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# **Legal Issues Regarding Police and Seat Belts**

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16. Abstract  Police officers comprise a high risk group for motor vehicle related injuries. They also are a significant factor in motivating the public to wear seat belts. For these two reasons, seat belt use by policemen is of importance. This report identifies and discusses the legal issues surrounding the use and non-use of seat belts by police officers.  The report is organized into six sections. First, a short background section discusses the significance of the relationship between police and seat belt usage. Second, seat belt usage laws are analyzed. Third, issues revolving around seat belts are examined within the context of potential lawsuits by and against police officers and their employers. Fourth, actual lawsuits involving these parties and issues are discussed. Fifth, employee discipline and worker compensation issues are examined. Sixth, recommendations are made concerning the role of law, litigation, and liability as motivating factors for altering individuals institutional behavior.					
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On October 1, 1965, Charles E. Calloway, an Asheville, North Carolina police officer, was pursuing a suspect on a rain-slicked highway. He skidded into a power pole. He was thrown into the windshield of his patrol car and suffered serious and permanent injury.<sup>1</sup>

On September 7, 1974, Richard F. Dawson, a Pennsauken, New Jersey police officer, was responding to a burglar alarm. He lost control of his patrol car on a rain-soaked highway and slid into a steel pole which was fifteen inches in diameter. As a result, Dawson's fifth and sixth cervical vertebrae were ruptured. Officer Dawson is now a quadriplegic.<sup>2</sup>

On December 10, 1983, John Duffy, a Philadelphia, Pennsylvania police officer, was a passenger in a police van which was responding to an emergency call. The van collided with a police patrol car which was also responding to the call. The van spun, hit a mailbox, and rolled over. Officer Duffy was ejected and was crushed by the van.<sup>3</sup>

All three of these cases share a common fact pattern. In each, a police officer was involved in an automobile crash and was severely injured. Each case wound up in a court of law. Most significantly, seat belts played a significant role in the officers' injuries and in the subsequent litigation. Evidence relating to seat belt use or nonuse by the three officers was used in markedly different ways in each of the cases, however. Officer Calloway was wearing his belt. It failed and he sued the automobile manufacturer. Officer Dawson also sued the manufacturer, alleging that his patrol car could have been designed in such a way that his injuries would have been minimal. The car manufacturer responded by pointing out that Dawson would have been less severely injured if he had been wearing his seat belt. Officer Duffy's heirs sued the auto manufacturer for failing to provide the police van with a passive restraint system, such as air bags, even though the van had been equipped with combined lap and shoulder belts which Officer Duffy did not utilize.

The purpose of this report is to identify and discuss the legal issues surrounding the use and nonuse of automobile safety seat belts by police officers.<sup>4</sup> The primary focus of the report

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<sup>1</sup> Calloway v. Ford Motor Company, 281 N.C. 496, 189 S.E. 2d 484, 486 (1972).

<sup>2</sup> Dawson v. Chrysler Corporation, 630 F. 2d 950, 953-54 (3d Cir. 1980), cert. den. 450 U.S. 959, 101 S.Ct. 1418, 67 L. Ed. 2d 383 (1981).

<sup>3</sup> Pokorny v. Ford Motor Company, 714 F. Supp. 739 (U.S.D.C., E.D. Pa., 1989).

<sup>4</sup> For the purposes of this paper, the term "seat belt" includes any combination of lap belts and shoulder harnesses installed as standard equipment in police vehicles. The term does not include passive restraints such as air bags.

will be on the liability of the employer of the police officer.<sup>5</sup> Particular emphasis will be placed on the impact of recently enacted seat belt usage laws in thirty-four states and the District of Columbia.

In 1983, The Traffic Institute of Northwestern University produced a report entitled The Legal Consequences of Police Failure to Wear Seat Belts.<sup>6</sup> The research and writing of that paper was sponsored by the National Highway Traffic Safety Administration, Police Traffic Services Division.<sup>7</sup> The paper contains an overview of police liability which this paper will not attempt to duplicate. Rather, this paper will attempt to focus on specific liability issues, using, whenever possible, specific case examples.

It should be recognized that some of the issues raised in this paper do not have clear answers. As much as possible, we will attempt to avoid twin hazards which often appear when one discusses unresolved legal issues. First, lengthy expositions of basic principles of law will be dispensed with in favor of a review of actual case law. Second, speculation concerning how courts might rule on particular issues will be tempered by reality rather than heightened by imagination.

This report is organized into six sections. First, a short background section will discuss the significance of the relationship between police and safety belt usage. Second, seat belt usage laws will be analyzed. Third, issues revolving around seat belts will be examined within the context of potential lawsuits by and against individual police officers and their employers. Fourth, actual lawsuits brought by or against police officers and their employers which involve seat belts will be discussed. Fifth, we will look at some other topics, such as employee discipline, workers compensation, and passive restraint systems. Finally, the report will make some recommendations concerning the role of law, litigation and liability as motivating factors which may alter individual and institutional behavior.

## I. BACKGROUND

Seat belt nonuse by police officers is a serious matter for two reasons. First, motor vehicle crashes are a major cause of

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<sup>5</sup> This report will not attempt to precisely define the term "police officer" because the laws of different jurisdictions define the term differently. The authors believe, however, that the principles reviewed in this report cover most categories of law enforcement officers, such as municipal police, county sheriffs and state highway patrol officers. Although the concepts discussed herein may also apply to such categories as federal law enforcement officials, military police, tribal police and private police such as railroad police and university police, no guarantee is made concerning its complete applicability.

<sup>6</sup> Manak, The Legal Consequences of Police Failure to Wear Seat Belts, The Traffic Institute, Northwestern University, Evanston, Illinois (1983).

<sup>7</sup> Id. at i.

police fatalities and injuries.<sup>8</sup> In addition to the many human tragedies caused by crashes, police agencies must cope with both the expense of caring for the victims and their families and the effect on public safety of staffing problems created by deaths and lengthy sick leaves. Second, police officers are perhaps the most significant factor in motivating ordinary citizens to make use of available seat belts. This role is twofold. First, police officers act as role models.<sup>9</sup> If a member of the public sees that an officer is not using a seat belt, that person may be less likely to buckle up.<sup>10</sup> Second, the actual enforcement of seat belt usage laws is done by police officers on patrol. Studies have shown that vigorous enforcement of usage laws increases the rate of compliance.<sup>11</sup> Actual enforcement levels vary greatly from state to state.<sup>12</sup> Police attitudes towards the laws which they are charged with enforcing may play a significant role in the level of enforcement activity.<sup>13</sup>

Potentially, the consequences of individual officers' nonuse of seat belts and their refusal or failure to enforce seat belt usage laws may be litigation directed at the agency or the municipality which employs the police officer. Most of the remainder of this report will focus on such potential litigation.

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<sup>8</sup> Copeland, Death Wearing a Badge, 25 Forensic Science International 175 (1984).

<sup>9</sup> See Campbell, North Carolina's Seat Belt Law: Public Safety and Public Policy, 53 Popular Government 27, 34-35 (1988). Also of interest is a recent news story entitled "Orange seat belts proposed for police" (UPI, October 9, 1989). According to the story, the chief of police in Lemoyne, Pennsylvania, is preparing to install orange seat belts in his force's patrol cars to remind citizens to fasten their own seat belts. A Lemoyne police officer died on July 11, 1989 when his cruiser crashed into a metal pole while involved in a chase. He was not wearing his seat belt.

<sup>10</sup> The same reasoning applies to administrators of law enforcement agencies. The officers in their commands may be less inclined to use seat belts if the chief does not use a belt.

<sup>11</sup> Jonah et. al., Effects of a Selective Traffic Enforcement Program on Seat Belt Usage, 67 Journal of Applied Psychology 89 (1982); Watson, The Effectiveness of Increased Police Enforcement as a General Deterrent, 20 Law & Society Review 293 (1986); Williams et. al., Seat Belt Use Law Enforcement and Publicity in Elmira, New York, 77 American Journal of Public Health 1450 (1987); Campbell, The Relationship of Seat Belt Law Enforcement to Level of Belt Use. Chapel Hill, N.C.: University of North Carolina Highway Safety Research Center (1987).

<sup>12</sup> Tickets issues for seat belt violations ranged from 10 per 100,000 population in Idaho to 878 per 100,000 population in Hawaii. Campbell, note 11, 2-3.

<sup>13</sup> See Rost and Gielen, Car Safety Seat legislation: Enforcement and Increased Restraint Use, 14 Journal of Police Science and Administration 62 (1986). An interesting example of police attitudes is a quote from Rockwall County, Texas, Sheriff John McWhorter, who has been accused of stealing 90 pounds of confiscated marijuana from his office and selling it: "I'm no thief. Occasionally I may forget to put my seat belt on, but that's the only law I've ever broken." (UPI, October 8, 1989).

## II. SEAT BELT USAGE LAWS

Spurred by federal regulations<sup>14</sup>, states began enacting seat belt usage laws in 1984. Presently, such laws exist in thirty-six states and the District of Columbia. In three other states, usage laws were enacted by state legislatures but were repealed by the voters through the referendum procedure. Typically, usage laws make failure to use seat belts a minor traffic infraction punishable by a small fine. As with other traffic infractions, enforcement is left to police agencies. However, many state legislatures placed limitations on the manner in which their seat belt usage laws are enforced. Secondary enforcement, which permits an officer to cite a vehicle occupant for seat belt nonuse only in connection with a stop and citation for another offense, is quite common. Exceptions to seat belt usage laws are also prevalent, the most significant for the purposes of this paper being exceptions for police or other emergency personnel. Many seat belt usage laws provide that evidence of nonuse of seat belts may not be introduced in any civil action. These "gag provisions" apply to cases in which police officers are involved, either as plaintiffs or as defendants. (Actual cases involving seat belt evidence will be discussed in Part IV of this report.)

Taken together, seat belt usage laws may send a somewhat contradictory message to police officers. The laws which are on the books in many states show a clear intent on the part of state legislatures to induce motor vehicle occupants to use seat belts. Police officers must enforce these laws.<sup>15</sup> On the other hand, the small penalties, secondary enforcement, exceptions, and gag provisions may give police officers the impression that enforcement of such laws is a low priority item. One school of thought even holds that seat belt legislation has nothing to do with safety.<sup>16</sup> Under such circumstances, the attitudes of police administrators become vitally important. There is a compelling need for "clear direction and a policy position that defines the importance of these new laws for the personnel who will have enforcement

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<sup>14</sup> See 49 C.F.R. sec.571.208, commonly known as Standard 208. S4.1.4 of Standard 208 provides that all passenger cars manufactured after September 1, 1989 must be equipped with passive passenger restraint systems (air bags or automatic seat belts) unless mandatory safety belt usage laws were enacted which covered not less than two-thirds of the total population of the 50 states and the District of Columbia. Pressured by the automobile manufacturers, all states considered seat belt usage laws and many passed such laws, although a number of laws did not conform to the criteria of S4.1.5.2.

<sup>15</sup> "Law enforcement leaders are directed by their oath of office to protect and serve the public and to enforce the laws of their communities; enforcement of mandatory seat belt laws falls squarely within these parameters." Gruber, C.A., Motivating the Public to Buckle Up, 53 The Police Chief 42 (July 1986).

<sup>16</sup> "Simply put, 'seat belt' legislation was enacted not to save lives or prevent injury but instead was enacted only to save automobile manufacturers money by letting them install seat belts rather than air bags in newly manufactured automobiles." Richards v. State, 757 S.W. 2d 723, 725 (Texas Crim. App. 1988) (Teague, J., dissenting).

responsibility."<sup>17</sup> In addition, training of police personnel may have a significant effect on their own seat belt usage.<sup>18</sup>

Following is a state-by-state analysis of seat belt legislation, with particular emphasis placed on those aspects which directly involve police officers. In addition, other significant laws and judicial decisions will be cited. For the sake of completeness, states which do not have seat belt usage laws will also be included.

#### Alabama

Seat belt use law: none. Ala. Code sec. 16-27-6 requires school bus drivers to wear seat belts while the bus is in motion. Failure to comply with the law makes the driver subject to dismissal.

Case law: In Britton v. Doehring<sup>19</sup> the Supreme Court of Alabama held that evidence of seat belt nonuse is inadmissible in a civil action.

#### Alaska

Seat belt use law: none.

Case law: In Hutchins v. Schwartz<sup>20</sup> the Supreme Court of Alaska held that seat belt evidence may be introduced in a civil action. However, in a prosecution for negligent homicide, evidence of the deceased's failure to wear a seat belt was held to be irrelevant for the purpose of determining the guilt of the accused driver.<sup>21</sup>

#### Arizona

Seat belt use law: none.

Case law: The Supreme Court of Arizona, in Law v. Superior Court,<sup>22</sup> allowed evidence of nonuse of seat belts to be considered by juries in civil actions for the purpose of apportioning damages.

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<sup>17</sup> Steed DK, Safety Belts: You Can Make a Difference, 54 The Police Chief 26 (July 1987).

<sup>18</sup> See McKnight AJ, McPherson K, Hilburn BG, Use of Safety Restraints by Law Enforcement Officers Following Safety Belt Training and Passage of a State-wide Belt Law, U.S. Department of Transportation, National Highway Traffic Safety Administration, Final Report DOT HS 807 260 (April, 1988).

<sup>19</sup> 242 So. 2d 666 (Ala. 1970).

<sup>20</sup> 724 P. 2d 1194 (Alaska 1986).

<sup>21</sup> Wren v. State, 577 P. 2d 235 (Alaska 1978).

<sup>22</sup> 157 Ariz. 147, 755 P. 2d 1135 (Ariz. 1988).

## Arkansas

Seat belt use law: none.

Case law: Although presented with the opportunity to consider seat belt evidence in two cases,<sup>23</sup> the Supreme Court of Arkansas has thus far refused to address the issue.

## California

Seat belt use law: Cal. Veh. Code sec. 27315.

Fine: Not more than \$20 for first offense; not more than \$50 for each subsequent offense.

Enforcement: Secondary.

Exception for police officers: "(g) This section also does not apply to a peace officer, as defined in Section 830 of the Penal Code, when in an authorized emergency vehicle as defined in paragraph (1) of subdivision (b) of Section 165, or to any passenger in any seat behind the front seat of an authorized emergency vehicle as defined in paragraph (1) of subdivision (b) of Section 165 operated by the peace officer, unless required by the agency employing the peace officer."

