Approved 2-18-86
Date

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND UTILITIES.

The meeting was called to order by Sen. Bill Morris at
Chairperson

9:00 a.m./pxxxon February 13, 1986 in room 254-E of the Capitol.

All members were present xxxxptx.
Sen. Vidricksen and Sen. Walker were excused.

Committee staff present:
Fred Carman, Revisor
Ben Barrett, Legislative Research Department
Hank Avila, Legislative Research Department
Louise Cunningham, Secretary

Conferees appearing before the committee:
Rep. Jeff Freeman, Burlington
Jay Kreipe, Topeka
Howard Hughes, McClouth
Robert W. Beach, McClouth
Ronald Ford, Manhattan
Darrell Brewer, Topeka
Victor Poe, Jr., Topeka
Richard Leeman, Silver Lake
Ron Smith, Topeka Bar Association
Jim Edwards, KCCI
Bill Sneed, Kansas Association of Defense Counsel

HEARING ON S.B. 520 - Mandatory Life Belts - Opponents

Rep. Jeff Freeman said he had asked his constituents what they thought about this and had checked other states that had passed a mandatory seat belt law and said there was strong support for seat belts but people were opposed to mandatory laws. He said people have testified how seat belts saved their lives and they are correct and he would urge others to do so. It makes good sense to wear a seat belt but they should not be forced to do it. People can think for themselves and this is taking away an individual freedom. He distributed newspaper clippings which showed some problems with seat belts. A copy of these clippings is attached. (Att. 1). He also said S.B. 520 does not meet the requirements of Transportation Secretary Dole's ruling for seat belts. A copy of the federal transportation law, Chapter V, Title 49, with the criteria outlined was distributed. A copy is attached. (Att. 2). Rep. Freeman said this bill should be defeated. The people are not in favor of it and they should be able to decide for themselves.

Jay Kreipe, Topeka, was also opposed and said it was a scarey feeling to have someone dictate to her what to do.

Howard Hughes said he was a veteran of the armed forces and knows what it is to be exposed to danger and chemicals, all done in the name of freedom. He said many veterans feel they have been exposed to those things for nothing and mandatory seat belts are an infringement of the freedoms they fought for.

Robert Beach, McClouth said seat belts were a good thing to do at times but the government should not make it a law. There is too much government in our lives now and the people should draw the line. People should be educated to wear them and not be forced.

Ronald Ford, Manhattan, told of an automobile accident he had in December, 1984 when he was a passenger in a car. The driver fell asleep and they had an accident. He was able to duck down before the crash. If he had been wearing a seat belt he feels that he would have been killed. He said this committee does not have the right to play God.

Darrell J. Brewer said he is a courier here in Topeka and drives about 300 miles every day. He will not wear a seat belt. He said we are not living in Russia and should not be forced to wear seat belts. A copy of his statement is attached. (Att. 3).

Victor E. Poe, Jr. said the government has already told him what to do enough and at work he is told when to eat, when to smoke, when to punch in. He is regulated enough already and should not be when he leaves work. He also said he has claustrophobia and cannot stand to have anything around him strapping him in.

Richard Leeman, Silver Lake, was opposed to seat belts and said he was mature enough to make that decision for himself.

This ended the testimony for the opponents and the committee then heard from some proponents that had not been heard on the previous day.

PROPONENTS:

Ron Smith, Kansas Bar Association said they support the bill. A copy of his statement is attached. (Att. 4).

Jim Edwards, KCCI, said a question had been raised yesterday comparing the safety of a seat belt with an air bag and said the seat belt was more effective. A copy of his statement is attached. (Att. 5). KCCI supports the bill.

Bill Sneed, Kansas Association for Defense Counsel, said they support the bill. Using a seat belt would be like having a driver's license or using turn signals. He said he felt that if the law was passed it would provide for mitigation of damages.

The committee discussed the point that is someone makes a claim for insurance they might have to take less money if it could be shown they didn't have their seat belt on.

The committee also asked if a passenger did not buckle up, who was responsible? Also, that a person should not be stopped by a law officer just to check the seat belt.

Meeting was adjourned at 9:45 a.m.

SENATE TRANSPORATION AND UTILITIES COMMITTEE

Date 2-13-86 Place 254-E Time 9:00

GUEST LIST

NAME	ADDRESS	ORGANIZATION
JoEllen McGranahan	Topeka	AAA Kansas
Nancy Bauder	Lewenworth	Kansas Women for Highway Safety
Lou A. Hightower	Topeka	KDHE
PAT BARNES	TOPEKA	Kansas Motor Car Dealers Ass'n.
RICK FLEMMING	TOPEKA	AT+T
Jim Edwards	"	KCCI
Robert Beach	McLouth	Citizen
Victor E. Koch	Topeka	Citizen
Linda Beach	McLouth	NONE
Jay Kneepe	Topeka	None Citizen
Katharine Clark CRNA	Wichita	Intern
RICHARD E. LEEMAN	SILVERLAKE KS	CITIZEN
Howard J. Hughes	McLouth	Citizen
Karl Bonjorn		Citizen
Curtis J. Lamb	Ottawa	Citizen

SENATE TRANSPORATION AND UTILITIES COMMITTEE

Date 2-13-86 Place _____ Time _____

GUEST LIST

NAME	ADDRESS	ORGANIZATION
Steve Rubis	OTTAWA	Citizen
Jim Sullins	Topeka	KMCDA
SUSAN TANNENWALD-MIRINOFF	TOPEKA	KSNA
Ronald M. Ford	Manhattan KS	
Eric Bu[illegible]	STERLING	Citizen
Darrell Brewer	616 W 4th	citizen
[illegible] Potter	Topeka	K.C.C. Trust
Bill Henry	"	
Lt. Bill Jaudes	Topeka	KHP

Kansas City Times Wed Feb 12, 1986

Repeal efforts aim at seat belt laws

By John Petterson
Topeka Correspondent

TOPEKA — Momentum is growing in state legislatures across the country to repeal recently passed seat belt laws, and voters in two states, Nebraska and Massachusetts, already are scheduled to decide in November whether to retain mandatory seat belt laws.

Individual lawmakers in several states, including Missouri, have introduced bills to remove seat belt laws either by putting the question to a referendum or by outright legislative repeal.

The repeal attempts come as a Kansas Senate committee today begins two days of hearings on requiring motorists to use seat belts.

Jane Strotman, record supervisor for the National Highway Users Federation, which keeps tabs on seat belt legislation, said Tuesday that repeal legislation could be expected in several states this year.

"The legislatures are just kind of getting started," she said.

But she said it was difficult to determine whether those bills that have been introduced or are expected to be offered in this year's legislative sessions will be successful.

"There's always somebody who didn't like it (the seat belt law)," Mrs. Strotman said.

In addition to three proposals filed with the Missouri General Assembly, which have yet to be considered, repeal efforts are under way in Delaware, Louisiana, Nebraska, New York, North Carolina and Oklahoma. Seat belt

See REPEAL, A-12, Col. 1

ATT. ①
S. T+U 2/13/86

Repeal efforts aiming at laws on seat belts

Continued from Page A-1

critics often cite personal freedom as their reason for opposing mandatory belt laws, and some question the safety statistics used by proponents.

The National Highway Users Federation predicts that seat belt legislation will be considered in 27 states this year, and already legislation has been passed by at least one house in eight states.

So far, 17 states and the District of Columbia have mandatory seat belt laws. Residents of those states and the district make up 57.9 percent of the nation's population, according to the Highway Users Federation. Missouri's law took effect in September, but fines for violating the law won't be imposed until July 1.

The U.S. Department of Transportation said in 1984 that if states covering two-thirds of the population adopted mandatory seat belt laws, federal requirements for installation of air bags in cars could be dropped.

As a result, big automakers, such as General Motors, have been involved in substantial lobbying efforts to win seat belt legislation in the states.

At the National Conference of State Legislatures in Washington, a spokesman described mandatory seat belts as "probably the biggest single issue in transportation this year."

In Topeka the Senate Transportation Committee will hear proponents and opponents of the legislation in separate hearings today and Thursday. Similar legislation failed during the 1985 session, but at least one of its backers is more optimistic this year.

"I think it has more support than it did last year," said Sen. Bill Morris, a Wichita Republican who heads the committee. "With the proper amendments, we hope to have even more support."

