7 (2000); IDAHO CODE ANN. § 6-801 (2004); KAN. STAT. ANN. § 60-258a (Supp. 2010); ME. REV. STAT. ANN. tit. 14, § 156 (2003); N.D. CENT. CODE § 32-03.2-02 (2010); UTAH CODE ANN. § 78B-5-818 (LexisNexis 2008); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979).

40. Westenberg, *supra* note 22, at 874.

41. *Id.*; see also *infra* text accompanying notes 42-56.

*Sams*<sup>42</sup> case, the Supreme Court of South Carolina became the first court to recognize the merits of the seat belt defense.<sup>43</sup> The basis for admitting evidence of seat belt nonuse rested on the belief that the plaintiff's failure to wear his seat belt "amounted to a failure to exercise such due care as a person of ordinary reason and prudence would have exercised under the same circumstances, and that such failure constituted a contributing proximate cause of plaintiff's injuries."<sup>44</sup>

The Supreme Court of Wisconsin faced the question of the admissibility of seat belt nonuse a year later in *Bentzler v. Braun*.<sup>45</sup> Bentzler was injured in a rear-end collision when she was thrown from her seat and pinned in the wreckage.<sup>46</sup> At the time of the accident, Bentzler was asleep and not wearing her seat belt.<sup>47</sup> The trial court determined Bentzler's failure to wear an available seat belt was negligent, but did not cause her injuries.<sup>48</sup> On appeal, Braun argued Bentzler's negligence was the cause of her injuries and the jury should have been given a special verdict form regarding Bentzler's negligence by failing to use a seat belt.<sup>49</sup> Wisconsin's supreme court determined the failure to use an available seat belt could not be negligence per se without a statute mandating the use of seat belts, but rather invoked the common law standard of ordinary care.<sup>50</sup> Therefore, if evidence indicated a causal relationship between the plaintiff's failure to use a seat belt and his/her injuries, a jury instruction would be proper and necessary.<sup>51</sup> One year later, the Appellate Court of Illinois adopted the causal relationship standard in *Mount v. McClellan*.<sup>52</sup>

The most prominent adoption of the seat belt defense came in *Spier v. Barker*,<sup>53</sup> which is now regarded as the modern version of the defense.<sup>54</sup> The New York Court of Appeals determined "the plaintiff's nonuse of an available seat belt should be strictly limited to the jury's determination of

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42. 148 S.E.2d 154 (S.C. 1966).

43. *Sams*, 148 S.E.2d at 155.

44. *Id.* The California Court of Appeals adopted the same standard in *Truman v. Vargas*, 80 Cal. Rptr. 373 (Cal. App. Dep't Super. Ct. 1969).

45. 149 N.W.2d 626 (Wis. 1967).

46. *Bentzler*, 149 N.W.2d at 630.

47. *Id.*

48. *Id.*

49. *Id.* at 638.

50. *Id.* at 639.

51. *Id.* at 640.

52. 234 N.E.2d 329 (Ill. App. Ct. 1968). The Supreme Court of Illinois reversed *Mount* seventeen years later. *Clarkson v. Wright*, 483 N.E.2d 268, 270 (Ill. 1985) (rejecting the seat belt defense).

53. 323 N.E.2d 164 (N.Y. 1974).

54. *Westenberg*, *supra* note 22, at 874.

the plaintiff's damages and should not be considered by the triers of fact in resolving the issue of liability."<sup>55</sup> However, the court further concluded the issue of mitigating damages should only be given to the jury after the defendant demonstrates, by "competent evidence," a causal relationship between the injuries, or damages, sustained and the plaintiff's failure to use a seat belt.<sup>56</sup>

As courts began adopting the seat belt defense as an affirmative defense in civil negligence cases, state legislatures began pushing for laws mandating seat belt use.<sup>57</sup> The push for such laws derived from the increased social and economic loss incurred by auto accidents.<sup>58</sup> In response to demands, Congress passed the Federal Aid Highway Act of 1973, which allowed Congress to increase state highway funds by twenty-five percent if states passed mandatory seat belt use laws.<sup>59</sup> Additionally, on July 17, 1984, the National Highway Traffic Safety Administration (NHTSA) enacted Federal Motor Vehicle Safety Standard No. 208, requiring the mandatory installation of seat belts in all vehicles.<sup>60</sup>

In addition to requiring the installation of seat belts, the federal standard required a provision suggesting the admissibility of seat belt evidence.<sup>61</sup> The provision stated, in relevant part, any plaintiff violating the seat belt requirement would *mitigate* his/her damages if the plaintiff sought compensation for injuries arising from the accident.<sup>62</sup> Although states began mandating the installation of seat belts, a majority of states failed to adopt the "mitigation" provision.<sup>63</sup> However, the minority of states adopting the "mitigation" provision did so with substantial modifications.<sup>64</sup>

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55. *Spier*, 323 N.E.2d at 167.

56. *Id.*

57. Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 319 (1986).

58. *Id.*

59. *Id.*

60. *Id.* at 334-35 n.79 (citing 49 C.F.R. § 571.208 S4.1.5.2(c)(2) (1985)).

61. *Id.*

62. *See id.* "Mitigate" was to refer to either the mitigating damages approach or any other approach which would reduce the plaintiff's award. *Id.* at 335 n.80. The NHTSA's approach included comparative fault. *Id.*

63. *Id.*

64. *See* discussion *infra* Parts III.B-C.



### C. THE RELATIONSHIP BETWEEN NEGLIGENCE THEORIES AND THE SEAT BELT DEFENSE

The strength of the seat belt defense correlates with the American court system's adoption of comparative negligence.<sup>65</sup> Prior to the adoption of comparative negligence, the seat belt defense had been unanimously rejected.<sup>66</sup> Contributory negligence had the ability to bar a claim if the plaintiff was one percent at fault, which made courts unwilling to completely bar a plaintiff's recovery for failing to wear a seat belt.<sup>67</sup> Courts have unanimously rejected the assertion that failing to wear a mandatory seat belt is negligence per se because it would also completely bar a plaintiff's recovery.<sup>68</sup>

However, under the newly accepted comparative negligence laws, the failure to wear a seat belt *may* or *may not* completely bar a plaintiff's recovery.<sup>69</sup> Under the "pure" form of comparative negligence, a plaintiff's damages can be reduced up to ninety-nine percent.<sup>70</sup> Nevertheless, under either form of "modified" comparative negligence, there is a possibility the plaintiff's claim will be completely barred because of his/her failure to wear a seat belt.<sup>71</sup>

### III. THE APPLICATION OF THE SEAT BELT DEFENSE

There are three distinct ways in which a state can admit the seat belt defense.<sup>72</sup> A majority of states have determined seat belt evidence is not admissible for any purpose in the adjudication process of civil litigation

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65. See discussion *infra* Part II.C.