Use of seat belt evidence: Negligence may be proven as a fact in any civil action without regard to a violation of the seat belt use law.

Case law: Cal. Vehicle Code sec. 27315 has been held to be constitutional.<sup>24</sup>

## Colorado

Seat belt use law: Colo. Rev. Stat. sec. 42-4-236.

Fine: \$10.

Enforcement: Secondary.

Exception for police officers: "(3) The requirement of subsection (2) of this section shall not apply to... (c) A peace officer, level I, as defined in section 18-1-901 (3) (1) (I), C.R.S., while performing official duties so long as the performance of said duties is in accordance with rules and regulations applicable to said officer which are at least as restrictive as

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<sup>23</sup> Harlan v. Curbo, 250 Ark. 610, 466 S.W. 2d 459 (1971) and Shelter Mutual Insurance Company v. Tucker, 295 Ark. 260, 748 S.W. 2d 136 (1988).

<sup>24</sup> People v. Coyle, 251 Cal. Repr. 80 (Cal. Super. 1988).

subsection (2) of this section<sup>25</sup> and which only provide exceptions necessary to protect the officer."

Use of seat belt evidence: Evidence may be admitted to mitigate damages. The mitigation shall be limited to awards for pain and suffering and the evidence may not be used to limit recovery of economic loss and medical payments.

#### Connecticut

Seat belt use law: Conn. Gen. Stat. Ann. sec. 14-100a.

Fine: \$15.

Enforcement: Primary.

Exception for police officers: "(3) As used in this subsection, "private passenger motor vehicle" does not mean an authorized emergency vehicle responding to an emergency call...."

Use of seat belt evidence: Failure to wear seat belts is not admissible as evidence in any civil action.

#### Delaware

Seat belt use law: None.

Case law: In Lipscomb v. Diamiani<sup>26</sup> the Superior Court of Delaware refused to allow evidence of seat belt nonuse in an action based on negligence.

#### District of Columbia

Seat belt use law: D.C. Code Ann. sec. 40-1601 to 40-1607.

Fine: Not to exceed \$15.

Enforcement: Secondary.

Use of seat belt evidence: Not authorized.

#### Florida

Seat belt use law: Fla. Stat. Ann. sec. 316.614.

Fine: \$20.

Enforcement: Secondary.

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<sup>25</sup> Subsection (2) of C.R.S. sec. 42-4-236 reads as follows; " Unless exempted pursuant to subsection (3) of this section, every driver of and every front seat passenger in a motor vehicle equipped with a safety belt system shall wear a fastened safety belt while the motor vehicle is being operated on a street or highway in this state."

<sup>26</sup> 226 A. 2d 914 (Del. 1967).

Use of seat belt evidence: "(10) A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence in any civil action."

Case law: The Supreme Court of Florida has ruled that evidence of seat belt nonuse may be introduced into evidence at civil trials in Florida for the purpose of mitigating damages.<sup>27</sup> The Florida legislature is on record as stating that the seat belt use law does not alter this holding.<sup>28</sup>

### Georgia

Seat belt use law: Ga. Code sec. 40-8-76.1.

Fine: Not more than \$15.

Enforcement: Secondary. Persons who cannot be ticketed for other specific offenses and who are not wearing their seat belts "shall be warned that the failure to use a seat safety belt is dangerous to the person's safety and such person shall be encouraged to comply with the provisions of this Code section."

Exception for police officers: The law does not apply to " a passenger vehicle performing an emergency service."

Use of seat belt evidence: Not authorized.

Case law: In a prosecution for vehicular homicide, the defendant's contention that the victim caused his own death because he failed to wear a seat belt was held by the court to be mistaken. The true issue in the case, according to the court, was whether the victim's death was caused by the defendant's drunk driving.<sup>29</sup> Because the victim in this case was a police officer who was responding to a domestic disturbance, this case will be discussed more fully in Part IV of this report.

### Hawaii

Seat belt use law: Hawaii Rev. Stat. sec. 291-11.6.

Fine: \$20.

Enforcement: Primary.

Exception for police officers: Passengers in a police vehicle

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<sup>27</sup> Insurance Company of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984).

<sup>28</sup> See American Automobile Association v. Tehrani, 508 So. 2d 365, 370 (Fla. 1st Dist. App. 1987). See also Van Laningham JG, The Making of the 1986 Florida Safety Belt Law: Issues and Insight, 14 Florida State University Law Review 685 (1986).

<sup>29</sup> Roberts v. State, 173 Ga. App. 701, 327 S.E. 2d 819 (1985).

while on duty are exempt from the requirements of the law.

Use of seat belt evidence: Not covered by the law.

#### Idaho

Seat belt use law: Idaho Code sec. 49-673.

Fine: \$5.

Enforcement: Secondary.

Case law: Evidence of seat belt nonuse is inadmissible in Idaho.<sup>30</sup>

#### Illinois

Seat belt use law: Ill. Stat. Ann. ch. 95 1/2, sec. 12-603.1.

Fine: Not to exceed \$25.

Enforcement: Secondary.

Use of seat belt evidence: Not authorized.

Case law: The Illinois seat belt law has been held constitutional by the Illinois Supreme Court.<sup>31</sup>

#### Indiana

Seat belt use law: Ind. Code Ann. secs. 9-8-14-1 to 9-8-14-6.

Fine: No more than \$25.

Enforcement: Secondary.

Use of seat belt evidence: Evidence of failure to comply with the law may not be admitted in any civil action to mitigate damages.

#### Iowa

Seat belt use law: Iowa Code Ann. sec. 321.445

Fine: \$10.

Enforcement: Primary.

Exception for police officers: The law does not apply to "front seat occupants of an authorized emergency vehicle while they are being transported in an emergency. However, this exemption does not apply to the driver of the authorized emergency vehicle."

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<sup>30</sup> Quick v. Crane, 111 Idaho 759, 727 P. 2d 1187 (1986).

<sup>31</sup> People v. Kohrig, 113 Ill. 2d 384, 498 N.E. 2d 1158 (1986), cert. den. 479 U.S. 1093, 107 S. Ct. 1264, 94 L. Ed. 2d 126 (1986).

Presumably, then, the driver of a police vehicle which is responding to an emergency call would have to use a seat belt but an officer in the front passenger seat would not.<sup>32</sup>

Use of seat belt evidence: Evidence of a violation of the seat belt law may be introduced in order to mitigate damages, but a plaintiff's recovery may be reduced only by an amount not to exceed five percent.

Case law: The Supreme Court of Iowa has held the Iowa seat belt use law to be constitutional.<sup>33</sup>

#### Kansas

Seat belt use law: Kan. Stat. Ann. secs. 8-2501 to 8-2507.

Fine: Not more than \$10.

Enforcement: Secondary.

Use of seat belt evidence: Kan. Stat. Ann. sec. 8-504(c) reads: "Evidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages."

#### Kentucky

Seat belt use law: none.

Case law: The Supreme Court of Kentucky has allowed evidence of seat belt nonuse to be considered by juries in civil actions for the purpose of determining contributory fault.<sup>34</sup>

#### Louisiana

Seat belt use law: La. Rev. Stat. sec. 32:295.1.

Fine: \$25.

Enforcement: Secondary.

Use of seat belt evidence: Failure to wear a seat belt may not be considered as evidence of comparative negligence, nor may it be admitted to mitigate damages.

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<sup>32</sup> The Iowa child passenger restraint law, Iowa Code Ann. sec. 321.446(3), exempts from its provisions peace officers acting on official duty.

<sup>33</sup> State v. Hartog, 440 N.W. 2d 852 (Iowa 1989).

<sup>34</sup> Weymss v. Coleman, 729 S.W. 2d 174 (Ky., 1987).

Case law: In Hammer v. City of Lafayette <sup>35</sup> a child was injured when a car driven by his mother collided with a police car which ran a stop light in responding to a call. The court held that the mother had no duty to restrain the child with a seat belt. This case will be discussed more fully in Part IV of this report.

#### Maine

Seat belt use law: None.

Use of seat belt evidence: Maine Rev. Stat. tit. 29 sec. 1368-A reads in part as follows: "In any accident involving an automobile, the nonuse of seat belts by the driver of or any passengers in the automobile shall not be admissible in evidence in any trial, civil or criminal, arising out of such accident."<sup>36</sup>

#### Maryland

Seat belt use law: Md. Trans. Code sec. 22-412.3.

Fine: no more than \$25.

Enforcement: Secondary.

Use of seat belt evidence: Under most circumstances, seat belts may not even be mentioned during the trial of a civil action. The only exception is limited to cases which involve defectively installed or defectively operating seat belts.

#### Massachusetts

Seat belt use law: None. Former Mass. Gen. Laws Ann. ch. 90, sec. 7BB was repealed by the voters at a referendum on November 4, 1986.<sup>37</sup> It is worth noting, however, that the ill-fated seat belt law exempted "any police officer while performing his duties as a police officer."

Case law: Massachusetts courts have not squarely addressed the issue of the seat belt defense, but in two cases<sup>38</sup> Massachusetts courts refused to allow evidence of seat belt nonuse to be considered.

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<sup>35</sup> 502 So. 2d 301 (La. App. 3 Cir. 1987).

<sup>36</sup> See Pasternack v. Achorn, 680 F. Supp. (D.Me. 1988).

<sup>37</sup> See Hingson R et al., Repeal of the Massachusetts Seat Belt Law, 78 American Journal of Public Health 548 (1988).

<sup>38</sup> Breault v. Ford Motor Company, 305 N.E. 2d 824 (Mass. 1973) and MacCuish v. Volkswagenwerk A.G., 494 N.E. 2d 390 (Mass. App. Ct. 1986).

## Michigan

Seat belt use law: Mich. Comp. Laws Ann. sec. 257.710e.

Fine: \$25.

Enforcement: Secondary.

Use of seat belt evidence: Failure to wear a seat belt in violation of the seat belt use law may be considered as evidence of negligence. However, plaintiffs' recovery for damages may be reduced only by a maximum of five percent due to a violation of the law.

Case law: One of the leading seat belt defense cases is Lowe v. Estate Motors Limited.<sup>39</sup> The Supreme Court of Michigan allowed evidence of failure to use a seat belt to be considered by the jury in assessing damages. Since the case arose before the enactment of the Michigan seat belt law, the 5% damage reduction limitation did not apply. As the opinion in Lowe recognizes, the seat belt use law does not apply to rear seat passengers and the seat belt defense theoretically could be used to deny recovery to such plaintiffs.<sup>40</sup> This would create a situation in which a front seat passenger who is not using a seat belt has his damages reduced by a mere 5% while his counterpart in the rear seat would receive no damages.<sup>41</sup>

Although the seat belt defense was once successfully used as a defense against charges of negligent homicide,<sup>42</sup> a number of Michigan cases have recently held that a victim's failure to wear a seat belt is irrelevant to the determination of the criminal conduct of a defendant.<sup>43</sup>

## Minnesota

Seat belt use law: Minn. Stat. Ann. sec. 169.686.

Fine: \$10.

Enforcement: Secondary.

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<sup>39</sup> 428 Mich. 439, 410 N.W. 2d 706 (1987)

<sup>40</sup> 410 N.W. 2d at 718-19.

<sup>41</sup> See Fahrner FR, The Michigan Supreme Court Says Yes to the Seat Belt Defense, 5 Cooley Law Review 159, 173 (1988).

<sup>42</sup> State V. Smith. See Fisher BD and Fisher JH, Use of the Safety Belt Defense in Michigan Negligent Homicide Cases, Michigan Bar Journal 144 (february 1989).

<sup>43</sup> See People v. Richardson, 170 Mich. App. 470, 428 N.W. 2d 698 (1988); People v. Clark, 171 Mich. App. 656, 431 N.W. 2d 88 (1988); People v. Burt, 173 Mich. App. 332, 433 N.W. 2d 366 (1989).

Exemption for police: None.<sup>44</sup>

Use of seat belt evidence: Seat belt evidence is not admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.<sup>45</sup>

### Mississippi

Seat belt use law: None.

Case law: There is little solid case law on seat belt usage in Mississippi. The Mississippi Supreme Court, in D.W. Boutwell Butane Company v. Smith,<sup>46</sup> expressed doubt about the efficacy of seat belts but did not definitively rule on the seat belt defense.

### Missouri

Seat belt use law: Mo. Stat. Ann. sec. 307.178.

Fine: \$10.

Enforcement: Secondary.

Use of seat belt evidence: Evidence of failure to wear a seat belt may be considered by juries. Plaintiff's recovery may be reduced a maximum of one per cent.<sup>47</sup>

Case law: A recent federal court decision in Missouri held that seat belt evidence may be introduced by a defendant automobile manufacturer in a products liability action, and that the 1% limit on reduction in damages does not apply.<sup>48</sup>

### Montana

Seat belt use law: Mont. Code Ann. secs. 61-13-101 to 61-13-106.

Fine: \$20.

Enforcement: Secondary.

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<sup>44</sup> The Minnesota child restraint law, Minn. Stat. Ann. sec. 169.685, exempts police officers while in performance of their official duties, provided that a seat belt must be substituted for the child restraint system.

<sup>45</sup> Minn. Stat. Ann. sec. 169.685 Subd. 4. This is the section immediately preceding Minnesota's seat belt use law.

<sup>46</sup> 244 So. 2d 11 (Miss. 1971).

<sup>47</sup> Since the law requires proof by expert testimony of a causal connection between a plaintiff's failure to use a seat belt and her injuries, as a practical matter the 1% maximum reduction in damages would hardly cover expert fees and other costs borne by a defendant in raising the seat belt defense.

<sup>48</sup> LaHue v. General Motors Corporation, Case No. 88-5063-CV-SW-1 (W.D. Mo., July 5, 1989).

Use of seat belt evidence: Not admissible.

### Nebraska

Seat belt use law: None. The former Nebraska seat belt use law, Neb. Rev. Stat., was repealed by the voters at a referendum in November of 1988.<sup>49</sup>

Case law: In Welsh v. Anderson,<sup>50</sup> the Supreme Court of Nebraska refused to allow a defendant to introduce evidence of plaintiff's nonuse of seat belts in order to mitigate damages.

### Nevada

Seat belt use law: Nev. Rev. Stat. sec. 484.641.

Fine: No more than \$25. Alternatively a sentence of community service work may be imposed.

