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Moving Toward the Fully Informed Jury

STEVEN B. HANTLER,* VICTOR E. SCHWARTZ,** CARY SILVERMAN,*** AND EMILY J. LAIRD****

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* Steven B. Hantler is Assistant General Counsel for government and regulation at the DaimlerChrysler Corporation. He directs the Company's litigation communications function, as well as the Class Action Group, Consumer Litigation Group and legal reform activities. Mr. Hantler is a senior fellow at the Pacific Research Institute. He has written extensively on the tactics employed by plaintiffs' lawyers in suing large corporations and in targeting certain industries. Recently, he published *The Change in How We Deal with Crisis: The Seven Myths of Highly Effective Plaintiffs' Lawyers*, VITAL SPEECHES OF THE DAY, Oct. 1, 2003, at 761. He also has a quarterly column on litigation issues published in *Litigation Management Magazine*. He is widely quoted on television and in business magazines and newspapers about high profile litigation. Mr. Hantler received his Bachelor of Arts from the University of Michigan and his J.D. from Wayne State University.

** Victor E. Schwartz is Chairman of the Public Policy Group in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. He co-authors the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S TORTS (10th ed. 2000). He has served on the Advisory Committees of the American Law Institute's RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY, APPORTIONMENT OF LIABILITY, and GENERAL PRINCIPLES projects. Mr. Schwartz received his B.A. *summa cum laude* from Boston University and his J.D. *magna cum laude* from Columbia University. In 2003, he was named one of the nation's Legal Reform Champions by *Chief Legal Executive* magazine; the American Legislative Exchange Council, the nation's largest membership organization of state legislators, also named Mr. Schwartz the Private Sector Person of 2003.

*** Cary Silverman is an associate in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. He received a B.S. in Management Science from the State University of New York College at Geneseo in 1997, an M.P.A. from The George Washington University in 2000, and a J.D. with honors from The George Washington University Law School in 2000, where he served as Managing Editor of The Environmental Lawyer.

**** Emily J. Laird is an associate in the Public Policy Group in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. She received her Bachelor of Arts *summa cum laude* from Oklahoma Baptist University and her J.D. from the University of Missouri-Columbia School of Law, where she was a member of the *Order of the Coif* and *Order of the Barristers*. While in law school, Ms. Laird was a member of the *Missouri Law Review* and a Note and Comment Editor for the *Journal of Dispute Resolution*.

I. INTRODUCTION

The backbone of the American justice system is the jury. No other country gives a group of ordinary citizens such great responsibility in deciding matters of money and freedom. This responsibility is bolstered by the public's faith in the jury system. According to an American Bar Association opinion poll, more than two thirds of the public considers juries to be the most important part of the justice system.[1] Despite the public's confidence, the system is actually riddled with contradictions, and undermined by current court practices and some rules of evidence.

1. *See* AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6-7 (1998), *available at* http://www.abanet.org/media/perception/perceptions.pdf (last visited Oct. 14, 2004).

While witnesses that appear before juries swear to tell "the truth, the whole truth, and nothing but the truth" under threat of perjury, in some cases they are not allowed to tell the "whole truth," so jurors do not hear it.

Courts have adopted rules of law that shield juries from material information that goes directly to their task of assessing all the relevant facts. For example, jurors in a civil case are unlikely to learn that a plaintiff has already received full compensation for his or her injury. Evidence that a plaintiff was not wearing a seatbelt, or was drunk, on drugs, or asleep at the wheel, is sometimes hidden from juries awarding damages in car accident cases. When a jury finds that a defendant is only slightly responsible for an injury, they are not instructed that under certain legal doctrines their decision may require the defendant to pay the entire award. Likewise, in some jurisdictions, jurors are not told that in finding a plaintiff just 1% responsible, they may substantially reduce his or her ability to recover damages at all. Jurors may also be misled into believing that a person who developed injuries from a toxic substance was exposed in a single work-place or through a single product, even if there were numerous and more significant sources of exposure unrelated to the defendant.

These are just a few areas where the jury is blindfolded from relevant and material information in the decision-making process. Typically, the rationale for these rules is based on legal doctrines that no longer exist. In other cases, courts simply find that juries cannot properly evaluate the evidence because it will lead them to a result based on passion or prejudice rather than law.[2] The evidence

2. In many courtrooms, jurors are also not provided with the basic tools necessary to evaluate the evidence and reach a decision based on the evidence, rather than their gut feelings, emotions, or impressions. For instance, many courts continue to not permit jurors to take notes, or discuss the testimony or other evidence amongst themselves prior to the conclusion of the trial. *See, e.g.*, B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1236 (1993) ("Despite overwhelming evidence from social science research and accepted truths about the educational process, the legal establishment remains largely resistant to proposals that would modify the present trial model to allow for more juror participation in general and improved communications with jurors in particular."); *Let Juries be Heard*, COLUMBUS DISPATCH, June 18, 2003 (citing Georgia, Minnesota, Mississippi, Nebraska and Texas as states that do not allow jurors to ask questions of witnesses); Sandra Day O'Connor, *Juries: They May Be Broken but We Can Fix Them*, 44-June FED. LAW. 20, 22 (1997) ("Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea what the legal issues are in the case, without permission to take notes or participate in any way, finally to be read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began."). Such practices, which require jurors to be silent, passive fillers of seats also demonstrates a lack of trust in their ability to reach reasoned decisions.

