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**Plaintiff Seat Belt Non-Use**

J. Gregory Marks  
Guajardo & Marks  
One Galleria Tower  
13355 Noel Road, Ste 1370  
Dallas, Texas 75240  
972-774-9800  
[greg@guajardomarks.com](mailto:greg@guajardomarks.com)

Client not wearing their seat Belt? What happens now?

I. OVER 40 YEARS OF PRECEDENCE, OVERRULED!

A. Seat Belt Nonuse Precedence

In the late 1960s, defense attorneys began trying to limit their client's exposure by introducing evidence that the plaintiff was not wearing a seat belt during an automobile accident. The first court of appeals to address the issue was *Tom Brown Drilling Co. v. Nieman*, 418 S.W.2d 337, 340-41 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.). In that case, two women were killed when their car struck a truck that illegally entered an intersection. The trial court refused to submit a charge on whether the plaintiffs' failure to wear seat belts was contributory negligence. The court of appeals affirmed holding that because there was no evidence that the plaintiffs would have lived had they been wearing their seat belts, then there was no evidence to support such an issue. The court also noted that there was no Texas authority holding that plaintiffs had a duty to wear seat belts. *See Also; United Furniture & Appliance Co. v. Johnson*, 456 S.W.2d 455, 459 (Tex. Civ. App.—Tyler 1970, writ dismissed) (holding that because defendants had no evidence that failure to wear seat belt caused the plaintiff's injuries, evidence of non-use irrelevant.). In *Quinius v. Estrada*, 448 S.W.2d 552, 554 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.), the court did hold that there was no common-law duty to use a seat belt and the omission was not actionable negligence because the plaintiff could not reasonably foresee the effects of a failure to use a seat belt.

The first Texas Supreme Court case to deal with the issue of non-use of seat belt was *Kerby v. Abilene Christian College*, 503 S.W.2d 526 (Tex. 1973). In that case, the driver of a truck was injured when he was ejected out an open sliding door after colliding with an ACC bus. The jury found Kerby 35% responsible and as a result the court of appeals held that Kerby was not entitled to any award due to his contributory negligence. The Texas Supreme Court, however, overruled the court of appeals and reinstated Kerby's recovery in full. The court distinguished between contributory negligence that contributed to cause the accident and contributory negligence that increases or adds to the extent of loss or injury. The court held that while the first will defeat recovery, the later will not. A year later, the Texas Supreme Court, in *Carnation v. Wong*, 516 S.W.2d 116 (Tex. 1974), held that "persons whose negligence did not contribute to an automobile accident should not have the damages awarded to them reduced or mitigated because of their failure to wear available seat belts." For over 40 years, the law in a car wreck case, absent crashworthiness issues, was well settled, evidence of non-use of seat belt was inadmissible.

In February of 2015, the Texas Supreme Court overruled this well settled precedence in *Nabors Well Services v. Romero*, 456 S.W.3d 553 (Tex. 2015). Specifically, the court held that evidence of nonuse of seat belts is admissible for the purpose of apportioning responsibility under the Texas proportionate-responsibility statute, provided that the nonuse of seat belt was a cause of his/her damages. In so doing, the court pointed out that the language of Tex. Civ. Prac. & Rem. Code, Section 33 specifically states that the fact finder should consider each person's role in causing, in any way, harm for which recovery of damages is sought. Because a plaintiff has both a statutory duty as well as a common law duty to wear a seat belt, a breach of that duty that causes plaintiff's harm can result in a reduction, and possibly a bar, to recovery.

## B. Takeaways from *Nabors Well Service v. Romero*

The court recognized that seat-belt evidence has been unique only in that it has been categorically prohibited in negligence cases. However, with that prohibition lifted, the court provided us with some very general guidelines. First, the court noted that seat belt evidence is only admissible if it is relevant. In other words, nonuse of seat belt can only be relevant if defendant has some evidence that nonuse caused or contributed to cause the plaintiff's injuries. Furthermore, the trial court should consider the evidence of whether the nonuse of seat belt caused or contributed to cause the plaintiff's injuries outside the presence of the jury, presumably because the court recognized the prejudicial effect that such evidence would have on a jury. In addition, the court recognized that expert testimony will often be required for the defendant to establish relevancy, however the court declined to say that expert testimony would be necessary in all cases. Lastly, the court specifically noted that even relevant seat belt evidence is subject to exclusion under Rule 403; more prejudicial than probative.

