

Buckle Up or Else: Texas Supreme Court Holds Plaintiffs Responsible for Failure to Wear Seat Belts

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I. A CHANGE IN THE LAW

On February 13, 2015, the Supreme Court of Texas issued a ruling in *Nabors Well Services, Ltd. v. Romero*,¹ which changed the rules in Texas regarding the admissibility of the use or nonuse of a seat belt by a plaintiff injured in a car crash. This ruling provides a new way for defense attorneys to help their clients. Many Texas defense attorneys may not know the methodology behind preparing a seat belt defense in a case where a plaintiff was injured in a car crash because it has been so long since the seat belt defense was allowed. In some cases, it is even possible that an attorney representing the plaintiff may want to present a seat belt case to prove the negative; i.e., that the nonuse of a seat belt did not affect the injury outcome of the plaintiff. The purpose of this article is to discuss some of the nuances of this ruling and provide an overview of the methodology behind a seat belt defense.

By way of background, in deciding *Nabors Well Services*, the Supreme Court of Texas overturned its precedent regarding seat belt use that was created in its 40-year-old decision in *Carnation Co. v. Wong*.² This prior ruling was based on the reasoning that a plaintiff's failure to use a seat belt may exacerbate her injuries; but her failure to use a seat belt did not *cause* the car crash, and therefore the failure to use a seat belt should not affect a plaintiff's recovery.³ Between 1974 and 1995, Texas operated under an all-or-nothing rule in negligence cases.⁴ If the plaintiff was found to have any amount of negligence the plaintiff could not recover any damages.⁵ Subsequent to 1995, a plaintiff's negligence could be apportioned alongside a defendant's without entirely barring the plaintiff from

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1. 456 S.W.3d 553 (Tex. 2015).

2. 516 S.W.2d 116 (Tex. 1974).

3. *Id.* at 117.

4. *Nabors Well Servs.*, 456 S.W.3d at 558.

5. *Id.*

any recovery.⁶ As long as the plaintiff's own responsibility did not exceed 50%, the plaintiff was entitled to a recovery reduced by their percentage of responsibility.⁷ In *Nabors Well Services*, however, the Supreme Court of Texas stated that the legal environment and societal views on safety have changed since 1974.⁸ Unlike in 1974, seat belts are now required by law and have become an unquestioned part of daily life for the vast majority of drivers and passengers.⁹ In 1974, lap and shoulder belts were new in the front seats of passenger cars and the national occupant use rate was very low, less than 10%.¹⁰ As of 2010, the occupant use rate had climbed to 93.8% in Texas.¹¹ The Court held, the "relevant evidence of use or nonuse of seat belts, and relevant evidence of a plaintiff's pre-occurrence, injury-causing conduct generally, is admissible for the purpose of apportioning responsibility...."¹² Following *Nabors Well Services*, a jury may now consider whether plaintiff's failure to use a seat belt, although it did not cause the crash, may have played a role in causing the plaintiff's injuries.

It is important to note that the holding in *Nabors Well Services* also directly addresses the responsibility of the adult driver to properly restrain children.¹³ Therefore, when an infant or child is injured in a crash, juries may now consider whether the responsible adult was negligent in properly restraining the minor under the applicable statute.¹⁴

Significantly, the *Nabors* opinion represents a dramatic shift in the application of the proportionate-responsibility statute to include injury-causing evidence against a plaintiff. The Court, through a thoughtful, lengthy analysis, clearly defined the probative value of seat belt evidence and provided a practical guide as to how

6. *Id.*

7. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001, 33.012 (West 2015).

8. *Nabors Well Servs.*, 456 S.W.3d at 555 (Tex. 2015).

9. *Id.*

10. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., DOT-HS-812-139, TRAFFIC SAFETY FACTS 2013: A COMPILATION OF MOTOR VEHICLE CRASH DATA FROM THE FATALITY ANALYSIS REPORTING SYSTEM AND THE GENERAL ESTIMATES SYSTEM 202 (2015), <http://www-nrd.nhtsa.dot.gov/Pubs/812139.pdf> (noting that only one state, Tennessee, had a mandatory child restraint law in effect in 1978).

11. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., DOT-HS-811-619, TRAFFIC SAFETY FACTS: 2010 DATA: OCCUPANT PROTECTION 6 (2012), <http://www-nrd.nhtsa.dot.gov/Pubs/811619.pdf>.

12. *Nabors Well Servs.*, 456 S.W.3d at 566.

13. *Id.* at 558.