Expected amendments during the committee stage, he said, would exempt rural mail carriers and newspaper carriers from the provisions. Another amendment would prohibit a person from being cited for not using a seat belt unless he was stopped for another offense, and the citation could not be used against him to suspend his driver's license, to increase his insurance premiums or in a legal action.

A person cited for not using his seat belt would face a $25 fine plus court costs, which could range up to $50.

Bill Henry, coordinator for the Kansas Coalition for Safety Belts, made up of a variety of professional, business and educational organizations, said the big battle probably would take place in the House where similar legislation died last year.

"I think we're more optimistic about the prospects this year than last because we think more legislators have had an opportunity to receive more information on the value of seat belts," Mr. Henry said.

He said reports from other states where mandatory seat belt laws were in operation would help.

Mr. Henry said reductions in front-seat fatalities have ranged up to 30 percent in some states.

The National Highway Traffic Safety Administration projects that if 80 percent of the Kansas population used seat belts, 100 lives could have been saved in 1984 when 270 front-seat occupants died in crashes, Mr. Henry said.

"We think a more reasonable figure in the first year of the legislation might be closer to 60 lives (saved), but, of course, even at that we're talking about maybe $45 million in savings in medical costs," Mr. Henry said.

A safety belt usage study by Kansas State University that was completed last month showed that for the state as a whole, only 10.9 percent of Kansas drivers used seat belts and only 9.65 percent of front-seat passengers buckled up.

Considered together, 10.67 percent of drivers and front-seat passengers wore seat belts.

Johnson County, with 20.47 percent of all drivers and front-seat passengers buckled up, led metropolitan areas in seat belt usage, the survey showed.

Rates in cities with less than 20,000 population averaged less than 4 percent with little variance, the report showed.

Mr. Henry will be among nearly a dozen advocates of mandatory seat belts who are scheduled to testify today.

On Thursday, only Topekan Oscar Lind has asked to speak in opposition to the measure. He appeared at a similar hearing last year and said the bill would dilute his freedom.

New state warning to motorists: Learn to un-buckle up

By ANDY DANZO
Knickerbocker News Reporter
with wire reports

Because of a Buffalo accident in which a man wearing his seat belt died of burns, state officials are warning motorists to learn how their autos' seat belts unbuckle.

The warning will probably become part of the state's campaign to prepare people for the new mandatory seat-belt law, which becomes effective Dec. 1, according to state Department of Motor Vehicles spokeswoman Joan M. Paylo.

> *"...if you are unfamiliar with wearing seat belts, you should be aware of how you get in so you can get out again."*
>
> — Joan M. Paylo
> DMV spokeswoman

"One thing we would say is, if you are unfamiliar with wearing seat belts, it's like going into a theater or into the woods — you should be aware of how you get in so you can get out again," Ms. Paylo said.

She said she was not familiar with details of the weekend accident, in which a man's death was attributed to a seat belt trapping him in his burning car.

Elizabeth M. Derrico, another Motor Vehicles spokeswoman, said the department did not yet believe seat belts were a contributing cause in the motorist's death. She said officials were hoping to talk with rescue workers and the state trooper investigating the accident to learn more.

State police said James M. Morrison, 40, of Rochester was apparently unable to get out of his seat belt after his car burst into flames on Interstate 190 in Buffalo Saturday night.

Morrison had pulled the car to the shoulder after smelling smoke.

Three passengers said they also had trouble unbuckling their belts before escaping.

Morrison died early Monday morning.

"I didn't believe in them (seat belts) before and I surely don't now," Morrison's sister, Mary Morrison, said. "They almost killed me and they killed my brother."

The state police spokesman for the Buffalo area was not immediately available for comment.

Ms. Paylo said accidents where a seat belt might be a threat instead of a lifesaver were extremely rare, if they existed at all.

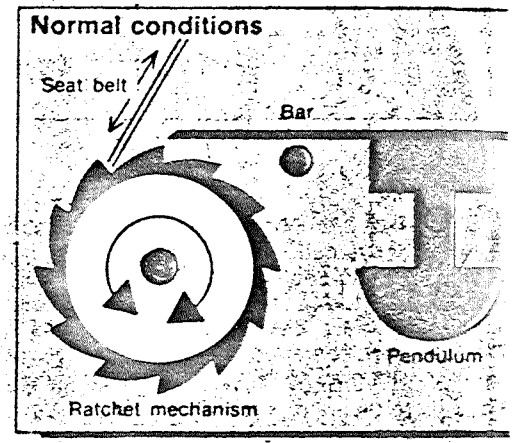
Less than one accident in 200 involves a fire or a plunge into water, Ms. Paylo said. Even in those cases, a seat belt could keep a person from being knocked unconscious and make it more likely he would escape from danger, she added.

"Even in the freakiest of accidents, the chances of your remaining conscious are greater if you're wearing safety belts," she said. "You're more likely to think of what to do."

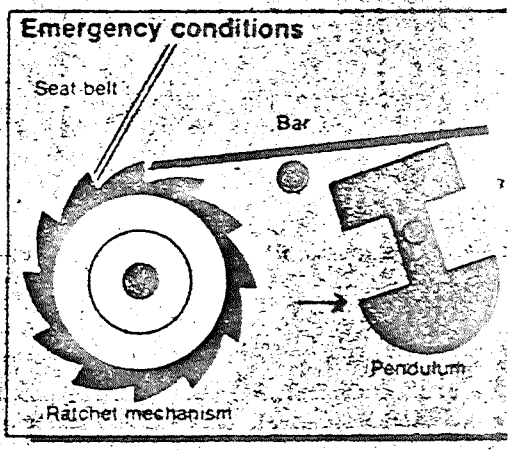
Ms. Derrico said of the 270,000 traffic accidents in New York in 1983, only 97 involved fire or an explosion. Those 97 accidents accounted for only two of the 1,918 highway fatalities that year, she added.

"Incidents like this (the Buffalo death) do not happen every day," Ms. Derrico said. "Accidents do happen every day."