Enforcement: Secondary.

Case law: The Supreme Court of Nevada briefly considered seat belt evidence in Jeep Corp. v. Murray.<sup>51</sup> It stated "we have serious doubts about the relevance of the evidence"<sup>52</sup> and upheld the trial judge's exclusion of such evidence from the trial.

### New Hampshire

Seat belt use law: None.

Case law: None.

### New Jersey

Seat belt use law: N.J. Stat. Ann. sec. 39:3-76.2e to 39:3-76.2k.

Fine: \$20.

Enforcement: Secondary.

Case law: The Supreme Court of New Jersey held that introduction of seat belt evidence is proper in civil actions.<sup>53</sup>

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<sup>49</sup> The Nebraska child restraint law, Neb. Rev. Stat. sec. 39-6,103.01(3), contains an exception for drivers of authorized emergency vehicles when operating such vehicles pursuant to their employment.

<sup>50</sup> 228 Neb. 79, 421 N.W. 2d 426 (1988).

<sup>51</sup> 708 P. 2d 297 (Nev. 1985).

<sup>52</sup> 708 P. 2d at 301.

<sup>53</sup> Waterson v. General Motors Corporation, 111 N.J. 238, 544 A. 2d 357 (N.J. 1988).

### New Mexico

Seat belt use law: N.M.S.A. secs. 66-7-370 to 66-7-373.

Fine: Not less than \$25 and not more than \$50.

Enforcement: Primary.<sup>54</sup>

Use of seat belt evidence: Not authorized.

### New York

Seat belt use law: Vehicle and Traffic Law sec. 1229-c.

Fine: Up to \$50.

Enforcement: Primary.

Use of seat belt evidence: Evidence of noncompliance with the seat belt use law may be introduced into evidence for the purpose of mitigation of damages.

Exemption for police: The law does not apply to "authorized emergency vehicles", which term includes police vehicles.<sup>55</sup>

Case law: Two lower courts have found the New York seat belt use law to be constitutional.<sup>56</sup>

### North Carolina

Seat belt use law: N.C. Gen Stat. sec. 20-135.2A.<sup>57</sup>

Fine: \$25

Enforcement: Primary.

Use of seat belt evidence: Not permitted, except in an action based on a violation of the seat belt law itself.

Case law: In State v. Swain<sup>58</sup> the North Carolina Court of Appeals held the seat belt use law to be constitutional.

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<sup>54</sup> The New Mexico statute is unique in that it specifically mandates primary enforcement: "The provisions of the Safety Belt Use Act shall be enforced whether or not associated with the enforcement of any other statute." N.M.S.A. sec. 66-7-373E.

<sup>55</sup> N.Y. Vehicle and traffic Law sec.101.

<sup>56</sup> People v. Weber, 129 Misc. 2d 993, 494 N.Y.S. 2d 960 (1985); Wells v. State, 130 Misc. 2d 113, 495 N.Y.S. 2d 591 (1985).

<sup>57</sup> The North Carolina child restraint law, N.C. Gen. Stat. sec. 20-137.1(b)(ii), exempts from its provisions the drivers of emergency vehicles.

<sup>58</sup> 92 N.C. App. 240, 374 S.E. 2d 173 (N.C. App. 1988).

## North Dakota

Seat belt use law: N.D. Cent. Code sec. 39-21-41.3?

Fine: None. Starting on January 1, 1991, the fine will not exceed \$20.

Enforcement: Primary.

Case law: Use of seat belt evidence is unsettled under North Dakota common law, although the Supreme Court of North Dakota appears to be leaning toward allowing its introduction for the purpose of mitigation of damages.<sup>59</sup>

## Ohio

Seat belt use law: Ohio Rev. Code Ann. sec. 4513.263.

Fine: \$20 for drivers; \$10 for passengers.

Enforcement: Secondary. The Ohio law contains a curious "see no evil" provision which prohibits police officers from looking at automobiles "for the sole purpose of determining whether such a violation has been or is being committed."

Use of seat belt evidence: Not permitted in ordinary negligence actions; under certain circumstances, evidence of a plaintiff's nonuse or improper use of a seat belt will be allowed in actions against manufacturers of passenger cars.

Case law: The Ohio seat belt law has been held to be constitutional.<sup>60</sup>

## Oklahoma

Seat belt use law: Okla. Stat. Ann. tit. 47, secs. 12-416 to 12-420.<sup>61</sup>

Fine: \$10, plus court costs of \$15.

Enforcement: Secondary. The law provides: "No law enforcement officer shall make routine stops of motorists for the purpose of enforcing this act."

Use of seat belt evidence: Not permitted.

Case law: The Court of Criminal Appeals of Oklahoma has held

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<sup>59</sup> Halvorson v. Voeller, 336 N.W. 2d 118 (N.D. 1983).

<sup>60</sup> Bendner v. Carr, 40 Ohio App. 3d 149, 532 N.E. 2d 178 (1987).

<sup>61</sup> The Oklahoma child restraint law, Okla. Stat. Ann. tit. 47, sec. 11-1112(C)(3), exempts drivers of emergency vehicles from its provisions.

the seat belt law to be constitutional.<sup>62</sup>

### Oregon

Seat belt use law: None. A seat belt use law was passed by the Oregon Legislature in 1987<sup>63</sup> but was repealed by the voters at a referendum held in November of 1988 and never took effect. One exemption in the proposed law covered "any person who is being transported while in the custody of a police officer or any law enforcement agency."

Case law: The Supreme Court of Oregon, in a pair of 1987 decisions,<sup>64</sup> allowed seat belt evidence to be considered in civil actions.

### Pennsylvania

Seat belt use law: 75 Pa.C.S.A. sec. 4581.

Fine: \$10.

Enforcement: Secondary. Unlike most other seat belt laws, the Pennsylvania law provides that an individual may not be convicted of a violation of the seat belt law unless he is also convicted of another violation which occurred at the same time.

Use of seat belt evidence: Not permitted in any civil or criminal action, except actions involving a violation of the seat belt law itself.

### Rhode Island

Seat belt use law: None. R.I. Gen. Laws sec. 31-23-41 requires that drivers of public service vehicles must use seat belts. Such vehicles must be equipped with such belts.

Case law: The Rhode Island Supreme Court has disapproved the use of seat belt evidence in civil cases.<sup>65</sup>

### South Carolina

Seat belt use law: S.C. Code secs. 56-5-6510 to 56-5-6550.<sup>66</sup>

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<sup>62</sup> City of Tulsa v. Martin, 775 P. 2d 824 (Okla. Crim. App. 1989).

<sup>63</sup> Chapter 385, Oregon Laws 1987.

<sup>64</sup> Dahl v. BMW, 304 Or. 558, 748 P. 2d 77 (1987); Morast v. James, 304 Or. 571, 748 P. 2d 84 (1987).

<sup>65</sup> Swajian v. General Motors Corporation, 559 A. 2d 1041 (R.I. 1989).

<sup>66</sup> The South Carolina child restraint law, Code of Laws of S.C. sec. 56-5-6440, exempts from its provisions the drivers of emergency vehicles while operating in emergency situations.

Fine: \$1<sup>0</sup> starting on January 1, 1990.

Enforcement: Secondary. A citation may not be issued for a violation of the seat belt law unless a citation also is issued for the violation which initially caused the officer to make the enforcement stop.

Use of seat belt evidence: Not permitted.

#### South Dakota

Seat belt use law: None.

Case law: None.

#### Tennessee

Seat belt use law: Tenn. Code Ann. secs. 55-9-601 to 55-9-610.

Fine: Warning for first offense; \$25 fine for subsequent offense. The law provides no mechanism for communicating to police officers whether a person who has been stopped has a prior record of seat belt violations.<sup>67</sup>

Enforcement: Secondary. Police officers are specifically forbidden to arrest or take into custody a person solely for a violation of the seat belt use law.

Use of seat belt evidence: Not permitted.

#### Texas

Seat belt use law: Tex. Rev. Civ. Stat. Ann. art. 6701d sec. 107C.

Fine: Not less than \$25 nor more than \$50.

Enforcement: Primary.

Use of seat belt evidence: Not permitted.

Case law: The Texas seat belt law has been held to be constitutional.<sup>68</sup>

The law has also been held to be a valid basis for stopping a vehicle, which led to discovery of illegal drugs and the driver's arrest.<sup>69</sup>

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<sup>67</sup> See Henry v. Alexander, No. 87-27-II (Slip Opinion, Court of Appeals of Tennessee, 1987).

<sup>68</sup> Richards v. State, 743 S.W. 2d 747 (Tex. App.- Houston [1st Dist.] 1987), pet. for disc. rev. den., 757 S.W. 2d 723 (Tex. Crim. App. 1988), appeal dismissed, U.S. , 109 S.Ct. 1105, 103 L. Ed. 2d 170 (1989).

<sup>69</sup> Stoneham v. State, 746 S.W. 2d 13 (Tex. App.- Houston [14th Dist.] 1988). See also Greenlee v. State, 1989 Tex. Crim. App. LEXIS 153. Liability issues involving automobile stops based on seat belt laws will be discussed more fully in Part III below.

### Utah

Seat belt use law: Utah code Ann. secs. 41-6-181 to 41-6-186.  
Fine: \$10.  
Enforcement: Secondary.

Use of seat belt evidence: Not permitted.

### Vermont

Seat belt use law: None.

Case law: Seat belt evidence is permitted to be introduced in civil actions in Vermont.<sup>70</sup>

### Virginia

Seat belt use law: Va. Code sec. 46.1 - 309.2.

Fine: \$25.  
Enforcement: Secondary.

Exceptions for police: The law does not apply to "any law enforcement officer transporting persons in custody or traveling in circumstances which render the wearing of such safety belt system impractical" and does not apply to "police or sheriff's department personnel operating motor vehicles to enforce laws governing motor vehicle parking."

Use of seat belt evidence: Not permitted.<sup>71</sup>

### Washington

Seat belt use law: Wash. Rev. Code Ann. sec. 46.61.688.

Fine: \$47.  
Enforcement: Secondary.

Use of seat belt evidence: Not permitted.

### West Virginia

Seat belt use law: None.

Case law: In a prosecution for causing a death while driving under the influence of alcohol, the fact that the victim was not

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<sup>70</sup> Smith v. Goodyear Tire & Rubber Co., 600 F. Supp. 1561 (D. Vt. 1985), cited as precedent in Grazulis v. Curtis, 543 A. 2d 1326 (Vt. 1988).

<sup>71</sup> In addition to Va. Code sec. 46.1-309.2(E), Va. Code sec. 46-1-309.1 also prohibits evidence of nonuse of seat belts from being considered in negligence actions.

wearing a seat belt was held by the Supreme Court of Appeals of West Virginia not be an intervening cause which would break the causal connection between the defendant's act and the victim's death.<sup>72</sup>

### Wisconsin

Seat belt use law: Wis. Stat. Ann. sec. 347.48.

Fine: \$10.

Enforcement: Secondary. A law enforcement officer may not take a version into custody solely for a violation of the seat belt law.

Exception for police: The law does not apply "to the operation of an authorized emergency vehicle by a law enforcement officer....under circumstances in which compliance could endanger the safety of the operator or another."

Use of seat belt evidence: Admissible, but damages may not be reduced by more than fifteen percent.

### Wyoming

Seat belt use law: Wyo. Stat. Ann. secs. 31-5-1401 and 31-5-1402.

Fine: None. Compliance with the seat belt law entitles a licensee to a \$5 reduction in a fine imposed for violation of another section of the motor vehicle law.

Enforcement: None. "No motor vehicle shall be halted for and no driver or passenger shall be cited for a violation of this section."

Exception for police: The law excludes "emergency vehicles" which includes police, sheriff's department or highway patrol vehicle.<sup>73</sup>

Use of seat belt evidence: Not permitted.

The following is a brief summary of seat belt legislation:

States with seat belt use laws: 34 and the District of Columbia.

States with primary enforcement: 8.

States with exceptions for police officers: 10.

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<sup>72</sup> State v. Nester, 336 S.E. 2d 187 (W.Va. 1985).

<sup>73</sup> Wyo. Stat. Ann. sec. 31-5-1302(a)(iii).

States which prohibit seat belt evidence from being introduced in civil trials, either through their seat belt use laws or because of judicial decisions, number 28. Seven states allow seat belt evidence for limited purposes.

### III. LIABILITY ISSUES - CITIZENS VS. POLICE

This part will deal with questions involving the possible legal liability of individual police officers and their employers.<sup>74</sup> In addition to a general discussion of legal liability which may stem from seat belt issues, several specific topics will be covered: lawsuits by persons in police custody; constitutional issues raised by enforcement of seat belt use laws; and potential liability due to nonuse of such laws.

#### Liability

Two major premises exist upon which aggrieved citizens may sue police officers and their employers. The first is a common law action for negligence. Under the Anglo-American legal system, a plaintiff may bring a successful action for negligence against a defendant in a court of law if the following may be proved:

1. The defendant must owe the plaintiff a legal duty.
2. The defendant must have failed to perform, or to properly perform, that duty.
3. The defendant's failure to perform the duty must have proximately caused harm to the plaintiff.

Under ordinary circumstances, each of these issues is resolved by the trier of fact, normally the jury, at a civil trial. If the defendant is a unit of government or a government official, however, the situation becomes more complicated.

Historically, governments were protected from lawsuits under the doctrine of sovereign immunity,<sup>75</sup> which can be traced back to the medieval concept that "the King can do no wrong".<sup>76</sup> The

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<sup>74</sup> In most instances, the employer will be a unit of government, such as a state, county or city, rather than a police agency, since police agencies are not ordinarily independent governmental entities. See Ashburn v. Anne Arundel County, 306 Md. 617, 510 A. 2d 1078, 1079 (1986); Hopkins v. State of Kansas, 237 Kan. 601, 702 P. 2d 311 (1985).

<sup>75</sup> The doctrine of sovereign immunity is now commonly called governmental immunity, and will be so called in this report.