14. TEX. TRANSP. CODE ANN. §§ 545.412–13 (West 2015).

the evidence will be admitted and submitted to the fact-finder.¹⁵ After careful analysis of the distinction between occurrence-causing and injury-causing conduct, the Court found:

the conclusion is unavoidable that failure to use a seat belt is one way in which a plaintiff can ‘cause []or contribut[e] to cause in any way’ his own ‘personal injuries’ or ‘death.’ The proportionate-responsibility statute calls for an apportionment of fault for ‘personal injuries’ and ‘death’ rather than for the underlying occurrence that introduced a sequence of events in which the end result is potentially influenced by whether the plaintiff acted unreasonably or even broke the law.¹⁶

The court held that, based upon the plain language of the statute, “the Legislature both intend[ed] and require[ed] fact-finders to consider relevant evidence of a plaintiff’s pre-occurrence, injury-causing conduct.”¹⁷ The Court’s conclusion directly contradicted and specifically overruled prior precedent holding that a plaintiff’s injury-causing negligence cannot reduce a plaintiff’s recovery.¹⁸ Thus, the Court’s decision to allow admission of this type of evidence for determination of proportionate responsibility was a substantial change in the concept of contributory negligence.

The Court noted that the relevance of this type of evidence will still be within the province of the trial court and that it will only be relevant if a defendant can establish that nonuse caused or contributed to cause the plaintiff’s injuries.¹⁹ Notably, the trial court should first consider this evidence for the purpose of making its relevance determination outside the presence of the jury.²⁰ For this reason, it will be extremely important for litigants on both sides of the case to have reliable, competent expert testimony that will survive challenge and prove the causal connection or the lack thereof.²¹

15. *Nabors Well Servs.*, 456 S.W.3d at 553.

16. *Id.* at 562.

17. *Id.* at 562–63 (quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.003(a), 33.011(4)).

18. *Id.* at 563.

19. *Id.*

20. *Id.*

21. *See* E.I. du Pont de Nemours v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (setting standards for admission of expert testimony, including showing that

Additionally, the Court provided practical guidance as to how to construct a jury charge when seat belt evidence is to be considered.²² With respect to this issue, the plaintiff's negligence should be submitted if he or she was in violation of the seat belt law.²³ If the plaintiff is a minor child, the jury may apportion responsibility to the person upon whom the law places the burden to properly restrain the child.²⁴ The court emphasized the need to not deviate from a single apportionment question.²⁵ The court noted: "A jury can consider a plaintiff's pre-occurrence, injury-causing conduct alongside his and other persons' occurrence-causing conduct."²⁶ It also added: "There is nothing about injury-causing conduct that renders it incompatible with being considered alongside occurrence-causing conduct in one responsibility apportionment for the harm suffered by the plaintiff."²⁷

The Court also clarified that the failure to use a seat belt is not a failure to mitigate.²⁸ A failure to mitigate occurs post-occurrence and the nonuse of a seat belt is pre-occurrence.²⁹ A plaintiff's post-occurrence failure to mitigate his damages operates as a reduction of his damages award and is not considered in the responsibility apportionment.³⁰ It is only the plaintiff's pre-occurrence, injury-causing conduct that should be considered in the responsibility apportionment.³¹

Crash field data collected over the last 35 years makes it very clear that wearing a seat belt properly can significantly reduce injury risk and death in all types of crashes.³² In some crashes the proper

the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation).

22. *Nabors Well Servs.*, 456 S.W.3d at 563.

23. *Id.*

24. *Id.*

25. *Id.* at 564.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See LEONARD EVANS, HOW WE KNOW SAFETY BELTS REDUCE INJURY AND FATALITY RISKS 7 (Soc'y of Auto. Eng'rs, SAE Technical Paper 950241, 1995) ("A large number of technical studies...over the last three decades addressing many facets of how safety belts affect occupant risk in car crashes....provide[] a fairly complete and consistent answer" to the benefits of using seatbelts.); Peter Cummings, James D. Wells, and Frederick P. Rivara, *Estimating Seat Belt Effectiveness Using Matched-Pair Cohort Methods*, 35 ACCIDENT ANALYSIS & PREVENTION. 143, 148 (2003) (noting that seat belt use by front-seat occupants reduces the risk of death in a crash by about 61%).

use or nonuse of a seat belt is the difference between a few bruises and a fatal injury.³³ When used properly the seat belt will apply restraining forces to strong boney structures, which in turn will make the occupant's body follow the new post-crash motion of the vehicle.³⁴ Exhibit 1 shows a properly worn 3-point seat belt on a person with the underlying boney structures visible.³⁵ In a frontal crash, shown in Exhibit 2, the occupant would move forward relative to the vehicle interior and the shoulder belt would interact with the left clavicle, rib cage, and sternum and the lap belt would interact with the pelvis. A properly worn seat belt would apply a restraining force to these strong boney structures which would in turn slow down the organs in the thorax and the abdomen through their anatomical attachments. The seat belt also provides protection to the occupant in crash types other than frontals, such as rear, side and oblique impacts, rollovers, and crashes composed of multiple events.³⁶