The safety belt: How it works

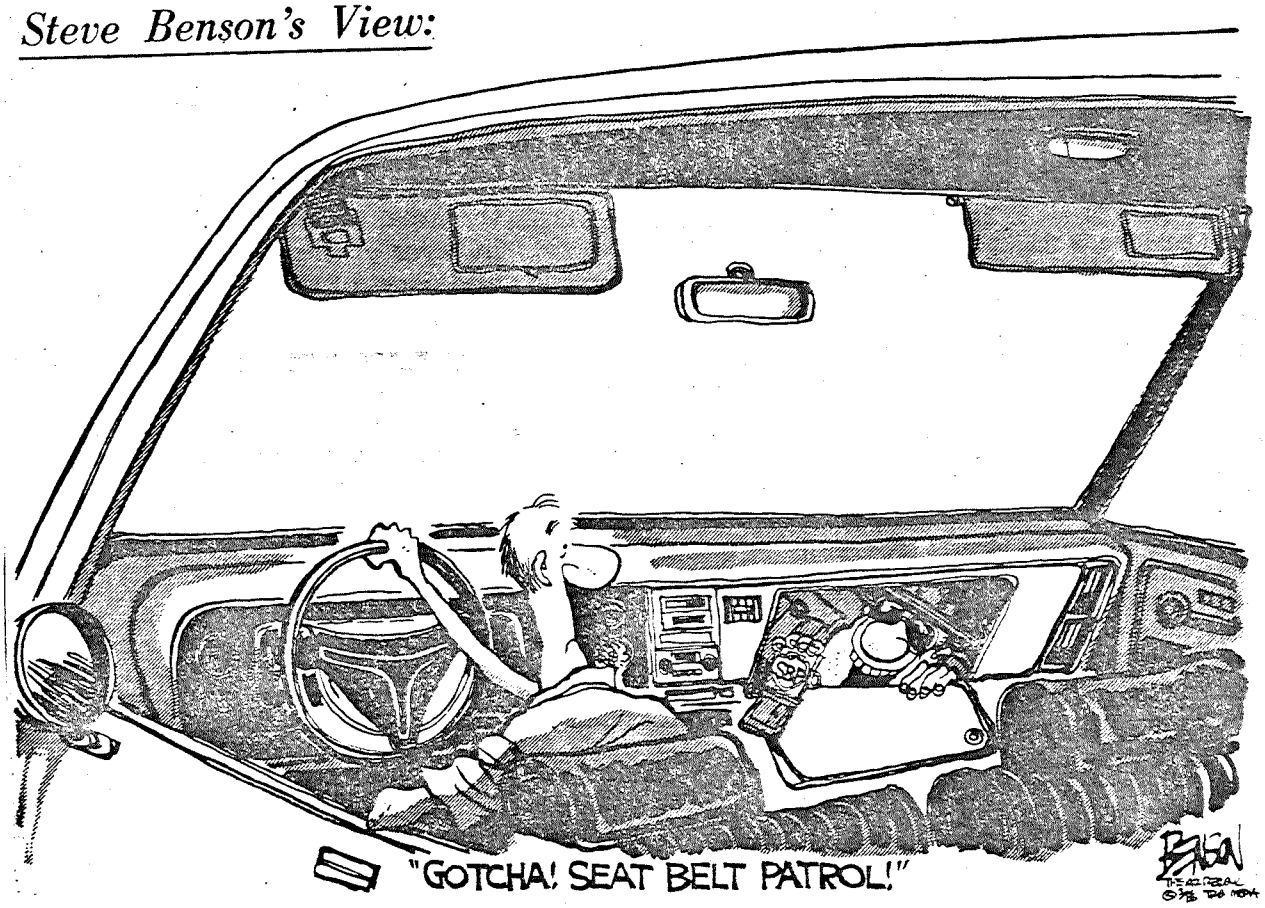


During normal driving conditions, the pendulum and bar are in their rest positions, leaving the reel that holds the belt free to rotate. The belt moves easily with the occupant, allowing freedom of movement.



In a collision the pendulum moves forward under the force of the impact causing the bar to engage the ratchet. The reel and seat belt lock in place, restraining the occupant in his seat.

Steve Benson's View:



New York Times Feb 28 1985

States Debate Laws on Seat Belt Use

NYT 2-28

By IRVIN MOLOTSKY
Special to The New York Times

WASHINGTON, Feb. 27 — The decision by Transportation Secretary Elizabeth Hanford Dole to seek state laws requiring the use of seat belts has touched off one of the strongest lobbying efforts ever seen in statehouses around the country.

Legislatures in four states, including New York and New Jersey, have approved mandatory use of seat belts. If enough follow suit, proponents of the air bag, which inflates upon impact in a collision to protect riders, fear the device will never achieve widespread use.

Mrs. Dole issued an order July 11 requiring all new automobiles to be equipped with passive restraints, such as air bags or seat belts that automatically snap on when the door is closed. However, the requirement would be waived if states representing two-thirds of the United States population enacted mandatory laws on seat belt use by April 1, 1989.

The lobbying has included a talk by the chairman of the Chrysler Corporation, Lee A. Iacocca, a staunch opponent of air bags, with Gov. James R. Thompson of Illinois at Chrysler headquarters in Highland Park, Mich.

Chrysler Chief's 'Pitch'

Governor Thompson, who later signed a seat belt law, said Mr. Iacocca had made "a very strong pitch" for the bill and had said that "it would forestall the mandatory use of air bags, which he claims are not all they are cracked up to be and which he also claims are virtually useless without using seat belts as well."

Mrs. Dole's decision to press for seat belt laws was applauded by automobile manufacturers and their allies, which maintain that air bags represent an unproved and expensive technology. It was criticized by many insurance companies and consumer organizations, which contend that air bags would save far more lives than seat belts.

Besides sending representatives to lobby Illinois legislators, Chrysler and the General Motors Corporation hired a former Illinois Secretary of State and a former majority leader of the State House. "The big heaters were all over this one," a legislator said. "We had Chrysler, Ford, G.M. We had banks they run their financing through. They were all working on us. I haven't seen a bill this heavily lobbied in a long time."

The lobbying has got so intense that G.M.'s impending decision on where to locate its multibillion-dollar plant for the Saturn car has become intertwined. Lobbyists who oppose the mandatory seat belt laws have asserted that General Motors has told states they will not be considered for the plant unless they pass such a measure.

General Motors has strongly denied the allegation. "It is absolutely ridiculous," said Donald Postma, a General Motors spokesman. "There is no truth to it. We don't do business that way."

But the assertion was repeated at a Congressional hearing last week by Senator John C. Danforth, Republican of Missouri, a strong supporter of the air bag. He said Missouri legislators had told him G.M. had spread the word.

There are many ironies in the issue, not the least being the position of G.M., which developed the air bag technology more than 10 years ago but has since abandoned it.

The Ford Motor Company has long opposed mandatory air bags but, alone among the big American auto makers, it is making air bags available to fleet purchasers.

"We are looking at all systems and devices," said John Manikas, a Ford spokesman. "We have felt that there are many questions that have to be answered with so-called passive restraints and that one way is to get them on the road."

Extra Cost of $815

Ford has agreed to sell 5,000 cars with air bags to the General Services Administration, the Government's housekeeping arm, and 600 to Travelers Insurance. The extra cost is $815 for a driver-only air bag, but the ordinary motorist cannot walk into a Ford showroom and buy a car equipped with air bags.

To help make their case, the auto makers flew members of the California Legislature to Detroit to tour auto plants. While not every legislator has been given two days in the nation's auto capital, reports from several states point to a high level of lobbying.

In Connecticut, a new group, the Connecticut Safety Belt Coalition, received a $137,000 grant from Traffic Safety Now, which is financed by the auto makers and has as its goal passage of a seat belt law in that state.

It describes itself as a coalition of medical, business, government, industry and law-enforcement officials. Its vice president, Dr. Carl Dila, a Stamford neurosurgeon, said, "I work on too many traumatic head injuries that could have been avoided if the person only had been wearing a seat belt."

His argument is similar to that of Larry Todd, spokesman for the Texas Department of Public Safety, which is supporting a seat belt law being considered in that state.

"I rarely ever hear our state troopers unbuckling somebody that's dead," Mr. Todd said, noting that more than 88 percent of Texas highway deaths involved people who were not using seat belts.

"The majority of drivers and passengers don't wear them, and yet they're there," he said. "We're talking about a behavior modification that is a lot more difficult than a safety approach."

Mr. Todd's view and the view of others is that many people would use seat belts if required by law, even if the law was not widely enforced and even if the penalty was modest. They cite the experience in New York, where the nation's first law requiring seat belt use took effect Jan. 1. Samplings cited by Federal officials indicate that 70 percent of front-seat occupants in New York now wear seat belts.

There are strong indications that there will be legislative action in Connecticut on seat belts this year, although Gov. William A. O'Neill says he has not decided whether to endorse it.

Last October Mr. O'Neill ordered all state employees driving state vehicles to wear seat belts.

"I wouldn't want to rely on an air bag popping up in front of me or not popping up in front of me if I knew I was going to crash," Mr. O'Neill said. "However, if you do have a seat belt on, you know it's there and it does work."

In Florida, State Representative Steve Pajcic, chairman of the House Transportation Committee, said he expected some kind of seat belt law to be passed in his state this year.

The picture is less clear in California. Asked about his position, Gov. George Deukmejian said, "I'm not prepared at this point to say that I would push for that kind of legislation, but I'll certainly be happy to consider it."

The head of the Democratic caucus in the California Senate, Paul B. Carpenter, noted that there were strong competing forces.

In Virginia, a state with a conservative Legislature, the seat belt law was rejected by lawmakers who invoked the state's historic opposition to attempts by the Federal Government to impose its wishes.

In Maryland, a liberal state, the bill has been held up on the ground that a seat belt requirement would impinge personal freedom.

Proponents in a Quandary

Some of the major proponents of air bags, such as the State Farm Mutual Insurance Company the Allstate Insurance Company and Joan Claybrook, a highway safety official in the Carter Administration who is head of the consumer organization Public Citizen, are finding themselves in the difficult position of opposing laws to require use of seat belts, which they acknowledge will save many lives.

The air bag forces tasted victory when the Supreme Court ruled in 1983 that the Reagan Administration acted arbitrarily when it revoked a decision requiring the installation of air bags in new cars. But they now find themselves on the defensive.

Upwards of 40 states may consider seat belt legislation this year, and if enough states pass such requirements the air bag, which the insurance and consumer advocates consider much more effective, would be dealt a severe blow, they believe.