Many have advocated a more active role for juries. *See, e.g.*, AMERICAN BAR ASS'N, STANDARDS RELATING TO JURY TRIALS, Std. 13, at 17-20 (Draft, Sept. 2004), *available at* http://www.abanet.org/juryprojectstandards/draft.html (last visited Oct. 25, 2004); Dann, *supra*; Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J. L. REF. 213 (1999); Gregory P. Joseph, *Innovative Comprehension Initiatives Have Enhanced Ability of Jurors to Make Fair Decisions*, 73 N.Y. ST. B.J. 14 (June 2001); Sandra Day O'Connor, *supra*. Courts and legislatures are now moving toward that goal. *See, e.g.*, U.S. v. Rena, 944 F.2d 123 (3d Cir. 1991) (allowing juror notebooks); U.S. v. Plitt S. Theaters, Inc., 671 F. Supp. 1095 (W.D.N.C. 1987) (same); ACandS, Inc. v. Goodwin, 667 A.2d 116 (Md. 1995) (same); Murphy v. U.S., 670 A.2d 1361 (D.C. 1996) (allowing juror note-taking); Esaw v. Friedman, 586 A.2d 1164 (Conn. 1991) (same); State v. Trujillo, 869 S.W.2d

withheld in these cases often dramatically affects the verdict or size of the damage award.

This article examines several areas in civil law where relevant evidence is excluded from the jury's consideration as a rule of substantive law. It does not, however, challenge the traditional lawyer-client privilege, which is considered a necessary part of the judicial system.[3] Nor does it challenge the balancing of whether relevant evidence in a particular case should be excluded because its probative value is less than the potential for prejudice.[4]

Rather, the article suggests that courts should closely reexamine the basis for withholding evidence from juries. As noted above, there may be some good reasons for not giving information to juries. But, in many cases, courts have created substantive rules of law that exclude useful information from the jury's consideration. This article proposes abrogation of these hard, fast and often arbitrary rules of law. More trust should be placed in juries to consider highly relevant evidence and reach fair and reasonable decisions.

II. FIVE EXAMPLES OF HIGHLY RELEVANT EVIDENCE THE JURY WILL NOT HEAR

A. The Jury Will Not Know that the Plaintiff has Already Received Compensation for the Injury

The purpose of tort law is to make an injured person whole. Given this principle, should not juries be told if a plaintiff has already received compensation for the injury which is the subject of the lawsuit? Juries, however, are not given this information. The collateral source rule provides that in computing damages, a jury is not permitted to consider compensation the plaintiff received for the injury from sources other than the defendant, even if the payments partially or completely mitigated the plaintiff's actual monetary loss.[5] Evidence of payments coming from third parties are barred from the jury's ears, allowing an injured party to receive an award to cover lost wages or medical expenses even if he or she has already been reimbursed for those losses from a third party.[6]

Consider a typical application of the collateral source rule from the practical perspective of the jurors. The jury has found in a slip-and-fall case that a

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844 (Mo. App. 1994) (same); State v. Graves, 907 P.2d 963 (Mont. 1995) (allowing juror questions for witnesses at the discretion of the trial judge); State v. Fisher, 789 N.E.2d 222 (Ohio 2003) (same); *see also* Tim Eigo, *Michael Dann Shapes Jury Reform for a New Century*, 37-FEB ARIZ. ATT'Y 18 (Feb. 2001) (discussing Arizona's steps toward allowing more juror interaction through the Arizona Supreme Court Committee on More Effective Use of Juries); Rebecca L. Kourlis & John Leopold, *Colorado Jury Reform*, 29 COLO. LAWYER 21 (Feb. 29, 2000) (noting Colorado allows juror note-taking, juror notebooks, non-argumentative mini opening statements, and in civil cases, juror questions and pilot program pre-deliberation discussion). The reforms suggested in this article are in the same spirit.

3. Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

4. FED. R. EVID. 403 and state rule equivalents.

5. *See* RESTATEMENT (SECOND) OF TORTS § 920A (1979).

6. *See id.*, cmt. b.

neighborhood grocery store is liable because its employees failed to promptly pick up a broken jar of ketchup from the aisle and a fifty-year-old woman fell and hurt her knee. The jury feels that the employer is minimally at fault because another customer dropped the jar just minutes before the fall, but also feels that it is fair to place the burden of the plaintiff's medical expenses and lost wages on the business owner, rather than the innocent customer. On the basis of the evidence before it, the jury awards $40,000 in medical expenses, $80,000 in lost wages and $100,000 in pain and suffering.

Arriving at its decision, because of the collateral source rule, that jury will not know that eighty percent of the plaintiff's medical expenses were covered by her employer-provided health insurance and that she is also collecting $1,500 each month in social security disability payments. Instead, in a vacuum, the jury will decide the amount due to the plaintiff and award the full amount of her past and future lost wages and medical bills, as well as compensation for pain and suffering. Jurors surely would not like this role if they knew about it.

1. Rationale for the Collateral Source Rule

Why is the jury barred from learning that eighty percent of the plaintiff's expenses were already paid? The basis for keeping this information from the jury, "the Collateral Source Rule," dates back to 1854.[7] The collateral source rule is intended to protect against the risk that a jury may find no liability if it knows the plaintiff was compensated for their injury by other sources. Such evidence could also be prejudicial or confusing to the jury in violation of Rule 403 of the Federal Rules of Evidence, or the state equivalent.[8]

Courts recognize that the collateral source rule may allow a plaintiff to collect twice for the same injury.[9] While contrary to the fundamental principle that the purpose of tort law is to make a person whole, not "more than whole," courts have allowed this exception to persist under the premise that "the wrongdoer ought not to benefit—in having what he owes diminished—by the fact that the victim was prudent enough to have other sources of compensation, which he was probably paying for."[10] As a public policy matter, those who

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7. The first American application of the collateral source rule would appear to have occurred in the 1854 case of *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854).

8. Some scholars have argued that the rule can be justified on the grounds that the plaintiff may otherwise be left uncompensated because he or she must pay one-third or more of the recovery to a contingency fee lawyer. *See* Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 68 (1970). This theory, however, is in derogation of the "American Rule" of each party paying his or her own attorneys' fees and steps on the legislature's ability to provide for the recovery of attorney's fees by statute in circumstances it deems appropriate as a matter of public policy.

9. *See, e.g.*, Estate of Farrell v. Gordon, 770 A.2d 517, 520 (Del. 2001) ("Double recovery by a plaintiff is acceptable so long as the source of such payment is unconnected to the tortfeasor.").