<sup>76</sup> See Fox NP, The King Can Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity, 25 Wayne Law Review 177, 193(1979).

doctrine was retained when the United States became an independent nation.<sup>77</sup> Prior to World War II, case law almost invariably held that municipalities were not liable for the negligent acts of their police. For example, in Aldrich v. City of Youngstown<sup>78</sup> the plaintiff was injured in an automobile collision with a police vehicle responding to a call. The court held that under the doctrine of governmental immunity the municipality could not be held liable for negligence. An almost identical fact situation, this time involving the death of a pedestrian, resulted in a similar decision in an Illinois case, Taylor v. City of Beryin.<sup>79</sup> Only in recent decades has common law shifted to remove absolute municipal immunity.<sup>80</sup> In addition, state legislation has been enacted which wholly or partially abolishes governmental immunity.<sup>81</sup>

Another issue which arises in connection with litigation against governments is the responsibility of the employing government for a negligent act committed by an employee. This concept, known as respondeat superior, holds that municipalities are liable for the negligent acts of their employees if the activities of the employees are within the scope of their employment. Accordingly, in an action against a unit of government due to negligent acts or omissions of police officers the doctrine of governmental immunity must have been waived and the doctrine of respondeat superior must apply.<sup>82</sup>

The second major basis for liability is federal civil rights law, specifically 42 U.S.C. sec. 1983.<sup>83</sup> Under normal

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<sup>77</sup> See Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

<sup>78</sup> 106 Ohio St. 342, 140 N.E. 164 (1922).

<sup>79</sup> 372 Ill. 124, 22 N.E. 2d 930 (1939). It is interesting to compare this case with a more recent Illinois case, Sundin v. Hughes, 107 Ill. App. 2d 195, 246 N.E. 2d 100, 103 (1969) which embodies the modern view that a defendant police officer "has no immunity from suit simply because he was acting in the performance of his duties as a police officer."

<sup>80</sup> See Shapo MS, Municipal Liability for Police Torts, 17 University of Miami Law Review 745 (1963).

<sup>81</sup> See Restatement of the Law (Second) Torts sec.895B (Appendix) for a listing of states which have wholly or partially waived immunity.

<sup>82</sup> See 57 Am Jur 2d Municipal, School and State Tort Liability sec. 260.

<sup>83</sup> 42 U.S.C. sec. 1983 reads as follows:

"Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

circumstances, this section applies only to individual public officers; the doctrine of respondeat superior is not applicable in a section 1983 action.<sup>84</sup> However, municipalities may be liable under sec. 1983 if a plaintiff's injury results from an action taken by a police officer pursuant to an official policy or custom.<sup>85</sup>

### Persons in Custody

In order to examine the dynamics of actions against police under both liability theory and sec. 1983, we will look first at actions brought by persons who claim to have been injured while in custody due to alleged police failure to secure them in safety seat belts. Such actions can be based on either common law liability for negligence or on a sec. 1983 violation of civil rights.

It may be noted that many police agencies have regulations requiring that prisoners be belted while in police cars, because of liability concerns and because a seat belt provides an additional impediment to the prisoner's ability to escape.<sup>86</sup>

Following are descriptions of cases in which an issue was police use or nonuse of seat belts in connection with persons in custody.

### Coles v. Mesh<sup>87</sup>

Coles, a prisoner, was being transported by Mesh, a Pennsylvania state trooper. Coles claimed that he received head and back injuries after being thrown forward when Mesh suddenly applied his brakes. Coles, who was handcuffed, further claimed that he had previously requested several times that he be belted,

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<sup>84</sup> Monroe v. Pape, 365 U.S. 167 (1961).

<sup>85</sup> Monnell v. New York City Department of Social Services, 436 U.S. 658 (1978). For more detailed discussions of this issue, see Annotation: Vicarious Liability of Superior Under 42 U.S.C. sec. 1983 for Subordinate's Acts in Deprivation of Civil Rights, 51 ALR Fed. 285 and Annotation: Liability of Supervisory Officials and Government Entities for Having Failed to Adequately Train, Supervise or Control Individual Peace Officers Who Violate Plaintiff's Civil Rights Under 42 U.S.C. sec. 1983, 70 ALR Fed. 17.

<sup>86</sup> With respect to seat belts as security devices, there has recently been a controversy over whether seat belt hardware may be used as tools to break handcuffs. A story in the Chicago Tribune dated June 12, 1989 described a incident in Columbus, Ohio, in which ten prisoners used seat belt hardware to break their handcuffs. The sheriff of Franklin County, Ohio, ordered seat belts removed from jail vans. A memo from the Peerless Handcuff Company to police agencies dated June 16, 1989 stated that the incident was "under study by us" and recommended that prisoners be handcuffed with their hands behind their backs and kept under constant surveillance.

<sup>87</sup> Civil Action No. 86-2636 (U.S.D.C., E.D. Pa., 1986) (Slip Opinion). It should be noted that the State of Pennsylvania was not a party to this action.

but Mesh refused.

Coles brought action under sec. 1983. The United States District Court noted that Coles "did not specify which public right, privilege, or immunity secured by the Constitution or law was violated by defendant's actions." Furthermore, the court noted that Coles was ambivalent concerning whether Mesh willfully refused Coles' requests to be belted (which would arguably be a basis for a sec. 1983 action) or whether Mesh was merely careless (which would be grounds for a negligence action but not a sec. 1983 action).

Both Coles' and Mesh's motions for summary judgment were denied. Presumably, further pleadings by Coles would be more clear as to his theories of Mesh's liability.<sup>88</sup>

#### Edwards v. May<sup>89</sup>

Edwards was arrested for burglary in Chicago, Illinois. He was placed in a squadron<sup>90</sup> by police officers who did not secure him with a seat belt. Edwards alleged that the officers transporting him intentionally ran the squadron over potholes at excessive rates of speed, bouncing him about inside and causing him to sustain serious injuries. The police then ignored his requests for medical attention.

Edwards brought this action against the police officers and the City of Chicago<sup>91</sup> under theories of negligence and a violation of sec. 1983. The court stated that Edwards failed "to support his allegation that a municipal custom or policy exists which could have caused his injury." Further, the court held that Edwards' allegations did not show that the officers' actions were intentional. Accordingly, his sec. 1983 claim was dismissed as to both the City of Chicago and the individual police officers. Since the remaining claims were based on negligence, the court dismissed

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<sup>88</sup> Coles was not represented by an attorney.

<sup>89</sup> No. 89 C 3102 (U.S.D.C., N.D. Ill., 1989), 1989 U.S. Dist. LEXIS 9620.

<sup>90</sup> The term "squadron" refers to a police van more commonly known as a "paddy wagon".

<sup>91</sup> The Chicago Police Department was the subject of a similar sec. 1983 action in 1983. See Magaynes v. Terrance, 739 F. 2d 1131 (7th Cir. 1983). Magaynes alleged that he was deprived of his rights by being transported in a squadron which lacked padding and seat belts. A jury found in favor of the police and the city. The United States Court of Appeals held that "the jury could have found on ample evidence that the squadrons were not of defective design." 739 F. 2d at 1135.

For a similar case in a different jurisdiction with a different result, see Sundance v. Municipal Court of the Los Angeles Judicial District, 190 Cal. Repr. 432 (Ct. App. 2d Dist. 1983), which was a class action brought by and on behalf of inebriates. In addition to other complaints, the design of "B-wagons" (step vans used for transporting prisoners) was criticized as unsafe. Among other alleged design problems, the B-wagons were not equipped with seat belts. The court issued an injunction against the use of B-wagons and required that arrestees be transported by police patrol cars.

them for lack of federal jurisdiction.

Castillo v. Bowles<sup>92</sup>

The plaintiff in this sec. 1983 action, a prisoner, claimed that the bus which transported prisoners between jails was unsafe because, among other alleged defects, it lacked seat belts. The court, in dismissing the suit, wrote: "Plaintiff has not alleged that the condition of the bus in which he was transported injured him in any way....Because plaintiff has not alleged a deprivation of a protected right, his claim is not cognizable under sec. 1983."<sup>93</sup>

State Department of Corrections v. Romero<sup>94</sup>

This was a negligence action in which Romero, a prisoner, was injured when he fell from a farm tractor while on a work detail. His suit alleged that the State of Florida was negligent in failing to provide the tractor with a seat belt. A jury found the state to be 100% negligent. The appeals court, while not disagreeing with Romero's theory, reversed, holding that Romero may have been contributorily negligent by being inattentive while the tractor was in motion.

Gibbs v. State of Louisiana<sup>95</sup>

This was an action based on the alleged negligence of a Louisiana state trooper while transporting a person in custody. The trooper was not made a party to the action.

Gibbs was arrested for driving while intoxicated. She was placed in the back seat of the arresting officer's vehicle and a seat belt was fitted snugly around her. Approximately 200 to 300 feet from the scene of the arrest, the officer heard a click similar to a seat belt being unfastened. He then heard Gibbs say "I'm getting out of here!" Gibbs opened the car door and fell to the roadside gravel while the vehicle was still moving, sustaining injuries.

The trial court held that the trooper's actions were not negligent. The appeals court agreed, stating that the trooper "properly followed all procedures securing Ms. Gibbs in the vehicle", specifically noting that the trooper secured Gibbs with a seat belt.

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<sup>92</sup> 687 F. Supp. 277 (N.D. Tex. 1988).

<sup>93</sup> 687 F. Supp. at 283.

<sup>94</sup> 524 So. 2d 1032 (Fla. App. 5th Dist. 1988).

<sup>95</sup> 524 So. 2d 817 (La. App. 3d Cir. 1988).

Taken together, these cases lead to the following conclusions:

A. In general:

1. Municipalities and individual police officers may be subject to liability for negligent actions in the same manner as anyone else, assuming that immunity has been waived by legislation. Municipalities are ordinarily liable for negligent actions of their police officers under the doctrine of respondeat superior.

Municipalities and individual police officers may also be subject to actions involving deprivation of civil rights under 42 U.S.C. sec. 1983. The following conditions apply:

a. Persons bringing sec. 1983 actions must allege and prove that the police officers intentionally caused them harm. The mere possibility of harm is not sufficient grounds for a sec. 1983 action. In addition, if police actions are unintentional, at most an action based on negligence is available.

b. In order for municipalities to be successfully sued under sec. 1983, there must be shown to have been an official custom or policy of the police department which led to the plaintiff's injury. Otherwise, the doctrine of respondeat superior applies.

B. With respect to seat belts:

1. An officer who fails to belt a prisoner runs the risk of losing a lawsuit. Conversely, an officer who belts prisoners may have demonstrated that he or she was not negligent and that he or she did not deliberately cause harm to the prisoner in a sec. 1983 action.

2. It is possible, although by no means settled, that a unit of government may be liable for failing to furnish seat belts to prisoners riding in its vehicles.

The following policies and guidelines are offered to limit liability in prisoner actions involving seat belts:

1. All police vehicles should be equipped with seat belts.
2. Department policy should require that all persons in custody should be secured in seat belts while being transported.
3. Individual officers should secure prisoners with seat belts.

Seat Belt Nonuse by Police as a Basis for Liability

No reported cases have been discovered which concern seat belt nonuse by a police officer as a basis for a lawsuit. In order for such a case to be viable, a connection would have to be shown between the nonuse of the seat belt by the defendant police officer and an injury to the plaintiff. Two fact patterns are possible for

this to occur. In the first, an officer might lose control of his or her vehicle due in part to not being secured in a seat belt.<sup>96</sup> In the second, an unbelted officer may be hurled about the interior of a police vehicle during a crash, injuring another occupant.<sup>97</sup>

The injured person appears to have a plausible negligence action against the police officer under either of these circumstances. It is very likely, moreover, that the municipal employer is also liable under the theory of respondeat superior, particularly if no policy exists which mandates seat belt use by police officers. Sec. 1983 does not appear to be a viable basis for a lawsuit based on seat belt nonuse, since such sec. 1983 actions involving auto crashes must be based on "egregious or reckless" conduct of the police officer.<sup>98</sup>

The role of seat belt nonuse as negligence is problematic for two reasons. First, as discussed in Part II of this report, a large number of jurisdictions prohibit the introduction related to seat belt nonuse at civil trials.<sup>99</sup> Second, the role of seat belt nonuse as a proximate cause of plaintiff's injuries is unclear. No one loses control of a motor vehicle or hurtles about the inside of a car simply because one is not wearing a seat belt. Other factors, including speed, weather conditions, the physical condition of the driver and a host of other factors may play significant causative roles and may be much more easily proven. In addition, juries ordinarily are charged with assessing individual negligence and are not required to identify precisely how an individual lost control of a car. Accordingly, attempting to determine the significance of seat belt nonuse as a causative factor in crashes may be in large measure a futile effort. However, since the possibility does exist that nonuse of an available seat belt may in some jurisdictions be found to be negligence which is causative of a motor vehicle crash, police officers are cautioned to use their seat belts and police agencies are advised to promulgate and enforce rules to that effect.

### Seat Belts and Constitutional Issues

Without exception, seat belt use laws have been held to be

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<sup>96</sup> See Kington v. Camden, 19 Ariz. App. 361, 507 P. 2d 700 (1973), involving a two car crash, and Rollins v. Department of Transportation, 238 Kan. 453, 711 P. 2d 1330 (1985), involving a one car crash.

<sup>97</sup> See Williams v. Chrysler Motors Corp., 271 So. 2d 551 (La. App. 1st Cir. 1972) (rear seat passenger was not wearing a seat belt; in a collision, she was thrown forward and injured person riding in the front seat).

<sup>98</sup> See Roach v. City of Fredericktown, 693 F. Supp. 795 (E.D. Mo. 1988). The judge wrote that an automobile crash involving a police vehicle "does not amount to a violation of someone's constitutional rights."

<sup>99</sup> Such prohibitions would apply even though the issue of seat belt nonuse as the cause of a crash is not a form of the seat belt defense, since the issue of the defendant's nonuse of an available seat belt is being raised by the plaintiff. In the seat belt defense, the issue of the plaintiff's seat belt nonuse is raised by the defendant.

constitutional by courts around the country.<sup>100</sup> The courts have consistently held that such laws are a valid exercise of a state's police power.<sup>101</sup> As a court in Ohio stated:

Legislation promoting the state's interest in protecting the health, safety and welfare of its citizens is a proper exercise of the state's police power. A law compelling motorists to use a seat belt promotes such a state interest. It not only saves lives, but it promotes the welfare of its citizens since the results of death or severe injuries often lead to the state's providing long-term care at taxpayers' expense to those injured. In addition, the wearing of a seat belt secures a driver in his seat making it easier for him to retain control of his motor vehicle and thus reducing the chances that sudden emergencies on the road may cause him to lose control of his vehicle and collide with other vehicles.<sup>102</sup>

It would be a mistake, however, for police officers to view such laws as a convenient excuse for stopping and detaining individuals who appear to be "suspicious". As described in Part II of this report, seat belt laws in many jurisdictions permit only secondary enforcement. A stop for a violation of the seat belt law alone would be illegal. Not only would the citation for a violation of the seat belt law be invalid, but any contraband which was discovered and seized in the course of the stop would be inadmissible as evidence in a criminal prosecution.