One insurance spokesman said his side's best hopes now appeared to be in either delaying state actions or in getting states to pass seat belt laws that did not comply with Mrs. Dole's requirements. Such an apparently noncomplying bill was passed with the support of the insurance industry in New Jersey, which set a $20 fine for people who do not buckle up. Mrs. Dole's standard calls for a minimum fine of $25.

A New Jersey legislator, Assemblyman Walter M. D. Kern Jr., Republican of Ridgewood, reflected the view of many when he said it was naive to believe that the light penalty would lead to a requirement of passive restraints. "When the time comes," he said, "they'll just change the requirements in Washington to include our law, and the manufacturers will be let off the hook."

VIEWPOINT

Now that we're buckled up...

State can rationalize a new law to outlaw smoking

By CHRISTOPHER ANZALONE

If New York state can legally require individuals within its borders to use seat belts while driving, why then doesn't it outlaw smoking?

The expressed purpose of such a law could be exactly the same as the seat-belt law: to save lives. The Legislature, with approval by Governor Cuomo, can easily rationalize this new law by pointing to the vast wealth of supporting scientific evidence relating to the short- and long-term harm of smoking. Furthermore, if legislative intent can be predicated upon saving lives (and it was when dealing with DES, asbestos, alcohol abuse, and driving without seat belts), it can be argued, that a no-smoking law would be universally pragmatic especially when compared with the seat-belt law.


Anzalone

On the one hand, smoking, according to the surgeon general, is inherently dangerous to the user's health. On the other, by itself, driving without seat belts is dependent upon external factors that create the possible detrimental circumstances for the individual. Secondly, abolition of tobacco use will legitimately eradicate the health dilemma; whereas the required use of seat belts can (as proven statistically) increase the likelihood of injury.

It would certainly be inspirational if our elected representatives cared so vigilantly for the health and welfare of their constituents. Unfortunately, however, there may exist greedy or hypocritical politicians with less than noble motives designed to thwart any practical regulatory legislation. Hopefully, this group is relegated to an ineffective minority. This appeal is, therefore, dedicated to the principled and altruistic leadership in Albany.

Opposition to a no-smoking bill would appreciably result in dialogue emanating from the congressional and executive chambers as well as from the many state agencies. All negative arguments can, I believe, be proven futile.

> If legislative intent can be predicated upon saving lives, it can be argued, that a no-smoking law would be universally pragmatic especially when compared with the seat-belt law.

For example, opponents may claim the law will result in fiscal hardship for New York state (declined revenues from its tax). Many state-supported regulations and programs, fortunately, are not revoked simply because they drain state revenues; they are allowed to carry out their intended beneficial function. Besides, should the state ethically tax and allocate such revenues from an agent proven to cause harm?

Secondly, the law may be denounced as a violation of the U.S. Constitution's "interstate commerce" clause. The feasibility of this argument is minimal since judicial history has upheld the use of similar state police power. Specifically, the U.S. Supreme Court has consistently affirmed burdens placed upon interstate commerce when the premise of the state intervention lies with safety and health motives (e.g., H.P. Hood & Sons v. Dumond, 1949, and Raymond Motor Transportation Inc. v. Rice, 1978).

Finally, the argument with the greatest political leverage is the citing of negative public opinion. The philosophical debate as to whether representatives in a democratic society should vote in accordance with their constituents' opinions as opposed to their moral conviction of what is "best" will not be addressed. Functionally though, such an argument is mere political rhetoric and inconsistent with reality since New York, if governed in this manner, would void many of its unpopular laws (e.g., the seat-belt law).

Furthermore, it is proposed, an empirical survey will conclude that a large majority of smokers recognize the hazards of tobacco and desire to quit, but are unable due to the psychological dependency.

If New York state is to lead the nation in the democracy of the perpetuation of human life, it should honestly esablish logical legislative priorities.

I emphatically conclude that the motives and procedures clearly exist allowing and demanding our dedicated state government in Albany to outlaw smoking.

Christopher Anzalone, a December graduate of State University at Oswego, is planning a career in law. He lives in Colonie.

Seat-belt law crosses 'imaginary line'

By BRUCE SCRUTON

In newsrooms across the country, on any given day, there are arguments, debates and discussions on almost any subject.

Recently, *The Knickerbocker News* has seen internal debates on the presidential race, the legal drinking age and mandatory use of seat belts.

I am not bashful about admitting I was one of those arguing against the New York law about seat belts. Sure, I agreed, seat-belt use will save lives. Sure, injuries will be reduced.

But isn't it a case of government stepping over that imaginary line between insuring people's health and safety, and an intrusion into private lives?

Argument One: Who are you hurting, besides yourself, if you don't wear a seat belt?

Argument Two: Is not wearing a seat belt an extension of attempted suicide? I don't think so. If the state equated drunken driving with attempted murder, there may be a point here.

Argument Three: With a reduction in injuries, insurance rates will go down. Less time will be lost at work.

This was one argument I could agree with, but those gains would be offset by the loss of personal freedom.

That's not to say I disagreed with seat-belt use. I generally wore one in bad weather, when the unpredictable and unstoppable could happen.

I took the point of view that if the state wanted people to wear seat belts, they should allow juries in injury cases to reduce any award because the injured party wasn't wearing a seat belt and contributed to the seriousness of the injury.

> *Maybe a rail from the fence might have come through the windshield of my car and through me, pinned in as I was inside my seat belt. Maybe...*

Hit people in their pocketbooks and they take notice, I argued.

Last Thursday, it happened. A pile of slush in the road threw my car into an uncontrollable skid. A snowbank, a rollover and I crawled out, unhurt.

I had been wearing my seat belt, mostly because it was bad weather and possibly a little bit because the state told me I had to wear one.

As a reporter, I have seen accidents in which people were killed in a less serious crash. I have also seen people standing beside their car which had crashed into a tree. They hadn't been wearing a seat belt, yet came out OK.

In my own crash, there are lots of ifs and maybes. If I hadn't been wearing a seat belt, maybe I would have been thrown clear and killed. Maybe thrown clear and landed unhurt in a soft snow. Maybe just thrown around inside the car.

Maybe a rail from the fence might have come through the windshield of my car and through me, pinned in as I was inside my seat belt.

Maybe... if....

What happened, happened. I was unhurt and I had my seat belt on.

Yet, I haven't changed my mind. In any future argument in the newsroom I will continue to argue the seat-belt law is unfair and an invasion of privacy.

With this law, the imaginary line has been crossed.

Bruce Scruton is a Knickerbocker News staff reporter.

Seat-Belt Use Drops in New York and New Jersey

By MICHAEL ORESKES
Special to The New York Times

WASHINGTON, Oct. 5 — The use of seat belts by motorists in New York and New Jersey, the first two states in the country to adopt mandatory seat-belt laws, went up immediately after the laws were enacted but has begun to slip, an insurance-industry group has reported.

The group, the Insurance Institute for Highway Safety, said the trend was an important lesson for states that have been adopting mandatory seat-belt laws this year.

"These findings confirm what we've learned from other countries with belt legislation," the president of the institute, Brian O'Neill, said. "Unless there is continuing publicity and enforcement, belt use declines from the initial levels achieved shortly after the laws go into effect. Unless something is done to reverse these declines, we will not realize the potential benefits of these laws."

Adopted by 15 States

The executive director of the Governor's Traffic Safety Committee in New York, William G. Rourke, said that his group was in the midst of conducting a survey of seat-belt use, but that based on earlier surveys, the Insurance Institute study appeared to be correct.

State legislatures across the country have been considering and adopting mandatory seat-belt laws, partly in response to an outcry over deaths on the highways and partly in response to pressure from automakers.

The United States Department of Transportation is planning to force automakers to install passive-restraint devices, such as air bags, in all new cars unless enough states mandate the use of seat belts. Transportation Secretary Elizabeth H. Dole has specified that if states containing two-thirds of the nation's people enacted belt laws with seven minimum criteria, restraint devices would not be required.

Fifteen states have adopted laws mandating the use of belts. They are following the lead of New York, where the law requiring drivers and front-seat passengers to use seat belts went into effect last December. A similar law in New Jersey became effective March 1.

Observers Riding in Vans

A spokesman for Governor Cuomo, Martin Steadman, said if the use of seat belts continued to slip, there would be a renewed emphasis on education about and, perhaps, stricter enforcement of the seat-belt law.