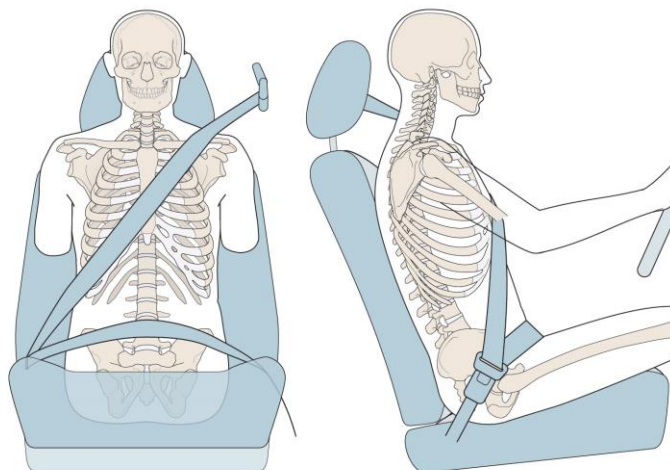


Exhibit 1. Illustrations that show the position of the bones of the thorax and the abdomen relative to the lap and shoulder belt parts of the seat belt.

33. See Evans, *supra* note 32 at 10 (discussing how the use of seat belts reduces the risk of injury and fatalities).

34. ACCIDENTAL INJURY: BIOMECHANICS AND PREVENTION 193 (Alan M. Nahum & John W. Melvin, eds., 2d ed. 2002).

35. U.S. Patent No. 2,710,649, fig. 1 and fig. 2 (issued June 14, 1955).

36. Evans, *supra* note 32, at 8.

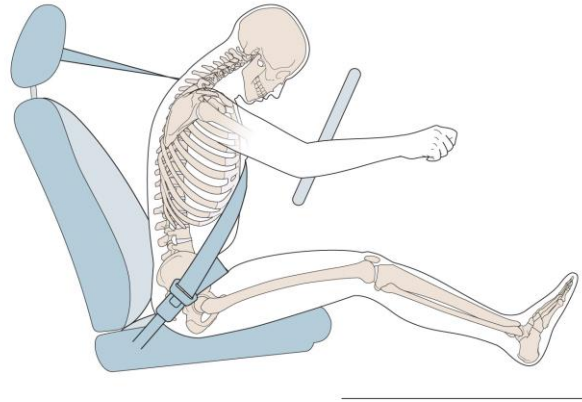


Exhibit 2. In a frontal crash the occupants move forward with respect to the vehicle interior and the shoulder belt applies a restraining force to the clavicle, sternum and rib cage and the lap belt applies a restraining force to the pelvis.

But what if the seat belt is not worn properly? How is this situation handled in light of the ruling in *Nabors Well Services*? Our experience tells us that when occupants wear their seat belt improperly, they may have unusual injury patterns in a crash. Usually these occupants are coded in police crash reports as having worn their seat belts. The first responders may remember removing a restraint system from an occupant, but their focus at the crash scene is on helping the injured occupant, not observing how the restraint system is worn. However, the resulting unusual injury pattern can be a flag for an experienced attorney or a trained biomechanical expert, who can tell that even though the seat belt was worn, it was not worn properly. *Nabors Well Services* does not directly discuss improper use of seat belts, although the ruling does focus on what the plaintiff may have done to cause his injuries—in this case not wearing his seat belt properly.³⁷ It follows then that the intent of the ruling, although not the letter, is to hold people accountable for their actions in causing their own injuries.³⁸ An improperly worn seat belt should be treated as an action that led to an injury or treated the same as not wearing a seat belt at all. Therefore, a seat belt defense should apply to cases where

^{37.} See generally *Nabors Well Services, Ltd., v. Romero*, 456 S.W.2d 553 (Tex. 2015).

^{38.} *Id.*

improperly restrained and unrestrained minors, improperly restrained occupants, or unrestrained occupants were injured in a vehicle crash.

II. DEVELOPING THE SEAT BELT DEFENSE

There are three steps an attorney needs to follow in order to develop a seat belt defense: 1) a cost-benefit analysis of employing the seat belt defense, 2) analysis by an expert of available evidence to determine how an occupant was injured and whether an occupant was using, improperly using, or not using a seat belt, and 3) if the expert's opinion is that the individual was not restrained or improperly restrained, a determination of the level of injury that would have occurred had the occupant been properly restrained.