10. J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 114 (1975); Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do not Mix*, 39 VAND. L. REV. 569, 571 (1986), *citing* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22, at 1345 (1957)) [hereinafter Schwartz, *Tort Law Reform*]; *see also Helfend*, 465 P.2d at 68 (stating that the rule "embodies the venerable concept that a person who has invested years of insurance premiums to assure

support the collateral source rule view the problem of "windfall" recovery as secondary to relieving a tortfeasor of liability due to a plaintiff's foresight in obtaining insurance or taking other action to mitigate the costs of the injury.

2. Criticism of the Collateral Source Rule

The collateral source rule has been called "one of the oddities of American accident law."[11] As one commentator observed, "[t]he question of mitigation for benefits from a collateral source reflects a potential conflict between guiding objectives of tort law. The first is to compensate the injured party, to make him whole; the second and more dubious one is to burden the tortfeasor with the loss."[12]

There are many criticisms of the collateral source rule. First, the rule's rationale is often not applicable in today's world of public benefits and trust funds.[13] Payments from these sources are not a result of any foresight on the part of the plaintiff, but the result of government-mandated programs, which are often at least partially, if not predominantly, funded by the same party that is subject to the lawsuit.[14] Despite this change in time and facts, some courts continue to strictly apply the collateral source rule to bar the jury from considering such payments to offset a defendant's liability.[15] Courts also apply the rule regardless of the degree of a defendant's wrongdoing such as when defendants are strictly liable.[16]

The collateral source rule also encourages litigation because it creates an incentive to sue, even if a person has already received or is receiving substantial compensation. Such litigation, and the attendant transactional costs, such as attorneys' and expert witness fees and court expenses, may increase insurance premiums and waste judicial resources. Awards in such cases serve little to no compensatory purpose. When the collateral source rule permits double compensation, the primary result is punitive.[17] Dispensing punishment through compensatory damages, however, improperly circumvents the constitutional safeguards

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his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence.").

11. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

12. Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 (1964) [hereinafter *Unreason*].

13. There are also other situations where application of the collateral source rule no longer makes sense, such as in strict product liability cases. *See generally*, Schwartz, *supra* note 10, at 573-75.

14. Even in cases in which the collateral payment resulted from the plaintiff's purchase of insurance, some have questioned whether the purchaser has already received "the benefit of the bargain." As one commentator noted, "the insured is purchasing security—prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants." *Unreason*, *supra* note 12, at 751.

15. *See* Schwartz, *supra* note 10, at 571.

16. *See generally* Schwartz, *supra* note 10, at 569.

17. *See* Hubbard Broad., Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980).

established by the Supreme Court.[18] Moreover, the vast expansion of the availability of punitive damages between the 1960s and 1980s has further weakened the call to use the collateral source rule as a backdoor means to punish a defendant.[19]

3. Cases Highlighting the Impact of the Collateral Source Rule

Though the collateral source rule does not serve its original purpose in many instances, courts tenaciously cling to it. These courts cite this rule to hide informative evidence from juries. For example, in *Johnson v. Weyerhaeuser Co.*,[20] substantial evidence existed that a worker's claims before the state department of labor for total permanent disability due to a psychiatric condition were not legitimate. Instead, the evidence showed malingering, where an able claimant opts to stay home rather than return to a job, because the claimant is receiving disability or other benefits.[21]

During the worker's administrative appeal to obtain permanent disability, the judge permitted the defense to present evidence from two doctors who independently diagnosed the worker as malingering, and a third who agreed the diagnosis was consistent with malingering.[22] The appeals judge allowed the defense to introduce evidence that the worker had incentive to malinger because he was receiving more money from worker's compensation than he could have made working.[23] The judge affirmed the award of permanent partial disability,

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18. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am. v. Gore, 517 U.S. 559 (1996); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

19. In the past thirty years, the underpinnings of the rule have further unraveled. First, state legislatures and courts drastically expanded the availability of punitive damages. Historically, and at the time of adoption of the collateral source rule, punitive damages were generally limited to cases of "the traditional intentional torts," designed to punish an individual's purposeful bad act against another. Victor E. Schwartz & Mark A. Behrens, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007 (1999). These included "assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property." *Id.* at 1008 (citations omitted). In the late 1960s, however, American courts radically expanded the availability of punitive damages beyond the traditional intentional torts. *See* Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (1967) (punitive damages awarded for fraud). "Reckless disregard" became a popular standard for punitive damages liability, *see, e.g.*, UTAH CODE ANN. § 78-18-1(1)(a) (2002), and even "gross negligence" became enough to support a punitive damages award in some states, *see e.g.*, Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988). By the late 1970s and early 1980s, "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface," and the size of punitive damage awards "increased dramatically." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

20. 953 P.2d 800 (Wash. 1998).

21. *Id.* at 801.

22. *Id.*

23. *Id.*

rejecting the worker's claim for permanent total disability.[24]

The worker appealed to the Washington Supreme Court, arguing that evidence of his workers' compensation payment was inadmissible collateral source evidence.[25] The court agreed.[26] In its holding, the court cited traditional collateral source concerns that juries would use evidence of collateral payment to improperly reduce damages.[27] Despite the fact that juries in workers' compensation cases do not determine the amount of damages, the court still held that juries must be blindfolded from this evidence "because at any stage of a workers' compensation proceeding, the trier of fact could use evidence of collateral source benefits to determine that the claimant does not need the award and, therefore, is not disabled."[28] The court's ruling signaled a lack of faith in jurors' abilities to use evidence to make informed decisions, choosing instead to hide important facts from the jury's purview.

The collateral source rule is also used to hide important evidence relating to responsibility in automobile accident cases. In *Votolato v. Merandi*,[29] a police car collided with a Chevy Blazer, causing the Blazer to flip over, killing a 16-year-old passenger. The girl's mother settled with the insurance carrier of the Blazer's driver for $95,000.[30] She then sued the City of Providence and the police officer whose car collided with the Blazer.[31] At trial, the defendant questioned the plaintiff about the $95,000 settlement, arguing this information was relevant to the jury for purposes of Rhode Island's set-off in allocating

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24. *Id.*

25. *Johnson*, 953 P.2d at 802.