### Search and Seizure

A number of appellate courts have held that violation of a

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<sup>100</sup> Cases upholding the constitutionality of seat belt use laws are becoming numerous. In only two states have the highest courts passed on the issue: People v. Kohrig, 113 Ill. 2d 384, 498 N.E. 2d 1158 (1986), appeal dismissed, 479 U.S. 1073, 107 S.Ct. 1264, 94 L.Ed. 2d 126 (1987) and State v. Hartog, 440 N.W. 2d 852 (Iowa 1989). Other cases include People v. Coyle, 251 Cal. Repr. 80 (Cal. Super. 1988); Wells v. State, 130 Misc. 2d 113, 495 N.Y.S. 2d 591 (Sup. Ct. Steuben Co. 1985), affd. 134 A.D. 2d 847, 521 N.Y.S. 2d 604 (4th Dept. 1987); State v. Swain, 92 N.C. App. 240, 374 S.E. 2d 173 (1988); Bendner v. Carr, 40 Ohio App. 3d 149, 582 N.E. 2d 178 (1987); City of Tulsa v. Martin, 775 P. 2d 824 (Okla. Crim App. 1989); and Richards v. State, 743 S.W. 2d 747 (Tex. App. - Houston [1st Dist.] 1987), pet. for disc. rev. den. 757 S.W. 2d 723 (Tex. Crim. App. 1988), appeal dismissed, 109 S.Ct. 1105, 103 L. Ed. 2d 170 (1989).

<sup>101</sup> "Police power" is the power of government to restrict the rights of individuals and is based on the responsibility of government to protect the health, safety, morals and general welfare of its citizens. It may be noted that "police power" is not exercised only by police officers. Such common municipal functions as animal control, zoning regulation, and restaurant inspections are examples of police power.

<sup>102</sup> State v. Batsch, 44 Ohio App. 3d 81, 541 N.E. 2d 475 (1988).

seat belt use law, by itself in a primary enforcement jurisdiction<sup>103</sup> or in conjunction with another violation in both primary and secondary enforcement jurisdictions,<sup>104</sup> is a valid basis for a police stop of a vehicle. A more significant issue, from the standpoint of potential police liability, is how far an officer may go in searching the vehicle and questioning its occupants once the stop has been made.

In order to better understand the legal ground rules covering seat belt stops, two cases decided by the same court at the same time will be examined.<sup>105</sup> Both cases involve stops by New Mexico State Police officers for seat belt violations<sup>106</sup> which led to arrests of the vehicle occupants for violations of narcotics laws.

#### United States v. Ashby

On April 3, 1987, a New Mexico State Police officer stopped a red Ford Thunderbird solely because its occupants were not wearing seat belts. As he approached the vehicle, the officer smelled the odor of burnt marijuana and observed what he believed to be marijuana seeds and residue in plain view in the car. He also smelled the odor of raw marijuana emanating from the trunk of the car. When the trunk of the car was pried open, police found sixty-eight pounds of marijuana. The trial judge ruled that the initial stop of the vehicle was legitimately made because of the seat belt violations and that probable cause existed for police to search the vehicle because of the visible presence, plus the smell, of marijuana. Teresa Ashby, a passenger in the automobile, was convicted of possession and of aiding and abetting the possession of marijuana with intent to distribute.

The United States Court of Appeals for the Tenth Circuit affirmed the conviction. Ashby's appeal did not challenge the initial stop for the seat belt violations. Rather, she claimed that there was no probable cause to search the car. The court rejected this argument, stating:

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<sup>103</sup> See People v. Mikel, 543 N.Y.S. 2d 712 (A.D. 2d Dept. 1989); Greenlee v. State, 773 S.W. 2d 939 (Tex. Crim. App. 1989); Rodriguez v. State, No. 13-88-334 CR (Tex. App. 13th Dist. [Corpus Christi] 1989), 1989 Tex. App. LEXIS 2279.

<sup>104</sup> See Caple v. Superior Court, 195 Cal. App. 3d 594, 241 Cal. Repr. 735 (1987); United States v. Williams, 876 F. 2d 1521 (11th Cir. 1989) (applying Florida law); State v. Winston, No. C7-88-2054 (Minn. App. 1989), 1989 Minn. App. LEXIS 546 (unpublished opinion); Stoneham v. State, 764 S.W. 2d 13 (Tex. App. - Houston [14th Dist.] 1988.

<sup>105</sup> United States v. Ashby, 684 F. 2d 690 (10th Cir. 1988), decided December 29, 1988 and United States v. Guzman, 684 F. 2d 1512 (10th Cir. 1988), decided December 30, 1988.

<sup>106</sup> New Mexico is a primary enforcement jurisdiction. N.M.S.A. sec. 66-7-373(E) reads as follows: "The provisions of the Safety Belt Use Act shall be enforced whether or not associated with the enforcement of any other statute."

Testimony regarding the ability of an experienced officer to recognize the smell of marijuana, the officer's view of marijuana in the car's interior, and the odor which sixty-eight pounds of partially unwrapped marijuana may emit, were sufficient to support the district court's ruling that probable cause existed for the search. Once probable cause exists for a search, the police have authority to search the entire vehicle.<sup>107</sup>

#### United States v. Guzman

In Guzman, similar circumstances led to a different result. On August 3, 1987, Jose Luis Guzman and his wife were driving a 1987 Cadillac with Florida license plates along Interstate 40<sup>108</sup> when they were stopped by a New Mexico State Police officer because they were not wearing seat belts. Although he could not pinpoint a reason, the officer's suspicions were aroused. The officer proceeded to conduct an investigation in order to determine whether the Guzmans were "hauling contraband in the vehicle."<sup>109</sup> He interrogated both Guzman and his wife, who both displayed signs of nervousness. Eventually Guzman consented to a search of the vehicle. The officer found \$5000 in cash hidden in the trunk of the car and a package of cocaine hidden in the rear seat.<sup>110</sup> The trial court granted the defendants' motion to suppress the evidence found in the car, holding that the stop for a seat belt violation was merely a pretext for an unconstitutional stop of the car on mere suspicion of a drug violation.

The Court of Appeals for the Tenth Circuit reviewed the law concerning pretextual stops.<sup>111</sup> After a lengthy discussion, the court concluded that whether a stop was pretextual hinged on police procedure:

If police officers in New Mexico are required to and/or do routinely stop most cars they see in which the driver is not wearing his seat belt, then this stop was not unconstitutionally pretextual at its inception....

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<sup>107</sup> 864 F. 2d at 692.

<sup>108</sup> A notorious drug trafficking route. See Greenlee v. State, 773 S.W. 2d 939, 940 (Tex. Crim. App. 1989) (Teague, J., dissenting).

<sup>109</sup> 864 F. 2d at 1514.

<sup>110</sup> Eventually a total of five kilograms of cocaine and \$40,000 in cash were recovered from various parts of the car.

<sup>111</sup> As defined by the court, " a pretextual stop occurs when police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. The classic example, presented in this case, occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity." 864 F. 2d at 1515.

Conversely, if officers rarely stop seat belt law violators absent some other reason to stop the car, the objective facts involved in the stop suggest that the stop would not have been made but for a suspicion that could not constitutionally justify the stop.<sup>112</sup>

Since the court did not have before it evidence of New Mexico State Police procedures concerning stops for seat belt violations, it could not rule on the stop of Guzman. However, the court adopted an alternative reason for disapproving the search. Even if the initial stop for the seat belt violation was valid, the officer's questioning of the Guzmans based only on his suspicion was not:

An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation....When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.<sup>113</sup>

The court noted that the "plain view" exception allows a police officer, once a valid stop has been made, to search vehicles and seize evidence if the officer inadvertently discovers incriminating evidence in plain view. (Such was the Ashby situation.)

The lesson from these two cases is that in a primary enforcement jurisdiction routine enforcement of a seat belt law plus some objective sign of illegal activity may be valid grounds for a detention and questioning of the vehicle occupants and a search of the vehicle. However, officers who enforce seat belt laws only to stop "suspicious" individuals, or officers who conduct "fishing expeditions" once a vehicle has been pulled over for a seat belt violation, run the risk of having the case dismissed because of illegal seizure of evidence.<sup>114</sup> In addition, such officers and their employers may be liable in actions based on harassment or false imprisonment.<sup>115</sup>

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<sup>112</sup> 864 F. 2d at 1518.

<sup>113</sup> 864 F. 2d at 1519.

<sup>114</sup> For a case very similar to Guzman, with a similar result, see People v. Mikel, 543 N.Y.S. 2d 712 (2d Dept. 1989).

<sup>115</sup> An interesting related issue is violation of seat belt laws as a parole violation. Although one might think that such a pretext would be imaginative at best and ludicrous at worst, it appears in one reported case, Witzke v. Withrow, 702 F. Supp. 1338 (W.D. Mich. 1988). Since the parolee was charged with a number of other violations, including malicious destruction of a police vehicle, the seat belt violation did not figure in the final resolution of the case.

Police agencies would do well to initiate and implement clear, written policies concerning the circumstances under which seat belt use laws are to be enforced. In addition, proper police procedures after a stop have been made should be instilled in all officers.

#### Municipal Liability for Failure to Enforce Seat Belt Laws

No cases have been identified which address the issue of potential liability based on the failure of police agencies to enforce seat belt use laws. Any discussion of such potential liability must of necessity involve speculation concerning how judges might rule on specific fact patterns.

Two possible circumstances of non-enforcement may be conceived. In primary enforcement jurisdictions, there may be a custom of non-enforcement of seat belt use laws. In secondary enforcement jurisdictions, one may find failure to enforce such laws in individual situations in which a vehicle is stopped for violation of another traffic regulation. In either situation, let us assume that a crash occurs which results in injury or death. A lawsuit is filed against the municipality and/or the police officer who is alleged to be negligent in enforcing the law.

Several impediments exist to plaintiffs in such actions:

1. As discussed in Part II of this report, many state seat belt laws do not allow evidence of nonuse of seat belts to be introduced in civil trials. Other states have no seat belt laws at all.

2. Such cases present plaintiffs' attorneys with difficult problems of proof. It is questionable as to whether police failure to enforce seat belt laws could ever be considered a proximate cause of anyone's injuries. Intervening factors, such as the negligence of one or more drivers or of the plaintiff, probably contribute far more to causation of a motor vehicle crashes than any nonenforcement of seat belt laws.

3. A related problem is that of timing. If a person is injured due to someone's nonuse of a seat belt, which municipality is responsible? The municipality in which the crash occurred? The municipality in which the unbelted person resides? Every municipality through which the unbelted one has travelled?

4. As discussed above, the doctrines of governmental immunity and respondeat superior may cause the action to be dismissed.

In order to determine whether a plaintiff in such an action would have any hope of success, let us consider the following situation, which although factually unlikely is at least possible and presents a plausible case for the plaintiff. Let us assume that in a secondary enforcement jurisdiction a police officer stops a motorist for a broken taillight. The officer notices that the driver is not wearing his seat belt, but the officer says and does nothing about it. The driver, after having been dismissed by the

officer, proceeds a short distance and swerves in an attempt to avoid an animal in the road. The driver loses control of the car and collides with an oncoming vehicle, driven by the plaintiff. The plaintiff sues the police officer and the municipality, alleging negligence in failing to enforce the state's seat belt law.

The closest cases, factually, to this situation are cases involving the non-enforcement of drunken driving laws.<sup>116</sup> Following is a review of several recent cases.

In Ashburn v. Anne Arundel County,<sup>117</sup> a county police officer discovered an intoxicated individual named John J. Millham sitting in his pickup truck in a parking lot. The officer, instead of charging Millham with drunken driving, ordered Millham to discontinue driving for the evening. As soon as the officer departed, however, Millham drove away and shortly thereafter hit John F. Ashburn, III, who lost his left leg and sustained other injuries. Ashburn sued the officer, the police department and the county, all of which moved to dismiss. The trial court dismissed the action, and Ashburn appealed. The Maryland Court of Appeals affirmed the dismissal.

#### Government Immunity

The Court of Appeals held that, under Maryland common law, an individual will be relieved of civil liability if "(1) he is a public official rather than a mere government employee or agent; and (2) his tortious conduct occurred while he was performing discretionary, rather than ministerial, acts in furtherance of his official duties."<sup>118</sup> The court went on to hold that the police officer met both parts of this test.

#### Public Duty Rule

The Court of Appeals further stated that even if governmental immunity did not apply, Ashburn still would lose the case because the officer owed no particular duty to Ashburn. "Absent a 'special relationship' between police and victim, liability for failure to protect an individual citizen against injury caused by another citizen does not lie against police officers."<sup>119</sup> The court also noted that this was the rule in most states.<sup>120</sup>

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<sup>116</sup> For an overview of this subject, see Annotation: Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government or Officer, 48 ALR 4th 320.

<sup>117</sup> 306 Md. 617, 510 A. 2d 1078 (1986).

<sup>118</sup> See James v. Princes George's County, 288 Md. 315,323, 418 A. 2d 1173, 1178 (1980).

<sup>119</sup> 510 A. 2d at 1083.

<sup>120</sup> 510 A. 2d 1085.

Since the officer was not liable for Ashburn's injuries, the employing municipality was also not liable.

Courts in some states have broken down the barriers of governmental immunity and the public duty doctrine and have allowed lawsuits based on non-enforcement of drunken driving statutes. In Irwin v. Town of Ware,<sup>121</sup> the facts were similar to those in Ashburn. A police officer pulled over a drunken driver but released him with the admonishment to "go slow and drive carefully." The drunken driver did neither and collided with a car containing a young family, killing the 19 year old husband and 20 month old daughter and severely injuring the wife and son. The survivors sued the police officer and the town. At the trial, the jury awarded the survivors damages in the aggregate of \$873,679. On appeal, the Supreme Judicial Court of Massachusetts affirmed, holding, unlike the Maryland Court of appeals in Ashburn, that there was a special relationship between the police officer and the victims, even though the exact identities of the victims could not be known to the officer. The court based its decision on the foreseeability of the tragic consequences of the officer permitting the drunk to continue driving.<sup>122</sup>

Applying Irwin to our scenario, it is unlikely that any injury caused to others by the nonuse of a seat belt is a foreseeable consequence of a police officer's failure to ticket or to warn a person discovered not wearing a seat belt. Thus failing to ticket or to warn does not constitute actionable negligence.

