1277 SAFETY BELT: FAILURE TO USE

The automobile in which (plaintiff) was (driving) (a passenger) was equipped with safety belts. Question _____ asks whether (plaintiff) was negligent in failing to use an available safety belt. In answering this question, you must determine if the omission by (plaintiff) to use an available safety belt was a failure to exercise ordinary care for (his) (her) own safety.

If you determine that (plaintiff) was negligent in failing to use an available safety belt, you should answer question _____ which asks whether (plaintiff)'s failure to use the safety belt was a cause of (plaintiff)'s injuries.

If you determine that the failure to use a safety belt was a cause of (plaintiff)'s injuries, you should then determine what percentage of (plaintiff)'s total damages were caused by the failure to wear an available safety belt.

(Burden of Proof, Wis JI-Civil 200)

SPECIAL VERDICT

Question _____: At and just before the accident was (plaintiff) negligent in failing to wear an available safety belt?

Answer: _____
Yes or No

Question _____: If you answer question _____ "yes," then answer this question:

Was such negligence a cause of (plaintiff)'s injuries?

Answer: _____
Yes or No

Question _____: If you answer question _____ "yes," then answer this question:

Assuming the total damages to be 100%, what percentage of (plaintiff)'s total damages was caused by the failure to wear an available safety belt?

Answer: _____%

COMMENT

This instruction was approved in 1985 and revised in 1988. The comment was revised in 1988, 1991, and 2002. The comment was updated in 2003, 2004, and 2009.

In 2003, the Wisconsin Supreme Court held that the Foley methodology, upon which this instruction and comment are based, still applies to safety belt negligence even though it applied a different methodology to safety helmet negligence. Stehlik v. Rhoads, 2002 WI 73, 253 Wis.2d 477, 645 N.W.2d 73; Hardy v. Hoefferle, 2007 WI 264, 306 Wis.2d 513, 743 N.W.2d 843. For helmet negligence, see JI-Civil 1278.

Expert Testimony. This instruction should not be used unless there is evidence before the jury that the plaintiff's injuries were caused by his or her failure to use an available safety belt. Expert testimony is necessary to establish how the plaintiff's failure to wear a safety belt affected the plaintiff's injuries. In Holbach v. Classified Ins. Corp., 155 Wis.2d 412, 455 N.W.2d 260 (Ct. App. 1990), the court of appeals said expert testimony is always required to establish a seatbelt defense. The court relied on Austin v. Ford Motor Co., 86 Wis.2d 628, 642, 273 N.W.2d 233, 239 (1979), in which the supreme court said "the effect of seatbelts in accidents of a particular type at a particular speed is not a question of fact to be determined by the average juror without benefit of specialized knowledge in the form of expert testimony."

In Bentzler v. Braun, 34 Wis.2d 362, 387, 149 N.W.2d 626 (1967), the court held that although failure to wear seat belts is not negligence per se, "where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard."

This instruction and the suggested special verdict were drafted by the Committee so that safety belt negligence is treated as a reducing factor in determining recoverable damages. The court, in Foley v. City of West Allis, 113 Wis.2d 475, 335 N.W. 2d 824 (1983), said that the seat belt defense is "this court's recognition that . . . those who fail to use available seat belts should be held responsible for the incremental harm caused by their failure to wear available seat belts." Foley, supra at 484.

In Foley v. City of West Allis, supra at 478, the supreme court held that "when seat belt negligence is not a cause of the collision but is a cause of a party's injury, such negligence should not be used to determine the injured party's contributory negligence for purposes of Wis. Stat. § 895.045 but should be used only to reduce the amount of damages recoverable."

In explaining its decision, the court said that it is illogical and unnecessary to view "in a one-dimensional way" the negligence causing the collision together with the plaintiff's negligence in failing to use a seat belt. Instead, the court said it is helpful to think of the accident involving seat belt negligence as involving "not one incident but two." Foley, supra at 485. The first incident is the actual collision of the vehicles. The second incident occurs when an occupant of a vehicle hits the vehicle's interior. Seat belt negligence relates only to this second incident, and the failure to wear seat belts may cause additional injuries beyond those caused by the first incident.

The court, in Foley, emphasized that seat belt negligence is to be treated as a reducing factor and that damages for "the incremental injuries caused by the failure to use a seat belt can be treated separately for purposes of calculating recoverable damages." Foley, supra at 485. Requiring the jury to assess this incremental damage by apportioning damages between the first and second incidents borrows from the apportionment techniques used in two traditional tort doctrines: avoidable consequences and mitigation of damages. Through these doctrines, tort law recognizes that if a plaintiff does not minimize the harm, plaintiff's recovery will be reduced for damages which reasonably could be avoided. Foley, supra at 487.

In determining how seat belt negligence should specifically be applied to damage recovery, the court in Foley, supra at 489, stated:

> We should seek to treat the plaintiff and defendant in such a way that the plaintiff recovers damages from the defendant for the injuries that the defendant caused but that the defendant is not liable for incremental injuries that the plaintiff could and should have prevented by wearing an available seat belt.

After reviewing the special verdict formulated by the trial court, the court in Foley recommended that this Committee draft an instruction "which advises the jury that if it determines that the failure to wear a seat belt was a cause of a person's injuries, the jury must determine what percentage of the total damages for that person's personal injuries was caused by his or her failure to wear a seat belt." Foley, supra at 495. In a footnote to this recommendation, the court stated:

> If this type of instruction is given, the calculation set forth in steps (4) and (5) at p. 490 should reflect the percentage of damages attributable to the plaintiff's failure to wear an available seat belt rather than the percentage of causal negligence attributable to plaintiff's failure to wear the seat belt. 113 Wis.2d at 495 n.15.

Steps 4 and 5 cited in this footnote refer to the five-step process adopted by the court for determining recoverable damages. 113 Wis.2d at 490. In response to this recommendation, the Committee approved this instruction and the suggested special verdict.

It has been suggested that seat belt negligence should instead be treated as a concurrent tort and that the seat belt negligence must be compared to the negligence of the accident as a whole in determining plaintiff's recovery. In support of this theory, reference is made to steps 4 and 5 of the five-step process adopted in Foley. The court said, with regard to steps 4 and 5, that the plaintiff's damages should be reduced by the percentage of total negligence attributable to plaintiff's seat belt negligence. Under this theory, the jury would first determine the amount of damages attributable to the seat belt negligence. Then, the jury would compare the seat belt negligence to the total negligence in causing the collision.

After reviewing the Foley decision, the Committee concludes that formulating the instruction and special verdict under the concurrent tort theory would be inconsistent with the Foley decision as a whole and contrary to the express recommendation of the court to this Committee. Instead, the instruction and special verdict approved by this Committee follows the court's recommendation by reducing recoverable damages by the percentage of damages attributable to the plaintiff's seat belt negligence. This formulation is consistent with the court's recognition in Foley that damages for the incremental injuries caused by the seat belt negligence should be treated separately and that those who fail to use seat belts should be held responsible for the incremental harm.

Limitation on the reduction of damages. In 1987, the Wisconsin Legislature enacted legislation requiring motor vehicle operators and passengers to wear safety belts. 1987 Wisconsin Act 132. The legislation restricts the reduction of plaintiff's damages for failure to wear a safety belt. Specifically, under Wis. Stat. § 347.48(2m)(g) created by 1987 Wisconsin Act 132, a failure to wear a safety belt shall not reduce the plaintiff's recovery of damages caused by the failure to wear a safety belt by more than 15%. The statute expressly states that this limitation does not affect the determination of causal negligence in the action.