26. *Id.*

27. *Id.* at 803.

28. *Id.* The decision in *Mickelson v. Montana Rail Link, Inc.* similarly demonstrates a court's desire to hide collateral source evidence from the jury, even when this evidence is highly probative on the issue of the plaintiff's failure to mitigate damages. 999 P.2d 985 (Mont. 2000). In *Mickelson*, the spouse and children of a driver sued a railroad after he received severe brain injuries when his vehicle collided with a freight train. The trial court allowed the defense to question one of the plaintiff's examining doctors on whether it was his understanding that the plaintiff "was resisting supported employment as a result of his fear that he might jeopardize his workers' compensation benefits." *Id.* at 990. The plaintiff's counsel moved for a mistrial based on the introduction of this evidence, but the trial court denied the plaintiff's motion, concluding that the defense could show the plaintiff "chose not to mitigate his damages and that he was actually malingering by not accepting a supported employment position." *Id.* The jury returned a verdict in favor of the defense. *Id.*

On appeal, the Montana Supreme Court held that the evidence of workers' compensation payments should not have been admitted and remanded the case for a new trial. *Id.* at 992. The court noted that "courts have reasoned that such information would tend to prejudice the jury and influence their verdict, either as to liability or damages, as such information is ordinarily immaterial and irrelevant." *Id.* at 991 (citations omitted). In so holding, the court removed from the jury's consideration evidence that the injured man may have failed to mitigate his damages—information clearly relevant to a jury's determination of damages.

29. 747 A.2d 455 (R.I. 2000).

30. *Id.* at 459.

31. *Id.* at 458.

damages.[32] The jury returned a verdict for the defense.[33]

The plaintiff appealed, claiming that a jury should not have considered settlement evidence under Rhode Island's set-off system, but that the judge should instead calculate the set-off after the jury's decision—a matter of first impression for the Rhode Island Supreme Court.[34] The court agreed. It rejected the minority "jury rule" that allows the jury to hear evidence of third-party settlements to help them determine the final amount of damages to award.[35] Instead, the court held that "unless evidence of a settlement is relevant to some issue, other than the quantum of damages, a trial justice is instructed to bar the admission of such evidence and subsequently to make the appropriate reduction in any jury award rendered in favor of the plaintiff."[36]

In the trial court, the jury received information pertinent to their determination of liability: the fact that the girl's mother had already settled with the driver of the car from which the girl was thrown. Knowing this information, the jury could then understand why the mother was suing only the city and the police officer and not the driver. Armed with these facts, the jury then could have determined whether the appropriate party had already paid, or whether the city and police authority should expend their more limited resources to pay damages. Yet, the Rhode Island Supreme Court took this greater understanding away from the jury. Under its ruling, Rhode Island judges—rather than jurors charged with the task of assessing damages—are solely responsible for reducing a plaintiff's recovery by the amount for which a claim was settled by a third party.

Courts use the collateral source rule today in situations which do not make sense, given its original purpose of not giving a defendant the benefit of a plaintiff's prudence in paying for insurance.[37] Courts sometimes hide evidence from the jury about available government programs that benefit the plaintiff—programs the plaintiff did not need to exercise any forethought to receive. For example, in a medical malpractice case, the Alabama Supreme Court held that a jury, in assessing lifetime damages for a child who sustained brain damage prior to birth, could not learn about available public school education opportunities.[38] In order to determine compensation for future educational expenses, the court allowed the plaintiff to present an expert who testified about the girl's needs for a rehabilitative program, including physical therapy, occupational therapy, and

32. *Id.* at 459 n.2, 461. Rhode Island law allows a set-off in damages for the amount already paid in a case. *Id.* Alternatively, the defense argued the settlement was relevant for impeachment purposes to show the plaintiff's litigiousness. *Id.*

33. *Id.* at 458.

34. *Votolato*, 747 A.2d at 461. The plaintiff also argued that this evidence could not be used for impeachment purposes. *Id.*

35. *Id.* at 461-62.

36. *Id.* at 462.

37. *See* Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 61 (Cal. 1970) ("The tortfeasor should not garner the benefits of his victim's providence.").

38. Williston v. Ard, 611 So. 2d 274, 278 (Ala. 1992).

speech pathology.[39] But when the defense attempted to allow a local special education coordinator to testify about the availability of programs in the public school system for multi-handicapped children, the trial court held that the defense could not present this evidence because of the collateral source rule.[40] The Alabama Supreme Court affirmed the trial court's decision to exclude this evidence. Allowing a jury to consider available public school resources would provide the jury the freedom to determine whether these services met the plaintiff's needs or not. The court deliberately withheld from the jury information that could help it make an informed decision.

Courts rejecting Alabama's approach point out that if a court admits evidence of available public special education, "[p]laintiffs, of course, may respond to this evidence with arguments of its inadequacy, the risk of its continued availability, etc."[41] Giving the jury this information merely allows them to understand the educational resources available to the plaintiff, rather than leaving the jury to speculate. Further, as the Florida Supreme Court determined, the original purposes of the collateral source rule are not undermined by admitting evidence of public school benefits:

> [T]he policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation . . . . In a situation [where] the injured party incurs no expense, obligation, or liability, we see no justification for applying the [Collateral Source] rule. We refuse to join those courts which, without consideration of the facts of each case, blindly adhere to "the collateral source rule permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant."[42]

4. A Better Approach: Let the Jury Decide Fair Compensation Based on All the Evidence

As the Florida Supreme Court recognized, the collateral source rule exists in many contexts today, but its public policy weakness has caused a number of courts to reduce its reach or eliminate it altogether.[43] A better approach is to allow juries to consider all of the compensation available to the plaintiff, including disability, healthcare insurance reimbursement of medical bills, and payments from settlements with other defendants. If the jury finds the defendant at fault and the plaintiff an innocent party, it can provide an award that gives the benefit of the doubt to the plaintiff. Damages awarded in this framework more

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39. *Id.* at 278-79.