Unfortunately, there are no published cases where a court of appeals has reviewed the conduct of a trial court in either admitting seat belt evidence or excluding seat belt evidence post *Romero*. But, based upon the court's language, it appears that we know the following:

1. The defense has the burden to plead and prove that the failure of the plaintiff to wear a seat belt was a cause of plaintiff's injuries. How specific the defense has to be is not known. In other words, does the defense have to show that the plaintiff would not have suffered x, y or z injury had they been wearing a seat belt, or can the defense simply show that the injuries "would not have been as bad." It is probably the former, and arguably, the defense must show that these injuries "probably" do not occur but for nonuse of seat belt.
2. The defense most likely will need a qualified expert to "prove" that the nonuse of seat belt "probably" caused the additional injuries. Obviously, what constitutes a "qualified" expert will vary from case to case, and from judge to judge but most likely, it will need to be some type of biomechanical engineer. Their opinions will need to be established by using a scientific method and based upon reliable data.
3. The trial court will need to determine the admissibility of the nonuse of seat belt evidence outside the presence of the jury. Apparently, that means the court will need to hold some type of evidentiary hearing where evidence and arguments can be made by the defense to show that the failure to wear a seat belt caused or contributed to plaintiff's injuries. Obviously, the defense expert that most likely will be necessary to show this causal relationship will be subject to a *Daubert* attack.
4. The plaintiff always has rule 403 as a fallback position. When would seat belt evidence be more prejudicial than probative if the defense has actually shown that there is evidence of a causal relationship between nonuse and injury? Unfortunately, we have no case law to guide us, however, given the extreme prejudicial effect that nonuse of seat belt would have on a jury, one could argue that in order to get past 403, the defense has a significant burden to establish the causal link between nonuse and plaintiff's injuries.

Probably the biggest takeaway is this: Relevance is the trial court's province. In other words, relevance is determined by the trial court judge and only overturned based upon an abuse of discretion.

Furthermore, whether evidence is excluded under 403 is likewise within the province of the trial court and only overturned based upon an abuse of discretion. As a very smart attorney told me a long time ago when dealing with *Daubert* issues: choose your gate keeper wisely!

## II. BIOMECHANICAL ISSUES WITH SEAT BELT USE VERSUS NONUSE

There are many variable that affect the risk of injury to an occupant of a vehicle involved in a crash. For example, there are occupant characteristics such as age, gender, behavior like seat belt use, as well as seating position; there are crash characteristics such as direction of impact, vehicle speed at impact, etc. and there is vehicle characteristics such as weight, length, air bags, etc. The importance of each of these variables is difficult to assess because of the sheer number of variables and the need for such a large sample size to control for numerous potential confounders. However, despite the issues with statistical analysis, the following are some general observations about the difference between risks of injury associated with seat belt use versus nonuse.

Probably the two most important factors when it comes to seat belt use effectiveness is the speed of the crash, known as delta  $v$ , and the direction of the crash. Belt usage is shown to be most effective for front seat passengers in frontal crash scenarios. Probably, the primary reason for this is because the focus of safety design has been for front seat passengers involved in frontal collisions.