#### Municipal Rules

One issue which has been raised in cases involving the failure to enforce drunken driving laws is the disregard of internal regulations by police officers.<sup>123</sup> A recent case is Fudge v. City of Kansas City.<sup>124</sup> The fact pattern is all too familiar. An individual named Delmar Henley, after spending an evening drinking in a tavern, became belligerent. The Kansas City police were summoned. Testimony differed, but credible evidence indicated that the officers told Henley to get into his car and leave. Henley did not get far. His car crossed the center line and collided with James Fudge's newspaper delivery van. Fudge was ejected from the

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<sup>121</sup> 392 Mass. 745, 467 N.E. 2d 1292 (1984). See also 26 ATLA Law Reporter 98 (April, 1983) for a discussion of this case prior to appeal.

<sup>122</sup> 467 N.E. 2d at 1304.

<sup>123</sup> In Part V, the effect of an officer's disregard of municipal rules concerning police themselves wearing seat belts will be discussed.

<sup>124</sup> 239 Kan. 369, 720 P. 2d 1093 (1986).

van, sustaining injuries which resulted in his death.<sup>125</sup> His widow and children sued the city and the police officers. The jury at the trial awarded damages in the amount of \$1,095,103.66. The city and the officers appealed.

The Supreme Court of Kansas affirmed the jury verdict. In considering arguments based on the governmental immunity and public duty doctrines, the court noted that the Kansas City Police Department had on its books a General Order which mandated that all individuals incapacitated by alcohol or drugs to such an extent that they posed a threat of personal injury to themselves or to others should be taken into protective custody.<sup>126</sup> The court held that:

The police officers should have realized that taking Henley into protective custody was necessary for the protection of third persons. Their failure to do so significantly increased the risk that Henley would cause physical harm to others. Accordingly, the City of Kansas City is subject to liability to James Fudge for the officers' failure to take Delmar Henley into custody.<sup>127</sup>

It is quite a leap from Fudge to the theoretical fact situation posed above. It would appear unlikely that police failure to enforce seat belt laws would lead to calamitous verdicts against municipalities. Nonetheless, such verdicts are conceivably possible. If police officers and police administrators wish to protect themselves, they should make sure that seat belt use laws are actively enforced.

#### **IV. SPECIFIC CASES**

To our knowledge, this report represents the first attempt to collect and review reported cases involving police officers and seat belts. Such cases afford an opportunity to analyze judicial attitudes towards nonuse of seat belts and to examine relevant legal concepts. The following cases are presented in chronological order. Police officers appear to be as plaintiffs and defendants, and, in one case, as the victim in a criminal action. Since these cases are relatively rare, they should not be perceived as definitive statements of law in all jurisdictions.

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<sup>125</sup> Interestingly, the seat defense was raised in this case but was rejected by the court, which relied on a line of Kansas cases which disapproved of the seat belt defense. The decision reads: "a driver need not anticipate the negligence of the drivers of other vehicles and has no duty to use an available seat belt." 720 P. 2d at 1101.

<sup>126</sup> Kansas City P.D. General Order 79-44.

<sup>127</sup> 720 P. 2d at 1098.

Calloway v. Ford Motor Company<sup>128</sup>

It is ironic that the earliest case involving police and seat belts is the only case in which the officer was using his belt, since seat belt use in 1965 was hardly the norm. Charles E. Calloway was a police officer in Asheville, North Carolina. On October 1, 1965, while pursuing a suspect in his Ford police car, he skidded on wet pavement and collided with a telephone pole. His seat belt was securely fastened, but the seat belt assembly failed and Calloway was thrown into the windshield. He sustained serious and permanent injury.

Calloway sued Ford Motor Company and the automobile dealer, alleging that the seat belt was defective in either failure to meet design standards or careless installation. Damages were sought in the amount of \$100,000. The decision of the court dealt entirely with procedural issues. However, the case stands for the proposition that seat belts may cause injuries under some circumstances. Since more people are wearing seat belts, due in large measure to use laws, it is to be expected that cases involving injuries caused by seat belt cases will proliferate. This should not discourage police officers from wearing seat belts, since the benefits in terms of lives saved and injuries prevented by seat belt use far outweigh the relatively rare instances in which seat belts have caused or worsened injuries.<sup>129</sup> It should also be noted that Calloway was not treated differently as a plaintiff by the court because he was a police officer.

The remaining cases, unlike Calloway, involve nonuse of an available seat belt, either by a police officer or by a person riding in a vehicle which was involved in a collision with a police car. One question which should be asked in connection with each of these cases is: what difference did nonuse of an available seat belt have on the outcome of the case?

Dawson v. Chrysler Corporation<sup>130</sup>

Richard F. Dawson was a police officer in the Township of Pennsauken, New Jersey. On September 7, 1974, he lost control of his 1974 Dodge Monaco patrol car while responding to a burglar alarm. The car skidded on a rain-soaked highway into an unyielding steel pole fifteen inches in diameter. Dawson was crushed between the seat and the roof. The force of the collision dislocated his left hip and ruptured his fifth and sixth cervical vertebrae. As a result of the injuries, Dawson became a quadriplegic requiring constant medical attention. He was not wearing an available seat belt at the time of the crash.

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<sup>128</sup> 281 N.C. 496, 189 S.E. 2d 484 (1972).

<sup>129</sup> See Muller HA, Benefits of Safety Belt Use Well Proven 91 Pennsylvania Mediline 38 (July 1988).

<sup>130</sup> 630 F. 2d 950 (3d Cir. 1980), cert. den. 450 U.S. 959, 101 S.Ct. 1418, 67 L. Ed. 2d 383 (1981).

Dawson, his wife and his son brought this action against the manufacturer of the car in federal court, alleging that the vehicle was defectively designed. Chrysler's response was that the vehicle met all federal vehicle safety standards, that design changes to the vehicle would be cumbersome and expensive, that the Dodge was more strongly constructed than its Ford and Chevrolet counterparts, and that Dawson's failure to use a seat belt caused or enhanced his injuries. A jury returned a verdict in favor of Dawson, concluding that the Dodge was defective and dangerous; that the defective design of the Dodge was the proximate cause of Dawson's injuries, and that Dawson's failure to use a seat belt was not a proximate cause of his injuries. The jury awarded Dawson \$2,064,863.19 for his expenses, disability, and pain and suffering and Mrs. Dawson \$60,000.00 for loss of consortium. In addition, the trial judge awarded pre-judgment interest in the amounts of \$388,012.53 for Dawson and \$11,274.72 for Mrs. Dawson. Chrysler appealed.

The United States Court of appeals for the Third Circuit affirmed. On the issue of proximate cause, the court held that the jury might reasonably concluded that the design defect of the car was the proximate cause of Dawson's injuries. Chrysler had presented expert testimony at the trial that, if Dawson had been wearing his seat belt, he would not have smashed into the roof of the car following the impact between the car and the pole. The Dawsons presented their own experts who testified that the pole pushed Dawson into the roof and that use of a seat belt would not have reduced the severity of his injuries. The court concluded: "The jurors reasonably could have found the testimony offered by the Dawsons' witnesses to be more persuasive than Chrysler's."<sup>131</sup>

Two other interesting issues are also found in Dawson. First, mention is made in the case of the Dawsons' theory that the vehicle was not fit "for use as a police car."<sup>132</sup> Although the court does not discuss this, since Dawson won the case on other grounds, it may be worth noting that in the future police vehicles may have to meet higher judicially-imposed standards than ordinary passenger cars. Second, one of Chrysler's theories in its defense was that Dawson's injuries may have been caused by modifications made by the Township of Pennsauken to the patrol car, specifically a tubular roll bar and a wire mesh screen which separated the front from the rear seat. As with the seat belt defense, the court ruled that the jury could have reasonably believed the Dawsons' experts, who testified that the modifications in no way contributed to Dawson's injuries, rather than Chrysler's experts, who were uncertain as to whether the modifications affected Dawson's injuries.

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<sup>131</sup> 630 F. 2d at 960.

<sup>132</sup> 630 F. 2d at 955.

Roberts v. State<sup>133</sup>

Unlike the other cases discussed in this report, this is a criminal case. On December 20, 1981, Vivian Roberts drove an automobile into an intersection in Swainsboro, Georgia without slowing down, colliding with a police car responding to a domestic disturbance. The police car then hit a light pole. The police officer, who was not wearing a seat belt, was thrown across the car, striking his head against the car frame on the passenger side of the vehicle. He died almost instantaneously. Ms. Roberts was tested for alcohol several hours after the crash, and had a .14 alcohol content in her urine. At her trial on a charge of vehicular homicide, Ms. Roberts raised in her defense the contention that if the officer had been wearing his seat belt he would not have been killed. Nonetheless, Ms. Roberts was convicted of vehicular homicide in the first degree and was sentenced to serve four years in prison.

On appeal, Ms. Roberts again raised the issue of the police officer's nonuse of his seat belt. The court summarized the defendant's contention: "in effect, Ms. Roberts contended that the police officer caused his own death by...negligently failing to use his seat belt, thus creating doubt as to the causation of death."<sup>134</sup> In rejecting this argument, the Court of Appeals of Georgia held that the trial court's charge to the jury "adequately presents the only real issue raised to the jury (guilt or innocence of vehicular homicide caused by drunk driving and not reasonably the result of an accident)."<sup>135</sup>

Woods v. City of Columbus

Mabel A. Woods was driving her automobile in the city of Columbus, Ohio. She entered an intersection with the green light and collided with a police cruiser, which was running a red light, although it was not responding to any emergency call at the time. Ms. Woods was not wearing a seat belt and was injured. She brought this negligence action against the city. The trial court ruled in her favor and the city appealed.

The basic issue in this appeal was the trial court's refusal to allow any evidence of Ms. Woods' failure to use an available seat belt to be admitted at the trial. In upholding the trial court, the Court of Appeals of Ohio stated:

In the instant case, the proffered testimony as to the nonuse of the seat belt was not sufficient for the jury in the case at bar to determine the proximate cause of

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<sup>133</sup> 173 Ga. App. 701, 327 S.E. 2d 819 (1985).

<sup>134</sup> 327 S.E. 2d at 821.

<sup>135</sup> 327 S.E. 2d at 822.

the injury the [Woods] sustained....<sup>136</sup>

In effect, the court held that the city could not merely introduce evidence of nonuse by Woods. Rather, strong testimony would have to have been offered which directly linked such nonuse to Woods' injuries.

#### Hammer v. City of Lafayette<sup>137</sup>

This case is factually very similar to Woods v. City of Columbus. Anethole Hammer, a five year old child, was injured when a police officer, responding to an emergency call, ran a red light. Mary Hammer, Anethole's mother and the driver of the vehicle, slammed on the brakes and narrowly avoided a collision. Unfortunately, Anethole was thrown forward into the dashboard of the car and suffered injuries. The Hammers brought an action for negligence against the City of Lafayette, Louisiana. The city brought a third party action against Mary Hammer based on Mary's own negligence in failing to secure her son in a seat belt. The trial court dismissed the city's action.

On appeal, the city admitted negligence in causing the crash. It argued, however, that Mary Hammer was also negligent because she failed to restrain her child. The Court of Appeal of Louisiana, Third Circuit, noted that Louisiana common law held that failure to fasten safety belts did not constitute contributory negligence.<sup>138</sup> The court concluded: "We find that Mary Hammer's duty to take reasonable steps to protect the minor child did not encompass the duty to restrain the minor child with a seat belt device."<sup>139</sup>

#### Conclusion

The answer to the question concerning what difference seat belt nonuse made to the resolution of these cases is: no difference. In each of these cases, the fact that a person was not making use of an available seat belt did not change the outcome of the case. In two cases, Dawson and Woods, the courts indicated that perhaps with stronger evidence of the relationship between seat belt nonuse and plaintiffs' injuries, the seat belt defense might be considered.<sup>140</sup> One may speculate that judges and juries may tend to be rather lenient to grievously injured plaintiffs suing relatively wealthy entities such as automobile manufacturers

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<sup>136</sup> 492 N.E. 2d at 471.

<sup>137</sup> 502 So. 2d 301 (La. App. 3 Cir. 1987).

<sup>138</sup> 502 So. 2d at 304.

<sup>139</sup> Id.

<sup>140</sup> However, if Woods was being decided today evidence of her failure to use her seat belt could not be introduced into evidence. See Ohio Rev. Stat. sec. 4513.26.3(G)(1), which became effective on May 6, 1986.

and cities, particularly when the defendants are viewed to have caused the plaintiffs' injuries through negligence.

### Passive Restraint Cases

No discussion of cases involving police and seat belts would be complete without touching upon a closely related basis for litigation, failure to furnish passive restraints in police vehicles.<sup>141</sup> In Pokorny v. Ford Motor Company,<sup>142</sup> Anne Duffy Pokorny brought an action against Ford Motor Company as administratrix of the estate of her deceased brother, John Duffy. Duffy was a Philadelphia police officer who was killed when the Ford Econoline police van in which he was a passenger collided with a police patrol car. Both vehicles were responding to the same emergency call. The police van overturned. Officer Duffy, who was not wearing a seat belt, was partially ejected from the open passenger window and was crushed beneath the van. His estate brought action against the van manufacturer based on Ford's alleged negligence in failing to provide passive restraint systems.<sup>143</sup> Ford defended the suit on the basis of its compliance with all applicable federal safety regulations. The District Court judge agreed with Ford, granting it summary judgment and holding that Pokorny's common law liability claims were preempted by federal motor vehicle safety standards, which gave Ford the option of installing either standard seat belts, automatic seat belts or air bags in its vehicles. Pokorny further argued that federal preemption of state tort claims should not apply in cases involving police cars. The judge rejected this contention, noting that no law was advanced by Pokorny in support of this proposition.