66. Miller, *supra* note 11, at 64. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still adhere to the principle of contributory negligence and, therefore, do not admit evidence of seat belt nonuse. See Westenberg, *supra* note 22, at 944, app. D; see also MD. CODE ANN., TRANSP. § 22-412.3(h)(1)(i)-(ii) (LexisNexis 2009) (stating evidence in violation of the mandatory seat belt law may not be considered for negligence or contributory negligence); VA. CODE ANN. § 46.2-1094(D) (2005) (stating evidence of seat belt nonuse shall not constitute negligence and is not admissible); Britton v. Doehring, 242 So. 2d 666, 671 (Ala. 1970) (holding seat belt evidence is inadmissible to show contributory negligence on behalf of the plaintiff); McCord v. Green, 362 A.2d 720, 722 (D.C. 1976) (determining seat belt nonuse cannot be considered evidence of contributory negligence); Miller v. Miller, 160 S.E.2d 65, 74 (N.C. 1968) (holding a plaintiff cannot foreseeably anticipate another's negligence and, therefore, seat belt evidence is generally inadmissible to show contributory negligence).

67. John A. Hoglund & A. Peter Parsons, *Caveat Viator: The Duty to Wear Seat Belts Under Comparative Negligence Law*, 50 WASH. L. REV. 1, 9 (1974).

68. *Id.*

69. See *infra* text accompanying notes 70-71.

70. KEETON ET AL., *supra* note 27, at 471-72. Therefore, as long as the plaintiff's failure to wear a seat belt is not the only cause of his/her injuries, the plaintiff will recover.

71. *Id.* at 473. If the plaintiff is found to be fifty or fifty-one percent liable for his/her damages, the claim is completely barred. *Id.*

72. See *infra* text accompanying notes 73-75.

claims.<sup>73</sup> Another alternative, and perhaps the most diverse alternative, is the theory that a plaintiff's failure to wear a seat belt is a failure by the plaintiff to mitigate his/her damages.<sup>74</sup> Lastly, some states allow evidence of seat belt nonuse to show comparative fault.<sup>75</sup> North Dakota has not taken a firm stance on the issue, but is among the minority of states that allow evidence of seat belt nonuse to be admitted as evidence of comparative negligence.<sup>76</sup>

#### A. EVIDENCE OF SEAT BELT NONUSE IS NOT ADMISSIBLE

The majority of states do not allow the seat belt defense in any fashion.<sup>77</sup> Traditionally, states were unwilling to admit seat belt evidence to show fault under contributory negligence based on its ability to wholly defeat a plaintiff's claim.<sup>78</sup> Scholars believed the shift from contributory negligence to comparative fault would lead to the adoption of the seat belt defense.<sup>79</sup> However, in light of the doctrine of comparative fault, states still embrace the defense's inadmissibility.<sup>80</sup> This part of the article will discuss states within the Eighth Circuit that do not allow the seat belt defense to be admitted in personal injury proceedings.<sup>81</sup>

##### 1. *Minnesota*

Minnesota is one of two states within the Eighth Circuit and one of thirty states within the United States that does not permit the seat belt defense to be used in any personal injury claim.<sup>82</sup> Minnesota has taken a firm stance on applying the seat belt gag rule,<sup>83</sup> precluding evidence of seat belt nonuse from all personal injury claims arising out of motor vehicle

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73. Westenberg, *supra* note 22, at 887-88.

74. Gallub, *supra* note 57, at 322-23; *see also* discussion *infra* Part III.B.

75. *See* discussion *infra* Part III.C.

76. N.D. CENT. CODE § 32-03.2-02 (2010) (combining accident-causing fault and injury-causing fault for purposes of demonstrating comparative fault).

77. Westenberg, *supra* note 22, at 887-88; *see also infra* Appendix A.

78. Miller, *supra* note 11, at 66. Contributory negligence would bar a plaintiff's claim if the plaintiff was found to be at least one percent at fault. KEETON ET AL., *supra* note 27, at 471.

79. Hoglund & Parsons, *supra* note 67, at 14-15.

80. *See* discussion *infra* Parts III.A.1-2.

81. *See* discussion *infra* Parts III.A.1-2.

82. *See infra* Appendix A; *see also* MINN. STAT. ANN. § 169.685(4)(a) (Supp. 2011) (stating "proof of the use or failure to use seat belts . . . or proof of the installation or failure of installation of seat belts . . . shall not be admissible in evidence in any litigation involving personal injuries or property damages resulting from the use or operation of any motor vehicle").

83. "Minnesota Statute section 169.685(4)(a) has commonly been referred to as the seat belt gag rule." Carlson v. Hyundai Motor Co., 164 F.3d 1160, 1161 (8th Cir. 1999).

collisions.<sup>84</sup> The intent behind disallowing such evidence is to “remove from the jury’s consideration the use or nonuse of a seat belt” when considering damages.<sup>85</sup>

*Cressy v. Grassmann*<sup>86</sup> challenged the constitutionality of the seat belt gag rule. The appellants argued differentiating between defendants, based on which traffic law the plaintiff violated, was unconstitutional.<sup>87</sup> The Minnesota Court of Appeals did not find merit in the argument based on the relationship between the accident and its proximate cause.<sup>88</sup> The court stated violation of the seat belt statute generally does not cause the accident, but it rather relates to the extent of damages.<sup>89</sup> The court determined creating classes of plaintiffs based on those who cause an accident and those who failed to mitigate his/her own damages sufficed the different treatment prong of the equal protection clause.<sup>90</sup> The second and third prongs were satisfied if the state’s directive served a particular class of people and a legitimate state interest, respectively.<sup>91</sup> The court in *Cressy* opined ensuring accident victims were fairly compensated served a particular class of people—accident victims.<sup>92</sup> Furthermore, providing the opportunity for accident victims to recoup losses served a legitimate state interest.<sup>93</sup> The court in *Cressy* also opined the enactment of mandatory seat belt laws and comparative fault statutes did not repeal the seat belt defense.<sup>94</sup>

## 2. *South Dakota*

In 1994, South Dakota mandated the use of seat belts for passengers in the front seat of a vehicle,<sup>95</sup> the same year the legislature adopted the seat belt gag rule.<sup>96</sup> The gag rule provided, among other things, that the failure to use a seat belt may not be used in “any civil litigation on issues of

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84. *Id.* at 1161-62 (failing to use a seat belt or proof of failure to installation a seat belt is inadmissible evidence in any suit involving personal injuries arising out of the use of a motor vehicle or in crashworthiness claims alleging a defect in the seat belt system).