Mr. Rourke said decisions on the actions would probably be made after the New York committee had completed its survey, in a few weeks.

The Institute for Highway Safety was established and is financed by property and casualty insurers, which must pay the claims from automobile accidents. Its survey was conducted by observers riding in vans and looking into cars to see who was wearing belts.

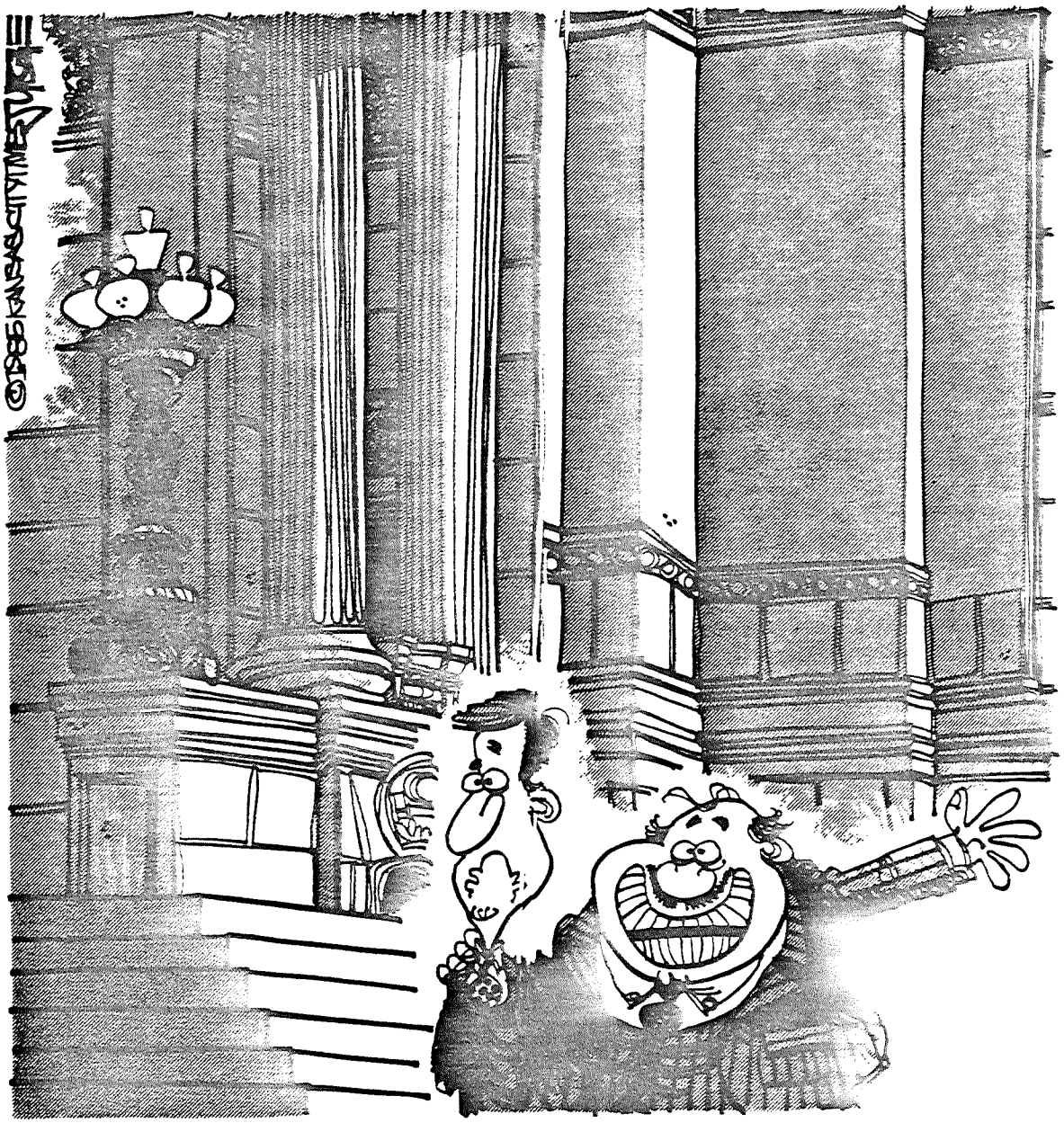
Mr. O'Neill said the use of seat belts was still considerably higher than before the laws were enacted, but lower than in the months immediately after they went into effect. Use varied around the state, but the trend was almost universal, Mr. O'Neill said.

In Queens and Nassau County, 11 percent of the motorists and their front-seat passengers were observed wearing seat belts in September 1984. Last January, the first month in which the seat-belt law was enforced, 49 percent wore their belts, but last August 39 percent did, the institute reported.

In Syracuse, 18 percent wore their belts before the law, 81 percent immediatly after it went into effect and 49 percent in August, according to the survey.

In Montclair and Bloomfield, N.J., 16 percent wore seat belts last November, rising to 61 percent in March and falling to 43 percent in July.

Comments



"WHY OF COURSE A MANDATORY SEAT BELT LAW WOULD BE GOOD FOR PEOPLE!... THEN WE'LL PASS A MANDATORY TOOTH-BRUSHING LAW, A MANDATORY BLOOD-PRESSURE-CHECK LAW, A MANDATORY-"

The Daily Star

Copyright 1985 The Daily Star — Oneonta, N.Y., 13820, Wednesday, Feb. 13, 1985

Petitions urge repeal of belt law

By KARIN ROBERTS
Walton News Bureau

FRANKLIN — A petition drive to repeal New York state's seat belt law has been started on the local level by William Degenhardt, a Franklin woodworker who said Tuesday that the law infringes on his personal freedoms.

Degenhardt, of county Route 14, said he has been collecting signatures and distributing petitions to merchants and friends for the past three weeks in an effort to overturn the 10-week-old law, which requires front-seat car occupants to buckle up or face a $50 fine.

Opposition to the law is also heating up in the state Legislature. A bill to repeal the law, sponsored by Senator Charles Cook, R-Delhi, and Assemblyman Michael Nozzolio, R-Seneca Falls, was sent to the Senate Transportation Committee Tuesday, said an aide to Cook.

Degenhardt said he was inspired to fight to overturn the law after watching Nozzolio attack the law during a televised debate on a Syracuse station recently. Nozzolio invited other opponents of the law to write to him and ask for petitions, and Degenhardt decided to respond.

He said he has collected about 300 signatures so far, and has sent the petitions back to Nozzolio. Copies of the petition were given to Franklin businessmen, who have in turn been encouraging other opponents to spread the petitions throughout the region.

Several hundred signatures already have been obtained in just the Franklin area.

Degenhardt said most people have been eager to sign the petition, which states, in part, "We, the residents of New York state, believe that government has neither the right nor the responsibility to prescribe (sic) conduct to its citizens simply because it deems such conduct to be in their best interest. Citizens must be allowed to think for themselves."

"They say, 'man, where's the pen?' " Degenhardt said of the people who have signed his petitions. "They don't hesitate at all."

Degenhardt said he believes the seat belt law will spur other legislation which restricts personal freedoms. He said government control over citizens' lives is approaching the police state envisioned in George Orwell's "1984."

"Pretty soon the government will be telling you what time to get up in the morning and what time to go to bed," he said. "If you want to get killed that's your business."

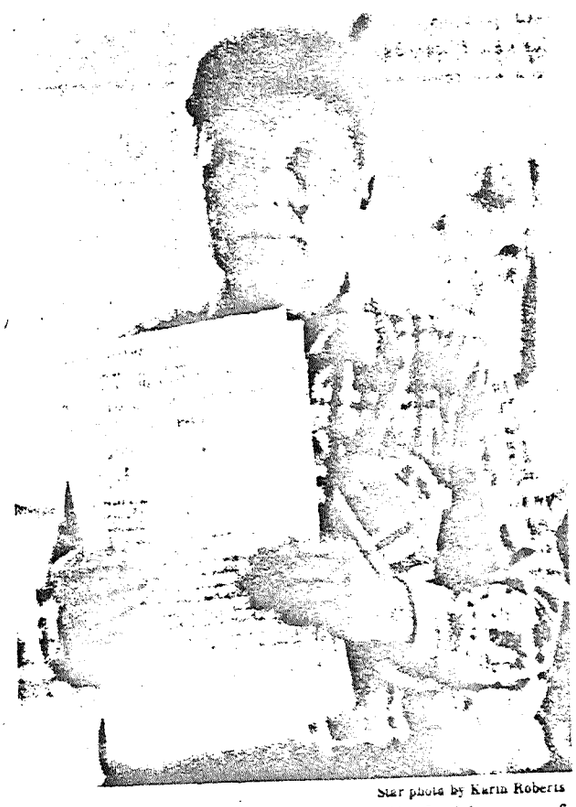
Degenhardt would not say whether he was obeying the law. "I think I'll plead the Fifth on that one," he said.