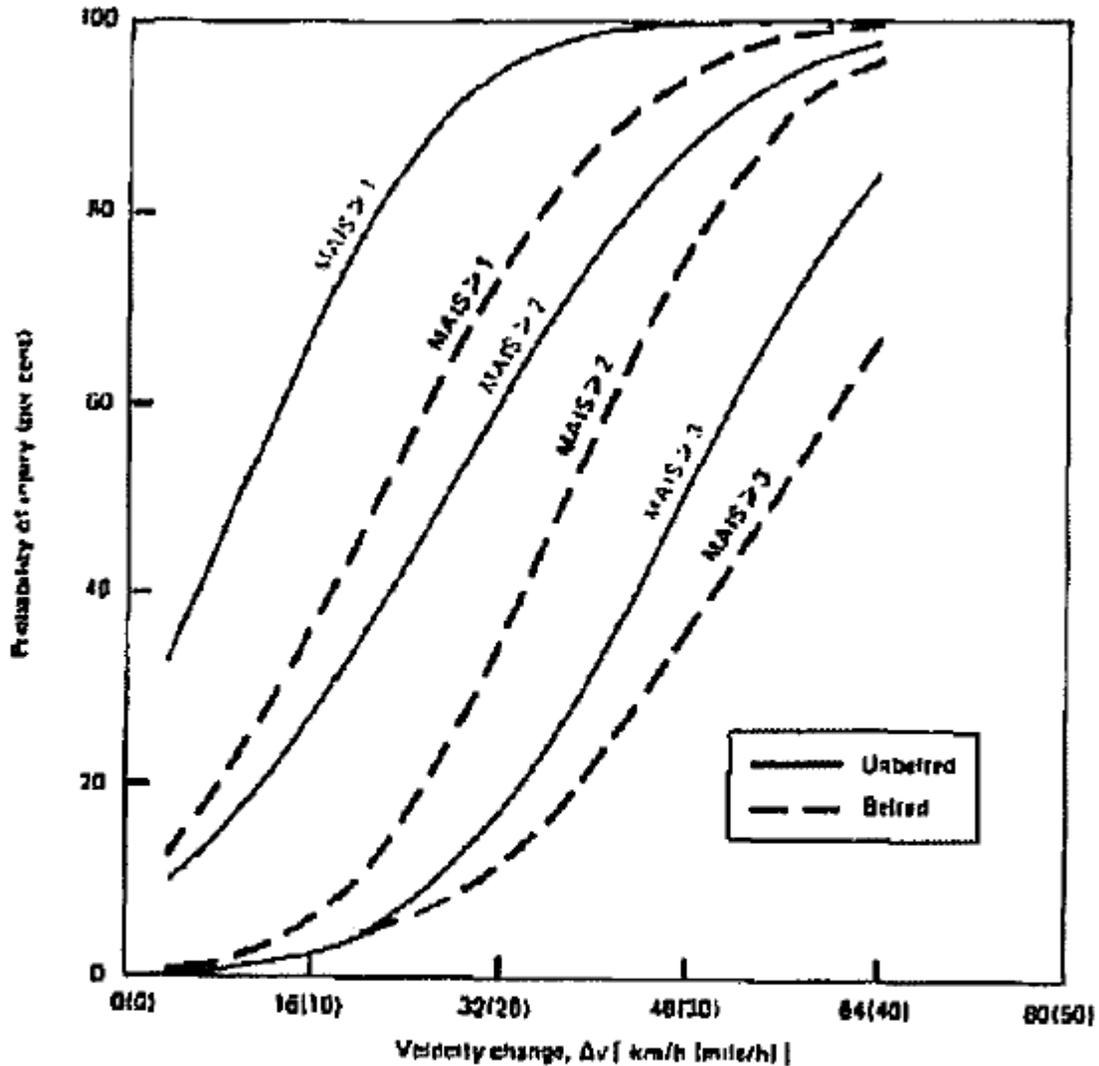
### A. The Bad News:

There is a significant reduction in risk for MAIS<sup>1</sup> 1 and 2 injuries when wearing a seat belt as opposed to not wearing a seat belt especially when the severity of impact is low.<sup>2</sup> As you can see from the following graph, at impact speeds from 10 to 15 mph, the risk of MAIS 1 injury is 70 to 85% without seat belt but drops to below 50% when wearing a seat belt. The risk for a MAIS 2 injury likewise drops significantly with seat belt usage.