The first step in developing a seat belt defense is determining whether a seat belt defense may assist an attorney in the defense of a case. It is axiomatic to say that it would be pointless to spend time and money on an analysis that would eventually provide no benefit. However, the decision on whether to go forward is somewhat subjective. An experienced personal injury attorney should be able to make an educated decision based on the information available and her experiences with analogous defenses. An inexperienced attorney may want to have an expert assist in evaluating the available information to help make this initial decision. If the decision to proceed with a seat belt defense is made, the second step is to determine what *did* happen in the crash to cause the plaintiff's injuries.

The second step in the seat belt defense involves determining whether the plaintiff was not wearing their seat belt or wearing it improperly by analyzing the available evidence. Detailed information about the crash is required to start the analysis, and an attorney needs to make sure that the proper information is available to his experts, including the Texas Peace Officer's Crash Report, witness statements, and the acute-phase medical records. Of particular importance in the medical records are the EMT reports and the acute-phase radiological studies. The EMTs are the first medical personnel on the scene and their report may provide the earliest information on how the plaintiff was restrained, if at all. The acute-phase radiological studies provide information on where external forces were applied to the body, including the forces applied by a seat belt. These radiological studies can provide information on whether a seat belt was worn and whether it was worn properly. Specific vehicle information needs to be available to the expert in the form of on-scene photographs or post-crash photographs taken after

the vehicle has been removed from the scene. The ideal source of information is an inspection of a well-preserved vehicle by the expert, documenting the external damage and any occupant witness marks, as well as the state of the seat belt systems. An inspection of the seat belt systems can provide valuable information on the use or nonuse of the seat belts by an occupant in a crash.³⁹

The type of accident that the vehicle and its occupants were involved in will dictate the type and magnitude of the biomechanical forces that an occupant had applied to his body in a crash and the level of complexity in analyzing the accident. A crash with complex vehicle motions and multiple events may require an expert in accident reconstruction to help explain and quantify the vehicle dynamics. Conversely, in a simple planar crash, a download of the airbag's control module may be sufficient to quantify the vehicle's accelerations and its change in velocity. A biomechanical expert can then use the vehicle dynamics to determine how the plaintiff moved inside the vehicle, how the plaintiff interacted with the seat belt or other parts of the vehicle, and how these interactions created the forces that led to the injuries. After evaluating the available evidence, an expert can render his opinion regarding whether a particular occupant was using, improperly using, or not using his seat belt system. If the conclusion in the second step is that that the plaintiff was not wearing his seat belt or was wearing it improperly and that most likely caused the plaintiff's injuries, then the next step is to determine the injuries that would have occurred had the plaintiff worn his seat belt or worn it properly.

The third step in the seat belt defense analysis must quantify the reduction in injury risk if the plaintiff had worn his seat belt properly. In many cases, this last step is very simple. For example, in a rollover crash where a plaintiff was fully ejected from the vehicle and seriously injured, it may be easy to show that had that plaintiff worn his seat belt and remained in the vehicle, he would have received only minor injuries. In other cases, it may be much more difficult and require a detailed analysis. Since this third step will involve risk analysis, it may be heavily theoretical. Another

39. See JON E. BREADY, ET AL., CHARACTERISTICS OF SEAT BELT RESTRAINT SYSTEM MARKINGS 1 (Soc'y of Auto. Eng'rs, SAE Technical Paper 2000-01-1317, 2000) (noting that accident investigators "routinely visually inspect restraint system components for evidence" that occupants used a seat belt); DAVID E. RAYMOND, ET AL., FORENSIC DETERMINATION OF SEAT BELT USAGE IN AUTOMOTIVE COLLISIONS: DEVELOPMENT OF A DIAGNOSTIC TOOL 125 (Soc'y of Auto. Eng'rs, SAE Technical Paper 2006-01-1128, 2006) (noting that reconstruction of automotive collisions requires the determination of whether or not the occupants are wearing their seat belts).

approach is to do testing to help quantify the differences between the risk of injury for a properly belted, an unbelted, and an improperly belted plaintiff. The ultimate expression of case-specific testing would be to run two crash tests: one with a properly restrained test dummy and one where the dummy is not restrained. Whatever approach is used to show a reduction in injury risk, it must be explainable, i.e., the attorney must be able to get in front of a jury and have her expert be able to explain the concepts in a manner that the jury can understand.

III. CONCLUSION

So what does this mean for savvy practitioners involved in automobile litigation? From a plaintiff attorney's perspective, developing an argument that seat belt evidence is not relevant to the plaintiff's injuries and properly presenting it pre-trial could avoid the issue altogether. Barring that, offering evidence to the jury that the plaintiff's failure to wear his seat belt did not *cause* or exacerbate any injuries could be essential to any recovery. For the defense, evidence that a plaintiff's own negligence in failing to wear his seat belt caused his own injuries may result in a complete bar to recovery, even in a case in which the defendant's negligence clearly caused the accident. For these reasons, an initial assessment of the use or nonuse of seat belts is essential in any automobile injury litigation.