A similar case is Steenbergen v. Ford Motor Co.<sup>144</sup> Sheriff Joseph Steenbergen died of injuries resulting from a head-on collision between his 1982 Ford LTD police car and a pickup truck. His widow and children sued Ford for failure to install passive restraints in the LTD. Unlike Pokorny, this case was allowed to go to the jury, but like Pokorny the plaintiffs were unsuccessful. Ford based its defense on the state of technology before the 1982 model year, claiming that at that time passive restraint systems

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<sup>141</sup> Cases against automobile manufacturers due to failure to install passive restraints abound. All recent cases have been resolved in favor of the auto manufacturers. See Wood v. General Motors Corp., 865 F. 2d 395 (1st Cir. 1988), pet. for cert. filed, U.S. S.Ct., No. 89-46; Kitts v. General Motors Corp., 875 F. 2d 787 (10th Cir. 1989), pet. for cert. filed, U.S. S.Ct., No. 89-279; and Taylor v. General Motors Corp., 875 F. 2d 816 (11th Cir. 1989). See also Fabian R, Federal Preemption: Car Makers' Cushion against Air Bag Claims?, 27 Duquesne Law Review 299 (1989).

<sup>142</sup> 714 F. Supp. 739 (U.S.D.C., E.D. Pa., 1989).

<sup>143</sup> Either air bags or automatic seat belts. The van was equipped with lap and shoulder seat belts and a warning light and buzzer, in compliance with Federal Motor Vehicle Safety Standard 208 (49 C.F.R. sec. 571.208).

<sup>144</sup> No. 84-44753-C (Tex. Dist Ct. Dallas County, July 17, 1989).

had not been proven to be sufficiently safe, effective or reliable to be installed in vehicles. The jury agreed with Ford and held that lack of air bags and automatic seat belts did not constitute a product defect.

In neither of these two cases were the plaintiffs treated differently from other plaintiffs by the courts because they were police officers.

## V. POLICE OFFICERS AS EMPLOYEES

This section of the report will deal with issues arising from the relationship between police officers and their employers.<sup>145</sup> Included in this discussion will be explorations of the topics of workers compensation; potential lawsuits by police against their departments; and discipline of police officers. As with other subject areas covered by this report, case law is in short supply. In the area of employee benefits and discipline, the reason may be that virtually all situations are handled administratively and do not wind up in the courts.

### Police and Workers' Compensation<sup>146</sup>

Workers' compensation<sup>147</sup> is a statutory scheme in which employees injured in the course of their employment are compensated by the state using the employers' funds. Negligence and fault are ordinarily not considered in determining workers' compensation awards, with the significant exceptions discussed later in this section. Workers' compensation procedures are statutory in nature and are distinct from, and are a replacement for, common law actions for negligence.<sup>148</sup> In some states, police are not covered by workers' compensation.<sup>149</sup>

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<sup>145</sup> As indicated above, most police officers are employed by units of government rather than by police departments. However, for the sake of simplicity, if not accuracy, the employer will be called the "police department".

<sup>146</sup> For a general discussion of workers' compensation and police officers, see Manak, note 6 above, 5-17.

<sup>147</sup> Workers' compensation is still known in some quarters, somewhat archaically, as "workmen's compensation". Legally, the two terms are synonymous.

<sup>148</sup> See Larson, Workmen's Compensation, (Desk Edition) sec. 1.

<sup>149</sup> For example, see City of Danville V. Industrial Commission, 57 Ill. 2d 345, 312 N.E. 2d 239 (1974) (police sergeant is not covered by workers compensation) and County of Winnebago v. Industrial Commission, 39 Ill. 2d 260, 234 N.E. 2d 781 (1968) (deputy sheriff is not covered by workers compensation). For a state-by-state outline, of coverage of workers' compensation laws, see Nackley JV, Primer on Workers' Compensation, (Washington, D.C.: The Bureau of National Affairs, Inc., 1987), Appendix A.

## Nonuse of Seat Belts and Workers' Compensation

Under workers' compensation laws in many states, awards may be reduced due to an employee's willful failure to use an available safety device provided by his or her employer, or willful disregard of a safety rule. The only reported case discovered which directly involves police, seat belts and workers' compensation gives a good example of such a reduction.

### Roybal v. County of Santa Fe<sup>150</sup>

Perez Roybal was the sheriff of Santa Fe County, New Mexico. On September 12, 1964 he suffered severe injuries in an automobile crash. He filed a workers' compensation claim. Under New Mexico law, workers' compensation awards were reduced by ten percent if the employee failed to use a safety device provided by his employer.<sup>151</sup> The trial court held that the County of Santa Fe had provided Roybal with a safety device, and that Roybal did not use the safety device. Accordingly, the court reduced Roybal's compensation by ten percent. Roybal did not contest this decision in his appeal.

In many instances, courts are extremely reluctant to reduce awards for injury or death even if evidence exists concerning serious employee misconduct. For example, in City of Buford v. Thomas,<sup>152</sup> an employee of a city was found fatally injured after having been run over by the tractor he had been operating. The seat belt of the tractor was unbuckled, and a sample of his blood revealed a blood alcohol content of .139. An administrative law judge awarded full workers' compensation benefits to his widow, and the Georgia Court of Appeals affirmed, holding that there was no evidence that the employee's intoxication caused his injuries, and that there had been no willful failure to use the seat belt.<sup>153</sup>

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<sup>150</sup> 79 N.M. 99, 440 P. 2d 291 (1968).

<sup>151</sup> N.M. Stat. Ann. sec. 59-10-7(A)(1953). This section has been renumbered as N.M. Stat. Ann. sec. 52-1-10(A) and reads as follows: "In case an injury to or death of a workman results from his failure to observe statutory regulations appertaining to the safe conduct of his employment, or from his failure to use a safety device provided by his employer, then the compensation otherwise payable under the Workmen's Compensation Act shall be reduced ten percent."

<sup>152</sup> 179 Ga. App. 769, 347 S.E.2d 713 (1986).

<sup>153</sup> For a similar case, with a similar result, see Stewart v. Oliver B. Cannon, 551 A. 2d 818 (Del. 1988), in which a painter fell from scaffolding. The painter failed to use an available safety belt, and his blood alcohol content was .110. He was awarded full workers' compensation payments, and the appeals court affirmed, holding that there was no evidence to establish a causal connection between the intoxication and the injury and that the painter did not willfully fail to use his seat belt. See also Chadwick v. Industrial Commission, 179 Ill. App. 3d 715, 128 Ill. Dec. 555, 534 N.E. 2d 1000 (1989), another fall from scaffolding case in which the widow of the employee was awarded full compensation notwithstanding a seemingly flagrant disregard of safety rules by the decedent.

Davis v. Roadway Express, Inc.<sup>154</sup>

This is a very recent, and very instructive, case involving seat belts, safety rules and workers' compensation.

Joe Davis was a tractor-trailer driver for Roadway Express, Inc. On December 29, 1985, his rig left an interstate highway, slid down an embankment and overturned. Davis was found, dead, pinned to the ground by the cab of the truck. He was not wearing his seat belt.

Several months prior to Davis' death, Roadway had adopted a policy requiring all drivers to wear seat belts while driving Roadway equipment. Evidence showed that Roadway had conducted extensive training of its drivers, emphasizing the necessity of wearing seat belts. A videotape on seat belt use had been shown to Davis and this fellow drivers seventeen days before his death.

Missouri law provides that a workers' compensation award shall be reduced by fifteen percent when an employee's injury or death is due either to (a) his willful failure to use employer provided safety devices or (b) his failure to obey reasonable safety rules posted in a conspicuous place on the employer's premises.<sup>155</sup> Both the administrative law judge and the Missouri Labor and Industrial Relations Commission refused to reduce the award to Davis' widow by fifteen percent, holding that Davis' failure to wear his seat belt was inadvertent.

On appeal by Roadway, the Court of Appeals of Missouri, in Davis I, agreed with the Commission's findings that the crash occurred at approximately 1:55 A.M., that Davis was fatigued, that the seat belt system in Davis' truck did not include a warning buzzer, and that the vehicle did not contain a sign reminding drivers to wear seat belts. It also agreed with the Commission's conclusion that Davis' failure to use his seat belt was due to inadvertence rather than to a willful failure to use a safety device provided by this employer. However, it still reversed the decision of the Commission and sent the case back to the Commission for further proceedings because no findings had been made

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<sup>154</sup> As detailed below, there are two separate appeals arising out of Joe Davis' death. For the sake of clarity, appeal No. 15870, reported as 764 S.W. 2d 145 (1989), will be referred to as "Davis I" and appeal No. 16321, as yet not included in the national reporter system, 1989 Mo. App. LEXIS 1403 (September 30, 1989) will be referred to as "Davis II".

<sup>155</sup> Rev. Stat. Mo. sec. 287.120.5 reads as follows: "Where the injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, which rule has been kept posted in a conspicuous place on the employer's premises, the compensation and death benefit provided for herein shall be reduced fifteen percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a diligent effort to cause his employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees."

concerning the second basis for reduction in an award, failure to obey reasonable safety rules. The Commission was directed by the court to determine whether: "(1) decedent's death was caused by his failure to obey Roadway's seat belt rule, (2) said rule was a reasonable rule adopted by Roadway for the safety of its employees, and (3) said rule had been kept posted in a conspicuous place on Roadway's premises."<sup>156</sup> The court went on to state that the fifteen percent award reduction would apply only if all three questions were answered in the affirmative.

The Commission indeed answered all three questions in the affirmative and reduced the award. This time, it was Davis' widow's turn to appeal to the Court of appeals. In Davis II, the only issue before the court was question (3), whether Roadway had posted its rule in a conspicuous place. The court found that Davis had worked out of Roadway's Springfield, Missouri terminal. The rule was posted in the driver's room of that terminal, which was frequented by all drivers and was therefore "a logical place to post the notice." The court held that Roadway had met the statutory requirement that the rule be posted in a conspicuous place on its premises and thus upheld the Commission's reduction in the award.

#### Conclusions

1. Since workers' compensation is a statutory plan, state laws apply concerning its applicability to police officers and its precise implementation vary among states.

2. Workers' compensation awards may be reduced if an injured or deceased police officer fails to wear an available automobile seat belt while on the job. However, (a) award reductions are relatively small, typically 10% or 15% of the award, and (b) administrative law judges, workers' compensation boards and appeals court judges appear to reduce awards only with the greatest reluctance.<sup>157</sup>

3. In order to ensure that award reductions will apply (or, more hopefully, that no injury or death will occur in the first place) police department should do the following:

(a) Make sure that all vehicles are equipped with working seat belts, easily accessible and in good condition.

(b) If possible, make sure that the safety belt system installed in each vehicle includes working reminder buzzers, lights or both.

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<sup>156</sup> 764 S.W. 2d at 151.

<sup>157</sup> Note that in several of the cases discussed above, a widow, possibly with small children and no other means of support, was the claimant.

(c) Promulgate a rule requiring all occupants in police vehicles to use seat belts.<sup>158</sup>

(d) Implement a training program which covers the use of seat belts.

(e) Post a notice of the rule conspicuously in a place frequented by all personnel, such as an entrance hallway, locker room or squad room.

(f) Reminder stickers should be placed on the dashboard of all vehicles.<sup>159</sup>

### Negligence Actions - Police Against Municipalities

This section will deal with possible negligence actions commenced by injured police officers against their employers. It should be noted that no examples of such cases have been found.<sup>160</sup> Several possible reasons for such lawsuits may exist. First, unbelted police officers may sue their employers, alleging negligence, if no rules covering seat belt use had been promulgated or if such rules were not disseminated or enforced. Second, if police agencies remove factory installed seat belts or air bags from police vehicles, injured officers may sue the agency for negligence.<sup>161</sup>

Part of the discussion will involve an exploration of the special characteristics, if any, of police officers and police vehicles which may cause them to be treated differently by courts of law in negligence actions. Is there a higher, or lower, standard for either or both?

### Safety rules - Auer v. Burlington Northern Railroad Company<sup>162</sup>

This case involves a lawsuit brought by a railroad employee against his employer. Steven Auer was a flagman assigned to accompany a welder in Burlington Northern's Hobson yards in

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<sup>158</sup> The International Association of Chiefs of Police has adopted a model rule. For the text of the rule, see 54 The Police Chief 61 (November 1987).

<sup>159</sup> See Rogers RW et. al., Promoting Safety Belt Use Among State Employees: The Effects of Prompting and a Stimulus-Control Intervention, 21 Journal of Applied Behavior Analysis 263 (1988).

<sup>160</sup> In Dawson V. Chrysler Corporation, 630 F. 2d 950 (3rd Cir 1980), discussed earlier in this paper, Dawson's employer, the Township of Pennsauken, New Jersey, was named as a defendant, but the decision of the court does not mention the Township as an active party in the action.

<sup>161</sup> See note 86 above concerning the possible removal of seat belts from police vehicles due to security concerns.

<sup>162</sup> 229 Neb. 504, 428 N.W. 2d 152 (1988).

Lincoln, Nebraska. On March 23, 1982 Auer was a passenger in a company truck being driven by the welder on an ungraded road on company property. The welder was wearing his seat belt; Auer was not. The truck hit some chuckholes, causing Auer to strike his head on the roof of the truck. Auer testified that he felt a "pop" in his back and experienced pain in his lower to middle back. He went to several physicians for treatment, lost work time and was eventually laid off. Auer sued Burlington Northern for negligence. After a trial a jury awarded Auer damages in the amount of \$5,205.16. Burlington Northern appealed, alleging that Auer failed to take reasonable precautions for his own safety in that he failed to utilize an available seat belt.

At issue was Burlington Northern's enforcement of its rule which required all employees to wear seat belts. Auer, while acknowledging the existence of such a rule, contended that it was not enforced and therefore he was not responsible for fastening his belt. Oddly enough, in reaching its decision the court relied on two previous federal cases in which Burlington Northern had also been the defendant. In Ybarra v. Burlington Northern, Inc.<sup>163</sup> it was claimed that the railroad had failed to enforce safety rules which it had promulgated. The court held that evidence of non-enforcement of safety rules could be considered by the jury in determining the railroad's responsibility for its employee's injury. In Flanigan v. Burlington Northern, Inc.<sup>164</sup> the court held that an employee's failure to obey safety rules may be considered by a jury in assessing the employee's contributory negligence. Accordingly, the Supreme Court of Nebraska held that the trial court had properly instructed the jury to consider evidence pertaining both to Burlington Northern's non-enforcement of its seat belt rule and Auer's violation of the rule.