40. *Id.* at 278.

41. Washington v. Barnes Hosp., 897 S.W.2d 611, 621 (Mo. 1995) (en banc) (admitting evidence of a free public education).

42. Florida Physician's Ins. Reciprocal v. Stanley, 452 So.2d 514, 515-16 (Fla. 1984) (quoting *Unreason*, *supra* note 12, at 742).

43. *See id.*

fairly compensate an injured person for actual loss and not provide double compensation resulting from legal fiction or unnecessary litigation.[44]

B. The Plaintiff Was Not Wearing a Seatbelt

In the federal regulatory process, safety policy is developed by a thorough, expert-led investigation of risks leading to a scientific conclusion.[45] In stark contrast, in the tort process, the investigative process is anything but scientific and methodological. Jurors are asked to make findings that can influence safety standards in entire industries armed with only the snippets of information provided to them by the attorneys for each side in an individual case.

Federal auto safety investigators and scientists want to know all the pertinent facts in making safety assessments.[46] The legal system, however, deliberately hides from jurors many pertinent and highly relevant facts through arcane and discriminatory rules of evidence. For example, an important fact in automobile accident cases is that no safety device can be counted on to fully protect people who fail to wear seatbelts.[47] The National Highway Traffic Safety Administration ("NHTSA") has found that safety belts reduce death and serious injury of front seat occupants by fifty percent.[48] Indeed, the NHTSA reports that seatbelts saved an estimated 14,000 motorists in 2002 and saved "billions of dollars in costs to society annually" by "saving lives and preventing injuries."[49]

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44. *See* PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 542 (10th ed. 2000) (noting that over half of the states have modified the collateral source rule by statute).

45. *See generally* U.S. DEPT. OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., GUIDE TO THE INSPECTIONS OF BIOTECHNOLOGY, BIOLOGICS, COMPUTER ISSUES, DEVICES, DRUGS, FOODS COSMETICS, & MISCELLANEOUS, *available at* http://www.fda.gov/ora/inspect_ref/igs/iglist.html (last visited Feb. 25, 2005) (providing detailed instructions for investigations of various industries).

46. In fact, federal guidelines suggest detailed questions and provide inspection checklists for safety inspectors of various industries. *See generally, e.g.*, U.S. DEPT. OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., GUIDE TO THE INSPECTIONS OF DAIRY PRODUCTS MANUFACTURERS, *available at* http://www.fda.gov/ora/inspect_ref/igs/dairy.html (last visited Feb. 25, 2005) (detailing specific facts to be checked in dairy inspections); U.S. DEPT. OF HEALTH & HUMAN SERVS., BIOTECHNOLOGY INSPECTION GUIDE REFERENCE MATERIALS & TRAINING AIDS, *available at* http://www.fda.gov/ora/inspect_ref/igs/biotech.html (last visited Feb. 25, 2005) (detailing specific facts to be checked in biotechnology inspections).

47. *See* U.S. DEP'T OF TRANSP., FED. MOTOR CARRIER SAFETY ADMIN., SHARE THE ROAD SAFELY: SAFETY TIPS FOR CAR DRIVERS, *at* http://www.nozone.org/cardrivers/carSafety_Tips.asp (last visited Feb. 25, 2005). Other safety devices are not nearly as effective as seatbelts. Take airbags, for instance. According to the National Highway Traffic Safety Administration, "[a]ir bags are designed to be used *with* seat belts. By themselves, they are only 12% effective at reducing deaths." U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., HOW WEARING SEATBELTS CAN HELP YOU SAVE MONEY, TIME,AND YOUR LIFE, DOT HS 809 453, *available at* http://www.nhtsa.dot.gov/people/injury/airbags/Seatbelt%20Broch%20Web/nonpolice.html (last visited Feb. 25, 2005) (emphasis in original).

48. U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., May 2003 CLICK IT OR TICKET SAFETY BELT MOBILIZATION EVALUATION FINAL REPORT (Nov. 2003), *available at* http://www.nhtsa.dot.gov/people/injury/airbags/clickit_ticke03/ciot-report04/CIOT%20May%202003/index.htm (last visited Feb. 25, 2005) [hereinafter, "CLICK IT OR TICKET FINAL REPORT"].

49. *Id.* at http://www.nhtsa.dot.gov/people/injury/airbags/clickit_ticke03/ciot-report04/CIOT%20May%202003/ pages/VDiscussion.htm (last visited Feb. 25, 2005).

1. Court Decisions Blindfolding Jurors to Evidence that the Plaintiff Failed to Wear a Seatbelt are Antiquated

People today naturally realize the importance of seatbelt use in auto accidents. Often, one of the first questions people ask after hearing about a car accident is, "were they wearing their seatbelts?" Certainly, this question also comes to the minds of jurors deliberating an automobile accident case. Yet thirty-two states do not allow jurors to consider a plaintiff's seatbelt use in assessing damages.[50] In fact, only nine states allow jurors to consider seatbelt use as evidence of contributory negligence,[51] sometimes referred to as the

