

8.21 NONUSE OF SEATBELT INCLUDING ULTIMATE OUTCOME¹ (12/09)

As I told you earlier², defendant's contention that plaintiff was not wearing a seatbelt is not relevant in deciding who is at fault for causing the accident. But it may be meaningful in determining the amount of money plaintiff may recover for any injuries you find he/she received. I would now like to tell you how this works.

In order to succeed on this reduction of damages issue, defendant must prove by the greater weight of the evidence that:

1. Plaintiff was not using an available seatbelt at the time of the accident.³
2. Plaintiff was negligent in not using that seatbelt at the time of the accident.

¹ This charge incorporates the standards of *Waterson v. General Motors Corp.*, 111 N.J. 238 (1988), but does not incorporate the standard charge on ultimate outcome regarding liability, which appears at Model Civil Charge 7.31.

² This refers to Model Civil Charge 5.30K.

³ Under Federal Motor Vehicle Safety Standards, all passenger automobiles manufactured after June 30, 1986, must be equipped with a safety seat belt system. Since the determination of *Waterson* that the enactment of N.J.S.A. 39:3-76.2(e) *et seq.* reinforced a public policy encouraging the use of seat belts, and since those statutes require the driver and front seat passenger to wear a properly adjusted and fastened seat belt, several questions continue after *Waterson*. For example, could plaintiff be negligent for knowingly occupying a vehicle with a non-functioning seat belt? If there is a factual dispute whether the available seat belt was functional, who has the burden of proving that it was functional? Does the rationale of *Waterson* apply to vehicles other than passenger automobiles? Does *Waterson* apply to situations exempted under N.J.S.A. 39:3-76.2(g) from seat belt usage requirements?

3. Plaintiff's injuries were made greater or more severe because he/she was not using a seatbelt. In other words, some or all of plaintiff's injuries could have been prevented or avoided if he/she had been using a seatbelt.⁴

I would like now to talk with you about how you go about deciding if defendant has proven each of these three points to you. You may note that each of these points is set out on the jury verdict sheet as questions (_____).

The first point you must decide is whether defendant has shown that plaintiff was not using an available seatbelt at the time of the accident.

The second point that defendant must show is that plaintiff was negligent for not using the seatbelt.

Negligence in this type of situation is the failure to use the degree of care for one's own safety and protection that a reasonably prudent person would use in the same or similar circumstances. By a reasonably prudent person I mean neither the most cautious person nor one who is unusually bold, but rather one of reasonable vigilance, caution and prudence.

⁴ Normally, this will require expert testimony. See, *Dunn v. Durso*, 219 N.J. Super. 383, 388-389 (Law Div. 1986), and *Barry v. The Coca Cola Co.*, 99 N.J. Super. 270, 274-275 (Law Div. 1967).

New Jersey law⁵ requires the driver [and front seat passengers] of a car to wear a properly adjusted and fastened seatbelt while the vehicle is in operation on any street or highway of this State. If you find that the plaintiff was in violation of that law at the time of the accident, you may consider that violation of a statutory duty of care on the issue of negligence. However, the violation is not conclusive as to the issue of whether plaintiff was negligent.⁶ It is a factor or circumstance which you should consider in assessing the negligence, if any, of the plaintiff. You may also take into account the prevailing custom of seatbelt use at the time of the accident.⁷ [That is, what percentage generally of the drivers (and front seat passengers) used a seatbelt at the time of the accident?] Think about all of these factors in deciding whether plaintiff acted as a reasonably prudent person and, therefore, was or was not negligent in not using a seatbelt.

If you decide that a reasonably prudent person would not have been using a seatbelt, then you should find that the plaintiff was not negligent and stop deliberating on the seatbelt damage reduction claim.⁸ However, if you decide that a

⁵ *N.J.S.A. 39:3-76.2(f)*. The statute applies only to passenger automobiles, not other vehicles.

⁶ *Waterson, supra*, 111 *N.J.* at 263.

⁷ *Waterson, supra*, 111 *N.J.* at 266.

⁸ *See, Bleeker v. Trickolo*, 89 *N.J. Super.* 502 (App. Div. 1965), and *Johnson v. Salem Corp.*, 97 *N.J.* 78, 97-98 (1984).

reasonably prudent person would have used a seatbelt in that situation at that time, then you should find that the plaintiff was negligent and continue deliberating on the seatbelt damage reduction claim.