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<sup>1</sup> MAIS stands for maximum abbreviated injury scale. Injuries are ranked on a scale of 1 to 6, with 1 being minor, 2 moderate, 3 serious, 4 severe, 5 critical and 6 an un-survivable injury. This represents the 'threat to life' associated with an injury and is not meant to represent a comprehensive measure of severity. The AIS is not an injury scale, in that the difference between AIS1 and AIS2 is not the same as that between AIS4 and AIS5. There are many similarities between the AIS scale and the Organ Injury Scales of the American Association for the Surgery of Trauma.

<sup>2</sup> See, The Probability of injury to Car Occupants in Frontal and Side Impacts, Mills and Hobbs, SAE No. 841652, 1984.



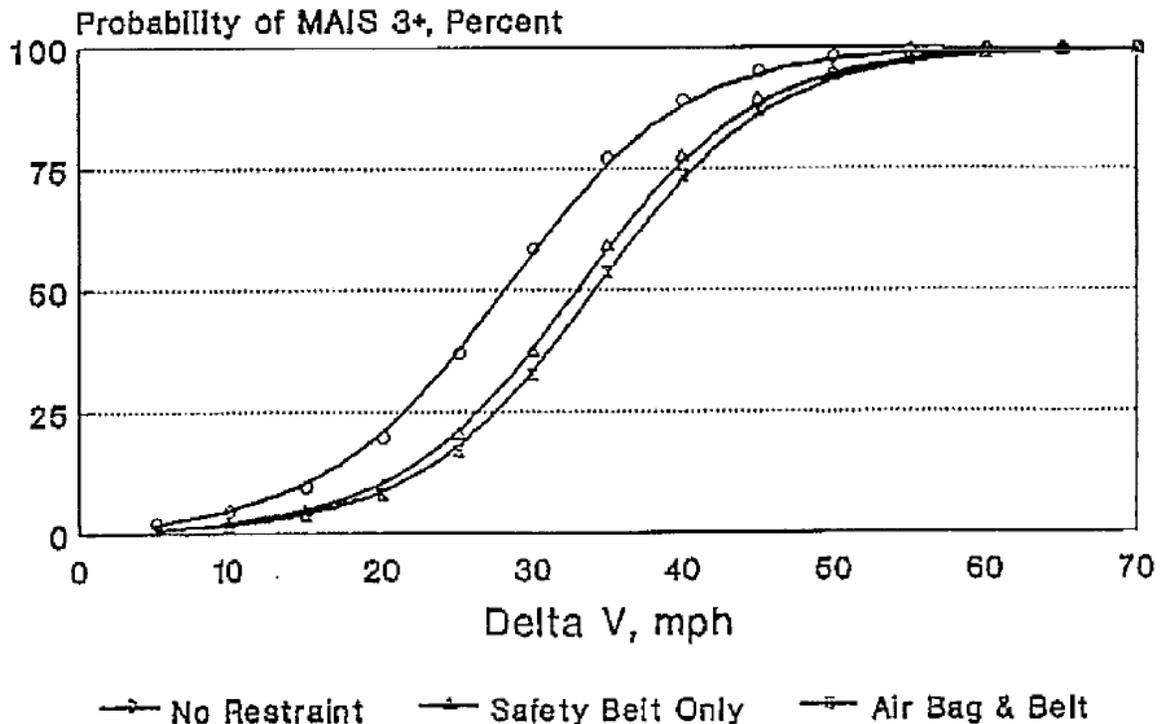
N.B. The range of impact severity for the sample studied was:  
 Unbelted  $\Delta v = 3 - 69 \text{ km/h (2 - 43 mile/h)}$   
 Belted  $\Delta v = 1 - 60 \text{ km/h (2 - 37 mile/h)}$

**Fig. 2 Probability of injury related to impact severity for unbelted and belted front seat occupants in frontal impacts (See also table 4)**

B. The Good News:

Below is a graph that compares the probability of  $MAIS 3+$  as a function of car crash severity ( $\Delta v$ ), for three different occupant scenarios; no restraint, safety belt only and air bag and safety belt<sup>3</sup>.