Degenhardt said most of the people signing the petitions buckle up anyway, but say they think the law infringes on their rights.

He added that he believes statistics which show that wearing seat belts save lives do not tell the whole story. "It seems to me there's a 50-50 chance of getting killed when you're wearing a seat belt," he said.

Harold Leitenberger, owner of the Treadwell Carbure-

See PETITIONS on page 9



Star photo by Karin Roberts

William Degenhardt of Franklin holds one of his petitions calling for repeal of the state's seat-belt law.

Petitions—

Continued from page 1

tor Company, agreed. Leitenberger, who has collected about 130 signatures in the last two weeks, hopped on the repeal bandwagon after getting a petition from Degenhardt.

Leitenberger said that in some cases, wearing seat belts can be dangerous to passengers of cars involved in accidents. If a car overturns, occupants can be trapped inside by their belts, unable to escape if the car should explode into flames, he said.

"The seat belt law is dictatorial. We're supposed to have government by the people, not by three men in a smoke-filled room," he said.

Mark Fairchild, owner of Mark's Grocery in Franklin, said he has collected about 300 signatures since he got a petition from Degenhardt. "It's democracy in motion," he said of the drive. "I'm not opposed to wearing one, I'm opposed to being told to wear one."

Cook sponsored the bill because it is a "gross intrusion into private life by government and creates greater disrespect for the law because people will ignore it," said legislative aide Alexander Mathes.

Nozzolio agreed, adding that about 14,500 signatures from people opposed to the law have poured into his office in the last two weeks.

"People are really saying something. The people demand this law be repealed," he said.

OCT 1, 1984 Revision

of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3.

S4.1.3.1.2 Subject to S4.1.5, an amount of the cars specified in S4.1.3.1.1 equal to not less than 10 percent of the average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, shall comply with the requirements of S4.1.2.1.

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3.

S4.1.3.2.2 Subject to S4.1.5, an amount of the cars specified in S4.1.3.2.1 equal to not less than 25 percent of the average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, shall comply with the requirements of S4.1.2.1.

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3.

S4.1.3.3.2 Subject to S4.1.5, an amount of the cars specified in S4.1.3.3.1 equal to not less than 40 percent of the average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer, shall comply with the requirements of S4.1.2.1.

S4.1.3.4 For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2 or S4.1.3.3.2 to comply with S4.1.2.1, each car whose driver's seating position will comply with these requirements by means other than any type of seat belt is counted as 1.5 vehicles.

S4.1.4 *Passenger cars manufactured on or after September 1, 1989.* Except as provided in S4.1.5, each passenger car manufactured on or after September 1, 1989, shall comply with the requirements of S4.1.2.1.

S4.1.5 *Mandatory seatbelt use laws.*

S4.1.5.1 If the Secretary of Transportation determines, by not later than April 1, 1989, that state mandatory safety belt usage laws have been enacted that meet the criteria specified in S4.1.5.2 and that are applicable to not less than two-thirds of the total population of the 50 states and the District of Columbia (based on the most recent Estimates of the Resident Population of States, by Age, Current Population Reports, Series P-25, Bureau of the Census), each passenger car manufactured under S4.1.3 or S4.1.4 on or after the date of that determination shall comply with the requirements of S4.1.2.1, S4.1.2.2. or S4.1.2.3.

S4.1.5.2 The minimum criteria for state mandatory safety belt usage laws are:

(a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.

(b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

(1) A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the belt usage requirement.

(2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

(3) A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989.

S4.2 *Trucks and multipurpose passenger vehicles with GVWR of 10,000 pounds or less.*

S4.2.1 *Trucks and multipurpose passenger vehicles, with GVWR of 10,000 pounds or less, manufactured from January 1, 1972 to December 31, 1975.* Each truck and multipurpose passenger vehicle with a gross vehicle weight rating of 10,000 pounds or less, manufactured from January 1, 1972, to December 31, 1975, inclusive, shall meet the requirements of S4.2.1.1 or S4.2.1.2, or at the option of the manufacturer, the requirements of S4.2.2. A protection system that meets the requirement of S4.2.1.1. may be installed at one or more designated seating posi-

33-182 O—84—23

ATT. (2)
S.THU 2/13/86

Thank you Mr. Chairman and Members of the Committee.

My name is Darrell Brewer. I live at 610 W 4th here in Topeka. I am a courier for Damon Medical Lab. I believe in freedom of choice and individual rights. Seat belts could be harmful as well as helpful. The government should not mandate and regulate my life like they do in Russia. Seat belts are there if I want to wear them.

I would thank my Senator, Jeanne Hoferer for circulating a survey in regard to the mandatory seat belt law. As I understand it the results of the survey show that 65% of the people in my district are against the bill.

If we had more legislators like Senator Hoferer that cared for and voted the desires of their constituents, we would be better off.

I ask this committee to defeat this bill.

Darrell J. Brewer

ATT. (3)
S.T+U 2/13/86

KANSAS BAR ASSOCIATION

1200 Harrison
P.O. Box 1037
Topeka, Kansas 66601
(913) 234-5696

SB 520

Senate Transportation Committee

February 13, 1986

Mr. Chairman. Members of the Senate Transportation Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

KBA represents 4,300 of the state's 5,900 attorneys. We support SB 520 as an appropriate public safety issue.

There was mention yesterday that one of the requirements of Transportation Secretary Dole was a provision that required evidence of nonuse of belts to be used in mitigation of damages.

I've enclosed a copy of the Kansas Supreme Court's latest ruling on the issue of whether nonuse of seat belts was negligence. This case, Rollins v. Department of Transportation, ____ Kan ____ (Dec. 1985) gives a history of our general rule, and I think predicts what it will do regarding the mitigation controversy when it states:

> "For there to be fault assessed in a negligence action there must be some duty which has been breached, and as there is no duty to use seat belts in Kansas, there can be no fault attributed to a person for failure to use them." (p. 5)

ATT. (4)
S.T+U 2/13/86

No. 56,947

WILLIAM T. ROLLINS,
Appellant,

v.

THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF KANSAS,
Appellee.

SYLLABUS BY THE COURT

1.

Evidence of the nonuse of seat belts by a driver of, or a passenger in, an automobile is inadmissible in a negligence action.

2.

Subject to the limitations of K.S.A. 75-6101 *et seq.*, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.

3.

In doing highway maintenance work, the duty under the tort claims act, absent any statutory exceptions, which the Department of Transportation of the State of Kansas owes the public is the same that would be required of a private individual doing the same work.

4.

The test of what duty is owed to the public under the tort

claims act is not whether the same or similar work is actually being done by a private person but what the standard would be if the work were to be done by a private person.

5.

An instruction on the duty required by the tort claims act under K.S.A. 75-6103(a) is appropriate if the government activity is such that there would be specific duties required of a private person doing the same work, other than to perform in a non-negligent manner.

6.

The standard instructions used in negligence actions are adequate under the tort claims act if the only duty required of a private person would be to perform in a non-negligent manner.

7.

Evidence of other accidents may be admitted if the court finds that the accidents have sufficient similarity to the accident in the case before the court. The admission of such evidence lies within the sound discretion of the trial court.

8.

An abuse of discretion is said to exist only when no reasonable person would take the view adopted by the trial court.

9.

The fact that an allegation of negligence is asserted in a pretrial pleading does not justify an instruction on that particular allegation if there is no evidence to support it.

Appeal from Sedgwick district court, KENNETH C. KIMMEL, judge. Opinion filed December 22, 1995. Reversed and remanded for new trial.

Jerry G. Elliott, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Mikel L. Stout* and *Nola Tedesco Foulston*, of the same firm, were with him on the brief for appellant.