If you find that the plaintiff was negligent, you must then decide whether the failure to use a seatbelt increased the extent or severity of his/her injuries. In making this decision, you are to consider all of the evidence in this case, including the testimony of the expert witness(es) who testified. Think about the total extent of plaintiff's injuries and whether any of those injuries would have been avoided if he/she had been using a seatbelt. [**WHERE APPLICABLE:** If you find that the plaintiff was severely injured, and the evidence shows that his/her severe injuries could not have been avoided by the use of a seatbelt, it is immaterial that some very minor injuries could have been avoided by seatbelt use. Therefore, if the negligent failure to wear a seatbelt had no impact on the extent of the injury, you should cease to consider the seatbelt issue. If, on the other hand, you find that the negligent failure to wear a seatbelt increased the extent or severity of injuries, you must then evaluate the impact of the failure to wear a seatbelt.]⁹

If you decide three facts — one, plaintiff was not using an available seatbelt at the time of the accident; two, plaintiff was negligent in not using the seatbelt; and three, as a result, plaintiff's injuries were made greater or more severe — then you

must make two more decisions. You will see that these appear as questions () on your jury verdict sheet.

The first is to decide what part of plaintiff's injuries would have been avoided if a seatbelt had been used. The defendant has the burden of proving this to you. To do this, you must first determine the value of the total damages which plaintiff incurred. Then, you must set the amount of the damages that would have been sustained in the accident if a seatbelt had been used. You will subtract that amount from the total damages actually sustained in order to obtain what I will call seatbelt damages.

The final decision you must make about the seatbelt claim is whether you will allocate or assign some percentage of negligence or fault to plaintiff because of his/her failure to use a seatbelt. This is a separate consideration of fault from your earlier one concerning the fault of the parties in causing the accident. The percentage of negligence or fault I am talking about now is only in connection with the increased injuries. For how much of that fault — in a percentage ranging from one to one hundred percent — do you find plaintiff is responsible?¹⁰

⁹ *Waterson, supra*, 111 N.J. at 272.

¹⁰ Query: Does this apply when the plaintiff-front seat passenger is between 5 and 17 years of age? *See N.J.S.A. 39:3-76.2(f)(b)*.

You may be wondering why you have to make all of these decisions and how they may affect the final outcome of this case. I want to describe that to you now.

From the jury verdict sheet, you can see that you are making two separate decisions about fault. The first one is as to the cause of the accident. The second is as to the cause of any enhanced or increased injuries which occurred by not using a seatbelt.

Understand that you are not being asked to make the mathematical calculations; that will be my job — to put your findings into effect. But I am going to give you some idea as to how your decisions will work in affecting the final outcome in this case.¹¹

What I shall do is begin with your total amount of damages and then separate that money amount into two portions. One portion shall be the sum you calculated for the plaintiff's enhanced injuries as a result of not wearing a seatbelt, which I have been calling seatbelt damages, and the other shall be the remainder sum of the non-seatbelt damages, which is the total damages, less seatbelt damages.

I shall reduce the non-seatbelt damages by the percentage of fault, if any, you decide is plaintiff's for causing the accident. I shall reduce the seatbelt damages by the total amount which you decide is plaintiff's for the fault of the accident and the

failure to wear the seatbelt, taking into consideration defendant's fault for causing the accident. I shall then add the two reduced amounts together to arrive at the total award to the plaintiff.

But, as I said a moment ago, you do not do these calculations. I do them, based on your answers on the jury verdict sheet.

¹¹ The process is fully described in *Waterson, supra*, 111 N.J. at 270-275, especially at 274.

JURY VERDICT SHEET
(Including Seatbelt Damages)

- 1. Was D negligent in the operation of his/her motor vehicle?
Yes _____ go on to 2.
No _____ end your discussions.

- 2. If D was negligent, was his/her negligence a proximate cause of the accident?
Yes _____ go on to 3.
No _____ end your discussions.

- 3. Was P Negligent in the operation of his/her motor vehicle?
Yes _____ go on to 4.
No _____ skip over 4 and 5, and go on to 6.

- 4. If P was negligent, was his/her negligence a proximate cause of the accident?
Yes _____ go on to 5.
No _____ skip over 5 and go on to 6.

- 5. Comparison of negligence in causing the accident:
P _____ %
D _____ %
Total 100 %

Go on to 6 only if the negligence of D in causing the accident is 50% or more; if D's negligence in causing the accident is less than 50%, end your discussions.

6. Was P using an available seatbelt at the time of the accident?

Yes _____ skip over 7 and 8 and go on to 9.

No _____ go on to 7.

7. Was P negligent for not using a seatbelt?

Yes _____ go on to 8.

No _____ skip over 8 and go on to 9.

8. Were P's injuries made greater or more severe because he/she was not using a seatbelt?

Yes _____ go on to 9.

No _____ go on to 9.

9. P's total damages from the accident: \$_____.

Go on to 10 only if you answered 8 as "yes." If you answered 6, 7 or 8 as "no," end your discussions.

10. P's damages, if he/she had used a seatbelt \$_____.

Go to 11.

11. P's seatbelt damages (answer to 9 minus answer to 10): \$_____.

Go to 12.

12. P's negligence for not using a seatbelt: _____% (from 1% to 100%).

End your discussions; return your verdict.