85. *Lind v. Slowinski*, 450 N.W.2d 353, 359 (Minn. Ct. App. 1990).

86. 536 N.W.2d 39 (Minn. Ct. App. 1995).

87. *Cressy*, 536 N.W.2d at 42 (differentiating between plaintiffs who violated the seat belt law and any other traffic violation).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 43.

95. *See* S.D. CODIFIED LAWS § 32-38-1 (2004) (indicating the mandate for use of seat belts).

96. *See id.* § 32-38-4.

injuries or mitigating damages.”<sup>97</sup> The statute further states that failing to comply with the mandatory seat belt law does “not constitute contributory negligence, comparative negligence, or an assumption of risk.”<sup>98</sup>

In 1993, one year prior to the effective date of South Dakota Codified Laws section 32-38-4, forbidding the admissibility of seat belt nonuse in civil litigation claims, Jeffrey Davis was involved in a two-car accident with Susan Knippling.<sup>99</sup> As a result of the accident, Davis, who was not wearing a seat belt, suffered multiple injuries.<sup>100</sup> At trial, the defense was allowed to admit evidence of Davis’s seat belt nonuse to show he failed to avoid or minimize his damages.<sup>101</sup> The court recognized the newly enacted section 32-38-4 controlled the issue for future cases, but decided the issue for the limited purpose of the case at hand.<sup>102</sup>

The South Dakota Supreme Court ruled consistent with the newly enacted statute, holding a plaintiff’s failure to wear an available seat belt should not be admissible in civil litigation claims.<sup>103</sup> The court reasoned such admissibility was inconsistent with the traditional view of the mitigation doctrine.<sup>104</sup> Furthermore, the court desired to stay in line with a majority of states judicially declining to admit seat belt nonuse to show a plaintiff’s failure to mitigate his/her damages.<sup>105</sup>

#### B. EVIDENCE OF SEAT BELT NONUSE IS ADMISSIBLE TO MITIGATE DAMAGES

There are a number of states that have adopted an alternative approach to admitting the seat belt defense.<sup>106</sup> These states allow the seat belt defense to be admitted only to show the plaintiff failed to mitigate his/her damages.<sup>107</sup> The theory is known as the doctrine of avoidable consequences.<sup>108</sup> There are a variety of ways in which states apply the

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97. *Id.*

98. *Id.*

99. *Davis v. Knippling*, 576 N.W.2d 525, 526, 528 (S.D. 1998).

100. *Id.* at 526.

101. *Id.* at 528.

102. *Id.*

103. *Id.* at 529.

104. *Id.*

105. *Id.*

106. *Gallub*, *supra* note 57, at 322-23.

107. *Hoglund & Parsons*, *supra* note 67, at 18-19. The jury is instructed to determine the percentage of damages which were attributable to the plaintiff’s negligence. *Id.* at 19 n.69. After allocation of comparative fault has been established, the plaintiff’s damages are then reduced by a percentage of “mitigating damages.” *Id.* at 19.

108. *Miller*, *supra* note 11, at 70.

doctrine.<sup>109</sup> However, it is consistent among states allowing the seat belt defense that a causal relationship must be shown between the failure to wear a seat belt and the resulting injuries.<sup>110</sup> This part of the article discusses two approaches to the doctrine of avoidable consequences.<sup>111</sup>

### 1. *Iowa, Nebraska, and Missouri*

Three states within the Eighth Circuit Court of Appeals, Iowa, Nebraska, and Missouri, are among the minority of states that allow the seat belt defense for purposes of demonstrating the plaintiff's failure to mitigate his/her damages.<sup>112</sup> States that have adopted the doctrine of avoidable consequences approach acknowledge the seat belt defense's applicability, but limit its scope by placing a percentage cap on the extent to which the plaintiff's recovery may be reduced.<sup>113</sup> Therefore, after the fact finder has determined the allocation of fault between the parties, the fact finder then reduces the plaintiff's damage recovery by the percentage attributed to the failure to wear a seat belt.<sup>114</sup> The additional reduction is not factored into the comparative fault analysis for purposes of recovery.<sup>115</sup>

Throughout the United States, the percentage cap is held between no more than a one percent reduction up to no more than a fifteen percent reduction.<sup>116</sup> Iowa and Nebraska are among several states that allow the seat belt defense to attribute up to five percent for the plaintiff's failure to mitigate damages.<sup>117</sup> However, Missouri is the most lenient state, capping the reduction at no more than one percent.<sup>118</sup>

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109. See Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 420-24 (2002).

110. Gallub, *supra* note 57, at 322-23. "[T]he defendant bears the burden of proving, by use of expert testimony, which injuries, if any, the plaintiff could have avoided through use of a seatbelt." *Id.* at 322.

111. Alternative approaches not discussed include the reduction for pain and suffering only. See *infra* appendix A (referencing Colorado's statute allowing reduction for pain and suffering).

112. See IOWA CODE ANN. § 321.445(4)(b) (West 1997 & Supp. 2011); MO. ANN. STAT. § 307.178(4) (West 2009); NEB. REV. STAT. § 60-6,273 (2004).

113. Bomer, *supra* note 109, at 422.

114. KEETON ET AL., *supra* note 27, at 345.

115. For example, if a person is forty-five percent at fault and his failure to wear a seat belt attributes to five percent of his injuries, he can still recover under a modified comparative fault structure because the two percentages are independent of one another and are applied consecutively, not concurrently.