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50. *See* Christopher Hall, *Nonuse of Seatbelt as Reducing Amount of Damages Recoverable*, 62 A.L.R.5th 537 § 3 (1998). The thirty-two jurisdictions that do not permit introduction of seatbelt nonusage to lower damages include: Alabama (*See* Britton v. Doehring, 242 So. 2d 666 (Ala. 1970)); Arkansas (*See* Baker v. Morrison, 829 S.W.2d 421 (Ark. 1992) (citing ARK. CODE. ANN. § 27-37-703 (Michie 1991))); Connecticut (*See* Bower v. D'Onfro, 663 A.2d 1061 (Conn. Ct. App. 1995), *rev'd in part on other grounds*, 696 A.2d 1285 (Conn. App. Ct. 1997) (citing CONN. GEN. STAT. ANN. § 14-100a(c)(4)); Delaware (*See* Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); the District of Columbia (*See* McCord v. Green, 362 A.2d 720 (D.C. 1976). *But see* Gen. Motors Corp. v. Wolhar, 686 A.2d 170 (Del. 1996) (allowing in evidence of non-seatbelt usage as supervening cause when motorist alleges injuries from being thrown around the vehicle as a result of negligent design)); Georgia (*See* C.W. Matthews Contracting Co., v. Gover, 428 S.E.2d 796 (Ga. 1993) (citing GA. CODE ANN. § 40-8-76.1 (1993)); Idaho (*See* Quick v. Crane, 727 P.2d 1187 (Idaho 1986)); Illinois (*See* Clarkson v. Wright, 483 N.E.2d 268 (Ill. 1985)); Indiana (*See* State v. Ingram, 427 N.E.2d 444 (Ind. 1981)); Kansas (*See* Gardner v. Chrysler Corp., 89 F.3d 729 (10th Cir. 1996) (applying Kansas law)); Louisiana (*See* Miller v. Coastal Corp., 635 So. 2d 607 (La. Ct. App. 1994 (citing LA. REV. STAT. ANN. § 32:295.1(E) (1994))); Maine (*See* Pasternak v. Achorn, 680 F. Supp. 447 (D. Me. 1988) (applying Maine law, citing ME. REV. STAT. ANN. tit. 29, § 1368-A (1964))); Minnesota (*See* Anker v. Little, 541 N.W.2d 333 (Minn. Ct. App. 1995) (citing MINN. STAT. § 139.685, subd. 4 (1994))); Mississippi (*See* D.W. Boutwell Butane Co. v. Smith, 244 So. 2d 11 (Miss. 1971)); Montana (*See* Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473 (D. Mont. 1995) (applying Montana law, citing MONT. CODE ANN. § 61-13-106 (1987))); Nevada (*See* Jeep Corp. v. Murray, 708 P.2d 297 (Nev. 1985)); New Hampshire (*See* Thibeault v. Campbell, 622 A.2d 212 (N.H. 1993) (citing N.H. REV. STAT. ANN. § 265:107(a) (Supp. 1992))); New Mexico (*See* Mott v. Sun Country Garden Prods., Inc., 901 P.2d 192 (N.M. Ct. App. 1995) (citing N.M. STAT. ANN. § 66-7-373 (Michie 1985))); North Carolina (*See* Barron v. Ford Motor Co. of Can. Ltd., 965 F.2d 195 (7th Cir. 1992) (applying North Carolina law)); Ohio (*See* Vogel v. Wells, 566 N.E.2d 154 (Ohio 1991)); Oklahoma (*See* Fields v. Volkswagen of Am., Inc., 555 P.2d 48 (Okla. 1976)); Pennsylvania (*See* Vizzini v. Ford Motor Co., 569 F.2d 754 (3d Cir. 1977) (applying Pennsylvania law)); Rhode Island (*See* Swajian v. Gen. Motors Corp., 559 A.2d 1041 (R.I. 1989)); South Carolina (*See* Jones v. Dague, 166 S.E.2d 99 (S.C. 1969)); South Dakota (*See* Davis v. Knippling, 576 N.W.2d 525 (S.D. 1998) (citing S.D. CODIFIED LAWS § 32-38-4) (Michie 1994)); Tennessee (*See* MacDonald v. Gen. Motors Corp., 784 F. Supp. 486 (M.D. Tenn. 1992) (applying Tennessee law, citing TENN. CODE ANN. 55-9-604) (1992))); Texas (*See* Carnation Co. v. Wong, 516 S.W.2d 116 (Tex. 1974)); Utah (*See* Whitehead v. Am. Motors Sales Corp., 801 P.2d 920 (Utah 1989) (citing UTAH CODE ANN. § 41-6-186 (1988)); Virginia (*See* Freeman v. Case Corp., 924 F. Supp. 1456 (W.D. Va. 1996), *rev'd on other grounds*, 118 F.3d 1011 (4th Cir. 1997), *cert. denied*, 522 U.S. 1069 (1998) (recognizing rule)); Washington (*See* Clark v. Payne, 810 P.2d 931 (Wash. Ct. App. 1991) (citing WASH. REV. CODE § 46.61.688(6) (1991))); West Virginia (*See* Miller v. Jeffrey, 576 S.E.2d 520 (W. Va. 2002) (citing W. VA. CODE § 17C-15-49 (1993))); Wyoming (*See* Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992)).

51. *See* Thomas R. Trenkner, *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence*, 92 A.L.R.3d 9 §5 (2004). These nine states include: California (*See* Truman v. Vargas, 80 Cal. Rptr. 373 (Cal. Ct. App.1969)); Connecticut (*See* Temple v. Giacco, 442 A.2d 947 (Conn. Super. Ct. 1981)); Florida (*See* Ridley v. Safety Kleen Corp., 693 So. 2d 934 (Fla. 1997)); Indiana (*See* Mays

"seatbelt defense."[52]

Though the use of seatbelts in any car accident case may help alleviate the extent of a plaintiff's injury, seatbelt use is even more relevant in a wrongful death case. In a wrongful death case, the use of a seatbelt "conceivably might have prevented the extreme result of death and the cause of action arising therefrom."[53] The NHTSA reports that, although only twenty percent of all drivers and passengers do not wear their seatbelts,[54] these non-seatbelt wearers disproportionately compose fifty-eight percent of those killed in automobile accidents.[55] Despite these facts, most courts that forbid jurors from hearing evidence of a plaintiff's failure to wear a seatbelt to show negligence make no exception for wrongful death cases.[56]

Courts express various rationales for hiding this fact from jurors. *Lipscomb v. Diamiani*[57] is typical of the cases forbidding jurors from learning about this evidence.[58] In *Lipscomb*, a plaintiff who was not wearing her seatbelt was

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v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971) (applying Indiana law). *But see* Gibson v. Henninger, 350 N.E.2d 631 (Ind. Ct. App. 1976)); Kentucky (*See* Geyer v. Mankin, 984 S.W.2d 104 (Ky. Ct. App. 1998)); Maryland (*See* Cierpisz v. Singleton, 230 A.2d 629 (Md. 1967)); New Jersey (*See* Nunez v. Schneider Nat'l Carriers, 217 F. Supp. 2d 562 (D.N.J. 2002)); South Carolina (*See* Sams v. Sams, 148 S.E.2d 154 (S.C. 1966)); and Virginia (*See* Brown v. Ford Motor Co., 67 F. Supp. 2d 581 (E.D. Va. 1999)).