Scott Logan, office of chief counsel, Kansas Department of Transportation, argued the cause, and *David G. Tittsworth*, chief counsel, *Jay L. Smith* and *Timothy P. Orrick*, of the same office, were with him on the brief for appellee.

The opinion of the court was delivered by

HOLMES, J.: This is an appeal by the plaintiff in a case which arose from a one-car accident that occurred in the early morning hours of July 31, 1980, on Kansas Highway 25 (K-25) seven miles south of Lakin. William T. Rollins (plaintiff-appellant) was a passenger in the back seat of the vehicle, a 1979 Chevrolet Chevette. The accident occurred on a section of highway that was undergoing resurfacing by the Department of Transportation of the State of Kansas (KDOT).

Rollins brought suit against KDOT and the Board of County Commissioners of Kearny County, Kansas, alleging failure of KDOT to exercise due care in the design, construction and maintenance of K-25. The Board of County Commissioners was subsequently dismissed from the action. A Sedgwick County District Court jury found the driver of the car sixty-five percent at fault, the plaintiff thirty-five percent at fault, and found no fault on the part of KDOT. Rollins appeals, claiming several errors on the part of the trial court.

Between midnight and 1:00 a.m., on July 31, 1980, Lana Swisher, BaLynda Bell and appellant left Ulysses, Kansas, in Lana's car, to travel to Lakin on K-25, a distance of approximately twenty-seven miles. Lana was driving. In the

area south of Lakin, KDOT was resurfacing the highway for about four miles with bituminous asphalt. The resurfacing work caused the surface of the roadway to extend above the highway shoulders, resulting in a drop-off at the edge of the paved portion of the highway. There were no warning signs in place and no temporary striping of the center and edges of the highway. As the Swisher automobile traveled this portion of the highway, its right wheels dropped off the road surface, the driver lost control and the car crashed in the ditch. Appellant was thrown from the vehicle and received serious injuries resulting in his being paralyzed from the waist down. Additional facts will be set forth as necessary in considering the various points on appeal.

The first issue raised by the appellant is that the trial court erred in admitting testimony regarding the effect of the driver's failure to use her seat belt on her ability to control the vehicle. Rollins' objection to evidence of the driver's failure to use a seat belt was overruled and the appellee's accident reconstruction expert was allowed to testify as to the effect of nonuse of a seat belt on a driver's ability to control his vehicle. It was his opinion Lana would not have lost control if she had been using her seat belt and that the accident would not have happened. In allowing the evidence, the judge stated he was only allowing it for the purposes of showing control of the vehicle and not to show negligence. We have consistently held that evidence of the nonuse of seat belts is inadmissible in a negligence action. In *Hampton v. State Highway Commission*, 209 Kan. 565, 498 P.2d 236 (1972), the defendant attempted to introduce evidence that the plaintiff was not using a seat belt to show negligence on behalf of plaintiff and a failure to mitigate damages. We held:

> "A driver has no legal duty to use an available seat belt, and evidence of nonuse is inadmissible either on the

issue of contributory negligence or in mitigation of damages." Syl. ¶ 9.

Following the adoption of comparative negligence, the issue was before the Court of Appeals in *Taplin v. Clark*, 6 Kan. App. 2d 66, 626 P.2d 1198 (1981), wherein the court stated:

"[U]nder the Kansas system of comparative negligence, it is not proper for a jury to consider as a negligence factor to reduce liability and damages the failure of a passenger to use an available seat belt." p.70.

The rule propounded in *Hampton* and *Taplin* was recently reconsidered and adhered to in *Ratterree v. Bartlett*,, 238 Kan. 11, 707 P.2d 1063 (1985). While the foregoing cases involved the plaintiff's failure to use a seat belt, the rule propounded is equally applicable when it is someone other than the plaintiff who is alleged to be at fault for failure to use the belts. KDOT's position was clearly set forth in Instruction No. 9, wherein the court states the appellee's contentions to be that the driver *was negligent* in failing to keep her vehicle under control. The attempt by the trial court to distinguish the driver's "control" of the vehicle from negligence was confusing as well as erroneous. For there to be fault assessed in a negligence action there must be some duty which has been breached and as there is no duty to use seat belts in Kansas, there can be no fault attributed to a person for failure to use them.

In his instructions to the jury the trial judge stated:

"The law of Kansas does not permit you to consider the presence and use or non-use of seat belts in any manner in arriving at your decision."

KDOT now asserts that, if the admission of the nonuse of seat belts by Lana was error, the foregoing instruction cured the error. We think not. It is clear that even with the giving of the instruction the trial court remained of the opinion the jury could consider the evidence on the issue of "control." To

allow KDOT's expert to voice an opinion based upon the nonuse of the seat belt by the driver was, in our opinion, so prejudicial that it could not be cured by the instruction given and certainly cannot be considered harmless error.

Although the foregoing would ordinarily dispose of this case, as it must be remanded for a new trial, there are other issues raised some of which we deem advisable to consider.

KDOT admits that it fell within the scope of the Kansas tort claims act, K.S.A. 75-6101 *et seq.* K.S.A. 75-6103(a) provides:

> "(a) Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

In *Carpenter v. Johnson*, 231 Kan. 783, 784, 649 P.2d 400 (1982), Chief Justice Schroeder, in writing for a unanimous court, stated:

> "The Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6101 *et seq.*, a so-called 'open ended' tort claims act, makes liability the rule and immunity the exception."

K.S.A. 75-6104 sets forth numerous exceptions under which liability is precluded. There is no contention on appeal that any of the exceptions apply in this case. Appellant sought an instruction based upon K.S.A. 75-6103(a) and also sought to introduce evidence of the standards and duties which would be required by KDOT if the work were being done by a private contractor. It appears that during the daytime, while work was going on, various warning signs were erected to advise and protect the motorists using the highway. However, at night the State's employees removed the signs and no warnings of the

condition of the highway, shoulders or ditches were provided. Appellant contends that he could produce evidence that if a private person were doing the maintenance or repair, then warning signs and other safety precautions would be required at night, which were not provided by KDOT in doing its work upon the highway. KDOT in its brief argues it is not subject to the same standards of a private person doing the same work, and states:

> "When plaintiff attempted to offer this evidence [KDOT's specifications for private contractors], defendant objected on the ground that the specifications were not relevant because they apply only to private contractors and are *not* applicable to defendant. Because there was no evidence of a private contractor's participation in the subject project, these specifications were irrelevant and wholly lacked probative value. . . .
>
> "The plaintiff's arguments on this point illustrate his lack of understanding of the Kansas Tort Claims Act . . . . Plaintiff labors under the fallacy that pursuant to the KTCA, the 'defendant at bar is to be judged by the same standards as would be applicable to a private person resurfacing the roadway.' . . . . Plaintiff argues that these standards are relevant because '. . . the jury . . . is entitled to consider what standards defendant requires of private contractors in assessing the negligence of defendant at bar.' . . . In other words, plaintiff argues that K.S.A. 75-6103 imposes upon governmental entities all duties applicable to private persons.
>
> "K.S.A. 75-6103(a) does *not* have this effect. The statute is intended to make governmental entities liable for the negligent acts of their employees where the employees were acting within the scope of their employment. Thus, K.S.A. 75-6103(a) is properly viewed as an effort to codify the common law doctrine of respondeat superior. The much-quoted article, 'Governmental

Liability: The Kansas Tort Claims Act [or The King *Can* Do Wrong]' by John A. Hageman and Lee A. Johnson, 19 W.L.J. 260 (1980), is instructive on this issue. In discussing K.S.A. 75-6103(a), the authors comment as follows:

> The final condition of liability, 'under circumstances where the governmental entity, if a private person, would be liable under the laws of this state,' should be read in conjunction with the preceding phrase to effect a codification of the common law of *respondeat superior*. 19 W.L.J. 260, 266-7 (1980).

The trial court properly ruled on this issue by sustaining defendant's objection."

We do not agree with appellee's interpretation of the statute. In that same article, immediately following the statement quoted by the appellee, the authors state:

> "That is, the governmental unit will be held liable for the negligent acts of its employees, if under the same facts a private employer would be held liable. It is clear from the conspicuous absence of reference to the 'proprietary-government' distinction, and from cases construing this phrase in the Federal Tort Claims Act that the test of liability is not whether the activity is done by the private sector." Note, Governmental Liability: The Kansas Tort Claims Act [or The King Can Do Wrong], 19 Washburn L.J. 260, 267 (1980).