116. Bomer, *supra* note 109, at 422-23; see *infra* Appendix A.

117. IOWA CODE ANN. § 321.445(4); NEB. REV. STAT. § 60-6,273.

118. MO. ANN. STAT. § 307.178(4) (West 2009).

## 2. *New York*

Although New York is the only state that applies an unrestricted mitigating damages approach, the unrestricted mitigation approach is said to be the modern trend for the seat belt defense.<sup>119</sup> Prior to the codification of the mitigation of damages approach, the New York Court of Appeals faced the question of how to admit seat belt use evidence in a civil litigation claim.<sup>120</sup> The court recognized three different approaches to admitting the seat belt defense.<sup>121</sup> The first approach held the plaintiff's failure to use a seat belt as negligence per se.<sup>122</sup> However, the court rejected the approach on the basis that New York did not require an automobile occupant to use an available seat belt at the time the accident occurred.<sup>123</sup>

The court also rejected the second approach: the doctrine of contributory negligence.<sup>124</sup> The theory of contributory negligence is only applicable "if the plaintiff's failure to exercise due care causes, in whole or in part, the accident," and the court determined failing to use a seat belt rarely, if ever, causes an accident.<sup>125</sup> The New York Court of Appeals, therefore, adopted a modification of the third approach: the plaintiff cannot recover for injuries sustained if the plaintiff acted with disregard to his/her best interest.<sup>126</sup>

The *Spier* court held the doctrine of avoidable consequences to be the most equitable approach to the seat belt defense.<sup>127</sup> Although wearing a seat belt is a pre-accident obligation and the doctrine of avoidable consequences generally deals with post-accident conduct, the act of fastening a seat belt is "an unusual and ordinarily unavailable" means by which a plaintiff can minimize his/her damages prior to the accident.<sup>128</sup> New York codified the doctrine of avoidable consequences approach following the decision in *Spier*.<sup>129</sup>

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119. Westenberg, *supra* note 22, at 874; *see also* Bomer, *supra* note 109, at 421.

120. *Spier v. Barker*, 323 N.E.2d 164, 165-66 (N.Y. 1974).

121. *Id.* at 167.

122. *Id.*

123. *Id.*

124. *Id.* at 167-68.

125. *Id.* at 168. The court felt it improper to impose liability on a plaintiff for all of his/her injuries, if the seat belt would have prevented only some or none of the injuries. *Id.*

126. *Id.* at 167.

127. *Id.* at 168.

128. *Id.*

129. Bomer, *supra* note 109, at 412. The avoidable consequences approach allows the jury to reduce a plaintiff's damage recovery by any amount without barring the plaintiff's claim. *Spier*, 323 N.E.2d at 167.

C. EVIDENCE OF SEAT BELT NONUSE IS ADMISSIBLE TO  
PROVE COMPARATIVE NEGLIGENCE

A minority of states allow the seat belt defense to show comparative fault.<sup>130</sup> These jurisdictions generally acknowledge failing to wear a seat belt in violation of mandatory seat belt laws is not negligence per se, but they recognize the defense's ability to show comparative fault.<sup>131</sup> This section discusses the comparative fault approach to the seat belt defense throughout the United States.<sup>132</sup>

1. *Florida*

Florida is one of three states whose legislature has adopted the seat belt defense as a means for showing comparative fault.<sup>133</sup> In 1986, Florida passed the Florida Safety Belt Law, mandating the use of seat belts in the front seat of automobiles.<sup>134</sup> In addition to mandating the use of seat belts, the provision provided that a violation of the mandatory seat belt law was not prima facie evidence of negligence or negligence per se.<sup>135</sup> However, the statutory language created ambiguity in determining whether seat belt use should be considered for purposes of contributory negligence or mitigating damages.<sup>136</sup> Therefore, in 1990, the Florida Legislature amended the statute to explicitly state a violation of the mandatory seat belt statute may be considered as comparative negligence, not negligence, negligence per se, or in consideration for mitigation of damages.<sup>137</sup> The change was adopted to create consistency and clarity within the judicial system.<sup>138</sup>

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130. See *infra* appendix A; see also CAL. VEH. CODE § 27315(i) (Deering Supp. 2011); FLA. STAT. ANN. § 316.614(10) (West 2006); MICH. COMP. LAWS SERV. § 257.710e(7) (LexisNexis 2010) (reducing recovery of damages only up to five percent); *Law v. Superior Court*, 755 P.2d 1135, 1145 (Ariz. 1988); *Wemyss v. Coleman*, 729 S.W.2d 174, 179 (Ky. 1987); *Dunn v. Durso*, 530 A.2d 387, 397 (N.J. Super. Ct. Law Div. 1986); *Day v. Gen. Motors Corp.*, 345 N.W.2d 349, 357 (N.D. 1984). North Dakota is the only other state within the Eighth Circuit allowing evidence of seat belt nonuse to be used for comparative fault. See *infra* Appendix A.

131. See discussion *infra* Part III.C.

132. See discussion *infra* Part III.C.

133. FLA. STAT. ANN. § 316.614(10); see also CAL. VEH. CODE § 27315(i); MICH. COMP. LAWS SERV. § 257.710e(7).

134. FLA. STAT. ANN. § 316.614 (stating the driver of the vehicle and any front seat passenger over the age of sixteen must wear a seat belt); *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934, 940 (Fla. 1996).

135. FLA. STAT. ANN. § 316.614.

136. *Ridley*, 693 So. 2d at 940.

137. *Id.* at 940-41.

138. *Id.* at 941.