<sup>3</sup> See Relationships Between Crash Casualties and Crash Attributes, Malliaris, Diggs and DeBlois, SAE 970393, 1997

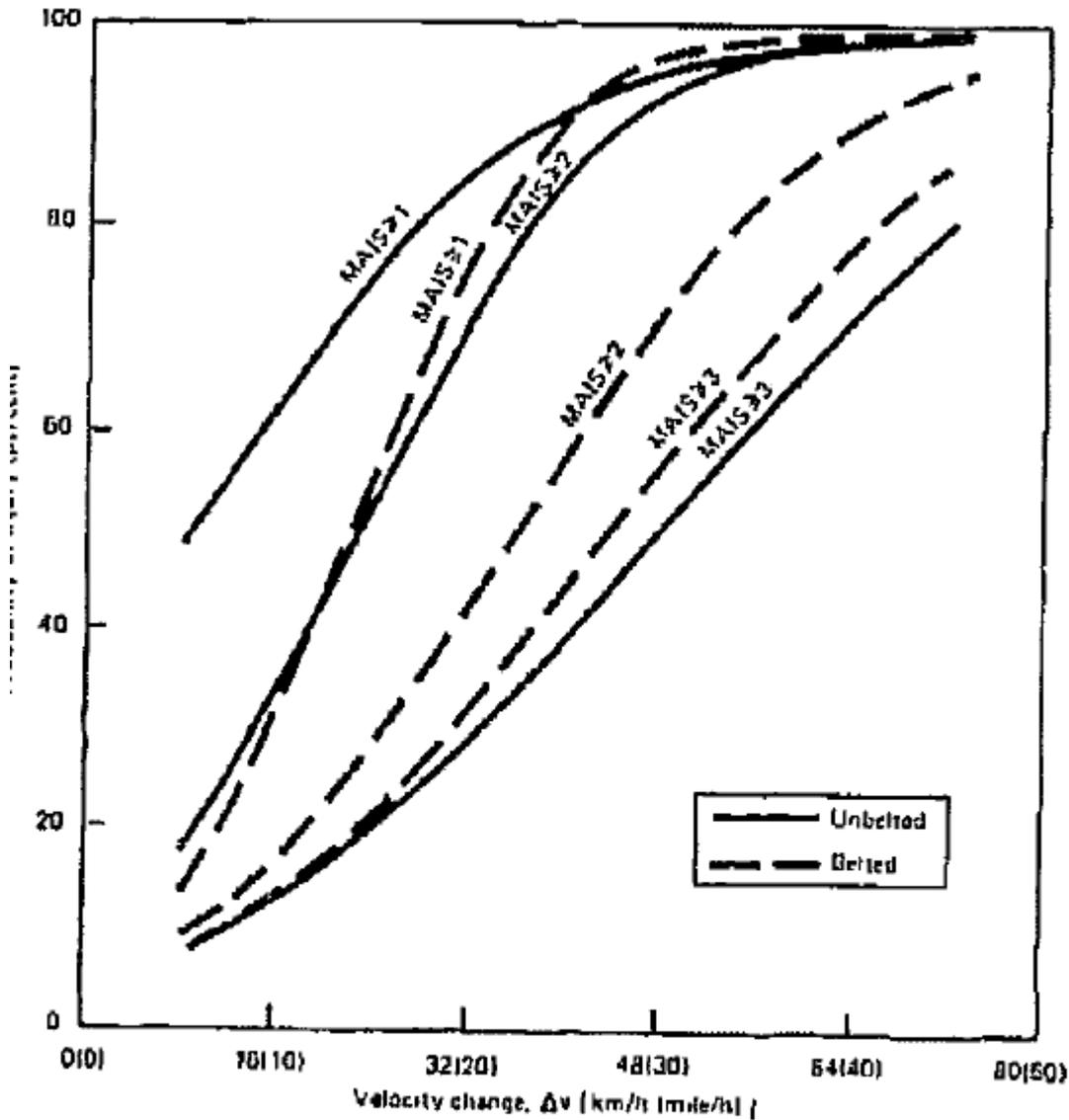


As you can see from this graph, there is a very small difference between risk of MAIS 3+ injury between safety belt only and safety belt and air bag. The difference between risk of injury for no restraint and safety belt only, however, is quite large especially when the crash severity is over 20 mph. For example, at 30 mph delta v, the risk of injury for non-belted occupants is greater than 50%, almost 60%, but the risk for the belted occupant is about half that. What is clear is that there is a limit to the speed of impact where seat belt usage will lower the risk of MAIS 3+ injuries below 50%, and that appears to be around 40 mph