KDOT argues that construction and reconstruction are done by private contractors while mere maintenance is done by KDOT employees and that, although there are specific standards and duties required for construction, there are none for maintenance. The trial court found that the work being done upon the highway constituted maintenance and not construction or reconstruction. We agree with that conclusion. KDOT's position is that as it does its own maintenance and no private

contractors are involved, it is not subject to any standards or duties which might apply if the work were being done by a private contractor. The test is not whether the same or similar work is actually being done by a private person but what the standard would be if the work were to be done by a private person. We hold that in doing highway maintenance work, the duty under the tort claims act, absent any statutory exceptions, which KDOT owes the public is the same that would be required of a private individual or contractor doing the same work. If appellant had evidence of stricter standards and duties required by KDOT for similar work by a private person, which if breached could be found to be negligence, then he should have been allowed to present it. In addition, an instruction upon the duty required by the tort claims act under K.S.A. 75-6103(a) is appropriate if the governmental activity is such that there would be specific duties required of a private person doing the same work other than to perform in a non-negligent manner. The instructions given herein were the standard ones used in negligence actions and would be adequate if due care is the only duty that would be required of a private contractor doing the same work. However, when higher, different, or particularized standards would be required if a private person were doing the same work, then the governmental employees are to be held to the same standards in determining liability under the tort claims act and an instruction covering such standards is appropriate. The fact that KDOT policy is to do all its own maintenance does not relieve it and its employees of the standards which would apply if a private person did the work under contract with KDOT.

Appellant next asserts error in the trial court's ruling that evidence of an allegedly similar accident was inadmissible in evidence. Without going into detail, Rollins attempted to introduce evidence of an accident wherein a car ran off the same stretch of highway, at night, only nine days after the

present accident. There, the driver had gone off the highway when he swerved to miss a jackrabbit, while in the present case, there is no clear explanation why the right wheels ran off the edge of the road. Evidence of other accidents may be admitted if the court finds that the accident has a sufficient similarity with the accident in the case before the court. *Hampton v. State Highway Commission*, 209 Kan. at 575. The admission of such evidence lies within the sound discretion of the trial court. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 538, 646 P.2d 1091 (1982). An abuse of discretion is said to exist only when no reasonable person would take the view adopted by the trial court. *Reich v. Reich*, 235 Kan. 339, 343, 680 P.2d 545 (1984). While there were numerous similarities in the two events, there were also dissimilar factors and we cannot say the court abused its discretion in excluding the evidence.

Another issue raised by appellant is that the trial court erred in not allowing his expert to testify that in his opinion the highway was not reasonably safe for travel. In *Ratterree v. Bartlett*,, 238 Kan. 11, we reiterated the rule that opinion testimony which goes to the ultimate issue of negligence is improper as invading the province of the jury. Here the ultimate issue for the jury to determine was whether the road was reasonably safe for the traveling public and, if not, whether it was due to KDOT's negligence. See *Lollis v. Superior Sales Co.*, 224 Kan. 251, 580 P.2d 423 (1978). Again, we cannot say the trial court abused its discretion in denying the opinion testimony.

Appellant asserts numerous errors in the instructions given by the trial court and in its refusal to give certain instructions requested by appellant. Many of these involved the seat belt and duty owed to plaintiff issues, and we assume similar problems with the instructions on those issues will not

arise in a retrial of this case. We do note, however, that the court's instruction setting out the contentions of the parties should be limited to the claims of negligence supported by the evidence. The fact that an allegation of negligence is asserted in a pretrial pleading does not justify an instruction on that particular allegation if there is no evidence to support it.

The final issue which we deem advisable to address is the trial court's admission into evidence of a 1980 version of the Kansas Driving Handbook. Lana was questioned by counsel for the appellee about her driving skills, when she obtained her driver's license and whether she had taken and passed a driver's education course. She had received a restricted license at the age of fourteen and an unrestricted license at sixteen, at least five years prior to this accident. At the time of preparing for her driver's license test she had been furnished a driver's handbook. She was also asked if she was familiar with the 1980 Kansas Driving Handbook and responded it was not the one furnished to her years earlier and she did not know what was in the 1980 version. We fail to see what relevance the admission of the 1980 driver's handbook had to the issues in this case. The trial court appears to have been under the impression that as it contained some "law" it could be considered by the jury and that the jury was not limited to the court's instructions on the law to be applied in this case. Considering the lack of foundation and relevance, the admission of the handbook was error.

We do not deem it necessary to address the other issues raised by the appellant as they are not likely to arise again on retrial.

The judgment is reversed and the case remanded for a new trial.

LOCKETT, J., concurring: I agree with the court on all issues raised, except that I would overrule *Hampton v. State Highway Commission*, 209 Kan. 565, 498 P.2d 236 (1972), and allow the trier of fact to consider the negligence factor of an occupant of an automobile who fails to use a seat belt.

Hampton is a 1972 case based on a 1970 Alabama decision, *Britton v. Doehring*, 286 Ala. 498, 242 So. 2d 666 (1970). There the Alabama court determined: (1) there was no statutory authority requiring that seat belts be installed or that they be used; and (2) admission of evidence of non-use of seat belts would allow the jury to "compare the damages" similarly to comparative negligence, a doctrine unknown to Alabama law. *Hampton* was decided in 1974, prior to the adoption of comparative negligence by our legislature.

In *Taplin v. Clark*, 6 Kan. App. 2d 66, 626 P. 2d 1198 (1981), the Court of Appeals stated that under comparative negligence the failure of a passenger of an automobile to use a seat belt was not a factor to consider. The *Taplin* court cited *Hampton's* conclusion that the existence of such a duty should be left up to the legislature.

Eleven years ago, our legislature required that all new passenger vehicles manufactured or assembled after January 1, 1968, be equipped with a seat belt for all passenger seating positions. K.S.A. 8-1749. In 1984, the legislature required every parent or legal guardian of a child under the age of four to provide a proper passenger safety restraining system while transporting the child in the front seat area of the automobile. K.S.A. 1984 Supp. 8-1344.

This court has recognized the general rule that one must use reasonable diligence to mitigate one's damages once the

risk is known. *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579 (1913). No one can deny that seat belts are placed in an automobile to protect the occupants of the vehicle from a known risk. In addition to the seat belt, devices to remind the occupants to use the seat belt are required to be installed, and the operator's manual furnished by the manufacturer states the hazards of failure to use a seat belt. The failure of an occupant of an automobile to use a seat belt should be a factor relevant to an appraisal of the occupant's duty to anticipate peril and should apply to the percentage of fault as required by our comparative negligence statute. Where safety standards are set by our leglislature, the failure to exercise the standard of safety should be relevant to the issue of negligence and admissible into evidence.

Kansas Chamber of Commerce and Industry

500 First National Tower, One Townsite Plaza
Topeka, KS 66603-3460 (913) 357-6321

JIM EDWARDS
Director
Public Affairs

Mr. Chairman and Members of the Committee:

In response to several of the questions that were asked in yesterday's hearing on SB 520, I am submitting this letter to you.

First, in reviewing the issue of the comparative safety between seat belts and shoulder harnesses, I would point to a National Highway Traffic Safety Administration study that shows lap/shoulder belt combination is 5.5 times more effective in preventing fatalities and 2.4 times more effective in preventing injuries than air bags are. Part of the reason for this difference is the way air bags work.

Air bags are engineered to inflate when sensors in the front of a car reveal that a solid barrier was hit when the car was traveling at least 12 miles per hour, or another vehicle was hit and the car was traveling at least 25 miles per hour. When either of these situations is detected, a small, hermetically sealed container of sodium azide ignites in a controlled fashion, generating a large amount of nitrogen gas. This gas inflates a porous bag so fast that before the bag is fully inflated, it is already releasing the gas. The air bag only works when fully inflated so there is just a fraction of a second where the bag provides full protection. In the case of multiple collisions, the air bag proves to be useless in the secondary impact.

One other reason for the difference is that air bags only provide protection in frontal collisions and are sometimes not even triggered by side, rollover, or rear-end collisions.

I hope that this input answers the questions raised yesterday.

Sincerely,

Jim Edwards

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ATT. (5)