## 2. *New Jersey*

Although a few states have legislatively adopted the seat belt defense as a means for showing comparative fault, other states have judicially adopted the approach.<sup>139</sup> In *Dunn v. Durso*,<sup>140</sup> the Superior Court of New Jersey recognized a plaintiff's "common-law duty to wear an available seat belt."<sup>141</sup> Although New Jersey did not mandate the use of seat belts at the time, the court opined a plaintiff's passive negligence should hold the plaintiff culpable.<sup>142</sup> A plaintiff's passive negligence rests in his/her duty to avoid an unreasonable risk of harm to one's self.<sup>143</sup> The court went on to say it is fundamental in the theory of negligence for one to "exercise the standard of care that a reasonably prudent person would pursue under similar circumstances in protecting himself from harm."<sup>144</sup> Thus, with the availability and demonstrated effectiveness of seat belts, it is the plaintiff's duty to avoid unreasonable harm by failing to utilize a seat belt.<sup>145</sup>

### D. NORTH DAKOTA'S CURRENT APPROACH

North Dakota is among the minority of states that fail to recognize the seat belt defense within its mandatory seat belt laws.<sup>146</sup> Instead, North Dakota's seat belt laws must be read in conjunction with its comparative fault statutes to determine the admissibility of seat belt evidence.<sup>147</sup> North Dakota Century Code section 39-21-41.4 states a person's failure to wear a seat belt should not be admitted for purposes of proving negligence.<sup>148</sup> However, North Dakota's comparative fault statute recognizes if the plaintiff is at fault, his/her damages should be reduced in proportion to such fault.<sup>149</sup>

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139. See *Wemyss v. Coleman*, 729 S.W.2d 174, 179 (Ky. 1987); *Dunn v. Durso*, 530 A.2d 387, 397 (N.J. Super. Ct. Law Div. 1986); see also *infra* Appendix A (listing the states judicially adopting the approach).

140. 530 A.2d 387 (N.J. Super. Ct. Law Div. 1986).

141. *Dunn*, 530 A.2d at 395.

142. *Id.*

143. *Id.*

144. *Id.* at 396.

145. *Id.* at 396-97.

146. See N.D. CENT. CODE § 39-21-41.4 (2008); see also *infra* Appendix A (comparing other state statutes).

147. See *supra* discussion accompanying notes 130-31.

148. N.D. CENT. CODE § 39-21-41.4.

149. See *id.* § 32-03.2-02 (2010). As long as the plaintiff's fault is not as great as the combined fault of all other persons contributing to the injury, the plaintiff's claim shall not be barred. *Id.*



*Day v. General Motors Corp.*<sup>150</sup> explained the theory of admitting seat belt evidence as it pertains to fault.<sup>151</sup> Day was involved in a one-vehicle accident after he fell asleep at the wheel and struck a culvert, causing his vehicle to rollover and subsequently caused him to be ejected from the vehicle through the doorframe.<sup>152</sup> Day admitted he was at fault for causing the accident because he fell asleep at the wheel, but contended his injuries would not have been sustained had General Motors not defectively designed the door latching system.<sup>153</sup>

The North Dakota Supreme Court determined all fault was to be analogous with causal negligence.<sup>154</sup> The court ultimately determined where the plaintiff's percentage of fault is relevant, both accident-producing fault and injury-enhancing fault should be considered together, so as to reduce or defeat the plaintiff's recovery.<sup>155</sup> Although *Day* involved strict liability, as noted in Justice Gierke's concurrence, the language in the majority opinion blurred the distinction between strict liability cases and common negligence cases.<sup>156</sup> The ambiguity in the majority opinion implied accident-causing fault and injury-enhancing fault should be viewed concurrently when determining fault for purposes of reducing or defeating a plaintiff's claim.<sup>157</sup>

To further blur the distinction between strict liability cases and common negligence cases, a proposed jury instruction highlights the opinion in *Day*.<sup>158</sup> It states: "The law makes no distinction between accident-causing fault and injury-causing fault. If you find fault, you must allocate the fault on a percentage basis between all persons legally responsible for such fault . . ." <sup>159</sup> Although patterned jury instructions are not mandatory, they must follow the law of the state.<sup>160</sup> Therefore, if the defense can adequately show a causal relationship between the plaintiff's injuries and his/her failure to wear a seat belt, then such evidence can be admitted to show comparative fault.<sup>161</sup>

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150. 345 N.W.2d 349 (N.D. 1984).

151. *Day*, 345 N.W.2d at 351.

152. *Id.*

153. *Id.*

154. *Id.* at 358.

155. *Id.* at 351, 358.

156. *Id.* at 358 (Gierke, J., concurring).

157. *Id.*

158. N.D.J.I. Civ. No. C-2.84 (2000).

159. *Id.*

160. *City of Minot v. Rubbelke*, 456 N.W.2d 511, 513 (N.D. 1990).

161. *See* discussion *supra* Part III.D.

#### IV. IMPLEMENTING THE DOCTRINE OF AVOIDABLE CONSEQUENCES

“America’s jurisdictions are both literally and figuratively all over the map with regard to the seat belt defense.”<sup>162</sup> As previously discussed, the doctrine of avoidable consequences is the minority position states have taken in admitting the seat belt defense.<sup>163</sup> Moreover, it is the most fractioned approach to admitting seat belt evidence.<sup>164</sup> This part of the article discusses the pros and cons of the doctrine of avoidable consequences.<sup>165</sup> It also proposes an approach for adopting the doctrine and implementing the mitigation of damages analysis in a special verdict form.<sup>166</sup>

##### A. ARGUMENTS FOR ADOPTION OF THE DOCTRINE

The doctrine of avoidable consequences is the middle ground for admitting seat belt evidence: evidence of the plaintiff’s seat belt nonuse is admissible, but it cannot wholly defeat a plaintiff’s recovery.<sup>167</sup> There are two over-arching reasons the doctrine of avoidable consequences is an appropriate method for applying the seat belt defense.<sup>168</sup> The first argument stems from the cause of the accident.<sup>169</sup> Generally, a person’s failure to wear his/her seat belt does not cause the accident.<sup>170</sup> Focusing on the cause of the accident creates distinction between active and passive negligence.<sup>171</sup> Active negligence is a negligent act that causes the initial accident, whereas passive negligence is a negligent act that enhances the person’s injuries.<sup>172</sup> However, for passive negligence to be operational, the conduct must be “unreasonable.”<sup>173</sup> Generally, “only risks which are recognizable or foreseeable are unreasonable. In the absence of negligent conduct which would alert the plaintiff to the possibility of the accident there is no foreseeable

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162. Bomer, *supra* note 109, at 424 (emphasis omitted).

163. *See* discussion *supra* Part III.B.

164. Bomer, *supra* note 109, at 70.

165. *See* discussion *infra* Parts IV.A-B.

166. *See* discussion *infra* Part IV.C. (specifically discussing how North Dakota should implement the adoption of the doctrine of avoidable consequences, but the approach could be implemented by any state).