In a majority of today's vehicles, however, despite not wearing a seat belt, the front seat occupant still receives the benefit of an air bag in collisions with a higher delta v . Unfortunately, the data comparing the risk of injury for belt and air bag versus air bag alone is sparse. It appears that there is some significant difference between air bag only and air bag and belt in frontal collisions.

C. Other factors:

For side impact crash scenarios, where the occupants are seated on the impact side, there is very little difference between the risks of MAIS 3+ injuries for belted occupants versus unbelted occupants.



NB. The range of impact severity for the sample studied was -

Unbelted  $\Delta v = 0 - 78 \text{ km/h } (0 - 47 \text{ mile/h})$

Belted  $\Delta v = 13 - 46 \text{ km/h } (8 - 28 \text{ mile/h})$

**Fig. 7** Probability of injury related to impact severity for unbelted and belted occupants in side impacts seated on the same side as the impact (See also table 10)

The data for occupants seated on the opposite side of impact is lacking.

With respect to specific body parts, seat belt use has been shown to significantly reduce MAIS 3+ head injuries, face injuries, and spine injuries for  $\Delta v$ 's of less than 60 kph. There is no significant reduction of risks of MAIS 3+ injuries to those areas when the  $\Delta v$  exceeds 60 kph. With respect to MAIS 3+ injuries to the abdomen and to the upper and lower extremities, the risks are similar regardless of the severity of the impact.

There is a plethora of studies dealing with seat belts usage and the effectiveness of seat belt usage in decreasing risk of injury. All of the studies conclude that seat belt usage decreases the risk of injuries in accidents. However, for purposes of whether nonuse of belts is admissible, the data must show that the injury more likely than not would have been avoided with seat belt use. In other words, the risk of that injury is less than 50% when the occupant is wearing a seat belt and more than 50% when he is not. That determination is influenced by many factors, most notably severity of impact and direction of impact. However, there are other factors, including, age, gender, seating position and the amount of intrusion into the occupant compartment. The fact is, the greater the intrusion into the occupant compartment, the less effective seat belt use is in preventing injuries. Each case will need to be analyzed based upon the unique set of facts for that case.

### III. PRACTICE POINTERS

#### A. Start with Screening your Cases better

Understanding that nonuse of seat belts is a potential issue, keep that in mind during case intake. When you learn that your client wasn't wearing a seat belt, most likely from the accident report, you need to consider the following questions:

1. What are your client's injuries?
2. How do you think the client suffered those injuries, i.e. specifically did they impact something inside the car, or was it from intrusion, etc.?
3. What is the severity of impact?
4. How could a seat belt have prevented the injury?

If your client suffered major internal injuries because he was ejected for the vehicle, it is very likely that evidence of your client's nonuse of seat belts is coming in. If your client suffered a broken leg, then maybe not. If your client suffered head injury, face injury, broken ribs, and internal injuries in a frontal crash with a delta v greater than 35 mph, then you may be able to keep out evidence of nonuse of seat belt. If your client suffered those same injuries at 25 mph delta v, then probably not. Whether you take the case or not may not be related to whether seat belt nonuse evidence is coming in or not but you need to be aware of the issue and its potential implication for if nothing else to manage your client's expectations.