52. *See* Michelle R. Mangrum, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 MO. L. REV. 968, 969 (1985).

53. *See* Noth v. Scheurer, 285 F. Supp. 81, 85 (E.D.N.Y. 1968) (holding that evidence of failure to use seatbelt may not be admitted in injury cases but may be admitted in cases resulting in death, but cautioning "[t]his is a highly speculative question which if considered, would be a question for the jury, imposing a heavy burden of proof upon the defendant").

54. *See* U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *Buckle Up America Website*, *available at* http://www.buckleupamerica.org (last visited Feb. 25, 2005) (graph on website shows that 80% of people use seatbelts).

55. *See* U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *'03 Crash Injuries Fall, Deaths Rise Slightly, NHTSA Estimates*, *available at* http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/PPT/2003AARelease.pdf (last visited Feb. 25, 2005).

56. Thomas R. Trenkner, *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence*, 92 A.L.R.3d 9 §§ 3 & 4 (2004) (listing over half of the jurisdictions as not allowing evidence of failure to wear seatbelts for proof of contributory negligence and citing only one case recognizing that a different result might be reached in a wrongful death action).

57. 226 A.2d 914 (Del. Super. Ct. 1967).

58. The reasons stated in *Lipscomb v. Diamiani* for not allowing evidence of seatbelt use to show comparative negligence have been stated in many other cases. *See, e.g.*, Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867, 869-71 (W.D. Pa. 1975) (citing *Lipscomb*, stating the harsh effect of comparative negligence, and noting public hesitancy to wear seatbelts due to fears or uncertainty about effectiveness); Miller v. Miller, 160 S.E.2d 65, 69-73 (N.C. 1968) (citing *Lipscomb*'s concern that analyzing a duty to wear a seatbelt would be a matter of conjecture and noting public uncertainty about the effectiveness and safety of seatbelts); Hampton v. State Highway Comm'n, 498 P.2d 236 248-49 (Kan. 1972) (citing the public's fears about wearing seatbelts); McCord v. Green, 362 A.2d 720, 722-25 (D.C. 1973) (questioning the effectiveness and safety of seatbelts).

Similarly, other cases echo *Lipscomb*'s reasons for not allowing evidence of seatbelt use to mitigate damages. *See, e.g.*, *Miller*, 160 S.E.2d at 74 ("The same considerations, however, which reject the proposition that a motorist's failure to fasten a seat belt whenever he travels is negligence, impel the rejection of the theorem that such a failure should reduce his damages."); Fischer v. Moore, 517 P.2d 458, 459 (Colo. 1973) (en banc); *Hampton*, 498 P.2d at 249; *McCord*, 362 A.2d at 725. *But see Pritts*,

injured in an accident. The trial court ruled jurors could not learn that the plaintiff failed to use an available seatbelt and the Delaware Supreme Court affirmed.[59] The Delaware Supreme Court decided the jury could not consider this evidence when determining whether the plaintiff failed to mitigate any damages.[60] The court feared that even if it instructed the jury that evidence of seatbelt nonuse could be considered *only* to reduce damages, juries might totally bar plaintiffs from recovery.[61] But this would be true only if the defendants had argued that the plaintiff's failure to wear a seat belt was the sole proximate cause of the accident. They made no such argument. The court also reasoned that seatbelts were "a relatively new safety device" not available in all cars.[62] This, of course, is no longer true.

The Delaware court also held that a jury could not consider a plaintiff's failure to wear a seatbelt as evidence of his or her negligence.[63] It reasoned that the determination of whether a plaintiff had a duty to wear a seatbelt in a given case would be a jury decision "void of standards."[64] The court expressed concern that, if allowed to learn of a plaintiff's failure to wear a seatbelt, a jury's reasoning would consist solely of "conjecture":

> In the seat belt area, we are dealing with what would have happened, insofar as the extent of injury is concerned, if the seat belt had been used as well as what happened due to failure to use the seat belt. I am not saying that this involves a qualitative difference from other trial questions. But it does seem to me that it involves an extreme extension of judgment which is required to be reasonable.[65]

The *Lipscomb* Court thus concluded that juries could not consider evidence

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400 F. Supp. at 871-72 (agreeing with *Lipscomb* that evidence cannot be admitted to prove plaintiff negligence, but allowing its admittance to show aggravation of injuries to reduce a plaintiff's damages).

A few courts have held that a plaintiff's failure to wear a seatbelt in a car accident cannot constitute negligence because contributory negligence requires causation and the plaintiff's conduct is not "a contributing cause of the collision." *See, e.g.*, Remington v. Arndt, 259 A.2d 145, 145 (Conn. 1969); *Fischer*, 517 P.2d at 459. Under this theory, however, the "consideration of nonuse is limited to the issue of damages as opposed to the issue of liability," so the evidence can still be admitted to reduce the plaintiff's damages. *See, e.g., Remington*, 259 A.2d at 146 ("To [defeat the action] it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though of course it may affect the amount of damages recovered in a given case."). *But see Miller*, 160 S.E. 2d at 239-40 ("The same considerations, however, which reject the proposition that a motorist's failure to fasten a seat belt whenever he travels is negligence, impel the rejection of the theorem that such a failure should reduce his damages.").