167. KEETON ET AL., *supra* note 27, at 458.

168. *See* discussion *infra* Part IV.A.

169. Bomer, *supra* note 109, at 430.

170. Miller, *supra* note 11, at 65.

171. Hoglund & Parsons, *supra* note 67, at 11.

172. *See id.*

173. Miller, *supra* note 11, at 67.

risk which would require the plaintiff to fasten his seat belt.”<sup>174</sup> Therefore, the doctrine of avoidable consequences shifts the focus of the defense from what caused the accident to the extent of injuries.<sup>175</sup> Thus, the seat belt defense applies to damages, not liability.<sup>176</sup>

The second argument is conceivably the most important.<sup>177</sup> If the seat belt defense is admitted to show liability under comparative fault, there is a possibility the plaintiff’s claim could be defeated.<sup>178</sup> Courts in contributory negligence jurisdictions have consistently disallowed the defense because of its ability to wholly deny a plaintiff’s claim.<sup>179</sup> The social policy for denying the defense in contributory negligence jurisdictions is that the plaintiff’s conduct of failing to wear a seat belt is not severe enough to potentially bar his/her recovery.<sup>180</sup> Because the possibility for a complete denial to recovery is conceivable, many jurisdictions adhere to a modified comparative fault approach.<sup>181</sup> Therefore, the same policy arguments that have unanimously defeated the defense under contributory negligence would again apply.<sup>182</sup>

#### B. ARGUMENTS AGAINST THE APPROACH

There are also arguments in opposition of applying the doctrine of avoidable consequences to the seat belt defense. The threshold argument involves the foreseeability of being in an accident.<sup>183</sup> Under common law, a person has a duty to conduct himself/herself in a manner that will not expose him/her to unreasonable harm.<sup>184</sup> Therefore, failing to act as a “reasonably prudent person” would support the conclusion that a plaintiff has a common law duty to wear a seat belt.<sup>185</sup> This argument is backed by the now legislatively-imposed duty to wear a seat belt.<sup>186</sup>

By incorporating the “reasonably prudent person” standard and the newly adopted comparative negligence theory, scholars contend the

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174. *Id.*

175. *See Spier v. Barker*, 323 N.E.2d 164, 168 (N.Y. 1974).

176. *See id.*

177. *See* discussion *infra* Part IV.A.

178. *See* discussion *supra* Part II.A.

179. Miller, *supra* note 11, at 70-71.

180. *Id.* at 73.

181. *Id.* at 74; *see also* discussion *supra* accompanying notes 35-39 (discussing how “modified” comparative fault functions).

182. Miller, *supra* note 11, at 74.

183. *See* Hoglund & Parsons, *supra* note 67, at 3 (conjecturing the average American will be injured in a motor vehicle accident in their lifetime).

184. *Dunn v. Durso*, 530 A.2d 387, 396 (N.J. Super. Ct. Law Div. 1986).

185. Hoglund & Parsons, *supra* note 67, at 11-12.

186. Bomer, *supra* note 109, at 428.

admissibility of the seat belt defense is a logical outcropping.<sup>187</sup> “By its very nature, the concept of comparative negligence contemplates the inclusion of all relevant factors in arriving at the appropriate amount of damages to be recovered by each of the claimants.”<sup>188</sup> The logical application argument is also supported by the difficulty in bifurcating damages and liability.<sup>189</sup> It would be particularly burdensome when the jury concludes all or most of the plaintiff’s damages are attributable to his/her failure to wear a seat belt.<sup>190</sup>

However, the legal reason most often cited for the doctrine’s rejection is that the plain and unambiguous definition of the doctrine of avoidable consequences cannot be practically applied to the seat belt defense.<sup>191</sup> The doctrine of avoidable consequences is a common law rule barring a plaintiff’s recovery for damages “for any harm that he could have avoided by the use of reasonable effort or expenditure *after* the commission of the tort.”<sup>192</sup> Because a person’s failure to fasten his/her seat belt precedes the accident, the doctrine of avoidable consequences is inapplicable.<sup>193</sup> Therefore, the comparative negligence approach is the middle ground between the theory of contributory negligence and the mitigation of damages approach.<sup>194</sup> Comparative negligence would not bar the plaintiff’s recovery, but contemplates the plaintiff’s failure to wear a seat belt *before* the accident occurs by reducing the damage recovery to the extent the plaintiff’s injuries were aggravated by such conduct.<sup>195</sup>

### C. PROPOSED APPROACH FOR NORTH DAKOTA

In 2009, 17,673 traffic accidents were reported in North Dakota.<sup>196</sup> In 10,238 North Dakota accidents, 1054 involved motorists who were not wearing their seat belt.<sup>197</sup> However, failure to wear an available seat belt was never cited as the cause of the accident.<sup>198</sup> Although a person will

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187. Hoglund & Parsons, *supra* note 67, at 14-15.

188. *Id.* at 14.

189. Westenberg, *supra* note 22, at 887.

190. *Id.*

191. Miller, *supra* note 11, at 70.

192. RESTATEMENT (SECOND) OF TORTS § 918(1) (1979) (emphasis added).

193. Miller, *supra* note 11, at 70.

194. *See* Hoglund & Parsons, *supra* note 67, at 10.

195. *Id.*

196. N.D. DEP’T OF TRANSP., N.D. 2009 CRASH SUMMARY 4 (2009), available at <http://www.dot.nd.gov/divisions/safety/docs/crash-summary.pdf>.