As indicated in earlier sections of this report, it is strongly suggested that police administrators have a clear, specific seat belt use policy in place and that all employees are informed and regularly reminded of the existence and details of the policy.

#### Removal of Safety Equipment - Mortensen v. Southern Pacific Co.<sup>165</sup>

Recent information indicates that some police agencies may be considering removal of seat belts or air bags from police vehicles because of security reasons or because such devices are viewed as inconvenient.<sup>166</sup> Such actions may lead to successful lawsuits by police officers injured in subsequent crashes.

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<sup>163</sup> 689 F. 2d 147 (8th Cir. 1982).

<sup>164</sup> 632 F. 2d 880 (8th Cir. 1980).

<sup>165</sup> 245 Cal. App. 2d 241, 53 Cal. Repr. 851 (Ct. App. 1st Dist., 1966).

<sup>166</sup> See footnotes 86 and 160 above.

Mortensen was employed by the Southern Pacific Company. On October 17, 1962, as he was driving a company-owned pickup truck on a California freeway, it was struck in the rear by a drunken driver. Mortensen was thrown from the vehicle and died an hour later from severe brain damage. His widow sued Southern Pacific, alleging that it was negligent in failing to equip the vehicle with seat belts. At the trial, testimony was introduced to the effect that Mortensen would probably have survived the crash had he been wearing a seat belt. At the close of the plaintiff's case, Southern Pacific's motion for nonsuit was granted and the jury was discharged. Mortensen's widow appealed.

The appeals court reversed the trial court's decision, holding that the evidence introduced by the plaintiff presented an issue of fact concerning the employer's negligence which should have gone to the jury. It is significant that the crash occurred in 1962, before any legislation concerning seat belts had been enacted on the state or federal level and at a time when many judges were expressing doubt concerning the effectiveness of seat belts in automobiles.<sup>167</sup> A similar case today would have an even greater likelihood of succeeding.

Police administrators are strongly cautioned against removing either seat belts or air bag systems from department vehicles. Such action would in all likelihood be allowed to be considered by juries in negligence actions brought by injured officers. Most juries, it is submitted, would find that such removal indicates at best an indifference to and at worst a callous disregard for the well-being of police department employees. It is crucial that police not become involved in tradeoffs involving officer safety. For example, if inadvertent air bag deployment is a concern, a device such as an override switch could be utilized to prevent such occurrences.<sup>168</sup>

#### Police Officers and Police Vehicles - Higher Standards?

Cases already discussed in this Part have indicated that, at least for employees who are not police officers, an employer not posting or enforcing safety rules involving seat belts may lead to potential liability of the employer.<sup>169</sup> Does the same hold true for police officers, or should they be held to a different standard because of their training and their familiarity with traffic hazards?

A California case,<sup>170</sup> although not providing all of the

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<sup>167</sup> See for example, Britton v. Doehring, 242 So. 2d 666, 675 (Ala. 1970).

<sup>168</sup> Conversation with Benjamin F. Kelley, July 15, 1989.

<sup>169</sup> See Davis v. Roadway Express, Inc. and Auer v. Burlington Northern, Inc., discussed above.

<sup>170</sup> Von Beltz v. Stuntman, Inc., 207 Cal. App. 3d 1467, 255 Cal. Repr. 755 (Cal. App. 2nd Dist. 1989).

answers, at least may be food for thought. The appropriately named Heidi von Beltz was an experienced stuntperson working on a motion picture named "Cannonball Run". The sports car in which she was riding as a passenger during a high-speed stunt was not equipped with seat belts. Evidence indicated that numerous seat belts and safety harnesses were maintained on the movie set and that stuntpersons could, and did, request that they be installed prior to shooting a stunt. Von Beltz did not order that a belt be installed in the sports car, which collided with another vehicle during the stunt. As a result of the collision, she was permanently and totally paralyzed from the neck down. At the trial, expert testimony indicated that had she been using a lap belt-shoulder harness combination she would have suffered injuries no worse than fractured ribs.

Von Beltz sued the company with which she had contracted to provide services as a stuntperson, alleging that it was negligent in failing to provide a seat belt in the sports car. After a jury trial, she was awarded \$0.00. She appealed. The Court of Appeals of California affirmed, stating:

Considering that a stuntperson is employed normally to perform an act at a minimum dangerous in appearance and at a maximum highly dangerous in fact ....it appears obvious to us that a stuntperson has responsibility to use whatever appropriate safety equipment is available.....The seat belt was available to her. Hence, clearly sufficient evidence allowed the jury to conclude that plaintiff had not exercised ordinary care when she failed to request a seat belt.<sup>171</sup>

It is debatable whether this case would be applicable to police officers. As an independent contractor von Beltz had more responsibility over her safety than would a municipal employee. In addition, movie stunts are arguably more hazardous than police work. Nonetheless, the case does stand for the proposition that more highly trained and experienced drivers may be held to higher standards than are ordinary drivers. A court or a jury might thus find that a police officer is at fault in failing to wear a seat belt, even if his or her department was lax in enforcing seat belt regulations.

#### Police Vehicles

Earlier in this report, mention was made of cases which tentatively raised the issue of higher standards of crashworthiness for vehicles intended for police use.<sup>172</sup> As noted by the court in

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<sup>171</sup> 255 Cal. Repr. at 763.

<sup>172</sup> See Dawson v. Chrysler Corporation (note 2 above) and Pokorny v. Ford Motor Company (note 3 above).

Pokorny,<sup>173</sup> no law exists to support the proposition that police vehicles, because of additional burdens placed upon them by hard service and high speeds, should be equipped with more and better safety devices.

Only one reported case has been identified which involves a similar issue. In Sanner v. Ford Motor Company,<sup>174</sup> a passenger in a United States Army jeep was ejected from the vehicle in a collision and injured. He sued the manufacturer of the jeep, Ford Motor Company, alleging negligence because the jeep was not equipped with seat belts. The trial court granted Ford summary judgment.

Ford had manufactured the jeep under a contract with the United States Army. The Army had considered ordering jeeps which were equipped with seat belts, but had ultimately rejected the idea because, among other reasons, it was decided that seat belts would impede quick egress from the vehicle in tactical situations.<sup>175</sup> Ford was granted the summary judgment because it had followed government specifications in manufacturing the vehicle without seat belts. Implicit in the court's decision was the concept that tactical exigencies may outweigh safety concerns involving seat belt installation.

### Conclusion

Arguments can be made that both police officers and police vehicles should be held to higher standards than ordinary citizens and ordinary passenger cars. However, it is questionable whether any court would accept such an argument. In addition, a case may be made based on Sanner for the proposition that police cars should contain less, or different, safety equipment than ordinary motor vehicles because of other considerations, such as the safety of officers in encounters with violent offenders. It is however, difficult to conceive of any situation which could not be taken care of by means of solutions other than dispensing with seat belts.

### Seat Belts and Discipline of Police Officers

No cases have been discovered which involve police agencies taking disciplinary action against a police officer for failing to

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<sup>173</sup> 714 F. Supp. at 742.

<sup>174</sup> 144 N.J. Super 1, 364 A. 2d 43 (1976).

<sup>175</sup> This concern has often been voiced by police officers. See Rutherford CW, Why Police Resist Mandatory Wear of Safety Belts, 54 The Police Chief 17 (July 1987). One reported case has been discovered in which a seat belt may have been an impediment in a crucial situation. In Powell v. State, 185 Ga. App. 464, 364 S.E. 2d 599 (1988), a police officer cornered a robbery suspect in a parking lot. The suspect shot at the police car. "The police officer then played dead because he could not get his seat belt undone in order to draw his pistol."

wear a seat belt. Information received from police officers and administrators indicates that such disciplinary procedures do indeed take place, but that such procedures are at the lowest levels of progressive discipline. As such, under most circumstances the penalties involved are oral or written reprimands and are not appealable.

There is no question that police agencies have the right<sup>176</sup> to make and enforce reasonable safety regulations. Judicial decisions have held that a police department has a "significant governmental interest in developing efficiency, loyalty, discipline, esprit de corps and uniformity in its operations."<sup>177</sup> There is, therefore, no legal impediment to a police department implementing and enforcing reasonable seat belt regulations. However, positive reinforcement strategies may prove to be more effective in guaranteeing the cooperation of individual police officers.<sup>178</sup>

## **PART VI. CONCLUSION AND RECOMMENDATIONS**

The foregoing material may suggest that nonuse of seat belts by police does not constitute a major problem for police agencies. Such is not the case. A review of the cases described in this report will reveal tragedies which could have been avoided through the simple expedient of an officer fastening his or her seat belt. Moreover, the injuries and deaths to police officers recounted above were costly to their employers in terms of death and injury benefits paid out, reduction in protection for the community, and costs associated with hiring and training replacement. What is suggested by this material is that police nonuse of seat belts is presently not a major legal problem. Few cases exist which even mention the subject in passing, and in those cases which do evidence of nonuse is often ignored.

The following is a recapitulation of situations in which police nonuse of seat belts may lead to financial losses by police officers and/or their employers:

1. Persons in custody. Injuries to unbelted prisoners may be a source of liability under a theory of ordinary negligence. In addition, if such injuries are held to be intentionally inflicted, the responsible police officers may be the subject of a section 1983 action. Further, if police departments do not have a policy in place which requires all persons in custody to be securely

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<sup>176</sup> As discussed elsewhere in this Part, police agencies may have a duty to do so.

<sup>177</sup> See Brockwell v. Norton, 732 F. 2d 664, 667 (8th Cir. 1984) and Jurgensen v. Fairfax County, 745 F. 2d 868, 880 (4th Cir. 1984).

<sup>178</sup> See Cotton RD, Law Enforcement Education and Training: Critical Steps in Achieving Enforcement of Occupant Protection Usage Statutes, The Maryland Trooper 81 (Spring, 1988).

belted, they, too may be liable under either common-law negligence or section 1983.

2. Nonuse of seat belts as a causative factor in car crashes. It is possible that juries may hold a police officer liable for damages caused in a crash in which one causative factor was loss of control of his or her vehicle due to nonuse of seat belts. Absent a clear policy requiring seat belt use, strongly enforced, municipalities may also be liable under the theory of respondeat superior.

3. Lawsuits by police against employers for negligence. Possible causes of action include removal of seat belt or passive restraint systems from police vehicles, refusal to order police vehicles equipped with passive restraint systems, poorly maintained or defective seat belt systems in police vehicles, and no rules or poorly enforced rules concerning the use of seat belts by police officers.

4. Workers' compensation. Many state workers' compensation laws require that an employee's death or injury benefits will be reduced by a stated percentage if the employee was not using an available safety device provided by his or her employer or was not following a reasonable safety rule promulgated by the employer.

Enforcement of seat belt laws may also lead to legal problems:

1. Nonenforcement of seat belt laws, at least theoretically, might lead to legal action taken by a person injured by an unbelted driver. Such actions, although possible, are unlikely due to problems related to linking the cause of a plaintiff's injuries to nonenforcement of a seat belt use law.

2. Of more concern is overzealous use of seat belt use laws as a pretext for stops of suspicious vehicles. Not only may evidence seized in consequent searches be thrown out of court, but the arresting officers and their employers may be subject to action for harassment, false arrest or false imprisonment.

#### Recommendations

This report recommends that the National Highway Traffic Safety Administration and all police agencies consider the following:

1. All police vehicles should be equipped with safety belt systems consisting of both seat belt and shoulder harness, in all passenger positions.

2. All safety belts should be carefully inspected for defects and replaced, if necessary, during scheduled maintenance of police vehicles.

3. New vehicles added to police fleets should be equipped with driver and passenger side air bag systems in addition to seat belt systems.

4. Issues of safety and convenience raised by police officers and police departments should be resolved without compromising officer safety in motor vehicle crashes. As examples, solutions may exist for common problems:

PROBLEM	SOLUTION
Prisoners using seat belt hardware to break handcuffs	Buckle prisoners behind their backs
Seat belts are an impediment to vehicle exit/use of weapon	Train officers to react in emergency situations
Air bags deploy when pushing disabled vehicles	Override switches installed in vehicles

5. All police agencies should have in place clearly articulated rules which require all personnel to wear seat belts at all times in police vehicles. Such a rule should be implemented by training, notices posted on official bulletin boards and in rooms frequented by all police personnel, such as break rooms or briefing rooms, and by reminder stickers placed on dashboards of police officers.

6. Any exceptions to seat belt rules, such as for undercover officers, should be limited in application to absolutely necessary circumstances.

7. Enforcement of seat belt usage laws should be encouraged. However, officers should be made aware of the limitations to investigations and searches occasioned by stops for seat belt violations.

8. All personnel should be made aware of state workers' compensation laws which may reduce their benefits if they fail to use an available seat belt.

9. There is little evidence to suggest that fear of personal liability causes individuals to change their safety behaviors.<sup>179</sup>

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<sup>179</sup> More research needs to be done on this important topic. A study done in 1970, Public Attitudes Toward Auto Insurance, A Report of the Survey Research Center, Institute for Social Research, The University of Michigan to the Department of Transportation (United States Department of Transportation, Auto Insurance and Compensation Study, March, 1970, page 65-69), asked 2,534 motorists whether they thought that liability concerns motivated people to drive more carefully. Only 14 percent responded that liability concerns lead to careful driving.

Accordingly, although a thorough review of liability issues may be of value to police administrators and supervisory personnel, the same may not be productive for individual patrol officers.

10. Exceptions for police officers presently found in some seat belt usage laws should be eliminated, except in circumstances in which the safety of police officers or others can only be guaranteed through seat belt nonuse.

11. Many state seat belt usage laws are weak to the point where doubts may be expressed concerning the commitment of certain state legislatures to automobile safety. Such laws may lead to cynicism on the part of both police and ordinary citizens. All seat belt laws should include minimum fines of at least \$25 few exceptions, and should provide for primary enforcement.

12. All persons, whether police officer or police administrator, should realize that automobile safety should not be a tradeoff for other kinds of personal safety or for personal or institutional convenience.

This report has attempted to focus on "real life" situations. A review of case law shows shattered bodies and shattered lives. Who is "at fault" becomes almost a trivial question; some courts have seemingly ignored "fault" by shifting the financial burden to those who can most afford it. The message of this paper is that the prevention of police injuries is much more sensible and cost efficient than letting judges and juries sort through the wreckage.



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