#### B. Scrutinize the Defenses Evidence

The Defense has the burden to both plead and prove that the plaintiff's injuries were caused in whole or in part by his failure to wear a seat belt. To do this, in most cases, the defense will hire a biomechanical expert. Read and understand the biomechanical's report. Get his complete file including all data upon which he is relying. Scour through his data so that you understand his methods and his opinions even better than he does. Find the holes and the weaknesses. There will be holes most likely, and exploit those holes. If you don't understand his methods and opinions, hire a biomechanical to help you understand it, to help you find the holes. A consultant to help you pick apart another experts opinions is a lot cheaper than a testifying expert.

Depose the biomechanical expert. While how to discredit a biomechanical expert is beyond the scope of this paper, and in fact, is the subject of another paper, you will need to prepare to discredit that expert in their deposition. To do so will require adequate preparation. In addition to knowing and understanding the holes and weaknesses of the expert's opinions and methods, you will need to do a background check on the expert. How many times has he been struck? What is his bias? Etc. The judge is human, just like a juror, and if you are able to show that he is a whore, then the judge may be more apt to limit his opinions. Hit him with research! There will be plenty of it available that could be helpful to you.

C. File a *Daubert* Motion against the Expert

You need to strike the expert! If nothing else, you need to at the very least discredit the expert and his opinions so that even if he is not struck, you have a potential 403 argument. One advantage the biomechanical expert will have is the ability to opine as to how the injuries occurred in this accident. Based upon the kinematics of the occupant during the crash, the evidence inside the vehicle and the particular injuries of the plaintiff, the expert should be able to opine about how these injuries occurred pretty convincingly. Where the expert may have a problem is to testify how seat belt usage would have prevented some or all of the plaintiff's injuries. In order to do that, the expert will need to know specific data for this particular belt, with this particular seat, with this particular weighted occupant with this particular crash scenario. That data probably does not exist. The expert will most likely try to extrapolate known data with this particular scenario. For example, there will be data for a 50% dummy as a driver in a 30 mph frontal barrier crash. But how that information relates to a person in the back seat who weighs 250 pounds and is involved in an offset collision involving an underride crash is unknown. The fact is, there is probably no correlation at all. The crash pulse is different, the environment for the back seat passenger is different, and the restraint system is different. That is what you will need to attack!

Be careful about hiring a rebuttal expert against the defenses' biomechanical expert. Judges have a tendency that when they hear two experts arguing, they leave it to the jury. They think it is just another battle of the experts. So, by having your own expert actually can take focus away as to why the judge should strike the defenses expert. Furthermore, while I have not focused grouped this, it is my belief that you are not going to convince a jury that seat belt usage would not have mattered. I'm not saying it is impossible, just that it could end up being a waste of time and money! Be Careful!

D. If the Judge refuses to strike the defense expert, try Rule 403

The Texas Supreme Court specifically noted that the seat belt evidence would be subject to rule 403. Therefore, it seems that the court could envision that there would be times that even though there is evidence to support the causal connection between lack of seat belt use by the plaintiff and the injuries sustained by the plaintiff, it nevertheless can be excluded because the prejudice substantially outweighs the probative value. The prejudice must be "unfair prejudice," meaning, for example, that the jury will probably give such evidence great deference even though the causal connection is very weak. There are other factors in the rule, however, such as "confusion of the issues, or misleading the jury." "Junk Science" has been used as an example of this element because the pseudoscientific razzle-dazzle

misleads the jury. Likewise, “considerations of undue delay” is also a factor, meaning that the “costs [in terms of delay] outweigh the benefits.” The scope of this paper does not include writing a law review article on arguing rule 403. The point, however, is that the practitioner should be creative and argue rule 403 to try to exclude seat belt nonuse.

#### IV. CONCLUSION

The Texas Supreme Court changed over 40 years of precedence in *Nabors Well Service v. Romero*, where it held that evidence of nonuse of seat belts is admissible for the purpose of apportioning responsibility under the Texas proportionate-responsibility statute, provided that the nonuse of seat belt was a cause of his/her damages. This change in precedence could significantly impact your client’s recovery. The practitioner needs to be aware of the potential effects that such evidence could have on the outcome, and prepare to fight the admission of such evidence into trial. All is not lost if your client was not wearing a seat belt, but the fight becomes much harder in certain circumstances.