59. *Lipscomb*, 226 A.2d at 918.

60. *Id.* at 917. Under this theory, "evidence of the plaintiff's failure to wear an available seat belt is directed toward the issue of damages rather than liability." *See* Mangrum, *supra* note 52, at 985.

61. *Lipscomb*, 226 A.2d at 917.

62. *Id.* at 917-18.

63. *Id.* at 916-17.

64. *Id.* at 917.

65. *Id.* at 917-18.

of a plaintiff's failure to use a seatbelt to reduce damages or to indicate negligence. It realized, however, that its ruling might not stand on solid legal ground, noting "this Court recognizes fully that the problem is not without analytical difficulty."[66]

2. Concepts of Comparative Fault Abrogate Earlier Rationales for Hiding this Evidence from the Jury

The reasoning of *Lipscomb* and similar cases provides no valid reason to continue blindfolding the jury to evidence of a plaintiff's failure to wear a seatbelt. Underlying these decades-old decisions is a landscape of contributory negligence void of comparative fault's relief of harsh results. At the time of these decisions, contributory negligence operated rather severely to "bar an otherwise wholly innocent victim" from recovering in the majority of states.[67] Naturally, courts were hesitant to allow a jury to deprive a plaintiff who was not wearing a seatbelt of all recovery against the person who negligently caused the accident.

Some courts stated explicitly that the harsh effects of contributory negligence prompted their rulings, noting that allowing a jury to consider non-seatbelt use as evidence of contributory negligence would grant the tortfeasor a "fortuitous windfall."[68] Other courts took a more implicit approach, providing sketchy, vague reasons to support their holdings.[69]

A Colorado Supreme Court decision, *Fischer v. Moore*,[70] illustrates the impact of the contributory negligence system on a court's decision to hide evidence of the plaintiff's failure to use a seatbelt from the jury. *Fischer* involved an automobile accident that occurred before the Colorado legislature enacted its comparative negligence statute.[71] The court highlighted the influence of Colorado's prior contributory negligence regime on its decision, noting:

> The automobile collision, upon which this civil tort action for damages was predicated, occurred prior to the time that the Colorado legislature enacted the comparative negligence statute. As a result, the disposition of this appeal is controlled by the doctrine of contributory negligence. Moreover, because contributory negligence acts as a complete bar to recovery and rests upon different policy considerations, the conclusions reached in this decision should not be construed to apply as a bar to the seat belt defense, in a similar factual setting, under the Colorado comparative negligence statute.[72]

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66. *Id.*

67. Miller v. Miller, 160 S.E.2d 65, 73 (N.C. 1968).

68. *See, e.g.*, Fischer v. Moore, 517 P.2d 458 (Colo. 1973).

69. *Lipscomb* appeared to take this veiled approach when it reasoned juror consideration of seatbelt use would be speculative, "void of standards," and "degrad[ing] the law by reducing it to a game of chance." 226 A.2d at 917.

70. 517 P.2d 458.

71. *Id.* at 458.

72. *Id.* at 458-59.

The decisions barring seat belt use as evidence of a plaintiff's negligence were rendered at a time that the all-or-nothing rule applied. However, given that this concern has been largely alleviated by the comparative fault scheme, the rule barring seat belt use as evidence of a plaintiff's negligence should not be applied by courts, unless the state still abides by an all-or-nothing contributory negligence scheme.

3. Evolving Public Understanding about the Advantages of Seatbelts Eliminates Earlier Reasons for Hiding this Evidence from the Jury

Lipscomb and other cases like it reflect a past public concern about the ineffectiveness and potential dangers of seatbelt use.[73] Opinions forbidding the jury from considering evidence of a plaintiff's failure to wear a seatbelt are from an era when car safety was quickly evolving, and seatbelts were relatively new. In short, they are no longer applicable. One court noted that its decision stood on public consensus—a consensus that has since evolved—stating: "[t]he social utility of wearing a seatbelt must be established in the mind of the public before failure to use a seat belt can be held to be negligence."[74] These courts also point out that many cars were not outfitted with seatbelts.[75]

These concerns are now outdated. As early as 1985, one commentator recognized, "[w]hile at one time it was not incorrect to deem seat belt effectiveness at best speculative, such a characterization is no longer supportable."[76] Earlier concerns about availability of seatbelts in many cars are assuaged today because most cars contain available seatbelts for all passengers. Today the general public recognizes that seatbelts are an effective safety device.[77]

In contrast to the climate of contributory negligence that prevailed when judges first barred evidence of seatbelt use, today, principles of comparative fault pervade most jurisdictions across America.[78] This allows jurors the freedom to determine whether a plaintiff is partially at fault, without depriving the plaintiff of all recovery if the jurors determine that this is just. These developments in legal principle and public safety alleviate the need for courts to contrive ways to hide from the jury facts that may help them assess liability. Given the demonstrated fact that seatbelts significantly increase passenger safety in the event of a crash, and the general public's awareness of the benefits of buckling up, jurors should be equipped to make fully informed decisions in auto accident cases—including knowing whether or not the plaintiff wore a seatbelt.

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73. *See* Mangrum, *supra* note 52, at 978.

74. *See, e.g.*, Miller v. Miller, 160 S.E.2d 65, 69 (N.C. 1968).

75. Lipscomb v. Diamiani, 226 A.2d 914, 917-18 (Del. Super. Ct. 1967).

76. *See* Mangrum, *supra* note 52, at 978.

77. Observational studies reveal that 79% of Americans buckle-up and 87% of Americans when surveyed reported that they buckled up "all the time." *See* CLICK IT OR TICKET FINAL REPORT, *at* http://www.nhtsa.dot.gov/people/injury/airbags/clickit_ticke03/ciot-report04/CIOT%20May%202003/pages/IVResults.htm#2 (last visited Oct. 14, 2004).

78. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE app. at 513-18 (4th ed., 2002) (providing a summary of comparative negligence laws adopted by the states).