197. *Id.* at 55. Data regarding seat belt usage was recorded in 10,238 of the 17,673 traffic accidents. *See id.*

198. *Id.* at 17.

likely be involved in a car accident at some point, the foreseeability of an accident should not outweigh the longstanding theory that a “defendant takes the plaintiff as he finds him.”<sup>199</sup>

The doctrine of avoidable consequences is the only approach combining the longstanding common law theories with the relative foreseeability that an accident will occur.<sup>200</sup> The opportunity for a plaintiff to mitigate his/her damages prior to an accident does not ordinarily arise; however, the use of a seat belt provides “an unusual and ordinarily unavailable means” to minimize damages before an accident occurs.<sup>201</sup> Under the cheapest cost-avoidance theory, the doctrine of avoidable consequences places the burden on the plaintiff to control whether or not he/she uses a seat belt, but shifts the burden for the cause of the accident to the tortfeasor.<sup>202</sup> North Dakota has already adopted the doctrine of avoidable consequences in its application of the helmet defense.<sup>203</sup> Implementing the doctrine of avoidable consequences would simply be a matter of legislative adoption and the creation of a patterned special verdict form.<sup>204</sup>

The first step would be to amend North Dakota Century Code section 39-21-41.4.<sup>205</sup> The adoption of language from New York’s seat belt law would be the least restrictive means of employing the defense.<sup>206</sup> The North Dakota statute currently reads, in relevant part: “A violation for not wearing a safety belt under this section is not, in itself, evidence of negligence.”<sup>207</sup> With the addition of language from the current New York law, a proposed version of the statute would read as follows: a violation for not wearing a safety belt under the section would “not be admissible as

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199. See Westenberg, *supra* note 22, at 871 n.12 (explaining the maxim means, for example, “if the defendant is liable for disabling a high wage earner, he will pay more in damages . . . than if liable for injuring someone who is unemployed”).

200. See discussion *supra* accompanying notes 174-75.

201. Spier v. Barker, 323 N.E.2d 164, 168 (N.Y. 1974).

202. Gallub, *supra* note 57, at 322-23. The cheapest cost-avoidance is an economic analysis which places “the party best situated to avoid injuries at the lowest cost.” SHAPO, *supra* note 21, at 8. Based on data from 2006 to 2009, seat belt use in North Dakota is reported as “56.1% effective in preventing injuries and 50.7% effective in preventing fatalities.” N.D. STATE UNIV., MEDICAL AND ECONOMIC COST OF NORTH DAKOTA MOTOR VEHICLE CRASHES 10 (May 2010), available at <http://www.ugpti.org/pubs/pdf/DP225.pdf>.

203. See Halvorson v. Voeller, 336 N.W.2d 118, 123 (N.D. 1983) (permitting a plaintiff’s failure to wear a helmet to be considered in mitigating damages).

204. See, e.g., N.Y. VEH. & TRAF. LAW § 1229-c (Consol. 1992 & Supp. 2011); Ins. Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984) (holding the mitigation of damages approach with the addition of specific interrogatories to the typical verdict form was an equitable approach to the seat belt defense).

205. N.D. CENT. CODE § 39-21-41.4 (2008) (requiring the use of seat belts in North Dakota).

206. See discussion *supra* Part III.B.2 (explaining New York allows evidence of seat belt nonuse to reduce the plaintiff’s damages up to any percent).

207. N.D. CENT. CODE § 39-21-41.4.

evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such noncompliance as an affirmative defense.<sup>208</sup>

Because of the defense's complexity, it may be difficult for a jury to adequately apply or understand how to apply the mitigation of damages approach.<sup>209</sup> To avoid confusion, a verdict form that clearly distinguishes between accident-causing fault and injury-enhancing fault should be utilized.<sup>210</sup> Therefore, the following interrogatories would be an appropriate addition to a special verdict form where the seat belt defense is an affirmative defense:<sup>211</sup>

(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?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question (a) is *No*, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (a) is *Yes*, please answer question (b).

(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?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question (b) is *No*, you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question (b) is *Yes*, please answer question (c).

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208. N.Y. VEH. & TRAF. LAWS § 1229-c(8); *see also* Bomer, *supra* note 109, at 431 (suggesting each state's legislature should enact the mitigation of damages approach for the seat belt defense).

209. *See* Westenberg, *supra* note 22, at 887 (discussing how the issues of damages and liability may merge for juries to consider).

210. *Ins. Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 454 (Fla. 1984).

211. The following jury instructions are more likely to be used if the defense has proven, through expert testimony, a causal relationship between the plaintiff's injuries and his/her failure to wear a seatbelt. *See* Westenberg, *supra* note 22, at 896-98.

(c) What percentage of plaintiff's total damages were caused by his (or her) failure to use an available and fully operational seat belt?

\_\_\_\_\_ %<sup>212</sup>

The additional interrogatories should follow the traditional interrogatories with regard to the relative contribution of fault for causing the accident.<sup>213</sup> The multi-step special verdict form allows the jury to first attribute each party's fault for purposes of comparative negligence.<sup>214</sup> Secondly, it allows the jury to further reduce the plaintiff's damage recovery by his/her failure to mitigate his/her damages.<sup>215</sup> The two-step application is a "rational approach" to a complicated and real problem.<sup>216</sup>

## V. CONCLUSION

"The seat belt defense has had a short but glamorous career."<sup>217</sup> Although it has only been in effect for less than four decades, it has managed to stir controversy and create divisions throughout the United States.<sup>218</sup> With such varying opinions, the defense has not yet received universal acceptance, judicially or legislatively, but the clear trend is towards acceptance.<sup>219</sup> Being that North Dakota has an unsettled and ambiguous past with the seat belt defense,<sup>220</sup> it is time for a change. Particularly, it is time North Dakota legislatively adopt the mitigation of damages approach for the seat belt defense.<sup>221</sup> The doctrine of avoidable consequences would create an equitable balance to the seat belt defense that is most appropriate for North Dakota.<sup>222</sup>

*Lindsay M. Harris\**

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212. *Pasakarnis*, 451 So. 2d at 454.

213. *Hoglund & Parsons*, *supra* note 67, at 19.

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

215. *Id.*

216. *Bomer*, *supra* note 109, at 431.

217. *Miller*, *supra* note 11, at 65.

218. *See Bommer*, *supra* note 109, at 424 (noting jurisdictions take several different approaches).

219. *Westenberg*, *supra* note 22, at 904.

220. *Id.* at 887 n.114.

221. *See supra* discussion Part IV.C (discussing an approach to adopting the mitigation of damages approach to the seat belt defense).

222. *Bomer*, *supra* note 109, at 431.

\*2012 J.D. candidate at the University of North Dakota School of Law. A special thank you to my family for their constant love, support, patience, and encouragement.

## APPENDIX A

Alabama	Inadmissible <sup>223</sup>	Britton v. Doehring, 242 So. 2d 666, 671 (Ala. 1970)
Alaska	Mitigation of damages	Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986)
Arizona	Comparative fault	Law v. Superior Court, 755 P.2d 1135, 1145 (Ariz. 1988)
Arkansas	Inadmissible	ARK. CODE ANN. § 27-37-703 (2008)
California	Comparative fault	CAL. VEH. CODE § 27315(i) (Deering Supp. 2011)
Colorado	Mitigation of damages for pain and suffering only	COLO. REV. STAT. § 42-4-237(7) (2009)
Connecticut	Inadmissible	CONN. GEN. STAT. ANN. § 14-100a(3) (West 2006)
Delaware	Inadmissible	DEL. CODE ANN. tit. 21, § 4802(i) (2005)
District of Columbia	Inadmissible	D.C. CODE § 50-1807 (LexisNexis 2007)
Florida	Comparative fault	FLA. STAT. ANN. § 316.614(10) (West 2006)
Georgia	Inadmissible	GA. CODE ANN. § 40-8-76.1(d) (2007 & Supp. 2010)
Hawaii	Unsettled <sup>224</sup>	
Idaho	Inadmissible	IDAHO CODE ANN. § 49-673(8) (2008)
Illinois	Inadmissible	625 ILL. COMP. STAT. ANN. 5/12-603.1(c) (West 2008 & Supp. 2011)

223. “Inadmissible” for purposes of this appendix is strictly limited to the seat belt defense’s admissibility for traditional comparative or contributory negligence. In some cases, it may be admissible in products liability cases, better known as “crashworthiness” cases.

224. “Unsettled” indicates the legislature has not adopted an affirmative approach and the defense has not been expounded upon by the judiciary.



Indiana	Inadmissible	State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981)
Iowa	Mitigation of damages up to five percent	IOWA CODE ANN. § 321.445(4) (West 1997 & Supp. 2011)
Kansas	Inadmissible	KAN. STAT. ANN. § 8-2504(c) (2001 & Supp. 2010)
Kentucky	Comparative fault	Wemyss v. Coleman, 729 S.W.2d 174, 179 (Ky. 1987)
Louisiana	Inadmissible	LA. REV. STAT. ANN. § 32:295.1(F) (2002 & Supp. 2011)
Maine	Inadmissible	ME. REV. STAT. tit. 29-A, § 2081(5) (Supp. 2010)
Maryland	Inadmissible	MD. CODE ANN., TRANSP. § 22-412.3(h) (LexisNexis 2009)
Massachusetts	Unsettled	
Michigan	Comparative fault up to five percent	MICH. COMP. LAWS SERV. § 257.710e(7) (LexisNexis 2010)
Minnesota	Inadmissible	MINN. STAT. ANN. § 169.685(4) (West Supp. 2011)
Mississippi	Inadmissible	MISS. CODE ANN. § 62-2-3 (2004)
Missouri	Mitigation of damages up to one percent	MO. ANN. STAT. § 307.178(4) (West 2009)
Montana	Inadmissible	MONT. CODE ANN. § 61-13-106 (2009)
Nebraska	Mitigation of damages up to five percent	NEB. REV. STAT. § 60-6,273 (2004)
Nevada	Inadmissible	Jeep Corp. v. Murray, 708 P.2d 297, 301 (Nev. 1985)
New Hampshire	Inadmissible	Thibeault v. Campbell, 622 A.2d 212, 214 (N.H. 1993)

New Jersey	Comparative fault	Dunn v. Durso, 530 A.2d 387, 397 (N.J. Super. Ct. Law Div. 1986)
New Mexico	Inadmissible	N.M. STAT. § 66-7-373 (LexisNexis Supp. 2003)
New York	Mitigation of damages	N.Y. VEH. & TRAF. LAW § 1229-c(8) (Consol. 1992)
North Carolina	Inadmissible	N.C. GEN. STAT. § 20-135.2A(d) (2009)
North Dakota	Comparative fault	Day v. Gen. Motors Corp., 345 N.W.2d 349, 357 (N.D. 1984)
Ohio	Mitigation of damages for noneconomic loss	OHIO REV. CODE ANN. § 4513.263(F) (LexisNexis 2008)
Oklahoma	Admissible <sup>225</sup>	OKLA. STAT. ANN. tit. 47, § 12-420 (West Supp. 2011)
Oregon	Mitigation of damages up to five percent	OR. REV. STAT. ANN. § 31.760 (West Supp. 2011)
Pennsylvania	Inadmissible	75 PA. CONS. STAT. § 4581(e) (West 2006)
Rhode Island	Inadmissible	R.I. GEN. LAWS § 32-22-22 (2002)
South Carolina	Inadmissible	S.C. CODE ANN. § 56-5-6540(c) (Supp. 2010)
South Dakota	Inadmissible	S.D. CODIFIED LAWS § 32-38-4 (2004)
Tennessee	Mitigation of damages	TENN. CODE ANN. § 55-9-604 (2008); Grandstaff v. Hawks, 36 S.W.3d 482, 492 (Tenn. Ct. App. 2000)
Texas	Unsettled <sup>226</sup>	
Utah	Inadmissible	UTAH CODE ANN. § 41-6a-1806 (LexisNexis 2010)

225. Effective November 1, 2009, Oklahoma's legislature changed the seat belt defense from not allowing evidence of seat belt use to allowing evidence of seat belt nonuse. H.R. 1603, 52d Leg., 1st Reg. Sess. (Okla. 2009).

226. Texas Transportation Code section 545.413(g), which rendered evidence of seat belt nonuse inadmissible, was repealed in 2003. H.R. 4, 78th Leg., Reg. Sess. (Tex. 2003).

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NOTE

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Vermont	Inadmissible	VT. STAT. ANN. tit. 23, § 1259(d) (2007)
Virginia	Inadmissible	VA. CODE ANN. § 46.2-1094(D) (2005)
Washington	Inadmissible	WASH. REV. CODE ANN. § 46.61.688(6) (West 1987)
West Virginia	Inadmissible	W. VA. CODE ANN. § 17C-15-49(d) (LexisNexis 2009)
Wisconsin	Mitigation of damages up to fifteen percent	WIS. STAT. ANN. § 347.48(2m)(g) (West 2005 & Supp. 2010)
Wyoming	Inadmissible	WYO. STAT. ANN. § 31-5-1402(f) (2011)